

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

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

and

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

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**AWARD**

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**ARBITRAL TRIBUNAL**

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

Secretary to the Tribunal  
Mr. Marco T. Montañés-Rumayor

Date of dispatch to the Parties: 14 March 2011

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**I. THE PARTIES**

1. Claimants:

1. Commerce Group Corp  
6001 North 91<sup>st</sup> Street  
Milwaukee, Wisconsin 53225  
USA

hereinafter referred to as “Claimant No. 1” or “CGC”.

and

2. San Sebastian Gold Mines  
6001 North 91<sup>st</sup> Street  
Milwaukee, Wisconsin 53225  
USA

hereinafter referred to as “Claimant No. 2” or “SSGM”.

2. Claimant No. 1 and Claimant No. 2 are hereinafter collectively referred to as “Claimants”.
3. CGC is a company organized and existing under the laws of Wisconsin, U.S.A.  
SSGM is a company organized and existing under the laws of Nevada, U.S.A.
4. Claimants are represented in this arbitration by their duly authorized attorneys mentioned at page 1 above.
5. Respondent:

The Republic of El Salvador  
Dirección de Administración de Tratados Comerciales  
Ministerio de Economía  
Alameda Juan Pablo II y Calle Guadalupe  
Edificio C1 – C2

Plan Maestro Centro de Gobierno  
San Salvador – El Salvador

hereinafter referred to as “Respondent” or “El Salvador”.

6. Respondent is represented in this arbitration by its duly authorized attorneys mentioned at page 1 above.
7. Claimants and Respondent are hereinafter collectively referred to as the “Parties”.

## **II. THE ARBITRAL TRIBUNAL**

8. The Arbitral Tribunal has been constituted as follows:
  - (i) Dr. Horacio A. Grigera Naón  
(jointly appointed by Claimants)  
2708 35<sup>th</sup> Place NW  
Washington, D.C. 20007-1  
U.S.A.
  - (ii) Mr. J. Christopher Thomas, Q.C.  
(appointed by Respondent)  
1000 Waterfront Centre  
200 Burrard Street, P.O. Box 48  
Vancouver, BC V7X1T2  
Canada
  - (iii) Professor Albert Jan van den Berg as President  
(appointed by the Secretary-General of the International Centre for  
Settlement of Investment Disputes, hereinafter “ICSID”)  
Hanotiau & van den Berg  
IT Tower (9<sup>th</sup> floor)  
480 Avenue Louise B.9  
1050 Brussels  
Belgium

### III. PROCEDURAL HISTORY

9. Claimants began mining precious metals in El Salvador in 1968. Between 1987 and early 2006, Claimants expanded their mining and related activities which were regulated by exploration licenses and environmental permits granted by the Government of El Salvador. However, in September/October 2006, the Government revoked Claimants' environmental permits and did not renew their exploration licenses.
10. Claimants assert that these measures amount to a violation of Respondent's obligations under the Central American-Dominican Republic Free Trade Agreement (hereinafter "CAFTA"<sup>1</sup>), ratified in El Salvador on 17 December 2004 (effective as of 1 March 2006) and ratified in the United States on 27 July 2005 (effective as of 1 March 2006).
11. CAFTA contains the following arbitration provision:

*Article 10.16*

Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
  - (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
    - (i) that the respondent has breached
      - (A) an obligation under Section A,

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<sup>1</sup> This Agreement is referenced as DR-CAFTA-US, CAFTA-DR, US-DR-CAFTA, etc., in various texts. For ease of reference, it will remain CAFTA throughout this Award.

- (B) an investment authorization, or
      - (C) an investment agreement; and
    - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
  - (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
    - (i) that the respondent has breached
      - (A) an obligation under Section A,
      - (B) an investment authorization, or
      - (C) an investment agreement; and
    - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). [...]
3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
- (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;
  - (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or
  - (c) under the UNCITRAL Arbitration Rules.
4. A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (“notice of arbitration”):
- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;  
or

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent.

A claim asserted for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint such arbitrator.

12. 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").
13. 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.
14. On 2 July 2009, Claimants filed their Notice of Arbitration with ICSID, accompanied by Annexes A through D (the "Request").
15. 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 ¶ 11

above), and Article 15(a) of the Ley de Inversiones of El Salvador (“Investment Law”). Article 15(a) of the Investment Law provides:

En caso que surgieren controversias o diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los Tribunales de Justicia, competentes, de acuerdo a los procedimientos legales.

En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia:

a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI);

[Tribunal’s translation:

In case of disputes arising between domestic or foreign investors and the State, regarding their investments made in El Salvador, the parties may resort to [El Salvador’s] Courts of Justice as the competent authority under the legal procedures.

In case of disputes arising between foreign investors and the State, regarding their investments made in El Salvador, the investors may submit the controversy to:

a) The International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).]

16. Within their Request, Claimants included the following waiver of rights, as required by Article 10.18.2(b)(ii) of CAFTA (the “Waiver Provision”):<sup>2</sup>

[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”.

17. 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”).

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<sup>2</sup> Request ¶ 36.

Article 10.18.2 of CAFTA provides:

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.

18. 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.
19. On 19 August 2009, Claimants submitted their Clarification, providing supplemental Annexes E, F, and G to the Request.
20. On 21 August 2009, the Secretary-General registered Claimants’ Request with Annexes A through G.
21. On 24 August 2009, Respondent filed a letter preserving its objections made in its letter of 14 August 2009.
22. On 29 October 2009, ICSID confirmed the appointment of Dr. Horacio A. Grigera Naón to serve as the arbitrator nominated by Claimants.
23. Thereafter, this matter remained at a standstill for many months.
24. On 9 April 2010, the Secretary-General informed the Parties that failure to take action during six consecutive months would lead to a discontinuance of proceedings pursuant to Rule 45 of the ICSID Arbitration Rules.
25. On 13 April 2010, Claimants filed a letter with ICSID, requesting that the Chairman of the Administrative Council immediately appoint an arbitrator on behalf of Respondent, as Respondent had failed to appoint an arbitrator.
26. Before such action from ICSID became necessary, on 28 April 2010, Respondent appointed Mr. J. Christopher Thomas, Q.C., to serve as co-arbitrator.

27. On 11 May 2010, the Secretary-General informed the Parties of the need to appoint a presiding arbitrator.
28. The Parties having been unable to agree on a presiding arbitrator, by letter dated 29 June 2010, the Secretary-General of ICSID advised that she had appointed Prof. van den Berg pursuant to Article 10.19.3 of CAFTA.
29. On the same day (29 June 2010), Prof. van den Berg accepted his appointment as President of the Tribunal, pursuant to Rule 5 of the ICSID Arbitration Rules.
30. 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.
31. On 27 July 2010, the First Session was held by telephone at which a procedural calendar for the further conduct of the proceedings was established. During the First Session, it was agreed that the arbitration would be bifurcated between a jurisdictional and a merits phase.
32. On 13 August 2010, the Parties jointly filed a letter evincing their agreement as to the procedural timetable.
33. 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.
34. The relevant provisions regarding the expedited procedures of CAFTA are contained in Article 10.20, captioned “Conduct of the Arbitration”, and provide as follows:

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its

decision or award by an additional brief period, which may not exceed 30 days.

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

35. On 15 September 2010, Claimants filed their Response to El Salvador's Preliminary Objections (the "PO Response").
36. On 30 September 2010, Respondent filed its Reply to Claimants' PO Response (the "PO Reply").
37. 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.
38. On 15 October 2010, Claimants filed their Statement of Rejoinder to the PO Reply (the "PO Rejoinder").
39. On 20 October 2010, the Tribunal issued Order No. 1, addressing the procedure and timeline for *amicus curiae* submissions pursuant to Article 10.20.3 of CAFTA ("[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party") and Rule 37(2) of the ICSID Arbitration Rules ("the Tribunal may allow a person or entity that is not a party to the dispute [...] to file a written submission with the Tribunal").
40. In response to Order No. 1, (i) Costa Rica filed a submission on 1 November 2010; (ii) Nicaragua filed a submission on 1 November 2010; and (iii) the United States

filed a letter on 1 November 2010, informing the Tribunal that it would not make a submission.

41. On 9 November 2010, the Tribunal informed the Parties of the agenda for the hearing to address Respondent's PO (the "Hearing") and invited the Parties to respond to the following two-part question (the "Pre-Hearing Question"):

(i) Can a party discontinue proceedings before the Supreme Court of El Salvador when they are in a deliberation phase?

(ii) If so, what are the steps to be taken and what are the relevant statutory provisions?

42. On 10 November 2010, Respondent requested that the Tribunal admit the registration of Claimants' joint venture<sup>3</sup> in the Commercial Registry of El Salvador (the "Official JV Registration") into the record.

43. On 11 November 2010, the Tribunal admitted the Official JV Registration into the record.

44. On 12 November 2010, Respondent filed its response to the Pre-Hearing Question with the Secretary of the Tribunal (the "Pre-Hearing Response").

45. On the same day, Claimants filed a letter with the Tribunal, submitting that "although we have been addressing these questions, we are unable at this time to furnish the tribunal with our answer."

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<sup>3</sup> See ¶ 56 below.

46. On 14 November 2010, Respondent filed two additional documents, which the Tribunal admitted into the record as supplemental attachments to its letter of 12 November 2010.
47. The Hearing to address Respondent's PO was held in Washington, D.C., on 15 November 2010.<sup>4</sup> The following representatives attended the hearing:
- a) on behalf of Claimants: Messrs. John Machulak, James Machulak, Eugene Bykhovsky, and Prof. Andrew Newcombe;
  - b) on behalf of Respondent: Messrs. Derek Smith, Luis Parada, Tomás Solís, Eric Stanculescu, Brian Vohrer, Ryan Tyndall, Christopher Dolan and Mesdames Erin Argueta and Mary Lewis; Dr. Benjamin Pleités, Office of the Attorney General of El Salvador; Mr. Enilson Solano, Embassy of El Salvador in Washington, D.C.; and Mesdames Stephanie McDonnell and Mimi Le of Doar Consulting;
  - c) On behalf of the non-disputing States, pursuant to Rule 32(2) of the ICSID Arbitration Rules: Ms. Mónica Fernández-Fonseca, Ministerio de Comercio Exterior (COMEX), the Republic of Costa Rica; Ms. Yahaira Sosa Machado, Ministerio de Industria y Comercio, the Dominican Republic; Messrs. Jeff Kovar, Mark Feldman, Patrick Pearsall and Mesdames Lisa Grosh and Karen Kizer, U.S. State Department; Ms. Kimberley Claman and

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<sup>4</sup> Video coverage of the hearing is available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement71>.

Mr. Daniel Bahar, USTR; and Mr. Gary Sampliner, U.S. Department of Treasury.

48. At the request of the Tribunal, Claimants provided an oral response to the Pre-Hearing Question, submitting that although they did not disagree with Respondent's Pre-Hearing Response, they were still unable to provide a definite answer.<sup>5</sup> When asked to comment on this by the Tribunal, Respondent submitted that its Pre-Hearing Response and the accompanying opinion of the Attorney General of El Salvador provide a "very clear" demonstration that "Claimant may request termination of the proceedings during the deliberation phase . . . and that the time period for a decision between the request for termination and the actual termination has been [would be] about three months."<sup>6</sup>
49. Thereafter, Claimants stated that they did not disagree with the rule of law espoused in Respondent's Pre-Hearing Response.<sup>7</sup>
50. Also at the Hearing, the Tribunal directed the Parties to respond to whether discontinuance of administrative proceedings before the Supreme Court of El Salvador is with or without prejudice to reinstatement (the "Post-Hearing Question").<sup>8</sup>
51. On 23 November 2010, the Parties filed their responses to the Post-Hearing Question.

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<sup>5</sup> Tr. 15-16.

<sup>6</sup> Tr. 17.

<sup>7</sup> Tr. 16.

52. On 30 November 2010, the Parties filed their respective submissions on costs.
53. Pursuant to Article 10.20.5 of CAFTA, a tribunal must render a decision or award on the PO within 150 days of the date of the filing of the PO, to which an additional 30 days may be added in the event a hearing is held. The Tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.
54. In this Award, the Tribunal adopts the following method of citation:
- “Request” refers to the Notice of Arbitration filed by Claimants on 2 July 2009;
  - “Notice of Registration” refers to the Notice of Registration registered by the ICSID on 21 August 2009;
  - “PO” refers to Respondent’s Preliminary Objections filed on 16 August 2010;
  - “PO Response” refers to Claimant’s Response to the Preliminary Objections filed on 15 September 2010;
  - “PO Reply” refers to Respondent’s Statement of Reply to the PO Response filed on 30 September 2010;

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<sup>8</sup> Tr. 274.

- “PO Rejoinder” refers to the Statement of Rejoinder filed by Claimants on 15 October 2010; and
- “Tr.” refers to the English transcript made of the Hearing on 15 November 2010 (Tr. 1 means Transcript on page 1).

#### IV. FACTUAL BACKGROUND

55. As an initial matter, the Tribunal notes that, in accordance with Article 10.20.4(c) of CAFTA, when deciding on Respondent’s PO, “the tribunal shall assume to be true claimant’s factual allegations in support of any claim” in the Request. In light of this, the Tribunal does not purport to make any findings of fact in this Section, but rather sets out what it understands to be this matter’s factual background in light of the factual allegations in the Request, which the Tribunal assumes to be true in this phase of the proceedings.
56. 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”).<sup>9</sup>
57. 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.<sup>10</sup>

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<sup>9</sup> Request ¶ 7.

<sup>10</sup> Request ¶¶ 6, 8.

58. 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.<sup>11</sup>
59. 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.<sup>12</sup>
60. 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.<sup>13</sup>
61. 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,

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<sup>11</sup> Request ¶ 15.

<sup>12</sup> Request ¶¶ 15-18; PO ¶ 106.

<sup>13</sup> Request ¶ 16.

encompassing eight former gold and silver mines (the “Nueva Esparta Exploration License”).<sup>14</sup>

62. On 13 September 2006, MARN revoked the environmental permits of the San Sebastian Gold Mine and the San Cristóbal Plant and Mine, thereby effectively terminating Claimants’ right to mine and process gold and silver.<sup>15</sup>
63. 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.<sup>16</sup>
64. 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.<sup>17</sup>
65. 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.<sup>18</sup> The requested

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<sup>14</sup> Request ¶¶ 18-19; PO ¶ 106.

<sup>15</sup> Request ¶ 21.

<sup>16</sup> Request ¶ 22.

<sup>17</sup> Tr. 164-166; R-5; R-6.

<sup>18</sup> Request ¶ 23.

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.<sup>19</sup>

**V. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT**

**A. Respondent's Position**

66. Respondent submits that the Tribunal does not have jurisdiction to hear this dispute because Claimants did not comply with the CAFTA Waiver Provision by allowing the extant court proceedings which they had initiated in El Salvador to continue. In Respondent's view, adherence to the Waiver Provision is a condition precedent to Respondent's consent to arbitration under both CAFTA and the ICSID Convention, and Claimants' failure to remedy their non-compliance with the Waiver Provision once they were put on notice by Respondent means that Claimants have not preserved their claims in a timely fashion. For this reason, Respondent requests that the Tribunal:<sup>20</sup>

- Suspend the proceedings on the merits while this Preliminary Objection is pending.
- Dismiss this arbitration in its entirety.
- Issue an order awarding the Republic of El Salvador its share of the arbitration costs and its attorney's fees incurred related to this Objection, plus interest from the time of the decision until

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<sup>19</sup> Request, ¶ 23; PO ¶ 106.

<sup>20</sup> PO ¶ 126, "reaffirm[ed]" in PO Reply ¶ 137.

payment is made, at a rate to be established at the appropriate time.

- Grant the Republic any other remedy that the Tribunal may consider proper.

**B. Claimants' Position**

67. Claimants consider that the Tribunal has jurisdiction to hear this dispute because they have complied fully with the Waiver Provision. Claimants submit that the waiver provided in the Request serves as “a unilateral and final abandonment, extinguishment, and abdication of Claimants’ legal rights to initiate or continue other proceedings” with regard to the claims before the Tribunal.<sup>21</sup> Claimants further submit that CAFTA does not require immediate discontinuance of domestic proceedings, but rather, allows Respondent to use Claimants’ waiver to seek the discontinuance of domestic proceedings if it so desires. Based on the foregoing, Claimants request that this Tribunal:<sup>22</sup>

- (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

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<sup>21</sup> PO Response ¶ 53.

<sup>22</sup> PO Response ¶ 101; PO Rejoinder ¶ 107.

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

**VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS**

68. The Tribunal has carefully reviewed the written and oral pleadings, evidence and legal authorities submitted by the Parties and has relied exclusively on those in the analysis below. To the extent arguments raised by the Parties are not referred to expressly in this Award, they must be deemed to be subsumed in the analysis. By contrast, the Tribunal will not address arguments that have not been raised by the Parties, as this Award is a decision only in the dispute as pleaded between them.

**VII. JURISDICTION**

69. The Parties' dispute revolves around the CAFTA Waiver Provision, which provides as follows:

**Article 10.18: Conditions and Limitations on Consent of Each Party**

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.
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.
- 4. No claim may be submitted to arbitration:
  - (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or 10-14
  - (b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C), if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.

**A. What Does the Waiver Provision require?**

*(a) The Parties' Positions*

- 70. Respondent contends that the Tribunal has neither jurisdiction nor competence to decide Claimants' claims because Claimants failed to comply with the Waiver

Provision in not providing and acting consistently with the relinquishment of their right to continue domestic court proceedings in favor of CAFTA arbitration.<sup>23</sup>

71. In Respondent's view, the Waiver Provision places two requirements on Claimants, namely, (i) a "form" requirement, whereby Claimants must in fact submit a waiver, and (ii) a "material" requirement, whereby Claimants must abide by such waiver by discontinuing domestic court proceedings before initiating this CAFTA arbitration.<sup>24</sup>
72. Respondent contends that to interpret Claimants' waiver in good faith requires Claimants, as the investors seeking to benefit from CAFTA, to take steps to comply with the Waiver Provision even after filing for arbitration. By not doing so, Claimants have not met their burden of perfecting Respondent's "conditional consent" to arbitrate under CAFTA and therefore Respondent has not consented to arbitrate this dispute.<sup>25</sup>
73. Claimants disagree and argue that the Waiver Provision only requires delivery of a signed waiver to Respondent – which they did with the Request – and that it then falls within Respondent's discretion to seek discontinuance of the domestic court proceedings.<sup>26</sup>

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<sup>23</sup> PO Response ¶¶ 77-80.

<sup>24</sup> PO ¶¶ 39-40, 45; Tr. 69-70.

<sup>25</sup> PO ¶ 37.

<sup>26</sup> PO ¶¶ 30, 44.

74. In this respect, Claimants state that “CAFTA’s drafters could have required the discontinuance of domestic proceedings as a condition precedent to the submission of a claim”, but instead, “they required a waiver of the rights to continue the proceedings”<sup>27</sup>, which allows a respondent state a “sovereign choice” whether it prefers “concurrent proceedings to continue”<sup>28</sup>.
75. Claimants also submit that they were under no obligation to put an end to the court proceedings after the start of the arbitration, arguing that events that occur after receipt of the Request by the Secretary-General are “irrelevant” and have no bearing on the Tribunal’s jurisdiction.<sup>29</sup>
76. Respondent rebuts Claimants’ position, contending that Claimants seek to “impose the burden on the respondent State to seek enforcement of the waiver” instead of “accepting that a claimant is required to make its waiver effective by discontinuing any parallel proceedings”.<sup>30</sup> Respondent submits that Claimants “had within their full power the ability to comply”.<sup>31</sup>
77. Moreover, Respondent submits that it would have been “sufficient” for Claimants to file their discontinuance application with the Supreme Court, where, pursuant to

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<sup>27</sup> PO ¶ 43.

<sup>28</sup> PO ¶ 23.

<sup>29</sup> SoRj ¶ 10.

<sup>30</sup> PO Reply ¶ 34.

<sup>31</sup> Tr. 71.

Salvadoran law, “discontinuance is automatic when claimant is in an administrative case.”<sup>32</sup>

78. Respondent concludes that where Claimants were in a position to discontinue domestic proceedings, they were correspondingly in a position to comply with the Waiver Provision at the time of filing, and that “[i]t is a matter of good faith to comply with the waiver and not to say, I filed my waiver and someday I will discontinue . . . the waiver had to be valid when filed.”<sup>33</sup>

(b) *The Tribunal’s Analysis*

79. The Tribunal notes that Respondent has put forth the argument that any waiver must comply with both a formal and a material element. Claimant disagrees, essentially arguing that the Waiver Provision only requires adherence to written formalities.
80. The Tribunal agrees with Respondent. In the Tribunal’s view, to understand the concept of waiver in any other way would render it devoid of meaning. Indeed, a waiver must be more than just words; it must accomplish its intended effect. In the case of CAFTA, this effect is to have Claimants relinquish “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” (*see* CAFTA 10.18(2)(b) in ¶ 69 above).

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<sup>32</sup> Tr. 42.

<sup>33</sup> Tr. 72.

81. The Tribunal is not alone in this view. For example, in its submission in these proceedings, the Republic of Costa Rica has stated that:<sup>34</sup>

A Claimant complies with the requirement of [CAFTA] Article 10.18(2)(b) by physically submitting the waiver document accompanying his request for arbitration. [S]aid submission must also be accompanied by the effective waiver, withdrawal or discontinuance, as appropriate, of any and all proceedings, either court or administrative proceedings, pending when the arbitration is commenced and whose procedural drive lies with the claimant. Otherwise, this provision would be denied effectiveness or “*effet utile*”.

82. The Republic of Nicaragua reiterated this point in its own submission.<sup>35</sup>

If an investor submits a written waiver under Article 10.18.2(i) and (ii), but fails to comply with such waiver, this conduct would be deemed as [misleading] within the scope of the general law and a violation to the rule within the scope of the DR-CAFTA Agreement. Therefore, the claim may not be submitted to arbitration.

83. Other tribunals have also seen things similarly. For instance, in *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, the tribunal decided that:<sup>36</sup>

Any waiver [...] implies a formal and material act on the part of the person tendering same. To this end, this Tribunal will therefore have to ascertain whether [the claimant] did indeed submit the waiver in accordance with the formalities envisaged

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<sup>34</sup> Non-Disputing Party Submission of the Republic of Costa Rica, ¶ 3.

<sup>35</sup> Communication of the Republic of Nicaragua, ¶ 12 (unofficial translation).

<sup>36</sup> CL-7; RL-6.

under NAFTA and whether it has respected the terms of the same through the material act of dropping or desisting from initiating parallel proceedings before other courts or tribunals.

84. Accordingly, the Tribunal concludes 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”.
85. At this juncture, the Tribunal observes that, as Claimants would have it, the Waiver Provision requires only the delivery of a signed waiver to Respondent, and Respondent would have to seek discontinuance of the domestic court proceedings itself. In other words, Claimants consider that while the formal requirement may be Claimants’ responsibility, the material element is Respondent’s.
86. The Tribunal does not agree. The Tribunal has been provided with no reason to conclude that the formal and material elements of the Waiver Provision should be divided between the Parties. In any event, logic tells us that it is up to Claimants to make the waiver of their legal rights effective, not Respondent.
87. Accordingly, in the next Section, the Tribunal will determine whether Claimants have acted in accordance with the Waiver Provision’s formal and material requirements.

**B. Did Claimants Act in Violation of the Waiver Provision’s Requirements?**

*(a) The Parties’ Positions*

88. Respondent contends that Claimants were “in patent violation” of the Waiver Provision by continuing with their claims before the national courts, “related to the

same measures to maximize the probability of obtaining a favorable result”, when they filed their Request with ICSID in July 2009.<sup>37</sup>

89. Respondent contends that Claimants’ violation turns upon the definition of “measures” within the Waiver Provision. Citing the decisions of tribunals in the *RDC*<sup>38</sup>, *Thunderbird*<sup>39</sup>, and *Loewen*<sup>40</sup> cases, as well as Article 2.1 of CAFTA, captioned “Definitions of General Application”, Respondent submits that the “same measures” challenged by the Claimants in the domestic judicial proceedings and this arbitration include the revocation of permits and similar quantification of monetary damages.<sup>41</sup>
90. Respondent submits that Claimants’ non-compliance with the Waiver Provision is evidenced by, among other things, a letter from El Salvador’s Court of Administrative Litigation of the Supreme Court of Justice dated 1 October 2009, whereby the court notified Claimants that the domestic proceedings initiated by them were awaiting final decision.<sup>42</sup>
91. In response to the above, Claimants submit that Respondent’s PO has no merit.

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<sup>37</sup> PO ¶ 5.

<sup>38</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5 (17 Nov. 2008).

<sup>39</sup> *See International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (26 Jan. 2006).

<sup>40</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction (5 Jan. 2001).

<sup>41</sup> PO ¶¶ 32-38; PO Response ¶ 76.

<sup>42</sup> R-16.

92. First, Claimants contend that they complied with the Waiver Provision because, among other things, (i) their waivers comply with the provisions of CAFTA, (ii) their waivers resulted in the abandonment of Claimants’ rights to pursue the domestic proceedings, and (iii) CAFTA does not require discontinuance of domestic proceedings as a condition to submitting a claim to arbitration.<sup>43</sup> In this respect, Claimants submit that there is “no question of a defect *ratione materiae* in the waivers”, seeing as they accurately reproduced the language of the Waiver Provision.<sup>44</sup>
93. Second, Claimants contend that “the fundamental point is that a waiver is a unilateral and final abandonment, extinguishment and abdication of legal rights”, rendering the fact that they took no steps to discontinue the domestic proceedings immaterial.<sup>45</sup> In Claimants’ view, what is relevant is that they have also taken no positive action to continue those proceedings and, therefore, have acted in accordance with the waiver.<sup>46</sup>
94. Third, Claimants contend that there were no overlapping proceedings as between the El Salvador courts and this arbitration, contrary to the issue faced by the tribunal in *RDC*.<sup>47</sup> Instead, citing the tribunal in *Vannessa Ventures*<sup>48</sup>, Claimants contend that courts in parallel domestic proceedings “are in the best position to

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<sup>43</sup> PO Response, ¶¶ 26-47.

<sup>44</sup> PO Response, ¶ 38.

<sup>45</sup> PO Response ¶ 17.

<sup>46</sup> PO Response ¶¶ 42-43, 53, 70; PO Rejoinder, ¶¶ 21, 36.

<sup>47</sup> *Railroad Development Corporation v. Republic of Guatemala*, *supra* at note 38.

enforce the waiver”, as opposed to the arbitral tribunal seized.<sup>49</sup> Further, Claimants argue that to the extent the question of the revocation of the environmental permits could be before the El Salvador courts and this Tribunal, their claim that El Salvador has imposed a *de facto* ban on gold and silver mining is not.<sup>50</sup>

(b) *The Tribunal’s Analysis*

95. It appears that the Parties are on common ground that Claimants adhered to the formal requirement of the Waiver Provision. The only question, therefore, is whether Claimants also adhered to the material requirement.
96. As an initial matter, the Tribunal notes that the Parties agree that the relevant date for determining the Tribunal’s jurisdiction is 2 July 2009, *i.e.*, the date the Request was filed.<sup>51</sup> However, Claimants submit that, for purposes of examining the waiver requirement, “there were no arbitral proceedings in the present case until 1 July 2010”, the date on which the Tribunal was constituted.<sup>52</sup>
97. In the Tribunal’s view, Claimants’ position is inconsistent. Claimants cannot at once argue that 2 July 2009 is the relevant date for determining jurisdiction and 1 July 2010 for examining waiver, when the issue of waiver *is* a question of

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<sup>48</sup> *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Decision on Jurisdiction (22 Aug. 2008).

<sup>49</sup> PO Response, ¶¶ 60-62.

<sup>50</sup> PO Rejoinder, ¶¶ 85-91.

<sup>51</sup> Tr. 61-62; PO Response, ¶ 40.

<sup>52</sup> PO Response, ¶ 69.

jurisdiction. Indeed, Claimants have admitted as much.<sup>53</sup> Accordingly, the Tribunal will examine whether Claimants' behavior was in compliance with its waiver as of 2 July 2009.

98. Respondent is of the view that Claimants were not in compliance with the material waiver requirement because on the date they filed the Request, the same "measures" challenged in these proceedings were also before El Salvador's courts. Claimants disagree, arguing that there were never even overlapping proceedings.
99. The Tribunal observes that while Claimants contend that there were never any overlapping proceedings, Claimants argue this with reference to the date of the constitution of the Tribunal (*i.e.*, 1 July 2010) as opposed to the date of the Request (*i.e.*, 2 July 2009).<sup>54</sup> Indeed, as of 1 July 2010, the proceedings before El Salvador's Court of Administrative Litigation of the Supreme Court of Justice had ended, with its decisions having been notified on 29 April 2010.
100. However, as the Tribunal decided in ¶ 97 above, the operative date for examining the waiver is 2 July 2009. There is no dispute that, as of that date, the two complaints filed by Claimants were awaiting judgment by El Salvador's Court of Administrative Litigation of the Supreme Court of Justice (*see* ¶¶ 63 – 64 above).
101. Furthermore, those complaints relate very much to the same "measures" as those at issue in these proceedings. The Article 10.18(2) waiver applies to proceedings

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<sup>53</sup> In ¶ 5 of the PO Rejoinder, Claimants "accept that the submission of a waiver under CAFTA Article 10.18 is a condition and limitation on consent and thus a jurisdictional requirement".

<sup>54</sup> *See generally* PO Response, ¶¶ 67-71.

“with respect to any measure alleged to constitute a breach” of CAFTA. The definition of “measure” in Article 2.1 of CAFTA “includes any law, regulation, procedure, requirement or practice”. It is undisputed that the relevant “measures” in this case and the El Salvador proceedings are the revocation of the environmental permits (*see* ¶¶ 62 – 65 above).

102. Claimants have indicated (as they must) that they were aware when they filed their Request that the proceedings which they had initiated in El Salvador were ongoing, but state further that they were unaware of the status of such proceedings because of communication difficulties with local counsel.<sup>55</sup> In the Tribunal’s view, this is no excuse. 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. It was fleshed out in connection with the Pre-Hearing Question that discontinuing the proceedings would have been possible and relatively quick (*see* ¶¶ 48 – 49 above). In this respect, 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.
103. The Tribunal notes that when El Salvador’s Court of Administrative Litigation of the Supreme Court of Justice issued its judgments, it only named Claimant No. 1,

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<sup>55</sup> Tr. 163.

omitting to mention Claimant No. 2.<sup>56</sup> This is despite the fact that claims were filed on behalf of both Claimants in the proceedings in El Salvador.<sup>57</sup> Respondent alleges that the Court's decision came about due to confusion concerning the joint venture's name on the part of the Government of El Salvador (because of its denomination in the commercial registry as "Commerce Group", rather than "Commerce/Sanseb Joint Venture"), and not due to any affirmative action by Claimant No. 2 to discontinue its participation.<sup>58</sup> Be it as it may, nothing in the record indicates any affirmative action by Claimant No. 2 to discontinue its participation in such proceedings. On the contrary, as is clear from Claimants' letter to the MARN dated 10 December 2009, both Claimants indicated that they were awaiting a decision from the El Salvador's courts.<sup>59</sup> Further, the Tribunal notes Claimants' statement in its Request that Claimant No. 1 and Claimant No. 2 entered into a joint venture named the "Commerce/Sanseb Joint Venture" on 22 September 1988 and that the joint venture agreement authorizes Claimant No. 1 to execute agreements on behalf of the Joint Venture and that the "Commerce/Sanseb Joint Venture is a 'national of another Contracting State' for the purposes of the ICSID Convention." Thus, the Tribunal understands that Claimant No. 1 has been acting on behalf of Claimant No. 2 in this matter and in the domestic proceedings.

104. At this juncture, the Tribunal must address the issue raised in connection with the Post-Hearing Question, namely, whether Claimants' discontinuing the proceedings

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<sup>56</sup> R-5; R-6.

<sup>57</sup> C-6; C-7.

<sup>58</sup> Tr. 87-90.

<sup>59</sup> R-15.

before the El Salvador courts would have been with or without prejudice to the reintroduction of Claimants' cause of action elsewhere.

105. In response to the Post-Hearing Question, Respondent submitted a memorandum composed with input from local counsel, indicating that Claimants' discontinuing those proceedings would not result in their losing the right to pursue the underlying cause of action in another forum.<sup>60</sup> For their part, Claimants submitted a letter, asserting that discontinuing proceedings would be with prejudice to reinstatement, "based on the combined effect of Art. 53 of the Law of Administrative Litigation Jurisdiction and Articles 464 and 467 of the Civil Proceedings Code".<sup>61</sup>
106. Claimants have not provided the Tribunal with the text of the laws to which they refer, nor with an analysis of those laws. By contrast, Respondent's memorandum provides a thorough analysis of the Post-Hearing Question, with which the Tribunal agrees. Accordingly, the Tribunal concludes that Claimants' rights would not have been impinged upon by discontinuing the proceedings in El Salvador.
107. In light of the foregoing, the Tribunal concludes 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.

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<sup>60</sup> See Respondent's letter dated 23 November 2010.

<sup>61</sup> See Claimants' letter dated 23 November 2010.

108. However, the foregoing does not dispose of the issue entirely. Indeed, the above only addresses the revocation of the environmental permits being before both this Tribunal and the courts of El Salvador. The above does not address Claimants' claim that a *de facto* ban imposed by El Salvador on gold and silver mining can still be heard in these proceedings because it is before this Tribunal only and not before the El Salvador courts (*see* ¶ 94 above).<sup>62</sup>
109. Respondent denies that such a *de facto* ban exists or ever existed and, in any event, contends that such a policy cannot constitute a "measure" within the meaning of CAFTA. Rather, Respondent contends that the only "measures" underlying Claimants' allegations of breach of CAFTA are the revocation of the environmental permits.<sup>63</sup>
110. Claimants counter Respondent's argument with reference to the tribunal's decision in *RDC*. In Claimants' view, *RDC* stands for the proposition that a partial overlap of claims between a CAFTA arbitration and parallel proceedings cannot render a CAFTA waiver invalid in its entirety. Claimants consider that claims not heard in the parallel proceedings can still be heard in the CAFTA arbitration. In light of this, Claimants submit that, as the *de facto* ban claim is not before the El Salvador courts, their waiver is valid and that claim can be heard before this Tribunal.<sup>64</sup>
111. The Tribunal does not disagree with Claimants' reading of the decision in *RDC*. However, the Tribunal considers reference to *RDC* in the context of this case to be

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<sup>62</sup> PO Rejoinder, ¶¶ 80-83.

<sup>63</sup> PO, ¶ 30-31.

<sup>64</sup> PO Rejoinder, ¶¶ 85-91.

inapposite, as the Tribunal has not been confronted with separate and distinct claims. The Tribunal views Claimants' claim regarding the *de facto* mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits. Indeed, when Claimants sought to challenge the revocation of the environmental permits before the El Salvador courts, they were not just hoping to have their permits reinstated – they were hoping to be able to mine again. The effect of the revocations, now upheld in Respondent's courts, was, to use Claimants' phrasing in their Notice of Arbitration, to “effectively terminat[e] Commerce/SanSeb's right to mine and process gold and silver.”<sup>65</sup> The *de facto* mining policy was alleged to have emerged in the same month as the permit revocations were notified to Claimants.<sup>66</sup> Consequently, in the Tribunal's view, the *de facto* mining ban policy claim is not separate and distinct.

112. Moreover, even if the *de facto* mining ban policy and the revocation of the permits could be teased apart, the Tribunal is of the view that the policy does not constitute a “measure” within the meaning of CAFTA. At most – at least based on the Tribunal's evaluation of this particular case – the ban is a policy of the Government as opposed to a “measure” taken by it. By contrast, the revocation of the environmental permits squarely constitutes a measure taken pursuant to that policy and, as noted, it was that revocation which put an end to Claimants' mining and processing activities.

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<sup>65</sup> Request, ¶ 21.

<sup>66</sup> Request, ¶ 25. In fact, the orders of revocation preceded their notification to Commerce/Sanseb by some two months.

113. The Tribunal therefore determines that Claimants failed to fulfill the requirements of the Waiver Provision with respect to their entire claims.

**C. Consequences of the Failure to Fulfill the Waiver Requirement**

114. Article 10.18 is clear in relevant part: “No claim may be submitted to arbitration . . . unless . . . (b) the notice of arbitration is accompanied . . . (i) by the claimant’s written waiver . . . of any right to initiate or to continue . . . any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”

115. As analyzed above, the waiver is required as a condition to Respondent’s consent to CAFTA. As also analyzed above, the waiver is invalid as it lacks effectiveness due to Claimants’ failure to discontinue the proceedings before El Salvador’s Court of Administrative Litigation of the Supreme Court. If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties’ CAFTA dispute.

116. For the sake of completeness, the Tribunal notes that Claimants have argued that their conduct following the submission of the waiver is irrelevant to the determination of jurisdiction and is rather subject to the Tribunal’s “supervisory power” over the admissibility of the claims.<sup>67</sup> However, as the Tribunal has already determined that it does not have jurisdiction over the Parties’ CAFTA dispute on the basis of Claimants’ behavior at the time the waiver was given, questions regarding admissibility of claims subsequent to the waiver fall away.

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<sup>67</sup> PO Rejoinder, ¶¶ 46-58.

117. On the other hand, the question as to whether the Tribunal may entertain claims based on the Foreign Investment Law of El Salvador will be addressed in the next Section.

**D. Can the Tribunal Hear Claims arising under the Foreign Investment Law of El Salvador, Regardless of the Waiver Provision?**

*(a) The Parties' Positions*

118. Claimants contend that “the current proceeding is based on two separate arbitral consents”, one arising under CAFTA and the other under the Foreign Investment Law of El Salvador. Claimants argue that the Waiver Provision has no effect on their claims submitted under the Investment Law, such that in the event the Tribunal agrees with Respondent regarding the Waiver Provision, Claimants’ other claims can be heard.<sup>68</sup>

119. Respondent contends that Claimants’ claims under the Investment Law cannot be heard in these proceedings because they were not raised in the Request, and neither the ICSID Rules nor CAFTA allow for a Request to be amended. In any event, Respondent argues that Claimants failed to particularize their claims regarding Respondent’s alleged violation of its Investment Law.<sup>69</sup>

120. At the Hearing, Respondent further specified as follows:<sup>70</sup>

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<sup>68</sup> PO Rejoinder, ¶¶ 98-100.

<sup>69</sup> PO Reply, ¶¶ 112-120.

<sup>70</sup> Tr. 278.

I also just want to point out, there has been a considerable discussion of whether or not the waiver applies to the investment law proceedings regarding the investment law before this tribunal. We've heard the position of the parties.

From El Salvador's point of view, that issue is not yet ripe for decision. It has not yet been placed before the tribunal. El Salvador again reserves its right to raise that issue if the time came, but would hope that the tribunal would reserve a decision on that until it has been fully briefed, as it is a rather significant and complicated legal issue.

*(b) The Tribunal's Analysis*

121. Respondent's position is, first and foremost, that the Tribunal cannot accept jurisdiction under the Investment Law because Claimants have failed to assert any claims thereunder.<sup>71</sup> Respondent's alternative position, as articulated in ¶ 120 above, is that in the event the Tribunal decided that such claims have been asserted, the Parties should be invited to brief the Tribunal as to whether those claims are subject to the Waiver Provision.
122. Claimants have responded to Respondent's primary argument by stating that "[i]t is evident on the face of the Notice of Arbitration that the same measures that give rise to CAFTA claims also give rise to breaches of the Foreign Investment Law"<sup>72</sup>, and that Claimants did not refer to the Foreign Investment Law in the Request

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<sup>71</sup> See PO Reply, ¶¶ 112-114, under the caption "Claimants did not submit any claims of violations of the Investment Law".

<sup>72</sup> PO Rejoinder, ¶ 93.

“because of the various rules in CAFTA” and because such was “not required under the ICSID Institution Rules or the ICSID Arbitration Rules”.<sup>73</sup>

123. Despite this, 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)”.<sup>74</sup>
124. The Tribunal is not satisfied that Claimants have in fact raised any claims – *i.e.*, causes of action – under the Foreign Investment Law. Claimants have, at most, given explanations as to why they have not done so (*see* ¶ 122 above). Further, Claimants’ “confirmation” that they have submitted a claim for breach of the Foreign Investment Law is unsupported by their submissions. Claimants have not articulated any claims; rather, as the following review of the submissions demonstrates, they have provided a perfunctory recital of the articles of the Foreign Investment Law, at most.
125. Indeed, in ¶ 1 of the Request, Claimants state that the Request was filed pursuant to the ICSID Convention, CAFTA and the Foreign Investment Law. Claimants make no other reference to the Foreign Investment Law in this document, not even in ¶ 31 where they set forth their request for relief (referring only to “El Salvador’s violation of its obligations under CAFTA-DR with respect to treatment of foreign investors”).

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<sup>73</sup> PO Rejoinder, ¶ 95.

<sup>74</sup> PO Rejoinder, ¶ 94, 97.

126. In ¶¶ 80 – 83 of the PO Response, Claimants submit that the revocation of the environmental permits and the *de facto* ban on mining constitute violations “of CAFTA and the Foreign Investment Law”. However, no provision of the Foreign Investment Law is specifically referred to in those paragraphs. Similarly, in ¶¶ 84 – 86 of the same submission, Claimants state that there are “multiple claims arising from two separate sources (the CAFTA and the Foreign Investment Law)”, but no specific reference to the Foreign Investment Law is made there, either. Aside from in these paragraphs, the PO Response makes only passing reference to the Foreign Investment Law.
127. It is only late in the pleadings stage, at ¶¶ 92 – 97 of the PO Rejoinder, that Claimants finally make specific reference to the Foreign Investment Law. As noted in ¶ 123 above, 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)”. However, aside from listing the article numbers and their captions, Claimants have not made reference to the specific provisions of any of these articles, nor have they indicated how the facts of this case apply to those specific provisions. In other words, Claimants have, at best, made belated contentions under the Foreign Investment Law that remain un-particularized; they have not articulated any specific causes of action.
128. Accordingly, the Tribunal concludes that there are no claims to be heard in this arbitration under the Foreign Investment Law, regardless of any Waiver Provision. In light of this, the dismissal of the CAFTA claims necessarily entails dismissal of the entire case.

**VIII. COSTS**

**A. The Parties' Positions**

129. On 17 November 2010, the Secretary to the Tribunal invited the Parties to submit their respective “statements of costs” by 30 November 2010.
130. On 30 November 2010, Claimants submitted an Application for Costs, requesting the Tribunal to:

Order Respondent to reimburse the Claimants for the Claimants’ portion of the Tribunal’s fees and expenses, along with ICSID’s administrative fees and expenses, associated with the Respondent’s preliminary objection; and,

Order Respondent to reimburse the Claimants for US\$ 145,120.59, representing the attorney fees and expenses paid and/or incurred by Claimants, with interest at a rate to be determined by the Tribunal from the date of the Award until final payment.

131. That same day, Respondent submitted a statement of costs amounting to US\$ 790,399. In addition, Respondent specified that its statement did not include its legal fees and costs incurred before 1 July 2010, in keeping with statements made to Claimants earlier in the proceedings.
132. On 1 December 2010, Respondent objected to Claimants’ Application for Costs on the basis that the Tribunal had simply asked for a statement of costs, *i.e.*, “a list of a party’s arbitration costs, submitted in the event the Tribunal decides to award costs to that party pursuant to an application for costs the party made earlier during the proceeding”. Respondent submitted that if “the Tribunal decides to admit Claimants’ application for costs”, it would like an opportunity to respond.

133. The Tribunal granted Respondent the opportunity to provide its comments on Claimants' Application for Costs, which it did on 2 February 2011.
134. In its comments, Respondent disputes Claimants' Application for Costs, but "reaffirms its request for costs and fees plus interest". Respondent argues that it is entitled to recover its own costs because Claimants' claim was "frivolous", as evidenced by, among other things, "Claimants' intention all along [...] to wait for the Supreme Court to issue its decisions and to keep the CAFTA arbitration open in case they lost". Respondent also argues that it is entitled to recover its costs because Claimants made frivolous arguments during the arbitration (*e.g.*, waiver was not a condition to consent, it was up to Respondent to make the waiver effective) and in their Application for Costs.

**B. The Tribunal's Analysis**

135. Article 10.20.6 of CAFTA provides as follows:

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

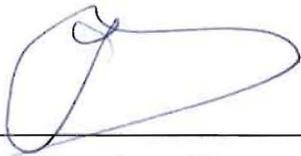
136. Article 10.20.6 sets forth a test for tribunals to assess costs, namely, "the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous". In light of this, the Tribunal understands the power granted under this Article to be limited, turning on whether the Tribunal considers Claimants claims or Respondent's preliminary objection to be "frivolous".

137. The Tribunal has found entirely in favor of Respondent. However, to conclude from Respondent's victory that Claimants' claims were "frivolous" would be to go too far. Indeed, the Tribunal has been presented with no indication that Claimants were not serious about the claims they asserted in these proceedings, nor that Claimants pursued this matter in bad faith.
138. In light of this, the Tribunal considers that there are no grounds pursuant to Article 10.20.6 of CAFTA to award costs to either side.
139. Accordingly, the Tribunal shall order each side to bear one-half of the costs of arbitration, and each Party to bear its own legal fees and expenses.

**IX. DECISIONS**

140. FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:
- (1) DETERMINES that the dispute is not within its jurisdiction and competence pursuant to CAFTA;
  - (2) ORDERS each side to bear one-half of the costs of arbitration, and each Party to bear its own legal fees and expenses; and
  - (3) DISMISSES all other claims or requests for relief.

THE ARBITRAL TRIBUNAL:



Dr. Horacio A. Grigera Naón

Arbitrator

10 February 2011



Mr. Christopher Thomas, Q.C.

Arbitrator

15 February 2011



Professor Albert Jan van den Berg

Presiding Arbitrator

21 FEBRUARY 2011