INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

COMMERCE GROUP CORP.
AND
SAN SEBASTIAN GOLD MINES, INC.
(APPLICANTS - CLAIMANTS)

and

THE REPUBLIC OF EL SALVADOR
(RESPONDENT)

ICSID CASE NO. ARB10917

MEMORIAL IN SUPPORT OF CLAIMANTS' APPLICATION FOR ANNULMENT

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*The exhibits referred to in this memorial were all submitted as part of the parties' submissions received in connection with the Respondent El Salvador's Preliminary Objection, and the reference numbers for the exhibits are the same.

LEGAL AUTHORITIES

MEMORIAL SUPPORTING ANNULMENT

Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), Rule 50 of the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), and the minutes of the first session of the *ad hoc* Committee conducted on September 26, 2011, the Applicants/Claimants, Commerce Group Corp. and San Sebastian Gold Mines, Inc. (collectively the "Claimants"), respectfully submit this Memorial in Support of their Application for Annulment of the Award issued on March 14, 2011, in the matter *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17):

INTRODUCTION

SUMMARY

1. The Claimants, Commerce Group Corp. ("CGC") and San Sebastian Gold Mines, Inc. ("SSGM"), were in the business of exploring for and producing gold and silver in the Republic of El Salvador since 1968. For nearly forty years, their work was permitted and encouraged by the Republic of El Salvador, which granted the Claimants concessions extending through the year 2034. However, in 2006, the Republic of El Salvador declared a general moratorium on mining and forced the Claimants to shut down their entire business in El Salvador. After it declared the moratorium, El Salvador revoked the Claimants' permits for mining, processing and exploration.

2. On 17 March 2009, the Claimants served on El Salvador a written notice of their intent to submit a claim to arbitration pursuant to Article 10.16.2 of CAFTA. The Republic of El Salvador did not respond to it. On 2 July 2009, the Claimants filed a Notice of Arbitration with ICSID, stating that their request for arbitration was made pursuant to Article 36 of the ICSID Convention, Articles 10.16(1)(a), 10.16(1)(b) and 10.16(3)(a) of CAFTA, and Article 15(a) of the Ley de Inversiones of El Salvador. The Claimants included their waivers of rights, in the form required by Article 10.18.2(b)(ii) of CAFTA.

3. On 14 August 2009 the Attorney General of El Salvador wrote to the Secretary-General of ICSID and asked the Secretary-General to find that the Claimants' request for arbitration was manifestly outside the jurisdiction of ICSID. The Attorney General contended that the Claimants had to abandon their request for arbitration to ICSID because the legal actions they had commenced in the courts of El Salvador were pending at the time of their Notice of Arbitration, and that this was a jurisdictional defect. The Attorney General took the position that even "if claimants were to withdraw the legal proceedings still pending in El Salvador, claimants' failure to honor their waivers *before submitting the request for arbitration to ICSID* cannot be remedied." [Emphasis added.] The Secretary-General of ICSID did not grant the Attorney General's request.

4. On 16 August 2010, El Salvador filed its Preliminary Objection under the expedited procedures of CAFTA, attacking jurisdiction on the grounds stated by El Salvador's Attorney General in his letter. After briefing and oral argument the Tribunal dismissed all proceedings pending before ICSID, deciding that the Tribunal did not have jurisdiction over the parties' CAFTA dispute for a different reason, namely, that the Claimants did not take steps to dismiss the legal proceedings pending in El Salvador referred to by the Attorney General *after submitting the request for arbitration to ICSID*. The Tribunal did not accept jurisdiction over the Claimants' claims under El Salvador's Foreign Investment Law because it decided that the Claimants had failed to assert any such claims.

5. On July 11, 2011, the Claimants applied for annulment based on grounds provided in ICSID Convention Article 52, specifically, that the Tribunal manifestly exceeded its powers under Article 52(1)(b) and the Award fails to state the reasons on which it is based under Article 52(1)(e).

FACTS UNDERLYING THE REQUEST FOR ARBITRATION

6. CGC and SSGM are affiliated U.S. corporations who formed a joint venture to undertake gold mining in the Republic of El Salvador. Both CGC and SSGM are publicly held corporations that have, in the aggregate, approximately 2,700 shareholders, over 95% of whom

reside in the United States. During the past over 40 years the Claimants have invested more than $100 million in their mining activities in El Salvador; they have a history of mining in the country going back to 1968.

7. From 1968 to 1978 the Claimants mined and produced gold and silver at a mill located at the site of the San Sebastian Gold Mine in Santa Rosa de Lima, El Salvador. In 1978, they suspended operations and left the site because of the dangers arising from El Salvador's civil war. They returned to the site in 1985, and by that time the entire plant, including the building and equipment, was destroyed or missing. On July 23, 1987, the President of El Salvador, José Napoleón Duarte, presented the Claimants with a new mining concession in a public ceremony conducted in Santa Rosa de Lima. In 1993 the Claimants acquired and then refurbished a processing mill and plant known as the San Cristóbal Mill and Plant. It was located on the Pan-American Highway west of the City of El Divisadero in San Cristóbal, which is approximately 15 miles from the San Sebastian Gold Mine. From 1995 through 2000 the Claimants produced tens of thousands of ounces of bullion by mining at the site of the San Sebastian Gold Mine and hauling material to the San Cristóbal Mill and Plant for processing.

8. In 2003 El Salvador's Ministry of Economy, Department of Hydrocarbons and Mines, replaced the Claimants' existing mining concession with a new 20-year exploitation concession under the new mining law. The concession gave the Claimants the right to mine at the San Sebastian Gold Mine site. A year later, the government of El Salvador extended this concession to 30 years, or in other words, until 2034.

9. On, respectively, 24 February 2003 and 25 May 2004, the Claimants were granted two exploration licenses for additional areas. The first, which was called the "New San Sebastian Exploration License", encompassed a 41-square kilometer area (10,374 acres), in the vicinity of the San Sebastian Gold Mine and included three other formerly-operated mines. The second, which was called the "Nueva Esparta Exploration License", encompassed an additional 45 square kilometers of area (11,115 acres) to the north of and abutting the New San Sebastian Exploration License area and included eight formerly-operated gold and silver mines.

10. With El Salvador's encouragement, the Claimants invested significant time, effort, and resources in developing their mining, exploration, and production operations. The Claimants employed hundreds of laborers, geologists, engineers, plant operators and others in El Salvador. During their long history in El Salvador, the Claimants brought not only employment, but also considerable infrastructure improvements to the vicinity of Santa Rosa de Lima, such as roads and bridges and a church, and made contributions for the general good.

11. After receiving the New San Sebastian Exploration License and the Nueva Esparta Exploration License, the Claimants invested resources for the exploration of areas including the La Lola Mine, the Santa Lucia Mine, the Tabanco Mine, the Montemayor Mine, and the La Joya Mine, with the expectation that these licenses would be renewed and that they would ultimately receive rights to mine at these additional sites.

12. Then, in 2006, the Republic of El Salvador unexpectedly declared a moratorium on precious metal mining, which has continued to the present. In July 2006 the Minister in charge of the Ministry of the Environment and Natural Resources (MARN), Minister Hugo Barrera, publicly stated in a newspaper interview that El Salvador would not approve any further mining projects because of concerns about environmental impacts. In this newspaper interview he stated that the government of El Salvador was going to take away the Claimants' authorization to produce gold from the San Sebastian Gold Mine:

> *They [i.e. the Government] are retracting the authorization that was given by the other government in San Sebastian, I am leaving the authorization without effect, I am going to take it away.*[1]

13. When asked, "Are you retracting the licenses because of possible contamination?", Minister Hugo Barrera stated:

> *No we are not doing it for anything in particular but rather for a general thing.*

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[1][Good Bye to the Mines], La Prensa Grafica, 9 July 2006 (C-1). The original Spanish text reads: "Se está revirtiendo la autorización que dieron en otro gobierno en San Sebastián, estoy dejando sin efecto la autorización, la voy a quitar".

In short, the government of El Salvador publicly announced that it was terminating the Claimants' rights to conduct business for no reason other than the government's decision to ban all mining[2].

14. The moratorium against mining continued through successive government administrations. In March 2008 President Antonio Saca stated, with respect to mining enterprises applying for exploitation permits:

> *What I am saying is that, in principle, I am not in favor of authorizing those permits.*[3]

15. In February 2009, in the context of commenting on mining claims, President Saca declared:

> *As long as Elias Antonio Saca is president, not a single permit (for mining exploitation) will be granted, not even environmental permits, which are prior to those authorized by the Ministry of Economy.*[4]

16. In January 2010, President Mauricio Funes repeated that no mining exploitation projects will be authorized:

> *I do not need to pass a decree for this authorization not to be given, since that would mean doubting the word of the President. The authorization of mining exploitation projects is not included in the governmental programs, it is not in the "Five Year Plan".*[5]

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[2] *Ibid*. The original Spanish text reads: "No lo hacemos por nada en particular, sino por una cosa en general."

[3] *President of El Salvador asks for caution regarding mining exploitation projects*, Invertia, 11 March 2008. The original Spanish text reads: "Lo que estoy diciendo es que, en principio, yo no estoy de acuerdo con otorgar esos permisos ....".

[4] *"No" to mining: Saca closes the doors to the exploitation of metals*, La Prensa Grafica, 26 February 2009. The original Spanish text reads: "Mientras Elías Antonio Saca esté en la presidencia, no otorgará ni un tan solo permiso, (para la explotación minera) ni siquiera permisos ambientales, que son previos a los que otorga el Ministerio de Economía."

[5] *No to Mining: Presidential Commitment*, La Prensa Grafica, 13 January 2010. The original Spanish text reads: "No necesito emitir un decreto para que esa autorización no se dé, eso sería

17. When it declared a moratorium on mining, El Salvador arbitrarily revoked the Claimants' environmental permits, and ordered the closure of their operations at the San Sebastian Gold Mine and at the San Cristóbal Mill and Plant. On 5 July 2006, the Ministry of Environment ("MARN") passed a resolution revoking the permit for the San Cristóbal Mill and Plant, and on 6 July 2006, MARN passed a resolution revoking the permit for the San Sebastian Gold Mine. These resolutions were served upon the Claimants on 13 September 2006. [See ¶¶ 17 and 18]

18. Afterwards, El Salvador refused to renew the Claimants' New San Sebastian Exploration License and the Nueva Esparta Exploration License. On 8 March 2007 the Claimants applied to the El Salvador Ministry of Economy for an extension of the exploration licenses. On 28 October 2008 the Ministry of Economy denied the Claimants' application, citing the Claimants' failure to secure environmental permits.

19. Since that time, the Claimants have been unable to operate or develop their mining business. In 2008 the Claimants entered into an agreement with a strategic partner to develop the San Sebastian Gold Mine. After meeting with representatives of the El Salvadoran government, however, the strategic partner withdrew. It was clear that the El Salvadoran government would not allow mining under any circumstances.[6]

20. The Claimants have not contested El Salvador's sovereign right to ban mining and expropriate mining operations. However, the Claimants maintain that any such public policy measures must be taken in accordance with due process of law and provide compensation to the affected investors in accordance with El Salvador's obligations under the Dominican Republic Central America – United States Free Trade Agreement (CAFTA)[7] and El Salvador's domestic foreign investment law (the Foreign Investment Law – AL-12).

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dudar de la palabra del presidente. No existe en los programas del gobierno, no está en el Plan Quinquenal la autorización de proyectos de explotación minera."

[6]Claimants' Rejoinder on Preliminary Objection, ¶ 105.

[7]Dominican Republic - Central America - United States Free Trade Agreement (the CAFTA) (AL-11).

THE CLAIMANTS' NOTICE OF ARBITRATION; EL SALVADOR'S OBJECTION TO THE SECRETARY-GENERAL

21. On 2 July 2009 the Claimants filed their Notice of Arbitration with ICSID, accompanied by Annexes A through D (the "Request"). [Award, ¶ 14]. The Request was timely filed at this time, but it was close to three years from El Salvador's revocation of the permits against the Claimants in 2006.

22. Within their Request, the Claimants included their waivers of rights, as required by Article 10.18.2(b)(ii) of CAFTA (the "Waiver Provision"), which stated [Award, ¶ 16]:

> [T]he claimants hereby waive their rights to initiate or continue any domestic proceeding with respect to any measure alleged to constitute a breach for purposes of the present Notice of Arbitration. Notwithstanding the foregoing, pursuant to Article 10.18.3 of CAFTA, the claimants reserve the right to initiate or continue any proceedings for injunctive relief not involving the payment of damages before any administrative or judicial tribunal of the Republic of El Salvador, for the purposes of preserving their rights and interests during the pendency of this arbitration. Copies of the waivers are attached as Exhibit "A" and Exhibit "B".

23. On 29 July 2009, the Secretary-General of ICSID (the "Secretary-General") asked the Claimants to submit additional information for purposes of determining whether their Request was "manifestly outside the jurisdiction of the Centre" pursuant to Article 36(3) of the ICSID Convention (the "Clarification"). [Award, ¶ 17] Among other things, the Secretary- General asked for: "An explanation as to whether Commerce and Sanseb are in compliance with CAFTA Article 10.18.4,[8] with respect to any previous submissions addressing the same alleged breaches to: i) an administrative tribunal of El Salvador; and to ii) a court of El Salvador for adjudication or resolution, particularly in view of paragraphs 22 and 24 of the request for arbitration..." Neither

[8]Article 10.18.4 provides: "No claim may be submitted to arbitration: (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C), if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution."

in this 29 July 2009 letter, nor in any other correspondence, did the Secretary-General refer to Article 10.18.2 or question the Claimants' compliance with Article 10.18.2 – the Waiver Provision.

24. On 14 August 2009, the Attorney General of El Salvador wrote to the Secretary-General and submitted that the Claimants' Request was "manifestly outside of ICSID's jurisdiction" because, in his opinion, Article 10.18.2, the Waiver Provision, required the Claimants to dismiss pending legal proceedings in El Salvador *before* filing their Request with ICSID. The Attorney General did not request that the Claimants take action to terminate the legal proceedings pending in El Salvador. To the contrary, the Attorney General stated that dismissing the legal proceedings pending in El Salvador would be a meaningless act:

> Even if claimants were to withdraw the legal proceedings still pending in El Salvador, claimants' failure to honor their waivers before submitting the request for arbitration to ICSID cannot be remedied once the request for arbitration has been filed. Therefore, lack of ICSID jurisdiction under CAFTA-DR is manifest.

The Attorney General concluded this letter with a request that "the Secretary-General exercise her screening function to reject the request for arbitration."

25. On 19 August 2009 the Claimants responded to the 29 July 2009 letter from the Secretary-General, and addressed the Secretary-General's issues, including the Claimants' compliance with Article 10.18.4:

> Both Commerce and Sanseb are in compliance with CAFTA-DR Article 10.18.4 with respects to the petitioners' prior submissions filed in the Republic of El Salvador. While the petitioners have previously filed a Complaint with the Department of Energy, Division of Hydrocarbons and Mines of the Republic of El Salvador and have also filed complaints in the Supreme Court of the Republic of El Salvador with respect to the procedural steps followed by the Republic of El Salvador Department of Energy when it determined to revoke mining and exploration permits and concessions of Commerce and Sanseb, these proceedings address the failure of these agencies to comply with the internal procedures required by El Salvadoran law. Prior to the commencement of these proceedings under CAFTA-DR, Commerce and Sanseb have not sought redress for the unfair treatment with respect to foreign investors or other claims that arise pursuant to Section A of Chapter 10 of the Central American Free Trade Agreement.

> Consequently, Commerce and Sanseb are in compliance with CAFTA-DR Article 10.18.4, and the Petitioners' request for arbitration should be allowed to proceed in accordance with ICSID Rules and Procedures.

26. After acknowledging the Claimants' response to the Secretary-General's letter of 29 July 2009, on 21 August 2009, the Secretary-General registered the Request.

27. On 24 August 2009 counsel for the Republic of El Salvador wrote to the Secretary-General to again assert that Article 10.18.2, the Waiver Provision, required the Claimants to dismiss pending legal proceedings in El Salvador before filing their Request with ICSID, and that therefore *the Request had to be dismissed*. He stated:

> The letter submitted by Commerce Group Corp. and San Sebastian Gold Mines, Inc. on August 19, 2009 did not address the issue raised by the Attorney General of El Salvador in his letter to the Secretary-General dated August 14, 2009, regarding claimants' failure to comply with the requirements of CAFTA-DR article 10.18.2. ...

And continued:

> Claimants have been made fully aware during the registration process, through the letter of the Attorney General to the Secretary-General together with claimants' knowledge about the nature of the pending legal proceedings claimants filed in El Salvador, that they did not comply with the jurisdictional requirements under CAFTA-DR article 10.18.2. This is not a novel jurisdictional issue, having been already subject of decisions and awards in arbitrations under CAFTA-DR and NAFTA.

Counsel for the Republic of El Salvador, like the Attorney General, did not request that the Claimants take action to terminate the legal proceedings pending in El Salvador. He demanded that Claimants dismiss the arbitration pending before ICSID:

> Having been made fully aware of the jurisdictional deficiency in their case, claimants still have a choice ***to request discontinuance of the arbitration*** in accordance with ICSID Arbitration Rule 44. I am writing to inform you that El Salvador would not object to such request for discontinuance if it is made prior to the constitution of the arbitral tribunal... [Emphasis added.]

In short, the Republic of El Salvador did not request that the Claimants dismiss the legal proceedings pending in El Salvador, and in fact, continued to take the position that dismissal of the legal proceedings pending in El Salvador would be of no consequence to the Request through the time that El Salvador filed its Preliminary Objection with the Tribunal.

28. On 29 September 2009 Senior Counsel for ICSID wrote to advise the parties that Professor Christopher Greenwood would be unable to accept the appointment and invited the Claimants to proceed with the appointment of another arbitrator. The Claimants had nominated Professor Christopher Greenwood, CMG QC as an arbitrator in their Request dated July 2, 2009.

29. On 23 October 2009 the Claimants nominated Dr. Horacio A. Grigera Naón in place of Professor Greenwood.

30. On 29 October 2009 Senior Counsel for ICSID wrote to advise the parties that Dr. Grigera Naón accepted his appointment as arbitrator.

31. Through this time and afterward, El Salvador did not nominate anyone to serve as arbitrator, and as a result, the Secretary–General did not constitute the Tribunal.

32. On 9 April 2010 the Secretary–General of ICSID wrote to the parties to remind them that the proceedings could be discontinued if the parties failed to take any steps during six consecutive months, noting that the last step taken by any party was the Claimants' nomination of Dr. Grigera Naón on 23 October 2009.

33. On 13 April 2010 the Claimants wrote to the Chairman of the Administrative Council, ICSID – The World Bank, with a copy to the Secretary–General of ICSID, to request that pursuant to Rule 4 of the ICSID Rules of Arbitration, the Chairman immediately appoint an arbitrator of behalf of the Republic of El Salvador.

34. On 19 April 2010 the Senior Counsel for ICSID wrote to the parties to advise them that the Secretary–General would proceed to the appointment of the two missing arbitrators, noting that El Salvador would retain its rights until the Secretary–General did so.

35. On 3 May 2010 the Secretary of the Tribunal wrote to the parties to advise them that ICSID had received a letter from counsel for El Salvador dated 28 April 2010, appointing Mr. J. Christopher Thomas, Q.C., as an arbitrator, and that ICSID would seek his acceptance.

36. On 11 May 2010 the Secretary–General wrote to the parties to initiate a process to select the president of the Tribunal and asked the parties to respond by 19 May 2010. The parties did so.

37. On 20 May 2010 the Secretary–General of ICSID notified the parties that the process had not produced a mutually agreeable candidate for president of the Tribunal and that it was her intention to appoint Professor Albert Jan van den Berg, unless she received an objection to his appointment by 27 May 2010.

38. On 27 May 2010 El Salvador objected to the appointment of Professor Albert Jan van den Berg.

39. On 22 June 2010, the Secretary–General wrote to the parties to advise that she did not find El Salvador's objection compelling and that she was appointing Professor Albert Jan van den Berg as president of the Tribunal unless the parties proposed an alternate solution by 25 June 2010.

40. On 1 July 2010 the Secretary-General informed the parties that the Tribunal was deemed constituted.

THE EL SALVADOR COURT PROCEEDINGS

41. On 5 July 2006 and 6 July 2006 the El Salvador Ministry of Environment ("MARN") passed resolutions revoking the Claimants' permits for, respectively, the San Cristóbal Mill and Plant and the San Sebastian Gold Mine. These resolutions were served upon the Claimants on 13 September 2006.

42. On 6 December 2006 counsel filed two petitions with El Salvador's Court of Administrative Litigation of the Supreme Court of Justice, one for the San Sebastian Gold Mine

and the other for the San Cristóbal Mill and Plant, seeking a review of MARN's revocation of the environmental permits and their reinstatement. [Award, ¶ 63, misstates that San Cristóbal was a mine; there was no mine at the San Cristóbal Mill and Plant.]

43. On 19 March 2007 the Court of Administrative Litigation of the Supreme Court of Justice denied a request for injunctive relief submitted by counsel. The parties were notified of the Court's decision on 26 June 2007.

44. The two cases before the Court of Administrative Litigation of the Supreme Court of Justice were pending decision when the Claimants filed their Request on 2 July 2009. Neither party filed substantive pleadings, participated in hearings, or submitted evidence after 2 July 2009.

45. On 2 July 2009 the Claimants provided El Salvador with their waivers of "their rights to initiate or continue any domestic proceeding" pursuant to Article 10.18.2(b)(ii) of CAFTA.

46. On 18 August 2009 the Attorney General of El Salvador wrote to the Court of Administrative Litigation of the Supreme Court of Justice to inquire about the status of the actions filed in 2006. (This was within days of the Attorney General's 14 August 2009 letter to the Secretary-General of ICSID discussed above at ¶ 24)

47. On 1 October 2009 the Court of Administrative Litigation of the Supreme Court of Justice issued a notice reporting that it had received all the required submissions. The notice included a copy of a note from the secretary of the Court to the Attorney General reporting the status of the domestic proceedings as awaiting final decisions.

48. On 26 February 2010 the Court of Administrative Litigation of the Supreme Court of Justice decided the petition filed in respect to the San Sebastian Gold Mine adversely to CGC, and on 29 April 2010 sent notice of its decision.

49. On 18 March 2010 the Court of Administrative Litigation of the Supreme Court of Justice decided the petition filed in respect to the San Cristóbal Mill and Plant adversely to CGC, and on 29 April 2010 sent notice of its decision.

PROCEEDINGS BEFORE THE TRIBUNAL

50. On 1 July 2010, the Secretary-General informed the Parties that the Tribunal was deemed constituted and that the proceedings had begun. Further, the Parties and the Tribunal were informed that Mr. Marco T. Montañés-Rumayor, Counsel for ICSID, would serve as the Secretary to the Tribunal. [Award, ¶ 30]

51. The Tribunal held its first session on 27 July 2010. El Salvador confirmed that it intended to file a Preliminary Objection under the expedited procedure of CAFTA Article 10.20.5. It was then agreed that the Preliminary Objection would be heard before the merits phase. On 13 August 2010 the parties jointly filed a letter evincing their agreement as to the procedural timetable set by the Tribunal.

52. In accordance with this timetable, on 16 August 2010 El Salvador filed its Preliminary Objection under the expedited procedures of CAFTA. On the same date, the Tribunal suspended the proceedings on the merits. [Award, ¶ 33]

53. In its Preliminary Objection El Salvador continued to assert that Article 10.18.2, the Waiver Provision, required the Claimants to dismiss pending legal proceedings in El Salvador before filing their Request with ICSID, and that this created a jurisdictional defect that could not be cured by dismissing the local proceedings while the Request was pending. At ¶ 7 of El Salvador's first submission, counsel argued:

> Claimants chose to submit the dispute to the Supreme Court of El Salvador in December 2006. Because CAFTA prohibits claimants from continuing any proceeding related to the same measures if they choose to initiate CAFTA arbitration, any arbitration filed by Claimants under CAFTA would be invalid so long as the judicial proceedings before the Supreme Court of El Salvador *were still pending at the time of filing the Notice of Arbitration*. [Emphasis added.]

At ¶ 9 of El Salvador's first submission, counsel argued:

> Claimants decided to initiate CAFTA arbitration by submitting the Notice of Arbitration on July 2, 2009, two months before the three-year limit under CAFTA ended on September 13, 2009. That decision by itself would not have

> been a problem. *The problem is that Claimants submitted the Notice of Arbitration to ICSID without **first** requesting termination of the judicial proceedings* in El Salvador. Claimants' actions thus invalidated their waivers and prevented El Salvador's consent to arbitration under CAFTA from being perfected. As a result, the required consent to arbitration does not exist in this case. [Emphasis added.]

El Salvador maintained that if the Request filed on 2 July 2009 were dismissed by the Tribunal, the Claimants would no longer be able to file a second, timely Notice of Arbitration. Counsel for El Salvador argued at ¶ 98:

> .... Claimants have also lost the opportunity to initiate a new CAFTA arbitration because the three-year statute of limitations under CAFTA Article 10.18.1 has already lapsed. Claimants have thus lost the opportunity to bring CAFTA claims regarding the measures related to the San Sebastian Gold Mine concession and San Cristobal Plant, solely due to their refusal to comply with CAFTA Article 10.18.2 in spite of repeated warnings.

Thus far, El Salvador never altered its position that dismissal of pending legal proceedings in El Salvador *after* the Request was filed would be of no consequence in deciding whether there was compliance with Article 10.18.2, the Waiver Provision, and never requested that the Claimants discontinue these proceedings.

54. El Salvador's Preliminary Objection did not question the Claimants' right to bring a claim under the Foreign Investment Act. The scope of the Preliminary objection was limited to the issue of whether the Claimant's waivers complied with the requirement under Article 10.18.2.

55. On 15 September 2010 the Claimants filed their Response to El Salvador's Preliminary Objection. [Award, ¶ 35]

56. In their Response, the Claimants pointed out that plainly, Article 10.18.2, the Waiver Provision, did not require that the local proceedings pending in El Salvador be dismissed before filing their Request. Among other things, counsel for the Claimants submitted at ¶ 45:

> The notion that a claimant is required to discontinue domestic proceedings before submitting a notice of arbitration is illogical. The Respondent argues that "Claimants elected to initiate CAFTA arbitration without first terminating their

> domestic proceedings, rather than comply with the waiver requirement before submitting their claims under CAFTA". A claimant does not comply with the waiver requirement before submitting its claims. It complies with the waiver requirement by delivering a waiver. If the claimant were required to discontinue proceedings before submitting its waiver, it would be submitting a waiver of rights to continue proceedings that it had already discontinued. It would, in fact, be waiving rights to continuance that no longer existed.

57. At ¶ 80 of their Response the Claimants highlighted the fact that El Salvador conceded that there were claims made in the Request that were never the subject of court proceedings in El Salvador:

> .... Indeed, the Respondent implicitly acknowledges the existence of other claims when it notes that the revocation of the environmental permits constitutes "by far the most significant claims in this arbitration".[9] Although the Claimants do not accept that categorization of their claims, the Respondent has essentially admitted that there are other claims in this arbitration unaffected by any alleged defect in the Waivers. The Respondent's clarifications in the Preliminary Objection highlight that there were no local court proceedings with respect to the Claimants' exploration licenses.[10] Accordingly, any alleged defects in the Waivers do not apply to claims with respect to the exploration licenses.

58. At ¶ 86 of their Response, the Claimants submitted that El Salvador's jurisdictional arguments did not apply to the Claimants' claims of breach under the Foreign Investment Law:

> Further, even if the Tribunal were to find Claimants' Waivers were somehow defective and that, as a result, there was an impediment to Claimants' claims relating to the revocation of the environmental permits, that impediment would only apply with respect to the CAFTA claims and not claims of the breach of the Foreign Investment Law as there are no similar waiver provisions in the Foreign Investment Law.

59. On 30 September 2010 El Salvador filed its Reply to the Claimants' Preliminary Objection Response. [Award, ¶ 36]

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[9]Preliminary Objection, ¶ 31.

[10]Preliminary Objection, ¶ 106.

60. In its Reply El Salvador reversed its earlier position. Before, El Salvador had argued that once the Claimants filed their Request, any effort on the part of the Claimants to dismiss the proceedings pending in El Salvador would be meaningless, because dismissal after filing the Request would not cure a jurisdictional defect. Now El Salvador argued that there was no jurisdiction because the Claimants did not try to dismiss these proceedings after filing their Request. At ¶ 40 of its Reply, El Salvador submitted:

> Second, and most importantly, Claimants ignore that the waiver required under Article 10.18.2 has two aspects: a **formal** aspect (the submission of the waiver) and a **material** aspect (actions in compliance with the waiver). Claimants complied with the formal requirement of submitting a written waiver with the stipulated text when they initiated arbitration under CAFTA, but they ignored the material requirement. ***CAFTA requires the claimant*** to submit the waiver with a specific text and ***to take action consistent with the waiver by requesting termination of any pending proceedings***, ceasing to participate in any other proceedings, and/or refraining from initiating any proceedings in violation of the waiver. If there are no pending proceedings, the material aspect may be fulfilled by simply not initiating proceedings related to the same measures. ***But if there are pending proceedings, the claimant must request termination and cease to participate in the proceedings in order to make the written waivers effective.*** [Italicized emphasis added.]

It bears noting that at this point in time, the Court of Administrative Litigation of the Supreme Court of Justice had decided the cases before it and there was nothing pending.

61. With respect to the Claimants' claims regarding El Salvador's actions taken with respect to their exploration permits, which were not challenged in any El Salvadoran Court, El Salvador argued, at ¶ 106, that because the Claimants did not effectively waive their rights as required by CAFTA to some of their claims, none of their claims could be arbitrated.

62. With respect to the Claimants' claims under the Foreign Investment Law, El Salvador submitted at ¶ 121 of its Reply:

> If, in spite of the fact that no claims were submitted and notwithstanding the Treaty text, the Tribunal were to allow Claimants to add claims under the Investment Law, El Salvador reserves the right to challenge the jurisdiction of the

Tribunal under the Investment Law, in a separate objection under ICSID Arbitration Rule 41.

63. On 7 October 2010 El Salvador filed a letter requesting the Tribunal to hold a hearing to address its Preliminary Objection pursuant to Article 10.20.5 of CAFTA. [Award, ¶ 37]

64. On 15 October 2010 the Claimants filed their Statement of Rejoinder to the Preliminary Objection Reply. [Award, ¶ 38]

65. The hearing to address El Salvador's Preliminary Objection was held in Washington, D.C., on 15 November 2010. [Award, ¶ 47]

THE TRIBUNAL'S AWARD

FACTS CITED BY THE TRIBUNAL

66. The Tribunal issued its award on 14 March 2011. For purposes of its award, the Tribunal stated that it would accept the Claimants' version of facts as true and recited the facts that are set forth below. [Award, ¶ 55]

67. On 22 September 1987, CGC and SSGM entered into a joint venture registered in Wisconsin, U.S.A, to explore, develop, mine and produce precious metals in El Salvador (the "Commerce/Sanseb Joint Venture"). [Award, ¶ 56]

68. CGC owns 82.5% of the authorized and issued stock of SSGM. CGC also owns 52% of the authorized and issued common shares in Mineral San Sebastian, S.A. de C.V., an El Salvadoran corporation formed on 8 May 1960. [Award, ¶ 57]

69. The Claimants received an exploitation concession from the government of El Salvador for the San Sebastian Gold Mine on 23 July 1987. At this time, the Claimants and Mineral San Sebastian, S.A. de C.V. entered into an agreement to lease 305 acres at the San Sebastian Gold Mine. Later, in 1993, the Claimants acquired two additional properties, the El Modesto Mine and the San Cristóbal Mill and Plant. [Award, ¶ 58]

70. On 18 August 2002, the Claimants met with the El Salvadoran Minister of Economy and the Department of Hydrocarbons and Mines to cancel their exploitation concession license for the San Sebastian Gold Mine in exchange for another exploitation license, to last for 20 to 30 years. [Award, ¶ 59]

71. In order to mine and process gold ore at the San Sebastian Gold Mine and San Cristóbal Mill and Plant, the Claimants received environmental permits from the El Salvador Ministry of Environment and Natural Resources ("MARN") on 20 October 2002 and 15 October 2002, respectively, renewed for a 3-year period as of 4 January 2006. [Award, ¶ 60]

72. In addition, El Salvador granted the Claimants two further exploration licenses, namely: (i) on 3 March 2003, encompassing the San Sebastian Mine and adjoining areas (the "New San Sebastian Exploration License"); and (ii) on 25 May 2004, encompassing eight former gold and silver mines (the "Nueva Esparta Exploration License"). [Award, ¶ 61] [11]

73. On 13 September 2006, MARN revoked the environmental permits of the San Sebastian Gold Mine and the San Cristóbal Plant and Mine [sic], thereby effectively terminating the Claimants' right to mine and process gold and silver. [Award, ¶ 62] [In real fact, there was no mine at the San Cristóbal Mill and Plant.]

74. In response, on 6 December 2006, counsel for Commerce and SanSeb filed two petitions with El Salvador's Court of Administrative Litigation of the Supreme Court of Justice, one for each affected mine [sic], seeking a review of the Ministry of the Environment's revocation of the environmental permits and their reinstatement. [Award, ¶ 63] [In real fact, one petition related to the San Sebastian Gold Mine, which is the only mine where El Salvador revoked a permit to mine gold. The second petition related to the processing facility at the San Cristóbal Mill and Plant. There was no mine at the San Cristóbal Mill and Plant.]

[11]The licenses were issued on respectively, 24 February 2003 and 25 May 2004, and noticed on 3 March 3002 and 4 June 2004.

75. On 29 April 2010, El Salvador's Court of Administrative Litigation of the Supreme Court of Justice notified the parties of its decisions of 18 March 2010 (Case No. 308-2006) and 28 April 2010 (Case No. 309-2006) with respect to these two complaints. [Award, ¶ 64] [The dates of decision appearing in the Award are not correct. The exhibits referred to by the Tribunal in the Award, R-5 and R-6, show that Case No. 308-2006 was decided on 26 February 2010, and Case No 309-2006 was decided on 18 March 2010.]

76. In the interim, over the course of 2006 and 2007, Commerce/Sanseb applied to MARN for an environmental permit for the New San Sebastian Exploration License and the Nueva Esparta Exploration License, and then to Respondent's Ministry of Economy for the extension of the exploration licenses. The requested environmental permits were not granted, and on 28 October 2008, El Salvador's Ministry of Economy denied Commerce/Sanseb's application citing Commerce/Sanseb's failure to secure an environmental permit. [Award, ¶ 65] [As noted by the Tribunal earlier, Commerce/Sanseb received permits to conduct exploration at these two sites in, respectively, 2003 and 2004. In 2006 and 2007, Commerce/Sanseb was asking MARN to renew its permits.]

77. On 17 March 2009, the Claimants served on El Salvador a written notice of their intent to submit a claim to arbitration pursuant to Article 10.16.2 of CAFTA (the "Notice of Intent"). [Award, ¶ 12]

78. Pursuant to Articles 10.16.3 and 10.16.4 of CAFTA, the Claimants had the right, six months after serving their Notice of Intent, to file a Notice of Arbitration either under the ICSID Convention or the UNCITRAL Arbitration Rules. [Award, ¶ 13]

79. On 2 July 2009, the Claimants filed their Notice of Arbitration with ICSID, accompanied by Annexes A through D (the "Request"). [Award, ¶ 14]

80. The Request states that it is made pursuant to Article 36 of the ICSID Convention, Articles 10.16(1)(a), 10.16(1)(b) and 10.16(3)(a) of CAFTA), and Article 15(a) of the Ley de Inversiones of El Salvador ("Investment Law"). [Award, ¶ 15]

81. Within their Request, the Claimants included the following waiver of rights, as required by Article 10.18.2(b)(ii) of CAFTA (the "Waiver Provision") [Award, ¶ 16]:

> [T]he claimants hereby waive their rights to initiate or continue any domestic proceeding with respect to any measure alleged to constitute a breach for purposes of the present Notice of Arbitration. Notwithstanding the foregoing, pursuant to Article 10.18.3 of CAFTA, the claimants reserve the right to initiate or continue any proceedings for injunctive relief not involving the payment of damages before any administrative or judicial tribunal of the Republic of El Salvador, for the purposes of preserving their rights and interests during the pendency of this arbitration. Copies of the waivers are attached as Exhibit "A" and Exhibit "B".

THE TRIBUNAL'S DECISION

82. The Tribunal concluded that Article 10.18(2)(b) of CAFTA requires the Claimants to file a formal "written waiver", and then materially ensure that no other legal proceedings are "initiated" or "continued". [Award, ¶ 84]

83. The Tribunal and the Parties agreed that the Claimants adhered to the formal requirement of the Waiver Provision. The Tribunal determined that the only question before it was whether the Claimants adhered to the "material requirement" described by the Tribunal. [Award, ¶ 95]

84. The Tribunal determined that the Claimants were under an obligation to discontinue the El Salvadoran court proceedings in order to give material effect to their formal waiver. [Award, ¶ 102]

85. The Tribunal rejected the argument that the Claimants acted in accordance with the waiver by not taking any positive action to continue those proceedings. [Award, ¶ 102]

86. The Tribunal concluded that the Claimants were obliged to discontinue the proceedings before the El Salvador courts relating to the revocation of the environmental permits, and by not doing so, the Claimants did not act in accordance with the requirements of the Waiver Provision. [Award, ¶ 107]

87. The Tribunal acknowledged that its decision of the "waiver" issue only related to the revocation of the environmental permits, those being before both the Tribunal and the courts of El Salvador, and that it did not address the Claimants' claim that there was a *de facto* ban imposed by El Salvador on gold and silver mining which was not before the El Salvador courts. [Award, ¶ 108]

88. However, the Tribunal viewed the Claimants' claim regarding the *de facto* mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits. [Award, ¶ 111]

89. The Tribunal also determined that the *de facto* mining ban policy does not constitute a "measure" within the meaning of CAFTA. [Award, ¶ 109]

90. The Tribunal therefore determined that the Claimants had failed to fulfill the requirements of the Waiver Provision with respect to their entire claims, [Award, ¶ 113] and that consequently, the Tribunal did not have jurisdiction over the parties' CAFTA dispute. [Award, ¶ 115]

91. The Tribunal decided that it would not accept jurisdiction over the Claimants' claims under the Foreign Investment Law because in its view the Claimants had failed to assert any claims. [Award, ¶ 121] The Tribunal decided that the Claimants "provided a perfunctory recital of the articles of the Foreign Investment Law, at most." [Award, ¶ 124]

REASONS TO ANNUL THE AWARD

I. ANNULMENT IS REQUIRED WHERE THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS OR THE AWARD FAILS TO STATE THE REASONS ON WHICH IT IS BASED.

92. As provided in Article 52(1)(b) of the ICSID Convention, annulment is required where the tribunal "manifestly exceeded its powers." This Award denying jurisdiction should be annulled for the same reason as stated in the Decision on Application for Annulment, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Application

for Annulment, 16 April 2009 (AL-3): The Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed, and it "manifestly" did so.

93. In *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (France/Argentina BIT)(AL-1), the tribunal stated:

> It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.
>
> One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b). [¶ 86]

94. Also, annulment is required where the Award fails to state the reasons on which it is based under Article 52(1)(e).

II. ANNULMENT IS REQUIRED AS TO THE TRIBUNAL'S DETERMINATION THAT THE CLAIMANTS HAD NOT COMPLIED WITH ARTICLE 10.18.2 BY FAILING TO DISCONTINUE THE PROCEEDINGS PENDING BEFORE EL SALVADOR'S COURT OF ADMINISTRATIVE LITIGATION OF THE SUPREME COURT OF JUSTICE.

A. The Tribunal Manifestly Exceeded its Powers by Departing from the Plain Language of CAFTA to Add a Jurisdictional Requirement Not Found in the Treaty.

95. Article 10.18.2 provides as follows:

> 2. No claim may be submitted to arbitration under this Section unless:
>
> (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

96. The ordinary meaning of Article 10.18.2(b), in its context and in light of the object and purpose of CAFTA, does not support the Tribunal's interpretation.

97. The ordinary meaning of 10.18.2(b) is that a specific type of written legal document must accompany the notice of arbitration. The ordinary meanings of the words "written waiver", "of any right to initiate or continue", and "accompany" do not suggest that there is a requirement to request termination of existing domestic proceedings.

98. The waivers tendered by the Claimants were binding upon them and relinquished their legal rights. The Claimants submitted, and neither the Respondent nor the Tribunal disagreed with the premise that "[t]he waivers are a unilateral and final abandonment, extinguishment and abdication of the Claimants' legal rights to initiate or continue other proceedings with respect to the measures alleged to breach the CAFTA." [Award, ¶ 67]

99. The fact that CAFTA does not expressly prohibit or rule out the possibility of the existence of concurrent proceedings with respect to the same measure has an important corollary: a respondent state can exercise a sovereign choice in whether it wishes concurrent proceedings to continue (i.e. whether to obtain the benefit of the waiver). A respondent state may well decide that it prefers to have the legality of its measures resolved in its courts.

B. The Awards of Other Tribunals do not Support the Tribunal's Decision.

100. The Tribunal cited *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (*Waste Management I*) (AL-9) in support of its

decision that the Claimants' waivers were invalid. However, the Claimants submit that *Waste Management I* is not a case where the Tribunal decided that the claimant provided a complete and effective waiver but later invalidated the waiver and destroyed jurisdiction by its subsequent conduct.

101. The investor-claimant in *Waste Management I* submitted a waiver that deviated from the language of the treaty in question, NAFTA. The waiver included the following language: "Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico." (*Waste Management I*, § 5)

102. The investor-claimant in *Waste Management I* then filed three new legal proceedings after tendering its waiver, namely, (1) it filed an appeal of an adverse judgment approximately six months after tendering its waiver, (2) it filed an appeal of a separate adverse judgment approximately four months after tendering its waiver, and (3) it filed an arbitration approximately one month after tendering its waiver.

103. The tribunal in *Waste Management I* understood that its function was to determine whether the investor's waiver complied with NAFTA at the time it was filed, and this meant interpreting the special additional language inserted by Waste Management. As a result, the tribunal determined that the waiver containing this additional language did not comply with the treaty, pointing to the interpretation that Waste Management itself gave to the additional language, as evidenced by its conduct. This is entirely different from saying that a valid waiver is invalidated by subsequent conduct.

104. Describing the process used by the tribunal in *Waste Management I*, the tribunal in *Waste Management II* (AL-10) stated:

> As an aspect of its power to determine its jurisdiction, the first Tribunal had to determine both that the waiver conformed to NAFTA requirements and that it was a genuine waiver, expressing the true intent of the Claimant at the time it was lodged. ***This did not mean that the Tribunal was entitled or required to ensure***

> ***actual compliance with the waiver. That would be a matter for the Respondent to plead in any Mexican court before which proceedings were brought contrary to the terms of the waiver.*** [Footnotes omitted, emphasis added.] (*Waste Management II*, ¶ 10)

105. In *Waste Management I*, the tribunal itself stated:

> However, ***this Tribunal is unable to agree with the assertions put forth by the Mexican Government to the effect that the purported function of the Arbitral Tribunal, in view of Article 1121, is to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding***, in order to comply with the procedure established under NAFTA Chapter XI Section B, and, in this manner, validate or perfect the consent to said Treaty. This Tribunal cannot but reject such an interpretation, since it lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one.
>
> In this case, ***it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals.*** [Emphasis added.] (*Waste Management I*, § 15)

106. The majority's award against Waste Management was ultimately based on the language of the waiver, and its resolving the meaning of the language of the waiver where it departed from the language required by the treaty. The tribunal stated:

> According to the interpretation of the waiver maintained by the Claimant, said waiver would refer exclusively to proceedings that expressly invoke failure to comply with obligations of international law set forth in Chapter XI of NAFTA. (*Waste Management I*, § 27)

And:

> If the Claimant, upon formulating its waiver, had clearly adopted the interpretation it now maintains, it would not have conditioned its waiver with the terms as it did, because under said interpretation, it would have been able to take parallel action in domestic courts or tribunals without expressly invoking NAFTA provisions and without thereby affecting these arbitral proceedings. (*Waste Management I*, § 28)

And ultimately concluded:

> Based on the foregoing, it is clear that the Claimant issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121.... (*Waste Management I*, § 30)

107. Were one to consistently apply the logic and outcome of the *Waste Management* cases to the issues before the Tribunal, there were be no question that El Salvador's Preliminary Objection should have been denied.

108. First, the Tribunal determined (based upon facts that were never in dispute) that the language of the waivers provided by the Claimants to El Salvador conformed in every respect to what was required by the Waiver Provision. The Claimants did not hold back on the relinquishment of their rights in any respect not permitted by the Waiver Provision.

109. Second, if El Salvador had a legitimate complaint that the Claimants were not honoring the waivers they furnished on 2 July 2009, their recourse would be to "plead the waiver" in local proceedings. [*Waste Management I*. § 15] It is not the function of the Tribunal to address the matter by retroactively rejecting all jurisdiction at, conceivably, any point in time during the CAFTA proceedings. The very idea of this upsets the commonplace tenet that jurisdiction is determined as of the point in time a proceeding is filed.

110. In its Award the Tribunal noted *Railroad Development Corporation v. The Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction, 17 November 2008. ("*RDC*") (AL-5) [Award, ¶¶ 89, 94] While it is unclear how, if at all, this decision was used as a basis for the Tribunal's decision, the Claimants submit that *RDC* is also not a case where the Tribunal decided that the claimant provided a complete and effective waiver but later invalidated the waiver and destroyed jurisdiction by its subsequent conduct. In fact, in *RDC* the tribunal determined that there was jurisdiction over claims at issue.

111. In *RDC*, the Tribunal found that "the Claimant has maintained the domestic arbitrations over the Respondent's objection, and there is no question of a merely formal defect at the outset of the international arbitral procedure." [*RDC*, footnote 36.] The Tribunal found that the Claimant's pending "domestic arbitration proceedings exist and overlap with [the CAFTA]

arbitration" filed by the claimant. [*RDC*, ¶ 54] The Tribunal queried "whether, because of this overlap, the entire waiver is defective and affects the whole proceeding before this Tribunal or whether the waiver is only partially defective in respect of those claims maintained in contradiction to the waiver requirements of Article 10.18." [*RDC*, ¶ 62] The Tribunal concluded "that the word 'claim' in Article 10.18 means the specific claim and not the whole arbitration in which that claim is maintained." [*RDC*, ¶ 75]

112. As a result, when the *RDC* Tribunal determined that there were domestic arbitration proceedings that existed and overlapped with the CAFTA arbitration, it allowed the claimant to nonetheless proceed to arbitrate claims under CAFTA.

113. The claimant's CAFTA request related to a resolution by the Guatemalan government. As stated in the RDC award, at ¶ 15:

> The Claimant affirms that the Lesivo Resolution had a devastating impact on its investment. According to the Claimant, since the Lesivo Resolution was issued, the Republic has made successive decisions not to pay into the Trust Fund and not to remove the squatters from the railway right of way. According to the Claimant, these decisions are bound up with the Lesivo Resolution. Furthermore, the Claimant alleges that the Lesivo Resolution was an 'all clear signal to poorer Guatemalan citizens to seize land and personal property from FVG with impunity as the Government would not provide protection.'

The actions which followed the Lesivo Resolution were also challenged in and "overlapped" on-going court proceedings in Guatemala.

114. This did not, however, prevent the *RDC* Tribunal from allowing the claimant to proceed with its claims under the provisions of Section A of Chapter 10 of CAFTA: Expropriation and Compensation (Article 10.7), Minimum Standard of Treatment (Article 10.5), and National Treatment (Article 10.3) [*RDC*, ¶ 51]

115. Were one to consistently apply the logic and outcome of *RDC* to the issues before the Tribunal, there would be no question that El Salvador's preliminary objection should have been denied.

116. First, the Tribunal would never have treated the pendency of local proceedings as a death-blow to CAFTA jurisdiction. As noted, the *RDC* tribunal stated that the claimant had continued domestic proceedings *even over the respondent's objection*. [*RDC*, footnote 36.] (The Claimants do not suggest that El Salvador objected to the continuance of the domestic proceedings, but a comparison with *RDC* shows the unfairness of the Award which the Claimants seek to have annulled.)

117. Second, the Tribunal would have recognized that a party can have claims under CAFTA, and in particular Expropriation and Compensation (Article 10.7), Minimum Standard of Treatment (Article 10.5), and National Treatment (Article 10.3), where there is "overlap" with domestic civil claims, and this is not fatal to jurisdiction of CAFTA claims.

118. Third, the Tribunal would in any event have determined that the CAFTA arbitration should certainly proceed as to claims where there were no domestic proceedings, i.e., El Salvador's actions with respect to the New San Sebastian Exploration License and the Nueva Esparta Exploration License.

119. Applying the logic of *RDC*, the Claimants should have been able to maintain their CAFTA claims against El Salvador under CAFTA Section A of Chapter 10 even though they challenged MARN's actions in revoking its permits for the San Sebastian Gold Mine and the San Cristóbal Mill and Plant in the context of what is permissible under El Salvadoran law. (This is not to suggest that El Salvador was in any way prevented from using the waiver tendered by the Claimants to terminate these proceedings.)

120. In its Award the Tribunal noted *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 Jan. 2006)("*Thunderbird* "). (AL-2) [Award, ¶ 89] While it is unclear how, if at all, this decision was used as a basis for the Tribunal's decision, the Claimants submit that this is also not a case where the tribunal decided that the claimant provided a complete and effective waiver but later invalidated the waiver and destroyed jurisdiction by its subsequent conduct.

121. In *Thunderbird* the claimant inadvertently failed to submit waivers required by Article 1121 of the NAFTA, which is similar to the Waiver Provision. At ¶ 117, the Tribunal determined that this did not defeat jurisdiction:

> 117. Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.

122. In its Award the Tribunal noted *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID, Case No. ARB (AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction ("*Loewen*")(5 Jan. 2001)(AL-7). While it is unclear how, if at all, this decision was used as a basis for the Tribunal's decision, the Claimants submit that this is also not a case where the tribunal decided that the claimant provided a complete and effective waiver but later invalidated the waiver and destroyed jurisdiction by its subsequent conduct.

123. In *Loewen* the claimant filed a waiver in compliance with Article 1121 of the NAFTA. The Tribunal's discussion was more to the point of how the waiver interrelated with considerations of the necessity to exhaust local remedies provided by the host country's administrative or judicial courts. [*Loewen*, ¶¶ 65-74]

124. Lastly, in its Award the Tribunal noted *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Decision on Jurisdiction (22 Aug. 2008)(*"Vannessa Ventures")*. (AL-8) [Award, ¶ 94] While it is unclear how, if at all, this decision was used as a basis for the Tribunal's decision, the Claimants submit that this is also not a case where the tribunal decided that the claimant provided a complete and effective waiver but later

invalidated the waiver and destroyed jurisdiction by its subsequent conduct. The tribunal's conclusion was to the contrary.

125. In *Vannessa Ventures* the claimant filed for arbitration under the Canada-Venezuela Bilateral Investment Treaty (the BIT).[12] Similar to CAFTA, Article XII(3)(b) of the BIT requires the investor to waive its rights to initiate or continue other proceedings.[13] In *Vannessa Ventures,* the investor filed waivers but did not immediately withdraw pending actions and indeed sought review of an earlier court decision by the Constitutional Chamber of the Venezuelan Supreme Court. The Supreme Court subsequently dismissed the investor's petition because it found that the waiver was effective. In rejecting Venezuela's submission that the investor's waivers were defective, the *Vannessa Ventures* tribunal noted that the Supreme Court had found the waiver was effective and that:

> In view of the fact that the question of the scope of the waiver, if this issue should in the future arise, is a matter to be decided under Venezuelan law by the Venezuelan Courts, this Tribunal considers that the Supreme Court of Venezuela is best qualified to interpret Venezuelan law. The Tribunal therefore holds that the waiver fulfils the requirements of the BIT and that this defense of the Respondent is denied.[14]

126. In *Vannessa Ventures,* the tribunal recognized that the waiver requirement in the BIT meant (1) the delivery of a signed waiver committed the claimant to irrevocable consequences with respect to domestic proceedings and (2) it is for the court or tribunal in the domestic proceedings to address the effect of the waiver. In *Vannessa Ventures,* the tribunal did not question the validity of the waiver because of the initiation and continuation of domestic proceedings.

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[12]Canada-Venezuela Bilateral Investment Treaty (AL-13).

[13]Article XII(3)(b) of the BIT states that an investor may submit a dispute to arbitration under the BIT "only if the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind."

[14]*Vannessa Ventures,* Decision on Jurisdiction, Section 3.4.4, page 28 (AL-8).

127. Were one to consistently apply the logic and outcome of *Vannessa Ventures* to the issues before the Tribunal, there would be no question that El Salvador's Preliminary Objection would have been denied without much discussion.

128. In summary, none of the Awards cited by the Tribunal are cases where the tribunal decided that the claimant provided a complete and effective waiver but later invalidated the waiver and destroyed jurisdiction by its subsequent conduct. The Tribunal has created a new rule to support its dismissal of the Claimants' Request without considering the merits and in so doing manifestly exceeded its powers under Article 52(1)(b).

129. The rule created by the Tribunal is not consistent with the plain language of the Waiver Provision. As noted above, there is nothing stated in the Waiver Provision that a claimant must take affirmative steps to discontinue domestic proceedings, let alone when the claimant is never even requested to do so by a respondent. By introducing requirements that do not appear from the plain language of a treaty, the Tribunal manifestly exceeded its powers.

130. The rule created by the Tribunal is not a practical application of the Waiver Provision. Objectively speaking, the rule created by the Tribunal means that if a Claimant missteps at any point in time while the CAFTA proceedings are moving forward, all claims pending before the CAFTA tribunal need to be dismissed because retroactively, there has never been jurisdiction. This does not square with any commonplace sense of jurisdiction, which is generally determined at the point in time when a legal proceeding is filed. The effect of the Tribunal's ruling is that jurisdiction floats and can be terminated by conduct after the date of receipt of the request for arbitration. By determining that a claimant's conduct after the submission of the request for arbitration can upset jurisdiction, even where there is jurisdiction at the outset, the Tribunal manifestly exceeded its powers.

131. The impracticality of the rule created by the Tribunal is further illustrated by the Tribunal's dismissing all of the Claimants' claims based upon the Claimants' failure to initiate affirmative steps to dismiss domestic proceedings having relevance only to the operation of the San Sebastian Gold Mine and San Cristóbal Mill and Plant. Although it is not clear from the Tribunal's

award, the Tribunal did seem to adopt the Respondent's argument that if the Claimants fail to dismiss any local proceeding, it retroactively has no jurisdiction for any of their claims.

132. The rule created by the Tribunal does not make sense in the overall context of proceedings under CAFTA. Counsel for El Salvador repeatedly suggested that the Claimants were hoping for a favorable outcome from El Salvador's Court of Administrative Litigation of the Supreme Court of Justice, and therefore did not take affirmative steps to discontinue the domestic proceedings. The Tribunal did not make any finding of fact to that effect, and this was certainly not true. But assuming the Tribunal accepted El Salvador's suggestions as fact, would it logically follow that the Tribunal never had jurisdiction of this matter when it was filed on 2 July 2009? Consistent with the Waiver Provision, the Claimants provided El Salvador with an irrevocable waiver of their rights in all domestic proceedings. At any point in time, on and after 2 July 2009, El Salvador was capable of using these waivers to eliminate any potential that the Claimants might benefit from pending domestic proceedings. El Salvador chose not to use the waiver and received favorable decisions from El Salvador's Court of Administrative Litigation of the Supreme Court of Justice.

133. Furthermore, would the outcome of any domestic proceedings constrain the Tribunal in considering the Claimants' CAFTA claims? Certainly the Tribunal could and probably would consider what occurred in the domestic proceedings in the context of analyzing the Claimants' claims under the provisions of Section A of Chapter 10 of CAFTA, however, the decisions of the El Salvadoran Supreme Court would not dictate the outcome of the CAFTA claims before the Tribunal. In fact, under CAFTA, court decisions can be "measures" adverse to an investor in the same sense of other governmental action. [See *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America, supra.*]

134. Moreover, the rule created by the Tribunal is wholly inequitable when applied to dismiss the Claimants' Request.

135. The Tribunal stated in its Award at ¶ 79, that the Claimants had taken the position that the Waiver Provision only requires adherence to written formalities and rejected the idea that

any waiver must comply with both a formal and a material element. This has been stated as if the Claimants flippantly tendered to El Salvador a document that had no consequences. The waivers which the Claimants tendered to El Salvador gave El Salvador the option of waiting for the outcome of the pending cases in El Salvador or demanding their dismissal. Between the time the Request was filed and when El Salvador's Court of Administrative Litigation of the Supreme Court of Justice decided the pending litigation, El Salvador asked neither the Court nor the Claimants to end these proceedings.[15]

136. To the contrary, after the Claimants filed their Request for Arbitration, the Attorney General of El Salvador sent a letter to the Secretary-General of ICSID dated 14 August 2009, where the Attorney General took the position that the Claimants could not file their request for arbitration without *first* dismissing the domestic proceedings. The Secretary-General did not agree with this argument, nor did the Tribunal.[16]

137. In his 14 August 2009 letter, the Attorney-General plainly stated that even "if claimants were to withdraw the legal proceedings still pending in El Salvador, claimants' failure to honor their waivers before submitting the request for arbitration to ICSID cannot be remedied."

138. In his 14 August 2009 letter, the Attorney-General could have requested a formal termination of the Domestic Proceedings, but instead, took the position that termination of the Domestic Proceedings would not make any difference.

C. The Tribunal Failed to State Its Basis for Determining That the Claimants' Waivers Were Not Effective.

139. At ¶ 18 of the Award, the Tribunal summarized the 14 August 2009 letter from the Attorney General as follows: "On 14 August 2009, Respondent filed a letter in which it submitted

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[15]Again, at ¶ 18 of the Award, the Tribunal suggests that the 14 August 2009 letter to the Secretary General of ICSID was a request for a dismissal of the proceedings pending in El Salvador after the Request was filed. As discussed above at ¶¶ 3, 24, that was not the case.

[16]At ¶ 71 of the Award, the Tribunal noted that the Respondent argued for "a 'material' requirement [of the waiver], whereby Claimants must abide by such waiver by discontinuing domestic court proceedings *before initiating this CAFTA arbitration*." [Emphasis added.]

that the present dispute 'is manifestly outside ICSID's jurisdiction', contending, among other things, that Claimants had not stopped court proceedings extent in El Salvador in which they sought to obtain the complete reversal of any measures taken against them, thereby violating the mandatory Waiver Provision of CAFTA."

140. By omitting reference to the fact that in this same letter the Attorney General clearly stated that the dismissal of the domestic proceedings would not make any difference to jurisdiction, the Award suggests that El Salvador asked the Claimants to discontinue court proceedings in El Salvador after the Claimants' Request was filed, which was never the case. The Tribunal's description mischaracterizes the Attorney General's letter.

141. Because of this mischaracterization of the Attorney General's letter, the reason for the Tribunal's decision is not clear. Has the Tribunal made some unsupported finding that the Claimants refused a request on the part of the Respondent to discontinue the domestic proceedings after the Request was filed? Or rather, has the Tribunal decided that CAFTA required the Claimants to obtain dismissal of the domestic proceedings, even though El Salvador never asked that they do so and, to the contrary, said that such action would be meaningless?

D. Conclusions.

142. The Tribunal has manifestly exceeded its powers by finding that the Claimants did not comply with the Waiver Provision of CAFTA.

143. The Award's failure to state the reasons on which it is based requires annulment pursuant to Article 52(1)(e) of the ICSID Convention.

III. ANNULMENT IS REQUIRED AS TO THE TRIBUNAL'S DETERMINATION THAT IT HAD NO JURISDICTION TO HEAR THESE CLAIMANTS' CLAIMS BASED ON THE REVOCATION OF THE CLAIMANTS' EXPLORATION LICENSES.

A. The Claimants Had Claims Based on El Salvador's Revocation of the Claimants' Exploration Licenses Which Were Not in Litigation in the Domestic Courts.

144. The Tribunal dismissed all of the Claimants' claims under CAFTA because it presumably determined that it did not have jurisdiction to hear any of them. The Tribunal determined that it did not have jurisdiction for the sole reason that the Claimants did not discontinue two proceedings pending before El Salvador's Court of Administrative Litigation of the Supreme Court of Justice at the time the Claimants filed their Request.

145. The two proceedings pending before El Salvador's Court of Administrative Litigation of the Supreme Court of Justice at the time the Claimants filed their Request were petitions filed with the court on 6 December 2006, one for the San Sebastian Gold Mine and the other for the San Cristóbal Mill and Plant, seeking a review of MARN's revocation of the environmental permits issued for this mine and processing plant.

146. The Claimants had other business activities in El Salvador which they were forced to discontinue because of separate government actions. The Claimants claimed in their Request:

> 18. On March 3, 2003, the Government of El Salvador granted Commerce/Sanseb a new exploration license for a 41-square kilometer area (10,374 acres), which surrounded the site of the San Sebastian Gold Mine and included three other formerly-operated mines (the "New San Sebastian Exploration License").
>
> 19. On May 25, 2004, the Government of El Salvador granted Commerce/Sanseb a new exploration license for an additional 45 square kilometers of area (11,115 acres) to the North of and abutting the New San Sebastian Exploration License area. This new license area encompassed eight formerly-operated gold and silver mines (the "Nueva Esparta Exploration License").
>
> 20. After receiving the New San Sebastian Exploration License and the Nueva Esparta Exploration License, Commerce/Sanseb invested resources for the exploration of these areas for precious metals including explorations at the La Lola Mine, the Santa Lucia Mine, the Tabanco Mine, the Montemayor Mine, and the La Joya Mine. This was done with the expectation that Commerce/Sanseb would ultimately receive exploitation concessions for these sites.
>
> ....
>
> 23. On October 10, 2006, Commerce/Sanseb applied to MARN for an environmental permit for its exploration in connection with the New San Sebastian Exploration License and the Nueva Esparta License. MARN did not respond to the

> request and on March 8, 2007, Commerce/ Sanseb applied to the El Salvador Ministry of Economy for an extension of these exploration licenses, as was its right. On October 28, 2008, the Ministry of Economy denied Commerce/Sanseb's application citing Commerce/Sanseb's failure to secure an environment permit.

147. Neither of the two proceedings pending before El Salvador's Court of Administrative Litigation of the Supreme Court of Justice involved El Salvador's refusal to renew these exploration permits, and there were no other domestic proceedings relating to these exploration permits pending either before or after the Claimants' request for arbitration.

148. In its Preliminary Objection, counsel for El Salvador acknowledged that the Claimants had separate claims arising from El Salvador's refusal to renew these exploration permits. At ¶ 31, counsel for El Salvador stated:

> 31. Thus, MARN's two resolutions revoking the environmental permits in 2006 are the measures that affected Claimants with regard to the San Sebastian Gold Mine exploitation concession and the San Cristóbal Mill and Plant. Those resolutions are the basis for Claimants' allegations of breaches of CAFTA with regard to the exploitation concession and the processing plant, which constitute *by far the most significant claims* in this arbitration. [Emphasis added.]

These other claims included the Respondent's refusal to renew the exploration permits, which were not addressed in "MARN's two resolutions" or the subsequent court action challenging MARN's resolutions.

149. In their Request, the Claimants mistakenly asserted that there were court proceedings involving these exploration permits. The Claimants sought an administrative appeal, and not a court review. However, even before the Respondent filed its Preliminary Objection, this mistaken assertion was clarified. The Respondent acknowledged in its Preliminary Objection that the assertion was a mistake:

> 103. Claimants alleged in the Notice of Arbitration that on October 28, 2008, the Ministry of Economy denied their application for extensions of their New San Sebastian and Nueva Esparta exploration licenses. Claimants asserted that their local counsel "filed a challenge in the Courts to the government's refusal to honor Commerce/Sanseb's request to extend its exploration permits pursuant to the terms

> of the 2002 permits" and that these "legal proceedings have not been resolved." If, in fact, court proceedings were continuing related to the same measures alleged to constitute CAFTA breaches, there would be an additional impermissible identity of measures in violation of the waivers. At a minimum, the Notice of Arbitration confirms that Claimants intended to act in violation of the waivers and took no action to effectuate the written waivers that they provided.
>
> 104. *But the Notice of Arbitration is factually incorrect.* The Republic's review of the facts shows that, contrary to what Claimants stated in paragraph 24 of the Notice of Arbitration, Claimants' legal counsel never filed a challenge in the courts of El Salvador with regard to either exploration license. Instead, Claimants' *local counsel only filed an administrative appeal* related to one of the two exploration licenses. [Emphasis added.]

As a result, the Tribunal was advised by both parties that the Claimants had separate claims arising from El Salvador's refusal to renew the Claimants' exploration permits that were not the subject of domestic proceedings.

B. The Tribunal Failed to State the Reasons on Which it Based its Dismissal of Claims Relating to El Salvador's Revocation of the Claimants' Exploration Licenses.

150. The Tribunal acknowledged that the Claimants had exploration permits and that the government of El Salvador refused to renew them after El Salvador imposed its ban on mining. [See Award, ¶¶ 9, 6, and 65] Nonetheless, the Tribunal dismissed the Claimants' claims arising from El Salvador's refusal to renew these exploration permits. At ¶ 113 of the Award, the Tribunal stated: "The Tribunal therefore determines that Claimants failed to fulfill the requirements of the Waiver Provision with respect to their entire claims."

151. The Tribunal did not explain why the Claimants' claims arising from El Salvador's refusal to renew their exploration permits were being dismissed. In the analysis section of the Award, ¶¶ 68 – 128, the Tribunal does not specifically refer to these claims.

152. The Award's dismissal of the Claimants' claims with respect to the exploration licenses must be annulled for failure to state reasons pursuant to Article 52(1)(e) of the ICSID Convention.

C. If it Can Be Inferred That the Tribunal Adopted El Salvador's Argument, Then the Tribunal Manifestly Exceeded its Powers by Dismissing Claims Relating to El Salvador's Revocation of the Claimants' Exploration Licenses.

153. Because the Tribunal did not state its reasons, one can only speculate as to the reasons why the Tribunal dismissed the Claimants' claims arising from El Salvador's refusal to renew their exploration permits. We would expect El Salvador to argue that the Tribunal must have adopted its argument for this result.

154. El Salvador argued in its Preliminary Objection, at ¶¶ 77-78:

> 77. It is important to note that the waiver requirement in CAFTA prohibits parallel proceedings with respect to any measure alleged to constitute a breach of CAFTA. The CAFTA waiver requirement prevents identity of measures, any measure. Not necessarily all measures, but any measure, in the singular.
>
> 78. If a claimant has initiated and continues any proceeding with respect to any measure alleged to constitute a breach of CAFTA after having filed a notice of arbitration, i.e., if the claimant does not waive such rights as required by CAFTA, the automatic result under CAFTA Article 10.18.2 is that no claim ("ninguna reclamación") may be submitted to arbitration. In short, if there is an impermissible identity of any measure, no claim ("ninguna reclamación") may be submitted to arbitration.

Counsel for El Salvador then argued that the Tribunal should disregard the analysis of the issue in *RDC*, which was absolutely contrary to El Salvador's position.

155. In *RDC*, the respondent made the same argument that "failure to submit the requisite waiver means that … there is no jurisdiction over the entire action, not just over the particular claim or one of the claims..." [*RDC*, ¶ 64]

156. In *RDC*, at ¶ 69, the Tribunal rejected this argument, stating, *inter alia*:

> 69. Grammatically, the phrase 'No claim' at the beginning of paragraphs 1, 2 and 4 of Article 10.18 could mean 'any claim', 'a claim', 'each claim' or 'all claims' and not necessarily the 'whole claim' to use the Respondent's terminology. But the term 'claim' is used consistently to refer to a specific cause of action

> throughout Article 10.18. It is not necessary to have recourse to any theory of "dual meaning" to make sense of Article 10.18. Article 10.18(1) time bars claims older than three years from the date on which the claimant first acquired, or should have first acquired knowledge of the alleged breach. Evidently here, as the Respondent accepts, the word 'claim' must mean each individual claim submitted to arbitration. This being the case, it would be odd that the same word in the same grammatical construction would mean something different when used subsequently in other paragraphs of the same article.

157. The Tribunal noted the *RDC* decision in the Award [¶¶ 89, 94, 110, and 111] and in no way indicated that in its view, the tribunal in *RDC* was incorrect in this analysis. As shown by *RDC*, Article 10.18 requires a separate consideration of "claims" and does not lead to the result that there is no jurisdiction over the entire action if a claimant's waiver is defective as to one or some of its claims.

158. The Tribunal manifestly exceeded its powers by failing to exercise jurisdiction over the Claimants' claims arising from El Salvador's refusal to renew their exploration permits.

III. ANNULMENT IS REQUIRED AS TO THE TRIBUNAL'S DETERMINATION THAT THE CLAIMANTS CANNOT PROCEED ON THEIR CAFTA CLAIMS BECAUSE EL SALVADOR'S *DE FACTO* BAN ON MINING IS NOT A "MEASURE".

A. El Salvador's De Facto Ban on Mining Is a "Measure" under Article 2.1 of CAFTA.

159. Article 2.1 of CAFTA defines "measure" as follows: "**measure** includes any law, regulation, procedure, requirement, or practice". This definition has been given a broad and inclusive interpretation. [See *Loewen*, supra, ¶ 40]

160. At ¶ 55 of the Award, the Tribunal stated that it would accept the Claimants' version of facts as true.

161. In their Preliminary Objection Response at ¶¶ 7-12, the Claimants presented facts that showed that the Respondent has imposed a moratorium on mining (which has continued through this day). [See ¶¶ 12-16, *infra*]

162. The Claimants had a 38 year history of mining, processing and exploring for gold in the Republic of El Salvador, under concessions granted to them by El Salvador that extended to the year 2034. In 2006, the Claimants were the only companies to hold permits to mine and produce gold in the Republic of El Salvador. [See ¶¶ 1, 6-11, *infra*][17]

163. In July 2006, Minister Hugo Barrera who was the Minister in charge of the Ministry of the Environment and Natural Resources (MARN) publicly stated that the government of El Salvador was going to take away the Claimants' authorization to produce gold from the San Sebastian Gold Mine because El Salvador had just made a general policy decision to end gold mining. [See ¶¶ 12-13, *infra*] Afterwards, the Claimants lost every permit they held.

164. In the years that followed, every president of the Republic of El Salvador publicly stated that the government of El Salvador would not issue permits to mine or explore for gold. [See ¶¶ 14-16, *infra*] This has been a government practice since 2006.

165. The Tribunal dismissed the claims based on the Respondent's *de facto* ban on mining, concluding that even if there is a *de facto* ban, it is a policy, rather than a "measure" that is actionable under CAFTA.

> 111. The Tribunal does not disagree with Claimants' reading of the decision in *RDC*. However, the Tribunal considers reference to *RDC* in the context of this case to be inapposite, as the Tribunal has not been confronted with separate and distinct claims. The Tribunal views Claimants' claim regarding the *de facto* mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits. Indeed, when Claimants sought to challenge the revocation of the environmental permits before the El Salvador courts, they were not just hoping to have their permits reinstated – they were hoping to be able to mine again. The effect of the revocations, now upheld in Respondent's courts, was, to use Claimants' phrasing in their Notice of Arbitration, to "effectively terminat[e] Commerce/SanSeb's right to mine and process gold and silver." The *de facto* mining policy was alleged to have emerged in the same month as the permit

[17]Another mining business, Pac Rim Cayman LLC, filed a notice of arbitration asserting CAFTA claims against El Salvador when El Salvador refused to issue to it permits to mine and produce gold. See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, (AL-4)]

> revocations were notified to Claimants. Consequently, in the Tribunal's view, the *de facto* mining ban policy claim is not separate and distinct.
>
> 112. Moreover, even if the *de facto* mining ban policy and the revocation of the permits could be teased apart, the Tribunal is of the view that the policy does not constitute a "measure" within the meaning of CAFTA. At most – at least based on the Tribunal's evaluation of this particular case – the ban is a policy of the Government as opposed to a "measure" taken by it. By contrast, the revocation of the environmental permits squarely constitutes a measure taken pursuant to that policy and, as noted, it was that revocation which put an end to Claimants' mining and processing activities.

166. A government practice, here denominated a "policy", is clearly within the definition of a "measure" under Article 2.1 of CAFTA

167. Also, El Salvador's pronouncement that it was going to take away the Claimants' right to do business at the San Sebastian Gold Mine and end mining in the Republic of El Salvador is a "measure."

168. The Tribunal's decision manifestly exceeded its powers by determining that El Salvador's *de facto* ban on mining was in itself not a "measure".

B. The Tribunal Manifestly Exceeded its Powers by Determining That El Salvador's *De Facto* Ban on Mining Is Not a "Measure" and That the Claimants Could Not Proceed on a CAFTA Claim Based on the *De Facto* Ban.

169. In their Request, the Claimants claimed that "the *actions* of the El Salvadoran government, through its ministries, reflects an ongoing government policy since September 2006 to de facto deny foreign companies the right to develop mining interests in the country of El Salvador." [Emphasis added.][18] The Request then proceeds to illustrate some of these actions, including the fact that the ban applies only to gold and silver mining, despite the fact that other more polluting industries are permitted, the ban applies in practice exclusively to foreign

[18]Notice of Arbitration, ¶ 25.

companies, and that the government does not enforce its stated policies against native El Salvadorans engaged in gold and silver production.[19]

170. The Request specifically refers to El Salvador's "*continuing refusal* to engage in any exploration or mining activities despite proposals to ensure environmental protection and compliance with the laws of El Salvador." [Emphasis added] For example, the Claimants' Rejoinder highlighted that:

> The conduct of the Respondent frustrated the Claimants' ability to proceed with investment partners, and this too must be taken into account. For example, in March, 2008, Commerce Group Corp. entered into a letter of intent with an investment partner, Manti Holdings, LLC. Under the terms negotiated by the parties, Manti would provide all the capital required to develop the Claimants' investment, pay in excess of $2 million for its right to participate, and share the revenues from production with the Claimants. After signing this letter of intent, representatives of Manti met with representatives of the government of El Salvador and learned that the Respondent would not permit mining.[20]

171. The references in the above paragraphs make it clear that the Claimants' claims are not only with respect to the revocation of the environmental permits, the result of which was to terminate the Claimants' right to continue mining operation, but more importantly El Salvador's continuing practice of not permitting mining under *any condition*. This continuing practice since 2006, which continues to the present, has resulted in a *de facto* expropriation of the Claimants' concession. The result of the *de facto* moratorium is that holders of mining concessions are not able to undertake any mining operations notwithstanding that they have the right to do so under a concession and they comply with all applicable El Salvadoran laws.

172. Even though the Claimants hold an exploitation concession that entitles them to mine until 2034, that concession has been rendered worthless because El Salvador will not permit mining. When the Claimants entered into an agreement in 2008 to try to sell the concession, El Salvadoran authorities told the interested party that mining would not be permitted. Thus, even

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[19]Notice of Arbitration, ¶ 26

[20]Claimants' Preliminary Objection Rejoinder, ¶ 105.

though the Claimants hold a valid concession and El Salvadoran law allows mining, in practice mining is not permitted because El Salvador will not issue permits. The issue is not simply that El Salvador revoked Claimants' environmental permits, but that since 2006 it would not issue any permit to mine.

173. The Tribunal manifestly exceeded its powers by failing to distinguish between: (i) the revocation of the permits; and (ii) the continuing practice of El Salvador in denying investors any benefit of their mining concessions. The continuing conduct of El Salvador (both its actions and omissions), including the statements of its highest officials, demonstrates a flagrant disregard of the Claimants' investment.

174. The Tribunal exceeded its powers by labeling El Salvador's conduct as a "policy" rather than a measure and doing so without any substantive analysis. The Tribunal simply stated that the "the ban is a policy of the Government as opposed to a 'measure' taken by it."[21] In doing so the Tribunal failed to consider the Claimants' claim that El Salvador has engaged in ongoing *actions* since 2006 to *de facto* deny foreign companies the right to develop mining interests. If the moratorium can be categorized simply as a policy that cannot be "teased apart"[22] from the question of the revocation of permits in 2006, why is it that in 2008 government officials told the Claimants' investment partner that El Salvador would not permit mining under any circumstances?

175. In these decisions, the Tribunal manifestly exceeded its powers by failing to provide any basis for its holding that a consistent practice over three years under which a government ignores its own laws, indicates to rights holders that they may not exercise their lawful rights and creates a complete legal limbo for the holders of exploitation concessions, is a "policy" that cannot *prima facie* be the subject of a claim under CAFTA. The Tribunal's decision to deny jurisdiction on this point is so egregious and illogical that is must be annulled.

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[21]Award, ¶ 112.

[22]Award, ¶ 112.

176. Furthermore, the Tribunal has no basis for stating that "the Tribunal has not been confronted with separate and distinct claims" when it seeks to distinguish *RDC*. As has been discussed earlier, the Claimants have a separate claim that El Salvador refused to renew the Claimants' New San Sebastian Exploration License and the Nueva Esparta Exploration License. Those licenses covered 86 square kilometers of land encompassing work performed by the Claimants at La Lola Mine, the Santa Lucia Mine, the Tabanco Mine, the Montemayor Mine, and the La Joya Mine – which was entirely separate and distinct from the Claimants' work at the San Sebastian Gold Mine and the San Cristóbal Mill and Plant.

177. If what the Tribunal meant to say is that the *de facto* ban on mining is not "separate and distinct" from El Salvador's revocation of the Claimants' permits for the San Sebastian Gold Mine and the San Cristóbal Mill and Plant, this would not make sense, because the announced *de facto* ban on mining later resulted in El Salvador's failure to renew the Claimants' New San Sebastian Exploration License and Nueva Esparta Exploration License. A CAFTA claim can be based upon a respondent's failure to renew a license. See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, Case No. ARB (AF)/00/2, AWARD, 29 May 2003 (AL-6), ¶ 117, et seq.

178. The Tribunal's decision was manifestly in error since the Respondent's ban on mining resulted in multiple actions against the Claimants not limited to the revocation of the Claimants' permits to operate at the San Sebastian Gold Mine and the San Cristóbal Mill and Plant in 2006.

179. In a larger sense, the Tribunal's analysis suggests that it wanted to avoid a hearing on the merits and gave vague and unsupported reasons why it should not have to have a hearing on the merits. Counsel for El Salvador introduced slanted, extraneous attacks on the Claimants that served to prejudice what should have been an objective focus on the issues involved in resolving the Preliminary Objection, and the Tribunal may have been influenced by this.

180. The Claimants submitted claims under CAFTA for Expropriation and Compensation (Article 10.7), Minimum Standard of Treatment (Article 10.5), and National

Treatment (Article 10.3). The real truth of the matter is that the Republic of El Salvador, after decades of encouraging the Claimants to invest and develop a mining business (in a country with an uncertain political environment), abruptly announced that all previous commitments were off the table and that all of the Claimants' business activity would have to cease.

181. Were this Request to proceed to the merits, the object of the proceeding would be to determine whether El Salvador breached its duties under CAFTA, such as payment of prompt, adequate, and effective compensation for its expropriation of a covered investment either directly or indirectly through measures equivalent to expropriation. [Article 10.7] At the merits stage of the proceeding, the hearing would focus on whether the various actions of El Salvador, including pronouncements of its successive presidents and ministers and specific actions directed at shutting down the Claimants' business operations, amounted to a violation of CAFTA.

182. The Award suggests that the Tribunal has prejudged the merits of the Request, despite its assertion that at this stage of the proceedings it must accept the Claimants' version of the facts.

C. The Tribunal Manifestly Exceeded its Powers and Failed to State Reasons When it Determined That Claimants' Claims for Breach of National Treatment and Minimum Standard of Treatment Could Not Proceed.

183. Having determined that the *de facto* moratorium was a policy as opposed to a measure, the Tribunal concluded that the "Claimants failed to fulfill the requirements of the Waiver Provision with respect to their entire claims."[23] However, the Tribunal failed to address the Claimants' claims that El Salvador's continuing actions breached other provisions of CAFTA including Art. 10.3 (National Treatment) and Article 10.5 (Minimum Standard of Treatment). Unlike the expropriation provision, which refers to "measures", Articles 10.3 and Articles 10.5 refer to the "treatment" of the investment. The Tribunal manifestly exceeded its powers by its egregious failure to even consider the jurisdictional basis for the Claimants' National Treatment and Minimum Standard of Treatment claims.

[23]Award, ¶ 113.

184. In the Claimants' Request, at ¶ 26, they claim that El Salvador discriminates against foreign investment because, amongst other things, the ban on development of gold and silver mines applies exclusively to foreign companies and El Salvador does not enforce its stated policies against native El Salvadorans engaged in gold and silver production. The Request specifically states that by its conduct El Salvador has breached its obligations under Article 10.3 (National Treatment) and Article 10.5 (Minimum Standard of Treatment).

185. Had the proceedings continued as they should have, the Claimants would have produced evidence demonstrating that El Salvador has failed to enforce its *de facto* moratorium on El Salvadorans. El Salvador enforces a *de facto* moratorium against foreign mining companies while allowing illegal and environmentally damaging mining activities by native El Salvadorans. The Claimants claim, among other things, that the failure of El Salvador to enforce its mining laws against native El Salvadorans, while imposing a *de facto* moratorium on foreign investment is contrary to CAFTA's National and Minimum Standard of Treatment Provision. Further, the continuing refusal to allow mining activities in accordance with its own laws (as evidenced by El Salvador's treatment of the investment during its meetings with Manti Resources) is a breach of the Minimum Standard of Treatment.

186. The Tribunal manifestly exceeded its powers by failing to exercise jurisdiction with respect to the Claimants' claims that El Salvador's conduct since 2006 is a breach of Article 10.3 (National Treatment) and Article 10.5 (Minimum Standard of Treatment). Further, the Tribunal failed to state any reasons for its denial of jurisdiction over these claims.

IV. ANNULMENT IS REQUIRED AS TO THE TRIBUNAL'S DETERMINATION THAT THE TRIBUNAL COULD NOT HEAR CLAIMS BASED UPON THE FOREIGN INVESTMENT LAW.

A. The Tribunal Failed to State its Basis for its Dismissal of the Claimants' Claims Based on El Salvador's Violation of the Foreign Investment Law.

187. The Tribunal acknowledged that the Claimants stated in their Request that the Request was filed pursuant to the ICSID Convention, CAFTA, and the Foreign Investment Law. [Award, ¶ 125]

188. The Claimants asserted that "the same measures that give rise to CAFTA claims also give rise to breaches of the Foreign Investment Law." [Award, ¶ 122]

189. The Tribunal did not determine that the facts asserted in the Request would not give rise to breaches of the Foreign Investment Law.

190. The Tribunal noted that the Claimants "confirm that they have submitted a claim for breach of the Foreign Investment Law, in particular for breaches of Article 5 (equal protection), Article 6 (non-discrimination) and Article 8 (compensation for expropriation)". [Award, ¶ 123]

191. The Tribunal nonetheless concluded: "The Tribunal is not satisfied that Claimants have in fact raised any claims – i.e., causes of action – under the Foreign Investment Law." [Award, ¶ 124]

192. The Tribunal did not provide a legal basis for its determination that there are "no claims to be heard" under the Foreign Investment Law. [Award, ¶ 128]

B. The Tribunal Manifestly Exceeded its Powers by Dismissing the Claimants' Claims Based on El Salvador's Violation of the Foreign Investment Law.

193. In their Notice of Arbitration (the "Request") the Claimants clearly stated:

> 1. This is a request pursuant to Article 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), Articles 10.16(1)(a), 10.16(l)(b), and 10.16(3)(a) of the Central America - United States - Dominican Republic Free Trade Agreement ("CAFTA-DR"), ***and Article 15(a) of the Ley de Inversiones of El Salvador ("Investment Law")*** for arbitration under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings. [Emphasis added.]

194. In its Preliminary Objection, captioned "The Republic of El Salvador's Preliminary Objection Under Article 10.20.5 of the Dominican Republic - Central America - United States Free Trade Agreement (CAFTA)", the Respondent did not argue that the Claimants had no right to proceed under the El Salvador Foreign Investment Law.

195. At ¶¶ 84-86 of the Preliminary Objection Response, the Claimants pointed out that the Respondent's "waiver" arguments did not apply to the Claimants' claims under the Foreign Investment Law because "there is no waiver of rights with respect to challenging the revocation of environmental permits as a breach of the Foreign Investment Law."

196. At ¶ 112 of the Preliminary Objection Reply, the Respondent argued:

> 112. Claimants have not submitted any Investment Law claims. They did not mention the Investment Law in their Notice of Intent, simply referring to claims under CAFTA. In their Notice of Arbitration, Claimants for the first time mentioned the Investment Law of El Salvador, but still did not specify any claims, or any alleged breaches of the Salvadoran law.

197. At ¶¶ 92-100 of the Preliminary Objection Rejoinder, the Claimants responded, and included in that response:

> 93. The Claimants' Notice of Arbitration includes "information concerning the issues in dispute" as required by Article 36(2), ICSID Convention and, on any view, confirms that the Claimants are submitting to the Centre a "legal dispute arising directly out of an investment" (Article 25(1), ICSID Convention). The Claimants identify arbitrary, discriminatory and expropriatory conduct by El Salvador that has injured the Claimants' investments. It is evident on the face of the Notice of Arbitration that the same measures that give rise to the CAFTA claims also give rise to breaches of the Foreign Investment Law and that there is a legal dispute with respect to the Respondent's treatment of the Claimants' investments under the Foreign Investment Law.

The Claimants also noted, at ¶ 95 of the Preliminary Objections Rejoinder, that while a "notice of intent" has to be given before demanding arbitration of a claim under CAFTA, there is no such requirement for a claim under the Foreign Investment Law.

198. The Tribunal arbitrarily dismissed the Claimants' claims under the Foreign Investment Law. It contended that it was "only late in the pleadings stage, at ¶¶ 92-97 of the Preliminary Objection Rejoinder, that Claimants finally make specific reference to the Foreign Investment Law." [Award, ¶ 127] This ignores the chronology set forth above, which shows that the Claimants did give notice of its Foreign Investment Law claim in its Notice of Arbitration, and that the Respondent's Preliminary Objection made no objection to this claim.

199. Moreover, the Respondent's Preliminary Objection under CAFTA Art. 10.18.4 focused solely on the validity of the Claimants' waivers under CAFTA Art. 10.18.2, the Waiver Provision. The Tribunal's references to the Claimants' failure to raise issues with respect to the Foreign Investment Law in its pleadings is inapposite because jurisdiction under the Foreign Investment Law was not properly before the Tribunal in the Preliminary Objection procedure, which was specifically invoked under CAFTA with respect to CAFTA claims. As the Tribunal noted in its Award,[24] at the hearing the Respondent specified as follows:

> I also just want to point out, there has been a considerable discussion of whether or not the waiver applies to the investment law proceedings regarding the investment law before this tribunal. We've heard the position of the parties.
>
> From El Salvador's point of view, that issue is not yet ripe for decision. It has not yet been placed before the tribunal. El Salvador again reserves its right to raise that issue if the time came, but would hope that the tribunal would reserve a decision on that until it has been fully briefed, as it is a rather significant and complicated legal issue.[25]

200. The Tribunal manifestly exceeded its powers by dealing with an issue that was not properly before it. The scope of the Preliminary Objection invoked by the Respondent was limited to CAFTA Art. 10.18.2, the Waiver Provision. Further, the Tribunal manifestly exceeded its powers by finding that the Request does not raise claims under the Foreign Investment Law. The Request asks for arbitration under the Foreign Investment Law and includes information

[24]Award, ¶ 120.

[25]Preliminary Objection Hearing Transcript, p.278.

concerning the issues in dispute as required by Article 36(2), ICSID Convention. This is a sufficient identification of the claims for the purposes of the ICSID Rules.

PRAYER FOR RELIEF

201. For the foregoing reasons, the Applicants/Claimants, Commerce Group Corp. and San Sebastian Gold Mines, Inc., respectfully request that the Tribunal's Award be annulled, and that they be awarded such attorneys fees and other costs of the annulment and preliminary objection proceedings that will restore them to the position they should have been in before El Salvador's Preliminary Objection.

Dated: 15 December 2011.

Respectfully submitted,

/s/ John E. Machulak

_____

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