



*Ástor Escalante Saravia*

*Fiscal General de la República en Funciones.*

August 14, 2009

Ms. Meg Kinnear  
Secretary-General  
International Centre for  
Settlement of Investment Disputes  
1818 H Street, N.W.  
Washington, D.C. 20433

Dear Ms. Kinnear,

I am writing on behalf of the Republic of El Salvador with regard to the request for arbitration filed by Commerce Group Corp. and San Sebastian Gold Mines, Inc. against the Republic on July 2, 2009.

The Republic is mindful that, in accordance with Article 36(3) of the ICSID Convention and Rule 6(1)(b) of the Institution Rules, the Secretary-General may only refuse registration of a request for arbitration if she finds, "on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre . . . ." Therefore, the Republic will refrain from including in this letter comments that could extend beyond this standard of review. However, even under this limited standard of review, the Republic submits that the dispute presented in the request for arbitration is manifestly outside ICSID's jurisdiction.

First, in addition to the issues already raised by the Secretariat's letter to claimants dated July 29, 2009, and pending review of claimants' response due next week, the Republic would like to provide comments regarding another aspect of the legal proceedings initiated by claimants and still pending in El Salvador. Given claimants' inability to respond to ICSID's request for clarification and additional information by the original deadline of August 7, 2009, the Republic would like to make ICSID aware that the measures subject of the proceedings filed by claimants in El Salvador are the same measures upon which claimants base their entire claim submitted to arbitration under the ICSID Convention. Furthermore, the legal proceedings pending in El Salvador are not only seeking interim injunctive relief to preserve claimants' rights, as would be allowed under CAFTA-DR article 10.18.3. Rather, the proceedings in El Salvador seek the complete reversal of the measures complained about both in El Salvador and before ICSID. In this regard, if the Supreme Court of El Salvador were to grant the remedies requested by claimants, the measures complained about in the request for arbitration, and



the corresponding claims of alleged breaches of legal obligations under CAFTA-DR made therein, would disappear. As a result, claimants have failed to comply with the waivers required by CAFTA-DR article 10.18.2, that claimants referenced in paragraph 36 of the request for arbitration and submitted as Exhibits A and B of the request for arbitration.

Claimants' failure to honor their waivers is dispositive of their CAFTA-DR claims. The waivers required by article 10.18.2 of CAFTA-DR, and a corresponding conduct consistent with those waivers, are conditions precedent to the Republic's consent to arbitration under CAFTA-DR, part of a sub-section titled "conditions and limitations on consent of each party". Article 10.18.2 of CAFTA-DR makes it clear that "[n]o claim may be submitted to arbitration under [section A of CAFTA-DR]" unless the notice of arbitration is accompanied by the written waivers referenced in paragraph 36 of the request for arbitration. The ICSID tribunal in *Railroad Development Corporation v. Republic of Guatemala* has already made it clear that a defective waiver under CAFTA-DR would result in the inability of claimants to raise the measures subject of the defective waiver as allegations of breaches in the course of the ICSID arbitration. Even if claimants were to withdraw the legal proceedings still pending in El Salvador, claimants' failure to honor their waivers before submitting the request for arbitration to ICSID cannot be remedied once the request for arbitration has been filed. Therefore, lack of ICSID jurisdiction under CAFTA-DR is manifest.

Second, because the measures subject of the defective waivers are the only measures that would constitute the alleged breaches of legal rights and obligations submitted by claimants to arbitration, claimants' entire case against the Republic must fail because of the defective waivers. In accordance with Institution Rule 2(1)(e), claimants were required to show in their request for arbitration that there is a legal dispute between the parties. To qualify as a "legal dispute" for the purposes of Article 25(1) of the Convention, a dispute "must concern the existence or scope of a legal right or obligation or the nature or extent of the reparation to be made for breach of a legal obligation."<sup>1</sup> Claimants' allegation of breaches of legal obligations giving rise to a legal dispute is only made in paragraph 30 of the request for arbitration, and the allegation of the existence of a legal dispute is only made in reference to alleged breaches of legal obligations under Section A of CAFTA-DR.

In spite of claimants' references to the Investment Law of El Salvador in paragraphs 1 and 37 of the request for arbitration, claimants' entire case against El Salvador rests only on the provisions of CAFTA-DR, as there are no allegations of breaches of legal obligations under the Investment Law of El Salvador or under any other law that would give rise to a legal dispute. Because lack of ICSID jurisdiction under CAFTA-DR is manifest, there would not be any remaining legal claims that would survive. Furthermore, the defects on the request for arbitration are not of the nature that

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<sup>1</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, ¶26.

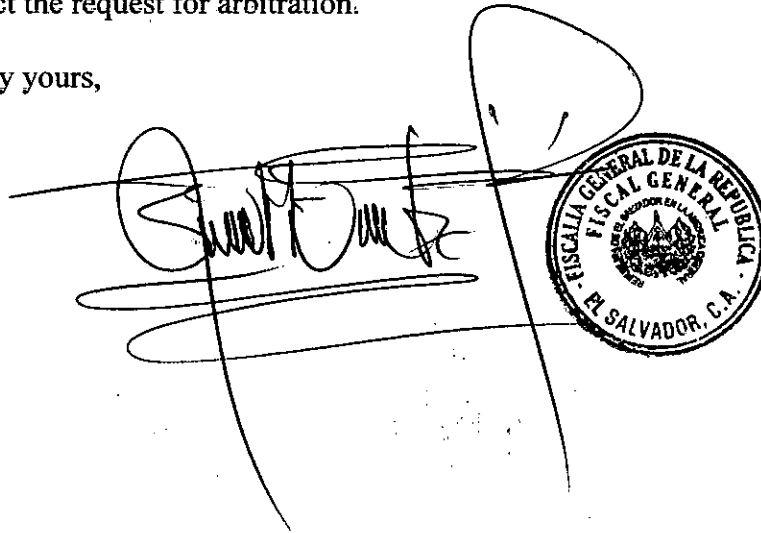


can be cured once the request for arbitration has been filed. Therefore, the entire request of arbitration is tainted by the manifest lack of ICSID jurisdiction under CAFTA-DR.

These considerations are without prejudice of the Republic's right to further object to claimants' assertion that article 15(a) of the Investment Law of El Salvador constitutes El Salvador's consent to arbitration under the ICSID Convention.

For the above reasons, the dispute submitted by claimants to arbitration under the ICSID Convention is manifestly outside the jurisdiction of the Centre, and the Republic of El Salvador respectfully requests that the Secretary-General exercise her screening function to reject the request for arbitration.

Sincerely yours,



The signature is written in black ink and is partially obscured by a large, loopy scribble that extends upwards and to the right. To the right of the signature is a circular official seal. The seal contains the text "FISCALIA GENERAL DE LA REPUBLICA" at the top, "FISCAL GENERAL" in the center, and "EL SALVADOR, C.A." at the bottom. In the center of the seal is a small emblem featuring a sun and a shield.