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. ARB/09/17

REPLY 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.

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REPLY MEMORIAL SUPPORTING ANNULMENT

The Applicants/Claimants, Commerce Group Corp. and San Sebastian Gold Mines, Inc. (collectively the "Claimants"), respectfully submit this Reply Memorial in Support of their Application for Annulment of the Award issued on March 14, 2011, in the matter of *Commerce Group Corp. and San Sebastian Gold Mines, Inc. and The Republic of El Salvador* (ICSID Case No. ARB/09/17):

INTRODUCTION

SUMMARY

1. On 11 July 2011, the Applicants applied for annulment and on 15 December 2011, they submitted their Memorial in Support of Claimants' Application for Annulment ("Memorial") to the *ad hoc* Committee. In their Memorial the Applicants alleged that the Tribunal manifestly exceeded its powers under Article 52(1)(b) and that the Award fails to state the reasons on which it is based under Article 52(1)(e).

2. On 19 October 2012, the Respondent submitted El Salvador's Counter-Memorial in Opposition to Claimants' Application for Annulment ("Counter-Memorial"). In its Counter-Memorial, the Respondent El Salvador argues that Commerce Group Corp. ("CGC") and San Sebastian Gold Mines, Inc. ("SSGM") are impermissibly using the annulment process as a chance to challenge the Tribunal's 14 March 2011 Award in this matter. Among other things, the Respondent complains that the Applicants include a "self serving account of the facts of the underlying dispute" [¶ 74], that the Applicants attempt to "develop new arguments" [¶ 77], that the Applicants present the "same arguments" [¶ 89], and that generally, the Applicants state reasons for their belief that the Award was unjust.

3. The Applicants do indeed submit that the Award is so unjust and unreasonable that is should be annulled. An application for an annulment cannot be decided in a vacuum. It would be impossible for the *ad hoc* Committee to determine whether the Tribunal manifestly exceeded its powers or whether the Award fails to state the reasons on which it is based without an

explanation of the facts and arguments underlying the Award. The Applicants are not claiming that the *ad hoc* Committee has inherent powers to annul on some nebulous standard of justice or reasonableness. Rather, their submission is that the Award is so manifestly unreasonable and unjust that it meets the criteria for annulment in Article 52.

4. Also, the Applicants emphasize that this is not a matter that has been decided on the merits. The Applicants were denied the opportunity for a hearing on the merits because the Tribunal found that it had no jurisdiction. This application for annulment concerns jurisdiction – access to the process – the right to be heard.

5. The Applicants acknowledge that the review process of an *ad hoc* committee in an annulment proceeding is limited, but limited is not the same as non-existent. An annulment is not an appeal, but neither is there a presumption against annulment. It has been said that an *ad hoc* committee should neither be concerned with upholding the finality of awards nor with ensuring that review is as extensive as possible. Its concern is with applying Article 52 according to its provisions.[1]

6. Under Article 52(1)(b), an *ad hoc* committee has the responsibility to annul where there is a manifest excess of power. "[A]n 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."[2]

7. Under Article 52(1)(e), an *ad hoc* committee has the responsibility to annul where there is no explanation of reasons for the Award. "Reasons are important to the legitimacy of the decision. The obligation to give a reasoned award is a guarantee that the Tribunal has not decided

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[1] *Republic of Kazakhstan and Rumeli Telekom A.S.*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee (25 March 2010*)* [¶73]

[2] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (*Vivendi I)*, Decision on Amendment (3 July 2002) [AL-1][¶86]; *Malaysian Historical Salvors, SDN, BHD and the Goverment of. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) [AL-3][¶ 27].

in an arbitrary manner." Reasons are required so that parties can "assure themselves that the Tribunal properly understood the questions before it."[3]

REPLY TO RESPONDENT'S COMMENTS ON THE FACTS

8. In this Reply, the Applicants would like to order the facts into three categories: (1) the background facts giving rise to the Applicants' claims against the Respondent, (2) the facts relating to the Tribunal's determination that the Applicants had not complied with their CAFTA waiver by allowing legal proceedings in El Salvador to continue, and (3) the facts which show that the Applicants had separate claims that the Tribunal should not have dismissed, even assuming that dismissal of certain of the Applicants' claims was warranted. In these lengthy submissions, these simple, core facts often become muddled. There will be a more detailed discussion of the facts stated below later in this Reply.

9. As the Tribunal noted, Article 10.20.4(c) of CAFTA required the Tribunal to "assume to be true claimant's factual allegations in support of any claim" when deciding on Respondent's Preliminary Objection. [Award, ¶ 55] The Respondent suggests that the Tribunal engaged in making "factual findings", but the Tribunal "does not purport to make any findings of fact" and assumes the Notice of Arbitration to be true in this phase of the proceedings. [Award, ¶ 55]

A. The Background Facts Giving Rise to the Dispute.

10. The background facts stated by the Respondent in its response depart from the applicable standard stated by the Tribunal. In their Notice of Arbitration the Applicants outlined their history of investment in El Salvador from 1969, the mining concessions they received and that they expected would continue through the year 2034, the exploration licenses they received and expected to develop, and the fact that in 2006 El Salvador declared (and has continued to

[3] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phillipines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010)[RL-21] ¶¶ 249-250.

apply) an arbitrary policy denying foreign companies the right to develop their mining interests which deprived the Applicants of their investment in the country of El Salvador.

11. As much as the Applicants hope that their version of the facts controls jurisdiction, the Applicants recognize the possibility that the Respondent's other discussion of the background facts will confuse and perhaps prejudice the discussion of issues material to jurisdiction. There will be further reply on this below, at ¶¶ 26-38.

B. The Facts Relating to the Tribunal's Determination That the Applicants Had Not Complied with Their CAFTA Waiver.

12. Article 10.18(2)(b) of CAFTA required the Applicants to submit with their notice of arbitration a "written waiver ... of any right to initiate or continue" court proceedings pending in El Salvador. The Tribunal and the parties agreed that the Applicants submitted the written waiver required by this Article. [Award, ¶ 95]

13. However, the Tribunal determined that the Applicants were under an obligation to discontinue the El Salvadoran court proceedings in order to give material effect to their formal waiver. [Award, ¶ 102] The Applicants want to make certain that the *ad hoc* Committee has a clear perception of the facts that underlay the Tribunal's determination.

14. On 13 September 2006, the El Salvador Ministry of Environment ("MARN") revoked the Applicants' environmental permits for mining at the San Sebastian Gold Mine and processing ore at the San Cristóbal Mill and Plant.

15. On 6 December 2006 the Applicants filed two petitions with El Salvador's Court of Administrative Litigation of the Supreme Court of Justice, one relating to the MARN's revocation of the permit for the San Sebastian Gold Mine and the other relating to the MARN's revocation of the permit for the San Cristóbal Mill and Plant.

16. These petitions were pending decision when on 2 July 2009, the Applicants filed their Notice of Arbitration. The Supreme Court decided the two petitions adverse to the Applicants on respectively 26 February 2010 and 18 March 2010.

17. The parties did not appear before the Supreme Court at any time between 2 July 2009 (when the Notice of Arbitration was filed) and the dates of these decisions (or any time after), nor did they file any submissions for the Supreme Court to consider after 2 July 2009. Simply speaking, the matters were pending decision.

18. At no time between 2 July 2009 and the dates of these decisions did the Respondent ask the Applicants to take any steps to discontinue the proceedings pending before the Supreme Court so as to give effect to the waivers that the Applicants gave on 2 July 2009. [See ¶¶ 52-58 below]

C. The Facts Which Show That the Applicants Had Separate Claims That the Tribunal Should Not Have Dismissed.

19. The Applicants had been given a concession to mine metals at the San Sebastian Gold Mine through the year 2034.

20. The Applicants had separate exploration rights to approximately eighty-six square kilometers, including 11 other mines, in two areas known as New San Sebastian and Nueva Esparta.

21. In 2006, the El Salvadoran government declared a ban on all metal mining and began to implement the ban against foreign companies. After this declaration, the Respondent refused to issue any permits for mining activity, including for exploration.

22. In 2008, the Respondent refused to renew the New San Sebastian Exploration License and the Nueva Esparta Exploration License. This was not challenged in the courts and was not addressed in the then pending proceedings before the Supreme Court of El Salvador. There were never any court proceedings relating to the Respondent's refusal to renew these exploration licenses.

23. After it declared its ban on mining, the Respondent continued to refuse to permit mining under any circumstances and frustrated the Applicants' ability to engage in mining activity with a new investment partner in 2008. The Notice of Arbitration at ¶ 25 expressly refers to

Respondent's "ongoing" government conduct since September 2006. This necessarily includes the Respondent's *de facto* moratorium on the development of mining interests *under any condition* since 2006 – conduct that detrimentally affected the Applicants' acquired rights and investment in 2006, 2007, 2008 and to the present day.

24. The Respondent's Foreign Investment Law grants foreign investors recourse for discriminatory treatment by the El Salvadoran government and provides for compensation for expropriation.

25. The Respondent's Foreign Investment Law confers jurisdiction on ICSID for resolution of investment disputes and does not require any "waiver" to confer jurisdiction on ICSID.

D. Generally, the Respondent's Comments on the Facts Are Immaterial to the Question of Jurisdiction.

26. Generally, the Respondent's comments on the facts are immaterial to the question of jurisdiction, and serve only to distract from the issues before the *ad hoc* Committee.

27. The Respondent argues in its Counter-Memorial that the Applicants include a "self-serving account of the facts of the underlying dispute." [Respondent's Counter-Memorial, ¶ 74] The Respondent then states so-called facts that are unsupported by any testimony now or earlier in these proceedings. The Respondent asserts, for example, that "applicants have been granted an exploitation concession in El Salvador in 1987 but they had made little progress". [Respondent's Counter-Memorial, ¶ 56] The Respondent implies that the Applicants' history in El Salvador began in 1987 and ended about 1999.

28. As stated in Applicants' Memorial, at ¶¶ 6 and 7, the Applicants' history in El Salvador dates back to 1968 — prior to El Salvador's civil war. Activities did not cease in 1999, and it is wholly incorrect to state that "Applicants still did not initiate exploitation activities after

the conversion of the concession."[4] [Counter-Memorial, ¶ 56] The Applicants acquired and were assembling equipment at the site of the San Sebastian Gold Mine as part of their open pit mining project. This included the equipment described in the letter to the *ad hoc* Committee dated 11 November 2011, which the Respondent has submitted with its response as R-1. Also, the Applicants were active in exploring the concessions granted to them in 2003 and 2004. [Memorial, ¶ 9]. While Respondent suggests that all activity ceased after 1999, in 2002, 2003 and 2004, the Respondent expanded and extended both the exploitation the exploration licenses it gave to the Applicants. [Notice of Arbitration, ¶¶ 15-20]

29. The Respondent suggests that certain facts asserted by the Applicants are different from the facts asserted in arguments to the Tribunal. At paragraph 72 of its submission, the Respondent states:

> In direct contradiction to the time sequence they presented to the Tribunal, Applicants now state: "After it declared the moratorium, El Salvador revoked the Claimants' permits for mining, processing and exploration."

The Respondent's assertion is not correct.

30. The time sequence presented in the Applicants' Memorial [¶¶ 7-19] is the same as the time sequence they outlined for the Tribunal in Claimants' Response to the Republic of El Salvador's Preliminary Objection [¶¶ 4-11]: In July, 2006, it was reported in El Salvador's *La Prensa Grafica* that the El Salvadoran government would be revoking the Applicants' permits because of a decision on the part of the government to end metal mining in El Salvador. That same month, El Salvador's Ministry of Environment passed resolutions dated respectively 6 July 2006 and 5 July 2006 to revoke the Applicants' permits to mine at the San Sebastian Gold Mine and process metals at the San Cristóbal Mill and Plant, but these resolutions were not served upon

[4]The Respondent's source for this assertion is its advocate's opinion. The Applicants certainly do not agree with that assertion, and these are not facts adopted by the Tribunal.

the Applicants until 13 September 2006.[5] Later, on 28 October 2008, the Respondent denied the Applicants' application to renew the exploration permits for the New San Sebastian and Nueva Esparta concessions. [Award, ¶ 65]

31. Consistent with this time sequence, the Tribunal stated: "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 Claimants' right to mine and process gold and silver," citing Applicants' Notice of Arbitration at ¶ 21. In the referenced paragraph in the Notice of Arbitration, the Applicants stated that "on or about September 13, 2006, MARN ***delivered*** to Commerce/Sanseb's El Salvadoran legal counsel its revocation of the environmental permits issued for the San Sebastian Gold Mine exploitation concession and the San Cristóbal Mill and Plant, effectively terminating Commerce/Sanseb's right to mine and process gold and silver...." [emphasis added]

32. The Tribunal stated in footnote 66 of the Award, referring to Claimants' Notice of Arbitration at ¶ 25, which marks September 2006 as the beginning of the Respondent's implementation of its moratorium on mining: "In fact, the orders of revocation preceded their notification to Commerce/Sanseb by some two months." Here the Tribunal again refers to the fact that the resolutions revoking the permits for mining at the San Sebastian Gold Mine and processing at the San Cristóbal Mill and Plant were passed in July 2006, but were first served upon the Applicants in September 2006 – a fact that was never in dispute by anyone.

33. In short, there has never been any deviation in the time sequence described by the Applicants.

34. The Respondent complains that the Applicants put more "emphasis on allegations about an alleged potential investment partner in 2008" in the Applicants' Memorial than in the Notice of Arbitration. [Respondent's Counter-Memorial, ¶72] The Applicants' detailed

[5]There was no confusion on this point. In its Preliminary Objection [at ¶¶ 33-34], the Respondent noted that resolutions dated respectively 6 July 2006 and 5 July 2006 were first served upon the Applicants on 13 September 2006.

description of this investment partner came in response to the Respondent's assertions to the Tribunal in its Preliminary Objection that the Applicants did not have the financial strength to go forward with their mining investment.[6] This is not a fact first raised or emphasized in these annulment proceedings.

35. In its Preliminary Objection, at ¶116, the Respondent asserted: "Claimants have demonstrated a lack of financial capability in their work in El Salvador", arguing that the Respondent's actions in 2006 could not have caused financial damage. The Applicants responded to the contrary, and stated in Claimants' Response to the Republic of El Salvador's Preliminary Objection, at ¶5: "In 2008, the Claimants entered 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." These same facts were stated in the same way in Applicants' Memorial, at ¶19. The details of the arrangement were stated at ¶105 of Claimants' Rejoinder on Preliminary Objection.[7] This is not something new.

36. Notably, the Respondent never claims that any of the facts presented in Applicants' Memorial are not true, or that the facts presented to the Tribunal in arguments on Respondent's Preliminary Objection are not true, with one exception: As noted by the Respondent, Claimants' Notice of Arbitration stated that they appealed their denial of the renewal of exploration licenses to a court, when the appeal was to an administrative agency. The parties agreed to the correct facts early on, when the matter was before the Tribunal.[8]

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[6]The Notice of Arbitration, at ¶ 29, stated that the Applicants "lost opportunities to secure investment capital."

[7]Albeit without the details, the Notice of Arbitration stated, at ¶ 28, that "[t]he government of El Salvador's [engaged in a] continuing refusal to permit Commerce Group to engage in any exploration or mining activities *despite proposals to ensure environmental protection and compliance with the laws of El Salvador*." [emphasis added]

[8]Compare the Respondent's Preliminary Objection at ¶104 with Claimants' Response to the Republic of El Salvador's Preliminary Objection, at ¶80.

37. With respect to the salient facts, the Respondent has not denied that it chose to prohibit mining in El Salvador in 2006, and that every successive administration of the Respondent's government has continued that prohibition. Also, the Respondent does not deny that it has not compensated the Applicants (as well as another foreign mining company, Pac Rim[9]) for any loss resulting from the Respondent's action.

38. The Respondent's arguments as to how badly or how little the Applicants were damaged further distract from issues material to the question of whether the Tribunal had jurisdiction over the CAFTA claims and whether a claim was stated under the Foreign Investment Law.

E. The Applicants Do Not Seek to Have the *Ad Hoc* Committee Adjudicate the Merits of Their Claim.

39. Referring to ¶ 181 of the Applicants' Memorial, the Respondent asserts that the Applicants seek to have the *ad hoc* Committee adjudicate the merits of their claim. This clearly mischaracterizes the Applicants' arguments. The Applicants seek the hearing on the merits that they were denied when the Tribunal found it had no jurisdiction.

40. Perhaps more to the point, the Respondent asserts that the Applicants "seek to relitigate their case and in the process distort the Tribunal's findings and ignore the record the Tribunal had before it." [Respondent's Counter-Memorial, ¶ 2] The Preliminary Objection considered by the Tribunal was not a trial on the merits. To the contrary, the Tribunal stated that for purposes of the matter before it, it would accept the Applicants' version of facts as true and would not purport to make any findings of fact. [Award, ¶ 55]

41. The Respondent seeks to create controversy over the facts in order to leave the impression that the Applicants had their hearing on the merits and now complain of the result. Again, the Applicants did not have a hearing on the merits.

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[9] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12

F. The Applicants for Good Reason Seek Annulment of the Award.

42. The Applicants submit that annulment is required where the Tribunal manifestly exceeded its powers or the award fails to state the reasons on which it is based. An ICSID tribunal exceeds its powers if it fails to exercise a jurisdiction which it possesses under a treaty.

43. In essence, the Respondent asks the *ad hoc* Committee (1) to treat the Tribunal's Award denying jurisdiction as the equivalent of an award on the merits, and (2) to uphold a flawed Award which denies jurisdiction without even considering whether that Award disregards the treaty creating that jurisdiction, and (3) to uphold a flawed Award which denies jurisdiction over CAFTA claims that are not affected by the Tribunal's concept of "waiver" and lack of jurisdiction without explanation of its reasons, and (4) to uphold a flawed Award which denies a right to proceed on claims under El Salvador's Foreign Investment Law without considering whether there is any basis for that ruling under any applicable rules.

44. The integrity of the ICSID process is at issue in this Application for Annulment. How could the Tribunal, with a pen stroke, declare that it has no jurisdiction over matters before it where the Applicants have submitted multiple claims that qualify under both CAFTA and El Salvador's Foreign Investment Law? How could it be that investors follow the plain language of CAFTA when they initiate an arbitration, and yet are denied the right to have their claim considered because of some unwritten rules, never before disclosed to them and never explained when jurisdiction is denied? How could it be that when investors seek recourse under a country's foreign investment law, and the law provides for ICSID jurisdiction upon a simple notice of their grievance, they are denied jurisdiction with no explanation of the rules of pleading they are told that they have breached?

45. In a recent paper it was stated: "It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process."[10] The case before this *ad hoc* Committee calls into question the integrity of the

[10] *Background Paper on Annulment for the Administrative Council of ICSID* (10 August 2012), ¶ 75(3), quoting *Vivendi II.*

process, because the Applicants are denied the right to be heard on any of their claims for unexplained reasons that appear to be specially designed to deny them access to the ICSID process and the right to be heard.

46. There is an excess of power if a tribunal acts "too much" and goes beyond its jurisdiction, but there is also an excess of power if a tribunal acts "too little" and "does not accept and exercise the powers granted to it and fails to fulfill its mandate."[11] "The *manifest* and *consequential* non-exercise of one's full powers conferred or recognized in a tribunal's constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power". *Id.*, ¶ 43. See also *Industria Nacional de Alimentos, S.A. v. The Repulic of Peru (Luchetti v. Peru)*, ICSID Case No. ARB/03/4, Decision on Annulment (5 September 2007) ¶ 99 [RL-19] (a Tribunal exceeds its powers when it exercises jurisdiction in a matter where it lacks competence, and when it fails to exercise jurisdiction which it possesses); *AES Summit Generation Limited v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment (29 June 2012) ¶21 [RL-8]; *Malaysian Historical Salvors, SDN, BHD and the Goverment of. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) [AL-3] ¶ 80 ("the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed"); and *Helnan International Hotels A/S and Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee (14 June 2010) [RL-15] ¶ 55 ("in failing to observe [the] clear requirements [of a treaty], the Tribunal has manifestly exceeded its powers within the terms of Article 52(1)(b) of the ICSID Convention.")

47. The failure to exercise jurisdiction which the Tribunal possesses is "manifest" where, as is so clearly the case here, it "is clearly capable of making a difference to the result." As stated in *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ("*Vivendi I*"), ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) [AL-1] [¶ 86]:

[11] *Hussein Nuaman Soufraki and The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki (5 June 2007) [RL-14] [¶¶ 42, 43]

> "... One might qualify this [duty with respect to the exercise of jurisdiction] 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)."

REASONS TO ANNUL THE AWARD

I. ANNULMENT IS REQUIRED AS TO THE TRIBUNAL'S DETERMINATION THAT THE CLAIMANTS HAD NOT COMPLIED WITH ARTICLE 10.18.2

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.

48. The parties agree that the Tribunal created a jurisdictional requirement, not found in the language of CAFTA Article 10.18(2)(b), namely, that any claimant must take affirmative steps to ensure that no other legal proceedings related to any measure subject to the arbitration continue. The plain language of the treaty requires the claimant to provide "written waivers of any right to initiate or continue" other described proceedings. It does not state that the claimant must ensure that any other legal proceedings related to any measure subject to the arbitration are dismissed.

49. Moreover, 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 the waivers are a "unilateral and final abandonment, extinguishment and abdication of Claimants' legal rights to initiate or continue other proceedings" with respect to the claims before the Tribunal. [Award, ¶ 67]

50. The Applicants have submitted that it logically follows that once the Applicants gave the Respondent their waivers, the Respondent had a choice as to whether to use them, and a respondent state can choose to not use the waiver and allow concurrent proceedings to continue. [Applicants' Memorial, ¶99]

51. However, the Tribunal determined that the Applicants were under an obligation to discontinue the El Salvadoran court proceedings in order to give material effect to their formal waiver. [Award, ¶ 102] 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] Ultimately, the Tribunal concluded that the Applicants destroyed the jurisdiction that existed when the arbitration was filed by not, some time after the filing, taking affirmative steps to have the proceedings before the Supreme Court of El Salvador dismissed, even without being requested to do so.

52. The Respondent's central argument is that the *ad hoc* Committee should avoid review of this denial of jurisdiction. To make this more palatable, the Respondent implies that there was (1) a request and refusal to comply with the written waivers tendered when the arbitration was filed, and (2) the Respondent had no ability to enforce these waivers. Neither is true.

53. The Respondent infers that there was a request and refusal to comply with the written waivers when it states with regard to the Award: "As quoted by the Tribunal, both States submitted that interpreting the provision as only requiring the formality of a written waiver, regardless of ***compliance***, would violate the purpose of the provision and deny it *effet utile*."[Respondent's Counter-Memorial, ¶87, emphasis added]

54. More particularly, the Respondent states that "El Salvador's only argument was that the Tribunal lacked jurisdiction to decide the claims because Applicants had failed to ***comply*** with the waiver" [Respondent's Counter-Memorial ¶89] and that "before the arbitration was even registered, and again immediately after it was registered, El Salvador alerted Applicants to the fatal jurisdictional defect they had caused by trying to preserve multiple opportunities for a favorable outcome. ***Applicants ignored the warnings*** and insisted that a Tribunal be constituted." [Respondent's Counter-Memorial ¶154, emphasis added]

55. By using such clever phrasing, the Respondent avoids having to acknowledge that at no time did the Respondent ask the Applicants to discontinue the proceedings before the

Supreme Court of El Salvador, which were pending decision at the time the arbitration was filed.[12] The "warnings" referred to by the Respondent are the two letters discussed at ¶24 and ¶27 of Applicants' Memorial.[13] The Respondent does not identify anything else that could be characterized as "warnings" where " El Salvador alerted Applicants to the fatal jurisdictional defect"; there is no footnote or reference in the text of the Counter-Memorial in the paragraph where the Respondent states that the "Applicants ignored the warnings "which identifies any other document or event. [Respondent's Counter-Memorial, ¶154]

56. The letters presumably constituting the so-called "warnings", one of which was discussed by the Tribunal in its Award, were not warnings, or even requests to discontinue the proceedings before the Supreme Court of El Salvador. In these letters the Respondent demanded that the Applicants terminate the arbitration proceedings before ICSID – not the proceedings before the Supreme Court of El Salvador. In fact, in the first of the two letters, the Attorney General of El Salvador stated: "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...."[14] In the second of the two letters, counsel for the Respondent demanded that Applicants "request ***discontinuance of the arbitration*** in accordance with ICSID Arbitration Rule 44." [emphasis added][15]

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[12]Other than the decision, there was no court activity after the arbitration was filed. The Attorney General checked the status of the cases by writing to the Clerk of the Supreme Court around the time he wrote his 14 August 2009 letter, but did not ask for any action on the part of the Supreme Court [Claimants' Rejoinder on Preliminary Objection, ¶¶ 66-68; Exhibit R-16].

[13]See Exhibits R-8 and R-10.

[14]As noted at ¶¶139-141 of Applicants' Memorial, the manner in which the Tribunal summarized the 14 August 2009 letter from the Attorney General [at Award, ¶18] suggests that the Respondent asked the Applicants to dismiss the proceedings pending before the Supreme Court of El Salvador to comply with the waiver so that the ICSID arbitration could continue. The Attorney General's letter stated that the dismissal of the proceedings pending before the Supreme Court of El Salvador would not "remedy" a jurisdictional defect in the ICSID arbitration.

[15]See Exhibit R-10.

57. These letters were not "warnings" to discontinue the proceedings before the Supreme Court of El Salvador. Elsewhere in its Counter-Memorial, at, ¶99, where it addresses the Applicants' argument that the Tribunal failed to state its reasons, the Respondent agrees that this is so:

> Of course, the Tribunal did not suggest or think that El Salvador had asked Applicants to discontinue their court proceedings in El Salvador, because that is not what El Salvador's letter says. The Tribunal knew that the purpose of El Salvador's letter was to oppose registration by submitting to the Centre that the dispute was "manifestly outside ICSID's jurisdiction." [fn137: Award, para. 18] The fact that El Salvador did not advise Applicants in that letter on how to comply with the waiver requirement had absolutely nothing to do with the Tribunal's decision.

What then are the "warnings" or requests "to comply" to which the Respondent refers, if not in that letter? They are not identified and they do not exist.

58. Therefore, based upon agreed facts, the Tribunal concluded that the Applicants destroyed the jurisdiction that existed when the arbitration was filed by not, some time after the filing, taking affirmative steps to have the proceedings before the Supreme Court of El Salvador dismissed, even without being requested to do so.

59. The Tribunal manifestly exceeded its powers by deciding that there was no jurisdiction under CAFTA by adding this unwritten and undefined requirement.

60. Contrary to the Respondent's suggestion [Respondent's Counter-Memorial, ¶77], none of the reasons offered in the application to annul the Tribunal's Award on jurisdiction are "new arguments" not presented to the Tribunal. In brief summary:

a. The plain language of Article 10.18.2(b) requires tendering a written waiver. [Applicants' Memorial, ¶96; Claimants' Response to Preliminary Objection, ¶46; Claimants' Rejoinder on Preliminary Objection, ¶¶ 15-20]

b. The drafters of Article 10.18.2(b) could have required the "discontinuance" of proceedings instead of requiring the tender of a "waiver" of the right to continue

proceedings, but did not do so, and the distinction is significant. [Claimants' Response to Preliminary Objection, ¶45; Claimants' Rejoinder on Preliminary Objection, ¶¶ 15-20,61]

c. The waivers tendered by the Claimants were binding upon them and relinquished their legal rights. [Applicants' Memorial, ¶98; Claimants' Response to Preliminary Objection, ¶¶50-53; Claimants' Rejoinder on Preliminary Objection, ¶¶ 7, 57][16]

d. In *Vannessa Ventures LLC and The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction (22 August 2008) [AL-8], the Tribunal recognized that the waiver requirement in the BIT it considered 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. [Applicants' Memorial ¶126; Claimants' Response to Preliminary Objection, ¶¶60-61]

e. 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 enables a respondent state to choose whether it wishes concurrent proceedings to continue at the same time as the arbitration. A respondent state may choose to not use the waiver and permit its own domestic court to proceed. [Applicants' Memorial, ¶ 99; Claimants' Rejoinder on Preliminary Objection, ¶¶ 20-25]

f. Jurisdiction is determined as of the point in time a proceeding is filed and should not be retroactively found not to exist because of later events. [Applicants'

[16]In its Preliminary Objection Reply, the Respondent stated that "El Salvador and Claimants actually agree on several key points that are the basis for El Salvador's Preliminary Objection", including that the "Claimants further agree that, pursuant to the waiver, they waived the right to continue the domestic judicial proceedings." [The Republic of El Salvador's Reply (Preliminary Objection under CAFTA Article 10.20.5), 30 September 2010, ¶ 3]

Memorial, ¶109; Claimants' Rejoinder on Preliminary Objection, ¶¶ 8,38-40,74-75] The rule created by the Tribunal means that if a claimant missteps at any point in time while the CAFTA proceedings are moving forward, the claim pending before the CAFTA tribunal needs to be dismissed because retroactively, there has never been jurisdiction. [Applicants' Memorial, ¶ 130]

g. Even if there is an impediment to jurisdiction on one claim, a CAFTA tribunal should not retroactively lose jurisdiction over other separate claims. [Applicants' Memorial ¶¶ 119, 131; Claimants' Response to Preliminary Objection, ¶¶77-80; Claimants' Rejoinder on Preliminary Objection, ¶¶ 85-91, 92-100] .

61. The Respondent suggests that the Award is supported by *Waste Management v. Mexico I*,[17] stating: "As the Tribunal noted, the *Waste Management v. Mexico I* tribunal also determined that a waiver requirement under NAFTA, which is nearly identical to the requirement under CAFTA, included a material act of dropping or desisting from initiating parallel proceedings in addition to the formal requirement to submit the waiver." [Respondent's Counter-Memorial, ¶88]

62. The Respondent goes on to state: "The most relevant previous case, in which the tribunal needed to determine whether claimants must act in compliance with the waiver, was *Waste Management I*. The Tribunal relied on that case and, reasonably, agreed with the *Waste Management I* tribunal's interpretation of the similar NAFTA waiver provision instead of trying to extrapolate from a BIT case with very different circumstances." [Respondent's Counter-Memorial, ¶ 93]

63. The Applicants showed in Claimants' Response to Preliminary Objection [at ¶¶ 36-40], in Claimants' Rejoinder on El Salvador's Preliminary Objection [at ¶¶ 27-35, 41], and in Applicants' Memorial [at ¶¶ 100-106] that the *Waste Management I* tribunal emphasized that the claimant did not provide a waiver stated in the language required by NAFTA. The Respondent

[17] *Waste Management, Inc. and United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, (2 June 2000) (*Waste Management I*) [AL-9]

acknowledges this when it states that the Applicants "present in their Memorial on Annulment the same arguments about *Waste Management* that they presented in the underlying arbitration." [Respondent's Counter-Memorial, ¶89] However, it is noteworthy that the Respondent does not assert that the Applicants' description of *Waste Management I* is wrong.

64. One cannot say from reading this Award that the Tribunal rejected the Applicants' interpretation of *Waste Management I* . The Tribunal cited the following discussion in *Waste Management I* [Award, ¶83]:

> "Any waiver […] implies a formal and material act on the part of the person tendering same. *To this end, this Tribunal will therefore have to ascertain whether [the claimant] did indeed submit the waiver in accordance with the formalities* envisaged under NAFTA and whether it has respected the terms of the same through the material act of dropping or desisting from initiating parallel proceedings before other courts or tribunals." [emphasis added]

The Tribunal did not comment on whether the claimant in *Waste Management I* submitted its waiver "in accordance with the formalities."

65. The Respondent dismisses the Applicants' discussion of every other Award cited by the Tribunal as being "of doubtful merit on the substantive issues they address" without explaining why this is so, and then stating that "the Tribunal did not rely on these cases for its Award." [Respondent's Counter-Memorial, ¶ 91] In result, the Respondent acknowledges that *Waste Management I* is the only possible precedent supporting the Tribunal's Award, and as shown, *Waste Management I* does not support the Tribunal's creation of a jurisdictional requirement separate from the plain language of CAFTA.

66. The Tribunal manifestly exceeded its powers by denying jurisdiction over all of the Applicants' CAFTA claims, and the award should be annulled.

B. The Tribunal Failed to State its Basis for Determining That the Applicants' Waivers Were Not Effective.

67. The Applicants submitted that the Tribunal failed to state its basis for determining that the Applicants' waivers were not effective. Addressing the Respondent's response:

(1) Is the Respondent correct in asserting that the Tribunal could not have been misled, or could not have mischaracterized the 14 August 2009 letter from El Salvador's Attorney General as a request to comply with the waiver, and thereby continue with the ICSID arbitration?

68. As noted above, in its Counter-Memorial at ¶ 99, where the Respondent addresses the Tribunal's failure to state its reasons, the Respondent states:

> Of course, the Tribunal did not suggest or think that El Salvador had asked Applicants to discontinue their court proceedings in El Salvador, because that is not what El Salvador's letter says. The Tribunal knew that the purpose of El Salvador's letter was to oppose registration by submitting to the Centre that the dispute was "manifestly outside ICSID's jurisdiction." [fn137: Award, para. 18] The fact that El Salvador did not advise Applicants in that letter on how to comply with the waiver requirement had absolutely nothing to do with the Tribunal's decision.

69. However, this is the section of the Award to which the Respondent refers in its footnote:

> 18. On 14 August 2009, Respondent filed a letter in which it submitted 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.

This certainly reads as though after the ICSID arbitration proceeding was filed on 2 July 2009, the Respondent asked the Applicants to stop the court proceedings in El Salvador to comply with their waiver and that the Applicants refused that request. The Respondent itself acknowledges that this did not happen, and yet it may be the very basis upon which the Tribunal denied jurisdiction.

70. It may be helpful to the *ad hoc* Committee to have a summary of the circumstances surrounding the Respondent's 14 August 2009 letter, to which the Tribunal refers. [Award, ¶18] At the time this letter, as well as a second letter from Respondent's counsel, was written and

through the time the Respondent submitted its Preliminary Objection to the Tribunal, the Respondent's argument as to jurisdiction was absolutely different from the argument it ultimately made to the Tribunal.[18]

71. Through the time that the Respondent filed its memorial outlining its Preliminary Objection on 16 August 2010, the Respondent argued both in its letters and in its first memorial that the *Applicants could not file a CAFTA arbitration unless the legal proceedings pending in El Salvador were first dismissed*. The Applicants responded that the Respondent's assertion was clearly different from what CAFTA required – CAFTA required tendering waivers of the right to continue such legal proceedings; that they had complied with CAFTA; and that there was no reason for them to dismiss the arbitration.[19]

72. The Respondent made no demand that the Applicants discontinue or take any steps with regard to the proceedings pending in El Salvador; the Respondent sought dismissal of the ICSID arbitration. In context, when the Applicants filed their Notice of Arbitration (on 2 July 2009), both parties had their eyes on the three-year limitation for filing claims under CAFTA and the consequence of discontinuing the pending arbitration and refiling a new one. In fact, the Respondent threatened to seek dismissal of a second filing for arbitration if the Applicants followed the course outlined in these letters.[20]

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[18]See Claimants' Rejoinder on El Salvador's Preliminary Objection, at ¶¶ 3, 74-75.

[19]The Applicants fully addressed the Respondent's argument that the Applicants could not file a CAFTA arbitration unless the legal proceedings pending in El Salvador were first dismissed in Claimant's Response to the Republic of El Salvador's Preliminary Objection [¶¶ 26-47] and Claimants' Rejoinder on El Salvador's Preliminary Objection [¶¶ 11-45]. This was the precise issue presented by the Respondent when it filed its Preliminary Objection, but the Respondent's argument shifted. In its Rejoinder, at ¶ 1, the Applicant stated that "[t]he narrow issue for determination in the Respondent's Preliminary Objection is whether Claimants were required to discontinue the Domestic Proceedings *prior* to submitting their claims to arbitration under CAFTA Chapter 10." In its Rejoinder, at ¶ 3, the Applicant stated "In its Reply, Respondent now also appears at points to argue the contrary, i.e., that the Claimants' conduct after the submission of the Waivers determines the Tribunal's jurisdiction, even though the Respondent accepts in its Reply that the parties' legal rights and obligations relevant for the Tribunal's determination of jurisdiction were frozen as a result of the filing of the Notice of Arbitration."

[20]See, e.g., Respondent's Preliminary Objection, ¶¶8-9, 98-99.

73. The Applicants note that at one point in its response [Respondent's Counter-Memorial, ¶ 66] the Respondent describes the Tribunal's ultimate conclusion as follows:

> On March 14, 2011, the Tribunal issued its Award finding that Applicants had failed to comply with the waiver provision ***by not discontinuing their proceedings before the Supreme Court of El Salvador before filing their CAFTA arbitration*** and that, therefore, Applicants had not perfected El Salvador's consent to CAFTA arbitration and, consequently, the Tribunal lacked jurisdiction. [emphasis added]

This was the result sought by the Respondent in its letters and when it filed its Preliminary Objection, but it is not an accurate summary of the Award. This description is even inconsistent with the Respondent's own description of the Award in its Counter-Memorial, ¶80, as will be discussed below.

74. The Applicants have argued to this *ad hoc* Committee that the Tribunal failed to state its basis for determining that the Applicants' waivers were not effective because the Tribunal mischaracterized the Attorney General's 14 August 2009 letter as a demand upon the Applicants to discontinue court proceedings in El Salvador to *comply with the waiver* and thereby *preserve their right to proceed with the CAFTA arbitration* they filed on 2 July 2009. In the Award, the Tribunal does not explain how the Attorney General's 14 August 2009 letter bears on its conclusions, except to infer that it gave the letter a meaning that even the Respondent agrees was not correct. [Applicants' Memorial, ¶¶ 139-140]

75. Article 52(1)(e), which provides that an award that has failed to state the reasons on which it is based should be annulled, exists so the parties can "assure themselves that the Tribunal properly understood the questions before it."[21] Here, there is no such assurance.

(2) Can one read this Award as concluding that the Applicants were obliged to discontinue the proceeding before the Supreme Court of El Salvador *before* filing their CAFTA arbitration?

[21] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phillipines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010)[RL-21]

76. Apparently so. At paragraph 80 of the Counter-Memorial the Respondent summarizes the Award as follows:

> "the Tribunal decided that the waiver must accomplish its intended effect, and that to do so, it must be more than just words. Thus, the Tribunal interpreted that CAFTA Article 10.18(2)(b) required Applicants to file formal, written waivers, but that it ***also required them to materially comply*** with the waiver by ensuring that no other legal proceedings related to any measure subject to the arbitration were initiated or continued."

77. But again referring to ¶ 66 of the Counter-Memorial the Respondent summarizes the Award as follows:

> On March 14, 2011, the Tribunal issued its Award finding that Applicants had failed to comply with the waiver provision by not discontinuing their proceedings before the Supreme Court of El Salvador ***before filing their CAFTA arbitration*** and that, therefore, the Applicants had not perfected El Salvador's consent to CAFTA arbitration and, consequently, the Tribunal lacked jurisdiction. Award ¶¶ 107,115

78. There is no clear statement in this Award that supports the second interpretation of the Award, but the Respondent clearly suggests this interpretation. [Respondent's Counter-Memorial, ¶ 66]

79. The Respondent cites ¶¶ 107 and 115 of the Award in support of this second interpretation. These paragraphs do not state that the Applicants were obliged to discontinue the proceeding before the Supreme Court of El Salvador ***before*** filing their CAFTA arbitration. At ¶ 107 of the Award, the Tribunal stated:

> 107. In light of the foregoing, the Tribunal concludes that 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, Claimants did not act in accordance with the requirements of the Waiver Provision.

And at ¶ 115 of the Award, the Tribunal stated:

> 115. As analyzed above, the waiver is required as a condition to Respondent's consent to CAFTA. As also analyzed above, the waiver is invalid as

> it lacks effectiveness due to Claimants' failure to discontinue the proceedings before El Salvador's Court of Administrative Litigation of the Supreme Court. If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute.

Consequently, these paragraphs do not support the Respondent's assertion at ¶ 66 of its Counter-Memorial, that the Tribunal found no jurisdiction because the proceedings before the Supreme Court were not discontinued ***before*** the Applicants filed their Notice of Arbitration.

80. From an overview of the Award, it appears that the Tribunal decided that in addition to waiving, in writing, its right to continue other proceedings, as required by the plain language of CAFTA, a claimant, on its own accord, must follow an unwritten and undefined rule that requires it to ensure that other proceedings are dismissed while the arbitration is pending, and that the Applicants' failure to do so deprived the Tribunal of jurisdiction from the date of the filing. The Tribunal determined that the Applicants were under an obligation to discontinue the El Salvadoran court proceedings in order to give material effect to their formal waiver [Award, ¶ 102], and rejected the argument that the Applicants acted in accordance with the waiver by not taking any positive action to continue those proceedings. [Award, ¶ 102]

81. However, the assertions made by the Respondent noted above certainly show that the Tribunal failed to explain its reasons. It would appear that the Respondent cannot say whether the Tribunal meant to say that the Applicants' waivers were not effective when they were tendered with their Notice of Arbitration because the Applicants had not discontinued the proceedings pending before the Supreme Court of El Salvador *beforehand*.[22] Yet, the resolution of what the Tribunal determined on this point is a necessary element of any cogent explanation of why the Applicants were refused jurisdiction.

[22]If that is how the *ad hoc* Committee interprets the Award, our first round of arguments in response to El Salvador's Preliminary Objection (in Claimant's Response to the Republic of El Salvador's Preliminary Objection [¶¶ 26-47] and Claimants' Rejoinder on El Salvador's Preliminary Objection [¶¶ 11-45]) are more to the point than much of the discussion in Applicants' Memorial and this Reply.

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

82. As stated in Applicants' Memorial, at ¶ 144, et. seq., the Tribunal dismissed all of the Applicants' claims under CAFTA (including Applicants' claims for the loss of its New San Sebastian Exploration License and Nueva Esparta Exploration License) 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 Applicants did not discontinue two proceedings pending before El Salvador's Court of Administrative Litigation of the Supreme Court of Justice *relating to the San Sebastian Gold Mine and the San Cristóbal Mill and Plant*. at the time the Applicants filed their Notice of Arbitration.

83. The Tribunal's discussion of the dismissal of these claims (i.e., the Applicants' claims based on the exploration licenses) appears at ¶ 113 of the Award, where the Tribunal stated: "The Tribunal therefore determines that Claimants failed to fulfill the requirements of the Waiver Provision with respect to their entire claims."

84. In its earlier discussion of the facts before it, the Tribunal acknowledged that the Applicants had exploration licenses and that the government of El Salvador refused to renew them after El Salvador imposed its ban on mining. [See Award, ¶¶ 9, 61, and 65][23]

85. The parties agree that there were never any proceedings before any court in El Salvador relating to the exploration licenses, as compared to the exploitation concession license for the San Sebastian Gold Mine and the license to process metals at the San Cristóbal Mill and Plant.[24] In other words, here the Respondent could not (and does not) argue that some legal proceeding in El Salvador relating to the exploration licenses had to be discontinued. Yet, the

[23]In the Award, at ¶ 9 the Tribunal stated that in September/October 2006, El Salvador did not renew the Applicants' exploration licenses. This date is not correct. El Salvador refused to renew the exploration licenses on 28 October 2008. The Tribunal has the correct date at ¶ 65.

[24]Respondent's Preliminary Objection, ¶¶ 102-107.

Tribunal, without any reasons suggests that it has not been confronted with separate and distinct claims. [Award ¶ 111]

A. The Respondent's First Explanation of the Tribunal's Award (That All CAFTA Claims Had to Be Dismissed If There Is a Failure to Comply with a Waiver to Any of Them) Is Not Evident from the Tribunal's Discussion.

86. The Respondent explains the Tribunal's decision as to the Applicants' exploration permits as follows [Respondent's Counter-Memorial, ¶ 104]:

> The Tribunal's reasoning is clear from the Award. First, the Tribunal concluded that the waiver violation meant that there was no jurisdiction with respect to Applicants' entire CAFTA claims. [citing Award, ¶ 113] The Tribunal expressly explained: "If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute." [citing Award, ¶ 115] This was in line with El Salvador's arguments in the proceedings.

87. The paragraphs of the Award cited by the Respondent in its footnotes for this proposition do not mention the exploration licenses. As stated above, ¶ 113 of the Award states:

> 113. The Tribunal therefore determines that Claimants failed to fulfill the requirements of the Waiver Provision with respect to their entire claims.

¶ 115 of the Award states:

> 115. As analyzed above, the waiver is required as a condition to Respondent's consent to CAFTA. As also analyzed above, the waiver is invalid as it lacks effectiveness due to Claimants' failure to discontinue the proceedings before El Salvador's Court of Administrative Litigation of the Supreme Court. If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute.

88. It would seem that the Respondent has experienced the same difficulty in discerning why the Tribunal determined that it had no jurisdiction over the claims relating to the Applicants' exploration licenses, and concludes that the Tribunal must have adopted the Respondent's arguments.

B. If the Tribunal Determined That All CAFTA Claims Have to Be Dismissed If There Is a Failure to Comply with a Waiver to Any of Them, it Would Have Manifestly Exceeded its Powers Because this Leads to an Untenable Result.

89. The Respondent states that the Tribunal adopted the Respondent's following argument: if the Applicants failed to comply with the waivers in any respect, there was no jurisdiction for any CAFTA claims. [Respondent's Counter-Memorial, ¶ 104]

90. As a general rule this would mean that the jurisdictional requirement created by the Tribunal leads to the outcome that if a claimant fails to dismiss any local proceeding after initiating a CAFTA arbitration, the CAFTA tribunal retroactively has no jurisdiction over any of the claimant's claims under CAFTA, regardless of how the claims are related.

91. The Tribunal would have manifestly exceeded its powers by adding such a rule to the CAFTA Art. 10.18.2 provision requiring that claimants submit a written "waiver" with their notice of arbitration.

92. It is highly unlikely that the drafters of CAFTA expected that an arbitral tribunal would lose jurisdiction, if a claimant committed some misstep after the proceedings were filed as to any claim that may or may not relate to matters which the arbitral tribunal is considering. Such a result would be untenable.

93. The Applicants submitted in Applicants' Memorial, at ¶¶ 155-156, that this 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..." was rejected in *Railroad Development Corporation and Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction (17 November 2008) [AL-5] ¶ 64. In Applicants' Memorial, at ¶ 157, the Applicants noted that the Tribunal discussed, but did not disagree with this award. In its Counter-Memorial, the Respondent ignores this observation, makes a passing reference to "*RDC*" at ¶91, and does not even list the case in its table of authorities.

94. Other authorities have like *RDC* held that a lack of jurisdiction over one claim in no way precludes a Tribunal from exercising jurisdiction with regard to other claims. See, e.g., *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6 (1/18/06)[RL-12]; *Compania de Aguas and Vivendi v. Argentina* ("*Vivendi II*"), ICSID Case No. ARB/97/3 (8/10/10)[RL-13].

C. The Respondent's Second Explanation of the Tribunal's Award (That the Applicants' Loss of Their Exploration Licenses Is Not a Separate Claim) Is Not Evident from the Tribunal's Discussion.

95. Perhaps sensing that the rationale which it seeks to impute to the Tribunal defies any commonplace notion of jurisdiction, the Respondent argues that the Tribunal could (and did) deny jurisdiction for other reasons as well. The Respondent now seeks to repudiate its own earlier admission that the Respondent's refusals to renew the Applicants' exploration licenses are separate claims. [See Applicants' Memorial, ¶ 148]

96. Parsing through the Award, the Respondent asserts that the Tribunal decided that the Tribunal "had not been presented with any claims that were separate and distinct from the claims regarding the revocation of the environmental permits" [Respondent's Counter-Memorial, ¶ 101] and that the Tribunal's "factual finding" was that the refusal to extend the exploration licenses was "part and parcel of [the Applicants'] claim regarding the revocation of the environmental permits." [Respondent's Counter-Memorial, ¶ 105].

97. As shown by its footnote, the Respondent bases this argument upon ¶ 111 of the Award, where the Tribunal treats the Applicants' "claim regarding the *de facto* mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits" which were challenged before the El Salvador courts. However, here the Tribunal is obviously not referring to the exploration licenses, which were never before the El Salvador courts.

98. Again citing ¶ 111 of the Award in its footnote, the Respondent then states at ¶ 5 of its Counter-Memorial:

> The Tribunal based this finding on the following facts: 1) when Applicants challenged the revocation of the environmental permits before the Supreme Court

> of El Salvador, they requested the right to mine again; 2) Applicants stated in their Notice of Arbitration that the revocations of their environmental permits "effectively terminat[ed] [their] right to mine and process gold and silver"; and 3) the environmental permits were revoked before the alleged ban was said to have begun.[25]

There is nothing here that suggests that the Tribunal is referring to the Respondent's refusal to renew the exploration permits for the New San Sebastian Exploration License and the Nueva Esparta Exploration License, which occurred on 28 October 2008.

99. Perhaps the Respondent confuses permits for mining, processing, and exploration which are all separate. At all times material to this dispute, the Respondent required separate environmental permits for separate activities. As noted above, El Salvador's Ministry of Environment passed resolutions dated respectively 6 July 2006 and 5 July 2006 to revoke the Applicants' permits *to mine* at the San Sebastian Gold Mine and *to process* metals at the San Cristóbal Mill and Plant, and served them upon the Applicants on 13 September 2006. On 6 December 2006, the Applicants filed two petitions with El Salvador's Court of Administrative Litigation of the Supreme Court of Justice, relating to these two resolutions.[26] [Award, ¶ 63]

100. The revocation of the Applicants' environmental permits *to mine* at the San Sebastian Gold Mine and *to process* metals at the San Cristóbal Mill and Plant "effectively terminat[ed] [their] right to mine and process gold and silver" because these were the only sites where the Applicants were then mining and processing gold and silver. There was no mining and processing gold and silver in connection with the New San Sebastian Exploration License and the Nueva Esparta Exploration License.[27]

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[25]The Respondent's third point, that "the environmental permits were revoked before the alleged ban was said to have begun" is puzzling, and certainly not correct.

[26]These petitions were pending decision when on 2 July 2009, the Applicants filed their Notice of Arbitration.

[27]The Tribunal mistakenly identifies the San Cristóbal Mill and Plant as "San Cristóbal Plant and Mine" at Award, ¶ 62. There was no mine at the San Cristóbal Mill and Plant.

101. The Notice of Arbitration distinguished the New San Sebastian Exploration License and the Nueva Esparta Exploration License. [Applicants' Memorial, ¶ 146]. These licenses, which were first issued in 2003 and 2004, granted the Applicants exploration rights to a collective eighty-six square kilometers, including eleven formerly operated gold and silver mines. The Applicants invested resources for the exploration of these areas with the expectation that they would eventually receive exploitation concessions for these sites. [Notice of Arbitration ¶¶ 18-20]. The Notice of Arbitration did not confuse the revocation of the permits for *mining* at the San Sebastian Gold Mine and *processing* at the San Cristóbal Mill and Plant with the Respondent's actions as to the New San Sebastian Exploration License and the Nueva Esparta Exploration License. As noted in Applicants' Memorial, ¶ 146, the Notice of Arbitration stated:

> 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. [emphasis added]

102. There is nothing in ¶ 111 of the Award that suggests that the Tribunal melded these events into the *revocation* of the mining and processing permits for the San Sebastian Gold Mine and the San Cristóbal Mill and Plant. Obviously, the "failure to secure" an environmental permit is different from a "revocation" of an environmental permit. The Award does not state the Applicants' loss of their exploration licenses was "part and parcel of their claim regarding the revocation of the environmental permits" as suggested by the Respondent [Respondent's Counter-Memorial, ¶ 105]

103. Not stopping there, the Respondent remarks that "Applicants must have forgotten the exchanges they had with the Tribunal at the hearing on the Preliminary Objection" on the subject of exploration licenses. [Respondent's Counter-Memorial, ¶107] The Respondent takes excerpts from the transcript of the Preliminary Objection Hearing in an effort to support its argument that the Notice of Arbitration does not distinguish separate measures related to the

exploration licenses. [Respondent's Counter-Memorial, ¶111] The Respondent asserts that "Applicants did not plead any measures related to the exploration licenses as distinct CAFTA violations in their Notice of Arbitration and, at the hearing, Applicants expressly told the Tribunal that their exploration license claims were included in their claims related to the alleged mining ban." [Respondent's Counter-Memorial, ¶111, emphasis in the original]

104. The Applicants disagree. The fact of the matter is, as noted above [at ¶ 101] and in Applicants' Memorial, at ¶ 146, that the Notice of Arbitration describes in detail the two exploration licenses and how they were taken away by the Respondent, and then goes on to state:

> "24. On January 20, 2009, Commerce/Sanseb's legal 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. These legal proceedings have not been resolved."

Albeit "challenge in the Courts" should have been "administrative challenge", this was corrected in the first brief submitted in connection with the Preliminary Objection,[28] and there is nothing that confuses this legal challenge with the matters filed with the Supreme Court of El Salvador on 6 December 2006.

105. Also, the Notice of Arbitration differentiates exploration from mining and processing in other sections not cited by the Respondent. After detailing the events relating to all of the Respondent's actions with respect to each of the Applicants' permits, the Notice of Arbitration states at ¶¶ 25-26:

> 25. 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 EI Salvador. [emphasis added]
>
> 26. This policy, as applied, discriminates against foreign investment:

[28]See Applicants' Memorial, ¶149.

a. While the government of El Salvador asserts that the current ban on gold and silver mining, ***and exploration*** connected with such mining, stems from the government's desire to protect the environment, the government permits, for example, the operation of coffee beneficios which dump liquid residue directly into rivers and other activities which are more intrusive on the environment. ... [emphasis added]

And in ¶¶ 28-29:

> 28. The government of El Salvador's continuing refusal to permit Commerce Group to engage in any ***exploration or*** mining activities despite proposals to ensure environmental protection and compliance with the laws of El Salvador, is unreasonable and is in violation of established international commerce law." [emphasis added]
>
> 29. "From 1969 forward, Commerce/Sanseb has provided substantially all of the capital required to develop the mining operation at the San Sebastian Gold Mine, to fund exploration, and to acquire, refurbish and operate the San Cristóbal Mill and Plant. Commerce/Sanseb has continued to pay and incur expenses, has lost opportunities to secure investment capital, and ***has been denied the ability to develop*** and process an estimated 3.5 million ounces of gold, pending its legal efforts to secure the right to develop its investments in the County of El Salvador. Commerce/Sanseb's damages exceed the sum of $100,000,000." [emphasis added]

106. In fact, the Respondent knows full well that exploration licenses are separate from exploitation concessions. In a decision on El Salvador's Preliminary Objection in the case of *Pac Rim Cayman LLC v. Republic of El Salvador*[29], describing the Respondent's [El Salvador's] arguments, the Tribunal stated:

> As the Claimant contends, there is a two-stage framework for mining in El Salvador: (i) an exploration phase and (ii) an extraction, or exploitation, phase. The Mining Law contains procedures for petitioning the Government for (i) exploration licenses and (ii) exploitation concessions. The requirements for an exploitation concession are necessarily distinct from the requirements for an exploration license." [¶ 144]

[29] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 (*Pac Rim I*), Decision on the Respondent's Preliminary Objections (2 August 2010) [AL-4]

107. In its exhaustive attempt to leave the impression that the Respondent's refusal to renew the Applicants' exploration permits was not stated as a separate claim, the Respondent also argues at ¶ 121 of it Counter-Memorial:

> ... Applicants did not allege that their damages had increased from the domestic proceedings, where the damages alleged were only related to the revocation of the environmental permits. Thus, Applicants did not allege before the Tribunal any more damages after those they had claimed as a result of the revocations of the environmental permits in 2006. Any alleged additional claims would have been already included in the main claims, or would have been insignificant. Based on the evidence before the Tribunal, no claims were made or could have been made regarding the exploration licenses.

It is somewhat difficult to follow this argument, because the Respondent incoherently moves from focusing on the Notice of Arbitration to what the Applicants "alleged before the Tribunal". The Notice of Arbitration, as shown above, stated an aggregate damage figure for both the "ability to develop" and the "ability to process" gold, as well as other injuries, and this does not support the Respondent's argument.

108. The Respondent goes on to assert that "[b]ased on the evidence before the Tribunal" the Tribunal presumably determined that damages sustained as a result of the revocation of the environmental permits were either "insignificant" or non-existent. [Counter-Memorial, ¶ 121]

109. The Applicants do not recall that the Tribunal made any findings of fact with respect to the Applicants' damages. Moreover, arguments such as these cannot be reconciled with the Respondent's general statement that "[b]ased on Applicants' version of the facts, the Tribunal reached the reasonable conclusion that it was not faced with separate claims." [Respondent's Counter-Memorial, ¶ 123] This was certainly not the Applicants' version of the facts.

110. It bears noting that in *Pac Rim*, the claimant's entire $77+ million dollar damage claim is based on exploration licenses it obtained from the government of El Salvador in 2002. The claimant applied for but was refused exploitation permits after the Respondent declared its

ban on mining. After the claimant filed a notice of arbitration, the Respondent submitted a preliminary objection to dismiss on grounds that merely holding exploration permits did not confer any rights, and consequently could not result in any damages. The claimant asserted:

> 32. While the Mining Law imposes detailed obligations on exploration licensees, it also extends to them significant rights and assurances. In particular, the Mining Law establishes a two-phase framework applicable to mining extraction activities. Article 23 of the Mining Law provides in relevant part: Once the exploration is concluded and the existence of economic mining potential on the authorized area is proved, the granting of the Concession for the exploitation and utilization of minerals shall be requested; which Concession will be verified through an Accord with the Ministry, followed by the granting of a Contract between the Ministry and the Holder, for a thirty (30) year term, which may be extended if the interested party requests it, if in the judgment of the Department [of Mines] and the Ministry, the requisites established by this Law are fulfilled.
>
> 34. Therefore, under the two-phase framework, a licensee who completes the exploration phase is entitled to proceed to the mineral extraction or "exploitation" phase - without which all of the investment and effort devoted to the exploration phase would be wasted. Once the exploration phase is concluded and the licensee has determined that there is "economical mining potential" at a site, the licensee has the right to request an exploitation concession for the purpose of mineral extraction in order to protect its exclusive rights over the license area. Moreover, the Government is required to grant the licensee an exploitation concession once the exploration phase is concluded, the existence of mineable deposits has been demonstrated, and the licensee has both filed the application provided in Article 36 of the Mining Law and enclosed the documents described below. [footnotes omitted]

The Respondent denied this assertion, but the Tribunal entered an Award in favor of Pac Rim, deciding that it was not appropriate to resolve the debate at the preliminary objection stage of the proceedings. *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 (*Pac Rim I*), Decision on the Respondent's Preliminary Objections (2 August 2010) [AL-4] ¶ 75.

D. If the Tribunal Determined that the Applicants' Loss of Their Exploration Licenses Is Not a Separate Claim, it Would Have Manifestly Exceeded its Powers Because this Leads to an Untenable Result.

111. At ¶ 31 of its Preliminary Objection, the Respondent acknowledged that the Applicants had stated claims based on their exploration licenses but then argued that the Applicants' claims relating to the San Sebastian Gold Mine exploitation concession and the San Cristóbal Mill and Plant "constitute by far *the most significant claims* in this arbitration." [Emphasis added.] [See Applicants' Memorial, ¶ 148]

112. The Respondent now advocates a rule that would enable a CAFTA tribunal to dismiss claims, on the merits, at the pleadings stage, arguing that they are not as significant, before considering any evidence.

113. If a rule such as this is the basis of the Tribunal's decision to refuse jurisdiction over the Applicants' claims relating to their exploration licenses, the result is untenable.

E. The Applicants Are Not Barred from Seeking Annulment Because They Did Not Make a Request to the Tribunal for a Supplementary Decision under Article 49(2) of the Convention, or an Interpretation under Article 50.

112. Aside from all of the above, the Respondent asserts that filing an application for an annulment was not the proper recourse. The Respondent states that the Applicants were required to make a request to the Tribunal for a supplementary decision under Article 49(2) of the Convention, or an interpretation under Article 50, as to the Tribunal's failure to mention how it arrived at its determination that there were no separate claims stated as to the Applicants' exploration licenses. [Respondent's Counter-Memorial, ¶112] The Respondent cites *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment (28 January 2002) [RL-17].

113. This point is covered in *The ICSID Convention: A Commentary*, at page 864:

> This case law on Art. 49(2) confirms the limited relevance of the remedy of supplementation. It is useful for unintentional omissions of the technical nature. As the Committee in *Wena Hostels v. Egypt* explained, "a proceeding under Article 49(2) would not allow the Tribunal to go further than to decide upon the question it had omitted to deal with". It is not a sufficient remedy for a failure to address major facts and arguments which go to the core of the tribunal's decision. In the latter case, a party must seek annulment if it can demonstrate one of the grounds listed in Art. 52(1). The *Wena Hotels* Committee observed that "the ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award". In that case a prior exhaustion of the lesser remedy of supplementation under Art. 49(2) is not necessary. [footnotes omitted][30]

114. Article 50 requires that there be a "dispute" between the parties as to the "meaning or scope" of the Award. This Award denies any jurisdiction over any and all of the Applicants' claims. Article 50 does not apply.

F. The Tribunal's Failure to Exercise Jurisdiction over the Applicants' Claims Relating to its Exploration Licenses for No Reason Warrants Annulment.

115. The Respondent argues that "[i]t is not the role of the *ad hoc* committee to decide whether the Tribunal adopted the best interpretation of the waiver provision; the Committee need only verify that the Tribunal applied a tenable interpretation of the proper law, which it did." [Respondent's Counter-Memorial, ¶118] The Applicants submit that the conclusions of the Tribunal as to jurisdiction are not tenable. Moreover, the Respondent's instruction to the *ad hoc* Committee as to its role assumes that there is some explanation of why jurisdiction was denied in the Award.

116. As was stated in *Fraport v. Phillipines*, ICSID Case No. ARB/03/25 (12/23/2010)[RL-21] ¶ 250: "Reasons are important to the legitimacy of the decision. The obligation to give a reasoned award is a guarantee that the Tribunal has not decided in an arbitrary manner."

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[30]Schreuer, Christoph H. and Malintoppi, Loretta, *The ICSID Convention: A Commentary* (2nd ed.).

117. In the Respondent's view, the limitations upon the *ad hoc* Committee go well beyond determining whether there is a connection between point A to B and then point B to C in the Tribunal's explanation of its Award. In the Respondent's view, where there is no explanation in the Award itself, if the Respondent can construct any kind of explanation, right or wrong, the award cannot be annulled. Why then, even provide as a grounds for an annulment that the Tribunal has failed to state its reasons?

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

118. The Respondent's pronouncement that it was going to take away the Applicants' right to do business at the San Sebastian Gold Mine and end mining in the Republic of El Salvador is a "measure" under Article 2.1 of CAFTA. The Tribunal manifestly exceeded its powers by determining that El Salvador's *de facto* ban on mining was in itself not a "measure". [See Applicants' Memorial, ¶¶ 166-168]

A. The Respondent Misstates the Tribunal's Determination That it Could Not "Tease Apart" Claims Based on El Salvador's Ban on Mining from Claims Regarding the Revocation of the Environmental Permits for the San Sebastian Gold Mine and the San Cristóbal Mill and Plant.

119. The Tribunal stated that the Applicants' claim regarding the *de facto* mining ban policy was part and parcel of their claim regarding the revocation of the environmental permits, so much so that they could not be "teased" apart. [Award, ¶¶ 111-112] The Applicants' claims regarding the revocation of the environmental permits related to the San Sebastian Gold Mine and the San Cristóbal Mill and Plant. The Tribunal stated that it saw no difference between the claim that the Respondent imposed a moratorium and the claim that the Respondent revoked the environmental permits required to mine at the San Sebastian Gold Mine and process material at the San Cristóbal Mill and Plant.

120. The difference is that the Respondent's ban on mining means that the Applicants cannot engage in any mining activity in El Salvador under any circumstances. The Applicants were stripped of their investment and denied the right to develop their exploration licenses at the New San Sebastian and the Nueva Esparta exploration sites. Through the present time, the Respondent refuses to issue permits for exploration, mining, or processing under any circumstances. [Applicants' Memorial, ¶¶ 170-173]

121. The Respondent addresses this argument by suggesting that the Tribunal stated that it could not "tease apart separate claims based on the alleged mining ban." [Respondent's Counter-Memorial, ¶ 125]. This is different from what the Tribunal did state. The Respondent suggests that the Tribunal stated that it could not distinguish the Applicants' claims relating to the New San Sebastian Exploration License and the Nueva Esparta Exploration License from their claims relating to their concessions to mine at the San Sebastian Gold Mine and to process material at the San Cristóbal Mill and Plant. Clearly, that was not what the Tribunal stated. The Tribunal stated that it was unable to distinguish the *de facto* mining ban policy from the revocation of the environmental permits relating to the San Sebastian Gold Mine and the San Cristóbal Mill and Plant. [Award, ¶¶ 111-112]

B. The Respondent's Arguments That There Was No Need to Reach the Question of Whether the Respondent's Ban on Mining Is a "Measure" Have No Merit.

122. Before addressing whether the Respondent's ban on mining is a "measure" under Article 2.1 of CAFTA, the Respondent argues that the question is immaterial because "[f]irst, and most importantly ... the Tribunal determined that it did 'not have jurisdiction over the Parties' CAFTA dispute' because of the waiver violation." [Respondent's Counter-Memorial, ¶ 126] The Respondent reasons that "an additional finding about whether or not the ban could be considered a measure was not necessary to and had no effect on its decision on jurisdiction." [Respondent's Counter-Memorial, ¶ 126, emphasis by Respondent]

123. This is the same argument that the Tribunal created a rule to the effect that jurisdiction over all claims is destroyed, if a claimant commits or omits some act that destroys

jurisdiction over any claim, regardless of how the claims interrelate, as discussed above in relation to the Applicants exploration licenses. Under such a rule, any act or omission as to any claim would retroactively wipe out jurisdiction over all claims between the parties. Here, the Respondent argues that because the Applicants did not take affirmative steps to dismiss the court proceedings relating to the 2006 revocation of the Applicants' permits allowing them to mine at the San Sebastian Gold Mine and to process at the San Cristóbal Mill and Plant (retroactively negating their waivers) the Tribunal would have no jurisdiction to, for example, consider whether the Respondent's ban on all mining frustrated the Applicants' ability to proceed with an investment partner in 2008.[31]

124. As stated above, at ¶¶ 86-94 above, the Tribunal did not explain its decision as argued by the Respondent, and if that were the explanation, the Tribunal would have created an untenable bar to jurisdiction.

125. The Respondent then argues that the Applicants "cannot deny that they admitted in the Notice of Arbitration that their environmental permits were revoked before the alleged ban began." [Respondent's Counter-Memorial, ¶ 127] Applicants do deny this, and the Award does not suggest otherwise. Applicants refer to their discussion at ¶ 29-33 above.

C. The Tribunal Manifestly Exceeded its Powers by Determining That the Respondent's Ban on Mining Was Not a "Measure".

126. When the Respondent focuses on the issue of whether the Respondent's ban on mining is a measure, its first argument is that "[t]he Tribunal stated that its determination that the alleged ban did not constitute a measure was specific to the circumstances of the case before it." [Respondent's Counter-Memorial, ¶128] This is what the Tribunal stated [Award, ¶ 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

[31]The Notice of Arbitration, at ¶ 26, asserted that the Respondent engaged in a "*continuing refusal* to engage in any exploration or mining activities despite proposals to ensure environmental protection and compliance with the laws of El Salvador."

> the Tribunal's evaluation of this particular case – the ban is a policy of the Government as opposed to a "measure" taken by it.

This suggests that the Tribunal did not regard the Respondent's publicly announced ban on mining as a "measure."

127. The Respondent states that the "Tribunal decided that the 'measure' that caused the alleged harm to Applicants was the revocation of their environmental permits, without which Applicants had no rights to mine or process gold in El Salvador." [Respondent's Counter-Memorial, ¶128] That appears to be the case on consideration of ¶¶ 111-112 of the Award, and this supports the Applicants' argument that the Tribunal manifestly exceeded its powers. The Respondent's own description of the matter suggests that the Tribunal weighed the facts presented by both sides and made some finding on the merits, as opposed to accepting the Applicants' version of the facts for purposes of jurisdiction.

128. For the Tribunal to conclude that the Applicants had no claim other than their claims relating to mining at the San Sebastian Gold Mine and processing at the San Cristóbal Mill and Plant, it would have to have concluded that there was no merit to the Applicants' claims regarding the New San Sebastian Exploration License and the Nueva Esparta Exploration License or their claim that the Respondent made it impossible for them to exercise their concession rights when the Respondent told them (and their investment partner) that El Salvador would not permit mining under any circumstances.[32]

129. The Respondent then argues that "this factual finding should not be reexamined by an *ad hoc* committee." [Respondent's Counter-Memorial, ¶128] The Applicants do not agree

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[32]In *Pac Rim I, supra*, the claimant Pac Rim was damaged by the same ban on mining declared by the government of El Salvador that damaged the Applicants. There the tribunal did not fail to see how El Salvador's ban on mining broadly affected Pac Rim's business. Among other things, Pac Rim claimed damages for its "lost investments in connection with [its] Santa Rita [site]", where Pac Rim itself decided not to renew its exploration license in July 2009. The claimant alleged that El Salvador had destroyed this investment by making it clear that, no matter what applications were filed or what the claimant did, the claimant would not be allowed by El Salvador to mine at Santa Rita or elsewhere. The tribunal denied El Salvador's preliminary objection, allowing this claim to proceed. *Pac Rim Cayman LLC v. Republic of El Salvador*, supra, at ¶¶ 164, 217, 247.

that this is the appropriate analysis. This is not a situation where the Applicants are asking an *ad hoc* committee to review the factual findings of a Tribunal after some hearing on the merits. This is a situation where, pursuant to Article 10.20.4(c) of CAFTA, when deciding on Respondent's preliminary objection, "the tribunal shall assume to be true claimant's factual allegations in support of any claim" in the Notice of Arbitration. Although the Tribunal stated that it would accept the Applicants' version of facts as true in determining jurisdiction [Award, ¶ 55], it clearly did not do so. The Tribunal manifestly exceeded its powers.

130. As submitted in Applicants' Memorial, ¶¶ 159-182, the Tribunal also manifestly exceeded its powers by adopting the view that the Respondent's ban on mining does not constitute a "measure" within the meaning of CAFTA. Article 2.1 of CAFTA defines "measure" as follows: "**measure** includes any law, regulation, procedure, requirement, or practice".

131. The Respondent asserts that Applicants "misunderstand" the meaning of "measure", are "confused" about the term "measure", "incorrectly assumed" that "the Tribunal did not differentiate between the different CAFTA provisions", based their arguments on an "unsupportable and a faulty reading of CAFTA, and just plain "misunderstood" the Award. [Respondent's Counter-Memorial, ¶¶ 129-133] It is difficult to say from all of this whether the Respondent agrees that the definition of "measure" stated in Article 2.1 of CAFTA applies. The Respondent's declaration that there would no longer be any mining in El Salvador, which was implemented by its practice of revoking and denying applications for permits, is a "measure".

132. The Applicants submit that ultimately, the Tribunal manifestly exceeded its powers by denying jurisdiction to investors who saw their business destroyed by a 180° change in government policy to one that arbitrarily prohibited all mining activity without compensating the investors for their loss resulting from this government action. In 2006, the Minister in charge of El Salvador's Ministry of the Environment and Natural Resources (MARN) publicly stated that El Salvador had just made a general policy decision to end gold mining. [Applicants' Memorial, ¶¶ 12-13] That government decision has had consequences that have gone beyond revoking the Applicants' environmental permits relating to the San Sebastian Gold Mine and the San Cristóbal Mill and Plant in 2006. The government's decision to end mining in El Salvador amounted to a *de*

facto expropriation of the Claimants' mining investment. Not only were operations no longer possible but the underlying legal rights to extract precious metals for the remaining term of the concession were also taken. El Salvador's action was a "measure."

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

133. The Applicants ask the *ad hoc* Committee to annul the Tribunal's determination that the Applicants did not state any claims based upon El Salvador's Foreign Investment Law.

134. The Applicants' claims under the Foreign Investment Law do not depend on their furnishing a waiver, and the Tribunal's considerations as to CAFTA Art. 10.18.2 are immaterial to the Applicants' ability to proceed on such claims. In *Pac Rim II*, the Tribunal hearing the case determined that while Pac Rim could not proceed under CAFTA (because Pac Rim was not a citizen of a country signing the treaty) it could nonetheless proceed under the Foreign Investment Law.

135. In their Memorial, the Applicants showed how the Tribunal failed to state its basis for its dismissal of the Applicants' claims based on El Salvador's violation of the Foreign Investment Law [Applicants' Memorial, ¶¶ 187-192], and how the Tribunal manifestly exceeded its powers by dismissing the Applicants' claims based on El Salvador's violation of the Foreign Investment Law. [Applicants' Memorial, ¶¶ 193-200] Has the Respondent showed the contrary?

A. The Respondent, like the Tribunal, Fails to Explain Why the Notice of Arbitration "Failed to Submit Claims under El Salvador's Investment Law"

136. The Respondent states that the reasons offered by the Tribunal were simply that the Applicants "failed to submit claims under El Salvador's Investment Law" [Respondent's Counter-Memorial, ¶ 135], and that the Applicants "[i]gnor[e] this clear explanation." [Respondent's Counter-Memorial, ¶ 137]

137. The Respondent does not deny that the Notice of Arbitration both in its caption and in its first paragraph states that it is submitted pursuant to *both* CAFTA and Article 15(a) of the Ley de Inversiones of El Salvador ("Investment Law"). The factual allegations that follow in the Notice of Arbitration do support claims under both.

138. The Respondent states "[t]he Tribunal then described how Claimants failed to refer to the Investment Law after the first paragraph of their Notice of Arbitration" [Respondent's Counter-Memorial, ¶ 136], perhaps being careful not to contradict the Tribunal's statement. Paragraph 37 of the Notice of Arbitration states:

> 37. The Republic of El Salvador's consent to submit the present dispute to arbitration under the auspices of ICSID is contained in Article 10.17 of CAFTA, as well as in Article 15 of the Investment Law,

contradicting the paragraph of the Award cited by the Respondent. [Award, ¶ 125]

139. Neither the Tribunal nor the Respondent assert that the Applicants' claims in its Notice of Arbitration are matters that would not give rise to claims under the Foreign Investment Law. In the Award, the Tribunal referred to the Applicants' argument that they are not in violation of any rule of pleading [Award, ¶ 122] and then went on to state:

> 123. Despite this, 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)".

Indeed, they had submitted such claims. The Tribunal suggests that it was, for some unexplained reason, wrong for the Applicants to "confirm" that they claim these breaches of the indicated provisions of the Foreign Investment Law. The Tribunal does not state that the allegations made in the Notice of Arbitration do not support those claims under the Foreign Investment Law.

140. In the Notice of Arbitration, after stating the background facts relating to the dispute, the Applicants alleged:

25. 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.

26. This policy, as applied, discriminates against foreign investment:

a. While the government of El Salvador asserts that the current ban on gold and silver mining, and exploration connected with such mining, stems from the government's desire to protect the environment, the government permits, for example, the operation of coffee beneficios which dump liquid residue directly into rivers and other activities which are more intrusive on the environment.

b. The government's ban on development of gold and silver mines applies in practice exclusively to foreign companies.

c. The government does not enforce its stated policies against native El Salvadorans engaged in gold and silver production.

27. This policy, as applied, is arbitrary and irrational, and has denied Commerce/Sanseb of its property rights and investment in the country of El Salvador.

28. The government of El Salvador's continuing refusal to permit Commerce Group to engage in any exploration or mining activities despite proposals to ensure environmental protection and compliance with the laws of El Salvador, is unreasonable and is in violation of established international commerce law.

These allegations do in fact state claims under Article 5 (equal protection), Article 6 (non-discrimination) and Article 8 (compensation for expropriation) of the Foreign Investment Law. The same allegations do in fact support both claims under CAFTA and claims under the Foreign Investment Law.

B. The Respondent Does Not Show That There Is Any Rule of Pleading Supporting the Tribunal's Determination, or Why Article 25(1) and Article 36(2) of the ICSID Convention and ICSID Institution Rule 2 Should Not Apply.

141. The Tribunal pointed to the fact that there was no specific reference to provisions of the Investment Law in the above referenced allegations or the request for relief. That suggests

that there is some rule of pleading claims under the Foreign Investment Law that was not followed by the Applicants. Yet the Award is devoid of any reference to any rule that supports the Tribunal's decision, and consequently, the result is not explained.

142. After the Respondent first argued that the Applicants' Notice of Arbitration did not state claims under the Foreign Investment Law, the Applicants brought Article 25(1) and Article 36(2) of the ICSID Convention and ICSID Institution Rule 2 to the attention of the Tribunal.[33] Article 25(1), regarding jurisdiction of the Centre, provides:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Article 36(2), regarding the request for arbitration provides:

> (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

ICSID Institution Rule 2, regarding the contents of the request, in the part relevant to the issue of how claims should be described, states:

> (1) The Request shall....(e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment....

Although the Notice of Arbitration makes many more references to specific CAFTA provisions, this specificity of pleading is mandated by CAFTA. It is not required under the ICSID Institution Rules or the ICSID Arbitration Rules. With respect to the request for arbitration under the Foreign Investment Law, the Claimants satisfy the requirement for a request for arbitration as set out in

[33]Claimants' Rejoinder on El Salvador's Preliminary Objection, ¶¶ 93-95.

ICSID Institution Rule 2.[34] In particular, as required by Rule 2(1)(e), the Notice of Arbitration "contains information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment."[35]

143. The Applicants also, without agreeing that the Notice of Arbitration failed to satisfy pleading requirements and believing that all arguments regarding the Notice could be easily resolved by supplementing the Notice, submitted in accordance with Arbitration Rule 40[36] incidental and/or additional claims that El Salvador has breached Article 5 (equal protection), Article 6 (non-discrimination) and Article 8 (compensation for expropriation) of the Foreign Investment Law as a result of the conduct and measures identified in the Claimants' Notice of Arbitration. [Claimants' Rejoinder on El Salvador's Preliminary Objection, ¶¶ 96-97]

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[34]Article 15 of the Investment Law states in its relevant part: "En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia: a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI)..." Translated: "In the case of disputes arising between foreign investors and the State concerning those investments made in El Salvador, investors may refer the dispute: a) To the International Centre for Settlement of Investment Disputes (ICSID) in order to resolve the dispute through concilliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)..."

[35]*CMS Gas Transmission Company and the Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) ¶ 106:: "In any event, CMS concludes on this matter, the fact that the post-July 2001 events were not mentioned in the Request for Arbitration does not affect the Claimant's entitlement to submit them to the Tribunal in its Memorial. CMS affirms that Article 36(2) of the ICSID Convention and Rule 2(1)(e) of the ICSID Institution Rules only require the request to "contain information concerning the issue in dispute," and that accordingly, Arbitration Rule 31 indicates that it is only at the time of its memorial that the claimant is required to argue its claims with specificity. Moreover, under Article 46 of the Convention and Rule 40 of the ICSID Arbitration Rules, CMS argues its entitlement to bring the matter as an additional or incidental claim because both clauses specifically provide for such a possibility."

[36]Under Arbitration Rule 40 "a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute."

C. The Tribunal Both Failed to Explain its Reasons and Manifestly Exceeded its Powers by Rejecting Jurisdiction As to the Applicants' Claims under the Investment Law.

144. The Tribunal did not discuss or even refer to any of these provisions in its Award, nor did it discuss or refer to any other rule or provisions. The rule requiring that "Foreign Investment Law" be mentioned more than in the caption and the initial paragraph of the Notice of Arbitration is not based on anything.

145. Taking the Respondent's arguments to their logical conclusion, the result would be: First, if the Tribunal wants to invent a rule that requires mentioning "Foreign Investment Law" more than twice to qualify as stating a claim, the mere declaration of such a rule would satisfy the requirement of providing an explanation under Article 52. Second, if the Tribunal in applying its rule miscounts the number of times "Foreign Investment Law" is mentioned, that cannot be reviewed either, because it is a "factual finding" that cannot be disturbed by the *ad hoc* Committee.

146. If the annulment process is to have any purpose at all, Article 52 must have some substance and must be interpreted to preclude arbitrary conduct, especially on questions of jurisdiction.

147. In the Respondent's second Preliminary Objection to Pac Rim's Notice of Arbitration, the Respondent raised a number of arguments why the Tribunal hearing the matter should find no jurisdiction. The Tribunal found that it did indeed have jurisdiction under El Salvador's Investment Law, even though it did not have jurisdiction over CAFTA claims (because Pac Rim was not a national of a state signing the treaty). The Tribunal stated:

> ... the Tribunal finds no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions, here CAFTA and the Investment Law.199 To the contrary, when consent to the same tribunal's jurisdiction is contained in two or more instruments, the Respondent's suggestion that different ICSID arbitrations must be commenced under each instrument would render nugatory the natural

inclinations of both investors and States for fairness, consistency and procedural efficiency in international arbitration.[37]

D. Jurisdiction under the Foreign Investment Law Was Not Properly Before the Tribunal in the Preliminary Objection Procedure.

148. In addition to its other arguments, the Respondent states that it is "patently incorrect" for the Applicants to assert that the question of whether the Applicants made claims under the Foreign Investment Law "was not before the Tribunal." [Respondent's Counter-Memorial, ¶ 143] The Applicants stated: "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." [Applicants' Memorial, ¶ 199] Here are the details:

149. In their Memorial, at ¶ 194, the Applicants stated: "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.

150. The Respondent denies this statement arguing: "In its Preliminary Objection, El Salvador challenged the jurisdiction of the Tribunal with respect to the Investment Law claims." [Respondent's Counter-Memorial, ¶ 143]

151. The Respondent's entire support for this denial and assertion is a footnote reference to paragraph 126 of its Preliminary Objection. Paragraph 126 is the final paragraph of the document, which is captioned "The Republic's Prayer for Relief" and which requests as part of the relief sought, that the Tribunal "[d]ismiss this arbitration in its entirety." All of the preceding 125 paragraphs of the Preliminary Objection relate to the Respondent's objection to CAFTA jurisdiction.

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[37]Pac Rim II, ¶ 5.45

152. Otherwise, the Respondent's citations to the record and the Applicants' citations to the record both show (referring to the same paragraphs) that there was no substantive discussion of the Applicants' Foreign Investment Law claims in the memorials filed in connection with the Preliminary Objection until after the Applicants noted in their Response that the Respondent's "waiver" arguments did not apply to claims under the Foreign Investment Law. [Applicants' Memorial, ¶¶ 196-197; Counter-Memorial, ¶ 143] The Respondent's citation to its own argument at the 15 November 2011 hearing on the Preliminary Objection does not alter the fact that the Respondent did not challenge the Foreign Investment Law claims when it filed its Preliminary Objection.

153. The Tribunal stated 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] The simple explanation is that the Respondent did not address the Foreign Investment Law in its Preliminary Objection. The undisputed sequence of events ought to support the Applicants' position, rather than the Tribunal's decision that the Applicants had no right to proceed with their claims under the Investment Law.

154. At ¶ 145 of its Counter-Memorial, the Respondent states:

> It was El Salvador's belief that, in the event the Tribunal were to decide, against all evidence, that there were indeed claims under the Investment Law of El Salvador, the very filing of those claims would have constituted a separate and independent violation of the CAFTA waivers, which would have required a separate jurisdictional objection."

The Respondent only raised that argument in its Reply on its Preliminary Objection, where it for the first time asserted that the Tribunal had no jurisdiction over the Applicants' claims under the Investment Law of El Salvador. [Respondent's Reply on Preliminary Objection, ¶ 115]

155. The Respondent made this same argument to the Tribunal hearing preliminary objections in *Pac Rim v. El Salvador*, i.e., that the waiver requirement in CAFTA Article 10.18(2) applied to Pac Rim's claims under the Foreign Investment Law, which Pac Rim likewise combined

with its claims under CAFTA when it filed its Notice of Arbitration. The tribunal rejected this argument, stating:

> In the Tribunal's view, these arbitration proceedings are indivisible, being the same single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration registered once by the ICSID Acting Secretary- General under the ICSID Convention. To decide otherwise would require an interpretation of CAFTA Article 10.18(2) wholly at odds with its object and purpose and potentially resulting in gross unfairness to a claimant. There is no corresponding unfairness to the Respondent in maintaining these ICSID proceedings as one single arbitration. In particular, the Respondent does not here face any practical risk of double jeopardy. Lastly, it is hardly a legitimate objection to this Tribunal's competence that it exercises jurisdiction over these Parties based not upon one consent to such jurisdiction from the Respondent but based upon two cumulative consents from the Respondent. It is an indisputable historical fact that several arbitration tribunals have exercised jurisdiction based on more than one consent from one disputant party, without being thereby deprived of jurisdiction.[38]

The simultaneous filing of claims under the Foreign Investment Law and CAFTA is not a violation of the waiver provision.

156. On this record, the Tribunal went out of its way to not take jurisdiction over the Applicants' claims under the Foreign Investment Law. Rather than offering a "clear explanation" as stated by the Respondent, the Tribunal did not provide any basis for its decision. The Tribunal faulted the Applicants for the lack of presentation on the topic of the Foreign Investment Law when it was not the subject of the Respondent's Preliminary Objection. The Tribunal behaved arbitrarily, it failed to explain its reasons, and manifestly exceeded its powers by not taking jurisdiction over the Applicants' claims under the Foreign Investment Law.

[38] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 (*Pac Rim I*), Decision on the Respondent's Preliminary Objections (2 August 2010) [AL-4] ¶ 253.

PRAYER FOR RELIEF

157. In summary, the Applicants ask the *ad hoc* Committee to agree that the integrity of the ICSID process is at issue in this Application for Annulment. The Applicants have been arbitrarily denied access to the process.

158. For the foregoing reasons, the Applicants/Claimants, Commerce Group Corp. and San Sebastian Gold Mines, Inc., again 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 as will restore them to the position they should have been in before El Salvador's Preliminary Objection.

Dated: 23 November 2012.

Respectfully submitted,

/s/ John E. Machulak

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