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BY EMAIL

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c/o Mr. Marco Tulio Montañes- Rumayor
Secretary of the Tribunal
ICSID
1818 H Street, N.W.
MSN U3-301

Re: Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12)

Dear Members of the Tribunal:

We write in response to the Tribunal's 14 March invitation for the parties to file any observations they may wish to make regarding the *amicus curiae* application by today's date.

Claimant has reviewed the 2 March 2011 Application for Permission to Proceed as *Amici Curiae* (the "Application"), which was submitted to the Tribunal by the Center for International Environmental Law on behalf of various member organizations of the *Mesa Nacional Frente a la Minería Metálica de El Salvador* (the "Applicants"). The Application sets forth three distinct requests: (1) that the Tribunal grant the Applicants permission to file an *amicus curiae* brief in the present arbitration; (2) that the Tribunal accept and consider the submission attached to the Application (the "Brief"); and (3) that the Tribunal allow the Applicants to make an oral presentation at the jurisdictional hearing. Claimant submits its observations on each of these three requests below.

I. Request for the Applicants to proceed as *amici curiae*

The Tribunal has authority under CAFTA Article 10.20.3 to "accept and consider" *amicus curiae* submissions from any "person or entity that is not a disputing party." Thus, as a general matter, Claimant has no objection to allowing the Applicants to proceed as *amici curiae*, if the Tribunal determines that the expertise or perspectives of such organizations would be helpful and appropriate for consideration in this case.

Nevertheless, Claimant must clarify at the outset that its agreement on this matter does *not* constitute its consent for the Applicants to intervene in this proceeding in any manner that they may wish (no matter how burdensome or disruptive), or for Applicants to be allowed to divert the focus of the proceedings to issues that cannot be resolved by the Tribunal, or that are otherwise irrelevant to the parties' dispute.

Given the potential for further *amicus* submissions at later stages of this proceeding, it is particularly important for the Tribunal to establish and maintain the applicable and appropriate procedural standards for the acceptance and consideration of *amicus curiae* submissions. Indeed, those standards have already been endorsed by this Tribunal in its Procedural Orders of 10 June 2010 and 2 February 2011. Thus, as set out further in the following sections, any submissions made by the Applicants: (1) should be limited to offering perspectives and arguments on the factual and legal issues before the Tribunal; and (2) should be in written form.

II. Request for the Tribunal to consider the Brief

As noted above, Claimant has no objection to the Applicants being permitted to submit a written brief in this arbitration, so long as that brief is limited to addressing factual and legal issues before the Tribunal. In this regard, ICSID Rule 37(2) dictates that *amicus curiae* submissions (1) should "assist the Tribunal in the determination of a factual or legal issue related to the proceeding;" (2) should "address a matter within the scope of the dispute;" and (3) should not "disrupt the proceeding or unduly burden or unfairly prejudice either party."¹

As the Tribunal is aware, the ICSID Rules of Arbitration are directly applicable to this proceeding to the extent they are not in conflict with the procedural rules set out in CAFTA Chapter 10. In this case, CAFTA does not address the specific procedural standards for the acceptance of *amicus curiae* submissions in Chapter 10 proceedings, and there is thus no conflict between the treaty and the more detailed provision on *amicus* submissions that is set out in ICSID Rule 37(2). Moreover, the principles underlying Rule 37(2) have also been reflected in the statement of the NAFTA Free Trade Commission concerning the procedure for *amicus curiae* submissions in NAFTA arbitrations,² and by numerous investment arbitration tribunals,³ including this one.⁴

¹ See ICSID Rules of Arbitration, Rule 37(2).

² Statement of the Free Trade Commission on non-disputing party participation, dated 3 October 2003, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>. The FTC statement dictates that *amicus curiae* submissions in NAFTA proceedings must "only address matters within the scope of the dispute;" and should not be allowed to "disrupt[] the proceedings" or to "unduly burden[] or unfairly prejudice[]" either disputing party. The statement furthermore clarifies that "the granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration."

Unfortunately, a large portion of the Applicants' Brief, as submitted in conjunction with the Application, fails to meet any of the applicable standards for acceptance of *amicus curiae* submissions. In particular, Part II of the Submission is devoted to a discussion of what the Applicants characterize as "Factual Background," although they fail to specify what issue or argument this discussion is intended to provide background *for*. Claimant notes that part of this discussion – commenting on the mining opposition in El Salvador – supports the proposition that the *de facto* mining ban which is the measure at issue in this dispute could not have been known to Claimant until President Saca confirmed its existence in public statements in March 2008. According to Applicants' view, prior to 2008, the "swells of resistance" to metallic mining were "unrelated to government action." It was only because "[t]he resistance was so broad, effective and deeply-felt," say the Applicants, "that in 2008, then-President Elías Antonio Saca of the right-wing ARENA party announced his own view that metals mining should not proceed in El Salvador without significant further study of possible environmental impacts and codification of more robust mining laws."⁵

In addition to these general comments regarding the mining opposition, Part II also sets out a series of allegations against Claimant, ranging from accusations of trespassing by Claimant's representatives and deficiencies in Claimant's proposed mining project; to insinuations of corruption and even homicide. Claimant rejects these irresponsible allegations and insinuations in their entirety.

More importantly for present purposes, however, Claimant simply fails to see how such allegations – even if they could be remotely substantiated, which they cannot – bear any relation

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³ See, e.g., *TCW Group, Inc. and Dominion Energy Holdings, LP v. Dominican Republic*, Procedural Order No. 3, PCA—UNCITRAL Arbitration Rules (16 December 2008), para. 3.61-3.6.2 (directing that *amicus curiae* submissions to be submitted at the jurisdictional phase be "relevant to the issue of jurisdiction" and "only address matters within the scope of the dispute."); *Glamis Gold, Ltd. v. The United States of America*, Ad hoc—UNCITRAL Arbitration Rules (NAFTA), Decision on Application and Submission by Quechuan Indian Nation (16 September 2005), paras. 10-11 (deciding that an *amicus curiae* submission would be admitted where it "satisfies the principles of the Free Trade Commission's Statement on non-disputing party participation" and noting that "in allowing such participation, it is important simultaneously to avoid undue burden on the Parties and delay in the proceedings."); *Aguas Argentinas SA and ors v Argentina*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, (19 May 2005), paras. 27-29 (noting that in deciding whether to accept an *amicus curiae* brief, the tribunal would have to consider "the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the Tribunal, and the proceedings; and the degree to which the proposed *amicus curiae* brief is likely to assist the Tribunal in arriving at its decision" and noting that any procedure established for the acceptance of such submissions would have to "safeguard due process and equal treatment as well as the efficiency of the proceedings.")

⁴ In its 10 June 2010 and 2 February 2011 Procedural Orders, the Tribunal ordered that any *amicus curiae* submissions filed in connection with the Preliminary Objections in this case should "address only matters within the scope of the subject-matter of these arbitration proceedings."

⁵ Brief, pp. 6-7.

to the factual and legal issues that the Tribunal must determine at this phase of the proceedings. Those factual and legal issues pertain only to: (1) whether the Tribunal has jurisdiction *ratione temporis* and *ratione personae* over the present dispute; (2) whether Respondent is entitled to deny the benefits of CAFTA to Claimant; (3) whether El Salvador has given its consent to ICSID arbitration in the Investment Law; and (4) whether Claimant has “abused the process” of this Tribunal. Indeed, the Applicants are apparently aware of the relevant issues, since Part III of their Brief – in which the Applicants set out their legal “Argument” – is (for the most part) nominally directed towards the application of relevant jurisdictional standards.

Yet, the Applicants have not even referred to the submissions set out in Part II of their Brief in making the “Argument” contained in Part III, much less explained the connection between those allegations and the actual issues to be decided by the Tribunal. Given that those allegations in fact have no relevance to the jurisdictional objections, they are plainly not capable of “assist[ing] the Tribunal in the determination of a factual or legal issue related to the proceeding;” or of “address[ing] matters within the scope of the dispute.” For that reason alone, they should not be accepted for consideration by the Tribunal.

Moreover, the consideration by the Tribunal of these allegations would “unduly burden or unfairly prejudice” the Claimant. In particular, the “facts” presented by the Applicants in Part II of their Brief involve inflammatory allegations and insinuations concerning Claimant and its conduct which, notwithstanding their lack of relevance to the jurisdictional issues before the Tribunal, might nevertheless require a response from Claimant (albeit not from Respondent) were they to be admitted into the record at this stage. Aside from being of no assistance to the Tribunal in making its jurisdictional determinations, such a procedural detour would only add further time and cost to what has already become a protracted and expensive preliminary phase of proceedings. Furthermore, to require Claimant to respond to the wide-ranging and irrelevant accusations of the Applicants at the same time that it is engaged in defending against the jurisdictional objections of Respondent would violate fundamental principles of procedural fairness, which the Tribunal is bound to uphold.

As noted above, in contrast to Part II, most of Part III of the Applicants’ Brief is at least nominally directed towards the issues being decided by the Tribunal. As such, Claimant is not opposed to having the Tribunal accept and consider the submissions made in Parts III or I (the latter entitled, “Introduction”) of the Brief, if the Tribunal believes that such consideration would be helpful and appropriate in this case. While Claimant does not find those submissions to be even minimally persuasive, it is willing to address them, if and to the extent necessary, in its oral submissions at the upcoming jurisdictional hearing and/or in post-hearing submissions.⁶

⁶ For the record, Claimant’s agreement on this issue should in no way be interpreted as constituting a waiver of its right to be granted the opportunity to respond in writing to any future *amicus curiae* submissions that may be accepted by the Tribunal.

Thus, if the Tribunal decides to allow the Applicants both: (1) to proceed as *amici curiae* in this proceeding as a general matter; and (2) to submit a brief for consideration in connection with jurisdiction, then Claimant requests that the Tribunal direct the Applicants to excise Part II of their Brief before resubmitting it into the record.

III. Request for the Applicants to make an oral presentation at the jurisdictional hearing

Claimants cannot agree to the Applicants' request to make an oral presentation at the jurisdictional hearing. Neither CAFTA Chapter 10 nor the ICSID Rules of Arbitration contemplate participation of this nature by *amici*. To the contrary, as explained in the following paragraphs, both sets of rules – not to mention basic principles of procedural fairness – weigh heavily against the granting of this particular request.

First, the plain text of ICSID Rule 37(2) specifically limits the authority of the tribunal to allow the filing of a “written” submission by a non-party. It does not authorize the Tribunal to accept non-party participation in the proceedings in any manner other than through a written submission. Moreover, as discussed further below, the text of CAFTA can in no way be interpreted as broadening this specific limitation.

Second, the standards set out in subsections (a), (b) and (c) of Rule 37(2) would prohibit an oral presentation by the Applicants in this case even if the plain text of the Rule did not already preclude it. In this regard, as noted above, it is particularly important for the Tribunal here to establish and maintain the applicable and appropriate procedural standards for the provision and consideration of *amicus curiae* submissions. As also seen above, those standards dictate that *amicus* submissions be directed to the issues in dispute and not create an undue burden for the parties or the Tribunal, and also that such submissions not be allowed to “disrupt the proceedings.”

In this case, it is difficult to imagine an *amicus* submission more capable of disrupting the proceedings than Applicants' proposed oral submission at the upcoming jurisdictional hearing. More importantly, allowing the Applicants to participate in the jurisdictional hearing would create an “undue” (and indeed, unreasonable) burden for Claimant. As previously noted, the arguments contained in the Applicants' Brief may require responses from Claimant, albeit not from Respondent. While Claimant is willing to accept that it may face an additional burden if it *chooses* to make a response to written submissions of *amici* even when no such response is required from Respondent,⁷ it is not willing to accept the inequality of arms that would result from *being forced* to face two separate opponents in the context of a live oral proceeding,

⁷ See *Methanex Corporation v. United States*, Decision on *Amici Curiae*, Ad hoc—UNCITRAL Arbitration Rules (15 January 2001), para. 37 (recognizing the existence of a “possible risk of unfair treatment” to the claimant as a result of the admission of *amicus curiae* submissions, and noting that such risk “must be addressed as and when it may arise.”)

wherein each party has only been allocated a limited amount of time to make its case. To require Claimant to take on this burden would entail nothing less than a violation of Claimant's fundamental right to procedural fairness.

Furthermore, CAFTA Article 10.20.3 does nothing to mitigate the preclusion of oral participation by *amici* that is dictated by application of ICSID Rule 37(2). In paragraph 3 of that provision, CAFTA tribunals are authorized to “accept and consider *amicus curiae* submissions.” The common meaning of the term “accept,” as used in the instant provision, is to “take or receive,” or to “agree to take something.”⁸ It is difficult to imagine how an oral presentation could be “taken” or “received;” certainly, that formulation would not comport with common usage. To the contrary, Article 10.20.3 is evidently directed towards the acceptance of *written* submissions.

This conclusion is further supported when Article 10.20.3 is viewed in the context of the surrounding provisions.⁹ In contrast to the unmodified “submissions” that are contemplated in Article 10.20.3, paragraph 2 of Article 10.20 recognizes the right of the non-disputing member States of CAFTA to “make oral and written submissions” to the tribunal. The difference in formulation between Article 10.20.2 and Article 10.20.3 indicates that when the CAFTA Parties wished to allow for the making of oral submissions in particular, they knew how to do so.

If the text of CAFTA Article 10.20 leaves any ambiguity on this point, it should be resolved by reference to “the preparatory work of the treaty and the circumstances of its conclusion,”¹⁰ which also very clearly indicate that the Parties presumed that *amicus* submissions would be written. Thus, the text of the U.S.-Chile FTA,¹¹ which was the basis for the text proposed by the United States for CAFTA, provides in Article 10.19.3 that: “The [*amicus curiae*] submissions shall be provided in both Spanish and English. Here, the use of the term “provided” – as opposed to “made” or “given,” for example – makes clear that the unmodified term “submissions” refers to written, and not oral, submissions. The word “provide” normally entails “[t]o supply (something) for use,” or “to give someone something,”¹² indicating a physical transfer. Moreover, as seen above, CAFTA Article 10.20.3 uses the word “make,” and not “provide,” when an oral submission may be entailed. Further, the requirement that a submission be provided in two different languages supports the view that what is envisaged is a

⁸ Oxford Online Dictionary, *available at* <http://www.oed.com/viewdictionaryentry/Entry/1006>; Cambridge Dictionaries Online, *available at* http://dictionary.cambridge.org/dictionary/british/accept_1.

⁹ See Vienna Convention on the Law of Treaties, Arts. 31(1) and 31(2).

¹⁰ *Id.*, Art. 32.

¹¹ Free Trade Agreement, U.S.-Chile, art. 10.19.3, Jun. 6, 2003, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta> (last visited Mar. 18, 2011).

¹² Oxford English Dictionary Online, *available at* <http://www.oed.com/viewdictionaryentry/Entry/153448>; Cambridge Dictionaries Online, *available at* http://dictionary.cambridge.org/dictionary/british/provide_1.

written rather than an oral submission. In turn, these drafting distinctions indicate that when the United States – drafter of the template for both the U.S.-Chile FTA and CAFTA – used the unmodified term “submission” in these two international agreements, it always meant a *written* submission.

Indeed, this is only to be expected, given that the standards governing *amicus curiae* submissions in the domestic legal system of the United States itself dictate that such submissions are customarily accepted only in written form. Thus, Rule 29 of the United States Federal Rules of Appellate Procedure provides that “a motion of an *amicus curiae* to participate in the oral argument will only be granted for extraordinary reasons” (emphasis added). Similarly, Rule 28.7 of the United States Supreme Court Rules provides that counsel for an *amicus curiae* not arguing as the designated attorney for one of the two parties will be heard only when it “would provide assistance to the Court not otherwise available,” and even then, “only in the most extraordinary circumstances.”

The extraordinary nature of oral submissions by *amici* has also been recognized in the international investment jurisprudence. As explained by the tribunal in the *Aguas Argentinas* case:

Petitioners request the Tribunal to “allow the applicants sufficient opportunity to present legal arguments, as *amicus curiae*.” Although Petitioners do not define in detail the role and nature of an *amicus curiae* or “friend of the court” in an ICSID arbitration or the precise form that such proposed intervention is to take, the Tribunal assumes that the *amicus curiae* role the Petitioners seek to play in the present case is similar to that of a friend of the court recognized in certain legal systems and more recently in a number of international proceedings. In such cases, a nonparty to the dispute, as “a friend,” offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission.¹³

In fact, we are not aware of *any* investment arbitration proceeding in which an *amicus curiae* has been allowed to make oral presentations at a hearing. To the extent that other investment arbitration tribunals have discussed the notion of *amicus curiae* submissions, they have almost always done so with specific reference to “briefs” or “written” submissions,¹⁴ and

¹³ *Aguas Argentinas SA and ors v Argentina*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, (19 May 2005), para. 8 (emphasis added).

¹⁴ *Id.*, paras. 24-29 (using interchangeably the words “submissions” and “briefs” in describing the procedures for *amicus curiae* participation); *Methanex Corporation v. United States*, Ad hoc—UNCITRAL Arbitration Rules, Decision on *Amici Curiae* (15 January 2001), para 36 (“As envisaged by the Tribunal, the Petitioners would make their submissions in writing...”) (emphasis added); *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 February 2006), para. 46 (noting that ICSID Rule 37(2) refers only to “written” submissions and noting that a “non-disputing party” does not become a party to the arbitration by virtue of a

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this Tribunal is no exception. Indeed, in its 10 June 2010 and 2 February 2011 Procedural Orders, the Tribunal made clear that any submissions to be received by *amicus curiae* were to be in written form.¹⁵

In short, to grant the Applicants' request for participation in the oral hearing in this case would: (1) violate the procedural standards for *amicus curiae* submissions set out in ICSID Rule 37(2); (2) run contrary to the intention of CAFTA Article 10.20.3; (3) violate Claimant's fundamental right to equality of arms and procedural fairness; (4) fall outside the bounds of normal and accepted practice in investment arbitration; and (5) open the door to a level of participation by *amicus curiae* that would be unprecedented even in domestic legal systems.

In Claimant's submission, the Applicants' submissions in this case simply do not warrant such a drastic measure. Indeed, as already discussed, most of those submissions are completely irrelevant to the jurisdictional issues forming the subject matter of the hearing. Even to the extent that any of the submissions put forward in the Applicants' Brief may be determined to be at all relevant by the Tribunal, there is certainly no "extraordinary reason" why those particular submissions should be made orally. In fact, the Applicants have failed to identify *any* reason why it would be helpful or appropriate for them to appear at the jurisdictional hearing, much less an "extraordinary" one.

IV. Petition

In consideration of all the foregoing, Claimant respectfully requests that the Tribunal:

1. Deny the Applicants' request to make an oral presentation at the upcoming jurisdictional hearing;
2. Deny the Applicants' request for acceptance and consideration of Part II of their Brief;

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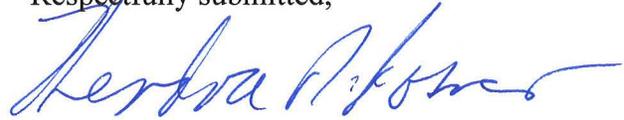
tribunal's decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission."

¹⁵ The Tribunal instructed in both orders that potential *amicus curiae* "include (as an appendix to the application) a copy of the applicant's written submissions to be filed in these arbitration proceedings." Similarly, the Tribunal noted that *amicus* applicants should explain "the reasons(s) why the Tribunal should grant permission to the applicant to file its written submissions in these arbitration proceedings as an *amicus curiae*" (emphasis added).

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3. Take whatever further action the Tribunal may deem necessary and appropriate with respect to the Applicants' requests for recognition as *amici curiae* and for acceptance and consideration of Parts I and III of their Brief.

Respectfully submitted,



Theodore R. Posner
Counsel for Claimant

Cc: Counsel of Record