INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Commerce Group Corp. and San Sebastian Gold Mines, Inc.	)	
Claimants,	)	
v.	)	**ICSID Case No. ARB/09/17**
Republic of El Salvador	)	
Respondent.	)	

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)

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I. INTRODUCTION

1. The Republic of El Salvador is filing this Preliminary Objection under the expedited procedure of the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA"), to dismiss this arbitration because of lack of consent.

2. As a condition to the Republic's consent to submit disputes to international arbitration, CAFTA Article 10.18.2(b) required Claimants to waive any right to initiate or continue before any court in El Salvador, among other dispute settlement procedures, *any proceeding* with respect to *any measure* alleged to constitute a breach of CAFTA.

3. Although Claimants included waivers with their Notice of Arbitration, Claimants simultaneously violated the waivers by maintaining judicial proceedings before the Supreme Court of El Salvador related to the same measures Claimants allege are breaches of CAFTA.

4. Claimants' violation of the waivers invalidated the waivers and as a result there is no consent by the Republic to submit this dispute to arbitration. Without the Republic's consent, there is no jurisdiction and this Tribunal lacks competence with regard to this arbitration.

5. Claimants' violation of the waivers was not accidental but plainly intentional and thus evidences a deliberate attempt to benefit from waivers with which Claimants had no intention of complying. In patent violation of their express waivers, Claimants chose to maintain two sets of proceedings related to the same measures to maximize the probability of obtaining a favorable result.

6. CAFTA was already in force when Claimants were notified of the revocation of the environmental permits—the measures Claimants allege constitute the principal breaches of CAFTA in this arbitration—in September 2006. Claimants thus had the option to initiate a proceeding with respect to those measures in international arbitration under CAFTA or before the courts of El Salvador. CAFTA's waiver provision prohibited Claimants from doing both at the same time.

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

8. This prohibition created a problem for Claimants. By July 2009, the judicial proceedings Claimants initiated in El Salvador were still pending. The briefing had just ended in June 2009 and the cases entered the deliberation phase during which the Supreme Court must consider the evidence, decide the cases, and publish the judgments, a process that lasts a number of months under the normal practice of the Supreme Court. But Claimants faced the end of the three-year period allowed under CAFTA Article 10.18.1 to initiate international arbitration under CAFTA after first acquiring knowledge of the alleged breach of CAFTA and that they had incurred loss or damage.

9. Claimants decided to initiate CAFTA arbitration by submitting the Notice of Arbitration on July 2, 2009, two months before the three-year limit under CAFTA ended on September 13, 2009. That decision by itself would not have been a problem. The problem is that Claimants submitted the Notice of Arbitration to ICSID without first requesting termination of the judicial proceedings in El Salvador. Claimants' actions thus invalidated their waivers and prevented El Salvador's consent to arbitration under CAFTA from being perfected. As a result, the required consent to arbitration does not exist in this case.

10. Claimants' conduct in violation of the waivers could not have been inadvertent. First, the violation was manifest in the Notice of Arbitration. Paragraph 22 of the Notice of Arbitration made reference to the judicial proceedings initiated by Claimants in El Salvador with regard to the same measures that are the subject of the CAFTA arbitration described in the preceding paragraph 21, and stated that the domestic judicial proceedings had not yet been resolved.

11. Second, El Salvador gave Claimants specific notice of the violation of the waivers at the outset of this arbitration and provided two opportunities to correct it. El Salvador first made reference to the waiver problem in a letter sent to the ICSID Secretariat on August 14, 2009. ICSID transmitted a copy of this letter to Claimants on the same date, but Claimants simply ignored the letter. El Salvador then sent a second letter to the ICSID Secretariat immediately after ICSID registered the case, inviting Claimants to withdraw the CAFTA arbitration because of the violation of the waivers. In this letter, which was notified to Claimants on August 25, 2009, El Salvador even provided its advance consent to the discontinuance of the case if Claimants requested discontinuance before the Tribunal was constituted. But Claimants again ignored the warning about the problem with the waivers.

12. Had Claimants taken advantage of either of those two opportunities to correct their violation of the provisions of CAFTA, they would have been able to discontinue the CAFTA arbitration, request termination of the judicial proceedings in El Salvador, and submit a new Notice of Arbitration under CAFTA *after terminating the local proceedings*. But Claimants chose to continue with both sets of proceedings with respect to the same measures, something CAFTA simply does not allow.

13. Having initiated CAFTA arbitration while in violation of the waivers, Claimants maintained the CAFTA arbitration alive but dormant for many months, hoping for a favorable result in the judicial proceedings before the Supreme Court of El Salvador. Only after the ICSID Secretariat warned Claimants that it intended to apply the provisions of ICSID Arbitration Rule 45 to discontinue the arbitration due to inactivity in the case for more than six months did Claimants request the constitution of this Tribunal. Now that the proceedings before the Supreme Court of El Salvador have ended with a negative outcome for Claimants, Claimants are entirely focused on the CAFTA arbitration option that they attempted to preserve with minimum effort until now. But because they chose to violate the terms of CAFTA in an attempt to improperly maximize the probability of a favorable result, this arbitration must be dismissed due to lack of jurisdiction caused by Claimants' violation of the waivers.

14. El Salvador is convinced that as a matter of treaty interpretation and international law, Claimants' violation of their waivers has resulted in a lack of jurisdiction to continue this arbitration. But Claimants' conduct goes beyond a simple failure to comply with the terms of a legal document. Claimants' willful disregard of the express waivers Claimants themselves filed in an attempt to perfect El Salvador's consent and create jurisdiction in this matter amounts to an act of bad faith and an affront to the international arbitration process.

15. If Claimants are permitted to reap the benefits of such willful misconduct, it will threaten the integrity of the increasingly fragile international arbitration system in which States have willingly given up the absolute protection international law provides them from being forced into binding international legal proceedings by private parties. One of the most basic premises of international law, which is as valid today as ever, is the rule that a State may not be subject to the jurisdiction of an international tribunal without its express consent. As a part of regimes established to help promote international trade and investment, some States, through a variety of legal instruments, have voluntarily given their consent under specifically defined conditions to provide certain investors the extraordinary remedy of international arbitration. This has created the existing investor-State arbitration system. The continued viability and very existence of this system thus depends on the willingness of States to accept and maintain their consent to arbitration in legal instruments such as CAFTA, which in turn depends on States having confidence that arbitration tribunals will properly enforce their agreements and the specific limits on consent contained in these agreements. Permitting claimants to benefit from their flagrant willful disregard of provisions that address the cornerstone issue of a State's consent to arbitration would certainly go a long way to undermining that confidence.

II. CLAIMANTS' VIOLATION OF THE WAIVERS COMPELS DISMISSAL OF THIS ARBITRATION

A. The Waiver Requirement Is a Condition to Consent

16. CAFTA requires exclusivity of proceedings with respect to any measure alleged to constitute a breach of CAFTA. This exclusivity requirement is a condition to the consent of the CAFTA Parties to submit disputes to arbitration under CAFTA Chapter 10.[1]

17. CAFTA's exclusivity requirement is included in CAFTA Article 10.18, which requires the submission of a waiver as a condition to consent:

> **Article 10.18: Conditions and Limitations on Consent of Each Party**
>
> . . . .
>
> 2. No claim may be submitted to arbitration under this Section unless: . . .
>
> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

[1] CAFTA Chapter 10 is provided as **Respondent's Authority 1**.

B. Claimants Waived Any Right to Initiate or Continue Any Proceeding with Respect to Any Measure Alleged to Constitute a Breach of CAFTA

18. Claimants submitted the waivers because they wanted to take advantage of El Salvador's offer of consent to submit disputes to arbitration in accordance with the provisions of CAFTA.

19. Claimants were fully aware of the requirement to actually waive any right to continue the local proceedings they had initiated in El Salvador before submitting their CAFTA claims to arbitration, as an integral part of the waiver requirement. In fact, Claimants inserted the following statement in paragraph 36 of the Notice of Arbitration:

> As required by Article 10.18.2(b)(ii) of CAFTA, the claimants hereby waive their rights to initiate or continue any domestic proceeding with respect to any measure alleged to constitute a breach for purposes of the present Notice of Arbitration. . . . Copies of the waivers are attached as Exhibit "A" and Exhibit "B".

20. Exhibits A and B to the Notice of Arbitration are the waivers of Claimants Commerce Group Corp. and San Sebastian Gold Mines, Inc., including the text of CAFTA Article 10.18.2(b). In these waivers, each Claimant expressed that it

> waives any rights that it has to initiate or continue before any administrative tribunal or court under the laws of any country that is a party to the Central America Free Trade Agreement, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach under Article 10.16 of the CAFTA-DR Treaty.

21. Claimants therefore knowingly and willingly waived any right to initiate or continue any proceeding before any administrative tribunal or court of El Salvador, or any other dispute settlement procedures, with respect to any measure Claimants allege to constitute a breach under Article 10.16 of CAFTA.

C. Claimants Intentionally Violated Their Waivers

22. It is evident that Claimants' waivers covered the proceedings before the Supreme Court of El Salvador and that Claimants willfully violated their waivers.

1. The waiver requirement applies to *measures*

23. The Article 10.18.2 waiver applies to proceedings "with respect to any measure alleged to constitute a breach" of CAFTA. The only tribunal to rule on CAFTA Article 10.18.2 so far, in *RDC v. Guatemala*, pointed out that the key question in deciding whether a waiver has been violated is "whether the measures before the domestic [proceedings] are the same measures which are 'alleged to constitute a breach referred to in Article 10.16.'"[2]

24. CAFTA Article 2.1, "Definitions of General Application," provides that "**measure** includes any law, regulation, procedure, requirement, or practice." In order to fit within the scope of CAFTA Chapter 10, a measure must be "adopted or maintained by a Party" and "relat[e] to" investors of another Party or covered investments.[3] In other words, measures are actions by or attributable to the State that have an actual effect on investors or investments.

25. In interpreting the same definition of *measure* in NAFTA, the tribunal in *Loewen v. United States* cited the European Court of Justice's view that measure "embraces 'any *action* which affects the rights of persons' coming within the application of the relevant treaty provision."[4] Similarly, the NAFTA tribunal in *International Thunderbird Gaming v. Mexico* related measures to "conduct."[5]

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[2] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, Nov. 17, 2008, para. 48 (**Respondent's Authority 2**).

[3] CAFTA Article 10.1.1 (RL-1).

[4] *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction, Jan. 5, 2001, para. 45 (emphasis added) (**Respondent's Authority 3**).

[5] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, Jan. 26, 2006, para. 118 (commenting that the specific purpose of the Article 1121 provisions is "to prevent a party from pursuing concurrent domestic and international remedies, which could . . . lead to double redress for the same conduct or measure") (**Respondent's Authority 4**).

26. In *RDC v. Guatemala*, the tribunal identified three measures involved in the arbitration. The first two measures were the alleged failure by Guatemala to pay into the trust fund and the alleged failure by Guatemala to remove squatters from the right of way. The other measure was a Resolution signed by the President of Guatemala.[6] In deciding an objection *ratione temporis* by Guatemala, the tribunal interpreted that even if the preparation of the Resolution had lasted several months, it was not until the Resolution was signed by the President and the Cabinet and published as required by law, that the Resolution became a *measure* for purposes of CAFTA.[7]

2. The relevant *measures* in this arbitration are the revocations of the environmental permits

27. The current arbitration before this Tribunal, initiated by Commerce Group Corp. and San Sebastian Gold Mines, Inc. against the Republic of El Salvador, alleges breaches of CAFTA based on certain measures of the Ministry of the Environment and Natural Resources ("MARN"), one of the ministries of the Executive Branch of the Government of the Republic of El Salvador, in relation to a mining exploitation concession and processing plant.

28. The Notice of Arbitration explains that in 2003, the Ministry of Economy of El Salvador converted Claimants' former gold mining exploitation concession granted under the old mining law in 1987, to a new 20-year concession under the new mining law. The new concession was granted on the basis of Claimants' application that was required to meet the requirements under the new mining law, which included environmental permits granted by the Ministry of the Environment. The term of the concession was extended to thirty years in 2004, to conform to the term specified in the new mining law.[8]

[6] *RDC v. Guatemala*, paras. 52, 62 (RL-2).
[7] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010, paras. 118-119, 136 (**Respondent's Authority 5**).
[8] NOA, paras. 15-16.

29. The Notice of Arbitration then complains 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.*[9]

30. Claimants refer to the revocation of the environmental permits, as well as decisions not to renew two exploration licenses, as "actions of the El Salvadoran government, through its ministries . . . [that reflect] 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."[10] El Salvador emphatically denies that such policy exists or ever existed. But even assuming for the sake of argument that such policy existed, the *actions* necessary to *apply* or *implement* a policy would be the *measures* that may constitute a breach of CAFTA. Claimants recognize this obvious point when they base their complaints not against the alleged policy, but against the alleged policy "*as applied*."[11] Any governmental policy can only be applied through government *action* that has a direct impact on Claimants. This obvious point is further recognized in the only paragraph in the Notice of Arbitration that includes specific allegations of breaches of CAFTA, which refers to the "conduct" of the Republic of El Salvador.[12] The *actions* by the Government, *i.e.* its conduct, are the *measures* that need to be compared for purposes of determining if there has been a violation of the waivers under CAFTA Article 10.18.2.

31. Thus, MARN's two resolutions revoking the environmental permits in 2006 are the measures that affected Claimants with regard to the San Sebastian Gold Mine exploitation concession and the San Cristobal Mill and Plant. Those resolutions are the basis for Claimants'

[9] NOA, para. 21 (emphasis added).
[10] NOA, para. 25.
[11] NOA, paras. 26, 27 (emphasis added).
[12] NOA, para. 30.

allegations of breaches of CAFTA with regard to the exploitation concession and the processing plant, which constitute by far the most significant claims in this arbitration.

3. The same *measures* are the basis of the domestic judicial proceedings initiated by Claimants

32. The MARN resolutions revoking the environmental permits are the very same measures involved in two judicial proceedings that Commerce Group Corp. and San Sebastian Gold Mines, Inc. initiated against MARN prior to starting this arbitration. In December 2006, less than three months after being notified of the MARN resolutions, Claimants filed two judicial proceedings before the Administrative Litigation Chamber of the Supreme Court of El Salvador challenging the revocations.

33. In the judicial proceeding regarding the San Sebastian Gold Mining exploitation concession, Case No. 308-2006 filed on December 6, 2006, Claimants requested the Supreme Court to invalidate MARN Resolution No. 3026-783-2006, dated July 6, 2006 (notified to Claimants on September 13, 2006), which revoked the environmental permit for the San Sebastian Gold Mine exploitation project. Claimants requested the Supreme Court of El Salvador to suspend the MARN resolution while the case was being decided, to declare the MARN resolution illegal and without force, and to award Claimants monetary damages and costs.[13]

34. Likewise, in the judicial proceeding filed in the Salvadoran Supreme Court regarding the San Cristobal Plant, Case No. 309-2006, filed on December 6, 2006, Claimants challenged the legality of MARN Resolution No. 3249-779-2006, dated July 5, 2006 (notified to Claimants on September 13, 2006), which revoked the environmental permit for the San Cristobal Plant project. Claimants requested the Supreme Court of El Salvador to suspend the MARN resolution while the case was being decided, to declare the MARN resolution illegal and without force, and to award Claimants monetary damages and costs.[14]

[13] Petition to Supreme Court of El Salvador, Case 308-2006, Dec. 6, 2006 (**Respondent's Exhibit 1**).
[14] Petition to Supreme Court of El Salvador, Case 309-2006, Dec. 6, 2006 (**Respondent's Exhibit 2**).

35. In addition to the identity of the measures complained about in those two judicial proceedings when compared to the measures complained about in this arbitration, there is a striking similarity between the other elements of the relief requested in the domestic judicial proceedings and in this arbitration.

36. In the current CAFTA arbitration, Claimants have requested "[p]ayment of compensation from the government of El Salvador to Commerce Group in an amount of not less than $100 [million] for its losses; and [g]ranting of permits allowing Commerce Group to resume its mining activities in the Country of El Salvador subject to reasonable and appropriate environmental protection conditions . . . ."[15]

37. Likewise, in the two judicial proceedings before the Supreme Court of El Salvador related to the San Sebastian Gold Mine exploitation concession and the San Cristobal Plant and Mill, Claimants quantified the monetary damages caused by the MARN resolutions at over $111 million. Claimants requested the Supreme Court to set aside the two MARN resolutions, to allow Claimants to resume operations under the environmental permits that the two MARN resolutions had revoked, and to award Claimants costs and damages.[16]

38. Thus, it is clear from the Notice of Arbitration and the documents in the domestic judicial proceedings that the measures alleged to constitute CAFTA breaches are the very same measures that were challenged in the domestic judicial proceedings.

4. Claimants were required to request termination of the domestic judicial proceedings before initiating arbitration under CAFTA but did not

39. It is not enough to submit the written waivers as a formality. Claimants had to act in accordance with the waivers to fulfill the waiver requirement. This they failed to do.

40. The basic principle that conduct consistent with the waiver is part of the waiver requirement and must exist before the waiver requirement may be deemed fulfilled has been confirmed by relevant jurisprudence and State practice.

[15] NOA, para. 31.
[16] Petitions to Supreme Court, Case 308-2006 and Case 309-2006 (R-1 and R-2).

41. The tribunal in *Waste Management v. Mexico*, interpreting the similar NAFTA requirement, determined that the intent expressed in the written waiver must be demonstrated by "specific conduct on the part of the waiving party in line with the declaration made."[17] The tribunal emphasized that the waiving party is solely liable for making the waiver effective. Thus, the tribunal concluded that the waiver "calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions."[18]

42. The tribunal in *Waste Management II* also recognized that the waiver in NAFTA requires conduct consistent with the waiver in order for the waiver requirement to be fulfilled.[19]

43. The principle that the waiver requirement includes the material element of conduct in conformity with the waiver is so solidly established that it was not in dispute between the parties in *RDC v. Guatemala* and the tribunal applied it without elaboration.[20]

44. With regard to State practice, in the context of NAFTA, the United States (the CAFTA Party of which Claimants are nationals) has noted that the requirement that a claimant act consistently with the waiver for the NAFTA waiver requirement to be deemed fulfilled has been "confirmed" by all three NAFTA parties.[21]

45. In the context of CAFTA, at least three State Parties—the Dominican Republic, Guatemala, and El Salvador in the present proceedings—have expressed their understanding that the waiver requirement in CAFTA includes this material element, *i.e.*, that a claimant must act in conformity with the waiver for the waiver requirement to be deemed fulfilled.[22] Taking into

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[17] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, ["*Waste Management I*"], Award, June 2, 2000, § 24 (**Respondent's Authority 6**).
[18] *Waste Management I*, § 24.
[19] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 ["*Waste Management II*"], Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002, para. 31 (**Respondent's Authority 7**).
[20] *RDC v. Guatemala*, (RL-2).
[21] *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, Feb. 4, 2005, at 36 (**Respondent's Authority 8**).
[22] *TCW Group, Inc., Dominican Energy Holdings, L.P. v. The Dominican Republic*, Respondent's Memorial on Jurisdiction, Nov. 21, 2008, paras. 35-38 (**Respondent's Authority 9**); *Railroad*

account its position concerning the waiver requirement in NAFTA, it is reasonable to assume that the United States would extend this understanding to the context of CAFTA. This would make at least four State Parties to CAFTA that expressly share this understanding of the waiver requirement.

46. Therefore, CAFTA required Claimants to request the discontinuance of any other proceeding with respect to any measure alleged in this arbitration to constitute a breach of CAFTA by the time Claimants filed their Notice of Arbitration with ICSID. The critical date for compliance with the waiver is the date the Notice of Arbitration is filed.[23]

47. Notwithstanding the clear language in the waivers and the clear legal precedents under NAFTA and CAFTA, Claimants chose not to request termination of the judicial proceedings they had previously initiated before the Supreme Court of El Salvador with respect to the same measures that Claimants alleged in the Notice of Arbitration constitute breaches under CAFTA Article 10.16.

48. As explained above, Claimants had initiated two legal proceedings related to the revocation of their environmental permits before the Administrative Litigation Chamber of the Supreme Court of El Salvador on December 6, 2006 requesting that the Court invalidate the two MARN resolutions revoking the environmental permits and award Claimants costs and damages.[24]

49. The proceedings were still pending when Claimants filed their Notice of Arbitration on July 2, 2009. The petitions to the Supreme Court were admitted in March 2007.[25]

Development Corporation v. The Republic of Guatemala, ICSID Case No. ARB/07/23, Respondent's Reply on Jurisdiction Regarding Claimant's Failure to Comply with CAFTA Article 10.18, Aug. 11, 2008, paras. 27-28 (**Respondent's Authority 10**).

[23] *See Waste Management I*, § 5 (RL-6).

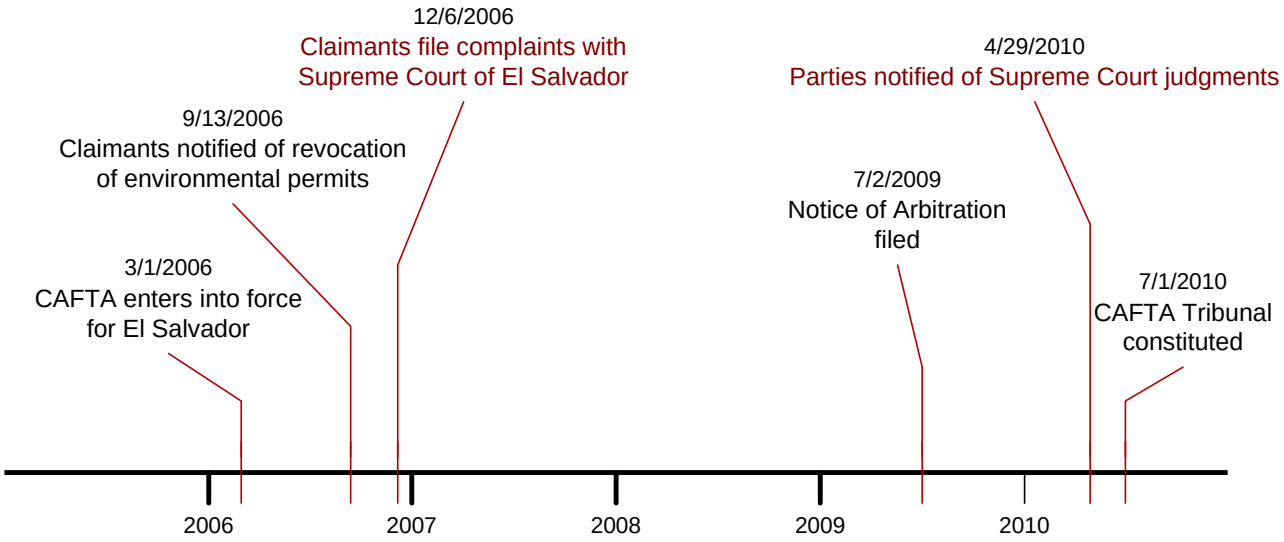
[24] *See* Petitions to Supreme Court, Case 308-2006 and Case 309-2006 (R-1 and R-2).

[25] *See* Notification from the Supreme Court admitting Case 308-2006, Mar. 19, 2007 and Notification from the Supreme Court admitting Case 309-2006, Mar. 21, 2007 (**Respondent's Exhibits 3 and 4**).

The briefing period ended in June 2009. The Supreme Court decided these cases in February and March 2010, and the parties were notified of the judgments on April 29, 2010.[26]

50. Thus, for more than eight months after filing the Notice of Arbitration, Claimants intentionally violated the CAFTA waivers as they waited for a favorable result in the pending judicial proceedings before the Supreme Court of El Salvador while the Republic faced proceedings with respect to the same measures in two fora.

51. The following timeline shows key dates relevant to the waiver violation:



52. Furthermore, Claimants' willful decision to continue the local judicial proceedings in violation of the waivers, despite the clear text of CAFTA, despite El Salvador's repeated notices of this failure, and despite NAFTA and CAFTA jurisprudence on the effects of such violations, amounts to bad faith. The principle of good faith is recognized in all legal systems,

[26] *See* Supreme Court Decision, Case 308-2006, Feb. 26, 2010 and Supreme Court Decision, Case 309-2006, Mar. 18, 2010 (**Respondent's Exhibits 5 and 6**); both decisions were notified to the parties on April 29, 2010.

and indeed is a fundamental principle of international law.[27] This principle has been not only adopted, but has been decisive, in the context of ICSID arbitrations.[28] The tribunal in *Phoenix Action v. The Czech Republic* noted that the principle of good faith "governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused."[29]

53. Qualifying investors are given a right of access to international arbitration under CAFTA, in accordance with its terms. In the circumstances of the present case, where Claimants have willfully violated their waivers, to allow this arbitration to proceed would condone Claimants' abuse of their right under CAFTA to initiate arbitration proceedings.

5. Claimants cannot avoid the conclusion that they violated the waivers

54. The waiver requirement under CAFTA, like the waiver requirement under NAFTA, does not depend on the source of law of the claims in the domestic judicial proceedings. In *Waste Management v. Mexico*, the ICSID Secretariat and the respondent alerted the claimant to potential problems with the waiver before registering the case. The claimant responded that its domestic proceedings were based on other sources of law,[30] but the tribunal called this reasoning "unsustainable" and correctly recognized that the waiver extended to any claims based on the same measures, no matter their legal basis.[31]

55. Thus, it is not the legal basis for the claims that determines a violation of the waivers, but an overlap of the measures at issue. As the *Waste Management* tribunal stated when

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[27] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, para. 170 (**Respondent's Authority 11**).

[28] *See Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, para. 107 (**Respondent's Authority 12**); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)06/2, Award, Sept. 17, 2009, para. 157 (**Respondent's Authority 13**).

[29] *Phoenix Action v. The Czech Republic*, para. 107.

[30] *Waste Management I*, § 5 (RL-6).

[31] *Waste Management I*, § 27 (concluding that proceedings in a national forum and in a NAFTA arbitration with "a legal basis derived from the same measures" could not "continue simultaneously").

it expressly rejected the theory that the NAFTA waiver would apply only to proceedings in which NAFTA breaches are invoked, "it is not imperative to know the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA."[32]

56. In addition, the *RDC* tribunal explained that likelihood of success in the domestic proceeding is of no consequence "[i]t is the fact that two domestic arbitration proceedings exist and overlap with this arbitration . . . that triggers the defect in the waiver."[33]

57. Claimants' Notice of Arbitration and their domestic judicial proceedings complain of the exact same measures and clearly invalidated their waivers.

6. The domestic judicial proceedings do not fall within the exception of CAFTA Article 10.18.3

58. CAFTA Article 10.18.3 provides that domestic judicial and administrative proceedings seeking "interim injunctive relief and [not involving] the payment of monetary damages . . . brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration" are exempt from the waiver requirement under CAFTA Article 10.18.2(b).

59. The two proceedings initiated by Claimants before the Supreme Court of El Salvador do not fall within this exception. They were not brought for the purpose of, much less the *sole* purpose of, preserving the Claimants' rights and interests during the pendency of arbitration.

60. First, although the two domestic judicial proceedings included a request for interim injunctive relief, the requests were made in connection with the protection of Claimants' rights *during the pendency of the domestic judicial proceedings*, not during the pendency of the CAFTA arbitration as required by CAFTA Article 10.18.3. In any event, the Supreme Court of

[32] *Waste Management I,* § 27.
[33] *RDC v. Guatemala*, para. 54 (RL-2).

El Salvador rejected Claimants' request for interim injunctive relief when it decided to admit the two complaints in March of 2007.[34] Thus, the two judicial proceedings that were still pending when Claimants filed their Notice of Arbitration in July 2009 did not even include the possibility of interim injunctive relief.

61. Second, the domestic judicial proceedings included a request for the payment of monetary damages, contrary to the requirement of the Article 10.18.3 exception. In both judicial proceedings, Claimants requested the Supreme Court to order MARN to pay costs and damages to Claimants. Claimants had quantified their damages resulting from the two resolutions at an amount in excess of $111 million.

62. Finally, the domestic judicial proceedings sought to invalidate the measures in question, which clearly puts these proceedings beyond the scope of the Article 10.18.3 exception.

D. The Result of Claimants' Violation of Their Waivers Is Lack of Consent

1. There is no consent under CAFTA

63. CAFTA Article 10.17 provides that each CAFTA Party consents "to the submission of a claim to arbitration under this Section in accordance with this Agreement." In order for that consent to become effective, a claimant must comply with Article 10.18—"Conditions and Limitations on Consent of Each Party." There is no consent for claims submitted not in accordance with CAFTA, *i.e.*, claims submitted without valid and effective waivers.

64. Claimants' refusal to abide by the waivers prevented El Salvador's consent to arbitration from being perfected. The provisions of Article 10.18, titled "Conditions and Limitations on Consent of Each Party" begin: "*No claim* may be submitted to arbitration under

[34] *See* Notifications from the Supreme Court admitting Case 308-2006 and Case 309-2006 (R-3 and R-4).

this Section unless . . ." In other words, if Article 10.18 is not complied with, there is no consent by the respondent State for *any claims* to be submitted to arbitration.

65. The only tribunal to rule on CAFTA Article 10.18 so far, in the ICSID arbitration *RDC v. Guatemala*, affirmed that the validity of the waiver is a "matter pertaining to the consent of the Respondent to this arbitration . . . ."[35] and that "the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected."[36]

66. As noted by previous tribunals, the analysis of the fulfillment of conditions and limitations on consent "calls for the utmost attention" as their non-fulfillment means lack of consent, and results in a tribunal being bereft of jurisdiction.[37] The CAFTA Parties granted investors an extraordinary remedy when they agreed to the dispute settlement procedures of CAFTA. The contracting States, agreeing to be perpetual respondents under CAFTA, with no opportunity to initiate arbitration as claimants, justifiably included conditions and limitations to their consent. Arbitral tribunals are entrusted with enforcing the protections the States built into the agreement. The CAFTA Parties agreed that investors choosing to submit disputes to CAFTA arbitration would have to waive the right to initiate or continue any proceedings with respect to the same measures, thereby providing for an orderly regime where the CAFTA Parties would not have to defend themselves against multiple proceedings in regard to the same measures. If investors do not comply with these provisions, *i.e.*, do not bring their claims in accordance with CAFTA, there is no consent by the CAFTA Party, and arbitration may not proceed.

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[35] *RDC v. Guatemala*, para. 61 (RL-2).
[36] *RDC v. Guatemala*, para. 56. The tribunal distinguished the NAFTA case, *International Thunderbird Gaming Corporation v. United Mexican States*, in which the tribunal held that the failure to file the waivers with the Notice of Arbitration was merely a formal defect when the waivers were presented with the Statement of Claim. The *RDC* tribunal explained, "[i]n the present case, by contrast, the Claimant has maintained the domestic arbitrations over the Respondent's objection, and there is no question of a merely formal defect at the outset of the international arbitral procedure." *Id.*, para. 61, n. 36.
[37] *Waste Management I*, § 17 (RL-6).

2. There is no consent under the ICSID Convention

67. Lack of consent to arbitration under CAFTA also means lack of consent under the ICSID Convention.

68. Consent of the parties is the "cornerstone" of the jurisdiction of ICSID.[38] Pursuant to Article 25, the jurisdiction of the Centre extends to legal disputes arising out of investments between a Contracting State and nationals of other Contracting States, "which the parties to the dispute consent in writing to submit to the Centre." Thus, Article 25 of the ICSID Convention requires consent of both parties to the dispute.

69. In the case of bilateral and multilateral international agreements, provisions on consent to arbitration contained in those instruments are conditional offers given by the State Parties that need to be accepted by the foreign investors to amount to an agreement on consent.

70. For example, the tribunal in *LG&E v. Argentina*, deciding claims under the United States-Argentina Bilateral Investment Treaty, emphasized the vital importance of the need to find consent by both parties under the terms of the relevant treaty. The tribunal noted that it was necessary to "determine whether *both parties* have expressed their consent to submit to the Centre, since consent of the parties is the 'cornerstone of the jurisdiction of the Centre'."[39]

71. In the same vein the tribunal in *Plama v. Bulgaria* was mindful of this basic pre-requisite of arbitration: the need of an agreement of *both parties* to the dispute for consent to exist. The tribunal noted that "[i]n the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, *and* the acceptance thereof by an investor if the latter so desires."[40]

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[38] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, para. 23 (**Respondent's Authority 14**).
[39] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, Apr. 30, 2004, para. 70 (emphasis added) (**Respondent's Authority 15**).
[40] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, para. 198 (emphasis added) (**Respondent's Authority 16**).

72. CAFTA is no different. In the present case, consent to arbitration is contained, and is perfected only in accordance with the relevant provisions of CAFTA. CAFTA Article 10.17 includes El Salvador's consent to arbitration. Article 10.18 contains the Conditions and Limitations of the State Parties' consent. If, as in this case, the conditions for consent under CAFTA are not met, there is no consent for purposes of Article 25 of the ICSID Convention.

73. Claimants failed to comply with the waiver requirement in CAFTA, which is a condition precedent to El Salvador's consent to arbitration. As noted by the tribunal in *Waste Management II*, if a condition precedent to consent to arbitration is not satisfied, there is simply no consent under the relevant treaty.[41] In *Wintershall v. Argentina*, the tribunal considered the general approach of an ICSID tribunal in deciding objections to jurisdiction. The tribunal noted the principle that international tribunals constituted under the ICSID Convention are bodies of limited competence. Indeed, such tribunals are "empowered to adjudicate [ICSID] cases *only if the conditions for the exercise of their jurisdiction are fulfilled*."[42] The tribunal found that the claimants had failed to comply with the conditions set forth in the relevant treaty for the State Party's consent to operate, and consequently, it declared it had no competence to hear the case on the merits and that therefore, access to ICSID was not available to the claimants.[43] More recently, in *Burlington Resources v. Ecuador*, the tribunal found that the claimant in that case failed to "abide by the conditions of the offer of ICSID arbitration" contained in the relevant provision of the relevant treaty and therefore, it declared that it lacked jurisdiction over claimant's treaty claims.[44] Therefore, because there is no consent under CAFTA in this arbitration, there is no consent under the ICSID Convention.

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[41] *Waste Management II*, para. 33 (RL-7).
[42] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, Dec. 8, 2008, para. 65 (emphasis added) (**Respondent's Authority 17**).
[43] *Wintershall*, paras. 156 and 198(1).
[44] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010, paras. 317, 318 (**Respondent's Authority 18**).

E. Without Consent, the Tribunal Must Dismiss this Arbitration

1. Lack of consent deprives ICSID of jurisdiction and the Tribunal of competence

74. Failure to meet the conditions to consent in accordance with CAFTA deprives ICSID of jurisdiction and the Tribunal of competence to decide this arbitration.

75. If a claimant tries to bring arbitration claims based on the same measures at issue in other concurrent proceedings, the claimant violates the waiver and renders the waiver invalid, requiring the dismissal of the arbitration because of lack of consent. Thus, the first *Waste Management* tribunal dismissed the entire case because the claimant maintained domestic proceedings related to the same measures after initiating the arbitration, in violation of the NAFTA waiver. The tribunal found that the waiving party must act in accordance with the written waiver and that the claimant had failed to do so.

76. Claimants in this case, as in *Waste Management*, ignored warnings and proceeded to willfully act in violation of the waivers. The tribunal in *Waste Management* held that the claimant's conduct violated the waiver because the claimant continued its domestic proceedings after the date of submission of the waiver and "until all avenues of recourse had been exhausted."[45] The same is true for Claimants in the current arbitration, who allowed the domestic judicial proceedings before the Supreme Court of El Salvador to run their full course until judgment. The *Waste Management* tribunal held that it lacked jurisdiction "owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration."[46] Claimants' breaches of CAFTA Article 10.18.2 are analogous and must likewise result in lack of jurisdiction and competence.

[45] *Waste Management I*, § 30 (RL-6).
[46] *Waste Management I*, § 31.

2. There is no consent and, therefore, no jurisdiction and competence with respect to the entire arbitration

77. It is important to note that the waiver requirement in CAFTA prohibits parallel proceedings with respect to *any measure* alleged to constitute a breach of CAFTA. The CAFTA waiver requirement prevents identity of measures, *any measure*. Not necessarily all measures, but *any measure*, in the singular.

78. If a claimant has initiated and continues *any* proceeding with respect to *any measure* alleged to constitute a breach of CAFTA after having filed a notice of arbitration, *i.e.*, if the claimant does not waive such rights as required by CAFTA, the automatic result under CAFTA Article 10.18.2 is that *no claim* ("*ninguna reclamación*") may be submitted to arbitration. In short, if there is an impermissible identity of *any* measure, *no claim* ("*ninguna reclamación*") may be submitted to arbitration.

79. There is nothing linking an impermissible identity of measures with a particular claim. There is only one waiver submitted for the entire arbitration applicable to any, and all, measures. The waiver is designed to cover all the claims in the arbitration by being directed to cover the *measures* giving rise to such claims. The requirement is not to submit one waiver for each individual claim. The requirement is to submit a waiver covering all measures. If there is an impermissible identity of *any measure*, the result is the invalidity of the waiver and a lack of consent to the entire arbitration proceeding and *no claim* ("*ninguna reclamación*") may be submitted to arbitration.

80. Claimants have failed to comply with a fundamental condition for El Salvador's consent. Claimants failed to effectively waive their right to continue with the domestic judicial proceedings they had initiated with respect to the same measures alleged to constitute a breach of CAFTA. El Salvador's consent to arbitration is thus lacking and the Tribunal is bereft of jurisdiction for lack of consent.

81. Finally, El Salvador would like to address the different effect that two tribunals gave to an apparent similar violation of a waiver by the claimant. Contrary to the result of the

violation of the waivers in *Waste Management,* which resulted in the dismissal of the entire arbitration, the tribunal in *RDC v. Guatemala* declined to dismiss the entire arbitration as a result of the overlapping measures that violated the waivers. The claimant was allowed to proceed with a claim that was unrelated to the measures complained of in the domestic proceedings.

82. The tribunal in *RDC v. Guatemala*, instead of focusing its analysis on whether the overlap of measures invalidated *the waiver* and this in turn invalidated the consent to arbitration, entered into an analysis of defective *claims*.[47] The tribunal engaged in a prolonged discussion on how the word *claim* is used in the relevant articles in NAFTA and CAFTA.[48] But regardless of the soundness of the tribunal's analysis about the word *claim*, that discussion is irrelevant for purposes of ascertaining the consequences of a violation of the waivers because it focuses on the wrong legal issue.

83. The waiver requirement has been conclusively tied to consent by the *Waste Management* and the *RDC* tribunals. It cannot be conceived otherwise since such a requirement is included in the text of CAFTA as a Condition to the State Parties' consent. Therefore, the relevant issue in a discussion of the effects of violating a waiver is what effects such *violation of the waiver, which inevitably invalidates the waiver,* has on the State Parties' consent. Without a waiver, there is no consent to arbitration. Without consent, there is no jurisdiction and competence over the entire arbitration proceeding initiated by the Notice of Arbitration, which includes all claims asserted in the Notice of Arbitration.

84. For avoidance of doubt, El Salvador is arguing in this arbitration before this Tribunal that Claimants' violation and repudiation of their waivers has resulted in the waivers being invalid. Invalid waivers must be treated as if no waivers had been submitted. Without waivers, there is no consent to arbitration. Without consent to arbitration there is no jurisdiction, and without jurisdiction this entire arbitration and all claims included in it must be dismissed.

[47] *RDC v. Guatemala*, para. 63 (RL-2).
[48] *RDC v. Guatemala*, paras. 63-72.

85. A factor that may have weighed in the *RDC v. Guatemala* tribunal in favor of not dismissing the entire arbitration is that the overlap of measures between the domestic proceedings and the CAFTA arbitration only related to measures concerning secondary claims. In *RDC v. Guatemala*, the principal claim related to the *Lesivo* Resolution, but the impermissible identity of measures only overlapped with respect to secondary claims related to the removal of squatters and deposits to a trust account. There was no overlap of measures with respect to the *Lesivo* Resolution.[49]

86. That situation, which should not have been relevant to the legal analysis, does not exist in this case. In the current arbitration before this Tribunal, the measures Claimants alleged breached the laws of El Salvador in the domestic judicial proceedings are the same measures Claimants allege are the principal breaches of CAFTA. There is an identity of measures with regard to those principal claims, which account for almost all the damages alleged in this arbitration.[50]

87. In sum, the absence of a valid waiver means that El Salvador's consent to CAFTA arbitration was not perfected. Therefore, there is no jurisdiction and this Tribunal has no competence to decide this case. As a consequence, the entire arbitration must be dismissed.

F. Claimants Refused to Take Advantage of Opportunities to Correct the Waiver Problem

1. Claimants missed the opportunities to preserve their claims

88. Claimants elected to initiate CAFTA arbitration without first terminating their domestic proceedings, rather than comply with the waiver requirement before submitting their claims under CAFTA. Even assuming for the sake of argument the possibility that Claimants at

[49] *RDC v. Guatemala*, paras. 62, 76(b).
[50] Claimants alleged damages of more than $111 million in the domestic judicial proceedings before the Supreme Court of El Salvador, which only involved the exploitation concession and the processing plant. In contrast, in information submitted to the Government of El Salvador, Claimants allege that they spent a total of $206,851.89 in the New San Sebastian License area and a total of $167,142.39 in the Nueva Esparta License area.

first misinterpreted the meaning of Article 10.18.2 and thought they could pursue both remedies concurrently, they were timely informed of the problem but ignored these warnings and thus missed the opportunity to correct it and preserve the opportunity to file arbitration under CAFTA.

89. ICSID drew Claimants' attention to Article 10.18.4 during the registration process. On July 29, 2009, the ICSID Secretariat wrote to Claimants requesting, "[a]n explanation as to whether Commerce and Sanseb are in compliance with CAFTA Article 10.18.4, with respect to any previous submissions addressing the same alleged breaches to: i) an administrative tribunal of El Salvador; and to ii) a court of El Salvador for adjudication or resolution, particularly in view of paragraphs 22 and 24 of the request for arbitration."[51]

90. After Claimants requested an extension to respond to the ICSID Secretariat's inquiries, El Salvador sent a letter dated August 14, 2009 drawing the attention of the ICSID Secretariat and Claimants to a different provision in CAFTA, Article 10.18.2, and explaining that "the measures subject of the proceedings filed by claimants in El Salvador are the same measures upon which claimants base their entire claim submitted to arbitration under the ICSID Convention."[52] El Salvador further explained that the Salvadoran judicial proceedings initiated by Claimants were not solely for "interim injunctive relief to preserve claimants' rights, as would be allowed under CAFTA-DR article 10.18.3," but were seeking "the complete reversal of the measures complained about both in El Salvador and before ICSID." El Salvador highlighted: "claimants have failed to comply with the waivers required by CAFTA-DR article 10.18.2."[53]

91. Claimants did not respond to El Salvador's letter, and made no reference to Article 10.18.2 or their compliance with the waiver in their answer to ICSID on August 19.[54] ICSID registered the request for arbitration two days after receiving Claimants' response.

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[51] Letter from ICSID Senior Counsel to Claimants, July 29, 2009 (**Respondent's Exhibit 7**).
[52] Letter from Attorney General of El Salvador to Secretary-General of ICSID, Aug. 14, 2009 (**Respondent's Exhibit 8**).
[53] *Id.*
[54] Letter from Claimants' counsel to ICSID Senior Counsel, Aug. 19, 2009 (**Respondent's Exhibit 9**).

92. El Salvador offered Claimants a second opportunity to correct their waiver problem. On August 24, 2009, El Salvador wrote to ICSID recalling that "Claimants have been made fully aware during the registration process, through the letter of the Attorney General to the Secretary-General together with claimants' knowledge about the nature of the pending legal proceedings claimants filed in El Salvador, that they did not comply with the jurisdictional requirements under CAFTA-DR article 10.18.2."[55] In addition, in an unprecedented step, El Salvador provided written advance consent to discontinue the proceedings if Claimants would so request prior to the constitution of the Tribunal.[56]

93. Claimants again chose to ignore El Salvador's offer and continue their intentional violation of their waivers. In fact, Claimants could have saved their CAFTA claims by immediately accepting the offer. If Claimants had requested discontinuance of the CAFTA arbitration, to which the Republic had already given its advance written consent, Claimants could have terminated the domestic judicial proceedings and initiated a new CAFTA arbitration with a valid waiver.

2. Claimants' ability or inability to resubmit their claims is immaterial to the fact that violation of the waivers requires dismissal

94. The violation of the waivers, in and of itself, requires the dismissal of the claims related to the invalid waivers. Whether Claimants would be able to file a new arbitration the day after dismissal of the claims is immaterial. The stated objective of creating an efficient procedure for dispute settlement in CAFTA cannot be read as overriding the text of the treaty itself where that procedure, including the Conditions and Limitations on Consent, is established.

95. It is perhaps useful to take a step back and reflect that an enterprise of a CAFTA Party can only bring international arbitration under CAFTA because of the State Parties' consent to arbitration. This consent to arbitration is premised on the condition that claimants follow

[55] Letter from counsel for El Salvador to ICSID Senior Counsel, Aug. 24, 2009 (**Respondent's Exhibit 10**).
[56] *Id.*

specific procedures and meet specific conditions before they may start arbitration under CAFTA. Where a claimant has not met those requirements and conditions, the arbitration could only continue by express consent of the relevant Respondent CAFTA Party to waive those requirements and conditions.

96. Some State Parties to multilateral treaties such as CAFTA and NAFTA have considered waiving the effects of invalid waivers for the sake of efficiency where the claimant could have begun a new arbitration if the claims in the case at hand were dismissed as a result of the defective waiver. That is, however, a sovereign decision of each State made on a case-by-case basis, and does not create any obligation for that State or for any other State Party to the multilateral treaty to act in a similar manner in future situations. Moreover, when State Parties have allowed an invalid waiver to be corrected, the date of the new, effective waiver has been used as the date of the initiation of proceedings. For example, in *Methanex v. United States of America*, the United States consented to reconstituting the same tribunal with the same members upon the submission of the valid waivers, but only on the condition that the tribunal "issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers."[57]

97. El Salvador does not waive the consequences of Claimants' violation of the waivers in this case, particularly taking into account that El Salvador timely informed Claimants about the manifest defect in the Notice of Arbitration and Claimants consciously decided to ignore El Salvador's correspondence to such effect. Absent a waiver of consent, no tribunal would have the power to ignore the plain text of the CAFTA treaty for the sake of efficiency.

3. Effects of Claimants' choices

98. The violation of the waiver requirement in this case has serious consequences for Claimants and it would not be a mere formality to dismiss the claims based on the measures

[57] *Methanex Corporation v. United States of America*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, Nov. 13, 2000, at 77 (**Respondent's Authority 19**).

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

99. CAFTA provides that no claim may be submitted to arbitration under CAFTA "if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage."[58] Claimants were notified of the revocation of their environmental permits on September 13, 2006. Thus, for Claimants to be able to initiate CAFTA claims, they had to submit their notice of arbitration by September 13, 2009. Claimants were waiting for decisions in their domestic judicial proceedings initiated in December 2006 before the Salvadoran Supreme Court with respect to these measures. To get in within the three years, Claimants submitted their Notice of Arbitration on July 2, 2009, while still awaiting the judgments from the Supreme Court.

100. Claimants were required to terminate the domestic judicial proceedings prior to filing the Notice of Arbitration and even had ample time to request such termination and still file a new Notice of Arbitration with a valid waiver by September 13, 2009, after El Salvador advised Claimants that CAFTA precluded them from initiating CAFTA arbitration while continuing domestic proceedings related to the same measures. But Claimants chose not to terminate the domestic judicial proceedings because they wanted to maximize the probability of a favorable decision while hoping to preserve the CAFTA option in the event their domestic litigations did not go as they wanted. This is precisely what CAFTA prohibits and what Claimants expressly committed *not* to do in their written waivers filed as a prerequisite to initiating this arbitration.

[58] CAFTA Article 10.18.1 (RL-1).

101. Now that the Supreme Court of El Salvador has ruled that the acts of the Ministry of the Environment were legal, Claimants want to continue the CAFTA arbitration. This is not allowed because Claimants invalidated their waivers and prevented El Salvador's consent from being perfected.

III. CLAIMANTS' INCORRECT FACTUAL ALLEGATIONS REGARDING OTHER CLAIMS

102. Claimants' Notice of Arbitration provides incorrect information for claims related to two exploration licenses.

103. Claimants alleged in the Notice of Arbitration that on October 28, 2008, the Ministry of Economy denied their application for extensions of their New San Sebastian and Nueva Esparta exploration licenses.[59] Claimants asserted that their local counsel "filed a challenge in the Courts to the government's refusal to honor Commerce/Sanseb's request to extend its exploration permits pursuant to the terms of the 2002 permits" and that these "legal proceedings have not been resolved."[60] If, in fact, court proceedings were continuing related to the same measures alleged to constitute CAFTA breaches, there would be an additional impermissible identity of measures in violation of the waivers. At a minimum, the Notice of Arbitration confirms that Claimants intended to act in violation of the waivers and took no action to effectuate the written waivers that they provided.

104. But the Notice of Arbitration is factually incorrect. The Republic's review of the facts shows that, contrary to what Claimants stated in paragraph 24 of the Notice of Arbitration, Claimants' legal counsel never filed a challenge in the courts of El Salvador with regard to either exploration license. Instead, Claimants' local counsel only filed an administrative appeal related to one of the two exploration licenses.

[59] NOA, para. 23.
[60] NOA, para. 24.

105. Furthermore, the administrative appeal had ended before Claimants filed the Notice of Arbitration, and Claimants' local counsel had been so notified one month before Claimants filed the Notice of Arbitration. Yet, Claimants' counsel in this arbitration did not include the correct information in the Notice of Arbitration and could not even provide the correct information when requested by the Republic's counsel on July 26, 2010, the day before the first session of the Tribunal, a full year after filing the Notice of Arbitration with the incorrect information.

106. The correct facts about the two exploration licenses are that:

1) the exploration licenses were granted at different times, New San Sebastian in March 2003 and Nueva Esparta in May 2004;

2) in March 2007, Claimants applied for an extension for the New San Sebastian exploration license only;

3) *Claimants' request for an extension of the New San Sebastian exploration license was filed several days after the license had already expired, and thus the time for requesting an extension under the Salvadoran Mining Law had also expired*;[61]

4) the request to extend the New San Sebastian license was rejected on October 28, 2008;[62]

5) Claimants' local counsel filed an administrative appeal related to the decision not to extend the New San Sebastian exploration license in November 2008;[63]

6) there were no judicial proceedings related to either exploration license;

7) the administrative appeal was denied before the Notice of Arbitration was filed;[64]

8) Claimants' local counsel was notified that the administrative appeal was denied on June 2,

[61] *See* Regulations of the Mining Law of El Salvador and its Amendments, Art. 11, Legislative Decree No. 47, June 20, 2003, published in the Official Gazette No. 125, Book 359 of July 8, 2003 (**Respondent's Authority 20**).
[62] *See* MINEC Resolution No. 246, Oct. 28, 2008 (**Respondent's Exhibit 11**).
[63] *See* Letter from Claimants' local counsel to Director of Mines and Hydrocarbons, Nov. 3, 2008 (**Respondent's Exhibit 12**).
[64] *See* MINEC Resolution No. 201, May 27, 2009 (**Respondent's Exhibit 13**).

2009, one month before Claimants filed the Notice of Arbitration;[65] and

9) the Ministry of Economy has not yet decided Claimants' request to extend the Nueva Esparta license.

107. Claimants' Notice of Arbitration, with substantially incorrect factual information related to the exploration licenses, on its face shows that at the very least, Claimants did not intend to act in compliance with the waivers with respect to these measures either.

108. However, there is no need for the Tribunal to make any decisions regarding this issue, because the impermissible overlap of the measures related to the principal claims in this arbitration compels the dismissal of the entire arbitration. In the alternative, El Salvador reserves its right to make objections under CAFTA Article 10.20.4 with regard to the lack of legal merit of any claims related to these two exploration licenses.

IV. CONCLUSION

109. El Salvador has demonstrated that Claimants have not complied with the required waiver under CAFTA Article 10.18.2(b) and that, as a result, the Republic's consent to submit to CAFTA arbitration was not perfected. Claimants willfully violated the waivers by continuing proceedings before the Supreme Court of El Salvador related to the revocation of their environmental permits for the San Sebastian Gold Mining Exploitation Concession and the San Cristobal Mill and Plant. The violation of the waivers rendered the waivers invalid and as a result, there is no consent to arbitration under CAFTA or under the ICSID Convention. Without consent, there is no jurisdiction to proceed with this arbitration and this Tribunal does not have competence to decide any claims submitted in this arbitration.

[65] *See* MINEC Resolution No. 201 (showing Claimants' counsel's signature as having been notified on June 2, 2009).

V. COSTS

110. CAFTA Article 10.20.6 specifically provides for costs to be awarded in the event of frivolous claims:

> When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

111. The Republic has been forced to defend itself in proceedings that should not have been initiated or gone forward because of the manifest violation of an explicit precondition to initiating CAFTA arbitration. Therefore, Claimants should bear all costs and expenses of this Preliminary Objection, including the Tribunal's expenses, the Republic's costs for legal representation, and interest.

112. Claimants brought this arbitration knowing that they had proceedings pending before the Supreme Court of El Salvador based on the same measures complained of in this arbitration. Claimants refused to discontinue the domestic judicial proceedings even after El Salvador informed them that CAFTA requires a claimant to waive the right to continue proceedings based on the same measures alleged as constituting breaches of CAFTA. Thus Claimants' claims are frivolous and an impermissible attempt to pursue multiple avenues against El Salvador.

113. Claimants' initiation and continuation of this arbitration despite the known waiver violation has forced El Salvador to spend its resources to bring this Preliminary Objection and otherwise defend itself in this matter. This is not an issue of first impression. Claimants could have looked to previous tribunal decisions to confirm that violation of the waiver by maintaining domestic proceedings based on the same measures would deprive this Tribunal of jurisdiction. El Salvador is thus entitled to reimbursement of its costs and expenses.

114. The Republic requests an opportunity to submit evidence of its costs and of the appropriate rate of interest.

VI. RESERVATION OF RIGHTS

A. The Republic Reserves its Right to Request Security for Costs

115. El Salvador has objected to the continuation of this arbitration with the manifest violation of the waivers since the registration of the case. El Salvador is confident that this Tribunal will bring a swift end to this frivolous case. However, if for some reason this arbitration continues beyond this Preliminary Objection, El Salvador reserves the right to request security for costs. Such request would be justified by El Salvador's legitimate concerns that, if it successfully defends itself and the Tribunal awards costs to El Salvador, Claimants will be unable to pay.

116. Claimants have demonstrated a lack of financial capability in their work in El Salvador. Claimants obtained the San Sebastian Gold Mine exploitation concession in 2003 based on their application which included a feasibility study with a proposed investment of $3.4 million dollars in the first five years of the concession.[66] By late 2006, however, Claimants had not begun work at the mine or the plant. In fact, Claimants had stopped work under the previous concession at the end of 1999 when the price of gold "suffered a severe decline."[67] This was before the measures Claimants allege have destroyed their investment, namely the two MARN resolutions dated July 2006, notified to Claimants in September 2006.

117. Claimants even made reference to their lack of performance of any work in the new concession as an argument before the Supreme Court of El Salvador of why they should not have been held responsible for not having begun the environmental protection measures required

[66] Claimants submitted this figure in their proposed "Investment Budget for First Five Years" appended to their 2002 Feasibility Study.
[67] Commerce Group Corp., Annual Report (Form 10-K), at 41 (July 14, 2010) (**Respondent's Exhibit 14**).

by the environmental permit.[68] It was Claimants' financial situation, not any acts of the Government, that has prevented Claimants from beginning their gold mining exploitation project. Far from excusing Claimants' non-performance of environmental obligations, the lack of work during the first years of the concession should actually result in the cancellation of the concession according to Mining Law Article 23.[69]

118. The Republic's concerns are reinforced by Commerce Group's recent Annual Report to the U.S. Securities and Exchange Commission, dated July 2010. The company reports that it only has $314,711 in assets and its obligations total $33.8 million.[70] The vast majority of debt is owed to related third parties including decades of accrued salaries to the past and current Presidents, years of rent for the company's headquarters, *more than half a million dollars for legal fees going back to 1980, more than half a million dollars in consulting fees going back to 1994*, and deferred Directors' fees since 1981.[71] The Republic believes that this history of non-payment and the evidence of increasing debt will support its request for security for costs if this arbitration goes forward.

B. The Republic Reserves its Right to File Counterclaims

119. The Government is not only concerned with the costs of this arbitral proceeding, but also with the clean-up of the San Sebastian River. Recent tests show that the river is contaminated with aluminum, arsenic, lead, lithium, and cyanide from acid drainage coming

[68] *See* Supreme Court of El Salvador Decision, Case 308-2006 (R-5) ("plaintiff explains that there was no non-compliance because the project had not continued since issuance of resolution 3026-003-2006 dated the fourth of January, two thousand six, which granted a period of three years for compliance with the proposed environmental measures. Plaintiff supports its argument with that which was established in the same act, which noted that exploitation of gold-bearing material had not been initiated; consequently there could not have been any damage that would violate the Environmental Law.").
[69] Mining Law of El Salvador, Art. 23, Legislative Decree No. 544, Dec. 14, 1995, published in the Official Gazette No. 16, Book 330 of Jan. 24, 1996, *amended by* Legislative Decree No. 475, July 11, 2001, published in the Official Gazette No. 144, Book 352 of July 31, 2001 ("If within one year of the effective date of the contract the holder does not initiate the preparatory work for the exploitation of the deposit, the concession shall be cancelled following a summary procedure . . . .") (**Respondent's Authority 21**).
[70] Commerce Group Corp., 2010 Annual Report at 31 (R-14).
[71] Commerce Group Corp., 2010 Annual Report at 36, 63-65.

from the mouth of the San Sebastian Gold Mine. The pollution has drastic effects on the health of the surrounding communities.

120. The Republic therefore reserves its rights under Article 46 of the ICSID Convention to file counterclaims related to Claimants' refusal to clean up or take appropriate protective measures after CAFTA entered into force in March 2006, to contain the contamination resulting from their previous mining activities under the old concession.[72]

C. The Republic Reserves its Rights to File Additional Preliminary Objections

121. Should this arbitration continue beyond this Preliminary Objection, El Salvador reserves the right under CAFTA Article 10.20.4 and 10.20.4(d) to file objections under CAFTA Article 10.20.4 regarding the lack of legal merit of the claims and to present preliminary objections to jurisdiction, competence, and admissibility under Articles 25 and 26 of the ICSID Convention and Rule 41(1) of the ICSID Arbitration Rules.

122. This Preliminary Objection is being filed under the expedited procedure of CAFTA Article 10.20.5 within 45 days of the constitution of the Tribunal, as the most efficient way to dispose of an arbitration that should have never been filed. It would be entirely inefficient to force a respondent using an expedited procedure to make preliminary objections, to include all possible preliminary objections in the expedited procedure, when one objection can dispose of the entire case, as in the arbitration before this Tribunal.

123. This is the reason why CAFTA Article 10.20.4 includes provisions allowing State Parties to file preliminary objections under the expedited procedure of Article 10.20.5 without waiving the right to raise any preliminary objection later in the arbitration. This explicit right enabling the State Parties to CAFTA to raise additional preliminary objections means that

[72] Claimants stopped working under the old concession in 1999 because of their own financial condition and have not extracted or processed gold under the new concession. The toxic residues are tied to Claimants' previous gold mining exploitation activities under the old concession, but the damage to the people and to the environment in the area is ongoing.

CAFTA's Objective of creating effective procedures for the resolution of disputes must be interpreted within the text of CAFTA which expressly includes this right.

124. The dicta by the tribunal in *RDC v. Guatemala* regarding this issue must be understood within the facts of that case. The tribunal in that case was deciding a jurisdictional objection regarding an additional reservation of rights that the claimant included in the text of the waiver. At that moment, the tribunal was speculating whether Guatemala would later raise an objection related to consent that would have complemented perfectly the objection being decided by the tribunal. The tribunal's comment was that although Guatemala would be within its right to raise such an additional objection later, it would be inefficient not to have raised it at the same time as the objection that Guatemala did raise, if it was Guatemala's intention to raise the other objection later. The fact remains that Guatemala did not raise the other objection.

125. In this case before this Tribunal, El Salvador's Preliminary Objection filed under the expedited procedure of CAFTA Article 10.20.5 is self-contained and sufficient to dispose of the entire case. Filing it by itself is the most efficient use of resources, considering the straightforward basis of the objection, Claimants' clear violation, and the fact that the objection goes to the jurisdiction and competence of the Tribunal for the entire arbitration.

VII. THE REPUBLIC'S PRAYER FOR RELIEF

126. The Republic of El Salvador respectfully requests that the Tribunal:

- Suspend the proceedings on the merits while this Preliminary Objection is pending.
- Dismiss this arbitration in its entirety.
- Issue an order awarding the Republic of El Salvador its share of the arbitration costs and its attorney's fees incurred related to this Objection, plus interest from the time of the decision until payment is made, at a rate to be established at the appropriate time.
- Grant the Republic any other remedy that the Tribunal may consider proper.

Dated: August 16, 2010

Respectfully submitted,

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