INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Pac Rim Cayman LLC	)	
	)	
Claimant,	)	
	)	
v.	)	**ICSID Case No. ARB/09/12**
	)	
The Republic of El Salvador	)	
	)	
Respondent.	)	

THE REPUBLIC OF EL SALVADOR'S RESPONSE TO PAC RIM CAYMAN'S PETITION FOR COSTS

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I. INTRODUCTION

1. As directed by the Tribunal at the end of the hearing on Jurisdiction, El Salvador is submitting a response to Claimant's Petition for Costs.[1]

2. As a preliminary matter, El Salvador notes that costs only need to be addressed at this stage if the Tribunal decides that it lacks jurisdiction as established by El Salvador. As the President of the Tribunal indicated when he instructed the parties to address costs with their Post-Hearing Submissions, "obviously on one view of what happens with our decision, we may have to address costs, and that's the claim[] which is made by the Respondent."[2]

3. Thus, despite Claimant's efforts to argue to the contrary, Claimant's Petition for Costs would only be relevant if Claimant were to prevail at the end of this arbitration. El Salvador is confident that the Tribunal has already seen enough to conclude without hesitation that this arbitration must end now. As the evidence has shown, this arbitration has been abusive at different levels, beginning with Pacific Rim Mining Corp.'s manipulation of Claimant's nationality to manufacture jurisdiction; followed by the lack of merit of the main claim in this arbitration (an asserted entitlement to a mining exploitation concession which Claimant in fact did not have a right to receive); and finally the manner in which Claimant and its counsel have conducted this arbitration. As a result, El Salvador is confident that this entire arbitration should be dismissed in an Award at the end of this jurisdictional phase and that costs and legal fees should be awarded to El Salvador.

4. El Salvador also notes that, even if Claimant's Petition for Costs were somehow relevant, it was filed in contravention of the Tribunal's instructions to include "a brief summary as regards both allocation and quantification of costs that are being sought by both sides" with the Post-Hearing Brief, which the Tribunal indicated was to have a maximum length of fifty pages.[3] Rather than abide by the clear instructions from the Tribunal, Claimant, after the hearing, informally requested flexibility on the page limit and then abused the Tribunal's

[1] Transcript of Hearing, Day 3, at 765:6-9.
[2] Transcript of Hearing, Day 3, at 764:18-21.
[3] Transcript of Hearing, Day 3, at 763:18 – 765:5.

indulgence in granting such flexibility by filing a separate submission on costs that was thirteen pages long, in addition to its full fifty-page brief. Claimant thus circumvented the page limit for the Post-Hearing Brief, seeking to gain an unfair advantage. El Salvador, of course, fully abided by the Tribunal's page limit. Accordingly, Claimant's separate thirteen-page Petition for Costs should be deemed inadmissible.

5. Nevertheless, because Claimant's Petition for Costs has been filed with the Tribunal as a part of the public record and includes many misrepresentations, El Salvador is obligated to respond. Because of the nature and extent of these misrepresentations, this response is necessarily much longer than El Salvador and the Tribunal would have preferred.

II. RESPONSE TO CLAIMANT'S ARGUMENTS ON ALLOCATION OF COSTS

A. El Salvador did not "bifurcate" its objections to cause delay, but to get Claimant's unmeritorious claims dismissed as efficiently as possible

1. Claimant previously argued that El Salvador brought too many objections in the Preliminary Objections phase

6. Claimant argued in the Preliminary Objections phase that El Salvador brought too many objections.[4]

7. Claimant now argues in its Petition for Costs that El Salvador, rather than limiting its Preliminary Objections, should have added even more objections.[5] While this new position may be convenient for Claimant at present, it should be rejected as contradictory to its prior assertions. In fact, El Salvador properly refrained in the previous phase from asserting its abuse of process, denial of benefits, *ratione temporis* objections, as well as additional objections to claims under the Investment Law, because these objections need to be decided without assuming Claimant's factual allegations to be true and require consideration of disputed facts, and because

[4] Claimant's Response to El Salvador's Preliminary Objections, para. 13.
[5] Claimant's Petition for Costs, paras. 15-19.

they could not have been properly decided under the strict time limit for the expedited procedure of CAFTA Article 10.20.5.

2. The Preliminary Objections phase served a useful purpose

8. El Salvador raised the Preliminary Objections to present undisputed facts to the Tribunal that exposed fatal weaknesses in Claimant's claims on the merits that could have resulted in the early dismissal of the primary claims in this arbitration. Claimant, however, refused to provide additional facts that might have permitted the Tribunal to come to an early decision, merely stating that its claims could not be decided at a preliminary phase in an expedited proceeding. Where El Salvador had hoped to narrow the issues in this arbitration to save everyone's time and expenses, Claimant successfully postponed the decision by promising that it would cure the serious weaknesses and deficiencies in the allegations made in the Notice of Arbitration at a later time.[6]

9. Even though the Tribunal decided to allow the arbitration to continue with regard to all of Claimant's claims, the Tribunal noted that El Salvador's Preliminary Objections had served a very useful purpose in the arbitration. As this Tribunal rightfully expressed at paragraph 264 of the Decision on the Preliminary Objections,

> as regards these particular claims, much of the costs so far incurred by the Parties will not have been wasted. Much of the work required to bring these proceedings forward[] to a conclusion has now been done. In the Tribunal's view, it is unlikely that much time, effort and expenditure will have been lost overall.

10. The Preliminary Objections phase allowed the Tribunal an early look at the weaknesses in Claimant's main claim. In addition, the filing of the Preliminary Objections was helpful for the Tribunal's decision in this jurisdictional phase. By having engaged in an early discussion of what the dispute was about, unaffected by a concurrent consideration of El Salvador's abuse of process objection, the Tribunal was able to see during the previous phase that

[6] Transcript of Hearing (Preliminary Objections), Day 2, at 452:21 – 453:20.

the dispute in this arbitration had started well before Claimant's abusive change of nationality. Had El Salvador not brought its Preliminary Objections about Claimant's claims with regard to its application for the El Dorado mining exploitation concession before filing its abuse of process objection, Claimant would have without a doubt argued that it was necessary to join the decision on jurisdiction to the merits of the dispute. But because El Salvador brought its Preliminary Objections earlier, the Tribunal has the evidence it needs to render its Award declining jurisdiction at this stage. Therefore, there is no need to waste more time and resources to reach the same result after a costly phase on the merits, which would have included evidence and arguments on both liability and damages.[7]

3. Claimant, not El Salvador, caused significant delay and unnecessary additional expense in this arbitration

11. El Salvador is the unwilling respondent State in these proceedings. Claimant chose to initiate arbitration, and Claimant should have researched and understood the legal and factual bases for its claims before forcing El Salvador into these proceedings. Had it done so, the expense of this arbitration could have been avoided. Instead, El Salvador has had to spend considerable resources to refute claims that should not have been made, and once these claims were refuted, Claimant, rather than accepting the consequences, constantly changed its positions on the facts and the law and now accuses El Salvador of "hold[ing] various allegations or information in reserve until the last minute in an effort to ambush Claimant."[8]

12. Claimant's complaints of "ambush" relate to the following points, which, of course, should not have come as surprises to Claimant: i) El Salvador's presentation of undisputed evidence in the Preliminary Objections phase that the Government had considered and rejected Claimant's proposals to "interpret" or amend the Mining Law to eliminate requirements that Claimant's application for an exploitation concession failed to meet (such as

[7] Rejoinder, para. 357, n. 437 ("Lest there be any doubt, Claimant will vigorously oppose the quadrification of this case, or any further division of this case into further separate phases.").
[8] Petition for Costs, para. 24.

the requirement for ownership or authorization to use the surface land covering the concession area),[9] and ii) El Salvador's early notification to the United States of El Salvador's intent to deny benefits.[10]

13. This evidence was not presented to "ambush" Claimant. Rather it was presented to prove facts that contradicted the theory of Claimant's case, which Claimant knew or should have known when it filed this arbitration, but did not present to the Tribunal. For example, Claimant initiated this arbitration based on a claim that it had met all the requirements for a concession application except for the environmental permit. When it was presented with El Salvador's evidence, however, Claimant changed its position and admitted that it had been advised of its failure to comply with the surface land ownership requirement in March 2005.[11] Indeed, after trying at the Preliminary Objections stage to create a complicated dispute regarding the surface land issue, at the jurisdictional stage Claimant admitted that it had tried to get the Government to interpret or amend the Mining Law to overcome the fact that the company's concession application did not comply with the existing surface land requirement.[12] As for

[9] Rejoinder on Preliminary Objections, paras. 2, 11, 25. Claimant complained of El Salvador's allegedly new "assertion that Claimant 'knew' that the Government had 'clearly' reached an 'interpretation' concerning the surface-ownership issue in 2005 . . . based on a number of internal communications among various executive branch officials that Claimant had never seen until Respondent submitted them to this Tribunal with its Reply." Claimant stated that it had never "been properly apprised of these alleged deficiencies" in its application and asserted: "the introduction of these new allegations and accusations in its Reply raise serious questions about the 'tactics' Respondent has chosen to employ in pursuing its Preliminary Objection. . . . If these allegations show – as Respondent argues – that Claimant was guilty of 'conscious non-compliance' with the law of El Salvador, why were they not made along with the other factual allegations contained in Respondent's submission in January 2010? It is difficult to come to any conclusion other than that Respondent held them in reserve in an attempt to 'ambush' Claimant in its Reply."

[10] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 3, n.11. Claimant wrote to the Tribunal: "It is typical of Respondent's conduct throughout this arbitration that it did not provide a copy of this letter to Claimant until now. . . . Respondent has consistently demonstrated that it is far more interested in 'ambush' tactics than in transparency and a fair exchange on the issues."

[11] Rejoinder on Preliminary Objections, para. 30 ("[I]n March 2005, Ms. Gina Navas de Hernández, the Director of the Bureau of Mines, informed PRES that several persons in MINEC were of the view that the Mining Law required PRES to acquire ownership of, or authorization to use, the entire land surface overlaying the concession.")

[12] Shrake Witness Statement, paras. 85-86 ("We believed that the Mining Law did not require ownership of or authorization to use the entire land surface overlaying the concession, and, moreover, that such a requirement was nonsensical for a variety of legal and practical reasons. . . . As a result of consultations

denial of benefits, it should have come as no surprise to Claimant, 100% owned and controlled by a Canadian company, with no substantial business activities, that El Salvador would seek to deny it the benefits of CAFTA.[13]

4. El Salvador avoided delay by filing the jurisdictional objections immediately, instead of waiting until the due date for the filing of the Counter-Memorial on the merits, as it was entitled to do

14. El Salvador, Claimant, and the Tribunal knew in advance of the Tribunal's decision of August 2, 2010 that some of Claimant's claims would not be dismissed, as some claims were not subject to the Preliminary Objections.[14] In keeping with its goal of ending this arbitration as soon as possible, El Salvador decided to be prepared immediately to file objections to jurisdiction with regard to surviving claims. El Salvador was under no obligation to act so expeditiously. If El Salvador actually wanted to delay this arbitration and increase Claimant's costs, it could have waited for Claimant to file its Memorial on the merits, then raised its objections to jurisdiction and requested the suspension of proceedings on the merits.

B. There is ample evidence of Claimant's bad faith

15. Claimant asserted in its Petition for Costs that El Salvador was "reduced to arguing that [El Salvador] did not have to show any bad faith on the part of Claimant, because bad faith is 'inherent in this type of abuse,'"[15] However, El Salvador presented ample evidence of Claimant's bad faith, and, in addition, noted that a tribunal need not find subjective bad faith as an additional element once it is shown that a claimant manipulated its corporate form to gain

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with the Government – and at the encouragement of Government officials – PRES's legal counsel in El Salvador requested an 'authentic interpretation' of the law and also suggested a legislative amendment to clarify and resolve the issue. Between 2004 and 2006, we tried both approaches, but neither moved forward.")

[13] *See, e.g.* Transcript of Hearing, Day 2, at 445:9-15 ("Q. Did [Claimant] own anything other than the shares in the company it held on behalf of Pacific Rim Mining? A. The verb being held, it's a holding company. Its purpose is to hold. Q. But it did nothing else. It held those shares. It didn't own any? A. That's what a holding company does.").

[14] Transcript of Hearing (Preliminary Objections), Day 1, at 33:15 – 34:13.

[15] Petition for Costs, para. 21.

access to jurisdiction after the interference with the investment, because that manipulation, by itself, constitutes bad faith.

16. Claimant exhibited bad faith when it decided not to mention to the Tribunal the crucial fact of its change of nationality anywhere in the entire text of the Notice of Intent and the Notice of Arbitration. Instead, Claimant only described itself as "an American investor organized under the laws of Nevada,"[16] "a U.S. investor organized under the laws of Nevada,"[17] and "a limited liability company duly organized under the laws of the state of Nevada, in the United States of America."[18] Nowhere in the 131 paragraphs of the Notice of Arbitration is there any reference to the change of nationality, much less to the date of that change. Claimant's attempts to argue that it provided notice of the change of nationality to the Tribunal by including an exhibit, for a different purpose and not translated into English, that happened to include a reference to the change of nationality, are disingenuous at best.

17. Claimant also exhibited bad faith in asserting that no one at Pacific Rim Mining Corp. had any reason to even suspect there was a dispute with El Salvador until reading a newspaper article in March 2008, after the change of nationality, in spite of all the evidence that the Tribunal had seen in the Preliminary Objections phase about the prior existence of the dispute. The extremity of Claimant's bad faith in this regard was revealed when Claimant's key witness, the CEO and President of Pacific Rim Mining Corp., denied that the newspaper article alerted him to the "measure"—the alleged *de facto* ban on mining—that Claimant now asserts gave rise to the dispute.[19]

18. Claimant's bad faith was also demonstrated by admissions and proof that other key factual assertions made by Claimant's counsel and witnesses were similarly false or misleading:

[16] NOI, at 1.
[17] NOA, para 2.
[18] NOA, para. 121.
[19] Transcript of Hearing, Day 2, at 481:11-16.

- Claimant's counsel and its in-house witnesses repeatedly asserted in written statements that saving costs, rather than creating jurisdiction, was "the primary factor behind" changing Pac Rim Cayman's nationality.[20] On oral testimony, however, Claimant's key witness admitted that saving costs was not the primary reason for the change of nationality.[21]
- Claimant and its witnesses asserted repeatedly that Pacific Rim was constantly assured "through 2007 and into 2008" that it would receive the environmental permit.[22] Claimant, however, could not and did not refute El Salvador's showing at the hearing that there were no meetings with officials of the Salvadoran administration between January and December 2007 and therefore no possibility that assurances were given in the year leading up to Claimant's change of nationality.[23]

19. Claimant's bad faith misrepresentations continued in its Petition for Costs, in which it asserts that "[f]ollowing the second 'alleged presumptive denial' in 2006, Respondent continued to request the enterprises to provide information about the applications, with the obvious intent of leading Claimant to believe that the applications could still be granted."[24]

20. The misrepresentations in this one sentence are multiple. First, Claimant would like the Tribunal to ignore the key fact that its claims make reference to two distinct applications related to the El Dorado project that serve different purposes and are adjudicated by different ministries: i) the request for an environmental permit (which requires the approval of an Environmental Impact Study) adjudicated by the Ministry of the Environment and Natural Resources ("MARN"), and ii) the application for an exploitation concession adjudicated by the Ministry of the Economy ("MINEC"), which is the primary application for rights to mine gold in El Salvador. The sentence quoted above makes reference to both using the plural "the

[20] McLeod Witness Statement, para. 36; Rejoinder, para. 91.
[21] Transcript of Hearing, Day 2, at 454:12-16.
[22] Rejoinder, para. 88.
[23] Transcript of Hearing, Day 3, at 598:21 – 600:15.
[24] Petition for Costs, para. 23.

applications," attempting to lead the Tribunal to believe that there was communication regarding the exploitation concession application after December 2006. However, as asserted by Claimant at paragraph 116 of its Counter-Memorial, there was not a single communication from MINEC regarding the exploitation concession application after the December 4, 2006 letter that gave Pacific Rim an additional 30 days to submit the required documentation for the exploitation concession application—which was never submitted, leading to the rejection of the application by operation of law.

21. Second, Claimant's statement is also highly misleading with regard to MARN and the environmental permit. The language quoted above is clearly designed to give the impression that there was constant communication from 2006 through 2008 that led Pacific Rim Mining to believe "the applications" could still be granted. The facts—once again as alleged by Claimant in the Notice of Arbitration—are completely different. At paragraph 64 of the Notice of Arbitration Claimant stated unequivocally:

> From December 2006 through December 2008, however, MARN ceased all official communication with the company in regards to its application, notwithstanding the fact that Salvadoran law clearly stipulates that MARN must take definitive action on EIA submissions ***within 60 business days****, and even under exceptional circumstances,* ***within a maximum of 120 business days***.[25]

22. The truth is that the record contains only one communication from MARN on the El Dorado Environmental Impact Study and environmental permit after December 2006. It was the letter dated December 4, 2008 —cited by Claimant at footnote 20 with the tag "*see, e.g.*"[26] as if it were one example of many letters, when in reality it was the only letter in the record, and is dated a full year after the Board of Pacific Rim Mining Corp. made the decision to change the nationality of Pac Rim Cayman.

[25] NOA, para. 64 (emphasis added); *see also* NOI, para. 23
[26] Petition for Costs, para. 23, n. 20.

23. Finally, there was not a "second 'alleged presumptive denial' in 2006." Again Claimant attempts to confuse the difference between its request for an environmental permit, and the application for an exploitation concession. El Salvador has indicated that the environmental permit application was presumptively denied in 2004 under the principle of administrative silence. This is separate and distinct from the termination of the exploitation concession application. In 2006 the concession application was not presumptively denied by administrative silence, but rather was terminated by operation of law under Article 38 of the Mining Law because Pacific Rim failed to provide the documentation that was required for the application to be admitted for adjudication after receiving notice that such documentation was missing. Claimant has now admitted that Pacific Rim made a conscious choice not to attempt to meet the requirements of the law and decided instead to seek legislation to change those requirements.[27] This is very different from an "alleged presumptive denial."

24. In sum, while El Salvador was not required to make any additional showing of bad faith once it had demonstrated the manipulation of the corporate form to gain jurisdiction after the alleged interference with the investment, it has indeed made such a showing.

C. Mr. Parada's testimony, the truth of which Claimant's counsel did not deny, only became necessary as a result of Claimant's behavior

1. Claimant made Mr. Parada's witness statement necessary

25. Surprisingly, Claimant bases its Petition for Costs on the fact that Mr. Parada felt compelled to submit testimony in these proceedings. Mr. Parada never imagined he would be a fact witness in this arbitration until August of 2010 when Claimant, in an effort to survive El Salvador's abuse of process objection, alleged that no one in Pacific Rim Mining Corp. knew or could have known that there was a dispute with El Salvador before reading a March 11, 2008 newspaper article reporting on a statement by President Saca. In fact, his testimony and all that has been associated with it would have been unnecessary if Claimant had not raised this absurd

[27] Shrake Witness Statement, paras. 86-87.

allegation, or if Claimant in September of 2010 had simply responded to El Salvador's questions and admitted the facts it finally admitted in April of 2011. The facts admitted were Claimant's retention of international arbitration counsel with regard to El Salvador in October of 2007 before Claimant's change of nationality and such counsel's attendance with their client at a luncheon for President Saca in November of 2007.

26. As regards Claimant's actions that made Mr. Parada's testimony necessary, in its August 17, 2010 response to El Salvador's letter raising its objections to jurisdiction, Claimant indicated that there was no dispute with El Salvador before March 2008. Claimant asserted, "prior to March 2008, Claimant had no reason to believe that this temporary impasse would not be resolved" and that the reporting about President Saca's remarks in March 2008 "was the first time that Claimant believed that its legal rights under Salvadoran and international law were being 'positively opposed' by El Salvador."[28]

27. As a result of these assertions, El Salvador included questions about Claimant's counsel in its request for documents and information, explaining that because "the August 17, 2010 letter denies that Pac Rim Cayman's change in nationality of December 2007 enabled the company to begin CAFTA arbitration about a dispute that already existed," the "timing of the relationship between Pac Rim Cayman and its international arbitration counsel" would be "relevant and material" to the abuse of process objection.[29] Of course, counsel for El Salvador knew that Claimant's statement was false, but El Salvador wanted to do everything possible to get Claimant itself to admit the truth without the need for testimony from counsel.

28. Claimant, however, rather than simply admitting at this time the facts that it later admitted, responded by mischaracterizing the facts and arguing that El Salvador's questions were irrelevant. According to Claimant, "[t]he issue of when Claimant or any of its affiliates decided to hire lobbyists or lawyers or any other service providers to assist them with the issues they were facing in El Salvador (which, as of December 2007, principally involved the failure of

[28] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 5 (R-56).
[29] El Salvador's Request for Documents and Information, Sept. 3, 2010, at 7.

Salvadoran regulators to rule on Claimant's application for a mining concession at the El Dorado site) has nothing to do with any question before the Tribunal."[30]

29. In response, El Salvador reiterated its request, explaining again that the questions related to Claimant's counsel were relevant to establishing when the dispute existed and if Claimant's nationality was changed to gain access to jurisdiction for arbitration. Specifically, El Salvador wrote: "it would be important to know if, for example, an attorney for Claimant met with a then-government official from El Salvador before Pac Rim Cayman's change in nationality and mentioned the possibility of initiating arbitration against El Salvador unless El Salvador granted the concession."[31]

30. Claimant continued to refuse to provide the information, responding that: 1) such information would not be relevant, 2) "the possibility of any such meeting appears to be purely speculative on Respondent's part," and 3) "[t]his sort of 'fishing expedition' might be commonplace in U.S.-style litigation" but is "not permitted under the norms of international arbitration generally or the standards of ICSID arbitration particularly."[32]

31. In its Procedural Order No. 2, the Tribunal granted most of El Salvador's requests for information but not those related to Claimant's counsel, reserving this issue until after the first round of written pleadings.

32. El Salvador renewed the requests for information about the timing of hiring counsel after Claimant filed its Counter-Memorial and witness statements insisting that, "[i]t was only after President Saca's announcement of a *de facto* mining ban in March 2008 that we began to believe that a dispute with the Government was a real possibility."[33]

33. As El Salvador explained:

> Claimant's continued allegations in its Counter-Memorial make the information and documents requested in El Salvador's requests numbers 10, 11, 12, and 13 even more relevant than before. As

[30] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 9 (R-57) (emphasis added).
[31] Letter from El Salvador to the Tribunal, Sept. 16, 2010, at 2.
[32] Letter from Claimant to the Tribunal, Sept. 17, 2010, at 2.
[33] Shrake Witness Statement, para. 11.

> noted in El Salvador's original request, the timing of the relationship between Pac Rim Cayman and its international arbitration counsel, as well as the identity of the client, are material for the Tribunal to make a decision regarding the reason why Pacific Rim Mining Corp. decided to change the nationality of Pac Rim Cayman from the Cayman Islands to the United States in December 2007. The issue is fundamental to the Tribunal's decision on the Objections to Jurisdiction because Claimant and its counsel have emphatically denied El Salvador's abuse of process objection and instead have accused El Salvador of fabricating the reasons for this objection.[34]

34. El Salvador ended its renewed request by noting that, if the questions remained unanswered, El Salvador would seek authorization from the Tribunal to introduce evidence contradicting the assertions in Claimant's letters.[35] But Claimant continued to refuse to answer the questions and to insist that such questions were irrelevant.[36]

35. Finally, in a letter dated February 22, 2011, Claimant curtly responded to El Salvador's announcement that it would seek to introduce additional evidence[37] and requested that the Tribunal order El Salvador to produce any information it had related to "any Crowell & Moring lawyer having attended any meetings with Salvadoran officials prior to Pac Rim Cayman's domestication to Nevada in December 2007."[38]

36. It was only in response to that letter, and given Claimant's steadfast refusal to answer the relevant questions, that Mr. Parada was forced to tell the Tribunal that he knew Claimant was not telling the whole truth. He wrote to the Tribunal explaining that he had been told directly by Claimant's counsel before the change of Pac Rim Cayman's nationality that they represented their client in a dispute with El Salvador and their client was planning on initiating arbitration under CAFTA if it did not receive the mining concession.[39]

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[34] Letter from El Salvador to the Tribunal, Feb. 17, 2011, at 2.
[35] Letter from El Salvador to the Tribunal, Feb. 17, 2011, at 3.
[36] Letter from Claimant to the Tribunal, Feb. 22, 2011, at 3-4.
[37] Letter from Claimant to the Tribunal, Feb. 22, 2011, at 7-8 (complaining of "'hide-and-ambush' tactics").
[38] Letter from Claimant to the Tribunal, Feb. 22, 2011, at 8.
[39] Letter from L. Parada to the Tribunal, Mar. 4, 2011.

37. In response to Mr. Parada's letter to the Tribunal, it was Claimant who urged the Tribunal to order Mr. Parada to submit a sworn witness statement:

> Not only does Claimant *not* oppose Mr. Parada's request. To the contrary, Claimant submits that under the circumstances, the Tribunal should *order* Mr. Parada to resubmit his 4 March 2011 letter as a sworn witness statement and to make himself available for cross-examination by Claimant's counsel during the . . . hearing.[40]

38. Acceding to Claimant's request, the Tribunal then ordered El Salvador to submit Mr. Parada's sworn statement and required him to be available for cross-examination at the hearing.[41]

39. Only after Mr. Parada was ordered to submit a sworn statement and to be available for cross-examination did Claimant finally admit—just ten days before the hearing—that "[a]n attorney-client relationship between Crowell & Moring and Pacific Rim Mining Corp. and its subsidiaries . . . commenced on or around [October 24, 2007] " and that Mr. Ali and another of Claimant's lawyers attended a luncheon where then-President Saca of El Salvador was the keynote speaker on November 28, 2007.[42] There is no excuse for Claimant to have put El Salvador and the Tribunal through seven months of denials and evasion and force Mr. Parada to become a witness in this arbitration before giving these answers to El Salvador's questions, when truthful, timely answers could have avoided this entire situation.

40. Under these circumstances, it is ironic that Claimant bases its request that El Salvador pay costs on a newly manufactured assertion that Mr. Parada's testimony was somehow improper and should have been discouraged.

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[40] Letter from Claimant to the Tribunal, Mar. 8, 2011 (emphasis in original).
[41] Procedural Order No. 5, Mar. 12, 2011.
[42] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011, at 1. In this letter, Claimant also admitted to another meeting in which Claimant's counsel and high government officials of El Salvador were present. This meeting was held in El Salvador in February 2008, after the change of nationality but before Claimant alleges it became aware that there was a possibility of a dispute with El Salvador.

41. But, indeed, Claimant is now trying to convince the Tribunal that it was inappropriate for Mr. Parada to testify. There is no basis for this assertion. As an international arbitral tribunal, this Tribunal is not bound by the rules of any U.S. jurisdiction. There is no rule preventing the Tribunal from accepting Mr. Parada's testimony, and there is no rule preventing Claimant from submitting its own rebuttal testimony, which it chose not to do. According to ICSID Arbitration Rule 34, "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." Thus, the Tribunal has full discretion to decide what evidence to admit and to determine the relevance and materiality of any proffered evidence.

42. Even under the American Bar Association Model Rule cited by Claimant as discouraging lawyers from representing parties in trials where the lawyer is likely to be a witness,[43] it was perfectly acceptable and appropriate for Mr. Parada to provide his witness statement, and it would have been perfectly acceptable and appropriate for Mr. Ali and Mr. de Gramont to testify if they believed anything in Mr. Parada's statement was inaccurate. As demonstrated earlier, Mr. Parada could not have anticipated that he would need to become a witness in this arbitration until after Claimant made its argument that it could not have known there was a dispute until after March 2008. As for Mr. Ali and Mr. de Gramont, if they did not believe Mr. Parada's testimony was accurate, the rule would not apply to them because it would not have been in any way foreseeable that they would be necessary fact witnesses when they agreed to the representation. In addition, they could have testified under the substantial hardship exception to protect their client's interests.

43. In fact, Claimant never denied the truth of Mr. Parada's account even in the correspondence after Mr. Parada filed his sworn witness statement. In its letter of March 14, 2011, Claimant requested documents related to Mr. Parada's statement, claiming that the documents provided with the original statement were "highly selective."[44] But as El Salvador noted in its response to this letter,

[43] Petition for Costs, para. 25 (citing ABA Model Rules of Professional Conduct, Rule 3.7(a) (CL- 204)).
[44] Letter from Claimant to the Tribunal, Mar. 14, 2011, at 1.

> The most important aspect of Claimant's request is that Claimant has not contested the facts in Mr. Parada's Witness Statement. Claimant should not be permitted to instead use innuendo to imply that the facts in Mr. Parada's Witness Statement are not true. If Claimant and its counsel actually believe that the facts are not as Mr. Parada asserts in his Witness Statement, they can submit witness statements from Mr. Ali and Mr. de Gramont to that effect. They should not be allowed to instead waste the Tribunal's time with a request for irrelevant information.[45]

44. Claimant responded on March 23, 2011, defending its requests for documents, but still not denying the facts as stated in Mr. Parada's testimony. El Salvador again highlighted the lack of denial in the next letter to the Tribunal:

> The most significant aspect of Mr. Posner's letter is not what it says, but what it still fails to say. There is no mention in Mr. Posner's letter that he has discussed Mr. Parada's Statement with the two partners from Claimant's counsel that have direct knowledge of the conversations recounted by Mr. Parada to ask them to confirm or deny the truth of his declaration.[46]

45. And still, Claimant did not deny the facts in Mr. Parada's statement in the communications with the Tribunal regarding procedural issues leading up to the hearing originally scheduled to begin on March 23, or during the conference call with the Tribunal.[47]

46. El Salvador urged Claimant to directly respond to Mr. Parada's testimony again in its letter of April 22, 2011, producing additional documents in compliance with the Tribunal's Procedural Order:

> *El Salvador also notes—again—that Claimant continues to insist on document production from Mr. Parada, while failing to tell the Tribunal whether Mr. de Gramont and Mr. Ali confirm or deny that they were already working for Pacific Rim Mining Corp. and preparing for this arbitration before Pacific Rim Mining Corp.*

[45] Letter from El Salvador to the Tribunal, Mar. 17, 2011, at 2.
[46] Letter from El Salvador to the Tribunal, Mar. 31, 2011, at 1.
[47] *See, e.g.*, Letter from Claimant to the Tribunal, Apr. 4, 2011 (proposing an agenda for the hearing and requesting permission to offer direct testimony from Ms. McLeod-Seltzer); Letter from Claimant to the Tribunal, Apr. 8, 2011 (reiterating its request to present direct testimony from Ms. McLeod-Seltzer); Second Letter from Claimant to the Tribunal, Apr. 8, 2011 (requesting admission of new witness statement from counsel for Inceysa Vallisoletana).

> *changed Pac Rim Cayman's nationality to allow it to become the Claimant in this arbitration. Claimant's answer to this question could save the parties and the Tribunal considerable time and expense in disposing of this case*.[48]

47. As indicated above, after forcing El Salvador and the Tribunal into the current situation by refusing to answer El Salvador's questions for seven months, Claimant finally admitted the truth of most of Mr. Parada's testimony in a letter to El Salvador's counsel dated April 22, 2011. Even then, however, Claimant persisted in having the Tribunal call Mr. Parada as a witness at the hearing and conducted an intensive cross-examination aimed at impugning Mr. Parada's credibility, but still without indicating that Mr. Ali and Mr. de Gramont denied any part of Mr. Parada's testimony. The plain fact is that, given multiple opportunities, whether in correspondence or in written or oral testimony before the Tribunal, Mr. Ali and Mr. de Gramont never denied the truth of any of Mr. Parada's statements.

48. It clearly makes no sense for Claimant to seek costs based on Mr. Parada's testimony.

2. Mr. Parada's early knowledge about the dispute and the potential arbitration could have only come from Claimant's counsel

49. Claimant's counsel admits that Mr. Ali and Mr. de Gramont asked Mr. Parada in November of 2007 about his willingness to work on a case against El Salvador.[49] They asked this question to Mr. Parada after Claimant's counsel had already been hired to work on this case, but before Pac Rim Cayman's change of nationality from the Cayman Islands to the United States.[50]

50. After his meetings with Claimant's counsel in November and early December of 2007, Mr. Parada knew facts about the existence of this dispute and this then-potential arbitration involving El Salvador that he could have only obtained from Claimant's counsel. In March and April of 2008, Mr. Parada wrote to the Attorney General of El Salvador requesting a meeting to

[48] Letter from El Salvador to the Tribunal, Apr. 22, 2011, at 2 (emphasis in original).
[49] Transcript of Hearing, Day 2, 383:19 – 384:20.
[50] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011, at 1.

talk about a potential ICSID arbitration against El Salvador, clarifying in the second e-mail that the dispute would be brought under CAFTA.[51] The fact that Pacific Rim Mining Corp. was threatening arbitration against El Salvador and had hired Crowell & Moring only became public knowledge in July 2008.[52]

51. Claimant's attempts to cast doubt about to which CAFTA dispute Mr. Parada could have been referring fail in light of the evidence submitted by Mr. Parada[53] and the uncontroverted fact that Claimant's counsel has never represented Commerce Group in the only other CAFTA arbitration that has been filed against El Salvador. In fact, one of the most compelling pieces of evidence in support of Mr. Parada's Witness Statement is Mr. Parada's response to the co-chair of the Dewey & LeBoeuf international arbitration group, who had forwarded a news release about Pac Rim's filing its Notice of Intent in December 2008. Mr. Parada (as yet not counsel for El Salvador and certainly unaware that Claimant would later deny knowledge of the existence of any possibility of a dispute before March 2008) responded:

> We have been on top of that dispute since last December, when I first learned that opposing counsel was preparing for arbitration. I brought this fact to the attention of the Government a couple of months later, and I went to El Salvador in July to meet with officials from the three relevant ministers about the case.[54]

52. The reference to "last December" meant December 2007, when Claimant's counsel told Mr. Parada that they were planning for a potential arbitration against El Salvador. Mr. Parada's statement is supported not only by the e-mails he included as annexes to his Witness Statement, but also by the abundant evidence El Salvador presented that Pacific Rim Mining Corp. had a dispute with El Salvador about its applications for an environmental permit and the El Dorado exploitation concession beginning in 2004.

[51] Annexes D and F to Parada Witness Statement.
[52] Annexes H and I to Parada Witness Statement.
[53] Annex R to Parada Witness Statement.
[54] Annex R to Parada Witness Statement. *See also* Annex G.

3. Claimant's attacks on Mr. Parada's credibility are baseless

53. Claimant, unable to deny the facts in Mr. Parada's Witness Statement, has resorted to attacking his credibility using misleading arguments.

54. For example, Claimant argues that if Mr. Ali and Mr. de Gramont had told Mr. Parada that they were preparing for arbitration against El Salvador, and because Mr. Parada responded to them that he would feel extremely uncomfortable working on an international arbitration against El Salvador, it would not have made sense for Crowell & Moring to still be interested in hiring Mr. Parada.[55] But as Mr. Parada mentioned during his testimony, Claimant's counsel's interest in hiring him went beyond this particular case, as Mr. de Gramont told Mr. Parada they wanted to build up their Latin American practice group.[56] In addition, at that time Claimant was still trying to resolve the dispute without the need to initiate arbitration. For instance, even in the cover letter accompanying the Notice of Intent, Claimant's counsel Mr. Arif H. Ali wrote in December 2008 that,

> [a]lthough PRC is confident in the merits of its claims and the likelihood of success, our client looks forward to continuing good faith discussions with the Government in order to attain an amicable resolution of the parties' dispute. Nonetheless, should a resolution of this dispute not be promptly achieved, PRC intends to submit its claims to arbitration as described within the NOI.[57]

55. Therefore, it would not be surprising that Claimant's counsel was still interested in hiring Mr. Parada, even if he did not want to work on a case against El Salvador, as Claimant was still hoping that the threat of arbitration would be enough to persuade El Salvador to grant the concession.

56. With regard to Mr. Parada's knowledge and role in the Inceysa arbitration, which Claimant has called into question,[58] El Salvador refers the Tribunal to the e-mail attached as Annex N to Mr. Parada's Witness Statement, at page 2, specifically the paragraph where Mr.

[55] Claimant's Petition for Costs, para. 27.
[56] Transcript of Hearing, Day 2, 386:9-13.
[57] Letter from Mr. Arif H. Ali accompanying Notice of Intent, Dec. 9, 2008 (emphasis added).
[58] Claimant's Petition for Costs, para. 26.

Parada describes his conversation with the former Attorney General during Mr. Parada's trip to El Salvador in July 2008.

D. Conclusion on allocation of costs

57. This arbitration concerning a pre-existing dispute regarding claims arising from the failure to issue a concession that Claimant did not have a right to receive should never have been initiated against El Salvador. Having been unfairly subjected to this abusive process and to Claimant's abusive tactics, El Salvador is entitled to recover the costs for its defense from Claimant.[59]

III. RESPONSE TO CLAIMANT'S QUANTIFICATION OF COSTS

58. El Salvador's attorney's fees for this arbitration totaled $3,610,651.75.[60] Claimant's attorney's fees totaled $4,147,010.00 for the two rounds of objections.[61]

59. Given that El Salvador had to do all of its research about the case and had to carry the burden of proof for its two sets of objections, there is no reason that Claimant's legal fees should be higher than El Salvador's. Claimant's fees do not include the work Claimant's counsel did prior to El Salvador's objections, such as the work to learn the case and prepare and file the Notice of Intent and Notice of Arbitration. The legal fees for El Salvador, on the other hand, reflect all of counsel's work on this arbitration. Therefore, Claimant should have had the advantage of needing less preparation during the objections because it should have already invested in a thorough review of the legal and factual bases for its claims before initiating arbitration. El Salvador's fees should reflect the higher cost of investigating the allegations in the NOA and preparing and filing its objections. As El Salvador has shown, however, Claimant's counsel did not fully grasp the details before initiating this arbitration, then constantly changed

[59] *See, e.g., Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, paras. 24.1-24.7 (stating that incoherent legal arguments and inconsistent positions during a proceeding have a direct effect on the assessment of costs) (RL-42).
[60] El Salvador's Post-Hearing Brief, para. 140.
[61] Claimant's Petition for Costs, para. 34.

its positions and raised absurd or misleading legal arguments, all of which caused higher legal fees than are reasonable.

60. However, Claimant's legal fees, which are higher than El Salvador's, are evidence that the amount of legal fees incurred by El Salvador is a reasonable amount for the Tribunal to include in its Award as compensation for El Salvador's legal expenses.

Dated: June 24, 2011

Respectfully submitted,

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