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

RESPONSE TO THE REPUBLIC OF EL SALVADOR'S PRELIMINARY OBJECTION

15 September 2010

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

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

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I. INTRODUCTION AND SUMMARY

1. Commerce Group Corp. (**Commerce**) and San Sebastian Gold Mines, Inc. (**SanSeb**) (collectively the **Claimants**) are affiliated U.S. corporations that have formed a joint venture to undertake gold mining in El Salvador. Both are publicly held corporations that have, in the aggregate, approximately 3,300 shareholders, over 95% of whom reside in the United States. Over the past over 40 years the Claimants have invested over $100 million in their mining activities in El Salvador; they have a history of mining in the country going back to October, 1968.

2. The Claimants mined gold at the San Sebastian Gold Mine in Santa Rosa de Lima. For over 25 years, however, there has been no processing of gold at or near the San Sebastian mine; all of the ore from the mine was hauled to and processed at the Claimants' mill and plant in San Cristóbal, which is approximately 15 miles from the San Sebastian mine. In the 1990s, the Claimants produced tens of thousands of ounces of bullion through their operations. When the San Sebastian Gold Mine was operating, the Claimants employed hundreds of laborers, geologists, engineers, plant operators and others in El Salvador. During their long history in El Salvador, the Claimants brought not only employment, but also considerable infrastructure improvements to the vicinity of Santa Rosa de Lima, such as roads and bridges, made contributions for the general good, and built a church.

3. In 2003, El Salvador's Ministry of Economy replaced the Claimants' existing mining concession with a new 20-year exploitation concession under the new mining law. The concession gave the Claimants the right to mine at the San Sebastian Gold Mine site. A year later, El Salvador extended the concession to 30 years, or in other words, until 2034. In 2003 and 2004, the Claimants obtained two exploration licenses for additional areas. From 2004 onwards, the Claimants continued to invest significant time, effort and resources in developing their mining exploration and production operations.

4. In 2006, the Republic of El Salvador (**El Salvador** or the **Respondent**) began a course of conduct that has resulted in the destruction of the Claimants' investments. In contravention of its domestic and international legal obligations, El Salvador arbitrarily revoked the Claimants' environmental permits, ordered the closure of their operations and failed to renew their exploration licenses. These measures are manifestations of a broader government practice to terminate all mining activities by foreign investors in El Salvador. In complete disregard of the Claimants' rights under their exploitation concession and exploration licenses, El Salvador has effectively adopted and maintained a *de facto* moratorium on metallic mining.

5. As a result of El Salvador's conduct, the Claimants have been unable to proceed with plans to develop their operations. In 2008, the Claimants entered an agreement with a strategic partner to develop the San Sebastian Gold Mine. After meeting with representatives of the El Salvadoran government, however, the strategic partner withdrew. It was clear that the El Salvadoran government would not allow mining under any circumstances.

6. Although the Claimants will prove the relevant facts to substantiate all of their claims in their memorial, in light of El Salvador's outright denial that a *de facto* moratorium on mining exists or has ever existed, combined with El Salvador's suggestion that the Claimants' claims are frivolous, the Claimants are compelled to draw the Tribunal's attention to several readily available public statements by the former Minister of Environment and the former and current Presidents of the Republic of El Salvador dating from 2006 to the present. The statements speak for themselves—there has been a radical change in government policy with respect to metallic mining in El Salvador. Since 2006, government representatives have made it clear that there is to be no mining in the country.

7. 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.*[1]

8. 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.*[2]

9. 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.*[3]

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

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

11. 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"*.[5]

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

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

[3] *President of El Salvador asks for caution regarding mining exploitation projects*, Invertia, 11 March 2008 (C-2). The original Spanish text reads: "Lo que estoy diciendo es que, en principio, yo no estoy de acuerdo con otorgar esos permisos . . . .".

[4] *"No" to mining: Saca closes the doors to the exploitation of metals*, La Prensa Grafica, 26 February 2009 (C-3). The original Spanish text reads: "Mientras Elías Antonio Saca esté en la presidencia, no otorgará ni un tan solo permiso, (para la explotación minera) ni siquiera permisos ambientales, que son previos a los que otorga el Ministerio de Economía."

[5] *No to Mining: Presidential Commitment*, La Prensa Grafica, 13 January 2010 (C-4). The original Spanish text reads: "No necesito emitir un decreto para que esa autorización no se dé, eso sería dudar de la palabra del presidente. No existe en los programas del gobierno, no está en el Plan Quinquenal la autorización de proyectos de explotación minera."

12. To be clear, Claimants do not contest 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 Dominican Republic – Central America – United States Free Trade Agreement (the **CAFTA**)[6] and El Salvador's domestic foreign investment law (the **Foreign Investment Law**).[7]

13. El Salvador has made its Preliminary Objection in this proceeding in the hope that it can avoid having to the face the consequence of its illegal conduct. As the Claimants will demonstrate, the Respondent's Preliminary Objection is entirely without merit. The Claimants submit that this proceeding should advance expeditiously to a written and oral phase on the merits.

14. The sole issue for determination in the Preliminary Objection is the relationship between the Respondent's consent to arbitration in CAFTA Article 10.17 and the requirement that the Claimants submit waivers in accordance with CAFTA Article 10.18.2. The Respondent spends needless pages of pleadings emphasizing the importance of consent as a cornerstone of ICSID arbitration. The Claimants agree that consent to arbitration is foundational. However, the issue before this Tribunal is a narrow one: do Claimants' waivers comply with CAFTA Article 10.18.2 and, if not, what might be the consequence of any alleged non-compliance.

15. The Claimants' submissions with respect to whether its waivers comply with the CAFTA proceed in three parts. First, the Claimants submitted waivers on 2 July 2009 in compliance with CAFTA Article 10.18.2 (Section II). Second, the continuation of domestic proceedings *after* 2 July 2009 does not affect

[6] Dominican Republic – Central America – United States Free Trade Agreement (the CAFTA) (CL-1).
[7] El Salvador's Investment Law (the Foreign Investment Law) (CL-2).

the validity of the waivers (Section III). Third, the waivers are not defective in any event (Section IV).

16. In Section II, the Claimants establish that on 2 July 2009 they submitted waivers in full compliance with the requirements of Art.10.18.2. The waivers are unqualified in all respects and are effective to waive definitively and absolutely the Claimants' rights to initiate or continue domestic proceedings. Notwithstanding whether the delivery of waivers is characterized as a procedural or jurisdictional requirement, the Claimants satisfied this requirement on 2 July 2009, the relevant date for determining the jurisdiction of this Tribunal. Further, the Claimants submit that there is no requirement in Article 10.18.2 to discontinue domestic proceedings prior to submitting a CAFTA claim. It would be nonsensical to require a claimant to deliver a signed waiver of the right to continue domestic proceeding, if, in fact, Article 10.18.2 already obligated the claimant to discontinue the domestic proceedings before submitting a claim in the first place.

17. In the second part of the pleadings (Section III), the focus turns to the relevance of the continuance of domestic proceedings *after* the submission of the Notice of Arbitration on 2 July 2009. The fundamental point is that a waiver is a unilateral and final abandonment, extinguishment and abdication of legal rights. The fact that the Claimants did not take active steps to discontinue the domestic proceedings (to which they had already and definitively waived their rights) does not affect the validity of the Claimants' waivers. Further, the facts in this case are entirely distinguishable from previous cases in which tribunals have found waivers defective. In those cases, the investors had taken active steps to maintain domestic proceedings, bringing into question whether the investors really intended to waive the right to initiate or continue proceedings. In contrast, in this case, the Claimants took no action to continue the domestic proceedings and have acted consistently with the waivers since 2 July 2009. Finally, the Claimants submit that any question of the alleged non-compliance of the waivers is a question of the admissibility of claims, not the jurisdiction of this Tribunal. Any alleged impediment that might

have existed to the admissibility of claims is no longer present because the domestic proceedings ended in March 2010.

18. Although the submissions in Sections I and II of this Response answer the Respondent's Preliminary Objection in its entirety, Section IV provides additional bases for rejecting the Respondent's Preliminary Objection. As the Respondent itself argues, the purpose of the waiver requirement is to ensure that a respondent state is not subject to concurrent proceedings regarding the same measure. In the present case there never were concurrent proceedings. The domestic proceedings ended in March 2010. As provided in ICSID Arbitration Rule 6, the current arbitral proceeding did not begin until 1 July 2010, the date the Secretary General notified the parties that all the arbitrators have accepted their appointment. There simply have not been any concurrent proceedings that would trigger any alleged defect.

19. In Section IV, the Claimants further submit that even if the Tribunal were to accept that a waiver can be rendered defective by subsequent conduct, the Claimants have never acted inconsistently with their waivers and that any alleged defect was remedied by the fact that, as of 18 March 2010, the domestic proceedings had ended.

20. Section V of the submissions addresses the potential consequences of a Tribunal determination that the waivers are terminally defective. Any defect that might be found in the waivers would only be operative with respect to the measures at issue in the domestic proceedings—the revocation of the environmental permits. All the Claimants' *other* CAFTA claims based on *other* measures, including those with respect to the exploration licenses and the *de facto* moratorium, are unaffected by the waiver issue. Further, even accepting the entirety of the Respondent's Preliminary Objection, lack of consent to the submission of CAFTA claims does not affect the Respondent's separate and independent consent to this proceeding based on the Foreign Investment Law.

21. Finally, any defect in the waivers operates only against Commerce. SanSeb was not a party to the domestic proceedings and its claims under the CAFTA and the Foreign Investment Law are entirely unaffected by the waiver issue.

22. The final sections of the Response address costs and reservations of rights.

23. To conclude this introduction and summary, the Claimants note with regret the tone taken by Respondent's Counsel in describing Claimants' conduct as characterized by bad faith and as representing an abuse of process. Claimants' so-called bad faith is nothing but a reflection of the Respondent's own misinterpretation of one article of the CAFTA. As amply demonstrated in this Response, Claimants submitted fully compliant waivers with their Notice of Arbitration. No provision in the CAFTA requires the immediate discontinuance of domestic proceedings. The Claimants have acted in full compliance with the waivers. Finally, the Respondent has not, in fact, been subject to concurrent proceedings.

24. The Claimants emphatically deny that they have acted in bad faith or adopted a strategy of waiting for a favourable result from the domestic proceedings. The Claimants have worked carefully and diligently to assess their legal options after being subject to the Respondent's illegal conduct. The Respondent's illegal conduct has eviscerated the Claimants' investment and caused significant business, financial and legal problems for the Claimants.

25. With respect to the Respondent's allegation that the Claimants were waiting for a favourable result, the Claimants would note that any delay in the commencement of this proceeding is due to the Respondent's failure to appoint an arbitrator in accordance with the time limits set out in CAFTA Article 10.19, which provides for the constitution of the arbitral tribunal within 75 days of the registration of

the Notice of Arbitration. ICSID registered the request for arbitration on 21 August 2009 and the Claimant appointed an arbitrator on 23 October 2009. The Respondent did not appoint an arbitrator until 28 April 2010, well over five months after the date on which this Tribunal was supposed to have been constituted and, as it turns out, well over a month after the El Salvadoran Supreme Court had rendered its final decision.

II. THE WAIVERS WERE FULLY EFFECTIVE AS OF 2 JULY 2009 AND RESULTED IN THE WAIVER OF THE RIGHT TO CONTINUE THE DOMESTIC PROCEEDINGS

A. Claimants' waivers comply fully with the CAFTA

26. CAFTA Articles 10.18.2 and 10.18.3 provide 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.
>
> 3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) 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.

27. In accordance with Article 10.18.2(b), the Claimants submitted waivers dated 2 July 2009 as Exhibits A and B to their Notice of Arbitration (the **Waivers**).[8] The Waivers fully satisfy all CAFTA requirements. The Waivers accompanied the Notice of

[8] Commerce Group Corp.'s Waiver dated 2 July 2009 and San Sebastian Gold Mines, Inc.'s Waiver dated 2 July 2009, are attached as Exhibits A and B to Claimants' Notice of Arbitration, 2 July 2009 (C-5).

Arbitration, are in writing and reproduce the waiver language in Article 10.18.2(b) word for word. In its Preliminary Objection, the Respondent does not allege any formal defect in the Waivers.

B. The Waivers resulted in the abandonment of the Claimants' rights to continue the domestic proceedings

28. The Claimants accept that the waiver required by CAFTA Article 10.18.2(b) includes domestic court proceedings with respect to any measure that is the subject of an investor claim under the CAFTA. The CAFTA does not distinguish between claims based on the source of the legal obligation, for example, whether a claim is based on domestic or international law. Rather, the CAFTA requires a waiver with regard to "any proceeding with respect to any measure alleged to constitute a breach" of the CAFTA. Further, the Claimants accept that the exception in CAFTA Article 10.18.3 does not apply to the facts in the present case. Accordingly, there would appear to be no disagreement between the parties regarding the subject matter scope of the waiver required under the CAFTA.[9]

29. The Claimants accept that: (i) the waiver requirement applies to measures; (ii) the revocations of the two environmental permits are measures; and (iii) the Claimants challenged the revocations in domestic proceedings. Claimants' Waivers apply to the proceedings before the Supreme Court of El Salvador in Case No. 308-2006[10] challenging MARN Resolution No. 3026-783-2006, dated July 6, 2006, which revoked the environmental permits for the San Sebastian Gold Mine exploitation concession, and Case No. 309-2006[11] challenging MARN Resolution No. 3249-779-2006, dated July 5, 2006, which revoked the environmental permit for the San Cristóbal Mill and Plant (the **Domestic Proceedings**).

[9] See El Salvador's Preliminary Objection, 16 August 2010 [Preliminary Objection], paras. 23-38.
[10] Petition to Supreme Court of El Salvador, Case 308-2006, 6 December 2006 MARN Resolution No. 3026-783-2006 (C-67).
[11] Petition to Supreme Court of El Salvador, Case 309-2006, 6 December 2006 MARN Resolution No. 3249-779-2006 (C-78).

30. As of 2 July 2009, the date of the submission of the Notice of Arbitration, the Claimants' Waivers of the right to continue the Domestic Proceedings were effective. Upon receipt of the Waivers, the Respondent was immediately in a position to seek discontinuance of the local proceedings if it so wished. Although the Respondent criticizes the Claimants for failing to discontinue the Domestic Proceedings, the Respondent is subject to the exact same criticism.

C. The submission of waivers is a procedural requirement that must be satisfied for the Tribunal to be properly seized of a claim

31. The requirement for the submission of a waiver is a procedural requirement for the submission of a claim to arbitration. In order for a tribunal under the CAFTA to be properly seized of a claim, the requirements in Article 10.18 must be satisfied. Although the Respondent argues that Article 10.18(2) establishes a "condition precedent to El Salvador's consent to arbitration",[12] this is not what the text of Article 10.18 says. The text of Article 10.18, which states, "No claim may be submitted…", stipulates that certain requirements must be met in order for claims to be properly submitted to the tribunal. If these requirements are not met, a tribunal, once constituted, will not be properly seized of claims and cannot consider them further until procedural defects have been remedied. Claims can be dismissed if procedural defects are not remedied.

32. The text of Article 10.18 does not operate as a condition precedent to consent. If the treaty drafters had intended Article 10.18 to apply as conditions precedent, they would have provided so expressly. They did not. Although Article 10.18 is called "Conditions and Limitations on Consent of Each Party", the treaty text does not expressly create conditions precedent to consent; rather it identifies procedural requirements for the submission of a claim to arbitration. The operative treaty language is "No claim may be submitted to arbitration under this Section unless… ", not "There is no consent to arbitration unless…". The reference in the article's heading to "Conditions and Limitations on Consent…" clarifies that in accordance with CAFTA Article 10.17,

[12] Preliminary Objection, para. 73.

the Respondent consents to the submission of a claim to arbitration in accordance with the various requirements and rules set out in the CAFTA. The limitations and conditions listed in Article 10.18 operate *on* consent (as provided in the heading to the article); they are not condition precedents *of* consent.

33. The distinction between jurisdictional provisions and procedural rules has been recognized in cases interpreting the waiver requirement in NAFTA Article 1121. The tribunal in *Ethyl v. Canada* recognized the distinction between jurisdictional provisions and procedural rules and found that non-compliance with the strict requirement of Article 1121 did not affect jurisdiction.[13] Further, the procedural nature of Article 1121 is reflected in the decisions of other NAFTA tribunals, which have found that defects in the submission of waivers may be remedied.[14]

D. Even if submission of a waiver is characterized as a jurisdictional requirement, Claimants have fully satisfied this requirement

34. If the Tribunal were to interpret Art. 10.18(2) as a condition of the Respondent's consent, and thus a jurisdictional requirement, the Claimants submit that they fully satisfied the waiver requirement as of 2 July 2009, the relevant date for determining the jurisdiction of this Tribunal.

35. It is well established that there is no principle of either extensive or restrictive interpretation of jurisdictional provisions in treaties.[15] Although the Respondent does not expressly argue that a rule of restrictive interpretation applies to the CAFTA, throughout its Preliminary Objection it argues for the most restrictive possible interpretation of Article 10.18.2, with ominous warnings about the threat to the integrity and continued existence and viability of the international arbitration system were this

[13] *Ethyl Corporation v. Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, paras. 58 and 91 (CL-3).
[14] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL, Arbitral Award, 26 January 2006, para. 117 (CL-4) and *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award - In Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record (the "Harmac Motion"), 24 February 2000, para. 18 (CL-5).
[15] See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 43 (CL-6).

Tribunal to find it had jurisdiction. These concerns are entirely misplaced in the case at hand as the Claimants manifestly satisfy all jurisdictional requirements.

36. The Respondent relies on the award in *Waste Management I*[16] as establishing that a waiver requirement is tied to the consent of the respondent state.[17] The Respondent argues that the tribunal in *Waste Management I* "dismissed the entire case because the claimant maintained domestic proceedings related to the same measures after initiating the arbitration".[18] This mischaracterizes the tribunal's holding. The *Waste Management I* tribunal was faced with a situation where the claimant submitted a qualified waiver, which, on its face, did not cover domestic proceedings under Mexican law. The tribunal found that it lacked jurisdiction because, in its view, a requisite of jurisdiction was not met—the submission of a waiver compliant with NAFTA Article 1121. The tribunal's holding on this point is clear:

> Accordingly, this Tribunal cannot deem as valid the waiver tendered by the Claimant in its submission of the claim to arbitration, in view of its having been drawn up with additional interpretations, which have failed to translate as the effective abdication of rights mandated by the waiver.[19]

37. The tribunal found that the waiver was materially defective, as it did not provide the waiver of rights required by Article 1121. In *Waste Management I*, the conduct of the claimant in actively maintaining domestic proceedings was relevant in determining whether the claimant had intended to grant a fully compliant waiver. As noted by the subsequent tribunal in *Waste Management II*, the issue before the first tribunal was the defect, *ratione materiae*, in the waiver.[20]

38. In contrast, in the case at hand, there is no question of a defect *ratione materiae* in the Waivers. The Claimants' Waivers reproduce the language of Article

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[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).
[17] Preliminary Objection, para. 83.
[18] Preliminary Objection, para. 75.
[19] *Waste Management I*, Arbitral Award, 2 June 2000 [*Waste Management I*], §31 (CL-7).
[20] *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. 11 (CL-8).

10.18(2) word for word. The Waivers are not qualified in any way. The Claimants have never maintained that the Waivers did not apply to the Domestic Proceedings.

39. The Respondent also relies on the decision in *Railroad Development Corporation v. Guatemala.*[21] The *RDC* tribunal, in interpreting Art. 10.18, found that "the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected."[22] The *RDC* tribunal, therefore, viewed the investor's submission of a waiver as a jurisdictional issue going to a respondent state's consent to arbitrate. In *RDC*, the tribunal found that measures in dispute in two domestic arbitrations overlapped with measures in dispute in the CAFTA arbitration and that this "triggers the defect in the waiver."[23] In Section III(A) below, the Claimants respectfully submit that the approach in *RDC* should not be followed by this Tribunal and that the continuation of the Domestic Proceedings after 2 July 2009 did not make the Waivers defective.

40. In accordance with CAFTA Article 10.16.4(a), a claim is deemed submitted to arbitration upon receipt by the Secretary General. Thus, the date for determining the jurisdiction of this Tribunal is 2 July 2009. It is well established that events occurring after that date are irrelevant to the Tribunal's jurisdiction:

> …it is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted. Events that take place before that date may affect jurisdiction; events that take place after that date do not.
> ...
>
> The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings (other than, in a case like this, an *ad hoc* Committee's Decision to annul the prior jurisdictional finding) cannot withdraw the Tribunal's jurisdiction over the dispute.[24]

[21] *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).
[22] *RDC*, Decision on Objection to Jurisdiction, para. 56 (CL-9).
[23] *RDC*, Decision on Objection to Jurisdiction, para. 54 (CL-9).
[24] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, paras. 60 and 63 (CL-10).

41. For present purposes, the Claimants' submission is that, as of 2 July 2009, the Claimants had met all CAFTA requirements for the submission of their claims. Thus, even if the submission of a waiver were viewed as a jurisdictional requirement, this requirement was satisfied with the submission of the valid and unqualified Waivers with the Notice of Arbitration. This Tribunal has jurisdiction.

E. The CAFTA does not require discontinuance of domestic proceedings as a condition of submitting a claim to arbitration

42. The Respondent submits that the Claimants were required to discontinue the Domestic Proceedings prior to submitting their Notice of Arbitration. There is no merit in this submission. The CAFTA does not require the discontinuance of proceedings before a claimant submits a claim to arbitration. Further, there is no basis for reading in such a requirement.

43. The drafters of the CAFTA were aware that situations might arise where domestic proceedings were ongoing at the time of the submission of a notice of arbitration. CAFTA's drafters could have required the discontinuance of domestic proceedings as a condition precedent to the submission of a claim. Instead, they required a waiver of the rights to continue the proceeding. This point was made persuasively in Mr. Keith Highet's dissenting opinion in *Waste Management I* with respect to NAFTA Article 1121:

> However, if Chapter Eleven had affirmatively contemplated the termination of litigation in national courts by claimants, why didn't it say so? The NAFTA Parties were fully competent to agree on language to that effect. Instead, they agreed on the formal requirements of Article 1121, paragraph 3, specifying only that a waiver should be in writing and delivered to the respondent. To require submission of a written waiver at the outset of a NAFTA arbitration, and then to require (as the majority of this Tribunal does) that the pending local litigations be discontinued or terminated by the claimant—not by the respondent—suggests that there was no purpose for the written waiver to begin with. There surely would have been no benefit or result from its "delivery" to the respondent in writing; the claimant would have been expected to do—and should already

have done—all the work.[25]

44. Mr. Highet's Dissenting Opinion highlights a key point about the structure and operation of the type of waiver provisions that appear in NAFTA and CAFTA. The delivery of a signed waiver to a respondent state puts the respondent state in the position to make use of the waiver, if it is so wishes. A respondent state can do so easily, particularly when the proceedings in question are before its own courts. Indeed, in *Waste Management I*, the majority of the tribunal expressly rejected Mexico's argument that an investor is required to make its waiver effective before a domestic court. The tribunal stated: "it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals."[26] The Respondent's assertion that the "the tribunal emphasized that the waiving party is solely liable for making the waiver effective"[27] mischaracterizes what the tribunal said in *Waste Management I*.

45. The notion that a claimant is required to discontinue domestic proceedings before submitting a notice of arbitration is illogical. The Respondent argues that "Claimants elected to initiate CAFTA arbitration without first terminating their domestic proceedings, rather than comply with the waiver requirement before submitting their claims under CAFTA".[28] A claimant does not comply with the waiver requirement before submitting its claims. It complies with the waiver requirement by delivering a waiver. If the claimant were required to discontinue proceedings before submitting its waiver, it would be submitting a waiver of rights to continue proceedings that it had already discontinued. It would, in fact, be waiving rights to continuance that no longer existed.

46. The Respondent's interpretation of the waiver requirement cannot be sustained in light of accepted principles of treaty interpretation. The Respondent refers

[25] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 [*Waste Management I*], Dissenting Opinion, 2 June 2000, para. 34 (CL-11).
[26] *Waste Management I*, Arbitral Award, §15 (CL-8).
[27] Preliminary Objection, para. 41.
[28] Preliminary Objection, para. 88.

to the "plain" and "clear" text of CAFTA as supporting its submissions.[29] Yet, the obligation that the Respondent wishes to imply does not exist in the treaty text. The ordinary meaning of Article 10.18, in its context and in light of the object and purpose of the CAFTA, does not support the Respondent's interpretation.

F. The Waivers were valid on 2 July 2009

47. As discussed above in Sections II(A) to II(E), on 2 July 2009, the Claimants submitted fully compliant Waivers. The CAFTA does not require the Claimants to have discontinued the Domestic Proceeding before 2 July 2009 as a condition of submitting their claims. Upon the submission of the Waivers satisfying the formal requirements of the CAFTA, the initiation or continuance of domestic proceedings after 2 July 2009 could not affect the jurisdiction of this Tribunal, as its jurisdiction is determined as of 2 July 2009.

III. THE DOMESTIC PROCEEDINGS ARE NOT AN IMPEDIMENT

A. The continuance of the Domestic Proceedings does not affect the validity of the Waivers

48. The Claimants now turn to the question of whether the failure to discontinue the Domestic Proceedings after the submission of the Notice of Arbitration in any way affects the validity of the Waivers. In this section, the Claimants establish that conduct subsequent to submission of a valid waiver does not affect the validity of the waiver.

49. The Respondent's submissions with respect to the alleged "invalidity", "violation" or "repudiation" of the Waivers are based upon the false premise that the Claimants' failure to take active steps to discontinue the Domestic Proceedings after submitting their Notice of Arbitration makes the Waivers ineffective. The Respondent repeatedly asserts that the Waivers were invalidated, violated or repudiated because of

[29] Preliminary Objection, paras. 52 and 97.

the continuance of Domestic Proceedings but fails to ground its submissions in sound legal principles.

50. A waiver is a unilateral and final abandonment, extinguishment and abdication of legal rights.[30] As a matter of logic and legal principle, a legal instrument under which rights have been abandoned is not made invalid by the previous rights holder's subsequent conduct. Nor can someone who has irrevocably abandoned a right by delivery of a binding legal instrument be said to repudiate that instrument through his or her subsequent conduct.

51. The tribunal in *Waste Management II* adverted to the definitive nature of a waiver when commenting that "it seems that the waiver contemplated by Article 1121(1)(b) is definitive in its effect, whatever the outcome of the arbitration."[31] Although the tribunal was referring to the idea that a waiver would be effective with respect to the initiation of domestic proceedings in the event that a NAFTA tribunal found that it lacked jurisdiction, the applicable principle is the finality of the waiver. Once a waiver is validly granted, it is effective.

52. Although the Respondent refers to *Waste Management I* to assert that there must be "conduct consistent with the waiver in order for the waiver requirement to be fulfilled",[32] the references in *Waste Management I* to conduct are made in the context of assessing whether a waiver, which met formal requirements, was in material compliance with the waiver requirement in light of the investor's continued assertions, made manifest through its conduct, that it was entitled to maintain domestic proceedings. The tribunal's analysis focused on the investor's intention. Even though the investor said that its waiver was compliant with NAFTA, it maintained that the waiver requirement did not apply to domestic proceedings under domestic law. Thus, there was an inconsistency in the manifestation of the investor's intent; on the one hand, the investor asserted that the

[30] *Waste Management I*, Arbitral Award, §18 (CL-7).
[31] *Waste Management II*, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, para. 31 (CL-8).
[32] Preliminary Objection, para. 42.

waiver was compliant with NAFTA, while, on the other hand, it maintained that the waiver requirement did not apply to domestic proceedings.[33] This resulted in a material defect in the claimant's waiver, as there was no "effective abdication of rights mandated by the waiver".[34] The *Waste Management I* tribunal stated:

> With respect to the content of the text of the NAFTA Article 1121 waiver, it is obvious that the Claimant did not limit itself to a full transcription of the content of this Article, which in itself is sufficiently complete and clearly reflects the scope of the waiver, but instead additionally introduced a series of statements that reflected its own understanding of the waiver submitted, as is evident from the findings of fact outlined in this arbitral award now issued hereunder.[35]

53. In contrast, in the case at hand, the Claimants submitted fully unqualified Waivers. The 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. Unlike in *Waste Management I*, the Claimants never asserted a right to continue the Domestic Proceedings, nor did they take *any* action inconsistent with the Waivers. Unlike in *Waste Management I*, the Claimants' intent to waive their rights is manifest in the unqualified Waivers and has not been contradicted through the Claimants' conduct.

54. The Respondent, citing para. 31 of *Waste Management II*, states that the "tribunal in *Waste Management II* also recognized that the waiver in NAFTA requires conduct consistent with the waiver in order for the waiver requirement to be fulfilled."[36] Yet again, the Respondent mischaracterizes the tribunal's statement. Para. 31 states in its entirety:

> A further point to note is that – as the parties agreed in response to a question from the Tribunal – it seems that the waiver contemplated by Article 1121 (1) (b) is definitive in its effect, whatever the outcome of the arbitration. The waiver concerns the right "to initiate or continue" domestic proceedings for damages or similar relief. A dismissal of the

[33] *Waste Management I*, Arbitral Award, §24 (CL-7).
[34] *Waste Management I*, Arbitral Award, §31 (CL-7).
[35] *Waste Management I*, Arbitral Award, §31 (CL-7).
[36] Preliminary Objection, para. 42.

> NAFTA claim would, it seems, be final not only with respect to NAFTA itself but also any domestic proceedings with respect to the measure of the disputing Party that was alleged to be a breach of NAFTA. Such proceedings may not be initiated or continued (except as permitted by Article 1121) at any time after the claim has been submitted to arbitration.

55. The tribunal does not refer to the waiver being "fulfilled" by consistent conduct. What the tribunal says is that the waiver is definitive, the effect of which is that other proceedings cannot be initiated or continued. The issue is not the alleged defect in the waiver, but the effect of the waiver on the other proceeding.

56. The Respondent has relied on the decision of the *RDC* tribunal to support its allegation that the Waivers are invalid. In *RDC*, the tribunal found a defect in the investor's waiver because two measures challenged in two domestic arbitration proceedings overlapped with two measures challenged in the CAFTA arbitration.[37] The tribunal found that it did not have jurisdiction with respect to the overlapping measures because "the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected."[38]

57. The Claimants begin by noting that even if the Tribunal were to accept that the *RDC* decision is correct as a matter of law, the case at hand is distinguishable because, unlike in *RDC*, there are no overlapping proceedings. In fact, as explained in Section IV(A) below, in the current case, there were *never* any overlapping proceedings.

58. With the utmost respect to the distinguished tribunal in *RDC*, the tribunal provides no reasoning for its conclusion that there was a defect in the claimant's waiver. In the Claimants' submission, the validity of a CAFTA waiver is unaffected by the initiation or continuance of domestic proceedings. This flows from the nature of a waiver as a definitive abandonment of legal rights. Rather than the waiver being invalid or defective with jurisdictional consequences in the CAFTA arbitration, the situation is quite

[37] *RDC*, Decision on Objection to Jurisdiction, para. 54 (CL-9).
[38] *RDC*, Decision on Objection to Jurisdiction, para. 56 (CL-9).

the opposite. The waiver remains effective, with definitive and fatal consequences for the other proceeding to which a claimant has waived its rights.

59. Further, the Claimants submit that the *RDC* decision incorrectly characterizes the issue as one of "perfecting" the Respondent's consent. The Respondent's consent and other jurisdictional requirements are determined as of the date of the receipt of the Notice of Arbitration by the Secretary General. After that date, the question of the legal effect of a waiver is one for the other proceeding to which a claimant has waived its rights.

60. This approach is supported by the decision in *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*,[39] a case under the Canada-Venezuela bilateral investment treaty (the **BIT**).[40] Similar to the CAFTA, Article XII(3)(b) of the BIT requires the investor to waive its rights to initiate or continue other proceedings.[41] In *Vanessa Ventures*, the investor filed waivers but did not immediately withdraw pending actions and indeed sought review of an earlier court decision by the Constitutional Chamber of the Venezuelan Supreme Court. The Supreme Court subsequently dismissed the investor's petition because it found that the waiver was effective. In rejecting Venezuela's submission that the investor's waivers were defective, the *Vanessa Ventures* tribunal noted that the Supreme Court had found the waiver was effective and that:

> In view of the fact that the question of the scope of the waiver, if this issue should in the future arise, is a matter to be decided under Venezuelan law by the Venezuelan Courts, this Tribunal considers that the Supreme Court of Venezuela is best qualified to interpret Venezuelan law. The Tribunal therefore holds that the waiver fulfils the requirements of the BIT and that this defense of the Respondent is denied.[42]

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[39] *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).
[40] Canada-Venezuela Bilateral Investment Treaty (CL-13).
[41] Article XII(3)(b) of the BIT states that an investor may submit a dispute to arbitration under the BIT "only if the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind."
[42] *Vanessa Ventures*, Decision on Jurisdiction, Section 3.4.4, page 28 (CL-12).

61. In *Vanessa Ventures*, the tribunal did not question the validity of the waiver because of the initiation and continuation of domestic proceedings. Rather, the analysis reflects the structure of the waiver requirement in the **BIT**—the delivery of a signed waiver has fatal consequences with respect to other proceedings, but it is for the court or tribunal in the other proceedings to address the effect of the waiver.

62. In the Claimants' submission, the approach in *Vanessa Ventures* is to be preferred to that in *RDC*. The CAFTA requires the delivery of a signed waiver, the purpose of which is to ensure that a respondent state can seek to have concurrent proceedings dismissed. The court or the tribunal hearing the other concurrent proceedings is in the best position to enforce the waiver. This approach reflects the structure of the waiver requirement, the definitive legal effect of the waiver, and also judicial comity and respect for a respondent state's courts.

63. Finally, the Respondent's argument that some CAFTA parties have expressed a particular understanding of Article 10.18 is unavailing.[43] These "understandings" have been made in the self-serving pleadings of three respondent states in arbitrations under the CAFTA. Second, the understandings of three of five CAFTA parties do not constitute a "subsequent agreement between the [CAFTA] parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention of the Law of Treaties.[44] Third, CAFTA Article 10.22.3 establishes the appropriate treaty mechanism for issuing binding interpretations of CAFTA provisions. The Free Trade Commission has not issued any binding interpretations of the CAFTA.

B. In the alternative, the alleged non-compliance with the Waivers is a question of admissibility of claims

64. If the Tribunal were to find that the continuance of Domestic Proceedings has

[43] See Preliminary Objection, para. 45.

[44] The United States and El Salvador have signed but not ratified the Vienna Convention on the Law of Treaties. The Claimants submit that the provisions of the Vienna Convention relating to the interpretation of treaties reflect customary international law and thus are still applicable. Vienna Convention on the Law of Treaties, 1969 (CL-14).

consequences for this arbitration, the Claimants submit that the failure to discontinue the Domestic Proceedings after 2 July 2009 is a question of the admissibility of claims.

65. Since jurisdiction is determined as of 2 July 2009, events occurring after that date do not have jurisdictional consequences. Compliance with the CAFTA waiver requirement after the date for determining consent is, in this submission, a question of the admissibility of claims. The point that conduct inconsistent with the waiver is related to the admissibility of the claim, rather than depriving the tribunal of jurisdiction, was made forcefully by Mr. Keith Highet in his dissenting opinion in *Waste Management I*:

> In the present case it is quite evident that the Award has dealt with a matter of admissibility of the claim rather than the jurisdiction of the Tribunal. The insufficiency of the waiver itself is the only element that could legally affect jurisdiction under Article 1121. Once that waiver has been delivered, jurisdiction exists and the proceedings under NAFTA could be started. If conduct inconsistent with that waiver requirement subsequently shows that the waiver is hollow or frustrates its object and purpose, this would be a matter of admissibility: it would be inappropriate for the Tribunal to adjudicate the case, insofar as the waiver originally validly submitted in connection with it had in effect been repudiated by the Claimant's subsequent conduct.[45]

66. As submitted in Section IV(B) below, if the Tribunal were to find that, in principle, the continuance of domestic proceedings can act as an impediment to a CAFTA claim, any such impediment has been remedied.

IV. THE WAIVERS ARE NOT DEFECTIVE IN ANY EVENT

A. The Respondent has not been subject to concurrent proceedings

67. The purpose of the waiver requirement in the CAFTA is to ensure that a respondent state is not subject to concurrent proceedings with respect to the same measure. The Respondent states that CAFTA requires "exclusivity of proceedings"[46] and complains

[45] *Waste Management I*, Dissenting Opinion, para. 59 (CL-11).
[46] Preliminary Objection, para. 16.

that the Claimants maintained "two sets of proceedings related to the same measures".[47] The Claimants recall that in *RDC*, the tribunal found that the defect in the investor's waivers was triggered because the "two domestic arbitration proceedings exist[ed] and overlap[ped]" with the CAFTA arbitration.

68. In contract with the situations in *Waste Management I* and *RDC*, the Respondent has never been subject to concurrent proceedings in the current case.

69. In accordance with ICSID Arbitration Rule 6, the present Tribunal was not constituted, and the current proceedings did not begin, until 1 July 2010, the date of notification by the Secretary-General that all the arbitrators have accepted their appointment. Accordingly, there were no arbitral proceedings in the present case until 1 July 2010.

70. As the Respondent notes, 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 **Court Decisions**).[48] Thus, the Domestic Proceedings had ended well over three months before the current arbitral proceedings had commenced. Further, the Respondent nominated its arbitrator in the present case on 28 April 2010, well over five weeks *after* the final Court Decisions. The dates speak for themselves—the Respondent was never subject to concurrent proceedings with respect to the revocation of the environmental permits.

71. In light of the conclusion of the Domestic Proceedings by 18 March 2010, there is no possibility of conflicting outcomes or double redress. The purpose and rationale of the waiver requirement have been satisfied. The Respondent is in the same position it would have been in had the Salvadoran Supreme Court issued its decisions prior to the submission of the Notice of Arbitration.

[47] Preliminary Objection, para. 5.
[48] Preliminary Objection, para. 49.

B. The Claimants have acted in accordance with the Waivers and the CAFTA

72. Since 2 July 2009, the Claimants have at all times acted in accordance with the Waivers. Since 2 July 2009, the Claimants have taken no actions inconsistent with the Waivers. They took no action in the Domestic Proceedings and have never maintained that they had a right to continue the Domestic Proceedings in any way.

73. Accordingly, the current case is entirely distinguishable from the situation in *Waste Management I*, where the investor submitted a non-compliant waiver and was actively engaged in domestic litigation after submitting its notice of arbitration, and *RDC*, where there existed ongoing and overlapping domestic arbitrations contemporaneously with the CAFTA arbitration proceedings.

C. If the continuation of the Domestic Proceedings were found to be an impediment to the admissibility of the claim or to have resulted in a defect in the Waivers, any impediment or defect has been remedied

74. If, contrary to the Claimants' submissions, the Tribunal were to find that the continuance of Domestic Proceedings has consequences for this arbitration, the Claimants submit that any alleged defect or impediment has been remedied.

75. If events subsequent to the submission of the Notice of Arbitration can make a waiver defective or result in an impediment to admissibility, other subsequent events can remedy any such defect or impediment.[49] Any alleged defect in the Waivers due to the continuance of the Domestic Proceedings was remedied by the conclusion of the Domestic Proceedings by the Court Decisions, or at the very latest by 29 April 2010, the date the parties were notified of the Court Decisions.

[49] *Waste Management I*, Dissenting Opinion, para. 55 (CL-11): "The correct conclusion must be that NAFTA claimants can be considered as failing to satisfy the jurisdictional waiver requirements of Article 1121 only as long as and to the extent that inconsistent recourse to local remedies is maintained in the local national courts. The *status quo ante* must be considered as susceptible of restoration once such an inconsistent recourse is terminated or abandoned, and not otherwise resumed. An elementary application of the principle of effectiveness in the interpretation of international undertakings (*ut magis res valeat quam pereat*) therefore makes it impossible to hold that a defective waiver can never be remedied."

76. Further, any impediment based on inadmissibility was remedied by the conclusion of the Domestic Proceedings by the Court Decisions, or at the latest by 29 April 2010, the date the parties were notified of the decisions.

V. THE PRELIMINARY OBJECTION CANNOT RESULT IN THE DISMISSAL OF THE ENTIRE PROCEEDING

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

77. Even if the Tribunal were to determine that the continuance of the Domestic Proceedings had 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. In contrast, the Respondent has argued that if the waiver is defective, then no claim may be submitted to arbitration because there is a lack of consent to the entire proceedings.[50]

78. The Respondent's submission is without merit. The tribunal in *RDC*, which specifically addressed this issue with detailed and persuasive reasons, held that the "word 'claim' in Article 10.18 means the specific claim and not the whole arbitration in which that claim is maintained".[51] In the context of the *RDC* case, 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 *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 overlap with the ongoing domestic arbitrations.[52]

79. Although the Respondent's argument fails on its legal merits for the reasons given by the tribunal in *RDC*, the Respondent also fails to explain what possible

[50] Preliminary Objection, paras. 77-87.
[51] *RDC*, Decision on Objection to Jurisdiction, para. 75 (CL-9).
[52] See *RDC*, Decision on Objection to Jurisdiction, paras. 69-75 (CL-9).

purpose would be served by such a waiver requirement. For example, in a case where an investor alleges violation of the CAFTA based on 20 different measures, a domestic proceeding with respect to one discrete measure would invalidate the consent for the other 19 measures. The Respondent's approach to the interpretation of Art. 10.18(2) is entirely inconsistent with one of the CAFTA's overall objectives, which is to "create effective procedures for the implementation and application of this Agreement, for its joint administration, and for the resolution of disputes".[53]

80. The only measures at issue in the Domestic Proceedings were the revocation of the environmental permits. The Claimants' Notice of Arbitration identifies a series of other measures that breach CAFTA and the Foreign Investment Law. First, the Respondent's decisions not to renew the Claimants' exploration licenses are undoubtedly measures. Indeed, the Respondent implicitly acknowledges the existence of other claims when it notes that the revocation of the environmental permits constitutes "by far the most significant claims in this arbitration".[54] Although the Claimants do not accept that categorization of their claims, the Respondent has essentially admitted that there are other claims in this arbitration unaffected by any alleged defect in the Waivers. The Respondent's clarifications in the Preliminary Objection highlight that there were no local court proceedings with respect to the Claimants' exploration licenses.[55] Accordingly, any alleged defects in the Waivers do not apply to claims with respect to the exploration licenses.

81. Second, the Notice of Arbitration claims that the Respondent has imposed a *de facto* ban on gold and silver mining, which is arbitrary, discriminatory and expropriatory. The ban is arbitrary because other environmentally damaging activities are not similarly banned. It is discriminatory because the ban is not applied against El Salvadorans, who continue to engage in mining activities without any regulation or enforcement by government officials of mining and environmental laws. The *de facto* ban is a measure that violates the CAFTA and the Foreign Investment Law. Thus, in

[53] Article 1.2(1)(f), CAFTA (CL-15).
[54] Preliminary Objection, para. 31.
[55] Preliminary Objection, para. 106.

addition to the revocation of the environment permits, the complete *de facto* ban on mining activities has resulted in the *de facto* expropriation of the Claimants' investment.

82. In discussing the meaning of "measure", the Respondent suggests that "[a]ny governmental policy can only be applied through government *action* that has a direct impact on Claimants" [emphasis in the original].[56] This is demonstrably false, if the Respondent is arguing that government omissions or inaction cannot amount to a measure for the purposes of CAFTA. It is well established that principles of state responsibility apply to actions and omissions[57] and that "a failure to act (an "omission") by a host State may also constitute a State measure tantamount to expropriation".[58] As the Respondent notes, CAFTA Article 2.1, "Definitions of General Application," provides that "measure includes any law, regulation, procedure, requirement, or practice." A *de facto* moratorium is a "procedure, requirement, or practice".

83. The reality is that, the former Minister of MARN and the current and former Presidents of El Salvador have publicly announced that there will be no mining in El Salvador. This *de facto* moratorium is a measure for the purposes of CAFTA and the Foreign Investment Law, which, among other violations, has resulted in the expropriation of the Claimants' investments.

B. There is no waiver with respect to the revocation of the environmental permits for the purposes of breaches of the Foreign Investment Law

84. The current proceeding is based on two separate arbitral consents, one under the CAFTA and one under the El Salvadoran Foreign Investment Law. A similar situation has arisen in *Pac Rim v. El Salvador*,[59] in which the Respondent argued that the waiver requirement in 10.18(2) applies not only to the initiation of proceedings before

[56] Preliminary Objection, para. 30.
[57] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 68 (CL-16).
[58] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award [redacted version], 14 July 2006, at footnote 155 (CL-17).
[59] *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).

other courts or tribunals but, in addition, applied to Pac Rim's claims under the Foreign Investment Law. The tribunal rejected this argument. The tribunal stated:

> In the Tribunal's view, these arbitration proceedings are indivisible, being the same single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration registered once by the ICSID Acting Secretary-General under the ICSID Convention. To decide otherwise would require an interpretation of CAFTA Article 10.18(2) wholly at odds with its object and purpose and potentially resulting in gross unfairness to a claimant. There is no corresponding unfairness to the Respondent in maintaining these ICSID proceedings as one single arbitration. In particular, the Respondent does not here face any practical risk of double jeopardy. Lastly, it is hardly a legitimate objection to this Tribunal's competence that it exercises jurisdiction over these Parties based not upon one consent to such jurisdiction from the Respondent but based upon two cumulative consents from the Respondent. It is an indisputable historical fact that several arbitration tribunals have exercised jurisdiction based on more than one consent from one disputant party, without being thereby deprived of jurisdiction.[60]

85. The Claimants accept that the Waivers apply to claims with respect to the measures "before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures". However, the present case involves one proceeding before a Tribunal in which there are multiple claims arising from two separate sources (the CAFTA and the Foreign Investment Law) and based on two separate consents to arbitration. Since the Waivers apply to other proceedings (and not this proceeding), there is no waiver of rights with respect to challenging the revocation of environmental permits as a breach of the Foreign Investment Law.

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

[60] *Pac Rim Cayman LLC v. Republic of El Salvador*, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, para. 253.

C. San Sebastian Gold Mines, Inc.'s Waiver is not defective in any event

87. SanSeb was not a party to the Domestic Proceedings. Any impediment that might apply to Commerce's claims does not apply to Sanseb's claims as a separate party to this arbitration.

88. Although, for ease of pleading, the Claimants have generally referred to the 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. COSTS

89. In accordance with CAFTA Article 10.20.6, the Claimants seek their costs plus compound interest in responding to the Respondent's Preliminary Objection. As the Claimants have demonstrated in this Response, the Respondent's Preliminary Objection is without legal merit. Further, Counsel for the Respondent has, throughout the Preliminary Objection, engaged in hyperbole and innuendo and made allegations of bad faith and abuse of process that are entirely devoid of foundation.

VII. THE RESPONDENT'S SUBMISSIONS ON RESERVATIONS OF RIGHTS WITH RESPECT TO COUNTERCLAIMS AND PROVISIONAL MEASURES ARE INAPPROPRIATE AND TRANSPARENT ATTEMPTS TO DISPARAGE THE CLAIMANTS

90. The Respondent's submissions on reservations of rights to make counterclaims and request provisional measures are inappropriate and transparent attempts to disparage the Claimants and veil the Respondent's illegal conduct in the cloth of legitimacy. As Counsel for the Respondent well knows, ICSID Arbitration Rules 39 and 40 provide the applicable procedures for requesting provisional measures and making

ancillary claims in this proceeding. There is no need for reservations of these procedural rights.

91. In light of Respondent's inappropriate pleadings on these issues, the Claimants simply deny that they have any factual truth or legal merit. The Claimants will address all relevant factual issues with respect to their claims in their memorial on the merits.

92. With respect to the Respondent's references to the Claimants' financial ability,[61] the Claimant Commerce's 2010 Annual Report to the U.S. Securities and Exchange Commission, to which Respondent refers, also shows that in 2009 Commerce discounted the book value of its El Salvadoran investment by more than $26 million because of the conduct of the Respondent. The Respondent's actions against the Claimants, coupled with the Respondent's unwillingness to engage in settlement discussions after the Claimants gave notice of their intent to file for arbitration, caused management of Commerce to conclude that the Claimants' El Salvadoran assets could not be used as intended—for the production of precious metals—in the foreseeable future.[62] In other words, after undermining the value of the Claimants' assets, the Respondent complains about their value. While the Respondent cites the Claimants' obligations to its past and current president, directors, and other shareholders as a negative, the Claimants submit that the historic willingness of those closely involved with the Claimants to defer the repayment of their debts to enable the Claimants' continued investment on the ground in El Salvador is a positive. It speaks to those investors' belief in the Claimants' investment and their future expectations, and is a testament to what the value of these assets would have been but for the Respondent's illegal and arbitrary actions.

[61] Preliminary Objection, paras. 115-118.
[62] Commerce Group Corp., 2010 Annual Report at 10 and 38 (C-8).

VIII. RESERVATION OF RIGHTS

A. The Respondent is not entitled to make further preliminary objections under Article 10.20.4 and the Claimants reserve their rights to object to a further purported exercise of Article 10.20.4

93. The Claimants submit that the Respondent is not entitled, as of right, to a second suspension of the proceedings under CAFTA Article 10.20.4. Rather, any further suspension of the proceedings is a question for this Tribunal under ICSID Arbitration Rule 41. In light of the Respondent's reservations, the Claimants reserve their rights to object to any further purported exercise of Article 10.20.4.

94. The Claimants' objection is based on the prospect of having to face three sets of preliminary objections before these proceedings can advance to the merits. The Respondent has made one preliminary objection under the expedited process in Article 10.20.5. In its Preliminary Objection, the Respondent suggests that it might bring other preliminary objections under Article 10.20.4 and that it might also seek a make other preliminary objections under ICSID Arbitration Rule 41.

95. In the Claimants' submission, Article 10.20.5 provides an expedited process for the hearing of a preliminary objection under Art. 10.20.4. Article 10.20.5 states that the tribunal "shall decide on an expedited basis an objection under paragraph 4". In other words, an Article 10.20.5 objection is, for all purposes, an Article 10.20.4 objection made on an expedited basis. The reference in Article 10.20.4 to the fact that a preliminary objection is "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question" clarifies that the exercise of Art. 10.20.4, is without prejudice to the right to make other preliminary objections under ICSID Arbitration Rule 41. It does not mean that Respondent is entitled to exercise Art. 10.20.4 again.

96. The issue is not that the Respondent cannot make further preliminary objections; it is whether the Respondent is entitled, as of right, to a suspension of the proceedings under Article 10.20.4(a), or whether, in accordance with ICSID Arbitration

Rule 41, the Tribunal has the discretion to deal with the objection as a preliminary question and decide whether to suspend the proceedings or to join any preliminary objection to the merits of the dispute. The Claimants submit that any further suspension of these proceedings is a question for the Tribunal's discretion and not the Respondent's right.

97. If the Tribunal were to find the Respondent is entitled to the further exercise of Article 10.20.4 as of right, the Claimants reserve their right to object to any further preliminary objection as untimely, in light of the requirement that a preliminary objection must be submitted to the tribunal "as soon as possible after the tribunal is constituted".

B. The Claimants reserve their rights to object to the Respondent's translations

98. For the purposes of this Response, the Claimants do not dispute the accuracy of the Respondent's translation of the exhibits to its Preliminary Objection. The Claimants reserve their rights to dispute the accuracy of Respondent's translation of documents in future submissions.

C. The Claimants reserve their rights with respect to any future proceedings

99. The Respondent tauntingly argues, that were the Tribunal to dismiss the Claimants' claims in their entirety, the Claimants could just start over, and then face claims that limitation periods, or perhaps other presently undisclosed objections, preclude their claims. The Claimants agree that the Tribunal's decision on this preliminary objection is extremely important. The Claimants do not agree that the intent or object of CAFTA was to create requirements not found in the plain language of the treaty text. The Respondent's Preliminary Objection is entirely without merit.

100. In any event, the Claimants reserve their rights with respect to any future proceedings. The Claimants have been operating in El Salvador for over 40 years. Their

concession runs until 2034. The Claimants are not going away. They will continue to enforce their rights in respect of El Salvador's past, continuing and future violations of the CAFTA, the Foreign Investment Law and domestic law.

IX. PRAYER FOR RELIEF

101. The Claimants respectfully request that the Tribunal:

(1) reject the Respondent's Preliminary Objection;

(2) award the Claimants their costs in opposing the Preliminary Objection, including counsel fees and disbursements, and the arbitration costs associated with the Preliminary Objection, with compound interest;

(3) resume the proceedings on the merits and, after consultation with the parties, establish a schedule for the written and oral phase of the merits of the proceeding; and

(4) grant such other relief as the Tribunal may consider appropriate.

15 September 2010

Respectfully submitted,

/s/ John E. Machulak

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and

Professor Andrew Newcombe

on behalf of
Commerce Group Corp. and
San Sebastian Gold Mines, Inc.