In The Matter Of An Arbitration Under
The Arbitration Rules of the
International Centre for Settlement of
Investment Disputes

ICSID Case No. ARB/09/17

COMMERCE GROUP CORP.

and

SAN SEBASTIAN GOLD MINES, INC.

Claimants

v.

REPUBLIC OF EL SALVADOR

Respondent

REJOINDER

REPUBLIC OF EL SALVADOR'S PRELIMINARY OBJECTION

15 October 2010

Before:
Professor Albert Jan van den Berg
(President)
Dr. Horacio A. Grigera Naón
Mr. J. Christopher Thomas, Q.C.

John E. Machulak
Eugene Bykhovsky
Machulak, Robertson & Sodos, S.C.
and
Professor Andrew Newcombe

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LEGAL AUTHORITIES

CL-19 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004

CL-20 *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, 16 March 2006

EXHIBITS

C-9 Letter dated 2 July 2009 from Machulak, Robertson & Sodos, S.C. to the Secretary General of ICSID

C-10 Witness Statement of Lic. Pedro Valle, dated 11 October 2010

C-11 Form 8-K dated 11 March 2008, including Exhibit 99.1

C-12 Form 8-K/A dated 10 April 2008

C-13 Form 8-K dated 5 August 2008

I. INTRODUCTION AND SUMMARY

1. The 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 this Rejoinder, the Claimants establish that they fully complied with jurisdictional requirements with respect to the submission of their Waivers (Section II) and that there was no requirement under CAFTA to request the discontinuance of the Domestic Proceedings as a pre-condition to submitting a claim to arbitration. The Claimants demonstrate that the Respondent's interpretation of Art. 10.18 would impermissibly add a restrictive jurisdictional requirement that is unsupported by the clear text of CAFTA.

2. In contrast to the Respondent's submission that the Claimants' approach puts respondent states at risk of facing multiple proceedings, the Claimants demonstrate that the requirement for the submission of waivers protects respondent states from being forced to defend themselves in concurrent or future proceedings. Further, the Claimants submit that tribunals have the power to supervise compliance with waivers and to make findings that CAFTA claims are inadmissible in light of the initiation or continuation of domestic proceedings during CAFTA arbitration proceedings (Section III). This approach reflects both the structure of CAFTA Article 10.18 and the principle that events occurring after the date for determining jurisdiction (2 July 2009) cannot affect the jurisdiction of this Tribunal. Claimants establish that in this case there is no issue of concurrent jurisdiction, nor any impediment to admissibility.

3. Respondent's Preliminary Objection framed the issue as whether Claimants were required to discontinue the Domestic Proceedings prior to submitting their claims to arbitration under CAFTA Chapter 10. As will be discussed in Section IV, this was the position taken by El Salvador's Attorney General after the Claimants submitted their Notice of Arbitration. El Salvador's Attorney General advised ICSID and the Claimants that no action by the Claimants could cure this claimed defect in jurisdiction. 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. The Claimants show that they acted in good faith in light of the position taken by the El Salvador Attorney General (Section IV).

4. In the final sections of the Rejoinder, the Claimants demonstrate that Sanseb was not a party to the Domestic Proceedings (Section V). Further, the Claimants submit that Respondent's Preliminary Objection cannot, in any event, result in the dismissal of all CAFTA claims (Section VI) or the claims under the Foreign Investment Law based on a separate consent to arbitration (Section VII). In Section VIII, Claimants provide a brief response to Respondent's reservation of rights.

II. THE CLAIMANTS HAVE FULLY SATISIFIED ALL JURISDICTIONAL REQUIREMENTS WITH RESPECT TO THE SUBMISSION OF THE WAIVERS

A. The Parties agree on a number of fundamental issues with respect to the determination of the Tribunal's jurisdiction over the Claimants' CAFTA claims

1. The Parties agree that the submission of waivers is a jurisdictional condition

5. The Claimants agree with the Respondent that the requirements set out in CAFTA Article 10.18 should be treated as jurisdictional. Although the Claimants argued in their Response that the text of CAFTA Article 10.18 establishes procedural requirements for the submission of claims, the Claimants accept that the submission of a waiver under CAFTA Article 10.18 is a condition and limitation on consent and thus a jurisdictional requirement.

6. As set out in Claimants' Response and in this Rejoinder, the Claimants submit that they have fully satisfied the CAFTA waiver requirement no matter how it is characterized.

2. The Parties agree that pursuant to the Waivers, Claimants waived the right to continue the Domestic Proceedings

7. The Parties agree that the Claimants' Waivers comply with the formal requirements of CAFTA Article 10.18. The Respondent has not alleged any formal defect in the Waivers. In its Reply, the Respondent states 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."[1] The Parties agree that the Waivers resulted in a waiver of the Claimants' rights to continue the Domestic Proceedings.

3. The Parties agree that the relevant date for the determination of the Tribunal's jurisdiction is the date the Claimants' Notice of Arbitration was received by the Secretary-General

8. The Parties agree that, in accordance with CAFTA Article 10.16.4(a), the Tribunal's jurisdiction is determined as of the date the Notice of Arbitration "is received by the Secretary-General". The Claimants emailed their Notice of Arbitration and wired their filing fee to the Secretary-General on 2 July 2009.[2] The Notice of Arbitration was therefore received in electronic form on 2 July 2009. In contrast, the Respondent's position is that the Notice of Arbitration was not officially received until 6 July 2009, the date that the Secretary-General confirmed receipt of the hard copy original and copies.[3] In the Claimants' submission, as the Notice of Arbitration was first received by the Secretary-General on 2 July 2009, this is the deemed date of receipt for jurisdictional purposes. Further, 2 July 2009 is the date for determining jurisdiction for the purposes of

[1] Reply, para. 3.
[2] Letter dated 2 July 2006 from Machulak, Robertson & Sodos, S.C. to the Secretary General of ICSID (C-9).
[3] Reply, para. 86.

Article 25, ICSID Convention, as this is the date of the investor's consent to arbitration. Rule 2(3) of the ICSID Institution Rules defines "Date of consent" as "the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted." As the Claimants provided their written consent to arbitration on 2 July 2009 in a Notice of Arbitration received by the Secretary-General on the same day, 2 July 2009 is the date for determining jurisdiction.

9. The Parties agree that events occurring after the Secretary-General receives the Notice of Arbitration are irrelevant to the Tribunal's jurisdiction.[4] Jurisdiction is to be determined in light of the situation existing on 2 July 2009.

10. This necessarily means that the fact that the Domestic Proceedings continued after 2 July 2009 and that the Claimants did not formally terminate the Domestic Proceeding after 2 July 2009 are not relevant to whether the Tribunal has jurisdiction. Jurisdiction is neither conferred nor lost by events occurring after 2 July 2009. The Respondent's extended submissions with respect to the Claimants' conduct after 2 July 2009 are entirely irrelevant for the question of whether this Tribunal has jurisdiction.

B. The CAFTA does not require discontinuance of domestic proceedings prior to the submission of claims

11. The fundamental legal issue that divides the Parties is whether the Claimants submitted waivers in compliance with Article 10.18 and, in particular, whether the CAFTA requires a claimant to request termination of domestic proceedings *prior* to submitting a notice of arbitration. Respondent submits that "the waivers were invalid the moment they were submitted"[5] because of the existence of the Domestic Proceedings. According to the Respondent, "[i]n order to make their waivers effective, Claimants were

[4] The Respondent states at para. 86 of its Reply that: "As of July 6, 2009, the parties' legal rights and obligations relevant for the Tribunal's determination of its jurisdiction were frozen as a result of the filing." Accord, Response, para. 40.
[5] Reply, para. 90.

required to request termination of the domestic proceedings."[6] Respondent maintains that an "investor seeking to take advantage of CAFTA must make its waiver effective by taking appropriate action before initiating CAFTA arbitration".[7] Respondent therefore argues that the waiver requirement in Article 10.18 required the Claimants, at a minimum, to request termination of the Domestic Proceedings *prior* to submitting the Notice of Arbitration.[8] According to the Respondent, since that was not done, the Claimants' Waivers are materially defective and invalid and the Tribunal lacks jurisdiction.

12. As the Claimants highlighted in their Response,[9] the Respondent's interpretation of the waiver requirement in CAFTA Article 10.18.2 cannot be sustained in light of accepted principles of treaty interpretation. The Respondent's interpretation requires that the Tribunal read into Article 10.18.2 a jurisdictional requirement that is not present in the clear treaty text. The plain and ordinary meaning of Article 10.18.2 is that a written waiver must accompany a notice of arbitration. The Claimants do not see how a requirement to submit a written waiver of rights is somehow transformed into an obligation to terminate domestic proceedings prior to the submission of the Notice of Arbitration.

13. The Respondent does not contest that there is no principle of restrictive interpretation of jurisdictional provisions in treaties, yet the alleged jurisdictional requirement to discontinue domestic proceedings prior to submitting a notice of arbitration is a restrictive interpretation of the jurisdictional requirements of CAFTA. The Respondent's interpretation creates a jurisdictional requirement that does not exist in the treaty text.

14. Article 10.18.2 provides as follows:

[6] Reply, para. 65.
[7] Reply, para. 37.
[8] Reply, para. 45.
[9] Response, para. 46.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

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

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

15. The ordinary meaning of Article 10.18.2(b), in its context and in light of the object and purpose of the CAFTA, does not support the Respondent's interpretation.[10]

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

17. The clear and plain text of Article 10.18.2(b) does not require discontinuance of domestic proceedings prior to submitting a claim; it requires the submission of a written waiver of the right to continue such proceedings. In the Claimants' view, it does not make sense to interpret Article 10.18.2(b) as requiring discontinuance of existing proceedings *prior* to submitting a claim while *simultaneously* requiring a written waiver of the right to continue those same proceedings. If that were

[10] Article 31(1), *Vienna Convention on the Law of Treaties*, 1969 provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (CL-14).

the case, there would be no need for the waiver of the right to continue. It would be entirely superfluous. If the CAFTA's drafters had intended to make discontinuance of existing proceedings a jurisdictional condition to submitting a claim, they could have done so expressly through clear language to that effect, while maintaining a requirement for the waiver of rights with respect to the initiation of new claims. Respondent's interpretation of the CAFTA text rewrites the requirement to submit a waiver of any right to initiate or continue proceedings into a requirement to: (i) discontinue existing proceedings prior to the submission of a claim; and (ii) waive any right to initiate new proceedings. The ordinary meaning of the treaty text does not support this interpretation. The Respondent, not the Claimants, disregards the plain text of the CAFTA.

18. Turning to the context, Respondent suggests Article 10.18.3 supports its position that there is an obligation to discontinue domestic proceedings prior to submitting a CAFTA claim because otherwise "the permission granted in Paragraph 3 of Article 10.18 to continue certain types of actions would be entirely unnecessary".[11]

19. Article 10.18.3 provides:

> Notwithstanding paragraph 2(b), the claimant . . . may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

20. The text of Article 10.18.3 does not support the Respondent's argument that Article 10.18.2 requires discontinuance of existing proceedings prior to the submission of a claim. Article 10.18.3 provides an exception to or carve-out from the written waiver required under Article 10.18.2, confirming that the waiver of rights does not apply to certain types of proceedings. If the intent of the CAFTA drafters had been to provide an absolute prohibition on continuation of domestic proceedings as a condition of jurisdiction, Article 10.18.3 would have been written as a prohibition (i.e. "A claimant

[11] Response, para. 35.

may not initiate or continue any action, except for an action that seeks interim relief….”). As explained below, the fact that the text of Article 10.18 requires the submission of a waiver, rather than establishing that there is no CAFTA jurisdiction if domestic proceedings are continued or initiated (a prohibition), reflects a policy of respect for local courts and for the sovereign choices of respondent states.

21. The waiver requirement in Article 10.18.2 protects a respondent state from being forced to defend itself in concurrent proceedings with respect to the same measure. Further, the waiver requirement also serves to protect the respondent state from being subject to future claims with respect to a measure that has already been the subject of a CAFTA claim. Importantly, Article 10.18.2 does not require a claimant to make a choice between domestic and CAFTA proceedings with respect to the same measure. Rather, domestic proceedings may be initiated, while Article 10.18.1 requires that any CAFTA claim be commenced within three years. The structure of Article 10.18 reflects a policy that promotes resolution of claims in host state courts, while at the same time ensuring that CAFTA claims are brought within a reasonable period of time. Once a CAFTA claim is brought, the waiver serves to protect the respondent state from being forced to defend itself in concurrent proceedings with respect to the same measure or from being subject to future proceedings with respect to the same measure. The decision in *Vanessa Ventures v. Venezuela*[12] serves to highlight that local courts are competent to adjudicate on the meaning of waivers and enforce the relinquishment of rights in the waiver.

22. The text of Article 10.18.2 does not provide for different types of jurisdictional requirements for waivers depending on the type of proceeding in question (i.e., whether it is a proceeding commenced before a CAFTA claim is submitted to arbitration, a new proceeding during the pendency of a CAFTA arbitration, or a proceeding after a final award). Rather, a uniform jurisdictional requirement applies to each case—to provide the required written waiver as a condition of submitting CAFTA

[12] *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6 [“*Vanessa Ventures*”], Decision on Jurisdiction, 22 August 2008 (CL-12).

claims. With respect to each kind of proceeding (existing or future) the state receives the same protection—it is the beneficiary of a waiver of rights. With respect to the initiation of future proceedings after the closure of CAFTA proceedings, the submission of the signed waiver provides the respondent state protection because the respondent state may benefit from the waiver by making use of it in any future proceedings. The same is true in the case of concurrent proceedings—whether continuing or newly initiated. The respondent state has the benefit of the waiver, which it can use if it so wishes.[13] This reflects the structure of the requirement that a claimant must submit a written waiver. The point is that the text of Article 10.18.2 does not establish different jurisdictional requirements for existing and new proceedings—the same jurisdictional requirements apply. The treaty text does not support the Respondent's argument that different jurisdictional requirements apply in these different situations.

23. The drafters of the CAFTA did not mandate discontinuance of domestic proceedings as a requirement prior to the submission of a CAFTA claim. The fact that the CAFTA does not expressly prohibit or rule out the possibility of the existence of concurrent proceedings with respect to the same measure has an important corollary: a respondent state can exercise a sovereign choice in whether it wishes concurrent proceedings to continue (i.e. whether to obtain a benefit from the waiver). A respondent state may well decide that it prefers to have the legality of its measures reviewed in its courts. The Respondent's interpretation of Article 10.18.2 deprives the respondent state of this choice by mandating that a claimant *must* discontinue domestic proceedings if it wishes to submit a CAFTA claim.

24. The Claimants do not suggest that respondent states generally desire to be subject to concurrent proceedings. The Claimants' submission is simply that there may be circumstances where a respondent state might actually prefer that its courts review the legality of its actions and that *CAFTA does not, in principle, make concurrent*

[13] The Claimants do not argue, as the Respondent suggests they do, "that a respondent State must be responsible for terminating the parallel proceedings" (Reply, para. 36). This misrepresents Claimants' argument. In their Response, Claimants argue that the respondent state is in the position to make use of the waiver, *if it so wishes* (Response, para. 44).

proceedings impossible. Take the current case. Despite the Respondent's position that the failure to discontinue the Domestic Proceedings bars this Tribunal's jurisdiction, it is not beyond conjecture to suggest that a respondent state in a similar position to the Respondent, confident in its view that its courts will find in its favor, would view a potential court judgment in its favor as being in both the public interest and, additionally, a strategic advantage in any CAFTA arbitration. It is not beyond conjecture to suggest that a respondent state might actually be in a better position on the merits in a CAFTA arbitration where its courts have upheld the legality of its conduct. It is not beyond conjecture to suggest that a respondent state might view itself in a position where it cannot lose by waiting (i.e., it can always use claimant's waiver if the respondent's own state court fails to rule in its favor) and would therefore choose to hold back on using the waiver.

25. CAFTA does not make concurrent proceedings impossible. A claimant's delivery of a waiver to a respondent state ensures that a respondent state is not forced to defend itself in multiple proceedings. Article 10.18 contemplates the possibility of domestic proceedings and cannot be reasonably interpreted as an absolute jurisdictional bar to the possibility of concurrent proceedings. The delivery of the waiver puts a respondent state in the position of having a choice. Although in the vast majority of cases, it may well be that respondent states want to have the benefit of the waiver, a respondent state may also have an interest in the conclusion of domestic proceedings that are before its courts for a whole variety of reasons (as a precedent relevant for other cases, to promote the rule of law, to allow the determination of a counterclaim or because it is otherwise in the public interest). CAFTA does not bar the possibility of concurrent proceedings and there is no necessary evil in such proceedings. Indeed, they may well serve one of the overall objectives of CAFTA to "create effective procedures … for the resolution of disputes".[14]

[14] Article 1.2(1)(f), CAFTA (CL-15).

26. In conclusion, the ordinary meaning of Article 10.18.2(b), in its context and in light of the object and purpose of the CAFTA, does not support the Respondent's interpretation.

C. *Waste Management I v. Mexico* and *RDC v. Guatemala* are distinguishable on their facts and are not persuasive on the question of whether there is a requirement to discontinue prior to submitting a CAFTA claim.

27. Claimants reiterate their submission in their Response[15] that in *Waste Management v. Mexico I*[16] the majority of the tribunal found that the investor's waiver was materially defective because the investor limited the scope of the waiver *ratione materiae* by insisting that its waiver did not extend to claims based on domestic law. As a result, the tribunal found that the jurisdictional condition of submitting a waiver had not been satisfied.

28. While Claimants have directed the Tribunal to the dissenting opinion of Mr. Keith Highet in *Waste Management I* on a number of issues, this is not to say that the Award in *Waste Management I* fails to support the Claimants' position. To the contrary of what the Respondent suggests, the Award in *Waste Management I* supports the view that a waiver filed in conformance with the language of a treaty satisfies the jurisdictional requirement.

29. First, as distinct from the facts before this Tribunal, the investor in *Waste Management I* submitted a waiver that deviated from the language of the treaty in question, NAFTA. In detail, the investor submitted a waiver that included the following language: "Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico."

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[15] Response, paras. 36-39.

[16] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 ["*Waste Management I*"], Arbitral Award, 2 June 2000 (CL-7).

30. Second, as distinct from the facts before this Tribunal, Waste Management filed three new legal proceedings *after* tendering its waiver, namely, (1) it filed an appeal of an adverse judgment approximately six months after tendering this waiver, (2) it filed an appeal of a separate adverse judgment approximately four months after tendering this waiver, and (3) it filed an arbitration approximately one month after tendering this waiver.[17]

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

32. Describing the process used by the tribunal in *Waste Management I*, the tribunal in *Waste Management II* stated:

> As an aspect of its power to determine its jurisdiction, the first Tribunal had to determine both that the waiver conformed to NAFTA requirements and that it was a genuine waiver, expressing the true intent of the Claimant at the time it was lodged. This did not mean that the Tribunal was entitled or required to ensure actual compliance with the waiver. That would be a matter for the Respondent to plead in any Mexican court before which proceedings were brought contrary to the terms of the waiver.[18] [footnotes omitted]

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

> However, this Tribunal is unable to agree with the assertions put forth by the Mexican Government to the effect that the purported function of the Arbitral Tribunal, in view of Article 1121, is to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding, in order to comply with the

[17] *Waste Management I*, Arbitral Award, 2 June 2000 [*Waste Management I*], §25 (CL-7).
[18] *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, 26 June 2002, para. 10 (CL-8).

> procedure established under NAFTA Chapter XI Section B, and, in this manner, validate or perfect the consent to said Treaty. This Tribunal cannot but reject such an interpretation, since it lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one.
>
> In this case, it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals.[19]

34. The majority's award against Waste Management was ultimately based on the language of the waiver. The tribunal stated:

> According to the interpretation of the waiver maintained by the Claimant, said waiver would refer exclusively to proceedings that expressly invoke failure to comply with obligations of international law set forth in Chapter XI of NAFTA.[20]

And:

> If the Claimant, upon formulating its waiver, had clearly adopted the interpretation it now maintains, it would not have conditioned its waiver with the terms as it did, because under said interpretation, it would have been able to take parallel action in domestic courts or tribunals without expressly invoking NAFTA provisions and without thereby affecting these arbitral proceedings.[21]

And ultimately concluded:

> Based on the foregoing, it is clear that the Claimant issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121....[22]

35. The Respondent asserts in its Reply that "[i]n its Preliminary Objection, El Salvador accurately described the view of the *Waste Management I* majority: the validity of a waiver depends on the conduct of the party making the waiver..."[23] That is not an accurate summary of the Award of the *Waste Management I* tribunal.

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[19] *Waste Management I*, Arbitral Award, 2 June 2000 [*Waste Management I*], §15 (CL-7).
[20] *Waste Management I*, Arbitral Award, 2 June 2000 [*Waste Management I*], §27 (CL-7).
[21] *Waste Management I*, Arbitral Award, 2 June 2000 [*Waste Management I*], §28 (CL-7).
[22] *Waste Management I*, Arbitral Award, 2 June 2000 [*Waste Management I*], §30 (CL-7).
[23] Reply, para. 38.

36. In the present case, the Respondent agrees that the Waivers submitted by the Claimants "waived the right to continue the domestic judicial proceedings."[24] There is no question as to the scope of the Waivers. The Respondent's complaint is that there is an additional obligation—to discontinue domestic proceedings prior to submitting a claim. For the reasons outlined in Section II(B) above, the Claimants submit that CAFTA does not impose such a requirement.

37. The Respondent argues that "the validity of a waiver depends on the conduct of the party making the waiver"[25] and that the United States, as well as the Dominican Republic and Guatemala in their CAFTA arbitrations "all agreed that claimants have to act in conformity with the waiver for the requirement to be fulfilled".[26] The Respondent cites the Dominican Republic's Memorial on Jurisdiction in *TCW Group, Inc., Dominican Energy Holdings, L.P. v. The Dominican Republic*, which argues that the "post-waiver conduct [ran] afoul of the material requirements of Article 10.18(2) of CAFTADR".[27]

38. Despite the Respondent's agreement that jurisdiction is determined in light of the situation existing when the claims are submitted to arbitration, the Respondent appears to suggest that conduct after the submission of the waiver is relevant to the determination of this Tribunal's jurisdiction.

39. The jurisdictional question cannot be that "claimants have to act in conformity with the waiver for the requirement to be fulfilled" because that entails consideration of conduct after the waiver was submitted. This is impermissible. There either was or was not jurisdiction on 2 July 2009.

40. Thus, the Respondent's extended submissions on the Claimants' conduct and alleged intentions after 2 July 2009 are entirely irrelevant for the purposes of the Respondent's Preliminary Objection, which is a jurisdictional objection.

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[24] Reply, para. 3.
[25] Reply, para. 38.
[26] Reply, para. 46.
[27] Reply, para. 46, citing to *TCW Group, Inc., Dominican Energy Holdings, L.P. v. The Dominican Republic*, Respondent's Memorial on Jurisdiction, Nov. 21, 2008, para. 35 (RL-9).

41. With respect to the consideration of an investor's conduct after the submission of the waiver to assess whether the investor has materially complied with the waiver, the Claimants note that the majority of the tribunal in *Waste Management I* considered the investor's conduct after submitting the waiver in assessing its jurisdiction. As highlighted above, the tribunal's discussion of the investor's post-waiver conduct occurs in the context of interpreting the meaning of the additional language that the investor added to its waiver. This is different from saying that a valid waiver is invalidated by subsequent conduct.

42. In any event, conduct after the submission of the waiver cannot be used to retroactively invalidate jurisdiction. As submitted in Section III, investor conduct after the date of the submission of the claim is a question of admissibility, not jurisdiction.

43. The Claimants reiterate their submissions in their Response[28] that, to the extent that *RDC v. Guatemala*[29] stands for the principle that the mere existence of concurrent proceedings on the date of submission of a CAFTA claim makes a waiver defective, the decision in *RDC* should not be followed. Although the *RDC* tribunal found that the defect in the investor's waivers was triggered because the "two domestic arbitration proceedings exist[ed] and overlap[ped]",[30] the tribunal did not explain why an overlap necessarily renders an otherwise valid waiver defective and why that conclusion is mandated by the CAFTA text as interpreted by rules of treaty interpretation. With great respect, the tribunal's conclusion is unreasoned.

44. The *RDC* tribunal's approach to interpreting Article 10.18.2 (focusing on the "overlap" of different proceedings) is unpersuasive as a test for whether jurisdictional conditions have been met. As discussed in Section II(B), concurrent proceedings may arise in different ways. In the case where a claimant begins domestic proceedings *after* the initiation of a CAFTA claim, although there would be concurrent proceedings, a

[28] Response, Section III(A).
[29] *Railroad Development Corporation v. The Republic of Guatemala*, ICSID Case No. ARB/07/23 [*RDC*], Decision on Objection to Jurisdiction, 17 November 2008 (CL-9).
[30] *RDC*, Decision on Objection to Jurisdiction, para. 54 (CL-9).

CAFTA tribunal would still have jurisdiction (indeed the tribunal may have already determined that it had jurisdiction) because of the fundamental principle that events after the submission to arbitration are not relevant to the determination of jurisdiction. This example proves the Claimants' point that Article 10.18 does not, in principle, bar the possibility that there may be concurrent proceedings, rather it protects a respondent state from the risk of being subject to concurrent claims by making it the beneficiary of a waiver.

45. Further, if one accepts, as did the *RDC* tribunal, that the waiver is defective or invalid for the purposes of the CAFTA arbitration, the waiver would arguably still be valid as a legal instrument to waive any rights to initiate or continue non-CAFTA proceedings. This puts claimants in double jeopardy—the loss of the CAFTA arbitration and the loss of any rights to seek recourse before another body with respect to the same measure.

III. THE TRIBUNAL HAS THE POWER TO SUPERVISE COMPLIANCE WITH THE WAIVER REQUIREMENT AS A QUESTION OF ADMISSIBILITY OF CLAIMS

46. As established in the previous section, the conduct of a claimant after the submission of waivers ("post-waiver conduct") is irrelevant to the determination of jurisdiction. This does not mean, however, that a CAFTA tribunal is powerless in the face of conduct by a claimant that shows that "the waiver is hollow or frustrates its object and purpose".[31] In the Claimants' submission, the Tribunal has the power to supervise compliance with waivers and to make findings that CAFTA claims are inadmissible in light of the initiation or continuation of domestic proceedings during CAFTA arbitration proceedings.

47. The Claimants' Response highlighted that conduct inconsistent with waivers can be considered a question of the admissibility of claims, quoting Mr. Keith

[31] Response, para. 65 citing *Waste Management I,* Dissenting Opinion, para. 59 (CL-11).

Highet in his dissenting opinion in *Waste Management I*.[32] In parodying the Claimants' position, Respondent refers to a hypothetical situation where a claimant initiates "proceedings in multiple courts in multiple jurisdictions as well as proceedings with other arbitration tribunals".[33] It is exactly this type of abusive conduct that an arbitral tribunal can control by finding claims to be inadmissible until the offending conduct is remedied.

48. Decisions of ICSID tribunals operating under investment treaties have confirmed that tribunals have the power to rule on the admissibility of claims and to stay proceedings until any impediment to admissibility has been remedied. In *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*,[34] the tribunal found claims based on the breach of an investment contract to be inadmissible in light of an exclusive jurisdiction clause in the contract.[35] As noted by the tribunal in *SGS Philippines*, "international tribunals have a certain flexibility in dealing with questions of competing forums"[36] and there is a power to stay a proceeding, citing both ICSID Arbitration Rule 19, which gives an ICSID tribunal the general power to "make orders required for the conduct of the proceeding" and the second sentence of Article 44, ICSID Convention, in accordance with which: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

49. Other ICSID tribunals have required investors to remedy defects in the admissibility of claims. In *Western NIS Enterprise Fund v. Ukraine*, the tribunal treated the investor's failure to provide proper notice of a claim as an issue of admissibility that could be remedied by the provision of notice.[37]

50. If the Domestic Proceedings were ongoing and overlapped with these proceedings (which in this case they were not and did not), then the Tribunal, in the

[32] Para. 65, Response.
[33] Para. 44, Reply.
[34] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 [*SGS Philippines*], Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (CL-19).
[35] *SGS Philippines*, Decision of the Tribunal on Objections to Jurisdiction, paras. 154-155 (CL-19).
[36] *SGS Philippines*, Decision of the Tribunal on Objections to Jurisdiction, para. 173 (CL-19).
[37] *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, 16 March 2006 (CL-20).

exercise of its supervisory powers, could order that CAFTA claims with respect to the same measures at issue in the Domestic Proceedings were inadmissible until the impediment had been remedied.

51. The Claimants submit that the supervisory power of a tribunal over admissibility of claims combined with the ability of respondent states to rely on waivers provides respondent states a guarantee that they will not be forced to defend concurrent proceedings. This is consistent with one of the overall objectives of CAFTA to "create effective procedures …. for the resolution of disputes".[38]

52. In the current case there is no impediment to the admissibility of claims resulting from the Domestic Proceedings. There is no impediment because there were never in fact concurrent proceedings. Although the claims are deemed submitted to arbitration on 2 July 2009, in accordance with ICSID Arbitration Rule 6, the present Tribunal was not constituted, and the current proceeding did not begin, until 1 July 2010, the date of notification by the Secretary-General that all the arbitrators had accepted their appointment. The Salvadoran Supreme Court decided the Domestic Proceedings on 26 February 2010 and 18 March 2010 and notified the parties of both decisions on 29 April 2010. The Respondent nominated its arbitrator in the present case on 28 April 2010, well over five weeks *after* the final Court Decisions.

53. Indeed, in commenting on the delay in the constitution of the Tribunal, the Respondent states that: "Awaiting a response from Claimants, and hoping to save the costs of constituting a tribunal and going through the Preliminary Objection phase, El Salvador did not appoint an arbitrator until Claimants finally responded that they wanted the arbitration to go forward, after ICSID notified the parties of its intention to terminate the arbitration after six months of inactivity in accordance with ICSID Arbitration Rule 45."[39] Respondent's allegation that Claimants purposefully maintained duplicative proceedings is, of course, fantasy on the part of the Respondent. But more to the point here, before this Tribunal was constituted there were no arbitration proceedings in any

[38] Article 1.2(1)(f), CAFTA (CL-15).
[39] Reply, para. 131.

real sense of the word. An arbitration proceeding is a proceeding before an arbitration tribunal. There were no arbitration proceedings in this case until well over three months after the Court Decisions.

54. The Respondent's allegation that Claimants did "purposefully maintain duplicative proceedings to maximize their opportunity for favorable results in violation of the CAFTA waivers"[40] is complete fiction. As set out in the next section, the Claimants acted in good faith in submitting the Waivers, which are fully compliant with all CAFTA requirements, and acted consistently with the Waivers from the date of their submission.

55. Finally, if the Tribunal were of the view that there was an impediment to the admissibility of claims as a result of the existence of the Domestic Proceedings, any impediment that may have existed, no longer exists as a result of the Court Decisions. The Respondent has suffered no prejudice by the conclusion of the Domestic Proceedings in its favour. Indeed, Respondent relies on the Court Decisions to suggest that the revocation of the environmental permits was justified and legal.[41]

56. The Claimants note that, unlike in *RDC*, where the Tribunal was faced with overlapping proceedings, there are currently no overlapping proceedings, nor in the Claimants' submission have there ever been overlapping proceedings.

57. As a final point, the Claimants note that if the Domestic Proceedings had been concluded in the Claimants' favour, the Respondent would certainly now be claiming that all rights in the Domestic Proceedings, including the right to participate in an appeal or enforce a judgment had been waived by the Claimants. The Respondent agrees that the Claimants' Waivers applied to the Domestic Proceedings.[42] The Respondent would have been able to use the Waivers as a complete defence to any attempt by the Claimants to benefit from the Court Decisions. The Waivers from the day that they were executed prevented any prospect of double recovery. Further, any finding

[40] Reply, para. 131.
[41] Reply, para. 126.
[42] Reply, para. 3.

by this Tribunal that El Salvador breached CAFTA or the Foreign Investment Law cannot be inconsistent with the Court Decisions, as the Court never considered breaches of CAFTA or the Foreign Investment Law.

58. In conclusion, the Claimants submit that there is no impediment to the admissibility of their claims that the revocation of the environmental permits breached CAFTA and the Foreign Investment Law.

IV. THE CLAIMANTS HAVE ACTED CONSISTENTLY WITH THE WAIVERS SINCE 2 JULY 2009

59. The Respondent alleges that the Claimants have acted in bad faith because the Claimants did not request the termination of the Domestic Proceedings prior to submitting their Notice of Arbitration and "have insisted on violating the waivers".[43]

60. As Claimants submitted in their Response, Claimants' so-called bad faith is nothing but a reflection of the Respondent's attempt to add a requirement that does not exist in the clear text of the CAFTA.

61. The Claimants did exactly what investors wishing to bring a claim under CAFTA should do. They reviewed the text of CAFTA Chapter 10 and the ICSID Arbitration Rules. They submitted a Notice of Arbitration, paying close attention to the requirements in Article 10.18.2 and Article 10.18.3 with respect to written waivers.

62. The treaty language in CAFTA Chapter 10 for the invocation of investor-state arbitration is meant to be used by investors, not all of whom will have experience with international arbitration. In order to be effective, procedural and jurisdictional requirements should be given an ordinary meaning in their context and in light of their object and purpose. The treaty should not be interpreted to have implied jurisdictional requirements that are not evident on the face of the treaty. The clear text of the CAFTA does not require discontinuance of domestic proceedings as a condition of submitting a

[43] Reply, para. 132.

claim. Accordingly, prior to submitting their Notice of Arbitration dated 2 July 2009, there was no reason for Claimants to request termination of the Domestic Proceedings.

63. In the Attorney General of El Salvador's letter to the Secretary-General of ICSID dated 14 August 2009, the Attorney General asked the Secretary-General to find that the Claimants' request was manifestly outside the jurisdiction of ICSID because the Claimants' Waivers were defective. The Attorney General's letter stated that even "if claimants were to withdraw the legal proceedings still pending in El Salvador, claimants' failure to honor their waivers before submitting the request for arbitration to ICSID cannot be remedied."[44] The letter made it clear that the Attorney General's position was that the Waivers were defective, defects could not be remedied, and that formally discontinuing the Domestic Proceedings would have no effect. The Claimants reviewed the Waivers in light of the requirements in Article 10.18.2 and Article 10.18.3 and concluded that the Waivers satisfied CAFTA requirements. Obviously, the Respondent could have requested a formal termination of the Domestic Proceedings, but instead, took the position that termination of the Domestic Proceedings would not make any difference.

64. After the Notice of Arbitration was registered by ICSID on 21 August 2009, the Claimants worked carefully and diligently to close their production facilities, to end the employment of their employees, to marshal the resources necessary to prosecute their claims, and to obtain the assistance of legal counsel with international investment law and arbitration experience. It was the Respondent that slowed things down by not nominating an arbitrator.

65. The Respondent's allegation that Claimants did "purposefully maintain duplicative proceedings to maximize their opportunity for favorable results in violation of the CAFTA waivers"[45] is completely baseless. The Claimants, in their view, submitted binding, legal waivers, where they forfeited their rights. Although the Respondent now

[44] Letter from Attorney General of El Salvador to Secretary-General of ICSID, 14 August 2009 (R-8). This letter was sent as an *ex parte* communication to ICSID; however, ICSID forwarded it to the Claimants.
[45] Reply, para. 131.

seems to have gravitated to the argument that the Claimants should have done something more to terminate the Domestic Proceedings, on 14 August 2009 the Attorney General of El Salvador stated that this would be pointless, and the Respondent did not change its view on this through the time it filed its Preliminary Objection.

66. The Respondent's statements that the "proceedings continue[d] in spite of the request to terminate them," that Claimants "refused" to and even "deliberately refused" to discontinue the Domestic Proceedings" all misleadingly imply that after the Claimants submitted their Notice of Arbitration, the Respondent warned them that they refused some request on the part of the Respondent to discontinue the Domestic Proceedings. The Respondent never made any such request. The Respondent's only demand was that the Claimants dismiss their CAFTA proceedings.

67. The Respondent now refers to a Supreme Court of El Salvador notice regarding the Domestic Proceedings dated 1 October 2009. The Respondent states:

> In fact, on October 1, 2009, three months after Claimants initiated this ICSID arbitration, the Supreme Court issued a notice to the parties, including Claimants, mentioning that it had received all the required submissions and including a copy of a note from the Secretary of the Supreme Court to the Attorney General reporting the status of the domestic proceedings as awaiting final decisions. There is no record that Claimants responded to this notice by informing the Supreme Court that they were under a legal obligation not to continue these domestic judicial proceedings because they had already initiated international arbitration under CAFTA and had submitted waivers purporting to abandon their right to continue the domestic judicial proceedings.[46]

68. On the face of it, this "notice" did not require any response. The "notice" is in fact a response to an 18 August 2009 written request of the Attorney General of El Salvador for information from the El Salvadoran Supreme Court showing the status of the actions filed in 2006. The Clerk of the Court responded that the actions were pending. There apparently was no need for any of the attorneys involved in those cases to respond to the Clerk's letter. While the Respondent suggests that this document (which does not even appear to be addressed to the Claimants' counsel – Lic. Luis

[46] Reply, para. 63.

Alfonso Valle Deras) ought to have prompted counsel for the Claimants to file something with the El Salvador Supreme Court, one might also wonder why the Respondent did not do so. The Respondent had possession of the Waivers at this point in time. Yet, the Respondent did not bring them to the attention of the Court. It seems logical to conclude that the so-called "notice" was nothing more than a response to the Attorney General's information request. The Attorney's General's request and the Clerk's response do not show that the Claimants were acting inconsistently with their Waivers.

69. The Respondent also refers to a letter from Claimants' local counsel, Lic. Pedro Valle to MARN,[47] in December 2009 as evidence that the Claimants were waiting for the Supreme Court's decisions and that it never intended the Waivers to be effective. This is not the case and Lic. Pedro Valle's letter, when read in its context, highlights that by December 2009, the Claimants were closing their facilities and were complying with the revocation of the environmental permits. In other words, the Claimants having waived their rights to continue the Domestic Proceedings and having begun their CAFTA proceedings, certainly showed by their conduct that they were not pursuing the Domestic Proceedings. There is nothing in this letter suggesting otherwise.

70. Although Lic. Pedro Valle has represented Commerce Group Corp. in El Salvador as local counsel in certain matters, he was not the lawyer acting for Commerce in the Domestic Proceedings (whose name is Luis Alfonso Valle Deras).[48] Despite the similarity in names the two lawyers do not belong to the same law firm, nor are they related.[49] In his witness statement dated 11 October 2010, Lic. Pedro Valle explains as follows:

> The purpose of my letter of December 10, 2009, was to formally notify the MARN that Commerce Group Corp. was closing the San Cristóbal plant, consistent with MARN resolution No. 3249-779-2006 dated July 5, 2006. The plant was situated on property that Commerce Group Corp. leased from CORSAIN, and the company terminated the lease. Through December 14, 2009, Commerce Group Corp. had employees at the plant. As of December 14, 2009, all the remaining employees were being terminated and the property was being

[47] Letter from Pedro Valle to Minister of the Environment, 10 December 2009 (R-15).
[48] Witness Statement of Lic. Pedro Valle, dated 11 October 2010, para. 4 (C-10).
[49] Witness Statement of Lic. Pedro Valle, dated 11 October 2010, para. 4 (C-10).

> handed back to the landlord, CORSAIN. At the same time Commerce Group Corp. contracted to disassemble the plant equipment and undertake other work needed to close the site. The purpose of my communication was to advise MARN of these facts.[50]

71. In his letter dated 10 December 2009, Lic. Pedro Valle refers to the fact that "compliance with the requirements established in the resolution in question remains outstanding".[51] This was, of course because, since 2006, the validity of the resolutions was being challenged as a result of the Domestic Proceedings. However, in 2009, the site was being permanently closed and Lic. Pedro Valle writes that: "compliance with the measures established by the Ministry in reference in its resolution dated July 5, 2006 will begin".[52]

72. The resolution in question was the one that revoked the environmental permits, the legality of which was subject of the Domestic Proceedings beginning in late 2006. Notwithstanding that the Domestic Proceedings had not formally been terminated and the legality of the resolution revoking the environmental permits had not been determined, Lic. Pedro Valle states that: "compliance with the measures established by the Ministry in reference in its resolution dated July 5, 2006 will begin."[53] Far from suggesting that the Claimants were waiting in hope of a favourable determination in the Domestic Proceedings, the letter demonstrates that the Claimants were closing the facility and had effectively abandoned the Domestic Proceedings.

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[50] Witness Statement of Lic. Pedro Valle, dated 11 October 2010, para. 5 (C-10). The original Spanish reads: "Que el propósito de mi carta del 10 de Diciembre del 2009, fue únicamente para notificar al MARN que Commerce Group Corp. estaba cerrando la planta San Cristóbal, conforme con la resolución de MARN No. 3249-779-2006 del 5 de Julio, 2006. La planta estaba situada en una propiedad que Commerce Group Corp. alquilaba a CORSAIN, y la compañia termino con el contrato de alquiler. Hasta el 14 de Diciembre del 2009, Commerce Group Corporation tenia empleados en la planta. El 14 de Diciembre del 2009, las posiciones de los restantes empleados llegaron a su fin y la propiedad fue entregada a su propietario, CORSAIN. Al mismo tiempo, Commerce Group Corp. contrato para desmantelar el equipo de la planta y emprender cualquier otro trabajo necesario para cerrar el sitio. El propósito de mi comunicación fue para avisar a MARN de estos hechos."

[51] Letter from Pedro Valle to Minister of the Environment, 10 December 2009 (R-15). The original Spanish reads: "se había dejado pendiente de cumplir con los requerimientos establecidos en dicha resolución".

[52] Letter from Pedro Valle to Minister of the Environment, 10 December 2009 (R-15). The original Spanish reads: "se dará inicio al cumplimiento de las medidas establecidas por ese Ministerio en su resolución de fecha 5 de julio de 2006".

[53] Letter from Pedro Valle to Minister of the Environment, 10 December 2009 (R-15).

73. The Respondent's allegation that the Claimants assert that "they nevertheless have the "right" to allow the domestic proceedings to continue so long as they take no affirmative steps to keep it going"[54] is incorrect. As a result of the Waivers (waivers of "*any* right"), the Claimants retained no rights in the Domestic Proceedings.

74. Claimants' position is that they did not have a positive obligation to request the termination of the Domestic Proceedings either when the Notice of Arbitration was submitted or thereafter. In any event, any conduct after 2 July 2009 is irrelevant for the purposes of determining the Respondent's jurisdictional objection.

75. The Claimants acted in good faith with the waiver requirement. They took no action inconsistent with the Waivers and were not required as a condition of jurisdiction to take the purely formal step of terminating the Domestic Proceedings. Although the continuing existence of the Domestic Proceedings is an incontrovertible fact, the Claimants' consistent position is that they waived and abandoned all rights in those proceedings as of 2 July 2009.

V. SAN SEBASTIAN WAS NOT A PARTY TO THE DOMESTIC PROCEEDINGS

76. The Claimants, Commerce Group Corp. (***Commerce***), and San Sebastian Gold Mines Inc. (***Sanseb***), are two separate legal entities that have pooled their resources in El Salvador to invest in, and operate, the San Sebastian Gold Mine. The San Sebastian Gold Mine is a joint venture of Commerce and SanSeb. Although, as part of the joint venture agreement, SanSeb delegated to Commerce the authority to manage the daily operation of the joint venture, and although Commerce owns the majority of the stock of SanSeb, the Claimants are separate corporations with separate sets of shareholders. Commerce is a United States Corporation organized under the laws of the State of Wisconsin, while SanSeb is a United States Corporation organized under the laws of the State of Nevada. Furthermore, SanSeb is entitled to 10% of the income from the joint venture and that income is for the benefit of its own shareholders.

[54] Reply, para. 64.

77. On 13 September 2006, the Ministry of the Environment issued notices suspending Commerce's permits for the San Sebastian Gold Mine and the San Cristóbal mill. These notices referred to resolutions dated 6 July 2006, and 5 July 2006. The notices and resolutions were directed only at Commerce and did not name SanSeb.

78. On 6 December 2006, Commerce filed two petitions in the El Salvador Supreme Court challenging the notices.[55] The petitions were filed on behalf of Commerce, which was the holder of the environmental permit, and the party with standing to contest the termination of the permits. Although Commerce's attorney indicated in these petitions that he also represented SanSeb, that statement was made for the purpose of fully disclosing to the Court the relationship between Commerce and SanSeb in the context of the mining operation.

79. When the Court admitted the petition in Case No. 308-2006 and issued its "Notifications and Citations" dated 19 March 2007,[56] the Court prefaced the document: "That in the Administrative Proceeding filed by Commerce Group Corporation through Attorney Luis Alfonso Valle Deras, as Attorney, against the Ministry of Environment and Natural Resources (MARN), the Administrative Litigation Chamber of the Supreme Court of Justice has handed down the Resolution which says, verbatim ..." – only referring to Commerce. The Court's substantive resolutions referred only to Commerce, and expressly stated: "this Court RESOLVES... To consider COMMERCE GROUP CORPORATION a party to the proceeding...."[57]

80. When the Court admitted the petition in Case No. 309-2006 and issued its "Notifications and Citations" dated 21 March 2007, the Court prefaced the document: "That in the Administrative Proceeding filed by Commerce Group Corporation through

[55] Petition to Supreme Court of El Salvador, Case 308-2006, 6 December 2006 (C-6) and Petition to Supreme Court of El Salvador, Case 309-2006, 6 December 2006 (C-7).
[56] Notification Admitting Case 308-2006 (R-3). The original Spanish text reads: "Que en el Juicio Contencioso Administrativo promovido por la Sociedad Commerce Group Corporation, a través del Abogado Luis Alfonso Valle Deras, en su carácter de apoderado general judicial, en contra: del Ministerio de Medio Ambiente y Recur[s]os Naturales (MARN), la Sala de lo Contencioso Administrativo de la Corte Suprema de Justicia, ha pronunciado la resolución que literalmente dice: . . ."
[57] Notification Admitting Case 308-2006 (R-3). The original Spanish text reads: "esta Sala RESUELVE . . . Tiénese por parte a la Sociedad COMMERCE GROUP CORPORATION, . . ."

Attorney Luis Alfonso Valle Deras, as Attorney, against the Ministry of Environment and Natural Resources (MARN), the Administrative Litigation Chamber of the Supreme Court of Justice has handed down the Resolution which says, verbatim ..." [58] – only referring to Commerce. The Court's substantive resolutions referred only to Commerce, and expressly stated: "this Court RESOLVES... To consider COMMERCE GROUP CORPORATION a party to the proceeding...."[59]

81. The Court's 26 February 2010 decision in Case No. 308-2006 opens with a description of the action as follows: "in the administrative proceeding filed by Mr. Luis Alfonso Valle Deras as attorney for COMMERCE GROUP CORP. against the MINISTER OF ENVIRONMENT AND NATURAL RESOURCES...". [60] The decision does not include SanSeb, as a party, and orders no relief in favor of or against SanSeb.

82. The Court's 18 March 2010 decision in Case No. 309-2006 opens with a description of the action as follows: "in the administrative proceeding filed by Mr. Luis Alfonso Valle Deras as attorney for COMMERCE GROUP CORP. against the MINISTER OF ENVIRONMENT AND NATURAL RESOURCES..."[61] The decision does not include SanSeb, as a party, and orders no relief in favor of or against SanSeb.

83. The record in the Domestic Proceedings is clear—only Commerce was a party to the Domestic Proceedings. Furthermore, in these proceedings commenced pursuant to CAFTA-DR, the Claimants provided separate waivers on behalf of Commerce and SanSeb, which further illustrates the fact that Commerce and SanSeb are

[58] Notification Admitting Case 309-2006 (R-4). The original Spanish text reads: "Que en el Juicio Contencioso Administrativo promovido por la Sociedad Commerce Group Corporation, a través del Abogado Luis Alfonso Valle Deras, en su carácter de apoderado general judicial, en contra: del Ministerio de Medio Ambiente y Recur[s]os Naturales (MARN), la Sala de lo Contencioso Administrativo de la Corte Suprema de Justicia, ha pronunciado la resolución que literalmente dice: . . ."

[59] Notification Admitting Case 309-2006 (R-4). The original Spanish text reads: "esta Sala RESUELVE . . . Tiénese por parte a la Sociedad COMMERCE GROUP CORPORATION, . . ."

[60] Decision in Case 308-2006 (R-5). The original Spanish text reads: "que en el proceso contencioso administrativo promovido por el Licenciado Luis Alfonso Valle Deras, como Apoderado de la Sociedad COMMERCE GROUP CORP. contra el MINISTRO DE MEDIO AMBIENTE Y RECURSOS NATURALES, . . ."

[61] Decision in Case 309-2006 (R-6). The original Spanish text reads: "que en el proceso contencioso administrativo promovido por el Licenciado Luis Alfonso Valle Deras, como Apoderado de la Sociedad COMMERCE GROUP CORP. contra el MINISTRO DE MEDIO AMBIENTE Y RECURSOS NATURALES, . . ."

two separate entities with separate rights and legal standing to initiate and pursue legal actions in El Salvador and elsewhere.

84. As stated in their Response,[62] although for ease of pleading, the Claimants have generally referred to Claimants and the Waivers in the plural, if the Tribunal were to find that the continuation of the Domestic Proceedings has an effect on the claims in this arbitration, the Tribunal must distinguish between Commerce and Sanseb, as only Commerce was a party to the Domestic Proceedings. The Respondent's Preliminary Objection simply does not apply to Sanseb.

VI. THE PRELIMINARY OBJECTION CANNOT RESULT IN THE DISMISSAL OF ALL THE CLAIMANTS' CAFTA CLAIMS

A. Any alleged defect in the Waivers or other impediment applies only to the revocation of the environmental permits

85. The Claimants reiterate their submissions in Section V of their Response that, even if the Tribunal were to determine that the continuance of the Domestic Proceedings has consequences with respect to the Tribunal's jurisdiction or with respect to the admissibility of claims, any such impediment would only apply to the Claimants' claims with respect to Respondent's revocation of the environmental permits. The alleged impediment does not apply to the Claimants' other claims in the Notice of Arbitration.[63]

86. Although Respondent cites *RDC* as providing a reasoned and authoritative interpretation of the waiver provisions in CAFTA Article 10.18.2, Respondent noticeably fails to mention the consequences that the *RDC* tribunal attributed to a defective waiver. In contrast to the Respondent's position, the *RDC* tribunal found that a defect in a waiver arising from overlapping proceedings is only fatal for claims with respect to the measures challenged in the domestic proceedings (i.e. to the extent of the overlap). In *RDC*, this meant that the investor's waiver with respect to the one measure not challenged in the domestic arbitrations (the so-called Lesivo Resolution) was not defective. As a result, the

[62] Response, para. 88.
[63] Response, paras. 80-83.

RDC tribunal found that the claim regarding the Lesivo Resolution could proceed, while the claims with respect to the other challenged measures could not proceed because of the overlap with the ongoing domestic arbitrations.[64]

87. In its Reply, the Respondent simply ignores the part of the *RDC* decision that does not support its position, and with total inconsistency argues that any defect in a waiver totally deprives the tribunal of jurisdiction.[65] Although the Claimants have stated their disagreement in principle with the conclusion of the *RDC* tribunal that concurrent proceedings render a waiver defective, the Claimants submit that the *RDC* tribunal's reasoning with respect to whether an overlap renders the entire waiver defective or only partially defective is very persuasive.

88. The interpretative issue before the *RDC* tribunal was whether the word "claim" in Article 10.18.2 ("No claim may be submitted to arbitration….") means the entire arbitration proceeding or whether a claim submitted to arbitration may contain multiple claims, such that each such claim is to be considered separately as a "claim" subject to the provisions of Article 10.18.2.[66] In *RDC*, the tribunal found that:

> Grammatically, the phrase 'No claim' at the beginning of paragraphs 1, 2 and 4 of Article 10.18 could mean 'any claim', 'a claim', 'each claim' or 'all claims' and not necessarily the 'whole claim' to use the Respondent's terminology. But the term 'claim' is used consistently to refer to a specific cause of action throughout Article 10.18. It is not necessary to have recourse to any theory of "dual meaning" to make sense of Article 10.18. Article 10.18(1) time bars claims older than three years from the date on which the claimant first acquired, or should have first acquired knowledge of the alleged breach. Evidently here, as the Respondent accepts, the word 'claim' must mean each individual claim submitted to arbitration. This being the case, it would be odd that the same word in the same grammatical construction would mean something different when used subsequently in other paragraphs of the same article."[67]

[64] See *RDC*, Decision on Objection to Jurisdiction, paras. 62-75 (CL-9).
[65] Reply, paras. 101-111.
[66] See *RDC*, Decision on Objection to Jurisdiction, paras. 63-76 (CL-9).
[67] *RDC*, Decision on Objection to Jurisdiction, paras. 69 (CL-9).

89. The tribunal then noted that "claim" in Article 10.18.4 (which deals with claims for breach of an investment authorization or an investment agreement) refers to individual claims, not the entire arbitration. The tribunal then confirmed its understanding of Article 10.18.4 by reference to Article 10.16(2)(b) and Article 10.16(2)(c), both of which refer to each individual claim:

> (b) for *each claim*, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
>
> (c) the legal and factual basis for *each claim*...[68]

The *RDC* tribunal concluded that:

> the word 'claim' in Article 10.18 means the specific claim and not the whole arbitration in which that claim is maintained. Therefore, the waivers submitted by the Claimant are valid in respect of claims arising out of the Lesivo Resolution and the subsequent conduct of the Respondent pursuant to that resolution.[69]

90. The Claimants submit that the *RDC* tribunal's interpretation of the meaning of claim in CAFTA Article 10.18. is persuasive. Dismissing an entire arbitration based on a partial overlap is not consistent with the objective of CAFTA to introduce effective procedures of dispute settlement, and as noted by the tribunal in *RDC* is "a rather ineffective and procedurally inefficient result."[70]

B. Respondent's submissions with respect to the other measures in dispute raise issues for the merits

91. Respondent argues that Claimants' rights under the exploitation concession were terminated by the revocation of the environmental permits and that, as a result "those are the only measures they can challenge before this Tribunal".[71] This is not correct. Claimants' claim that since 2006 there has been a *de facto* moratorium on

[68] *RDC*, Decision on Objection to Jurisdiction, paras. 72 (CL-9). Emphasis added by the tribunal.
[69] *RDC*, Decision on Objection to Jurisdiction, paras. 75 (CL-9).
[70] *RDC*, Decision on Objection to Jurisdiction, paras. 72 (CL-9).
[71] Reply, para. 110.

mining, which has resulted in the expropriation of their investment and other breaches of CAFTA and the Foreign Investment Law. As a result of the moratorium MARN would not issue new environmental permits for mining. Claimants' investment has been eviscerated by this ongoing measure since 2006, which continues to the current day. Respondent cannot rely on its own conduct as a defence to the claims. Further, on any view, this is a question for the merits.

VII. THE TRIBUNAL HAS JURISDICTION TO DETERMINE WHETHER THE FOREIGN INVESTMENT LAW WAS BREACHED

A. The Claimants have requested arbitration under the Foreign Investment Law

92. The Claimants' Notice of Arbitration clearly indicates that the Claimants request arbitration under CAFTA and Article 15 of the Foreign Investment Law.[72] Despite the clear reference to a request for arbitration under the Foreign Investment Law, Respondent suggests that the Claimants have not submitted a claim under the Foreign Investment Law.

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

94. The Respondent has been on notice since the submission of the Notice of Arbitration that this proceeding involves claims under both CAFTA and the Foreign Investment Law. For avoidance of doubt, the Claimants confirm that they have

[72] Notice of Arbitration, Title and paras. 1 and 37.

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).

95. The Respondent argues that the Claimants did not refer to the Foreign Investment Law in their Notice of Intent. This is because the various rules in CAFTA, including the provisions for a notice of intent, its specific pleading requirement, the limitation periods for bringing claims and the requirement for waivers, apply to CAFTA claims. They do not apply to claims under the Foreign Investment Law. Although the Notice of Arbitration makes 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 ICSID Institution Rule 2. 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".

96. Although the Claimants consider the Respondent's objection to be purely formal, out of abundance of caution and without admitting that the Notice of Arbitration fails to satisfy pleading requirements, the Claimants formally submit particularized claims for breach of the Foreign Investment Law under Arbitration Rule 40 (Ancillary Claims). In accordance with 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." In this case, the subject matter of the dispute is El Salvador's treatment of the Claimants' investment under the Foreign Investment Law.

97. Accordingly, the Claimants submit 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.

B. Any potential impediment resulting from alleged defects in the Waivers submitted under CAFTA does not apply to the Claimants' claims under the Foreign Investment Law

98. In the Respondent's Preliminary Objection, the Respondent argued that, as the result of the alleged defect in the Claimants' Waivers, there is no jurisdiction for the entire arbitration.[73] In their Response, the Claimants submitted that the Waivers would have no effect with respect to claims under the Foreign Investment Law.[74] In its Reply, the Respondent now says that there are no claims submitted under the Foreign Investment Law and that, if there are, Respondent will raise further jurisdictional objections.[75]

99. As the Claimants submitted in their Response, the current proceeding is based on two separate arbitral consents, one under the CAFTA and one under the El Salvadoran Foreign Investment Law. The Tribunal's jurisdiction with respect to the CAFTA claims is based on CAFTA. The Tribunal's jurisdiction with respect to Foreign Investment Law claims is based on the Foreign Investment Law. As previously submitted by the Claimants, the tribunal in *Pac Rim v. El Salvador,*[76] rejected El Salvador's argument that Pac Rim's waiver under Article 10.18.2 applied to Pac Rim's claims under the Foreign Investment Law. The *Pac Rim* tribunal found that there was no bar to the tribunal exercising two cumulative consents and rejected the El Salvador's preliminary objection.

100. It is the Claimants' understanding that the scope of the Respondent's Preliminary Objection called for a definitive decision on all issues relating to the Waivers and that this covers all jurisdictional issues with respect to the Claimants' Waivers. This necessarily includes the effect of the Waivers (if any) on the claims submitted under the Foreign Investment Law. As submitted by the Claimants in their Response, the Waivers do not apply to the Claimants' Foreign Investment Law claims in this proceeding, including those relating to the revocation of the environmental permits.

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[73] Preliminary Objection, paras. 74-80.
[74] Response, paras. 84-86.
[75] Reply, paras. 112-114 and 121.
[76] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010 (CL-18).

VIII. EL SALVADOR'S REPLY ON ITS RESERVATION OF RIGHTS SHOULD NOT BE PERMITTED TO PREJUDICE THE SUBSTANTIVE ISSUES

101. Respondent's "Reservation of Rights" in its Preliminary Objection and its further submissions in its Reply are nothing more than an excuse for mudslinging on issues that belong to the merits of this dispute. The one point where Claimants would agree is that this arbitration is a serious matter. As shown by statements of El Salvador's government officials made openly in newspapers in 2006, El Salvador cavalierly disregarded the Claimants' rights, the Claimants' investment, and the positive benefits that the Claimants have brought to El Salvador in the decades that they have done business in the country.

102. The Respondent claims that "El Salvador is not responsible for claimants' lack of assets".[77] As respondent is well aware (but chooses to obfuscate), the Claimants developed valuable assets in the Republic of El Salvador. The Respondent undermined the value of these assets. The Respondent made it impossible to realize any return on these assets. And now, the Respondent circles back to its argument that based on its own opinion of the Claimants' financial statements, the Claimants' investment was not worth anything anyway. This sort of debate is better reserved for the hearing on the merits, and truly is not relevant to the Respondent's Preliminary Objection. However, it is in any event difficult to let these comments go without a brief rejoinder.

103. The Respondent suggests that if it can be shown that the Claimants' investment did not have a return in a particular year or years, this proves that the investment has no value. That is not the case. Money spent on exploration, development, and holding costs always represents cash outlay that is not recouped until some future date. This does not negate the fact that Claimants' investment had a value that is not reflected in the financial statements, and is not the equivalent of "book value."

104. Furthermore, from 2006 forward, the Claimants have continued to pay and incur expenses in the Republic of El Salvador, without having the ability to earn revenue from gold production, and this also is part of the Claimants' loss.

[77] Reply, para. 123.

105. The conduct of the Respondent frustrated the Claimants' ability to proceed with investment partners, and this too must be taken into account. For example, in March, 2008, Commerce Group Corp. entered into a letter of intent with an investment partner, Manti Holdings, LLC. Under the terms negotiated by the parties, Manti would provide all the capital required to develop the Claimants' investment, pay in excess of $2 million for its right to participate, and share the revenues from production with the Claimants. After signing this letter of intent, representatives of Manti met with representatives of the government of El Salvador and learned that the Respondent would not permit mining. The Respondent undercut this business relationship and, as stated earlier, undermined the value of the Claimants' assets.[78]

106. Ultimately, there is no question that Respondent has injured and damaged the Claimants, and the Respondent's arguments to the contrary have no place in this hearing on the Respondent's Preliminary Objection.

IX. CONCLUSION

107. For the reasons stated in this Rejoinder and in the Claimants' Response, the Tribunal should reject the Respondent's Preliminary Objection. The Claimants reaffirm their request for the relief requested in their Response dated 15 September 2010.

15 October 2010

Respectfully submitted,

/s/ John E. Machulak

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and

Professor Andrew Newcombe
on behalf of Claimants
Commerce Group Corp. and
San Sebastian Gold Mines, Inc.

[78] Form 8-K dated 11 March 2008, including Exhibit 99.1 (C-11); Form 8-K/A dated 10 April 2008 (C-12); and Form 8-K dated 5 August 2008 (C-13).