INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Commerce Group Corp. and **San Sebastian Gold Mines, Inc.** **Claimants,** **v.** **Republic of El Salvador** **Respondent.**	**ICSID Case No. ARB/09/17**

THE REPUBLIC OF EL SALVADOR'S REPLY (PRELIMINARY OBJECTION UNDER CAFTA ARTICLE 10.20.5)

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I. INTRODUCTION

1. Claimants' Response rests entirely on the untenable premise that, in spite of the title of CAFTA Article 10.18, "Conditions and Limitations on Consent of Each Party," the waiver requirement in CAFTA Article 10.18 is not a condition precedent to consent. This flawed premise is the foundation for Claimants' other arguments. Because this unsound foundation cannot stand, all the arguments based on it fall.

2. Claimants' position that the waiver is not a condition precedent to consent would turn the text of a multilateral treaty on its head and render meaningless the unambiguous legal expression of the will of sovereign States. El Salvador urges the Tribunal to reject this late-hour self-serving attempt by Claimants to put a veneer of legal justification on their utter disregard for the text of the very Treaty from which they seek to benefit.

3. Beyond Claimants' unsustainable view of the meaning of "Conditions and Limitations on Consent of Each Party," El Salvador and Claimants actually agree on several key points that are the basis for El Salvador's Preliminary Objection. Claimants agree that consent to arbitration is "foundational" for jurisdiction.[1] Claimants agree with El Salvador's description of the subject matter and scope of the waiver required under CAFTA, and they agree that the required waiver applies to the proceedings before the Supreme Court of El Salvador in Case Nos. 308-2006 and 309-2006 because these domestic proceedings relate to the same measures alleged as breaches of CAFTA.[2] Claimants further agree that, pursuant to the waiver, they waived the right to continue the domestic judicial proceedings.[3]

4. In this Reply, El Salvador will show that, contrary to Claimants' assertions, the title of CAFTA Article 10.18 means what it says, *i.e.*, that the waiver is a condition precedent to

[1] Claimants' Response to the Republic of El Salvador's Preliminary Objection, Sept. 15, 2010, para. 14 ["Response"].
[2] Response, paras. 28-29.
[3] Response, Section II.

consent. With this point established, Claimants' remaining arguments fall because they depend on their leading premise that the waiver is a mere formal procedural requirement and not a condition to consent. It also becomes clear i) that Claimants filed their waivers with no intent to comply with them; ii) that Claimants' failure to terminate the domestic judicial proceedings was a deliberate breach of the waivers; iii) that the waivers were never effective; iv) that without effective waivers El Salvador's consent to CAFTA was not perfected; and v) that, as there is no jurisdiction without consent, this arbitration must be dismissed.

II. THE WAIVER REQUIREMENT IS A CONDITION TO CONSENT

A. The text of CAFTA unequivocally makes the waiver requirement a condition to consent

5. Claimants' entire case rests on the unsustainable proposition that the waiver requirement is not a condition precedent placed by the sovereign State Parties to CAFTA on their consent to allow investors to submit claims to arbitration under CAFTA. But the waiver requirement is a condition to consent. As such, invalid waivers result in there being no consent. Without the State's consent, there is no jurisdiction.

6. Arguing that the waiver requirement is not a condition to consent allows Claimants to posit that their invalid waivers are only an issue of admissibility and that as such it could be cured by subsequent events without the need to initiate a new arbitration.[4] As an alternative argument, Claimants propose that, because the waivers are not tied to consent, invalid waivers would only necessitate the dismissal of claims related to the individual measures instead of requiring dismissal of the entire arbitration.[5]

7. Claimants, however, cannot erase the title of CAFTA Article 10.18, which informs the entire article. That title unambiguously reads, "**Conditions and Limitations on Consent of Each Party**" and is followed by categorical statements beginning with "*No claim*

[4] Response, Section IV.C.
[5] Response, Section V.

may be submitted to arbitration under this Section. . . ." The relevant language with regard to the waiver is as follows:

> **Article 10.18: Conditions and Limitations on Consent of Each Party**
>
> . . . .
>
> 2. No claim may be submitted to arbitration under this Section unless: . . .
>
> (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.

8. Thus, under CAFTA Article 10.18.2, no claim may be submitted to arbitration without valid waivers. This is expressly made a condition on consent. There is no consent for claims submitted with invalid waivers, *i.e.*, claims not submitted in accordance with CAFTA.

9. Claimants' attempt to avoid the plain meaning of Article 10.18 is self-contradictory and unsustainable:

> 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 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.[6]

[6] Response, para. 32 (emphasis in original).

10. Claimants argue that if the Treaty drafters had intended to place conditions precedent on consent they would have expressly stated that the waiver was a condition precedent. Claimants then quote the language of Article 10.18 that does just that by including the waiver requirement under "Conditions and Limitations on Consent of Each Party." Confronted with this express statement of the CAFTA Parties' intent, Claimants suggest that the use of the word "on" somehow affects the meaning of the provision. Claimants offer no explanation for how the word "on" could turn an express condition into a mere procedural requirement—because it does not. There is simply no difference in legal meaning between a "condition on consent" and a "condition precedent of consent." If a party whose consent is required places a "condition on consent," the condition must be met before consent can be considered to exist. Similarly, if a party creates "a condition precedent of consent" the condition must be met before consent can be considered to exist. In either case, if the condition is not met, there is no consent.

B. The jurisprudence interpreting the waiver requirement in CAFTA and NAFTA as a condition to consent is consistent with the text of the Treaties

11. The only CAFTA Tribunal to previously examine the waiver requirement in CAFTA, in the ICSID arbitration *Railroad Development Corporation v. Guatemala* ("*RDC v. Guatemala*"), authoritatively concluded that the title of the article informs the purpose and meaning of the entire article and that the waiver requirement, therefore, is a condition to consent.

12. In *RDC v. Guatemala*, the claimant compared the title of CAFTA Article 10.18 to the title of the similar NAFTA Article, "Conditions Precedent to Submission of a Claim to Arbitration," and argued that the waiver requirement in CAFTA was not a condition precedent to consent, and that a breach of the CAFTA requirement could be "remedied by terminating or abandoning the inconsistent behavior."[7] The *RDC v. Guatemala* tribunal decisively rejected this

[7] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, Nov. 17, 2008, para. 55 (RL-2).

argument. As the tribunal explained, "'Only if' and 'unless' have the same meaning and, whether the term 'precedent' is used or not, the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected."[8]

13. Similar to Claimants in this case, the *RDC* claimant continued domestic proceedings over the respondent's objection. The *RDC* tribunal explained that the existence of proceedings related to the same measures as the CAFTA arbitration was <u>not</u> merely a formal defect.[9] The waiver violation was more than a formal defect, and could not be remedied, because the waiver requirement is included as a condition to consent. Thus, the only tribunal that has interpreted CAFTA Article 10.18 already expressly rejected the interpretation presented by Claimants to try to overcome their deliberate violation of the waiver requirement.

14. Thus, whether the term "precedent" is used or not, CAFTA Article 10.18.2 is clear that there needs to be a valid waiver <u>before</u> El Salvador's consent to arbitration is perfected.

15. Seeing that the only CAFTA decision related to waivers being a condition precedent to consent is contrary to their position, Claimants cite three NAFTA cases for their assertion that "defects in the submission of waivers may be remedied."[10] Those three cases, however, did not concern invalid waivers, but rather the untimely submission of the waivers. In each of these cases, it was important that the claimants, unlike Claimants here, had <u>not violated the waivers</u> by initiating or continuing other proceedings related to the same measures. In *International Thunderbird Gaming Corporation v. Mexico*, the tribunal found that:

> 1121 of the NAFTA is concerned with conditions precedent to the submission of a claim to arbitration. One cannot therefore treat lightly the failure by a party to comply with those conditions. The Tribunal <u>finds however that the waivers filed for EDM-Puebla, EDM-Monterrey, and EDM-Juarez were valid</u> within the meaning of Article 1121 of the NAFTA, for the following reasons.[11]

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[8] *RDC v. Guatemala*, para. 56.
[9] *RDC v. Guatemala*, para. 61, n. 36.
[10] Response, para. 33.
[11] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, Jan. 26, 2006, para. 115 (CL-4; RL-4) (emphasis added).

That tribunal went on to note,

> [t]he issue at hand is therefore not an actual failure to file waivers for EDM-Puebla, EDM-Monterrey, and EDM-Juarez, but rather the (un-)timeliness of the filings in question.[12]

Most significantly, that tribunal highlighted the importance of the key difference between the actions of claimants in *International Thunderbird* and the actions of Claimants here:

> In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.[13]

In contrast, Claimants in this arbitration did "continue . . . remedies" in El Salvador and therefore have not "effectively complied with the requirements of" Article 10.18 of CAFTA.

16. In fact, all three cases cited by Claimants differ decisively from this case because in those cases there were no other proceedings pending or initiated at the time of, or after, the initiation of arbitration.[14] In other words, none of those cases concerned a failure to effectively comply with the waiver. In none of those cases did the respondent face local proceedings concurrent with the arbitration. Here, in contrast, El Salvador is not complaining that the written waiver was submitted too late, but that Claimants submitted waivers that they did not intend to comply with and, in fact, did not comply with by maintaining their domestic judicial proceedings until the Supreme Court issued its final decisions.

17. Thus, the situation before this Tribunal is not like the cases where a waiver was filed late. Instead, the situation before this Tribunal is precisely like in *RDC v. Guatemala* and in *Waste Management v. Mexico*, where claimants violated their waivers by maintaining domestic proceedings at the time they initiated arbitration and for some time thereafter. The *Waste*

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[12] *International Thunderbird Gaming Corporation v. Mexico*, para 116.
[13] *International Thunderbird Gaming Corporation v. Mexico*, para. 118.
[14] *International Thunderbird Gaming Corporation v. Mexico*, paras. 116, 118; *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, paras. 89-90 (CL-3); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Relation to Harmac Motion, Feb. 24, 2000, paras. 5, 18 (CL-5).

Management I decision was absolutely clear that the finding of no jurisdiction was based on the claimant's conduct and intent to violate the waivers, explaining that in view of the claimant's "conduct and the text of its declaration of intent," the waiver was invalid for having "failed to translate as the effective abdication of rights mandated by the waiver."[15]

18. Similarly, Claimants' written waivers, unaccompanied by the termination of the domestic proceedings, failed to translate as the effective abdication of rights required by CAFTA Article 10.18.

19. Claimants' suggestion that the Tribunal follow the dissenting opinion in *Waste Management I* rather than the majority opinion must be rejected, especially since the majority opinion was followed in the CAFTA case, *RDC v. Guatemala*, and Claimants' own State of nationality, the United States, has endorsed the majority's interpretation that the waiver requirement is a condition to consent.

C. State Parties to CAFTA agree that the waiver requirement is a condition to consent that requires specific conduct in compliance with the waiver

20. State Parties' views are vital to interpreting and applying the Treaty. Claimants are mistaken to dismiss as "self-serving" the views of CAFTA State Parties that the waiver requirement is a condition to consent, that CAFTA requires conduct by claimants in compliance with the waiver, and that conduct by claimants in violation of the waiver means lack of consent, and therefore, lack of jurisdiction.

21. The CAFTA Parties' interpretations of the Treaty cannot be dismissed as "self-serving" simply because they have been made public in the context of arbitration. The Parties to CAFTA, and particularly the United States as a major exporter of investment, must always take into account that they have two sets of interests in the proper interpretation of the arbitration provisions of the Treaty: i) the interests of their Governments as potential respondents and ii) the

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[15] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000, § 31 ["*Waste Management I*"] (RL-6).

interests of protecting their nationals who are investors in other CAFTA States. These two interests were carefully balanced in the text of the Treaty. Positions, even in arbitration, are thus taken with a view to achieving a correct interpretation of CAFTA in accordance with the text as the true expression of the intent of the Parties that created the Treaty. The starting point is the text of CAFTA, without which there would be no jurisdiction for Claimants to initiate this arbitration. They can only claim CAFTA benefits because the CAFTA Parties agreed to sign this Treaty. The Parties agreed voluntarily to submit to arbitration to provide certain mutual protections to their investors, but they subjected their acceptance of arbitration to certain protections for the respondent governments. The CAFTA Parties rightly expect and demand that the text of the Treaty, including the conditions on consent to arbitration, be respected, effectively applied, and interpreted in good faith by claimants and arbitral tribunals.

22. Notably, the three CAFTA Parties against whom CAFTA arbitrations have been initiated—the Dominican Republic, Guatemala, and El Salvador—have all stated that the CAFTA waiver is a condition to consent and that the waiver includes a material requirement to effectively comply with the waiver. The reason is that in all three cases, the claimants have violated the waivers.[16]

23. In addition, the United States, the CAFTA Party of which Claimants are nationals, has endorsed the same view in the context of NAFTA. In fact, the United States expressed this view in 2005, long after the decision in *Waste Management I* and the publication of the dissenting opinion that Claimants are urging this Tribunal to adopt instead of the majority opinion. The United States' view in the context of NAFTA is identical to the majority opinion in *Waste Management I* and rejects the dissenting opinion.

24. Indeed, the United States argued in 2005 that the waiver requirement obliged claimants to "not only provide a written waiver, but . . . [to] *act consistently with that waiver* by

[16] In *RDC v. Guatemala*, the tribunal decided that the claimant had violated the waiver. In *TCW v. The Dominican Republic*, there was no finding by the tribunal because the case was settled before a decision on the Dominican Republic's objection to jurisdiction.

abstaining from initiating or continuing proceedings with respect to the same measures in another forum."[17] The United States quoted Canada's submission in the *Waste Management I* proceeding—"[i]t follows from a good faith interpretation of this obligation [in Article 1121] that the investor is required to *act in conformity with the waiver* that it is required to produce. In other words, *the waiver must be made effective by the investor*."[18]

25. In that case, *Tembec v. United States*, the United States' main argument was that NAFTA Chapter 19 barred Tembec from bringing its claims related to antidumping or countervailing duty laws under the Investment Chapter 11. However, as an additional argument, the United States also argued that there was no consent and therefore no jurisdiction because Tembec had violated its waivers by continuing the proceedings initiated under NAFTA Chapter 19 with regard to the same measures.[19] The United States argued that "[w]ithout a valid waiver, there is no consent of the parties necessary for a tribunal to assume jurisdiction over a dispute."[20]

26. In *Tembec*, as here, the claimant submitted a written waiver but then allowed parallel proceedings to continue and refused to make the waiver effective. Noting that Tembec had provided written waivers on April 5, 2004, the United States asserted that "Tembec's subsequent conduct, however, confirm[ed] that it ha[d] no intent to honor those waivers" because it remained a complainant in proceedings before binational panels seeking a favorable ruling on duty determinations.[21] In its Reply, the United States cited the *Waste Management I* tribunal's holding that a waiving party must "drop" any parallel proceedings.[22] The United States' position

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[17] *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, Feb. 4, 2005, at 36 ["*Tembec*, Objection to Jurisdiction"] (RL- 8) (emphasis in original).
[18] *Tembec*, Objection to Jurisdiction at 36 (emphasis in original).
[19] *Tembec*, Objection to Jurisdiction at 36.
[20] *Tembec*, Objection to Jurisdiction at 35.
[21] *Tembec*, Objection to Jurisdiction at 37.
[22] *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Reply on Jurisdiction of Respondent United States of America, Mar. 28, 2005, at 31 ["*Tembec*, Reply on Jurisdiction"] (**Respondent's Authority 22**).

was absolutely clear: "[Tembec's] failure to withdraw its Chapter Nineteen claims in accordance with its written waiver bars its claims in this proceeding."[23]

27. Before the tribunal decided the United States' objection, however, Tembec's arbitration was consolidated with proceedings initiated by claimants in two other NAFTA cases. Tembec withdrew from the Chapter 11 arbitration immediately prior to the jurisdictional hearing before the consolidated tribunal.[24]

28. After Tembec had already withdrawn from the consolidated NAFTA Chapter 11 case, the consolidated tribunal decided as a preliminary question that NAFTA Chapter 19 barred the submission of claims related to United States antidumping and countervailing duty law to arbitration under the Investment Chapter 11. The objections based on the waiver requirement were not at issue as a preliminary question, but the waiver was referred to in the context of understanding NAFTA's provisions against parallel proceedings. Because the consolidated tribunal determined that NAFTA Article 1901(3) precluded the overlapping claims, the claims of the remaining two claimants were dismissed for lack of jurisdiction before the waiver issue was even considered.

29. Nonetheless, that tribunal discussed the waiver requirement, noting that it was carefully drafted and intended to prevent concurrent or parallel proceedings.[25] The tribunal emphasized that "[t]he expression of the will of States in consenting, or not consenting, to compulsory dispute settlement remains the central operative principle."[26] In the tribunal's view, the claims under the Investment Chapter 11 were "based on the same factual matrix as the

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[23] *Tembec*, Reply on Jurisdiction at 33.

[24] *See Canfor Corporation v. United States of America, Tembec et al v. United States of America, and Terminal Forest Products Ltd. v. United States of America*, Order for the Termination of the Arbitral Proceedings with Respect to Tembec et al., Jan. 10, 2006 (**Respondent's Authority 23**).

[25] *See Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Decision on Preliminary Question, June 6, 2006, para. 247 ("The investors' rights and the corresponding obligations of the State Parties to the NAFTA are circumscribed in detail in the NAFTA.") (**Respondent's Authority 24**).

[26] *Canfor and Terminal v. United States*, Decision on Preliminary Question, para. 243.

various Article 1904 binational panel review proceedings," meaning that there would be parallel proceedings "with the attendant problems that this creates."[27]

30. In sum, the text of the Treaty, relevant jurisprudence, and the State Parties' views all reveal that providing an effective waiver is a condition precedent to consent. The Tribunal must reject Claimants' attempt to disregard the plain text of the Treaty and the Parties' intent expressed therein.

III. CLAIMANTS WERE REQUIRED TO REQUEST TERMINATION OF THE DOMESTIC JUDICIAL PROCEEDINGS

A. Claimants were required to submit effective waivers

31. Claimants argue that the text of CAFTA Article 10.18.2(b) does not require the discontinuation of domestic proceedings as a condition of submitting a claim to arbitration based on the dissenting opinion of Mr. Keith Highet in *Waste Management I*. Claimants accept that a written waiver submitted pursuant to Article 10.18.2(b) must be effective,[28] yet still try to argue that they have no obligation to act consistently with those waivers. Their arguments about who could make the waiver effective once it is submitted are irrelevant to the fact that they did not submit effective waivers.

32. CAFTA Article 10.18.2(b) contains the requirement that, as a condition to consent, a claimant must accompany a notice of arbitration with a written waiver to not initiate or continue any proceeding with respect to any measure alleged to be a breach of CAFTA. Claimants state that the purpose of the waiver provision is to prevent the existence of concurrent proceedings with respect to any measure alleged to be a breach of CAFTA.[29] Therefore, if

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[27] *Canfor and Terminal v. United States*, Decision on Preliminary Question, para. 246. The consolidated case was discontinued at the request of the parties shortly after the tribunal's decision on the preliminary question, so there was never any determination on the violation of the waivers and what effect that would have on consent.
[28] Throughout their Response, Claimants make reference to the fact that the key question is to determine the effectiveness of the waivers. *See, e.g.*, Response, paras. 16, 30, 51 and Title to Section II.
[29] Response, para. 67.

despite the written waiver, concurrent proceedings in fact exist, the waiver is not effective because it is not achieving its purpose.

33. The fact that "a waiver is a unilateral and final abandonment, extinguishment and abdication of legal rights"[30] has proven insufficient to make claimants comply with the waiver requirements in NAFTA and CAFTA. But NAFTA and CAFTA jurisprudence on the interpretation of the waiver requirement in each Treaty put claimants on notice that the submission of the written waiver without conduct consistent with the waiver is not enough.

34. Claimants seek an impermissible change of roles in the design of CAFTA by trying to impose the burden on the respondent State to seek enforcement of the waiver before the local court or tribunal before which the parallel proceeding is being conducted. They seek to place the burden on the State instead of accepting that a claimant is required to make its waiver effective by discontinuing any parallel proceedings, as a condition to consent before initiating arbitration under CAFTA. But submitting an effective waiver is indisputably the responsibility of the claimant.

35. A reading of the full text of CAFTA Article 10.18 confirms that Claimants' position is wholly unviable. In paragraph 16 of the Response, Claimants "submit that there is no requirement in Article 10.18.2 to discontinue domestic proceedings prior to submitting a CAFTA claim." If this were the case, the permission granted in Paragraph 3 of Article 10.18 to continue certain types of actions would be entirely unnecessary. Paragraph 3 reads:

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

[30] Response, paras. 17, 50.

The text does not state that "notwithstanding paragraph 2(b) the waiver need not be submitted for an action that seeks interim injunctive relief. . . ." Rather, it states that "[n]otwithstanding paragraph 2(b), the claimant . . . may initiate or continue an action that seeks interim injunctive relief . . . ." By necessary implication, contrary to Claimants' assertion, the initiation or continuance of all other types of action is a violation of the requirement under Article 10.18.2(b). In other words, the Parties to CAFTA expressed in the text of Article 10.18 a clear intent to create a requirement to materially comply with the waiver and effectively abdicate the right to continue parallel proceedings by terminating those proceedings, not just to say the words formally with no intent to abide by them.

36. El Salvador strongly disagrees with Claimants' suggestion that a respondent State must be responsible for terminating the parallel proceedings, as this would place the burden of making a waiver effective on the State. According to Claimants, "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" and they quote the tribunal's statement that the Government should plead the waiver to other courts.[31] Claimants are wrong. The line they quoted does not follow any mention of the investor's obligation, but rather refers to the unrelated topic of whether the arbitral tribunal could ensure compliance with the waiver by informing the domestic courts or tribunals about the waiver. The tribunal, noting that it would not have the authority to affect proceedings in other fora, commented that, in those situations, "it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals."[32] This is very far from a determination that it is the respondent State and not the claimant that must make the claimant's waiver effective, which is the interpretation that Claimants assert before the Tribunal.

37. Claimants' proposal that States must seek dismissal of concurrent litigation also fails to consider that proceedings could be initiated in other fora outside the territory of the

[31] Response, para. 44.
[32] *Waste Management I*, § 15 (RL-6).

respondent Party, where a unilateral move to dismiss by the defending State may not be well received or may not be sufficient without similar action by the other party. In addition, States may not be immediately aware of arbitration or litigation against them or their agencies or subdivisions. A good faith interpretation of the waiver requirement supports the view that the investor seeking to take advantage of CAFTA must make its waiver effective by taking appropriate action before initiating CAFTA arbitration and maintaining conduct consistent with the waiver after it is submitted. In fact, the provision puts all the burdens on the claimant to perfect the consent of the respondent State. The State has done its part by offering its conditional consent.

38. In its Preliminary Objection, El Salvador accurately described the view of the *Waste Management I* majority: the validity of a waiver depends on the conduct of the party making the waiver, "the reason being that said party, and only said party, is liable for the effectiveness of such declaration, due to the so-called principle of self-responsibility."[33]

B. An effective waiver includes the material aspect of conduct in accordance with the waiver

39. Claimants argue that it would be "nonsensical" to require the submission of the waiver if they would also be required to terminate any proceedings before submitting the waiver,[34] but this only seems "nonsensical" to Claimants because they refuse to recognize the nature and purpose of the waiver requirement. First, they fail to see that the dual requirement to discontinue proceedings and submit the waiver arises from the need to protect respondent States over time and is in fact contained in the language of the waiver itself. The waiver is of the right to "initiate or continue" proceedings. The waiver of the right to continue is, among other purposes, meant to protect States from a claimant doing what Claimants have done in this case, initiating local court proceedings and then initiating arbitration proceedings, while maintaining

[33] *Waste Management I*, § 24. Claimants' reliance instead on the dissent is weak. They cite no authority suggesting that Mr. Highet's approach was followed by other tribunals or endorsed by any scholar.
[34] Response, para. 16.

the local proceedings. Claimants are correct that this protection could have been afforded with only a requirement to terminate local proceedings and no waiver. However Article 10.18 is also designed to protect respondent States from future proceedings, including proceedings initiated after the end of the CAFTA arbitration. The use of the waiver formulation, rather than just a requirement to terminate proceedings, was intended to provide respondent States with the additional protection of being able to seek enforcement of the waiver in other courts and tribunals, after the CAFTA arbitration tribunal has been dissolved and can no longer enforce the waiver by dismissing the arbitration. This possibility of future enforcement in other fora does not, as Claimants assert, deprive this Tribunal of its authority and obligation to enforce the waivers. It is simply additional protection afforded to respondent States.

40. Second, and most importantly, Claimants ignore that the waiver required under Article 10.18.2 has two aspects: a **formal aspect** (the submission of the waiver) and a **material aspect** (actions in compliance with the waiver).[35] Claimants complied with the formal requirement of submitting a written waiver with the stipulated text when they initiated arbitration under CAFTA, but they ignored the material requirement. CAFTA requires the claimant to submit the waiver with a specific text and to take action consistent with the waiver by requesting termination of any pending proceedings, ceasing to participate in any other proceedings, and/or refraining from initiating any proceedings in violation of the waiver. If there are no pending proceedings, the material aspect may be fulfilled by simply not initiating proceedings related to the same measures. But if there are pending proceedings, the claimant must request termination and cease to participate in the proceedings in order to make the written waivers effective.

41. The analysis in *Waste Management I* exemplifies the analytical difference between the formal aspect of the waiver requirement and the material aspect. In that case, there was a discrepancy between the text of the waiver submitted and the text of the NAFTA

[35] *See, e.g.*, *Waste Management I*, § 20 (RL-6) ("this Tribunal will therefore have to ascertain whether WASTE MANAGEMENT did indeed submit the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.").

requirement, due to the addition of a reservation that was not included in the required text. The tribunal considered that the submission of the written waiver met the formal requirement, but that the additional text and the claimant's conduct resulted in non-fulfillment of the material requirement.[36]

42. Thus, the problem in *Waste Management I* was the claimant's insistence, in form and in practice, that it could maintain both the domestic proceedings and the international arbitration proceeding because, although they referred to the same measures, they were based on two different bodies of law. This lack of compliance with the material requirement (by continuing domestic proceedings in violation of the waivers) required the termination of the entire arbitration proceeding because of lack of consent. Notably, Claimants in the present arbitration take in essence the same position as the *Waste Management I* claimant, but they use somewhat different legal arguments. Like the claimant in *Waste Management I*, Claimants here argue that they (and all future CAFTA claimants) may continue domestic court proceedings because they have met a "procedural requirement" to submit a waiver with the wording required by CAFTA. Thus Claimants have done precisely what the claimant in *Waste Management I* did, albeit with different reasoning: they filed waivers and then took the position that domestic proceedings could continue despite the waivers.

43. Because of fundamental requirements of good faith, a CAFTA claimant is responsible for requesting the termination of the proceedings before submitting the waiver, and abstaining from participating in the other proceedings after submitting the waiver if the proceedings continue in spite of the request to terminate them. It is the height of cynicism to maintain that a party seeking to benefit from consent to arbitration provided under an international treaty may submit a formal waiver to the Tribunal expressly renouncing any right to initiate or continue any other proceeding and at the same time argue that the initiating party may freely allow the continuation of parallel proceedings that are completely inconsistent with this

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[36] *Waste Management I*, §§ 23, 31.

express waiver, and, indeed, need not even have the intention to comply with the waiver at the time it is submitted.

44. This cynicism is even more apparent if one looks at the full consequences of Claimants' arguments in paragraphs 26 to 33 of their Response. They argue that the submission of the waiver is a mere "procedural requirement for the submission of a claim to arbitration,"[37] generating no material obligation to actually comply with the waiver. Under Claimants' reading of CAFTA, they could initiate proceedings in multiple courts in multiple jurisdictions as well as proceedings with other arbitration tribunals before initiating proceedings under CAFTA. They could then initiate CAFTA proceedings with the formal waiver while fully intending to continue all of those prior proceedings after initiating the CAFTA arbitration. Under Claimants' view, they could then continue all of those proceedings after initiating CAFTA arbitration. Under Claimants' position, none of this conduct would invalidate the waivers or have any effect on the CAFTA proceedings because the waiver requirement is purely procedural and can be met in all circumstances by simply submitting the correct language with the Notice of Arbitration. It would be up to the Respondent to seek dismissal of all the proceedings, and this Tribunal would be powerless to enforce Claimants' express waiver. Claimants ask the Tribunal to find that this is the regime established by the States that created CAFTA.

45. But a waiver must be made in good faith. As stated by the *Waste Management I* tribunal, a waiver is ineffective if the claimant does not intend to comply with it, and a claimant must act consistently with its waiver. A claimant must do everything it reasonably can to prevent those proceedings from continuing, the least of which is requesting termination of the parallel proceedings. Normally, only the court or tribunal before which these parallel proceedings are pending actually has the power to terminate the other proceedings. El Salvador recognizes that in some circumstances, the other court or tribunal might take months to terminate the proceedings or may require the consent of all parties for termination. But the claimant must,

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[37] Response, para. 31.

at a minimum, request termination of the proceedings and, if called to continue to participate in those other proceedings, refrain from doing so.

46. As stated by the majority in *Waste Management I*, the waiver requirement "logically entails a certain conduct in line with the statement issued" and "must assume concrete form in the intention or resolve whereby something is said or done (conduct of the deponent)."[38] Mere compliance with the formal aspect is insufficient if duplicative proceedings nevertheless continue. As discussed above, this position has been adopted by respondent States facing parallel proceedings. Thus, the United States in *Tembec v. United States*, as well as the Dominican Republic and Guatemala in their CAFTA arbitrations, all agreed that claimants have to act in conformity with the waiver for the requirement to be fulfilled.[39]

47. The waiver requirement and the text of CAFTA Article 10.18.2 only make sense if there is both a formal requirement to submit the waiver and a material requirement to comply with the waiver. Both are absolutely necessary, as the waiver would provide scant protection to respondent States if claimants were free to ignore it from the very moment they solemnly declare it.

C. The *Vannessa Ventures v. Venezuela* decision does not support Claimants' position

48. In spite of the reasoned decision of the tribunal in *RDC v. Guatemala*, which held that the waiver requirement in CAFTA requires a claimant to take action to terminate other proceedings before initiating the CAFTA arbitration, Claimants go to great lengths to try to persuade the Tribunal that another decision in a case under a different treaty (the Canada-Venezuela BIT) supports their position and should be followed instead of the reasoning of a tribunal that decided this same issue regarding the very same treaty (CAFTA).

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[38] *Waste Management I*, § 24 (emphasis added).

[39] *See* Section II.C, above. *See also TCW Group, Inc., Dominican Energy Holdings, L.P. v. The Dominican Republic*, Respondent's Memorial on Jurisdiction, Nov. 21, 2008, para. 35 (arguing that the claimants' "post-waiver conduct [ran] afoul of the material requirements of Article 10.18(2) of CAFTA-DR" because the claimants did not "drop" their parallel proceedings) (RL-9).

49. But the case cited by Claimants, *Vannessa Ventures v. Venezuela*, is inapposite here for more than the fact that it was not a CAFTA arbitration. Claimants assert that the *Vannessa Ventures* decision under the ICSID Additional Facility Rules supports their view that that decision "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."[40]

50. However, nowhere in its decision did the tribunal in *Vannessa Ventures* interpret the waiver provision in the BIT (Article XII(3)(b)). What the tribunal was deciding was the parties' respective positions on whether the termination of the parallel local proceedings was with prejudice or without prejudice, in accordance with the law of Venezuela. The parties argued extensively on the effects of the waivers pursuant to Venezuelan law and submitted expert opinions in support of their respective positions. Having before it a dispute concerning the legal effects of a waiver under local law before a local court, the tribunal not surprisingly declared that the Supreme Court of Venezuela was the most suitable body to interpret Venezuelan law.[41] It is untenable to argue that the tribunal's decision "reflects the structure" of the waiver requirement in the relevant BIT and to imply that, as a matter of legal interpretation of a treaty, that decision establishes that it is for local courts to enforce waivers required by international treaties as conditions to consent under such international instruments.

51. Furthermore, Claimants leave out important details and misrepresent that tribunal's decision.

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[40] Response, para. 61.

[41] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, Aug. 22, 2008, § 3.4.4 (CL-12) ("This Arbitral Tribunal is confronted with the question as to what might occur in the future if the Claimant or one of its affiliated companies seizes a Venezuelan court. The statements of the experts presented by the Parties come to opposing conclusions. . . . 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.").

52. First, in *Vannessa Ventures*, the claimant did withdraw its claims before the domestic courts. This fact alone should be decisive to reject Claimants' reliance on that decision. In its summary of the objection based on the waiver requirement, the tribunal indicates that "*in the context of Venezuela's opposition to the registration of Vannessa's Request for Arbitration . . . Vannessa and MINCA filed motions to discontinue the related proceedings (except the case mentioned in the preceding paragraph).*"[42] The claimant in that case, after the respondent's opposition to registration of the case, clearly recognized its obligation to make its waivers effective and discontinued all the proceedings it understood to be subject to the waiver during the registration process. That, of course, is very different from what occurred in this case, where Claimants simply ignored El Salvador's objections to the registration of the case by the ICSID Secretariat. Claimants filed no motions to discontinue the cases in El Salvador and certainly did not notify the Salvadoran Supreme Court that they considered their pending litigation in El Salvador to be waived. On the contrary, Claimants waited for the Supreme Court's decision. In fact, in December 2009, five months after initiating the CAFTA arbitration, Claimants mentioned that they were waiting for the Supreme Court's decision in a letter to the Ministry of the Environment.[43]

53. Second, the issues argued before the tribunal in *Vannessa Ventures v. Venezuela* were very different from those asserted here by Claimants. As noted above, the parties in *Vannessa Ventures* argued and submitted expert opinions about whether the claimant's withdrawals were done with prejudice or without prejudice, the clear assumption being that if the withdrawals had not been properly done (much less not done at all), the waivers would have been ineffective and there would have been no jurisdiction. The respondent was concerned that the withdrawals were not "with prejudice,"[44] while the claimant argued that "the form of the

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[42] *Vannessa Ventures*, § 3.1. The claimant argued that it could continue the one suit that was not withdrawn because it "did not relate to any claim advanced in these ICSID proceedings but only concerned a previous decision on costs which MINCA considered to be wrong." *Id.* at § 3.4.3.
[43] Letter from P. Valle to Minister of the Environment, Dec. 10, 2009 (**Respondent's Exhibit 15**).
[44] *See Vannessa Ventures*, § 3.4.2 (CL-12).

desistimiento chosen was in order to not be deemed to have waived" its rights to arbitration or possible enforcement actions.[45]

54. Thus, the tribunal was considering the legal nature of claimant's withdrawal of its domestic judicial proceedings, either with prejudice or without prejudice. In fact, the tribunal described the main question on the waivers issue as: "what might occur in the future if the Claimant or one of its affiliated companies seizes a Venezuelan court."[46]

55. This, again, is very different from the case before this Tribunal. Claimants did not withdraw their cases at all, with or without prejudice. El Salvador's objection is not about the possibility of future duplicative proceedings, but rather about Claimants' deliberate breach of the waiver requirement not to pursue other remedies at the time of initiating the CAFTA arbitration.

56. Third, the *Vannessa Ventures* tribunal had before it a decision of the domestic court stating that it would dismiss proceedings in violation of the waivers. In October 2005, the Constitutional Chamber of the Venezuelan Supreme Court dismissed the domestic lawsuit related to the costs award because of the waiver submitted in the ICSID proceeding.[47] The *Vannessa Ventures* tribunal considered this Supreme Court decision to be very important. Quoting the Supreme Court's decision, the tribunal decided that it would not analyze the expert opinions on whether or not the claimant and its affiliated companies had chosen the proper withdrawal procedure.[48] Thus, in fact, the arbitral tribunal did not have to decide what parties would have to do to make a waiver effective or how a domestic court would have to treat the waiver, but merely took that Supreme Court's decision into account in deciding that the claimant's waivers and termination of the domestic judicial proceeding in that case were effective and sufficient to comply with the waiver requirement in that BIT.

57. In the case before this Tribunal, on the other hand, Claimants did not request termination of the domestic judicial proceedings, and the Supreme Court of El Salvador did not

[45] *Vannessa Ventures*, § 3.4.3.
[46] *Vannessa Ventures*, § 3.4.4.
[47] *Vannessa Ventures*, § 3.4.4.
[48] *Vannessa Ventures*, § 3.4.4.

discontinue the domestic judicial proceedings. Claimants took no steps to make their waiver effective. To the contrary, Claimants intentionally did not take any action to discontinue the domestic proceedings and now argue before this Tribunal that they had no obligation to do so.

58. The *Vannessa Ventures* case simply does not support Claimants' conclusion that "the purpose of [the written waiver] is to ensure that a respondent state can seek to have concurrent proceedings dismissed."[49] The purpose of the waiver is to protect respondent States, not to impose a burden on them. Just like Claimants should have done, but refused to, the *Vannessa Ventures* claimant withdrew its domestic judicial proceedings. Therefore, even in Claimants' cited authority, the claimant took action to terminate the domestic judicial proceedings and ensure that the waiver effectively protected the respondent State from multiple proceedings related to the same measures.

59. As further evidence that *Vannessa Ventures* would be inapplicable to this arbitration even if the issues to be determined had been similar, the BIT provisions are significantly different from the CAFTA provisions. First, Article XII.5 of the BIT provides that "[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article."[50] Moreover, the BIT requires a waiver of the right to initiate or continue proceedings "before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind."[51]

60. In contrast, the CAFTA waiver requirement is included under the title "Conditions and Limitations on Consent of Each Party" and it prohibits proceedings before any tribunal or court "under the law of any Party."[52] The consent of the CAFTA Parties is not unconditional—it is expressly conditioned on the claimants' compliance with the terms of CAFTA Article 10.18. CAFTA Article 10.17 provides that each "Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement."

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[49] Response, para. 62.
[50] Canada-Venezuela BIT, Art. XII.5 (emphasis added) (CL-13).
[51] Canada-Venezuela BIT, Art. XII.3(b).
[52] CAFTA, Art. 10.18.2(b) (RL-1).

61. In sum, El Salvador submits that the *Vannessa Ventures* decision is not an appropriate decision to be considered as authority, let alone persuasive authority, in the present case. In any event, this decision does not support Claimants' position that the CAFTA waivers are merely procedural requirements that need not be made effective by the claimant's actions. To the contrary, the *Vannessa Ventures* decision demonstrates the importance of material compliance with waivers of the right to initiate or continue domestic proceedings and highlights just how extreme Claimants' position is in this regard, as the claimant in that case did exactly the opposite of what Claimants did here. Although it would have been late for purposes of consent in a CAFTA arbitration under the ICSID Convention, the claimant in *Vannessa Ventures* took concrete steps to comply with its waiver by discontinuing local proceedings prior to the registration of the arbitration. It is perhaps telling that Claimants put forth the *Vannessa Ventures* decision as the strongest precedent in favor of their view.

D. Claimants violated the waivers even though Claimants were no longer required to take action in the domestic judicial proceedings

1. Claimants initiated CAFTA arbitration when the domestic judicial proceedings were pending but no further action was required by Claimants

62. Claimants did not materially comply with their waivers. When Claimants submitted their claims to ICSID, the pending domestic litigation was at a point where it would continue without any action by Claimants. Claimants' lack of direct action has nothing to do with having abandoned the litigation and everything to do with timing. The petitions to the Supreme Court, filed on December 6, 2006, were admitted in March 2007. The evidentiary phase commenced in December 2007 and Claimants made the required written submissions. MARN submitted its final arguments in April 2009, and the Attorney General's Office filed its written submission in June 2009. Thus, when Claimants initiated this arbitration by submitting the Notice of Arbitration on July 2, 2009, the litigation in El Salvador required no further action by Claimants but was still pending decision by the Supreme Court.

63. In fact, on October 1, 2009, three months after Claimants initiated this ICSID arbitration, the Supreme Court issued a notice to the parties, including Claimants, mentioning that it had received all the required submissions and including a copy of a note from the Secretary of the Supreme Court to the Attorney General reporting the status of the domestic proceedings as awaiting final decisions.[53] There is no record that Claimants responded to this notice by informing the Supreme Court that they were under a legal obligation not to continue these domestic judicial proceedings because they had already initiated international arbitration under CAFTA and had submitted waivers purporting to abandon their right to continue the domestic judicial proceedings.

64. Under these circumstances, Claimants' assertion that "[s]ince 2 July 2009, the Claimants . . . took no action in the Domestic Proceedings and have never maintained that they had a right to continue the Domestic Proceedings in any way"[54] is legally irrelevant and misleading. While Claimants state repeatedly that they have abandoned their right to continue proceedings, their entire Response is directed at convincing the Tribunal that they nevertheless have the "right" to allow the domestic proceedings to continue so long as they take no affirmative steps to keep it going. It is notable that at the end of their Response, Claimants assert that under international law a party is responsible for both acts and omissions, yet when it comes to their own conduct under the waivers, they argue that their omissions are materially different from the acts of the claimant in *Waste Management I* even though they had the exact same practical result—the continuation of a domestic proceeding. Claimants took no action to continue the domestic proceedings because none was required for the proceeding to continue. Whether or not Claimants submitted a waiver, they would have taken no action to maintain the domestic proceedings except await the decisions. As of July 2, 2009, the litigation was at the point that it did not require any direct action from Claimants to continue through to decisions.

[53] *See* Supreme Court Notification, Oct. 1, 2009. The Notification enclosed copies of communications between the Court and the Attorney General's Office. The Notification and one relevant attachment, a letter informing of the status of the proceedings, are attached as **Respondent's Exhibit 16**.
[54] Response, para. 72.

65. The *Waste Management I* tribunal specified that the waiving party's intent is of utmost importance for an effective waiver. Thus, simply not acting is insufficient where proceedings in violation of the waivers continue to exist. Just like in *Waste Management*, here "[i]t remains clear that at no time did [Claimants] intend to abandon the domestic proceedings, rather, on the contrary, [their] manifest intention was to continue [domestic] legal proceedings."[55] In order to make their waivers effective, Claimants were required to request termination of the domestic proceedings. They refused to do so when they began the CAFTA arbitration even after El Salvador notified them of the need to comply with the waiver requirement during the registration of the case. They further ignored the notice from the Supreme Court that the proceedings were pending decision in late 2009.

66. The fact that Claimants did not have to do any specific act to "continue" their litigation after June 2009, having already submitted their final briefs, does not mean that the domestic judicial proceedings had ended. The proceedings before the Supreme Court of El Salvador continued in violation of the waivers Claimants submitted with their Notice of Arbitration.

2. Given the failure to request termination of the domestic judicial proceedings, lack of action is not materially different from taking affirmative steps to continue the proceedings

67. If there had been no pending litigation, there would have been no need for Claimants to take any action. In such case, lack of action would have been sufficient to comply with the waivers. But in this case before the Tribunal, where there were pending domestic judicial proceedings, doing nothing did not fulfill the material aspect of the waiver requirement.

68. Given that Claimants had initiated proceedings in El Salvador, submitted written briefs, and were waiting for decisions from the Supreme Court of El Salvador, Claimants had the obligation to at least request termination of those proceedings in order to make the waivers valid.

[55] *Waste Management I*, § 27.

69. The fact that Claimants did not do anything to continue the proceedings, at the stage when the Supreme Court did not require anything more from Claimants, is irrelevant. The relevant fact, conversely, is that Claimants did not request termination of the domestic judicial proceedings and as a result the proceedings continued. Since there was nothing to be done, Claimants had already done everything they needed to do to continue the proceedings.

70. Until the Response submitted on September 15, 2010, in fact, Claimants never even alleged that they had abandoned the domestic judicial proceedings. Indeed, Claimants made statements to the contrary. First, in their Notice of Arbitration, Claimants stated that the proceedings before the Supreme Court "have not been resolved."[56] Claimants did not say that, because they were submitting CAFTA claims and the required waivers, such proceedings were "irrevocably abandoned."[57] Claimants choice of words—"have not been"—indicated that the proceedings continued. When El Salvador objected to registration and asked Claimants to terminate the arbitration because of the waiver violation, Claimants never said that the domestic proceedings were abandoned. Claimants likewise did not take action when the Supreme Court sent a notice about the status of the proceedings in late 2009. In fact, in a letter to MARN dated December 10, 2009, Claimants' local counsel mentioned that Claimants were awaiting the Supreme Court's decisions.[58] Also, in Quarterly Reports to the U.S. Securities and Exchange Commission filed in November 2009 and February 2010, Commerce Group reported that the Supreme Court "legal proceedings are pending."[59]

71. Claimants offer no explanation in their September 2010 Response to El Salvador's Preliminary Objection as to why it took more than a year for them to state that they had abandoned the right to continue the domestic proceedings. In fact, last year, in July-August 2009, at the point when, according to Claimants' new proposed interpretation of the waiver

[56] NOA, para. 22.
[57] Claimants only introduced such language in the Response. *See, e.g.*, Response, para. 50.
[58] Letter from P. Valle to Minister of the Environment, Dec. 10, 2009 (R-15).
[59] Commerce Group Corp., Quarterly Report (Form 10-Q), at 17 (Nov. 12, 2009) (**Respondent's Exhibit 17**) (emphasis added); Commerce Group Corp., Quarterly Report (Form 10-Q), at 17 (Feb. 5, 2010) (**Respondent's Exhibit 18**) (emphasis added).

requirement, filing the waivers nullified their right to continue the domestic proceedings, and when Claimants words could have had an actual effect in those proceedings, Claimants remained silent. They remained silent (except to note that they were waiting for Supreme Court decisions) until after the domestic proceedings were decided. It is only now, after the cases ended unfavorably for the Claimants and when nullifying those domestic judicial proceedings would be helpful to them, that Claimants suddenly insist that their rights to continue the proceedings were abandoned and nullified by the waivers. It is pure sophistry for Claimants to simultaneously assert that the waivers resulted "in the abandonment of Claimants' rights to continue domestic proceedings" at the same time that they argue that they could allow those proceedings to continue to conclusion.

72. An assertion that a right to continue a case was abandoned, months after receiving an unfavorable decision, and more than a year after the time when making such a statement to the local court would have had an actual effect, does not change what actually happened. Claimants filed their Notice of Arbitration, Claimants failed to request termination of the domestic proceedings, Claimants knew the domestic proceedings were continuing, and Claimants waited for the final decisions in those domestic judicial proceedings. In light of these facts, Claimants' new allegation that their rights to continue those proceedings were abandoned over a year ago, and that this was sufficient to comply with the waiver requirement, must be rejected.

73. Claimants' choice to continue the domestic proceedings when initiating CAFTA arbitration and then continue them until those proceedings were finally decided, was a choice to not make the waivers effective. Claimants chose to ignore the CAFTA requirement and thereby did not file claims in accordance with the Treaty and did not perfect El Salvador's consent.

74. Other tribunals have made it abundantly clear that the mere existence of multiple proceedings related to the same measures violates the waivers. Thus, the tribunal in *Waste*

Management I explained, "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously . . . ."[60]

75. Claimants accept that the relevant jurisprudence has found that pending parallel proceedings with respect to the same measures alleged to be a breach of NAFTA and CAFTA trigger a defect in the waivers. Claimants, however, argue that *Waste Management I* is distinguishable from this case because the claimants in that case took "active steps" in the local parallel proceedings after arbitration had started, and Claimants allege that they have not.[61]

76. Consequently, Claimants take the surprising position that domestic parallel proceedings are allowed to exist concurrently with a CAFTA proceeding with respect to the same measures, as long as the claimant does not take any active step in the local proceeding after initiating arbitration.[62] The fallacy of this argument is quite apparent.

77. First, the decision of the tribunal in *Waste Management I* was not premised on the fact that the claimant was taking "active steps" in the local proceedings, but rather on the fact that the claimant "continue[d]" the local proceedings "after" the date of submission of the waiver.[63]

78. Second, the alleged factual difference between *Waste Management I* and this case does not exist with respect to the decision of the tribunal in *RDC v. Guatemala*. In *RDC v. Guatemala*, the defect in the waiver was triggered by the fact that the domestic proceedings existed and overlapped with the CAFTA proceeding. The tribunal did not base its decision on specific facts of that case related to what the claimant had done to further the parallel proceedings, and it specifically rejected as irrelevant the claimant's argument that the duplicative proceedings would not harm the respondent. The tribunal simply noted that "the fact that two domestic arbitration proceedings exist and overlap with this arbitration" triggered the defect of

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[60] *Waste Management I*, § 27 (RL-6).
[61] Response, para. 17.
[62] Response, paras. 17, 72-73.
[63] *Waste Management I*, § 30.

the waiver.[64] Just like in *RDC v. Guatemala*, domestic judicial proceedings in El Salvador existed and overlapped with this CAFTA arbitration, rendering Claimants' waivers ineffective and invalid.

79. According to Claimants' argument, they could be parties in pending proceedings before the Supreme Court of El Salvador from July 2009 to April 2010, as long as they took no active steps while the Court was deliberating in the proceedings they had initiated. They suggest that it was not inconsistent with the waiver to file a Notice of Arbitration for alleged breaches of CAFTA with respect to the same measures challenged in the pending proceedings before the Supreme Court, on July 2, 2009, while the Supreme Court was deliberating.

80. Claimants are essentially proposing that this Tribunal adopt a "physical action" test for the determination of whether an existing parallel proceeding affects the validity of a waiver. Indeed, Claimants accept that "[t]he 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."[65] Claimants also accept that the Supreme Court proceedings are related to the same measures as the CAFTA arbitration.[66]

81. Claimants, recognizing the indisputable existence of parallel proceedings in this case, take the position that what triggers the defect in a waiver is any action by a claimant in the parallel domestic proceeding after CAFTA arbitration was initiated. But, as noted above, CAFTA jurisprudence is clear that the existence of parallel proceedings is what triggers the defect in the waivers.[67] The "physical action" test proposed by Claimants must therefore fail.

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[64] *RDC v. Guatemala*, para. 54 (RL-2) (emphasis added).
[65] Response, para. 67.
[66] Response, para. 29 ("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 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 challenging MARN Resolution No. 3249-779-2006, dated July 5, 2006, which revoked the environmental permit for the San Cristóbal Mill and Plant.").
[67] *RDC v. Guatemala*, para. 54.

82. The local proceedings before the Supreme Court ran parallel with this CAFTA arbitration for almost a year. Claimants initiated the Supreme Court proceedings in December 2006, and the Court notified its decisions in the cases in April 2010. All this time Claimants were parties to the Supreme Court proceedings. Claimants submitted their claims to arbitration by filing their notice of arbitration on July 2, 2009, which was officially received by the Secretary-General on July 6, 2009 and registered on August 21, 2009. Therefore, the local proceedings existed concurrent with this CAFTA arbitration and this triggered the defect in the waivers. As a result, this Tribunal does not have jurisdiction.

E. The concurrent existence of the CAFTA arbitration and the domestic judicial proceedings constitutes a violation of the waivers

83. With some juggling of the dates and playing with words, Claimants assert that there have never been concurrent proceedings in this case. At the same time as Claimants attempt this argument, however, they accept that the relevant date for purposes of the determination to be made by this Tribunal is July 2, 2009. Throughout their Response, Claimants emphasize the relevance of this date.[68] In a convenient side position, Claimants nonetheless argue that in the present case there were never concurrent proceedings because under ICSID Arbitration Rule 6, an ICSID proceeding is deemed to have begun once a tribunal is constituted, which in this case occurred in July 2010, a full year after Claimants initiated this arbitration, and after the domestic judicial proceedings had already ended.

84. Claimants' position defies logic and in any event is contradicted by CAFTA. The relevant date is not, as Claimants would assert, the Article 6 date of the constitution of the Tribunal. Rather the relevant date for the waiver referred to in CAFTA Article 10.18 is the date when the claim is "submitted to arbitration." In this case that date is July 6, 2009.[69] The requirement is not that there be no concurrent "proceedings" in the technical sense that Claimants

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[68] Response, paras. 17, 30, 34, 40, 47, 65.
[69] *See* Letter from ICSID to Claimants, July 7, 2009 (**Respondent's Exhibit 19**).

apply the term, but that there can be no proceeding before any other court or tribunal concurrent with the "arbitration under this Section" of CAFTA Chapter 10.[70]

85. In fact, the prohibition under CAFTA Article 10.18 is not limited to "parallel proceedings." Rather it is a prohibition on the initiation or continuation of "any proceeding" at the time of or after the initiation of arbitration, whether the proceeding is "parallel" or not. For example, *the waiver requirement prohibits the initiation of other proceedings after the CAFTA arbitration ends, even though these proceedings would never be parallel to the arbitration.*

86. In any event, Claimants' understanding of when the arbitration begins for purposes of CAFTA and its waiver provision is simply wrong. Claimants submitted their claims to arbitration under CAFTA in July 2009, one year before the Tribunal was constituted. According to CAFTA Article 10.16.4, "[a] claim shall be deemed submitted to arbitration . . . when the claimant's notice of or request for arbitration . . . is received by the Secretary-General." Claimants submitted their Notice of Arbitration on July 2, 2009, and it was officially received by the Secretary-General of ICSID on July 6, 2009. Therefore, as of July 6, 2009, Claimants were deemed to have submitted their claims to arbitration under CAFTA. As of July 6, 2009, the parties' legal rights and obligations relevant for the Tribunal's determination of its jurisdiction were frozen as a result of the filing. Also, significantly, as of that date, Claimants had to waive the right to initiate or continue any other proceeding related to the measures alleged to constitute a breach of CAFTA.[71]

87. Thus, Claimants' argument that there were no concurrent proceedings because the Tribunal in this case was constituted on July 1, 2010 must fail. The CAFTA article establishing the waiver requirement, Article 10.18, expressly refers to the submission of the matter to arbitration as the relevant date, and CAFTA Article 10.16.4 explicitly provides that claims are

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[70] CAFTA, Art. 10.18.2.

[71] *See, e.g. Waste Management I*, § 19 (explaining that "[the claimant] submitted notice of request for arbitration to the Secretary-General of ICSID on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings" related to the same measures alleged as constituting a breach of NAFTA).

deemed to be submitted to arbitration when the Notice of Arbitration is received by the Secretary-General of ICSID.

F. Because the waivers are a condition to consent, the subsequent conclusion of the domestic judicial proceedings cannot cure the invalid waivers

88. Claimants did not comply with a condition to El Salvador's consent, so they failed to perfect El Salvador's consent to arbitration when they initiated this proceeding without submitting an effective waiver in compliance with CAFTA Article 10.18.2 and therefore, there is no jurisdiction over this proceeding. Lack of jurisdiction cannot be suddenly remedied by external events long after the proceedings commence.

89. Thus, Claimants' final argument that even if the waivers were defective, "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"[72] is without merit.

90. Claimants' violation of the waivers does not result in the claims being inadmissible, but rather in there being no consent and therefore no jurisdiction. As Claimants quoted in another context:

> …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.[73]

Claimants try to argue that the continuation of the domestic judicial proceedings after the submission of their waivers cannot affect jurisdiction. But Claimants continued with those domestic judicial proceedings at the very instant they submitted their waivers, and, in fact,

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[72] Response, para. 76.
[73] Response, para. 40 (quoting *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Jurisdiction, Nov. 14, 2005, para. 61).

submitted the waivers with no intention whatsoever of complying with them. Thus the waivers were invalid the moment they were submitted, *i.e.* when the claim was "submitted to arbitration."

91. Since El Salvador's consent was not perfected by effective waivers at the time the arbitration was initiated by Claimants, there is no jurisdiction. Lack of jurisdiction cannot be changed by later events.

92. Indeed, Claimants' argument that there is no longer a waiver problem because the domestic proceedings have since ended flies in the face of interpreting CAFTA in good faith. There either is or is not a violation of the text of the Treaty and measuring the resulting harm after the violation is irrelevant. The Tribunal should not tolerate this after-the-fact justification.

93. Moreover, even though irrelevant for treaty interpretation, Claimants' assertion that "there is no possibility of conflicting outcomes or double redress" is plainly wrong.[74] Of course there is the possibility of inconsistent outcomes. After analyzing the evidence before it, including the parties' written submissions, the Supreme Court found that the revocation of the environmental permits was justified and legally done. Unless Claimants' position is that the Supreme Court's conclusion is binding on this Tribunal, there is a risk of conflicting outcomes, though El Salvador is confident that this Tribunal will ultimately agree with the Supreme Court, and thus that risk is, in this instance, low. Nevertheless, any proceedings before this Tribunal are added cost, time, and risk that El Salvador should not have to face pursuant to the waivers.

IV. SAN SEBASTIAN WAS A PARTY IN THE DOMESTIC JUDICIAL PROCEEDINGS, AND THUS ALSO VIOLATED THE WAIVERS

94. Claimants allege that while Commerce Group was a party to the domestic judicial proceedings, San Sebastian Gold Mines, Inc. was not, and therefore San Sebastian did not violate the waivers. This is a surprising statement from Claimants who have up to now continuously represented that "SanSeb" was a party to the litigation in El Salvador.

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[74] Response, para. 71.

95. In paragraph 22 of the Notice of Arbitration, Claimants state the following:

> On December 6, 2006, Commerce/Sanseb's legal counsel filed with the El Salvadoran Court of Administrative Litigation of the Supreme Court of Justice two complaints relating to this matter, one for the San Sebastian Gold Mine and the other for the San Cristobal Mill and Plant. These legal proceedings have not been resolved.

This assertion that SanSeb was a party to the proceedings in El Salvador is contradicted by Claimants' most recent statement at paragraph 87 of their Response:

> 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.

96. A review of the relevant Court documents shows that the latter statement is incorrect. The two petitions filed by Claimants' local counsel before the Supreme Court of El Salvador clearly show that both Commerce Group Corp. and San Sebastian Gold Mines, Inc. were the petitioners in both cases. The two petitions have already been presented as evidence before the Tribunal by both parties in this arbitration. The two petitions were submitted by El Salvador as Exhibits R-1 and R-2 and by Claimants as Exhibits C-6 and C-7. In both petitions, Claimants' local counsel clearly states that he is initiating the two actions as the "Attorney for COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC" and he refers to the amount invested by his "poderantes" ("principals") for damages.

97. The full Spanish text of the section of the petitions that defines the petitioners follows, along with an English translation:

> A) DEMANDANTE:
> Que soy Apoderado General Judicial de las Sociedades COMMERCE GROUP CORP. y SAN SEBASTIAN GOLD MINES, INC, registradas en el Estado de Wisconsin, Estados Unidos de América y en el Registro de Comercio de El Salvador, al número tres del Libro novecientos veinticinco del Registro de Sociedades, siendo éstas Sociedades Anónimas del domicilio del Estado de Delaware y de Nevada, de los Estados Unidos de América; según lo establezco con el PODER GENERAL

> JUDICIAL sustituido a mi favor por el Licenciado Pedro Valle, el cual adjunto a la presente demanda.
>
> A) PLAINTIFF:
> I am the Attorney for COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC, registered in Wisconsin, United States of America, and in the Commercial Registry of El Salvador at number three of Book nine hundred twenty-five of the Registry of Business Associations. They are Delaware and Nevada corporations in the United States of America, as I establish with the GENERAL JUDICIAL POWER OF ATTORNEY substituted in my favor by Mr. Pedro Valle, which I attach hereto.[75]

98. The Spanish original uses the plural form "*registradas* en el Estado de Wisconsin" ("*registered* in Wisconsin" in the English translation), with an "s" to denote that he was acting as attorney on behalf of the two companies named immediately before, and further makes reference to these corporations being domiciled in the states of Delaware and Nevada of the United States of America. Clearly both companies were parties to the complaint filed with the Supreme Court.

99. Claimants' local counsel cited the power of attorney he received from the two companies as the source of his authority to act on their behalf. The power of attorney clearly states that it was granted by both companies naming both and using the plural form of the relevant verbs.[76] Nothing on the record indicates that San Sebastian Gold Mines, Inc. withdrew as a claimant in the domestic judicial proceedings.

100. The subsequent record of the two cases shows that the Supreme Court only refers to the first of the two petitioners. The reason appears to be that both companies, being nationals of the United States, are registered in the Commercial Registry of El Salvador under a single entry, "number three of Book nine hundred and twenty-five of the Registry of Business Associations."[77] But the fact remains that both companies were and remained the petitioners in

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[75] Petition to Supreme Court of El Salvador, Case 308-2006, Dec. 6, 2006, at 1 (R-1; C-6); Petition to Supreme Court of El Salvador, Case 309-2006, Dec. 6, 2006, at 1 (R-2; C-7).

[76] Power of Attorney of Commerce Group Corp. and San Sebastian Gold Mines, Inc., Sept. 23, 2005 (**Respondent's Exhibit 20**).

[77] *See* Petitions to Supreme Court of El Salvador, Case Nos. 308-2006 and 309-2006, at 1 (R-1; C-6 and R-2; C-7). The Power of Attorney refers to Book No. 965.

the domestic judicial proceedings, and thus both companies violated their waivers and must accept the consequences of this violation.

V. THE INVALID WAIVERS REQUIRE TERMINATION OF THE ENTIRE CASE

A. There is no jurisdiction under CAFTA

1. Because the waivers are a condition to consent, the invalid waivers deprive this Tribunal of jurisdiction

101. As explained in detail in the Preliminary Objection, the clear consequence of an invalid waiver is lack of consent. Without consent, there is no jurisdiction. Indeed, Claimants agreed in their Response that "consent to arbitration is foundational."[78]

102. In the Preliminary Objection, El Salvador cited the only tribunal to rule on CAFTA Article 10.18 so far, in *RDC v. Guatemala*, for the principles that the validity of the waiver is a "matter pertaining to the consent of the Respondent to this arbitration" and that "the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected."[79]

103. El Salvador reiterates that CAFTA provides investors with an extraordinary remedy to initiate international arbitration against sovereign States, and that the State Parties to CAFTA provided their consent with specific conditions. Tribunals must ensure that the provisions explicitly provided in the Treaty text are enforced. As the tribunal in *Waste Management I* explained regarding the conditions of the similar NAFTA provision, "analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim to arbitration . . . calls for the utmost attention," because meeting the conditions opens the door to arbitration.[80]

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[78] Response, para. 14.
[79] *RDC v. Guatemala*, paras. 61, 56 (RL-2).
[80] *Waste Management I*, § 17 (RL-6).

104. The CAFTA Parties voluntarily offered their advance consent to arbitration, but only on the condition that, in order to take advantage of the benefits of CAFTA, investors would effectively give up the right to pursue other remedies related to the same measures. The consent and the conditions on consent are explicit in the Treaty. If the conditions are not met, the State's consent is not perfected, and there is no jurisdiction.

2. There is no jurisdiction for other alleged CAFTA claims

105. As El Salvador explained in the Preliminary Objection, the lack of consent covers the entire CAFTA arbitration. Each Claimant submitted only one waiver for the entire arbitration applicable to any, and all, measures. Indeed, there is nothing linking an impermissible identity of measures with a particular claim.

106. If a claimant has initiated and continues any proceeding with respect to any measure alleged to constitute a breach of CAFTA after having filed a notice of arbitration, *i.e.*, if the claimant does not effectively waive such rights as required by CAFTA, the automatic result under CAFTA Article 10.18.2 is that no claim ("ninguna reclamación") may be submitted to arbitration. In short, if there is an impermissible identity of any measure, no claim may be submitted to arbitration.[81]

107. Claimants argue that this is unreasonable because if an investor alleged violations of 20 measures, "a domestic proceeding with respect to one discrete measure would invalidate the consent for the other 19 measures."[82] But it is not unreasonable to expect an investor to know the conditions to consent of the treaty it seeks to invoke and to comply with them. The investor in Claimants' example could simply start a new proceeding with an effective waiver, as in *Waste Management II*. If Claimants have lost that opportunity in the current case it is only because of Claimants' calculated decision not to comply with the waivers in order to keep open

[81] El Salvador agrees that lack of action, when there is a duty to act, may also be a "measure" for purposes of CAFTA. *See, e.g.*, El Salvador's Preliminary Objection, para. 26, noting that the first two measures at issue in the *RDC v. Guatemala* arbitration were related to allegations of Guatemala's failure to act with regard to payments to a trust fund and the removal of squatters from the right of way.
[82] Response, para. 79.

the possibility of a favorable decision from the Supreme Court, even as they had affirmatively waived all rights to obtain such a decision. It should be recalled that El Salvador, like the respondent in *Vannessa Ventures*, explicitly notified Claimants of the problem with their waivers on two occasions when they still could have withdrawn their Notice of Arbitration and filed a new arbitration within the CAFTA statute of limitations. Claimants chose not to, and alone are responsible for the consequences of their decision.

108. In any event, in this case before this Tribunal, there are not 20 measures and a violation of the waiver affecting only one of them. The violation of the waivers is central to the entire case brought before this Tribunal.

109. The other CAFTA claims based on the alleged failure to extend the exploration licenses are subject to the lack of consent to arbitration covering the entire case. In addition, the Notice of Arbitration indicated that Claimants did not intend to act in compliance with the waivers with respect to these measures. Claimants submitted their Notice of Arbitration in the belief that there were also pending domestic proceedings related to the exploration licenses, and their mistaken belief in this regard continued for more than a year after submitting the Notice of Arbitration. In any event, the impermissible overlap of proceedings related to the measures concerning the principal claims in this arbitration compels the dismissal of the entire arbitration because it vitiated El Salvador's consent.

110. Claimants also suggest that they may have claims based on an alleged policy of a de facto ban on mining directed against foreign companies.[83] Not only does El Salvador flatly deny that any such ban exists, but in any case Claimants would have no claims based on any alleged de facto ban. Claimants admit that the revocation of the environmental permits, the precise measures challenged both in this arbitration and in the domestic judicial proceedings, "*effectively terminat[ed] Commerce/Sanseb's right to mine and process gold and silver*" in El Salvador.[84] Because Claimants' rights to the concession were terminated by the revocation of the

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[83] Response, paras. 81-83.
[84] NOA, para. 21 (emphasis added).

environmental permits, those are the only measures they can challenge before this Tribunal. Calling the revocations, which the Supreme Court determined to be justified, part of an alleged ban does not negate the fact that without the environmental permits, the concession would be automatically terminated and Claimants would not have any rights to mine and no other claims to bring to this Tribunal.

111. Because they failed to submit effective waivers, Claimants did not perfect El Salvador's consent for the submission of claims under CAFTA. As a result, there is no jurisdiction for any of these claims. Moreover, the Tribunal should not hesitate to dismiss these minor claims with the claims that Claimants admit are related to the same measures challenged in the Supreme Court proceedings because the damages sought in the domestic proceedings, $111 million,[85] encompass all the damages sought in this proceeding, "not less than $100" million.[86]

B. There are no claims under the Investment Law of El Salvador that would survive the dismissal of the CAFTA arbitration

1. Claimants did not submit any claims of violations of the Investment Law

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

113. In paragraph 30 of the Notice of Arbitration, Claimants alleged that El Salvador had breached "its obligations under Section A of CAFTA-DR, including Article 10.3 (National Treatment), Article 10.4 (Most-Favored Nation Treatment), Article 10.5 (Minimum Standard of Treatment), and Article [10].7 (Expropriation and Compensation)."

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[85] Petition to Supreme Court of El Salvador, Case 308-2006, Dec. 6, 2006, at 4 (R-1; C-6); Petition to Supreme Court of El Salvador, Case 309-2006, Dec. 6, 2006, at 3 (R-2; C-7).

[86] NOA, para. 31.

114. Claimants, in contrast, did not mention any articles of the Investment Law that were allegedly violated. Consequently, there are no claims under the Investment Law submitted in this arbitration, and the dismissal of the CAFTA claims because of lack of consent necessarily entails the dismissal of the entire case.

2. CAFTA claims can only be brought under the provisions of CAFTA

115. CAFTA claims related to investment disputes may only be brought under the provisions of CAFTA.[87] Therefore, Claimants cannot bring any CAFTA claims, *i.e.*, the types of claims listed in CAFTA Article 10.16.1, under the umbrella of their invocation of jurisdiction under the Investment Law of El Salvador. As a result, the dismissal of the CAFTA claims because of lack of consent necessarily entails the dismissal of the entire case.

3. Claimants cannot amend the Notice of Arbitration

116. There is no right to amend under either the ICSID Convention and Rules or CAFTA. The only reference to amendment of the Notice of Arbitration is in the CAFTA article regarding preliminary objections as a matter of law, CAFTA Article 10.20.4(c), which refers to "the notice of arbitration (or any amendment thereof) . . . ."[88] This obviously cannot be the source of an affirmative right to amend the Notice of Arbitration. It does not provide any guidelines as to what could be amended, when amendments would be allowed, what kind of notice would have to be given, or what standard tribunals should apply.

117. The passing reference to amendments in CAFTA Article 10.20.4(c), which has not been invoked in this Preliminary Objection, is not an open permission to amend the Notice of Arbitration under CAFTA, but rather an acknowledgment that some of the systems in which CAFTA proceedings may be brought may provide now or in the future a procedure for amending the Notice of Arbitration. For example, under the current UNCITRAL Arbitration Rules, "either party may amend or supplement his claim or defence unless the arbitral tribunal considers it

[87] CAFTA, Art. 10.17.1.
[88] CAFTA, Art. 10.20.4(c).

inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances."[89] This provision specifically allows amendments, and provides standards tribunals can use to determine whether or not to allow an amendment. There is no such provision in the current ICSID Arbitration Rules. Until the ICSID Arbitration Rules are amended to allow for the possibility and provide the conditions to allow amendment of the Request for Arbitration, this passing reference in CAFTA Article 10.20.4(c) is inapplicable to ICSID arbitration.

118. In addition, the provisions of CAFTA, interpreted in light of its stated purpose of providing "effective procedures for the implementation and application of this Agreement," demonstrate that the drafters did not intend for amendments to be freely allowed. Allowing amendments, in fact, would deprive Articles 10.16.2 and 10.20.4 of their meaning. Article 10.16.2 provides that before submitting any claim to arbitration, a claimant must deliver a notice of intent specifying "the legal and factual basis for each claim." It should go without saying that the Notice of Arbitration, which actually initiates the proceeding, must contain at least as much information as the Notice of Intent. Allowing amendments to provide the factual and/or legal bases of claims later would deprive the respondent of the notice it is entitled to under CAFTA.

119. CAFTA Article 10.20.4, drafted to provide respondent States with a procedure to quickly dismiss claims for which an award in favor of the claimant may not be made, would also be rendered meaningless if tribunals allow unrestricted amendments of claims after an objection is made. Rather than providing respondents a mechanism to prevent the time and expense of a long proceeding on meritless claims, the provision would be converted into an early opportunity for claimants to remedy deficiencies in their claims.

120. In this regard, El Salvador would like to note that the tribunal in *Pac Rim Cayman v. El Salvador* did, without the benefit of briefing by the parties or even hearing El Salvador's view, allow the claimant to amend its Notice of Arbitration to purportedly include the missing

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[89] UNCITRAL Arbitration Rules, Art. 20 (**Respondent's Authority 25**).

factual bases for some of its claims. El Salvador, in fact, had already expressed its view to the tribunal in a procedural conference call that the Notice of Arbitration could not be amended and El Salvador intends to contest this issue at the next available opportunity in the *Pac Rim Cayman* case. In any event, that claimant had at least identified its claims. El Salvador urges this Tribunal not to allow Claimants to amend the Notice of Arbitration to add new claims under a different instrument, where the legal and factual bases were entirely absent from both the Notice of Intent and the Notice of Arbitration. Allowing amendments to the Notice of Arbitration to introduce new claims would be contrary to the text and purpose of CAFTA and would obliterate the Treaty's protections for respondent States.

4. If this Tribunal were to allow Investment Law claims to be added to this case, El Salvador would raise objections to jurisdiction

121. If, in spite of the fact that no claims were submitted and notwithstanding the Treaty text, the Tribunal were to allow Claimants to add claims under the Investment Law, El Salvador reserves the right to challenge the jurisdiction of the Tribunal under the Investment Law, in a separate objection under ICSID Arbitration Rule 41.

VI. EL SALVADOR'S RESERVATION OF RIGHTS IS PROPER

A. El Salvador's reservation of rights to file counter-claims was an effort to make Claimants aware of the facts of their own case and the risks they incur

122. El Salvador rejects Claimants' characterization of its reservation of rights as a threat. These proceedings have reflected from the very beginning a manifest lack of knowledge by Claimants of the facts of their own case. In light of this, El Salvador feels compelled to bring to Claimants' attention that the filing of ICSID arbitration against a sovereign State is a serious endeavor that opens the possibility for counterclaims against Claimants. Seeing that Claimants were unable to provide the facts related to their claims and did not even know whether or not

litigation had been initiated related to the exploration licenses, El Salvador reasonably concluded that Claimants might also be unaware of the facts related to environmental damage.[90]

B. Claimants' lack of economic capacity predated the alleged interference with the investment

123. In the Response, Claimants complain that "after undermining the value of the Claimants' assets, the Respondent complains about their value."[91] But El Salvador is not responsible for Claimants' lack of assets.

124. As El Salvador emphasized in the Preliminary Objections, Claimants were having serious financial trouble long before the measures they complain of in their Notice of Arbitration. In fact, Commerce Group's 2002 Annual Report, from a time when the company was seeking more exploration and exploitation rights from the Government of El Salvador, mentions that the company recorded a net loss of $43,171 on zero revenues in 2002.[92] Notably, the company's losses were entirely unrelated to any Government action—"[t]here were no revenues in 2002 as the Joint Venture suspended its gold mining and processing due to its need to rehabilitate, overhaul and expand its [mill and plant]."[93] The company was also already capitalizing more than $1 million in interest expense each year.

125. Indeed, Claimants stopped work in El Salvador in 1999 because they needed money to rehabilitate and overhaul their plant. The lack of financial capacity continued, and at the end of fiscal 2002, the company mentioned that it hoped to "begin its open-pit, heap-leaching process on the SSGM site when adequate funding becomes available."[94] Claimants never came up with adequate funding. El Salvador stands by its concern about a company that owes legal

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[90] El Salvador notes that Claimants still have not investigated the facts, instead relying on the work of El Salvador. *See, e.g.*, Response, para. 80 ("The Respondent's clarifications in the Preliminary Objection highlight that there were no local court proceedings with respect to the Claimants' exploration licenses.").
[91] Response, para. 92.
[92] Commerce Group Corp., Annual Report (Form 10-K) (May 28, 2002) ["2002 Annual Report"] (**Respondent's Exhibit 21**).
[93] 2002 Annual Report.
[94] 2002 Annual Report (emphasis added).

fees, consulting fees, and Directors' fees from up to 30 years ago and objects to Claimants' absurd suggestion that the Government's actions in 2006 could have anything to do with the company's failure to meet its financial obligations since the 1980s.

C. Even if the Tribunal decided to exercise jurisdiction over all or some of the claims, there would be no liability or damages

126. El Salvador notes that even if this arbitration is not dismissed as a result of this Preliminary Objection, there are no claims for which Claimants could prove liability or damages. As explained in the Supreme Court decisions, the revocations of the environmental permits were justified and lawful. Claimants will not be able to prove that the revocations violated any CAFTA obligations. Moreover, El Salvador will show that denying exploration license extensions to applicants who failed to complete the promised work and investment during the initial four years of the exploration licenses, was not only justified, but legally required given the circumstances.

127. In addition to lack of liability for El Salvador, Claimants have suffered no damages caused by any alleged breach of a CAFTA obligation. As explained above, Claimants lacked the financial capacity to conduct their work absent any interference from the Government. Claimants stopped work in 1999 because they lacked funds, and they never resumed the work. Claimants were given a concession in 2003, but by late 2006, they had not begun work. In these circumstances, where Claimants lacked funds in 1999, were losing money in 2002, and never got the funding together to start their exploitation work in El Salvador, any allegations about Government conduct in late 2006 and beyond will not support a claim for damages. Indeed, since Claimants did no work for more than a year after receiving the exploitation concession, the concession should have been cancelled in 2004.[95]

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[95] *See* Mining Law of El Salvador, Art. 23 ("If within one year of the effective date of the contract the holder does not initiate the preparatory work for the exploitation of the deposit, the concession shall be cancelled following a summary procedure . . . .") (RL-21).

D. Claimants have acted in bad faith in these proceedings

128. Claimants have maintained this proceeding in violation of the waivers in bad faith.

129. Claimants' allegation in their Response 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,"[96] is simply not true. Claimants had the full legal capacity to ensure the immediate continuation of the proceedings. Claimants instead decided to let the proceedings they initiated remain idle for several months after they finally appointed an arbitrator willing to accept the appointment. El Salvador's decision not to immediately appoint an arbitrator thus could not have been made for purposes of delay, as Claimants had full control over whether proceedings would be delayed or not. Rather, El Salvador's decision was made in light of its open invitation to Claimants to terminate the proceedings and comply with their waivers. Awaiting a response from Claimants, and hoping to save the costs of constituting a tribunal and going through the Preliminary Objection phase, El Salvador did not appoint an arbitrator until Claimants finally responded that they wanted the arbitration to go forward, after ICSID notified the parties of its intention to terminate the arbitration after six months of inactivity in accordance with ICSID Arbitration Rule 45.

130. As indicated, Claimants could have moved the proceedings to constitute the Tribunal earlier if they had wanted to. First, had Claimants deigned to respond to El Salvador's observations about the waivers or about the invitation to terminate the case, then El Salvador would have known that Claimants were insisting on continuing and would have acted accordingly. As it was, El Salvador assumed that Claimants' silence meant that they were considering alternatives to proceeding with this arbitration. Second, Claimants could have invoked the default procedure to constitute the Tribunal. In accordance with CAFTA Article 10.19, starting 75 days after the Notice of Arbitration was submitted, *i.e.*, in mid-September 2009, Claimants had the right to request that the Secretary-General appoint the arbitrators not yet

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[96] Response, para. 25.

appointed. In other words, Claimants could have requested that the Secretary-General appoint the arbitrators the very same day that they appointed their second arbitrator. Claimants chose not to respond to El Salvador and chose not to invoke the procedures to constitute the Tribunal; Claimants chose to delay the proceedings.[97]

131. Not only did Claimants purposefully maintain duplicative proceedings to maximize their opportunity for favorable results in violation of the CAFTA waivers, but Claimants have also increased the costs for El Salvador in other ways. First, Claimants demonstrated a complete disregard for the factual background of their case in the Notice of Arbitration. Second, Claimants claimed to have appointed an arbitrator in the Notice of Arbitration as required by CAFTA Article 10.16.6 without apparently having asked him whether he would accept the appointment. This action by Claimants could have been detrimental for El Salvador. Third, Claimants present a new argument in their Response that they believed that filing the waiver by itself was sufficient to discharge their duty to abandon the domestic proceedings. This new argument is expressly contradicted by Claimants' words and actions at the time of filing and until after the proceedings were decided against them.

132. El Salvador not only had to successfully defend itself in the domestic proceedings, but has had to investigate and present the true facts to this Tribunal. El Salvador agreed to CAFTA with the express condition that it would not have to defend against multiple proceedings related to the same measures continued or initiated after the start of CAFTA arbitration. Claimants, in bad faith, have insisted on violating the waivers.

E. Further preliminary objections

133. It is clear from the text of CAFTA that El Salvador has the right to bring objections under CAFTA Article 10.20.4 after using the expedited procedure for making

[97] Indeed, when Claimants finally were forced to invoke the default procedure for the appointment of arbitrators, Claimants invoked the wrong procedure under ICSID Arbitration Rule 4 instead of the correct procedure under CAFTA Article 10.19.3. Once again, it fell on El Salvador to bring Claimants' mistake to the attention of the ICSID Secretariat, so that the Tribunal would be properly constituted.

preliminary objections under CAFTA Article 10.20.5. Although El Salvador does not foresee making an objection under CAFTA Article 10.20.4 at this time, it reserves the right to do so.

134. In addition, should this arbitration continue, El Salvador reserves the right to make preliminary objections under ICSID Arbitration Rule 41.

VII. CONCLUSION

135. The CAFTA Parties carefully drafted the conditions under which they would consent to international arbitration, including the requirement that any investor seeking to take advantage of CAFTA would waive <u>any right</u> to initiate or continue <u>any proceeding</u> before <u>any</u> tribunal or court under the law of any Party related to any of the same measures as the CAFTA claims. Claimants' entire case is based on the unsustainable argument that the waiver requirement, despite the title of Article 10.18, is not a condition precedent to consent. But, in fact, the Parties considered the protection provided by the waiver requirement so important that they expressly included this provision as a condition precedent to their consent.

136. Claimants, rather than fulfill this express condition in good faith, submitted the required written waivers with no intention of complying with them. Then, in blatant violation of the waivers, Claimants continued their domestic judicial proceedings in El Salvador. The waivers were not valid or effective from the moment that Claimants submitted them without intending to comply with them. Claimants deliberately refused to discontinue the domestic judicial proceedings in order to maintain the possibility of a favorable result in those proceedings even after initiating this CAFTA arbitration in July 2009. Claimants, therefore, failed to comply with the requirement of submitting effective waivers, an express condition to El Salvador's consent to CAFTA arbitration. As there is no jurisdiction without consent, this arbitration must be dismissed.

137. El Salvador reaffirms the contents and the relief requested in the Preliminary Objection dated August 16, 2010.

Dated: September 30, 2010

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