

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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<b>Commerce Group Corp. and</b>	)
<b>San Sebastian Gold Mines, Inc.</b>	)
	)
<b>Claimants,</b>	)
	)
<b>v.</b>	)
	)
<b>Republic of El Salvador</b>	)
	)
<b>Respondent.</b>	)

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**EL SALVADOR'S REPLY**  
**APPLICATION FOR SECURITY FOR COSTS**

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## **I. INTRODUCTION**

1. In this Reply, El Salvador will address three points in Claimants' Response and demonstrate that: a) Claimants' alternative proposal of a new request for advance payment under the ICSID Administrative and Financial Regulations fails to guarantee the integrity of this annulment proceeding; b) this Committee has the inherent power to order security for costs; and c) this Committee has the inherent power to discontinue this annulment proceeding if Claimants fail to comply with the Committee's order.

2. Claimants' Response to El Salvador's Application for Security for Costs is replete with incorrect or misleading assertions. For example, even after defaulting on the very first request for payment and admitting they do not have any funds to proceed, Claimants had the audacity to state in their Response that they "have not failed to pay any of their obligations in this proceeding,"<sup>1</sup> and that they "do not regard themselves as being insolvent."<sup>2</sup> The facts and arguments included in El Salvador's Application for Security for Costs already exposed the truth about Claimants' situation, and need not be repeated here. However, given the numerous incorrect or misleading assertions included in Claimants' Response, which El Salvador does not want to leave unanswered, the attached annex addresses Claimants' incorrect or misleading assertions in their Response.

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<sup>1</sup> Claimants' Response to El Salvador's Application for Security for Costs, Aug. 17, 2012, para. 6 ("Claimants' Response").

<sup>2</sup> Claimants' Response, para. 7.

**II. THE NORMAL PROCEDURE FOR ADVANCE PAYMENTS UNDER THE ICSID  
ADMINISTRATIVE AND FINANCIAL REGULATIONS IS INADEQUATE TO GUARANTEE THE  
INTEGRITY OF THIS PARTICULAR ANNULMENT PROCEEDING**

3. Under the normal procedure in the ICSID Administrative and Financial Regulations, this annulment proceeding should have already been discontinued for lack of payment. The Regulations were followed by the Centre, but Claimants remained in default throughout. This proceeding was not discontinued only because the Committee, in the exercise of its discretion, decided to grant Claimants an extension to make the first advance payment. Under these circumstances, Claimants' recitation of the ICSID Administrative and Financial Regulations that they consistently failed to observe for eleven months is cynical at best.

4. Expecting the Committee to forget everything that has happened in this annulment proceeding for the past twelve months, Claimants make the hollow argument that the exercise of the Committee's inherent power to safeguard the integrity of this proceeding by ordering Claimants to pay security for costs is unnecessary because any concerns about Claimants' ability to fund the annulment proceeding would be resolved by the Centre making a new request for advance payment as provided for in the ICSID Administrative and Financial Regulations.<sup>3</sup>

5. In light of the fact that Claimants have already admitted that they do not have the funds to make further payments to ICSID unless they secure third-party financing,<sup>4</sup> however, Claimants' apparent invitation for the Centre to issue a new call for funds is disingenuous. In fact, it is plain from Claimants' Response that they have not secured financing even now, well after the end of the sixty-day extension they requested on June 18, 2012, for a third-party financier to study the

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<sup>3</sup> See, e.g., Claimants' Response, paras. 25, 27.

<sup>4</sup> Letter from Claimants to the Secretary of the *ad hoc* Committee, June 18, 2012, at 1 (R-11).

case and make a decision on whether to fund their application for annulment.<sup>5</sup> Claimants, if they were acting in good faith, should have informed the Committee at the end of those sixty days whether the third-party financier had agreed to fund this proceeding, which they admittedly cannot do on their own.

6. Claimants also fail to mention that the normal procedure under the Regulations would take at least forty-seven days until another suspension of the proceedings triggered by their expected default would be ordered.<sup>6</sup> Claimants' ploy would thus force El Salvador to expend significant resources preparing its Counter-Memorial, which is due on October 19, 2012. Even if the Centre were to call for a new advance payment on September 7, 2012, the day after Claimants' Rejoinder is due, and every procedural step was taken in the shortest time possible under the Regulations after Claimants default again, El Salvador would have already submitted its Counter-Memorial by the time the proceeding would be suspended. By that time, El Salvador would have incurred significant costs that would never be reimbursed, and the proceeding would be suspended and likely never be restarted again.

7. Moreover, even assuming for a moment that Claimants somehow were able to make the next advance payment to ICSID following the normal procedure under the Administrative and Financial Regulations, there would be at least one additional call for funds, and likely two,

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<sup>5</sup> Letter from Claimants to the Secretary of the *ad hoc* Committee, June 18, 2012, at 1 (R-11); Letter from Claimants' new counsel to ICSID Secretary-General, June 22, 2012, at 1 (**Exhibit R-16**).

<sup>6</sup> ICSID Administrative and Financial Regulation 14(3)(d) provides for an initial period of thirty days for payment. In the event of default, on day 31 at the earliest, the Centre will inform the parties of the default and provide an additional period of fifteen days for either party to make the outstanding payment. If payment has not been made, on day 47 at the earliest, the Secretary-General may move that the Committee stay the proceeding.

before the annulment proceeding reaches its normal conclusion.<sup>7</sup> If Claimants default again further into the proceeding, the losses to everyone involved would be significantly higher in the absence of security for costs. As emphasized in El Salvador's Application, the Centre and the Committee could also be left with unreimbursed costs if Claimants fail to pay any of the remaining advances.

8. The concern here is not whether the ICSID Rules and Regulations provide for how a proceeding is funded and who makes the requests for funding. The issue here is Claimants' inability to meet their obligation to fund this proceeding. Regardless of whether Claimants regard themselves as insolvent or not, the facts are clear: 1) Claimants have already indicated that they do not have the funds to finance this proceeding; 2) Claimants have already indicated that they need third-party financing to go forward; and 3) more importantly, Claimants have failed to indicate whether they have secured financing. Any objective observer can only assume that Claimants have not secured financing and that, as a consequence, they will not be able to move forward with this proceeding. This is not an "argument" from El Salvador. These are all Claimants' admissions. The issue before this Committee is how this undisputed scenario is addressed in order to guarantee the integrity of this annulment proceeding.

9. More importantly, Claimants' irresponsible initiation of an annulment proceeding without any funds or any plan for how to fund it abuses the annulment process, which is by design an "extraordinary remedy for unusual and important cases,"<sup>8</sup> and a "limited exception to the finality

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<sup>7</sup> For example, in the underlying arbitration, even in an expedited procedure under CAFTA to decide one preliminary objection, there were two calls for funds, one before and one after the hearing, and the second call for funds was revised upward.

<sup>8</sup> *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 (Annulment Proceeding), Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, para. 34 (**Authority RL-33**).

of ICSID awards,"<sup>9</sup> as highlighted by Article 53 of the Convention. Because Claimants have admitted their inability to meet their financial obligations for this proceeding, further recourse to the advance payment mechanism will only perpetuate Claimants' abuse of this exceptional remedy.

10. In sum, Claimants' irresponsible initiation of an annulment proceeding without any funds, or any plan for how to fund it, places the integrity of the entire proceeding at risk. Waiting for the Centre to request another advance, given the evidence that Claimants will default again and the proceeding will have to be suspended and then discontinued (after more costs are incurred), does not protect this proceeding or allow the Committee to fulfill its exceptional role. Under these circumstances, the normal procedure for advance payments outlined in the ICSID Administrative and Financial Regulations fails to guarantee the integrity of this particular annulment proceeding.

### **III. THIS COMMITTEE HAS THE INHERENT POWER TO ORDER SECURITY FOR COSTS**

11. In its Application, El Salvador demonstrated that the Committee's inherent power to safeguard the integrity of this proceeding can be particularized in the circumstances of the present case into an order of security for costs. In this Reply, El Salvador focuses on its disagreement with Claimants' argument that an application for security for costs can only be made in the form of a request for provisional measures.

12. The drafters of the Convention did not include Article 47 of the Convention among the articles that apply *mutatis mutandis* to annulment proceedings, perhaps believing that, due to the

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<sup>9</sup> *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10 (Annulment Proceeding), Decision on the Application for Annulment, Jan. 8, 2007, para. 81 (**Authority RL-34**).

limited scope of an *ad hoc* committee's mandate, a committee would not need to issue interim measures to protect the rights of any one party, beyond ordering a stay of enforcement as provided for in Article 52(5).<sup>10</sup>

13. The reason El Salvador's Application for Security for Costs is not being submitted as a request for provisional measures, however, is not because Article 47 of the Convention is arguably not applicable to annulment proceedings, but because El Salvador's Application is of a broader scope than just a request for interim relief to protect the rights of one party. In this respect, it must be noted that the ICSID Rules do not in any way restrict how a committee can guarantee the integrity of a proceeding. Indeed, nowhere in the Rules is it stated that a committee can only protect the integrity of a proceeding by way of provisional measures under Article 47 of the Convention.

14. While all other applications for security for costs have been predicated solely on the effects of non-payment of a potential award of costs on the party making the request, El Salvador's Application for Security for Costs is designed to protect the integrity of this proceeding, which has been threatened by Claimants' reckless actions initiating an annulment proceeding without the necessary funds or a plan for how to get the funds. Of course El Salvador wants to protect its own rights and interests in this proceeding, but that is not the only reason behind its Application. This Application only became necessary because Claimants defaulted on their very first payment to ICSID and stated that they lack the funds to carry this

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<sup>10</sup> See Christoph H. Schreuer et. al., The ICSID Convention: A Commentary 1055 (2d. ed., 2009) (RL-14). At least one committee has recognized that annulment committees enjoy broad discretion to protect the interests of the parties while exercising their powers under Article 52(5). See *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15 (Annulment Proceeding), Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award, Nov. 12, 2010, para. 29 (**Authority RL-35**).

process to conclusion. Had Claimants not defaulted on their first payment obligation in this proceeding, El Salvador would have had no reason to make this Application.

15. It follows that El Salvador is not advocating for creating a second system for interim relief as Claimants assert;<sup>11</sup> the Committee has the undisputed power to protect the integrity of the proceeding whenever it is jeopardized, as it is in the circumstances created by Claimants.

16. In light of the object and purpose of an ICSID annulment proceeding, as well as the self-contained nature of the process, the Committee must be deemed fully capable to ensure the fundamental integrity of its own process. The drafters of the Convention never expected that a party would initiate an annulment proceeding without the funds to finance it. Unusual situations such as those present in this case expose gaps in the rules that need to be filled by the inherent powers that an *ad hoc* committee undoubtedly has. The circumstances here show an "overriding and undeniable need to safeguard the essential integrity of the entire arbitral process."<sup>12</sup> This Committee is bound to protect the interests of the parties and the annulment process and can do so by subjecting the continuation of this proceeding to the condition that Claimants provide the requested security.<sup>13</sup>

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<sup>11</sup> Claimants' Response, para. 32.

<sup>12</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of Counsel, Jan. 14, 2010, para. 16 (**Authority RL-36**); *Waguilh Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, para. 365 (RL-13).

<sup>13</sup> *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Oct. 7, 2008, para. 26 (RL-19) ("The Committee considers that a discretionary power to allow or deny a remedy may implicitly include a power to allow the remedy subject to conditions, and that such an interpretation would be consistent with the objects and purposes of Article 52(5), which is designed to enable the *ad hoc* committee to balance the rights of the parties pending annulment proceedings.") (internal citations omitted).

17. Furthermore, while it is true that the inherent powers of the Committee cannot be exercised in "opposition to a clear directive" in the ICSID Convention and Arbitration Rules,<sup>14</sup> no such "opposition to a clear directive" exists here. The exercise of the Committee's inherent power is not inconsistent with the mechanism of advance payment. They can perfectly coexist.

18. In particular, just as an *ad hoc* committee derives its power to impose conditions on a stay of enforcement of an award from its power to decide whether or not to grant a stay,<sup>15</sup> this Committee can order security for costs as an extension of its broad discretionary power under ICSID Administrative and Financial Regulation 14(3)(d), ranging from granting extensions for payment to discontinuing the proceeding. In fact, on July 3, 2012, El Salvador requested that if the Committee was inclined to grant an extension to Claimants, the granting of such extension be conditioned on Claimants' posting of security for costs.<sup>16</sup> There is no question that the Committee had the power to impose that condition on Claimants at that time, when the Committee also had the power to discontinue the proceeding without providing further explanation or an opportunity for Claimants to be heard. If the Committee had the power to order security for costs then, on July 3, 2012, it has the power to order security for costs now,

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<sup>14</sup> *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, para. 6 (**Authority RL-37**).

<sup>15</sup> *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, para. 26 (RL-19).

<sup>16</sup> Letter from El Salvador to the Secretary-General, July 3, 2012, at 3 (**Exhibit R-17**) ("if the Secretary-General or the *ad hoc* Committee decide to accommodate Claimants' request for additional time, El Salvador requests that the continuation of the annulment proceeding be conditioned on Claimants' willingness and ability to provide security for costs. El Salvador should not have to continue to expend its scarce resources on this case without any hope of recovering its legal expenses if Claimants, after finding cash to pay the initial fees to ICSID, again find themselves unable to continue funding the annulment proceeding. Therefore, as a condition for the continuation of the annulment proceeding, El Salvador requests that Claimants be required to produce security for costs in the amount of \$2,500,000 to be in a position to reimburse El Salvador, and ICSID for that matter, in the event the annulment proceeding is discontinued at a later stage for lack of payment or if El Salvador is awarded legal fees and costs in a final decision on annulment.").

because notwithstanding that the first payment eventually was made, the same threat to the integrity of this proceeding that existed then still exists now.

**IV. THIS COMMITTEE HAS THE INHERENT POWER TO DISCONTINUE THE ANNULMENT PROCEEDING IF CLAIMANTS FAIL TO COMPLY WITH AN ORDER FOR SECURITY FOR COSTS**

**A. This Committee has the power to discontinue this proceeding.**

19. There are various remedies open to international courts or tribunals, including *ad hoc* committees, to ensure the integrity of the proceeding entrusted to them,<sup>17</sup> including the discontinuance of proceedings. In the present circumstances, if this Committee orders Claimants to post security, and Claimants are unwilling or unable to provide the required security, this Committee must have the power to discontinue the proceeding.

20. The authority to discontinue proceedings for failure to comply with an order to provide security for costs is a necessary corollary to the power to issue such an order where, as here, the order is issued to preserve the integrity of the proceeding by ensuring that an applicant does not irresponsibly and in bad faith impose costs on the Committee, the Centre, and the opposing party by initiating and continuing an attack on a final ICSID award the applicant knows it cannot fund to conclusion.<sup>18</sup> In these circumstances, the order would be virtually meaningless if the applicant could simply ignore the Committee and the Committee would have no choice but to allow the annulment proceeding to continue without any security for costs. To hold otherwise would be

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<sup>17</sup> See, e.g., *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, para. 80 (RL-8) (referring to "other remedies available apart from the exclusion of improperly obtained evidence or information").

<sup>18</sup> El Salvador is not suggesting that discontinuance of the proceeding is the appropriate remedy for every instance of non-compliance with an order for security for costs. The appropriate remedy for non-compliance with a tribunal or committee's order must be assessed by each tribunal or committee on a case-by-case basis, depending on the facts of the case and the particular situation before it, in particular the reason the order has been issued.

tantamount to Claimants being permitted to impose on the Committee precisely the result the Committee would seek to avoid with its order. It would make no sense for the Committee to have the authority to issue an order only to have that order be frustrated by the party to whom it is directed. The Committee, of course, is not required to exercise its power to discontinue proceedings, but it clearly must have the ability to do so.

21. Furthermore Claimants' abuse of the ICSID process, discussed below, would be exacerbated if Claimants were to seek to continue these proceedings after they have refused to comply with an order for security of costs issued for the very purpose of ensuring that they do not misuse the right to continue annulment proceedings and impose unnecessary costs on all concerned. The Committee clearly has the authority to discontinue proceedings for abuse of process under these circumstances.

22. While it has not yet been considered in the present context, the power of tribunals to dismiss a claim because of a party's abuse of process is well established.<sup>19</sup> The competence to dismiss a claim on grounds of abuse of process<sup>20</sup> is not expressly codified in the ICSID Convention and Arbitration Rules, but it must exist in the ICSID system, as it does in "any system of administration of justice, in which courts are not purely mechanical agencies."<sup>21</sup> Indeed, in the context of the duty of international courts and tribunals to protect the integrity of

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<sup>19</sup> See e.g., Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 British Yearbook of Int'l Law 195, 205 (2005) (**Authority RL-38**) (quoting Lord Morris: "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. . . . A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.").

<sup>20</sup> Abuse of process is a special application of the prohibition of abuse of rights, which is a general principle applicable in international law as well as in municipal law. See R. Kolb, *General Principles of Procedural Law*, in The Statute of the International Court of Justice: A Commentary 793, 831 (Andreas Zimmerman et al. eds., 2006) (**Authority RL-39**).

<sup>21</sup> Hersch Lauterpacht, *The Development of International Law by the International Court* 165 (1958) (**Authority RL-40**).

the system of international adjudication and ensure the proper administration of international justice, ICSID arbitral tribunals have affirmed that they possess the inherent power to dismiss proceedings that constitute an abuse of process.

23. The tribunal in *Mobil v. Venezuela*, for example, recognized that:

in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. . . .

The principle of good faith has been recognized by the International Court of Justice as "one of the basic principles governing the creation and performance of legal obligations". . . .

The same is true of abuse of right. As Hersch Lauterpacht noted . . . : "There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."<sup>22</sup>

24. The *Mobil v. Venezuela* tribunal discussed several ICSID cases considering whether or not to dismiss claims based on abuse of right, and recognized that the tribunals were always acting "to give effect to the object and purpose of the ICSID Convention and to preserve its integrity."<sup>23</sup>

25. Thus, as the *Mobil v. Venezuela* tribunal recognized based on its consideration of several cases, in a situation of abuse of the arbitral process, the inherent powers of an international court or tribunal would allow it to dismiss the claims.<sup>24</sup> It is proper to rely on inherent powers where,

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<sup>22</sup> *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, paras. 169-172 (**Authority RL-41**).

<sup>23</sup> *Mobil v. Venezuela*, para. 184 (emphasis added) (internal citations omitted).

<sup>24</sup> *Mobil v. Venezuela*, para. 185. See also *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection, June 26, 2002, para. 49 (**Authority RL-42**).

as here, a question of how to protect the integrity of the proceeding and ensure the proper administration of international justice arises for which the applicable rules provide no answer.<sup>25</sup>

26. This Committee could best protect the administration of justice and the integrity of the annulment process by discontinuing the proceeding for non-compliance with an order for security for costs. In addition, discontinuance of the proceeding would be the proper remedy in this case, because the nature of the order would go to the heart of the Committee's powers to discontinue the proceeding under ICSID Administrative and Financial Regulation 14(3)(d).

27. In fact, this Committee already had in its hands the power to discontinue this proceeding during the twenty days that elapsed between the expiration of the time limit indicated by the Secretary-General (June 19, 2012) and the date when the Committee decided to grant a ten-day extension to Claimants (July 10, 2012). Although the Committee eventually chose not to exercise this power, and instead granted a ten-day extension, the Committee had the express power under the Administrative and Financial Regulations to discontinue the proceeding. The Committee must also have the inherent power to discontinue the proceeding where doing so is necessary to protect the integrity of the proceeding, particularly when the Committee has used its discretion to abstain from discontinuing the proceedings to allow Claimants time to obtain funds and it has become clear that they have not obtained sufficient funds to continue the proceedings to conclusion.

#### **B. The circumstances in this case justify discontinuance.**

28. The circumstances of this particular case before this Committee justify discontinuance. Initiating an annulment proceeding without funds and with no plan to fund it constitutes an abuse

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<sup>25</sup> Brown at 195 (RL-38).

of the ICSID annulment process, designed to be a very limited exception to the general rule of finality of ICSID awards. Arbitrating parties' obligation to act in good faith<sup>26</sup> becomes all the more imperative when initiating such an exceptional remedy. Initiating a proceeding that any reasonable observer would recognize is unlikely to be completed evidences a lack of good faith,<sup>27</sup> and, in light of Article 53 of the ICSID Convention, must be deemed abusive.

29. In this case, Claimants have initiated and prolonged a proceeding that is, without commenting on the merits, unlikely to be completed because they admittedly do not have the funding to see the proceeding through to completion. Their insistence on continuing the proceeding as long as possible, even though they do not have the funds that it is their obligation to advance, harms El Salvador and the ICSID system which guarantees the finality of awards in Article 53 of the Convention. As indicated by the tribunal in *Quadrant Pacific v. Costa Rica*, a failure by the claimants to "thoughtfully consider[] the costs involved" in initiating arbitration and the "consequences of their action" for the Respondent State and the tribunal is evidence of "a party's bad faith . . . or otherwise improper conduct."<sup>28</sup>

30. Claimants' financial irresponsibility in starting this annulment proceeding without funds or a plan to secure funds is compounded by the fact that the original arbitration was just getting started when it ended on a preliminary objection under CAFTA's expedited procedure.

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<sup>26</sup> See *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006, para. 230 (RL-6) ("Good faith is a supreme principle, which governs legal relations in all of their aspects and content.").

<sup>27</sup> See, e.g., *CDC Group plc v. Republic of the Seychelles*, Decision of the ad hoc Committee on the Application for Annulment of the Republic of Seychelles, paras. 89-90 (RL-33) (ordering the applicant for annulment to pay all costs and legal fees for the annulment proceeding, where "taking into account the presumption of finality in ICSID arbitration and the restrictive grounds of challenge available in the annulment process, the Republic's case was, to any reasonable and impartial observer, most unlikely to succeed.").

<sup>28</sup> *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, Oct. 27, 2010, paras. 67-70 (RL-2).

Claimants' lack of funds for the very first advance payment requested by ICSID, when they had just avoided having to fund proceedings on the merits and damages if they had been able to establish jurisdiction, makes their decision to initiate the annulment proceeding plainly abusive.

31. Yet Claimants even try to negate the facts about their inability to pay for this proceeding. They state: "Claimants have not failed to pay any of their obligations in this proceeding."<sup>29</sup> But, as this Committee is well-aware, both parties were informed on October 24, 2011 that Claimants had failed to make the required advance payment;<sup>30</sup> on December 19, 2011, the proceeding was suspended because "the requested payment [wa]s still outstanding";<sup>31</sup> and on May 22, 2012, the parties were notified that five months had passed "without receipt of the outstanding payment."<sup>32</sup> Claimants' proclivity to revise and omit unfavorable facts corroborates their abuse of the annulment process.<sup>33</sup>

32. El Salvador is not accusing Claimants of having a "secret plan to initiate and then abandon" this annulment proceeding.<sup>34</sup> But it is beyond question that Claimants irresponsibly initiated this annulment proceeding with no plan for how to fund it and without considering how their actions would affect El Salvador, the Centre, and the Committee.

33. Indeed, Claimants apparently only got the idea to seek third-party funding as a result of a question from the editor of *International Arbitration Reporter*, who contacted Claimants' counsel

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<sup>29</sup> Claimants' Response, para. 6.

<sup>30</sup> Letter from ICSID to the Parties, Oct. 24, 2011 (R-6).

<sup>31</sup> Letter from ICSID to the Parties, Dec. 19, 2011 (R-9).

<sup>32</sup> Letter from ICSID to the Parties, May 22, 2012 (R-10).

<sup>33</sup> See, e.g., *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, para. 24.2 (**Authority RL-43**) (complaining that the claimant's "characterisation of evidence has been unacceptably slanted, and has required the Respondent and the Tribunal to verify every allegation with suspicion.").

<sup>34</sup> Claimants' Response, para. 18.

for an article after the suspension of the annulment proceeding was announced on the ICSID website in December 2011. According to the article,

When contacted by *IAReporter*, Mr. Machulak indicated that the arbitration had been funded by the company's shareholders until now, but that the company was unable, for the moment, to push the case further. When asked if his firm had sought outside funding for the arbitration, Mr. Machulak indicated that it had not attempted to do so. However, he added that "anything could be on the table now."<sup>35</sup>

34. Thus Claimants admittedly initiated an annulment proceeding they cannot fund, with no plan for how to try to secure funding, and then began looking for third-party financing only after the proceeding was suspended for non-payment and, even then only by chance. And in July of this year, Claimants admitted that they had been seeking third-party funding for six months, but had thus far been refused. So unfortunately, "inferences with respect to third-party funding" are not "premature and speculative."<sup>36</sup> Third-party funding is the only way this proceeding could continue per Claimants' admission. In any event, as El Salvador noted in its Application, a third-party funder would not be subject to an award of costs and would have no obligation to fund the proceeding through to a decision.

35. In these circumstances, it was an abuse of process for Claimants to launch an attack on a final ICSID award by initiating a proceeding that has a high likelihood of being abandoned. All the more so, to insist on continuing the proceeding after being denied financing. Discontinuance, therefore, is a proper remedy in the event Claimants fail to comply with an order for security for costs.

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<sup>35</sup> See Luke Eric Peterson, "Mining Investor's Lack of Funding Puts CAFTA Arbitration on Ice", *Investment Arbitration Reporter*, Dec. 31, 2011 (**Exhibit R-18**) (emphasis added).

<sup>36</sup> Claimants' Response, para. 35.

36. In light of the nature of the threat to the integrity of the proceeding and Claimants' reckless financial decision to initiate this annulment proceeding without funds and without a plan for how to obtain those funds, this Committee must use its inherent power to discontinue the proceeding if Claimants do not comply with the Committee's order.

#### **V. CONCLUSION**

37. El Salvador incorporates by reference its Application for Security for Costs which has the complete formulation of the justifications and legal arguments supporting its requests.

38. El Salvador refers to and reaffirms its requests and reservation of rights contained in Part VI of its Application.

Dated: August 27, 2012

Respectfully submitted,



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