

**Annex A to El Salvador's Reply (Application for Security for Costs)**

Claimants' Assertion	How it is Misleading and/or Inaccurate
<p>"El Salvador asks the <i>ad hoc</i> Committee to create an economic bar to this annulment proceeding so that the merits of the Claimants' claims and arguments will never be heard." (Claimants' Response, ¶ 1)</p>	<p>As demonstrated in El Salvador's Application, Claimants' economic problems are of their own making. El Salvador's request for security of costs creates no economic bar. It simply seeks to ensure that El Salvador, the Committee, and the Centre do not become victims of Claimants' financially irresponsible actions. The fact that Claimants view it as an economic bar is simply a further admission that they do not have the funds to meet their obligations in this proceeding.</p> <p>In fact, the merits of Claimants' claims were heard and decided by the Supreme Court of El Salvador, the tribunal originally chosen by the Claimants to hear their case, and from which Claimants failed to seek termination of the pending cases when they filed their arbitration under CAFTA, in violation of their waivers. As noted by the Tribunal, the two cases initiated by Claimants before the Supreme Court of El Salvador were decided in early 2010. (Award, ¶¶ 63-64).</p>
<p>"After it declared the moratorium, El Salvador revoked the Claimants' permits for mining, processing, and exploration." (Claimants' Response, ¶ 4)</p>	<p>As was clear from the Notice of Arbitration, El Salvador formally notified Claimants of the revocations of their permits in September 2006, and Claimants alleged that El Salvador then began a "policy since September 2006" to deny mining rights to foreign companies. (NOA, ¶ 25)</p> <p>As the Tribunal noted, "[t]he <i>de facto</i> mining policy was alleged to have emerged in the same month as the permit revocations were notified to Claimants" and "[i]n fact, the orders of revocation preceded their notification to Commerce/Sanseb by some two months." (Award, ¶ 111, n.66)</p>
<p>"The Claimants have not failed to pay any of their obligations in this proceeding." (Claimants' Response, ¶ 6)</p>	<p>As the Committee knows, Claimants defaulted on their financial obligations in September 2011. After a second default in November 2011, this proceeding was suspended for non-payment of the requested advance in December 2011, and was almost terminated when payment was still outstanding six months later.</p>
<p>"Claimants do not regard themselves as being insolvent." (Claimants' Response, ¶ 7)</p>	<p>According to Black's Law Dictionary, a business is insolvent when it lacks the ability or means to pay its debts. "Under bankruptcy law, [insolvency is] the condition of a person or firm that is unable to pay debts when they fall due, or in the usual course of trade or business." Although there might be other definitions Claimants would like to use, it is clear from the record that Claimants have been unable to pay debts for years, and defaulted in their very first obligation to make an advance payment to ICSID.</p>

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<p>"[Claimants] have substantial assets in the Republic of El Salvador which they cannot develop because of El Salvador's moratorium on mining." (Claimants' Response, ¶ 7)</p>	<p><i>First</i>, Claimants were not developing any assets in El Salvador long before any alleged actions by the Government:</p> <p>"The Joint Venture will continue <u>its attempts to commence its production of gold</u>. Its objectives are to have an expanded complementary operation while <u>continuing its endeavor to obtain sufficient funds for the SSGM open-pit, heap-leach operation</u>. The Company's main objective and plan . . . is to operate at the SSGM site, a moderate tonnage, low-grade, open-pit, heap-leaching, gold-producing mine. It intends to commence this gold-mining operation <u>as soon as adequate funding is in place and the gold price stabilizes at a higher level</u>."<sup>1</sup></p> <p>"The Joint Venture on December 31, 1999 suspended its gold mining and processing <u>due to its need to rehabilitate, overhaul, and expand the SCMP, and due to the continuous decline and instability in the price of gold</u>."<sup>2</sup></p> <p><i>Second</i>, Claimants' rights to mine in El Salvador were affected by the revocations of Claimants' environmental permits, not by any moratorium:</p> <p>"on or about September 13, 2006, MARN delivered to Commerce/Sanseb's El Salvadoran legal counsel its revocation of the environmental permits issued for the San Sebastian Gold Mine exploitation concession and the San Cristóbal Mill and Plant, effectively terminating Commerce/Sanseb's right to mine and process gold and silver." (NOA, ¶ 21)</p>
<p>"As reported in our 17 November 2011 letter to the <i>ad hoc</i> Committee, during the pendency of the proceedings the Respondent has not refunded tax and security deposits due the Claimants . . . ." (Claimants' Response, ¶ 11)</p>	<p>As explained in El Salvador's letter dated December 15, 2011, the alleged \$70,000 tax refund is not "due" to Claimants:</p> <p>"suffice to say that the reimbursement requests were not made by an authorized legal representative of the companies in El Salvador; they were not addressed to the appropriate authorities in El Salvador; one request is inconsistent with Salvadoran tax law; and the other request is subject to the companies' obligation to cover costs for closing the facilities and environmental clean-up in El Salvador."<sup>3</sup></p>

<sup>1</sup> Commerce Group Corp., Annual Report (Form 10-K), at 43 (May 28, 2002) (R-2) (emphasis added).

<sup>2</sup> Commerce Group Corp., Annual Report (Form 10-K), at 45 (May 28, 2002) (R-2) (emphasis added).

<sup>3</sup> Letter from El Salvador to *ad hoc* Committee, Dec. 15, 2011, at 4 (R-8).

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<p>"The Respondent suggests that for some inexplicable reason, the Claimants have been preventing this matter from proceeding to a hearing on the merits, all to the detriment of the Respondents' international reputation." (Claimants' Response, ¶ 13)</p>	<p>El Salvador made no such suggestion. El Salvador simply noted that Claimants' actions have serious consequences for El Salvador. (El Salvador's Application, ¶ 17) Claimants' inability to pay has delayed the proceeding, which negatively impacts El Salvador, regardless of Claimants' intent, or lack thereof.</p>
<p>"From the outset, the Respondent's response has been to stonewall against claims and to introduce successive objections to prevent a hearing on the merits. This can be seen not only in the history of the proceedings initiated by the Claimants, but also in the proceedings initiated by another mining company, Pacific Rim." (Claimants' Response, ¶ 13)</p>	<p>El Salvador is not stonewalling, but raising valid objections where claimants have failed to comply with the Treaty they wish to invoke. The tribunals in both cases agreed with El Salvador and found that they did not have jurisdiction under CAFTA to decide the disputes.</p> <p>This particular case was dismissed based on El Salvador's expedited Preliminary Objection – there were no "successive objections." However, as the Tribunal itself noted without the need for El Salvador to make the argument, there were additional jurisdictional objections that El Salvador could and would have made if Claimants' case had survived the expedited Preliminary Objection phase. (Award, ¶ 120)</p> <p>Claimants chose to arbitrate under ICSID. Therefore, they must accept to abide by the ICSID Convention, including its jurisdictional requirements, such as the principle that consent is the "cornerstone" of ICSID jurisdiction. Without consent, there is simply no jurisdiction.</p>
<p>"In fact, the Respondent delayed the proceedings by failing to nominate an arbitrator." (Claimants' Response, ¶ 15)</p>	<p>As explained by El Salvador, "El Salvador's decision [to not appoint an arbitrator immediately] was made in light of its open invitation to Claimants to terminate the proceedings and comply with their waivers," to which Claimants never responded. (Reply (Preliminary Objection), ¶ 129) El Salvador was waiting for Claimant to take the next step in the proceeding, either to request discontinuance as already consented by El Salvador, or to proceed to the constitution of the Tribunal.</p> <p>By mid-September 2009, 75 days after the Notice of Arbitration was submitted, it was open to Claimants under CAFTA Article 10.19 to invoke the default procedure to constitute the Tribunal. (Reply (Preliminary Objection), ¶ 130) Claimants, not El Salvador, delayed the proceeding (until the domestic court reached its decisions on their pending claims and receiving the warning from the ICSID Secretariat) by ignoring El Salvador's letter and not requesting constitution of the Tribunal.</p>

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<p>"The Respondent suggests that the Claimants have had some secret plan to initiate and then abandon this annulment proceeding, and have advanced that plan by paying the \$150,000 requested by the Secretary-General of ICSID." (Claimants' Response, ¶ 18)</p>	<p>Quite to the contrary, El Salvador laments that Claimants have <u>no</u> plan. They started a proceeding without the necessary funds to pursue it and will have to abandon the proceeding unless they secure third-party financing, which is unlikely. El Salvador does not accuse Claimants of having any "secret plan"; El Salvador merely requests protection from the harm Claimants' reckless lack of planning will likely cause.</p>
<p>"The integrity of the proceeding involves the process by which claims are made and determined. The integrity of legal proceedings is not affected by whether an award or decision is satisfied by one of the parties. To hold otherwise would mean that, not only must a tribunal render an enforceable award, it must render an award that will be satisfied by the award debtor. An agreement to arbitrate promises a process, not a result." (Claimants' Response, ¶ 33)</p>	<p>Of course an outright refusal to comply with an order or decision from the Committee would affect the integrity of these proceedings. Claimants had a duty to initiate and conduct this annulment proceeding in good faith. By commencing proceedings under the ICSID Convention, Claimants accepted the obligation under Article 53 of the Convention to comply with and recognize as binding any decisions of the Committee. Now, they seem to suggest that they are free to ignore this fundamental obligation and do not intend to comply with an unfavorable decision on allocation of costs by this Committee.</p> <p>Even more troubling, Claimants argue that the Committee need not concern itself with whether they accept their obligations under the Convention in good faith and should simply ignore the clear signals that Claimants would in fact not comply with the Committee's decision on costs. Claimants' position regarding their obligations under the Convention reinforces the need for an order requiring security for costs and for consequences if Claimants refuse to comply with the order.</p>
<p>"In a seriously flawed Award, the Tribunal held, among other things, that a <i>de facto</i> moratorium on mining is not a measure and found that it had no jurisdiction." (Claimants' Response, ¶ 36)</p>	<p>After finding that Claimants had violated their waivers and that Claimants had not made distinct claims based on the alleged mining ban, the Tribunal found that, <u>based on the facts as pleaded by Claimants</u>, the alleged mining ban would not be a measure:</p> <p>"Moreover, even if the <i>de facto</i> mining ban policy and the revocation of the permits could be teased apart, the Tribunal is of the view that the policy does not constitute a 'measure' within the meaning of CAFTA. At most – at least based on the Tribunal's evaluation of this particular case – the ban is a policy of the Government as opposed to a 'measure' taken by it. By contrast, the revocation of the environmental permits squarely constitutes a measure taken pursuant to that policy and, as noted, it was that revocation which put an end to Claimants' mining and processing activities." (Award, ¶ 112)</p>