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July 3, 2012

Ms. Meg Kinnear
Secretary-General
International Centre for Settlement of
Investment Disputes
Washington, D.C.

Re: Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador (ICSID Case No. ARB/09/17) – Annulment Proceeding

Dear Ms. Kinnear,

I am writing to correct some inaccurate statements recently made to you and transmitted to the *ad hoc* Committee, so that any decision about the pending application for annulment is based on facts, not on inflammatory statements.

1. El Salvador is not responsible for Claimants' inability to pay

Claimants, through their new counsel, repeat once again their charge that their "means of financing this claim have been destroyed by Respondent's actions." But as we have demonstrated before, Claimants' attempts to blame El Salvador for their lack of funding to pursue their annulment application (the Tribunal having rejected the claim for lack of jurisdiction) are plainly contradicted by the facts revealed in Claimants' own documents.

The Government's acts on which Claimants based their arbitration claims took place in 2006.¹ Yet *Claimants had stopped their activity in El Salvador seven years earlier*, in 1999, not because of anything the Government did, but because "the price of gold suffered a severe decline."² Commerce Group Corp. itself admitted in its annual reports that it "has not had any revenues since April 1, 2000."³ After that date, in 2002-2004, Claimants received a new exploitation concession, their environmental permits, and new exploration licenses from the Government of El Salvador.

¹ Claimants' Response to El Salvador's Preliminary Objection, Sept. 15, 2010, para. 4.

² Commerce Group Corp., Annual Report (Form 10-K), at 41 (July 15, 2010).

³ Commerce Group Corp., Annual Report (Form 10-K), at 94 (July 15, 2010).

After 1999, despite obtaining new permits and licenses, Claimants never managed to re-initiate their gold mining and processing activities. In 2002, Claimants explained that they had no revenue because of the "need to rehabilitate, overhaul and expand" the processing facilities and stated that they hoped to resume their activities "when adequate funding becomes available."⁴ They never got the funding they needed, and therefore failed to fulfill their investment commitments to El Salvador. In fact, during the arbitration, Commerce Group Corp.'s 2010 Annual Report showed that the company had more than \$33 million in debt, including *decades of accrued salaries, rent, legal fees, and deferred Directors' fees.*⁵

Therefore, El Salvador had nothing to do with Claimants' financial situation or with their inability to pay the costs for the arbitration they chose to initiate.

Claimants must have been aware of their decades-old financial problems when they initiated the arbitration against El Salvador three years ago. El Salvador's Preliminary Objection ended the arbitration quickly with the least possible costs for the parties. At this point, giving Claimants more time to hold El Salvador in limbo with a pending annulment proceeding while they look for funding is not justified.

2. Counsel's issue conflict with its client, the Republic of Guatemala

Claimants' new counsel has chosen to look away from the issue conflict brewing in this annulment proceeding. In his letter to the Secretary-General, Mr. Blackaby states that Guatemala has not raised an objection in connection with the CAFTA waiver provision in the *TECO v. Republic of Guatemala* arbitration, where he and his law firm, Freshfields Bruckhaus Deringer, act as Guatemala's counsel. But he fails to mention Guatemala's other CAFTA case, *Railroad Development Corporation v. Republic of Guatemala*, in which the waiver provision was at issue. The tribunal in that case just released its Award on June 29, 2012, and we will not know whether the waiver issue, raised by Guatemala, will be the subject of annulment proceedings until the period for seeking annulment expires in four months. But regardless of whether an application for annulment is filed in that case, Claimants' position in this annulment proceeding is contrary to the interests of Guatemala, an existing client of Claimants' new counsel.

El Salvador brings this issue to everyone's attention at the first possible time because it wants to avoid having this annulment proceeding abandoned or interrupted if the issue conflict arises several months from now.

3. Claimants' chosen forum already decided the merits of their claims

El Salvador would like to note that Claimants did have their day in court before the Supreme Court of El Salvador. That was the forum they chose when their environmental permits were revoked in 2006, and that was the forum in which they continued to pursue

⁴ Commerce Group Corp., Annual Report (Form 10-K), at 45, 66 (May 28, 2002).

⁵ Commerce Group Corp., Annual Report (Form 10-K), at 31, 36, 63-65 (July 15, 2010).

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their claims even after initiating this CAFTA arbitration on July 2, 2009. The Supreme Court of El Salvador decided the two cases brought by Claimants in February and March 2010. Then the CAFTA Tribunal, in March 2011, found that it lacked jurisdiction to hear the claims because Claimants had violated the required waivers by initiating this arbitration when they had already chosen to seek relief before the Supreme Court of El Salvador.

El Salvador had twice warned Claimants about the waiver violation during the registration process, but Claimants insisted on continuing the arbitration.

Having defended itself before the Supreme Court, and again in the underlying arbitration that should never have been initiated given the clear violation of the waivers on the face of the Notice of Arbitration, El Salvador believes that this annulment proceeding should be discontinued without further delay.

However, if the Secretary-General or the *ad hoc* Committee decide to accommodate Claimants' request for additional time, El Salvador requests that the continuation of the annulment proceeding be conditioned on Claimants' willingness and ability to provide security for costs. El Salvador should not have to continue to expend its scarce resources on this case without any hope of recovering its legal expenses if Claimants, after finding cash to pay the initial fees to ICSID, again find themselves unable to continue funding the annulment proceeding. Therefore, as a condition for the continuation of the annulment proceeding, El Salvador requests that Claimants be required to produce security for costs in the amount of \$2,500,000 to be in a position to reimburse El Salvador, and ICSID for that matter, in the event the annulment proceeding is discontinued at a later stage for lack of payment or if El Salvador is awarded legal fees and costs in a final decision on annulment.

Finally, it would be useful to keep in mind that counsel for El Salvador represents a sovereign State, which is a Contracting State to the ICSID Convention and a Party to CAFTA. Therefore, counsel's communications with the Centre or the Committee are on behalf of, and under instructions of, the Government of a sovereign State.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Luis Alberto Parada', written over a horizontal line.

Luis Alberto Parada
Counsel