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

**COMMERCE GROUP CORP.**
**AND**
**SAN SEBASTIAN GOLD MINE, INC.**
**(CLAIMANTS)**

**and**

**THE REPUBLIC OF EL SALVADOR**
**(RESPONDENT)**

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# APPLICATION FOR ANNULMENT

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**John E. Machulak**
**Eugene Bykhovsky**
**Machulak, Robertson & Sodos, S.C.**
**Counsel for the Claimants**
**1733 North Farwell Avenue**
**Milwaukee, Wisconsin 53202**
**(414) 271-0760 - telephone**
**(414) 271-6363 - facsimile**
**machulak@lawmessage.com**

## CLAIMANTS' APPLICATION FOR ANNULMENT

1. Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), and Rule 50 of the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Claimants, Commerce Group Corp. ("CGC") and San Sebastian Gold Mine, Inc., ("SSGM"), respectfully submit this Application for Annulment of the Award issued in the matter *Commerce Group Corp. and San Sebastian Gold Mines v. Republic of El Salvador* (ICSID Case No. ARB/09/17).

## APPLICATION REQUIREMENTS

2. ICSID Arbitration Rule 50(1) provides that an application for the annulment of an award shall be addressed in writing to the Secretary-General and shall (a) identify the award to which it relates; (b) indicate the date of the application; and (c) state in detail the grounds on which it is based.

3. **Identification of the Award.** The Claimants, CGC and SSMG, seek annulment of the Award issued March 14, 2011, in ICSID Case No. ARB/09/17, in which the Tribunal dismissed the Claimants' notice of arbitration determining that the dispute is not within its jurisdiction and competence pursuant to CAFTA and El Salvador's foreign investment law.

4. **Date of the Application.** The date of the Claimants' Application for Annulment is July 11, 2011.

5. **Grounds for Annulment.** The Claimants apply for annulment based on the following grounds provided in ICSID Convention Article 52:

a. Art. 52(1)(b): The Tribunal manifestly exceeded its powers; and

b. Art. 52(1)(e): The Award fails to state the reasons on which it is based.

## BACKGROUND

6. For purposes of its award, the Tribunal stated that it would accept the Claimants' version of facts as true and recited the facts set forth herein. [Award, ¶ 55] These are the facts recited by the Tribunal:

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

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

9. Claimants received an exploitation concession from the Government of El Salvador for the San Sebastian Gold Mine on 23 July 1987. At this time, Claimants and Minsane entered into an agreement to lease 305-acres at the San Sebastian Gold Mine (the "Minsane Agreement"). Later, in 1993, Claimants acquired two additional properties, the El Modesto Mine and the San Cristóbal Mill and Plant. [Award, ¶ 58]

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

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

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

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

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

15. On 29 April 2010, El Salvador's Court of Administrative Litigation of the Supreme Court of Justice notified its decisions of 18 March 2010 (Case No. 308-2006) and 28 April 2010 (Case No. 309-2006) with respect to these two complaints. [Award, ¶ 64]

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

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

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

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

20. The Request states that it is made pursuant to Article 36 of the ICSID Convention, Articles 10.16(1)(a), 10.16(1)(b) and 10.16(3)(a) of CAFTA (quoted at ¶ 11above), and Article 15(a) of the Ley de Inversiones of El Salvador ("Investment Law"). [Award, ¶ 15]

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

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

22. On 29 July 2009, the Secretary-General of ICSID (the "Secretary-General") requested Claimants to submit additional information for purposes of determining whether their Request was "manifestly outside the jurisdiction of the Centre" pursuant to Article 36(3) of the ICSID Convention (the "Clarification"). [Award, ¶ 17]

23. On 14 August 2009, Respondent filed a letter in which it submitted that the present dispute "is manifestly outside ICSID's jurisdiction", contending, among other things, that Claimants had not stopped court proceedings extent in El Salvador in which they sought to obtain the complete reversal of any measures taken against them, thereby violating the mandatory Waiver Provision of CAFTA. [Award, ¶ 18] [This description of Respondent's letter omits a material fact, namely, that Respondent stated that even if the Claimants discontinued the court proceedings, ICSID would not have jurisdiction.]

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

25. In accordance with this timetable, on 16 August 2010, Respondent filed its Preliminary Objections under the expedited procedures of CAFTA (the "PO"). On the same date, the Tribunal suspended the proceeding on the merits. [Award, ¶ 33]

26. On 15 September 2010, Claimants filed their Response to El Salvador's Preliminary Objections (the "PO Response"). [Award, ¶ 35]

27. On 30 September 2010, Respondent filed its Reply to Claimants' PO Response (the "PO Reply"). [Award, ¶ 36]

28. On 7 October 2010, Respondent filed a letter requesting the Tribunal to hold a hearing to address its PO pursuant to Article 10.20.5 of CAFTA. [Award, ¶ 37]

29. On 15 October 2010, Claimants filed their Statement of Rejoinder to the PO Reply (the "PO Rejoinder"). [Award, ¶ 38]

30. The Hearing to address Respondent's PO was held in Washington, D.C., on 15 November 2010. [Award, ¶ 39?]

**THE AWARD**

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

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

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

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

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

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

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

38. The Tribunal also determined that the *de facto* mining ban policy does not constitute a "measure" within the meaning of CAFTA.

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

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

## REASONS TO ANNUL THE AWARD

## I. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS.

41. As provided in Article 52(1)(b) of the ICSID Convention, annulment is required where the tribunal "manifestly exceeded its powers." This Award denying jurisdiction should be denied for the same reason as stated in the Decision on Application for Annulment, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Application for Annulment, 16 April 2009:[1] The Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed, and that it "manifestly" did so.

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

42. Article 10.18.2 provides as follows:

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

43. 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 Tribunal's interpretation.

[1]http://italaw.com/documents/MalaysianHistoricalAnnulment_000.pdf

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

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

46. 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 the benefit of the waiver). A respondent state may well decide that it prefers to have the legality of its measures resolved in its courts.

47. Here, on the facts before the Tribunal, the Respondent Republic of El Salvador never acted upon the waiver given to it, and never even requested that the Claimants take further action with respect to the domestic litigation.

48. To the contrary, after the Claimants filed their request for arbitration, the Attorney General of El Salvador sent a letter to the Secretary-General of ICSID dated 14 August 2009, where the Attorney General 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 took the position that the Claimants could not file their request for arbitration without *first* dismissing the domestic proceedings. The Secretary-General did not agree with this argument, nor did the Tribunal.[2]

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

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

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

51. At ¶ 18 of the Tribunal's decision, the Tribunal characterized this same letter as follows: "On 14 August 2009, Respondent filed a letter in which it submitted that the present dispute 'is manifestly outside ICSID's jurisdiction', contending, among other things, that Claimants had not stopped court proceedings extent in El Salvador in which they sought to obtain the complete reversal of any measures taken against them, thereby violating the mandatory Waiver Provision of CAFTA."

52. By suggesting that the Respondent asked the Claimants to discontinue court proceedings in El Salvador after the Claimants filed their request for arbitration, the Tribunal has mis-characterized the letter and manifestly exceeded its powers by finding that the Claimants did not comply with the Waiver Provision of CAFTA.

### B. The Tribunal Manifestly Exceeded its Powers by Dismissing Claimants' Claims Based on the Revocation of the Claimants' Exploration Licenses.

53. The Claimants claimed in their Notice of Arbitration (the "Request"):

> 18. On March 3, 2003, the Government of El Salvador granted Commerce/Sanseb a new exploration license for a 41-square kilometer area (10,374 acres), which surrounded the site of the San Sebastian Gold Mine and included three other formerly-operated mines (the "New San Sebastian Exploration License").
>
> 19. On May 25, 2004, the Government of El Salvador granted Commerce/Sanseb a new exploration license for an additional 45 square kilometers of area (11,115 acres) to the North of and abutting the New San Sebastian Exploration License area. This new license area encompassed eight formerly-operated gold and silver mines (the "Nueva Esparta Exploration License").
>
> 20. After receiving the New San Sebastian Exploration License and the Nueva Esparta Exploration License, Commerce/Sanseb invested

> resources for the exploration of these areas for precious metals including explorations at the La Lola Mine, the Santa Lucia Mine, the Tabanco Mine, the Montemayor Mine, and the La Joya Mine. This was done with the expectation that Commerce/Sanseb would ultimately receive exploitation concessions for these sites.
>
> ....
>
> 23. On October 10, 2006, Commerce/Sanseb applied to MARN for an environmental permit for its exploration in connection with the New San Sebastian Exploration License and the Nueva Esparta License. MARN did not respond to the request and on March 8, 2007, Commerce/ Sanseb applied to the El Salvador Ministry of Economy for an extension of these exploration licenses, as was its right. On October 28, 2008, the Ministry of Economy denied Commerce/Sanseb's application citing Commerce/Sanseb's failure to secure an environment permit.

54. The domestic proceedings referred to by the Tribunal did not involve the Respondent's refusal to renew these exploration permits, and there were no domestic proceeding relating to these exploration permits pending either before or after the Claimants' request for arbitration.

55. When the Respondent argued its PO, it acknowledged that its "waiver" argument did not apply to the Respondent's refusal to renew these exploration permits. In its PO counsel for the Respondent stated:

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

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

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

> 103. Claimants alleged in the Notice of Arbitration that on October 28, 2008, the Ministry of Economy denied their application for extensions of their New San Sebastian and Nueva Esparta exploration licenses. Claimants asserted that their local counsel "filed a challenge in the Courts to the government's refusal to honor Commerce/Sanseb's request to extend its exploration permits pursuant to the terms of the 2002 permits" and that these "legal proceedings have not been resolved." If, in fact, court proceedings were continuing related to the same measures alleged to constitute CAFTA breaches, there would be an additional impermissible identity of measures in violation of the waivers. At a minimum, the Notice of Arbitration confirms that Claimants intended to act in violation of the waivers and took no action to effectuate the written waivers that they provided.
>
> 104. *But the Notice of Arbitration is factually incorrect.* The Republic's review of the facts shows that, contrary to what Claimants stated in paragraph 24 of the Notice of Arbitration, Claimants' legal counsel never filed a challenge in the courts of El Salvador with regard to either exploration license. Instead, Claimants' *local counsel only filed an administrative appeal* related to one of the two exploration licenses. [emphasis added].

In result, the Tribunal was advised by both parties that Respondent's "waiver" argument did not apply to the Respondent's refusal to renew the Claimants' exploration permits

57. The Tribunal nonetheless dismissed all of the Claimants' claims, including claims based on the Respondent's refusal to renew these exploration permits. The Tribunal manifestly exceeded its powers by Failing to exercise jurisdiction over the exploration permits claimed.

### C. The Tribunal Manifestly Exceeded its Powers by Dismissing Claimant's Claims Based on the Respondent's De Facto Ban on Mining.

58. At paragraph 50 of its decision, the Tribunal stated that it would accept the Claimants' version of facts as true.

59. In its PO Response at ¶¶ 7-12, the Claimants presented facts that showed that the Respondent has imposed a moratorium on mining (which has continued through this day). The following was included:

60. In July 2006, the Minister in charge of the Ministry of the Environment and Natural Resources (MARN) stated in an interview that El Salvador would not approve any

further mining projects because of concerns about environmental impacts. With respect to mining in Santa Rosa de Lima (the Claimants' San Sebastian Gold Mine), Minister Hugo Barrera stated:

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

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

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

62. In March 2008, President Saca stated, with respect to mining enterprises applying for exploitation permits:

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

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

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

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

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

65. Claimants do not contest the Respondent El Salvador’s sovereign right to ban mining and expropriate mining operations. However, any such public policy measures must be taken in accordance with due process of law and provide compensation to the affected investors in accordance with El Salvador's obligations under the CAFTA and El Salvador’s domestic foreign investment law. Here the entire loss resulting from the Respondent’s ban on mining has fallen upon the investors.

66. The Tribunal dismissed the claims based on the Respondent's de facto ban on mining, concluding that even if there is a *de facto* ban, it is a policy rather than a "measure" that is actionable under CAFTA. The Tribunal's decision was manifestly in error since the Respondent's ban on mining resulted in specific measures taken against the Claimants not limited to the revocation of the Claimants' permits to operate at the San Sebastian Gold Mine and San Cristóbal Mill and Plant in 2006.

### D. The Tribunal Manifestly Exceeded its Powers by Dismissing Claimant's Claims Based on the Respondent's Violation of the Foreign Investment Law.

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

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

68. In its PO, the Respondent did not argue that Claimants had no right to proceed under the El Salvador Investment Law and which continued after the revocation of the permits.

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

70. At ¶ 112 of the PO Reply, Respondent argued:

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

71. At ¶¶ 99-94 of the PO Rejoinder, the Claimants responded, and included in that response:

> 90. The Claimant's 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.

Claimants also noted that while a "notice of intent" had to be given before demanding arbitration of a claim under CAFTA, the was no such requirement for a claim under the Foreign Investment Law.

72. The Tribunal arbitrarily dismissed the Claimants' claims under the Investment Law.

## II. THE AWARD FAILS TO STATE THE REASONS ON WHICH IT IS BASED.

73. As explained below, the Award's failure to state the reasons on which it is based requires annulment pursuant to Article 52(1)(e) of the ICSID Convention.

### A. The Tribunal Failed to State it Basis for Determining That the Claimants' Waivers Were Not Effective.

74. The Tribunal inferred that the Respondent asked the Claimants to discontinue the domestic proceedings [Award, ¶ 18]. As noted above,[3] in the letter to which the Tribunal referred the Respondent stated the opposite, i.e., 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."

75. In the Award, the Tribunal stated that "Claimants' argument that they acted in accordance with the waiver by not taking any positive action to continue those proceedings holds no weight, as the El Salvador proceedings continued with no positive action on Claimants' part to discontinue them, and ultimately resulted in two judgments." [Award, ¶ 102] On the one hand, the Tribunal appears to accept the fact that the Claimants did not do anything to advance the

[3]See ¶¶ 48-52, *infra*.

domestic proceeding after the Request was filed. On the other hand, it is wholly unclear whether the Tribunal is suggesting that the Claimants were opposing some request on the part of the Respondent to discontinue the domestic proceedings.

76. Consequently, the Award does not state whether the Tribunal has made some (unsupported) finding that the Claimants refused some request on the part of the Respondent to discontinue the domestic proceeding or rather, decided as a general rule that the CAFTA requires affirmative action after tendering the required waiver.

77. The Tribunal's Award can also be read as a determination that under any circumstances, the CAFTA required the Claimants to secure the dismissal of the domestic proceedings after tendering their waivers. The Tribunal stated: "Regardless of the status of the El Salvador proceedings, Claimants knew the proceedings they had initiated and argued were pending a decision of the Court. Claimants were accordingly under an obligation to discontinue those proceedings in order to give material effect to their formal waiver."[Award, ¶ 102]

78. If this is the case, the Tribunal has added requirements to Article 10.18.2(b), which as written, does not suggest that there is a requirement to request termination of existing domestic proceedings.[4]

### B. The Tribunal Failed to State it Basis for its Dismissal of Claimants' Claims Based on the Revocation of the Claimants' Exploration Licenses.

79. As stated above,[5] the Claimants have separate claims based upon the Respondent's failure to renew their exploration permits relating to approximately 21,000 acres of land known as the New San Sebastian Exploration License and the Nueva Esparta Exploration License. These claims were never the subject of any domestic proceedings and were not the subject of the Respondent's "waiver" arguments.

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[4]See ¶¶ 42-45, *infra.*

[5]See ¶¶ 53-57, *infra.*

80. Nonetheless, at ¶ 113 of the Award, the Tribunal stated: "The Tribunal therefore determines that Claimants failed to fulfill the requirements of the Waiver Provision with respect to their entire claims."

81. The Tribunal failed to state its rationale for dismissing these claims. At best, the Tribunal referred to the Claimants statement that the revocations of the permits for mining at the San Sebastian Gold Mine and processing at the San Cristóbal Mill and Plant was to "effectively terminat[e] Commerce/SanSeb's right to mine and process gold and silver." This is not at all inconsistent with the fact that the Claimants had exploration permits for the New San Sebastian and the Nueva Esparta tracts of land, where no mining or processing had taken place.

### C. The Tribunal Failed to State its Basis for its Dismissal of Claimants' Claims Based on the Respondent's De Facto Ban on Mining.

82. The Tribunal failed to state its rationale for dismissing Claimants' claims based on the Respondent's *de facto* ban on mining.

83. The Tribunal stated that in its view, "the *de facto* mining ban policy claim is not separate and distinct" from the Claimants' claim that its permits for the San Sebastian Gold Mine and San Cristóbal Mill and Plant were revoked, and that "it was that revocation which put an end to Claimants' mining and processing activities." [Award, ¶¶ 111, 112] The Tribunal failed to address not only the separate claims based on the revoked exploration permits, but also, the on-going ability of the Claimants to proceed to any type of mining activity, including securing new permits.

84. Also, the Tribunal failed to explain why the claims based on the moratorium must be dismissed, when the moratorium has resulted in specific measures being taken against Claimants' investment interests.

### D. The Tribunal Failed to State its Basis for its Dismissal of Claimant's Claims Based on the Respondent's Violation of the Foreign Investment Law.

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

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

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

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

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

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

**PRAYER**

91. For the foregoing reasons, the Claimants, Commerce Group Corp. and San Sebastian Gold Mine, Inc., ("SSGM"), respectfully request that the Tribunal's Award be annulled.

Dated: July 11, 2011

Respectfully submitted,

*/s/ John E. Machulak*

_____

John E. Machulak
Eugene Bykhovsky
Machulak, Robertson & Sodos, S.C.
Counsel for the Claimants