INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE ARBITRATION BETWEEN

COMMERCE GROUP CORP. AND

SAN SEBASTIÁN GOLD MINES, INC.

(Claimants)

VS.

REPUBLIC OF EL SALVADOR

(Respondent)

ICSID CASE NO. ARB/09/17

NON-DISPUTING PARTY SUBMISSION OF THE REPUBLIC OF COSTA RICA

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1. The Republic of Costa Rica makes this submission on the interpretation of certain provisions of the Dominican Republic – Central America – United States Free Trade Agreement ("DR-CAFTA" or the "Treaty"), pursuant to Article 10.20.2 of the Treaty. Costa Rica does not take a position on the facts of the dispute, and no inference should be drawn as to Costa Rica's position with regards to any legal issues that may have arisen between the parties to this dispute and which are not addressed here.

2. As indicated by its title, Article 10.18 sets forth the conditions and limitations on the consent given by States Party to the DR-CAFTA to the submission of a claim to arbitration under the terms of the treaty. Among those "conditions and limitations", no claim may be submitted to arbitration under the Treaty unless it is accompanied by the Claimant's written waiver of the domestic proceedings related to the claims submitted to arbitration.

3. A Claimant complies with the requirement of DR-CAFTA Article 10.18.2(b) by physically submitting the waiver document accompanying his request for arbitration. Pursuant to an interpretation in accordance with the Vienna Convention on the Law of Treaties ("Vienna Convention")[1], said submission must also be accompanied by the effective waiver, withdrawal or discontinuance, as appropriate, of any and all proceedings, either court or administrative proceedings, pending when the arbitration is commenced and whose procedural drive lies with the claimant. Otherwise, this provision would be denied effectiveness or "*effet utile*".

4. Indeed, an interpretation in accordance with the ordinary meaning to be given to the provisions of the DR-CAFTA, as set forth by the general rule of interpretation contained in Article 31 of the Vienna Convention, must be made according to the so-called "principle of effectiveness". Under this principle, international treaties are to be interpreted to ensure the effects of their provisions. The International Court of Justice has already recognized that the principle of effectiveness in treaty interpretation has been consistently upheld by international jurisprudence[2], and has even specifically invoked this principle when interpreting of dispute resolution treaties[3]. Thus, a correct interpretation of the scope of the requirement set forth in Article 10.18.2(b) includes not

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[1] *Vienna Convention on the Law of Treaties* of 23 May 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331. Besides being an International treaty, the Vienna Convention is generally regarded to have codified provisions of customary international law on the interpretation of international treaties. See, for example, *Pope and Talbot v. Government of Canada*, Interim Award of 26 June 2000, para. 66, available at http://ita.law.uvic.ca/documents/InterimAward_001.pdf, visited on 20 October 2010.

[2] *Territorial Dispute (Libyan Arab Jamahiriyu/Chad)*, Judgment, I.C.J. Reports 1994, p. 25. See also, *Lighthouse Case (France/Greece), Judgment, 1934, P.C.I.J., Series A/B, No. 62*, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 35, para. 66; and *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 22, para. 52. In internataional trade law, the principle of effectiveness has been applied repeated times by the Appellate Body of the World Trade Organization, in particular when interpreting provisions from the *Understanding on rules and procedures governing the settlement of disputes*; see, for example, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996) p. 16-17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996) p. 10-11; *Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (adopted 25 February 1997) p. 16; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* WT/DS98/AB/R (circulated 14 December 1999), para. 80 – 82; *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, (circulated 14 December 1999) para. 88; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (adopted 27 October 1999) para. 132-133; and *Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, para. 338.

[3] *Case of the Free Zones of Upper Savoy and the District of Gex*, Order of August 19th, 1929, P.C.I.J. Collection of Judgments, Series A, No. 22, p. 13; and *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950, p. 229.*

only the presentation of the waiver document, but also the corresponding actions under the relevant State Party's domestic law to make that waiver effective.

5. Article 10.18.2(b) requires the waiver of any right "to initiate or continue" another dispute settlement procedure; for example, an administrative or court proceeding in the host State of the alleged investment. Clearly, the contents of the Claimant's waiver must include not only an undertaking not "to initiate" new proceedings, but also no "to continue" with those pending. Where the procedural drive lies with the Claimant, it is he who shall take the necessary measures to discontinue such pending proceedings, in response to the choice he has made to submit his claim to arbitration under the provisions of the DR-CAFTA.

6. As to which proceedings the Claimants must waive, Article 10.18.2(b) is drafted in very broad terms, without any exceptions other than those set forth in Article 10.18.3. The waiver requirement includes the waiver of the right "to initiate or continue before any administrative tribunal or court ... any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.". This language covers any proceedings of any nature where the measure allegedly in breach of the Treaty is being discussed and does not require the identity of any specific element of the claims in the arbitration under the DR-CAFTA with those of the claims whose waiver is required.

7. Article 10.18.2(b) is very clear as to the consequences of a failure to comply with the waiver requirement when it states that "[n]o claim may be submitted to arbitration under this Section unless" it is accompanied by the waivers (which in turn must be effective in the terms discussed above). States Party to the DR-CAFTA have not consented to the submission of claims to arbitration where there has been no compliance with the requirement of Article 10.18.2(b). Absent the Respondent's consent, the only possible outcome is the lack of jurisdiction of a tribunal established pursuant to a defective request for arbitration for lack of compliance with the requirement of Article 10.18.2(b).

8. This interpretation does not deprive the Claimant of dispute resolution protection under the Treaty nor under the domestic laws of the State Party host of the alleged investment. On the contrary, this provision recognizes that the Claimant has different

options as to the submission of his claims to a dispute resolution mechanism and demands from him, in order to benefit from the possibility of an arbitration pursuant to the provisions of the DR-CAFTA, that he effectively waive all other fora. The decision lies with the Claimant.

9. Costa Rica understands, furthermore, that there are two distinct possibilities under the DR-CAFTA for States to file preliminary objections. Under Article 10.20.4, they have the possibility of filing a preliminary objection that "as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made". That is to say, this is a defense based on the lack of merits of the claim presented.

10. On the other hand, Article 10.20.5 of the Treaty sets forth an expedited proceeding to file preliminary objections, either under Article 10.20.4 or any other "that the dispute is not within the tribunal's competence". All of this, without prejudice to the possibility of filing preliminary objections to the jurisdiction of the International Centre for Settlement of Investment Disputes ("ICSID") and to the competence of an arbitral tribunal established under its aegis, pursuant to Article 25 of the ICSID Convention and Rule 41 of the Centre's Arbitration Rules, when the arbitration has been commenced under said Rules.

Respectfully submitted,

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