

**IN THE MATTER OF AN ARBITRATION  
UNDER THE RULES OF ARBITRATION OF THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE  
DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES – FREE TRADE  
AGREEMENT AND THE FOREIGN INVESTMENT LAW OF EL SALVADOR**

_____	)	
PAC RIM CAYMAN LLC,	)	
	)	
Claimant,	)	
	)	
v.	)	ICSID Case No. ARB/09/12
	)	
REPUBLIC OF EL SALVADOR,	)	
	)	
Respondent.	)	
_____	)	

**CLAIMANT PAC RIM CAYMAN LLC'S  
POST-HEARING SUBMISSION  
ON RESPONDENT'S OBJECTIONS TO JURISDICTION**

Arif H. Ali  
Alexandre de Gramont  
R. Timothy McCrum  
Theodore R. Posner  
Marguerite C. Walter  
Ashley R. Riveira  
Kassi D. Tallent  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(1) 202 624 2500 (tel.)  
(1) 202 628 5116 (fax)

Counsel for Claimant

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## **I. INTRODUCTION**

1. Despite its protestations against the Tribunal's jurisdiction to hear Pac Rim Cayman's claims, El Salvador has not succeeded in establishing a single one of its objections to jurisdiction. Instead, it has continued to press the Tribunal to dismiss Pac Rim Cayman's claims as a purported "abuse of process," even to the point of suggesting to the Tribunal that it could ignore its treaty-based objections to jurisdiction altogether. Respondent set itself a tall task. If it was not already obvious before the 2-4 May 2011 hearing on jurisdiction ("Hearing") that Respondent had failed in that task, its presentations at the hearing have made this abundantly clear.

2. The cornerstone of Respondent's objections to the Tribunal's jurisdiction is that Pac Rim Cayman supposedly opportunistically and disingenuously attempted to avail itself of a forum to which it has no right, because it is only a "shell company" with no genuine ties to its ostensible home state, the United States. In reality, both Pac Rim Cayman itself and its investment in El Salvador have been closely tied to the United States from the very inception of the project. All managerial and strategic decisions were primarily made by Mr. Shrake in Nevada. Much of the funding for the investment came from the Pacific Rim companies' Nevada mining investments, and the technical experts hired to develop the project were also employed in Nevada. Pac Rim Cayman was later moved to Nevada in order to rationalize the companies' organizational structure (as well as to save money). The fact that Respondent's *de facto* ban on metallic mining subsequently came to light does not somehow cast a retrospectively sinister pall over these pre-existing facts. To deny Claimant access to this Tribunal's jurisdiction and to the substantive protections of CAFTA would be to deny the genuine equities in this case; that is, those associated with the destruction of a multi-million dollar investment that was made in good faith over a number of years.

3. Not surprisingly, even after a three-day hearing and the curious role of Respondent's counsel-turned-fact-witness, Respondent's case for objecting to the Tribunal's jurisdiction has fallen short. In this submission, we elaborate on certain points made in our previous oral and written submissions in light of the Tribunal's questions and statements made by Respondent's counsel at the Hearing. In particular, we show that:

- a. The measure at issue as consistently identified in Claimant's pleadings is El Salvador's practice of withholding permits necessary for metallic mining;

- b. This measure is a continuing course of conduct by Respondent which may have begun before CAFTA became applicable to Claimant, but continued thereafter (indeed, to this very day) and which Claimant became aware of at the earliest in March 2008, when El Salvador's President first confirmed the existence of a *de facto* mining ban;
- c. Respondent's attempt to invoke CAFTA's denial of benefits provision over a year into this arbitration comes too late, in view of the notice and consultation conditions in that provision as understood in the context of CAFTA and the ICSID Convention;
- d. In any event, Respondent has failed to establish either that Claimant lacks substantial business activities in the United States, or that Claimant is not owned and controlled by U.S. persons;
- e. Respondent's non-treaty-based, "primary objection" that Claimant somehow engaged in an "abuse of process" by acquiring U.S. nationality after Respondent "interfered" with its investment lacks any basis in CAFTA or in any conceivably relevant principles of international law;
- f. In Article 15 of its Investment Law, Respondent unquestionably gave its consent to ICSID jurisdiction for the resolution of disputes with foreign investors; and
- g. The fact that Claimant's CAFTA claims and its Investment Law claims are part of a single proceeding does not mean that if the Tribunal were to dismiss the CAFTA claims it would be required to dismiss the Investment Law claims as well.

## **II. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS***

4. Through its written and oral submissions, Claimant has established that the Tribunal has jurisdiction *ratione temporis* over the matter before it. This dispute concerns a measure (a *de facto* ban on metallic mining) maintained by a CAFTA Party (El Salvador) relating to an investor of another Party (Claimant, Pac Rim Cayman, LLC, which is an investor of the United States)<sup>1</sup> and its covered investments (the mining investments Claimant made in El Salvador through PRES and DOREX). While the ban may have come into existence at some earlier point in time, it continued to exist after Pac Rim Cayman acquired its U.S. nationality in December 2007, which is when CAFTA became applicable to measures relating to Pac Rim Cayman. Indeed, as

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<sup>1</sup> At the Hearing, Respondent maintained its argument that Claimant is not an investor of a Party because it acquired U.S. nationality after the investment in El Salvador was made. *See* Transcript of 2-4 May 2011 Hearing on Jurisdiction (hereinafter "Hearing Tr."), pp. 107:17-111:15. Claimant has shown that CAFTA does not require a person to have the nationality of a Party before acquiring an investment in order to qualify as an investor of a Party. *See* Claimant's Counter-Memorial in Response to Respondent's Objections to Jurisdiction, dated 31 December 2010 (hereinafter "Counter-Memorial"), paras. 184-192; Claimant's Rejoinder on Respondent's Objections to Jurisdiction, dated 2 March 2011 (hereinafter "Rejoinder"), para. 229; Hearing Tr., pp. 136:6-136:20, 237:6-238:21. As Respondent has failed to rebut that point, Claimant does not elaborate on it here.

openly acknowledged by successive Presidents of El Salvador, the measure continues to this very day.<sup>2</sup> Because the *de facto* mining ban is a situation that did not cease to exist before measures of El Salvador relating to Pac Rim Cayman became covered by CAFTA, the ban as applied to Pac Rim Cayman is within CAFTA’s temporal scope.<sup>3</sup>

5. Like the *measure* at issue, the *claims* at issue also are within CAFTA’s temporal scope. Pac Rim Cayman claims that through the *de facto* mining ban as applicable to its investments in El Salvador, Respondent has breached obligations owed to Claimant under CAFTA (and under the Investment Law of El Salvador), including obligations relating to expropriation and compensation and fair and equitable treatment, and that these breaches caused damage to Pac Rim Cayman and to its covered investments. Pac Rim Cayman did not become aware (nor could it have become aware) of the breaches (and eventually the damages arising therefrom) until at the earliest, March 2008, which is when El Salvador’s head of State first publicly confirmed the ban’s existence. Prior to then, the failure of El Salvador’s agencies to provide the permits needed to operate Pac Rim Cayman’s investments appeared to be ordinary bureaucratic delay, which was reinforced by encouraging statements of senior Salvadoran officials.<sup>4</sup> Because Pac Rim Cayman submitted its claims to arbitration on 30 April 2009 – well within three years of the March 2008 date on which it first acquired or should have first acquired knowledge of the breaches and damages at issue – the claims are within the temporal scope set forth in CAFTA Article 10.18.1.

6. Respondent’s objections that both the measure and claims at issue are outside CAFTA’s temporal scope are based on the same flawed premise – that the measure at issue is something other than the *de facto* mining ban.<sup>5</sup> In Respondent’s view, the measure at issue is an act or fact

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<sup>2</sup> See Hearing Tr., pp. 674:16–675:11 (quoting public statements by Presidents of El Salvador), 161:17-163:8; Claimant’s Opening Statement – Overview of Key Facts, Slide 6.

<sup>3</sup> See CAFTA, Arts. 10.1.1 and 10.1.3 (**RL-1**).

<sup>4</sup> See, e.g., Rejoinder, paras. 268-277; Counter-Memorial, paras. 117-130; Hearing Tr., pp. 199:13-205:17, 223:14-225:3; Claimant’s Opening Statement-Jurisdiction *Ratione Temporis*, Slide 11.

<sup>5</sup> See, e.g., Respondent’s Memorial on Objections to Jurisdiction dated 15 October 2010 (hereinafter “Objections”), paras. 327-329, 336; Respondent’s Reply on Objections to Jurisdiction, dated 31 January 2011 (hereinafter “Reply”), para. 221; Hearing Tr., pp. 117:16-118:20. Our discussion in this section further demonstrates why that premise is flawed. Accordingly, it supports not only the conclusion that the measure at issue is within the Tribunal’s temporal jurisdiction, but also the conclusion that the claims at issue were submitted within the three-year limitations period.

that took place in December 2004 – *i.e.*, MARN’s failure to act on PRES’s application for an environmental permit within a statutorily prescribed 60-day period – putting both the measure and claims based on the measure and submitted to arbitration in April 2009 beyond CAFTA’s scope.<sup>6</sup> In our prior submissions, we have shown that Respondent’s premise regarding the measure at issue is incorrect: the complaint of Pac Rim Cayman is not that Respondent failed to act on permit and license applications *on time*, but that it failed to act on them *at all*.<sup>7</sup> In this submission, we elaborate on that showing in light of Respondent’s statements and the Tribunal’s questions at the Hearing. In particular, we expand on our demonstration that Respondent’s *de facto* mining ban (a) is a “measure” within the meaning of CAFTA; (b) continued in existence after CAFTA became applicable to measures relating to Pac Rim Cayman; and (c) has been identified consistently by Pac Rim Cayman, from the outset of this proceeding, as the measure at issue.

7. Before addressing these issues, however, we first address an issue on which Respondent has sown substantial confusion: the relevance of the date on which the present dispute arose (or, in Respondent’s formulation, was “born”) to the Tribunal’s temporal jurisdiction – as distinct from its relevance to Respondent’s abuse of process objection, as discussed in Section IV below.

**A. The Tribunal’s Jurisdiction *Ratione Temporis* Depends On When The Measure At Issue Occurred**

8. Throughout its submissions, including at the recent hearing, Respondent has suggested that whether the Tribunal has jurisdiction *ratione temporis* depends on whether the dispute arose before or after CAFTA became applicable to Claimant.<sup>8</sup> That is not correct. Whether the Tribunal has jurisdiction *ratione temporis* depends on whether the measure at issue is an act or fact that took place or a situation that continued to exist after CAFTA became applicable to

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<sup>6</sup> See, e.g., Hearing Tr., pp. 111:16-114:21.

<sup>7</sup> See, e.g., Counter-Memorial, paras. 193-202; Rejoinder, paras. 230-239.

<sup>8</sup> See, e.g., Objections, paras. 266-267, 274; Reply, paras. 203, 217-219; Hearing Tr., pp. 14:4-22, 107:10-107:13, 114:13-21. *But see also id.*, 583:5-10 (Respondent admitting that jurisdiction *ratione temporis* and abuse of process “[are] not the same inquiry. They’re two different legal concepts, and the factual inquiry of each one is distinct”); Reply, para. 191 (“The relevant issue [for jurisdiction *ratione temporis*] is the date on which the measure, act, or fact that constitutes the alleged breach took place.”).

Claimant. That is so regardless of whether the dispute arose before or after CAFTA became applicable to Claimant (although in fact it did not arise until after).<sup>9</sup>

9. Compounding the confusion, Respondent equates the concept of the dispute arising with “the alleged Government interference with the investment tak[ing] place.”<sup>10</sup> In Respondent’s view, the critical moment from a jurisdictional standpoint is not the occurrence of conduct in breach of CAFTA obligations and causing damage to Claimant’s investments, thus triggering El Salvador’s responsibility on the international plane, but rather, the occurrence of any “alleged Government interference with the investment,” regardless of whether such “interference” breached CAFTA obligations and caused damage. Respondent cites no authority for this “interference” theory of jurisdiction and, in fact, there is none.<sup>11</sup>

10. In point of fact, Claimant did not have and could not have had a dispute with El Salvador until, at the earliest, March 2008, when President Saca first publicly confirmed the existence of the *de facto* mining ban. Prior to then, there existed, at most, a “*possible* international dispute *in the making* . . . that may result in an international ICSID arbitration against El Salvador,” as Respondent’s counsel-turned-fact-witness, Luis Parada, put it in an e-mail to an assistant to El Salvador’s Attorney General dated 7 March 2008 (*i.e.*, four days before President Saca’s first public confirmation of the mining ban’s existence).<sup>12</sup> Nor was there even a possible dispute with respect to the measure here at issue, *i.e.*, the *de facto* ban.

11. It was only with the Saca announcement that Claimant became aware (or could have become aware) that, notwithstanding earlier statements of senior Salvadoran officials, the failure

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<sup>9</sup> See CAFTA, Art. 10.1.3 (RL-1); see also Counter-Memorial, paras. 206, 220-223; Hearing Tr., pp. 134:11-135:7; 699:13-701:3.

<sup>10</sup> Hearing Tr., pp. 582:4-12; see also pp. 7:4-5; 10:8-10; 12:5-6; 14:19-22; 15:7-9; 17:17-21; 20:3-5; 20:18-20; 22:1-4; 22:17-18; 24:12-15; 25:11-15; 35:17-19; 35:21-22; 44:14-17; 60:2-6; 67:4-15; 70:10-13; 581:15-17; 582:4-12; 583:3-5; 601:22-602:2; 756:20-757:5; 761:18-21.

<sup>11</sup> Cf. Hearing Tr., pp. 219:13-221:19 (Claimant explaining that measure must be capable of giving rise to “dispute” within meaning of CAFTA to be measure at issue); *id.*, 138:1-17 (Claimant explaining that mere interference with investment cannot be measure at issue).

<sup>12</sup> Witness Statement of Luis Alberto Parada, dated 14 March 2011 (hereinafter “Parada Statement”), Annex D (e-mail from Luis Parada to I. Valencia dated 7 Mar. 2008) (emphasis added). To borrow the words of Respondent’s counsel (Mr. Smith), Mr. Parada’s contemporaneous characterization of the situation is “uncontaminated” by knowledge of the jurisdictional objections his future client would be asserting. See Hearing Tr., p. 23:3.

to grant permits and licenses to PRES and DOREX constituted not just delay, but the application of the *de facto* mining ban.<sup>13</sup>

12. But, more fundamentally, the Tribunal’s jurisdiction *ratione temporis* does not depend on when the dispute arose. It depends on whether the measure at issue constitutes an act or fact that took place after CAFTA became applicable to Claimant or a situation that continued to exist after that date.<sup>14</sup> Because the *de facto* mining ban is such a measure, the Tribunal has jurisdiction *ratione temporis* with respect to the ban.

**B. The De Facto Mining Ban Is A “Measure”**

13. At the hearing, Respondent maintained its position that the *de facto* mining ban is not a “measure” as that term is used in CAFTA.<sup>15</sup> It based that argument entirely on a *dictum* of the tribunal in *Commerce Group v. El Salvador*, a case that Respondent’s own counsel (in his capacity as fact witness) described as “very different” from this case.<sup>16</sup>

14. Claimant previously has demonstrated that El Salvador’s consistent withholding of permits and concessions necessary for the exploitation of metallic mining investments – its *de facto* mining ban – is a “practice” within the ordinary meaning of that term. It is “a repeated or customary action;” “the usual way of doing something.”<sup>17</sup> As Respondent’s counsel admitted, “[t]he truth of the matter is that no foreign or national company received a mining exploitation concession in El Salvador since Commerce Group was issued its last concession in August of 2003.”<sup>18</sup> (That concession was revoked in 2006.)<sup>19</sup> As a practice, the mining ban comes within CAFTA’s definition of “measure.”<sup>20</sup>

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<sup>13</sup> See Hearing Tr., pp. 140:14-141:14, 219:5-225:10.

<sup>14</sup> See, e.g., *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, (11 Oct. 2002), paras. 57, 68-70 (**RL-82**); *SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No ARB/02/6, IIC 224 (29 Jan. 2004), para. 167 (**CL-194**).

<sup>15</sup> See Hearing Tr., pp. 60:17–61:12; see also Objections, paras. 46-48; Letter from Derek C. Smith to Members of the Tribunal (17 Mar. 2011); Letter from Derek C. Smith to Members of the Tribunal (7 Apr. 2011); *Amicus curiae* submission by Member Organizations of *La Mesa Nacional Frente a la Minería Metálica de El Salvador* at 1 (20 May 2011) (hereinafter “**Amicus Submission**”).

<sup>16</sup> Hearing Tr., p. 339:5-22; *id.*, 411:18–20 (“description of the dispute in both cases is entirely different”).

<sup>17</sup> Merriam-Webster online dictionary, definition of “practice” (**CL-141**) (quoted in Counter-Memorial, para. 408); see also Counter-Memorial, paras. 406-412; Hearing Tr., pp. 701:4–702:20.

<sup>18</sup> Hearing Tr., p. 614:13–16.

15. In disputing this point, Respondent’s reliance on a brief, conclusory *dictum* in the *Commerce Group* award is misplaced, for reasons Claimant discussed in its opening statement at the Hearing,<sup>21</sup> which Respondent did not rebut. In view of Respondent’s apparent retreat from its argument that the mining ban is not a measure, Claimant will not expand on its arguments here, except to underscore Mr. Parada’s explanation of why *Commerce Group* is “very different” from this case. In testifying that the “possible international dispute in the making” he was alluding to in his 7 March 2008 e-mail to the Salvadoran Attorney General’s office<sup>22</sup> could not have been the possible dispute involving Commerce Group, Mr. Parada stated, “Commerce Group was – case was about the revocation of the environmental permits. Pacific Rim’s case was that their application for the environmental permits and for the Concession was never granted.”<sup>23</sup>

16. It is precisely that distinction that makes the *Commerce Group* award irrelevant here. In that case, there was a revocation of permits that, in effect, eliminated the claimant’s investment and gave rise to the allegations of CAFTA breaches and damages. The revocation was an act that occurred at a particular moment in time. Here, by contrast, what has eliminated Pac Rim Cayman’s investment and given rise to its allegations of CAFTA breaches and damages is not a single act occurring at a particular moment in time; it is the continued application to Pac Rim Cayman’s investments of a practice – the *de facto* mining ban – which became discernible as such only after El Salvador’s head of State confirmed its existence in March 2008, and then re-confirmed its existence in the months that followed.<sup>24</sup>

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(continued...)

<sup>19</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador*, ICSID Case No. ARB/09/17, Award (14 Mar. 2011), para. 62, (RL-113); see also Hearing Tr. p. 615:7–10.

<sup>20</sup> CAFTA, Art. 2.1 (CL-73) (“measure” includes “any law, regulation, procedure, requirement, or practice”).

<sup>21</sup> See Hearing Tr., pp. 228:20–234:9.

<sup>22</sup> Parada Statement, Annex D (e-mail from Luis Parada to I. Valencia dated 7 Mar. 2008).

<sup>23</sup> Hearing Tr., p. 339:18–22; see also *id.*, 411:18–412:13 (explaining why dispute in *Commerce Group* was “entirely different” from present dispute).

<sup>24</sup> *Id.*, pp. 233:7–234:5.

**C. The *De Facto* Mining Ban Continued To Exist After CAFTA Became Applicable To Claimant**

17. At the Hearing, the Tribunal posed questions regarding the timing of the *de facto* mining ban and, in particular, the relationship between acts and omissions that occurred before CAFTA became applicable to Claimant and acts and omissions that occurred after that date (*i.e.*, 13 December 2007).<sup>25</sup> Claimant addresses those questions in this section.<sup>26</sup>

18. The mining ban consists at least in part of a failure by agencies of Respondent, over a period extending indefinitely into the future, to do what they are required to do under Salvadoran law. It is nonfeasance, as opposed to malfeasance or misfeasance; which is not to admit that it may not also be attributable to these. The failure to act *began* when MARN did not accept or reject PRES's application for a permit within a 60-day period ending in December 2004. But that initial missed deadline was at most the beginning of the measure at issue; contrary to Respondent's mischaracterization, the measure was not "exhausted" at that point.<sup>27</sup> Again, Pac Rim Cayman's complaint is not that Respondent failed to act on its permit and license applications *on time* (as Respondent's mischaracterization would seem to suggest), but that it failed to act on them *at all*.

19. Over time, the failure to act continued. Its character as either application of a *de facto* ban or simple delay was obscured by acts and communications from government officials suggesting that a decision in PRES's favor was forthcoming. These have been detailed in Claimant's prior submissions,<sup>28</sup> though, as the Tribunal noted at the Hearing,<sup>29</sup> Respondent has failed to address them.

20. Finally, in March 2008, President Saca publicly stated his opposition to the issuance of metallic mining permits, and in July 2008 he again confirmed the existence of a *de facto* ban, stating that mining permits would not be granted absent a change in the law and completion of a

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<sup>25</sup> *Id.*, 709:22–710:18; 715:9–22; 718:6–11; 719:10–16.

<sup>26</sup> *See also* Counter-Memorial, paras. 224-244, where Claimant discussed the continuing or composite nature of the *de facto* mining ban at length. Respondent failed to reply.

<sup>27</sup> Objections, para. 317.

<sup>28</sup> *See, e.g.*, Rejoinder, paras. 268-277; Hearing Tr., pp. 199:13-205:17; 223:14-225:3; Claimant's Opening Statement—Overview of Key Facts, Slides 24-25.

<sup>29</sup> Hearing Tr., p. 598:7-10 (Arbitrator Tawil: "I didn't hear the Respondent's view concerning the alleged conversations and promises with officers of El Salvador brought by Claimant.").

country-wide study which had not even begun.<sup>30</sup> Either the ban had been in existence for years, and the failures to act on PRES's applications for an environmental permit and an exploitation license were instances of the ban's application from the start, or the ban came into existence at some point after the initial failure to act, and the continued failure to act became an instance of the ban's application. Under either scenario, the continued nonfeasance after CAFTA became applicable to Claimant and to the present day causes the ban to come within CAFTA's temporal scope. It is a situation that did not cease to exist after CAFTA became applicable to Claimant.

21. The Tribunal has asked whether the ban constitutes a continuing measure or a composite measure (as those terms are used in Articles 14 and 15, respectively, of the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts*) and whether Claimant's claims are based on conduct that predates CAFTA's becoming applicable to Pac Rim Cayman in December 2007.<sup>31</sup> To address the second part first, Claimant refers to acts and omissions before December 2007 only to establish the course of conduct that continued after that date and which, when combined with acts and omissions that occurred after that date, acquired the qualities that cause it to breach CAFTA obligations and give rise to the damages at issue. It asks the Tribunal to take account of those prior acts and omissions solely "for 'purposes of understanding the background, the causes, or scope of the violations of [CAFTA] that occurred after entry into force.'"<sup>32</sup>

22. Claimant does not allege that, taken in isolation, the pre-December 2007 conduct itself breached CAFTA obligations or gave rise to the damages at issue. Rather, it is the continuation of that nonfeasance as understood in the context of President Saca's confirmations of the

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<sup>30</sup> See *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 Mar. 2008) (C-1) and *Saca afirma que no concederá permisos de extracción minera*, CadenaGlobal.com (15 July 2008) (C-61). Respondent's suggestion that the existence of a mining ban was known to Claimant (and that, therefore, in its view, a dispute had arisen) before March 2008 (see Hearing Tr., pp. 45:5-50:16) is belied by amici's characterization of events leading up to March 2008. As described in their submission, "swells of resistance" to metallic mining had been growing within the population, to the point where "[t]he resistance was so broad, effective, and deeply-felt 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." Amicus Submission at 4. Thus, amici agree that there was a course of conduct in El Salvador that converged toward the critical event of President Saca's announcement in March 2008. This is in sharp contrast to Respondent's downplaying of that announcement. See Hearing Tr., pp. 61:13-62:9.

<sup>31</sup> See, e.g., Hearing Tr., p. 715:9-22.

<sup>32</sup> *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, (19 Sep. 2008), para. 87 (quoting *M.C.I. Power Group L.C. and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, (31 July 2007), para. 93) (hereinafter "*Société Générale*") (RL-78).

existence of a ban, which occurred months after December 2007, that constitutes the breach of CAFTA obligations upon which Claimant has based its case.

23. As for whether the ban is better described as a continuing measure or a composite measure, Claimant suggests that, like other tribunals confronted with similar fact patterns, this Tribunal need not choose. If the Tribunal finds that the measure at issue is conduct that did not cease to exist prior to CAFTA's becoming applicable to Claimant, there is no need to label the measure.

24. A case in point is *Walter Bau v. Thailand*.<sup>33</sup> Like this case, *Walter Bau* concerned a protracted period of nonfeasance by the respondent host State that began prior to entry into force of the applicable treaty (the Germany-Thailand BIT) and continued after entry into force. The investor was a participant in a concession agreement for the construction and operation of a toll road in Thailand. Under the agreement, tolls were to increase periodically starting in 1997.<sup>34</sup> Respondent consistently failed to act on the investor's requests for toll increases from 1997 through the BIT's entry into force in 2004. The failure to act continued and culminated, shortly after entry into force, in a statement by Thailand's Prime Minister of an intention to decrease tolls.<sup>35</sup>

25. The claimant in *Walter Bau* described the foregoing conduct as “the continuing/composite acts of the Respondent.”<sup>36</sup> The tribunal, in finding the conduct breached Thailand's obligation to accord fair and equitable treatment, did not classify it as either one or the other and described it in ways that would fit either category. Thus, it said that the ultimate announcement of a toll reduction “can be seen as an addition to the composite acts which had started before but which continued after the entry into force of the BIT,”<sup>37</sup> or “the convergence of the various acts of nonfeasance by the Respondent over a long period.”<sup>38</sup> It added that “the refusal to increase tolls originated long before the crucial date [*i.e.*, the BIT's entry into force] in

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<sup>33</sup> *Walter Bau AG v. Thailand*, Award (*ad hoc* – UNCITRAL Arbitration Rules, tribunal members: Ian Barker, Marc Lalonde, Jayavadah Bunnag) (1 July 2009) (CL-195) (hereinafter “*Walter Bau*”).

<sup>34</sup> *Id.*, paras. 2.37, 5.14.

<sup>35</sup> *Id.*, para. 6.7.

<sup>36</sup> *Id.*, para. 9.88.

<sup>37</sup> *Id.*, para. 12.26.

<sup>38</sup> *Id.*, para. 12.27; *see also* para. 12.36 (“The failure to increase tolls was the culmination of a series of wrongful acts of the Respondent which converged when the Respondent decreased the tolls.”).

October 2004; but it continued in existence after that date, thus amounting to a breach of a Treaty obligation in force at the time when it occurred.”<sup>39</sup>

26. The *Walter Bau* tribunal relied on the analytical construct articulated by the tribunal in *Société Générale v. Dominican Republic*.<sup>40</sup> That tribunal explained the circumstances under which acts or omissions pre-dating a treaty’s entry into force may be taken into account as continuing or composite acts or omissions, but did not find a need to classify such acts or omissions one way or the other for purposes of establishing its jurisdiction *ratione temporis*.<sup>41</sup>

27. The tribunal in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* made a similar finding, grouping together all “conduct, acts or omissions” pre-dating a treaty’s entry into force which “may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date.”<sup>42</sup> As relevant here, that tribunal found that such earlier conduct, acts, or omissions should be taken into account in a jurisdictional analysis,

particularly if . . . [they] could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place, either because as the Agreement was not in force they could not be considered within the framework of a possible claim under its provisions or because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with the investment, the key point of which led to violations of the Agreement following its entry into force.<sup>43</sup>

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<sup>39</sup> *Id.*, para. 12.37.

<sup>40</sup> *Id.*, paras. 9.84–9.85 (tribunal finding it should follow principles articulated by tribunal in *Société Générale* and quoting at length from paragraphs 87 to 92 of that tribunal’s award).

<sup>41</sup> See *Société Générale*, para. 94. Also recognizing the difficulty in classifying conduct as continuing or composite, the World Trade Organization Appellate Body in its recent report in *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* observed that “almost any ‘situation’ can be said to have arisen from one or more past ‘acts’ or ‘facts’, including ones that have been ‘completed’. Moreover, it would seem that a ‘situation’ may consist of more than a distinct set of repeated acts, such as the use of subsidies under a scheme.” WT/DS316/AB/R, para. 679, adopted 1 June 2011 (CL-196). It made that observation in the course of finding that subsidies granted before the WTO Subsidies Agreement entered into force still may come within the treaty’s temporal scope if a situation continues to exist after entry into force in which the subsidies are being used to cause adverse effects to the interests of other WTO Members. *Id.*, para. 686.

<sup>42</sup> *Técnicas Medioambientales Tecmed v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (29 May 2003), para. 68 (CL- 197).

<sup>43</sup> *Id.*, para. 68; see also *id.*, para. 62, n.26 (“Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent

(continued...)

28. The relationship between conduct, acts, and omissions pre-dating and post-dating CAFTA's becoming applicable to Pac Rim Cayman is precisely as described by the *Tecmed* tribunal. The measure at issue is a failure to act that began before entry into force and continued after entry into force (much like the prolonged nonfeasance at issue in *Walter Bau*). The "significance and effects" of Respondent's failure to act on PRES's mining-related applications "could not reasonably have been fully assessed by the Claimant" before entry into force. It was only with the post-entry-into-force context provided by the continuing course of conduct consisting of encouraging statements by senior officials followed by inaction,<sup>44</sup> coupled with the President's confirmation of the ban's existence,<sup>45</sup> that Claimant was able to appreciate that the failure to act constituted a breach of CAFTA obligations giving rise to the damages at issue.

29. Respondent's failure to act may be considered either a continuing measure or a composite measure. It is continuing in the sense that it may be seen as consisting of a single course of conduct that has persisted without interruption throughout the relevant period. The conduct after entry into force that breached CAFTA obligations and caused damage to Claimant is Respondent's nonfeasance, which had its origins before entry into force. It is the continuation of that nonfeasance over a period of more than four years (as of the date Claimant filed its notice of arbitration), coupled with the confirmation by El Salvador's head of State that the nonfeasance represents the application of a distinct practice, that gives the conduct its breaching quality.

30. At the same time, it is possible to view the failure to act as a composite measure. A composite measure is a series of acts and omissions which, in the aggregate, constitute a breach of relevant obligations (even though individual acts or omissions on their own may not constitute such a breach).<sup>46</sup> The *Société Générale* tribunal described "denial of justice as a result of undue

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(continued...)

damage is caused." (citing J. Crawford, *The International Law Commissions Articles on State Responsibility* at 136-137, 143 (2002)).

<sup>44</sup> See, e.g., Counter-Memorial, paras. 129, 148-150; Rejoinder, paras. 106-108; Witness Statement of Thomas C. Shrake, dated 31 December 2010 (hereinafter "**Shrake Statement**"), paras. 101, 118-120; Hearing Tr., pp. 424:13-426:3; 427:6-432:7, 478:8-19, 481:11-482:7 (testimony of Thomas Shrake).

<sup>45</sup> See *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 Mar. 2008) (C-1); "Saca afirma que no concederá permisos de extracción minera," CadenaGlobal.com (15 July 2008) (C-61); see also "No to mining: Saca closes the doors to the exploitation of metals," PRENSA GRÁFICA (26 Feb. 2009) (C-4).

<sup>46</sup> See *Société Générale*, para. 91 (RL-78)

delays in judging a case by a municipal court” as an example of a composite act.<sup>47</sup> In this sense, while Respondent’s original failure to act by the statutorily prescribed deadline did not constitute CAFTA–breaching conduct, that original omission taken together with subsequent acts and omissions constitute CAFTA–breaching conduct when viewed in the aggregate. Those subsequent acts and omissions include repeated instances (including after CAFTA’s entry into force) of Salvadoran officials indicating that the requested permit and license were forthcoming, followed by inaction.<sup>48</sup> They also include the aforementioned statements by El Salvador’s Presidents (also after entry into force) affirming the existence of a ban.

31. Whichever way the Tribunal views the measure at issue, the critical point is that the nonfeasance on which Pac Rim Cayman’s claims are based was occurring after CAFTA became applicable to Pac Rim Cayman.<sup>49</sup> Whether that conduct is seen as a continuation of prior conduct or an accumulation of acts and omissions converging towards the express affirmation of the existence of a ban and thus acquiring its breaching quality at that moment, the conduct unquestionably falls within the Tribunal’s temporal jurisdiction.

**D. Claimant Has Consistently Identified The *De Facto* Mining Ban As The Measure At Issue**

32. At several points during the Hearing, Respondent attempted to show that the *de facto* mining ban was not actually the measure Claimant put “at issue” in its notice of intent and notice of arbitration. Respondent asserted that Pac Rim Cayman’s complaint really is based on omissions – the failure to act on permit and license applications in a timely manner – that were “exhausted” prior to CAFTA’s becoming applicable to Claimant.<sup>50</sup> That argument relies on a

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<sup>47</sup> *Id.*

<sup>48</sup> *See, e.g.*, Counter-Memorial, paras. 129, 148-150; Rejoinder, paras. 106-108; Shrake Statement, paras. 101, 118-120; Hearing Tr., pp. 424:13-426:3, 427:6-432:7, 478:8-19, 481:11- 482:7 (testimony of Thomas Shrake).

<sup>49</sup> This situation is very different, for example, from the situation described in the recent award in *Paushok v. Mongolia*. There, the investor’s claims were based in part on Mongolia’s conduct in the negotiation over a “stability agreement” which occurred in 2001 – almost five years before the treaty at issue (the Russia-Mongolia BIT) entered into force – and was not concluded, allegedly leaving the investor liable for a later-enacted tax. *See Paushok v. Mongolia*, Award on Jurisdiction and Liability, (28 Apr. 2011) (*ad hoc*- UNCITRAL Arbitration Rules), para. 401 (CL-198). In finding it lacked jurisdiction *ratione temporis*, the tribunal found the negotiations were neither a continuing act nor a composite act. Unlike the continuing failure to act at issue here, the negotiations “were a discrete event in the course of the relations between [the investor] and Respondent which lasted for a few months during 2001.” *Id.*, para. 498. By contrast, El Salvador’s application of its *de facto* mining ban to Claimant’s investments is not a “discrete event,” but a protracted situation of uncertain duration.

<sup>50</sup> *See, e.g.*, Objections, para. 317; Reply, para. 193; Hearing Tr., pp. 18:3-7; 24:10-15; 25:11-44:17; 112:1-9.

selective, out-of-context reading of Claimant’s submissions. In this section, we expand on our previous demonstration that Claimant consistently has identified the *de facto* mining ban as the measure at issue.<sup>51</sup>

33. Respondent’s argument focuses on isolated passages in Claimant’s notice of intent.<sup>52</sup> When read as a whole, however, that document clearly identifies Respondent’s practice of withholding permits and licenses for metallic mining as the measure at issue. Thus, in introducing the factual bases for the claim, Claimant described the measure at issue as “*failing to act* upon the Enterprises’ applications for a mining exploitation concession and for various environmental permits, as well as El Salvador’s failure to protect the Investor’s investments.”<sup>53</sup>

34. In describing the history of that conduct, Claimant explained that in late 2005, MARN “*began* delaying its responses to [PRES’ and DOEX’s] applications for environmental permits without explanation” and “*began* to arbitrarily change or add new requirements to the established legal process for obtaining such permits.”<sup>54</sup> This wording plainly denotes a continuing course of conduct, as opposed to a discrete act that begins and ends at a particular moment in time.

35. Claimant then went on to state that as of “[t]oday . . . the Government has failed to approve either of PRES’s *pending* applications,”<sup>55</sup> again making clear that the complaint is based on conduct continuing into the present. This framing of the issue belies Respondent’s suggestion that the complaint is based on a single omission that occurred and was “exhausted” in the past, before CAFTA’s entry into force. To similar effect is Claimant’s explanation of PRES’s interaction with MARN over the years, during which MARN identified various concerns, each of

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<sup>51</sup> See, e.g., Counter-Memorial, paras. 194-202; Rejoinder, paras. 233-239; Hearing Tr., pp. 721:10-723:13. In this section, we also address the Tribunal’s question posed at pages 550:9 to 551:2 of the Hearing transcript.

<sup>52</sup> See, e.g., Hearing Tr., pp. 25:11–26:5 (focusing on paragraph 17 of Notice of Intent); see also *id.*, 32:16-33:17.

<sup>53</sup> Claimant’s notice of intent to submit a claim to arbitration under Chapter Ten of CAFTA, dated 9 December 2008, para. 5 (emphasis added).

<sup>54</sup> *Id.*, para. 18 (emphasis added).

<sup>55</sup> *Id.*, para. 21 (emphasis added).

which PRES diligently addressed.<sup>56</sup> Claimant then stated that despite this engagement, “El Salvador’s total *inaction* . . . *has continued* without justification.”<sup>57</sup>

36. In concluding its recitation of the factual background, Claimant emphasized that “the Government has not actually denied any of the Enterprises’ applications. . . . Instead, it has simply failed to act upon these applications. . . . This conduct constitutes a gross abuse of administrative discretion. . . .”<sup>58</sup> This summation underscores that Pac Rim Cayman’s complaint is about a continuing course of conduct, not a single, isolated act or omission.

37. Finally, in setting forth the legal bases for its claims, Claimant’s notice of intent repeated that “El Salvador has refused *and continues to refuse* to allow the mining activities that are permitted by its own legislation.”<sup>59</sup>

38. While the foregoing statements do not use the label “*de facto* mining ban,” they make clear that the measure at issue is the continuing practice described by that label. The same is true of Claimant’s notice of arbitration.

39. In the introduction to the notice of arbitration, Claimant stated explicitly that the course of conduct at issue culminated in President Saca’s public confirmation of the mining ban in March 2008:

[I]n March 2008, President Saca abruptly and without any justification announced that he opposed granting any new mining permits. This pronouncement followed an extended period during which the Government had simply ceased to communicate with the Enterprises or to act upon their regulatory filings. Without Government action, the Enterprises could not exercise their vested rights . . . to proceed to extraction. . . . *[O]nly after President Saca’s announcement in March 2008 did they understand that they had become the target of something other than bureaucratic delay or incompetence.*<sup>60</sup>

40. The factual discussion here is consistent with the description in the Notice of Intent, albeit a bit more detailed. Claimant stated from the outset that its claims are based on

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<sup>56</sup> *Id.*, paras. 22-23, 31.

<sup>57</sup> *Id.*, para. 32 (emphasis added).

<sup>58</sup> *Id.*, para. 34.

<sup>59</sup> *Id.*, para. 36 (emphasis added).

<sup>60</sup> Claimant’s Notice of Arbitration, dated 30 April 2009 (hereinafter “NOA”), para. 9 (emphasis added).

Respondent's "failing to act upon the Enterprises' applications for a mining exploitation concession and for various environmental permits."<sup>61</sup>

41. In discussing the factual background, Claimant again stated that the developments that made it apparent that Respondent's continuing failure to act constituted a breach of CAFTA obligations occurred starting in 2008, with President Saca's repeated public announcements of the mining ban.<sup>62</sup> Claimant then explained that "as of the time of this Notice, the Government's conduct has impeded the ability of the Enterprises to conduct mining activities and benefit from their investments,"<sup>63</sup> again reinforcing the point that the complaint is based on a course of conduct continuing to the present.

42. Explaining the legal bases for its claims, Claimant stated that President Saca's March 2008 "public declaration against mining" "cast new light on the extraordinary delays, the administrative irregularities, and ultimately, the silence, that PRC had endured from MINEC and MARN over the [preceding] months."<sup>64</sup> In other words, the course of conduct that had begun before CAFTA became applicable to Claimant and continued afterwards converged towards an event, an announcement by the head of State, that put the conduct in context and established it as a breach of CAFTA obligations.

43. In sum, not only is the *de facto* mining ban a "measure" within the meaning of CAFTA, and not only does the ban constitute a situation that has continued in existence since CAFTA became applicable to Claimant, but Claimant consistently has identified the ban as the measure at issue. It did not, as Respondent alleges, change the measure at issue upon reading Respondent's objections to jurisdiction. For the foregoing reasons, as well as those set forth in Claimant's previous written and oral submissions, the Tribunal should reject Respondent's objections to the Tribunal's jurisdiction *ratione temporis*.

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<sup>61</sup> *Id.*, para. 26.

<sup>62</sup> *Id.*, paras. 74-77.

<sup>63</sup> *Id.*, para. 79; *see also*, para. 81 (recalling that Respondent has not actually denied applications and that complaint is based on the fact that Respondent "has unlawfully failed to act upon these applications"), para. 103 (stating that complaint is based on "conduct" Claimant seeks to have reversed "immediately").

<sup>64</sup> *Id.*, para. 107.

### **III. RESPONDENT HAS FAILED TO ESTABLISH ANY OF THE CONDITIONS FOR INVOKING DENIAL OF BENEFITS UNDER CAFTA ARTICLE 10.12.2**

44. Respondent expressly acknowledges that denial of benefits under CAFTA Article 10.12.2 would be an “exceptional step.”<sup>65</sup> As such, the provisions of Article 10.12.2 should be construed against stripping benefits from an investor presumptively entitled to those protections, especially where, as here, Respondent purposefully failed to provide notice of its intent to deny benefits until Claimant had accepted its standing offer to arbitrate and the arbitration proceedings had been under way for over 15 months.<sup>66</sup>

45. In order to properly invoke Article 10.12.2 and deny CAFTA’s protections to Claimant, Respondent must establish that the three conditions imposed by CAFTA are satisfied. After multiple written pleadings and a three-day hearing, Respondent has failed to establish any of these three conditions. First, as a prerequisite for invoking Article 10.12.2, Respondent must prove that it gave timely notice of its invocation of the provision. As discussed at the Hearing as well as in Claimant’s written submissions, Respondent failed to meet this prerequisite. As a result, its attempt, well after the commencement of this arbitration, to deny to Claimant the benefits of Respondent’s consent to resolve investment disputes through arbitration is unavailing. Even if that were not the case, Respondent has failed to rebut Claimant’s demonstration that it has substantial business activities in the United States and that it is owned and controlled by persons of the United States.

#### **A. Respondent Failed To Provide Timely Notice Of Its Proposed Denial Of Benefits And Is Thus Precluded From Denying Benefits under Article 10.12.2**

##### ***1. Respondent’s late notice***

46. Respondent’s attempt to deny CAFTA benefits to Claimant must fail because Respondent did not comply with the procedural requirements of Article 10.12.2, which obligated Respondent to provide the United States notice of its intent to deny benefits to Claimant and an opportunity

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<sup>65</sup> Letter from Vice Minister Mario Roger Hernandez to Assistant USTR for the Americas Everett Eissenstat, (1 Mar. 2010) at 1 (**R-111**).

<sup>66</sup> Respondent has conceded that it “has the burden of proof with respect to the factual and legal basis of its objections that are not strictly tied to the requirements for jurisdiction, like Abuse of Process and Denial of Benefits.” Reply, para. 14. See *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, (16 Sep. 2003), para. 15.7 (**CL-193**).

to engage in State-to-State consultations.<sup>67</sup> Respondent waited until March 2010 – 15 months after Pac Rim Cayman provided El Salvador with its notice of intent and over 27 months after Respondent’s counsel claims to have been on notice of Claimant’s alleged Canadian nationality and intention to submit its claims to arbitration<sup>68</sup> – to notify the United States of its intent to exercise its right to deny benefits to Pac Rim Cayman. Respondent’s notice to the United States came long after any meaningful State-to-State consultation of the kind envisaged by Article 10.12.2 could have been held. It was untimely and is therefore ineffective.

47. Respondent has been forced to admit that it could have provided the United States with notice as early as June 2008 (following the meeting among the President of El Salvador, the U.S. Ambassador, and the CEO of Pacific Rim Mining Corp.), yet it has offered no explanation as to why it chose to wait so long before it provided the requisite notice.<sup>69</sup> If, as Respondent asserts, “El Salvador always believed it was dealing with a Canadian investor, from when the investment was made until the present arbitration was filed,”<sup>70</sup> then this delay is particularly baffling. Indeed, if the testimony offered by Respondent’s counsel is to be believed, Respondent’s counsel assumed (erroneously) that El Salvador could deny CAFTA benefits to Claimant as early as December 2007, 27 months prior to its notice to the United States.<sup>71</sup>

48. Regardless of the reasons for Respondent’s delay, however, CAFTA requires that a Party provide notice of its intention to deny benefits before the filing of a request for arbitration.<sup>72</sup> In

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<sup>67</sup> For reasons explained in its written pleadings and at the hearing, Claimant also maintains that Respondent was required to provide notice to Claimant. Counter-Memorial, paras. 355-368 (and citations therein); Rejoinder, paras. 210-214 (and citations therein). It is undisputed that CAFTA contains no express language requiring such notice. *See* Counter-Memorial, paras. 355-368 (and citations therein); *cf.* Non-Disputing Party Submission of the United States, dated 20 May 2011 (hereinafter “**U.S. Submission**”); Non-Disputing Party Submission of Costa Rica, dated 23 May 2011 (hereinafter “**C.R. Submission**”), para. 4. However, tribunals construing the denial of benefits provision of the Energy Charter Treaty, which also is silent on the question of advance notice to claimants, have uniformly found that such notice is required in order to avoid placing unfair burdens on investors. Counter-Memorial, paras. 358-363 (and citations therein); Rejoinder, para. 214 (and citations therein). The same considerations apply here.

<sup>68</sup> Hearing Tr., pp. 318:14-16 (Luis Parada testifying that as of December 2007, “I was aware that there was a mining dispute in the brewing. I was aware that the company was Canadian.”), 364:7-15 (Parada testifying that in July 2008 he “confirmed that [Pacific Rim] was not U.S., that it was Canadian”).

<sup>69</sup> Hearing Tr., p. 101:16-19.

<sup>70</sup> Objections, para. 417.

<sup>71</sup> Hearing Tr., pp. 318:14-16, 364:7-15 (testimony of Luis Parada).

<sup>72</sup> *See* Counter-Memorial, para. 341-354; Hearing Tr., p. 243:1-19.

contrast to almost every one of the 44 other U.S. investment treaties and free trade agreements concluded since the North American Free Trade Agreement entered into force in 1994, CAFTA makes the invocation of denial of benefits “subject to” compliance with two other CAFTA articles – one on the provision of notice to other CAFTA Parties of measures that may affect CAFTA rights (Article 18.3), and one on formal State-to-State consultations (Article 20.4).<sup>73</sup> As denial of an investor’s CAFTA benefits is made “subject to” these other obligations, compliance with those obligations must precede an actual denial of benefits. For reasons discussed in our previous submissions, when understood in context, it is clear that compliance with the antecedent obligations must occur *before* claims are submitted to arbitration.<sup>74</sup>

49. Respondent could certainly have provided the notice required by CAFTA Article 18.3 after receiving Claimant’s notice of intent in December 2008, but before Claimant submitted its notice of arbitration at the end of April 2009. Contrary to Respondent’s suggestion, it was not necessary for Respondent to engage in a lengthy investigation to determine whether all the criteria for denial of benefits were definitively established before it provided such notice.<sup>75</sup> On the contrary, the CAFTA notice and consultation process exists precisely so that CAFTA Parties may consult with one another over the merits of a proposed measure, such as a proposed denial of benefits to an investor of another Party.<sup>76</sup> Moreover, if, as Respondent claims, it believed all

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<sup>73</sup> See Claimant’s Opening Statement-Denial of Benefits, Slide 4.

<sup>74</sup> See Counter-Memorial, paras. 341-354; Rejoinder, paras. 201-09.

<sup>75</sup> See Hearing Tr., pp. 647:20-648:6. See also Objections, para. 251. Both the United States and Costa Rica echo El Salvador’s assertions that requiring notice before arbitration has begun would somehow impose a Herculean task on host states. See U.S. Submission, paras. 6-7; C.R. Submission, para. 13. In reality, under the framework of Article 10.12.2, it would be sufficient for a host state to make preliminary investigations to support a good faith belief that it may be able to deny benefits in order to notify the interested CAFTA Party so that that Party can assist in clarifying the facts regarding its national. By the same token, there is nothing about requiring notice before an arbitration has begun that would violate the principle of *effet utile*, see C.R. Submission, para. 10, since if the requirements for denying benefits are met, the CAFTA Party is free to do so. Furthermore, tribunals analyzing the denial of benefits provision of the ECT have consistently rejected arguments that requiring notice before a denial may be effective imposes an unacceptable burden on states. See e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), para. 157 (RL-66) (confirming notice to investors must occur before denial may take effect, and proposing various means by which such notice may be provided without imposing undue burden on states); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009), paras. 452-456 (RL-72) (rejecting respondent’s argument of undue burden and requiring notice to investor before right can be exercised).

<sup>76</sup> See Counter-Memorial, paras. 341-354; Rejoinder, paras. 197-209; see also, Reply, para. 161 (Respondent acknowledging that “the claimed home State has the right to request consultations and can use the mechanism to show the denying State that the investor actually does have substantial business activities in its territory.”).

along that it was dealing with a Canadian company,<sup>77</sup> it surely knew as soon as it received Claimant's notice of intent that it might wish to invoke Article 10.12.2.<sup>78</sup>

50. In attempting to excuse its untimely provision of notice to the United States, Respondent's counsel referred to the fact that the notice requirement in Article 18.3 applies "[t]o the maximum extent possible." Respondent seems to suggest that this language means that providing notice is somehow optional.<sup>79</sup> But Respondent provides no support in either the text or context of CAFTA to support this interpretation. This is hardly surprising, since the plain language of the clause "to the maximum extent possible" means just what it says, *i.e.*, that failure to provide notice will not result in a breach of CAFTA in circumstances where it is actually impossible to provide such notice, as opposed to merely inconvenient from a litigation strategy or other standpoint. An example of such impossibility might include an emergency measure adopted to deal with the impact of a natural disaster, where the urgent need to put the measure in place precludes prior notice and consultation with other CAFTA Parties. Another example would be a situation in which the legislature unexpectedly includes an amendment in a statute without prior consultation with the executive branch authorities responsible for providing notice to CAFTA Parties under Article 18.3.<sup>80</sup> By contrast, nothing in the circumstances of Respondent's dealings with Claimant limited the possibility of its providing notice to the United States of its proposed denial of benefits to Claimant. In fact, quite the contrary.

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<sup>77</sup> See Objections, para. 417.

<sup>78</sup> See Counter-Memorial, para. 354.

<sup>79</sup> Hearing Tr., p. 98:16-20.

<sup>80</sup> By contrast, the United States-Korea FTA (which has been concluded but has not yet entered into force) requires that notice be given prior to a denial of benefits "to the extent practicable," the interpretation that Respondent urges here for the phrase "to the maximum extent possible." See U.S.-Korea FTA, Art. 11.11.2 (concluded 30 June 2007 but not yet entered into force) (CL-88). Clearly, however, the two phrases are not synonymous. "To the extent practicable" imposes an obligation to make one's best efforts to give notice, whereas "to the maximum extent possible" (followed by the mandatory verb "shall") requires a state to do everything in its power to provide advance notice. The state is excused only when such notice is genuinely not possible. Other points of contrast between the denial of benefits provision in CAFTA and the corresponding provision in the U.S.-Korea FTA serve to underscore the nature of the procedural preconditions for invoking denial of benefits under CAFTA. For example, the U.S.-Korea FTA requires the denying Party to provide notice to the other Party only if it "knows" that the substantive conditions (*i.e.*, lack of substantial business activities in home State and ownership or control by persons of a non-Party or of the denying Party) are met. This is a higher threshold than CAFTA, which contains no such knowledge requirement. Moreover, while the U.S.-Korea FTA denial of benefits provision contains a notice and consultation clause, it does not cross-reference the notice and consultation provisions set forth elsewhere in the agreement, indicating a lower degree of formality than is envisaged in the corresponding CAFTA provision, which of course does cross-reference those provisions.

51. Similarly, Respondent referred to the fact that the notice obligation under CAFTA Article 18.3 pertains to “proposed or actual measures,” as if to suggest that Respondent had the choice to notify the United States of its denial of benefits to Claimant at the point when the denial was “proposed,” or it could wait until the denial became “actual.”<sup>81</sup> That suggestion is not consistent with the ordinary meaning of the text of Article 18.3 in context. A Party’s obligation is to provide notice of any measure that might affect another Party’s interests under CAFTA – such as a denial of benefits to one of that Party’s investors – whether that measure is proposed or actual. As explained in the preceding paragraph, a Party may not dispense with notice unless it is actually impossible to provide such notice before the implementation of the measure. Similarly, a Party may not wait until a proposed measure becomes actual in order to provide notice. The obligation is to provide notice of a proposed measure or, if it was impossible to provide such notice before the measure was implemented, to provide notice as soon as it becomes possible to do so. In fact, in the denial of benefits context, waiting until the measure has become actual to provide notice to the investor’s home Party would undermine the separate obligation to engage in State-to-State consultations regarding the measure. As we will discuss now, State-to-State consultations are of little if any utility if, as appears to have been the case when Respondent sent its 1 March 2010 letter to an Assistant U.S. Trade Representative, the denying Party has “made up its mind” and committed to its position. Respondent’s proposed interpretation of its obligation under Article 18.3 (as referenced in Article 10.12.2) violates the principle of *effet utile*.

**2. *Understood in the context of ICSID Article 27(1), it is clear that a denying Party’s notice under CAFTA Article 10.12.2 must be provided in time for State-to-State consultations to occur before claims are submitted to arbitration***

52. When asked by the Tribunal why it waited for five months to deny benefits after its March 2010 notice to the United States, Respondent replied, “the answer is because this really is the first denial of benefits that we’re aware of under CAFTA or NAFTA. And because we take seriously the opportunity of the United States Government or any other affected Party to engage in State-to-State consultation.”<sup>82</sup> If El Salvador truly wanted to provide the United States with an

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<sup>81</sup> Hearing Tr., p. 99:4-9.

<sup>82</sup> *Id.*, p. 647:6-11.

opportunity to engage in consultations, it would not have waited until the arbitration was well under way, at which point the United States was bound by its obligation under Article 27 of the ICSID Convention not to give diplomatic protection to Claimant.<sup>83</sup> By contrast, by providing its notice when it did, El Salvador put the United States in an untenable position. It could do the cautious thing and refrain from exercising its right under CAFTA Article 20.4 to engage in State-to-State consultations, thus avoiding any possibility of breaching its obligation not to give diplomatic protection to a claimant in ICSID arbitration. But, that would prejudice its own interests as well as those of Claimant. Alternatively, the United States could seek consultations under CAFTA Article 20.4 – a formal process under CAFTA’s dispute settlement chapter requiring a written request, and potentially involving participation by other CAFTA Parties, exchanges of information and participation of expert personnel. But, that would risk breaching the obligation not to give diplomatic protection, particularly if the United States were inclined to engage in robust advocacy in defense of the interests of a U.S. investor. At the Hearing, Respondent’s counsel made an unusual suggestion in this vein:

[I]f the United States of America wishes to initiate such consultations with El Salvador with respect to the invocation of the denial of benefits, El Salvador would not have any objection to those consultations on the basis that they would amount to diplomatic protection for purposes of Article 27 of the ICSID Convention, and El Salvador expressly waives any right it might have to object to those consultations on that ground.<sup>84</sup>

53. As Claimant pointed out at the Hearing, the ICSID Convention is a multilateral treaty.<sup>85</sup> The obligations of the United States under that treaty cannot be waived by one Party stating on an *ad hoc* basis that it “would not have any objection” to the United States engaging in conduct that could be seen as giving diplomatic protection, in contravention of the treaty. In any event, the United States, in its non-disputing Party submission, was notably silent in response to El Salvador’s invitation.

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<sup>83</sup> See Hearing Tr., pp. 731:8-732:5; Counter-Memorial, paras. 345-54; Rejoinder, para. 201.

<sup>84</sup> Hearing Tr., pp. 649:20-650:7.

<sup>85</sup> *Id.*, p. 731:1-15.

54. Even if such a unilateral waiver were effective, that would not change the significance of Article 27 of the ICSID Convention as context for interpreting the notice and consultation conditions for invoking the denial of benefits under Article 10.12.2 of CAFTA. That context counsels against interpreting Article 10.12.2 as permitting a Party to deny CAFTA's benefits to an investor after the investor has submitted claims to arbitration. Article 10.12.2 requires a denying Party to provide notice to the investor's home Party of its proposed denial of benefits and to give that Party an opportunity to engage in consultations over the proposal. It would be an absurd result if that notice could be given at a moment when, due to its ICSID obligation to avoid giving diplomatic protection, the home Party was constrained from engaging in the very consultations CAFTA envisages.

55. The non-disputing Party submissions by the United States and Costa Rica on the interpretation of CAFTA were silent on the significance of the ICSID Convention Article 27 obligation not to give diplomatic protection as context. However, the United States has laid out its policy concerning intervention in ongoing investment disputes in the section of the Foreign Affairs Manual ("FAM") devoted to this topic.<sup>86</sup>

56. In fact, careful examination of the FAM reveals that the U.S. policy on handling the foreign investment disputes of U.S. nationals overseas closely tracks the distinction made in ICSID Articles 27(1) and 27(2) between diplomatic protection and espousal, on the one hand, and informal communications meant to facilitate dispute resolution on the other. Among other things, the FAM prohibits United States officials from taking a position on the merits of a dispute until the requirements for espousal have been met, including the exhaustion of local remedies (which expressly includes international arbitration under a BIT or other international instrument where applicable).<sup>87</sup> Unless and until that time, "the scope of appropriate USG [U.S. Government] assistance is generally confined to consular services aimed at helping the United States citizen/national navigate the host country legal system."<sup>88</sup> In addition, the United States

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<sup>86</sup> See U.S. Department of State Foreign Affairs Manual, Volume 7 – Consular Services, Part 671, Assistance to Citizens Involved in Commercial, Investment and Other Business Related Disputes Abroad (C-95). As its name suggests, the FAM is a manual to be used by U.S. diplomatic personnel in conducting their duties overseas. As such, it provides guidance on how to carry out those duties consistent with U.S. foreign policy.

<sup>87</sup> See *id.*, paras. (g)-(i).

<sup>88</sup> *Id.*, para. (j).

“may in its discretion decide to make diplomatic representations to the host government in order to encourage expeditious resolution of the dispute.”<sup>89</sup> But there is a clear limit on such representations, as follows:

In all such cases, however, posts [*i.e.*, embassies and consulates] should be clear both with the host government and with the investor that such representations do not reflect a decision on the part of the USG that the claim is valid, but rather reflect our interest in having the claim amicably and expeditiously resolved.<sup>90</sup>

57. In other words, United States government officials *must refrain from taking any position on the merits of the dispute while it is pending*. Indeed, immediately following this admonition in the FAM is a list of acceptable messages that may be communicated to the investor and the host government, all of which clearly fall within the scope of Article 27(2) of the ICSID Convention, namely, informal diplomatic representations as to the general desirability of a resolution to the dispute.<sup>91</sup> For further clarification in case of doubt, the FAM also provides a list of prohibited interventions. Among them, notably, are “[a]rgu[ing] a legal position on behalf of a United States citizen/national,” and “[a]ssert[ing] a position on disputed facts.”<sup>92</sup>

58. Yet it is precisely arguments on the law and assertions on disputed facts that the State-to-State consultation provision of Article 20.4 (as cross-referenced in Article 10.12.2) envisions. The very purpose of notice and consultation under Article 10.12.2 is to give the States Parties the opportunity to exchange views on both the facts and the law pertaining to the dispute.<sup>93</sup> It is simply not credible that the United States would have agreed to a provision that would require precisely the kind of intervention in an ongoing dispute that its longstanding policy prohibits. Moreover, both the policy outlined in the FAM and the distinction made in Article 27 of the

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<sup>89</sup> *Id.*, para. (k).

<sup>90</sup> *Id.*, para. (l).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, para. (m), *see also id.*, para. (s) (explaining that U.S. government intervention where a dispute has been submitted to arbitration “might give rise to arguments that USG involvement has compromised the independence of a particular arbitration, which could jeopardize the interests of the United States citizen/national party”).

<sup>93</sup> Counter-Memorial, paras. 341-354; Rejoinder, paras. 197-209. In its non-disputing Party submission, the United States asserts that there is “a long-standing U.S. policy to include a denial of benefits provision in investment agreements.” U.S. Submission, para. 3. While this statement is true, it misses the point. As we explained at the Hearing, CAFTA’s denial of benefits provision is practically unique among such provisions post-dating NAFTA, due to its inclusion of a notice and consultation condition. *See* Hearing Tr., pp. 241:12-243:19.

ICSID Convention simply codify longstanding principles of customary international law relating to diplomatic protection and espousal versus consular assistance to overseas nationals. For all of these reasons, Respondent's reading of the notice and consultation requirement would render it ineffective as a practical matter, because CAFTA Parties would be extremely reluctant to engage in the kind of consultations Article 10.12.2 seeks to enable.<sup>94</sup>

59. Indeed, for this very reason, if Respondent's interpretation were correct, then for tactical reasons host States would deliberately wait until after an investor had submitted claims to arbitration to invoke denial of benefits, just as Respondent did in this case. Through this delay, a host State would be able to eliminate the prospects of objection from the investor's State and the difficulty that might pose to the defense of actions that harmed the investor's interests.

60. Finally, Respondent offers no rationale based in the text or context of CAFTA for its assertion that the proper time to provide notice is at the jurisdictional phase of a proceeding.<sup>95</sup> Indeed, as the Tribunal's questions indicated, if one follows Respondent's logic there is no reason why a respondent could not wait to deny benefits until after an award has been rendered.<sup>96</sup> Clearly, this cannot be a proper interpretation of CAFTA Article 10.12.2.

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<sup>94</sup> At the Hearing, there was some discussion of whether participation in consultations of the kind contemplated by CAFTA Article 20.4 (as cross-referenced in Article 10.12.2) by an investor's home State is different from the giving of diplomatic protection prohibited by ICSID Convention Article 27(1). See Hearing Tr., pp. 732:11–735:3. As we pointed out, the concept of "diplomatic protection" is distinct from the concept of "espousal" and certainly would encompass the kind of advocacy that consultations under CAFTA Article 20.4 could entail. As illustrations of the breadth of "diplomatic protection" as that term is used in ICSID Convention Article 27(1), we pointed to the care that was taken in limiting the intervention by the investor's home State (the Netherlands) in the *Aguas del Tunari* case. See Hearing Tr., pp. 248:12–249:19; Claimant's Opening Statement–Denial of Benefits, Slide 10; Counter-Memorial, paras. 351-352; Rejoinder, para. 207. We also pointed to the situation that arose in the case of *Duke Energy v. Peru*, where the respondent complained that merely by accepting for consideration claimant's petition to the U.S. Trade Representative for withdrawal of respondent's trade preferences, the obligations of the United States under ICSID Article 27(1) would be implicated. See *Duke Energy International Peru Investments No 1 Limited v. Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, (1 Feb. 2006), paras. 15-18 (CL-199); Hearing Tr., pp. 734:7–735:3.

<sup>95</sup> See Hearing Tr., p. 646:14-20.

<sup>96</sup> *Id.*, pp. 554:17-555:10. In fact, Costa Rica maintains that there is absolutely no temporal limit whatsoever to a CAFTA Party's ability to invoke denial of benefits, regardless of the existence of an arbitration. See CR Submission, para. 6. Instead, it argues that such an invocation may end up being ineffective if it is made, for example, after an award has been rendered. *Id.*, para. 7. This interpretation, however, is simply not logical. If a Party has the right to invoke the denial of benefits provision, but the invocation will be void *ab initio*, then effectively it does not have such a right. The fact that El Salvador and Costa Rica have suggested two different points in time beyond which a denial of benefits can no longer be made – *i.e.*, when a respondent makes jurisdictional objections or anytime up to the rendering of the final award, respectively – only serves to illustrate the lack of any principled interpretation of CAFTA Article 10.12.2 underlying their respective positions. Both arguments essentially subject other Parties, the investor, and potentially the tribunal, to the whim of the respondent

(continued...)

3. ***ICSID Article 25(1) prevents Respondent from denying benefits to Claimant after claims have been submitted to arbitration***

61. As discussed at the Hearing, Respondent's attempt to deny benefits to Claimant would also contravene ICSID Convention Article 25(1), which provides that once a Contracting State has consented to ICSID arbitration that consent is irrevocable and may not be unilaterally withdrawn.<sup>97</sup> However, Respondent's interpretation of CAFTA Article 10.12.2 would allow a respondent state to withdraw its consent after claims had been submitted to arbitration.<sup>98</sup> As Claimant has explained in its previous pleadings, a denial of benefits in the midst of a pending arbitration is fundamentally different from other jurisdictional objections, which involve an analysis of the salient facts as they existed at the moment of breach. Respondent's interpretation, by contrast, entails a respondent state affirmatively creating *new* factual circumstances that did not previously exist – that is, the exercise of a prerogative to deny benefits which was merely inchoate at the time of breach – which actually quash the jurisdiction of a tribunal to hear the pending claims *after* both parties have consented to that jurisdiction.<sup>99</sup> Such an interpretation would risk putting the respondent state squarely in breach of Article 25(1), a point Respondent failed to rebut and neither the United States nor Costa Rica addressed in their respective non-disputing Party submissions.

62. For all of these reasons, Respondent's contention that it was entitled to wait to provide notice of its intent to deny benefits until well after this arbitration was underway must be rejected.

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(continued...)

state to provide notice when – or even if – it chooses. This result is inconsistent with the text, context, and object and purpose of CAFTA. By contrast, Claimant's interpretation of that provision to require a denial of benefits before arbitration has commenced is based on the framework of CAFTA and the interplay between CAFTA and the ICSID Convention and offers far more certainty both to CAFTA Parties and investors.

<sup>97</sup> ICSID Article 25(1) provides, *inter alia*, “When the parties have given their consent, no party may withdraw its consent unilaterally.”

<sup>98</sup> *See* Hearing Tr., pp. 250:15-252:1.

<sup>99</sup> *See* Rejoinder, paras. 220-222; Hearing Tr., pp. 252:2-253:11. Thus, contrary to the arguments presented by Costa Rica (*see* C.R. Submission, para. 9), a denial of benefits is fundamentally different from an ordinary jurisdictional objection.

**B. Respondent Failed To Demonstrate That Claimant Lacks “Substantial Business Activities” In The United States**

63. Respondent has failed to meet its burden of proving that Claimant lacks “substantial business activities” in the United States. Ignoring all evidence to the contrary, Respondent clings to its argument that the Tribunal’s inquiry should be narrowly focused on a specific checklist of activities that must – according to Respondent – be present in order to qualify as substantial business activities.<sup>100</sup> As the Tribunal is well aware, the mechanical analysis that Respondent urges is inconsistent with the text, objectives, and purpose of CAFTA.<sup>101</sup>

64. Claimant has presented voluminous evidence rebutting Respondent’s baseless assertion that Claimant lacks substantial business activities in the United States.<sup>102</sup> Whether Claimant is looked at purely as a single holding company, which, along with its holdings, has been continuously managed from Nevada since 1997, or whether it is looked at as part of a group of Nevada-based companies which together contributed substantial financial capital, intellectual property, personnel, and oversight to the Companies’ Salvadoran operations, Claimant’s activities fall squarely within the meaning of “substantial business activities.”<sup>103</sup>

**C. Respondent Failed To Demonstrate That Claimant Is Not Owned and Controlled By U.S. Persons**

65. Just as it fails to meet its burden under the substantial business activities analysis, Respondent also fails to rebut Claimant’s demonstration that Claimant ultimately is owned and controlled by persons of the United States and that this ultimate ownership and control is a further basis for rejecting an attempted denial of benefits. Respondent’s argument that Claimant is owned and controlled directly by its Canadian parent, Pacific Rim Mining Corp., ignores the fact that the *ultimate* owners and controllers of Claimant are the U.S. persons who own a

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<sup>100</sup> See Objections, paras. 126-156; Reply, paras. 105-109.

<sup>101</sup> See CAFTA Preamble (RL-111), Counter-Memorial, paras. 255-277. Moreover, it does not comport with the weight of investment jurisprudence on this point (Counter-Memorial, paras. 282-297; Rejoinder, paras. 136-138.)

<sup>102</sup> See, e.g., Counter-Memorial, paras. 278-281; Rejoinder, paras. 139-147, 156, 163.

<sup>103</sup> See Counter-Memorial, paras. 255-307 (and citations therein); Rejoinder, paras. 133-63 (and citations therein); Hearing Tr., pp. 258:5-260:4.

majority of the shares of the Pacific Rim Mining Corp.<sup>104</sup> This ultimate ownership and control precludes the denial of benefits under Article 10.12.2.<sup>105</sup>

66. Claimant has also provided ample evidence that Pac Rim Cayman is controlled, in the sense of exercise of critical decision making, by a U.S. citizen, Mr. Shrake.<sup>106</sup> Here, as elsewhere, Respondent's continued reliance on half-truths and distortions of the truth must fail. At the hearing, Respondent argued that "Claimant has no executives or employees in the United States or otherwise, that is also undisputed. And Claimant has no Board of Directors, that is undisputed. The Claimant has no people who run it other than the Canadian parent."<sup>107</sup> However, as the Tribunal is well aware, Mr. Tom Shrake serves as one of three Managers of Pac Rim Cayman (Pac Rim Cayman's Board of Directors was replaced by three Managers during the domestication in 2007). As both the Manager and *de facto* CEO of Pac Rim Cayman, Mr. Shrake, a U.S. citizen, has the power to direct and control the activities of Pac Rim Cayman.<sup>108</sup>

67. The fact of majority ownership by U.S. persons and day-to-day management by a U.S. person in the United States precludes Respondent from denying CAFTA's benefits to Claimant.

68. In sum, Respondent has not satisfied any of the three conditions for denying benefits to an investor of a Party under Article 10.12.2. As such, Respondent's attempt to deprive Claimant of CAFTA benefits fails and has no effect on this Tribunal's jurisdiction.

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<sup>104</sup> See Counter-Memorial, paras. 325-338; Rejoinder, paras. 164-95. As explained in our written and oral submissions, in determining whether a company is majority-owned by U.S. citizens, it is appropriate to consider how agencies tasked with administering U.S. law make that determination under laws that require them to do so. Given the impracticality of determining the citizenship of each beneficial owner of a publicly held company, such agencies routinely apply a rule of thumb under which majority ownership by persons with addresses in the United States is deemed to be majority ownership by U.S. citizens. See Counter-Memorial, para. 329 n.397; Rejoinder, paras. 180-185; Hearing Tr., pp. 726:5-730:18.

<sup>105</sup> See Counter-Memorial, paras. 325-30; Rejoinder, paras. 167-95; *Cf. Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), paras. 245, 264 (RL-60).

<sup>106</sup> Counter-Memorial, paras. 336-337; Rejoinder, paras. 164-165, 186-195; Shrake Statement, paras. 34-35, 54-65; Hearing Tr., pp. 512:17-513:22.

<sup>107</sup> Hearing Tr., p. 79:10-15.

<sup>108</sup> See Counter-Memorial, paras. 336-337; Rejoinder, paras. 164-165; Shrake Statement, paras. 34-35, 54-65; Hearing Tr., pp. 512:17-513:22.

#### IV. CLAIMANT HAS NOT ABUSED THE INTERNATIONAL ARBITRATION PROCESS

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69. In this proceeding, Respondent has raised two kinds of objections to the Tribunal's jurisdiction: objections based in the text of an instrument of consent (either treaty or statute), and objections not based in any text. The objections that Respondent labels as "subsidiary"<sup>109</sup> (*i.e.*, its *ratione temporis*, denial of benefits, and Investment Law objections) are text-based. By contrast, the objection Respondent labels as "primary"<sup>110</sup> (*i.e.*, its abuse of process objection) has no basis in either treaty or statute. Neither text defines the Tribunal's jurisdiction in a way that would exclude this dispute due to an alleged "abuse of process." Instead, Respondent purports to draw on certain general principles of international law to support its assertion that as an equitable matter, and despite silence on the subject in both instruments of consent, the Tribunal should find that it lacks jurisdiction because Claimant acquired its U.S. nationality after Respondent engaged in conduct that allegedly "interfered" with Claimant's investments in El Salvador.

70. That Respondent's "primary objection" lacks a textual basis in treaty or statute is revealing. It suggests an acknowledgment of the weak (indeed, nonexistent) textual support for its "subsidiary" objections. In particular, Respondent's approach to abuse of process would allow it to side-step the inconvenient fact that the complaint is based on a measure – the *de facto* mining ban – that successive Presidents of El Salvador have openly and vocally acknowledged exists today, and thus plainly comes within CAFTA's temporal scope. What Respondent calls "abuse of process" is, in effect, an alternative, non-text-based objection to jurisdiction *ratione temporis* – albeit offering different temporal provisions than those in the treaty at issue. Untethered to any text, Respondent frees itself to focus on something other than the measure at issue, and chooses to focus on what it repeatedly refers to as an alleged "interference" with Claimant's investments.<sup>111</sup> On Respondent's theory, regardless of the fact that the measure at issue is a course of conduct that continued after CAFTA became applicable to Claimant, the

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<sup>109</sup> Hearing Tr., p. 106:20. Not only does Respondent label these objections as "subsidiary," it contends that the Tribunal does not even need to examine them. *Id.*, p. 7:13-16.

<sup>110</sup> *Id.*, p. 6:18.

<sup>111</sup> See *id.*, pp. 7:4-5; 10:8-10; 12:5-6; 14:19-22; 15:7-9; 17:17-21; 20:3-5; 20:18-20; 22:1-4; 22:17-18; 24:12-15; 25:11-15; 35:17-19; 35:21-22; 44:14-17; 60:2-6; 67:4-15; 70:10-13; 581:15-17; 582:4-12; 583:3-5; 601:22-602:2; 756:20-757:5; 761:18-21.

Tribunal lacks jurisdiction because Claimant changed its nationality knowing that “interference” with its investment had already occurred.

71. Not only does this “primary objection” lack any basis in treaty or statute, but, as Claimant has explained in its prior submissions and expands upon in this section, it also lacks any basis in the very international law principles on which Respondent purports to rely. Indeed, Respondent’s “interference” theory of abuse of process would lead to patently absurd results because virtually any regulation in some sense “interferes” with an investment. A land use regulation limiting the hours during which a mine may operate would “interfere” with an investment. Following Respondent’s logic, if an investor of a non-Party changed nationality and became an investor of a Party after such an hours-of-operation regulation had been adopted, it would be guilty of an “abuse of process” if it later sought the protections of CAFTA and initiated arbitration over a series of land use regulations that collectively amounted to an expropriation. That result makes no sense, and Respondent cites nothing in CAFTA to support it.

72. As we will further demonstrate in this section, Respondent’s “abuse of process” theory is deeply flawed for several reasons. Among these is the fact that a finding of abuse of process is extraordinary in nature and falls outside the treaty framework governing this arbitration. Further, Respondent has not met its burden of proving its allegation of abuse of process by the heightened standard of proof that applies to allegations of bad faith. Respondent’s new “two-prong test” for abuse of process, invented out of whole cloth at the hearing,<sup>112</sup> is not an appropriate test for the Tribunal to adopt. Even if it were, however, Respondent has failed to meet the requirements of its own test.

**A. Abuse Of Process Is A Non-Treaty-Based Doctrine That Does Not Justify  
Dismissing Pac Rim Cayman’s Claims**

73. A finding of abuse of process would be particularly inappropriate here, where the claimant has long-standing and significant ties with the jurisdiction of which it is a national. In stark contrast to the *Phoenix* claimant, which was incorporated only after the underlying breach and damages had already occurred, Claimant has existed since 1997, and has been run and managed primarily by Mr. Shrake from Nevada since its inception. The entire investment at issue was planned and managed from Nevada as well. And, notwithstanding Respondent’s

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<sup>112</sup> *Id.*, p. 14:16-21.

purported doubts on the matter, it simply made sense to bring Pac Rim Cayman to Nevada once it became clear that the companies would not be selling the El Salvador assets in the foreseeable future, obviating the tax reasons for locating Pac Rim Cayman in the Cayman Islands.<sup>113</sup> The facts on the record simply do not support a finding of abuse of process.

74. Furthermore, abuse of process is an extraordinary accusation, and an even more extraordinary finding.<sup>114</sup> It is thus all the more remarkable that Respondent has chosen to pin its objections to jurisdiction so heavily on this doctrine, rather than on the text of the law and treaties that apply to this proceeding. Respondent's assertion that the Tribunal may dismiss Pac Rim Cayman's claims due to an alleged abuse of process, without even addressing the legal bases for its jurisdiction, is founded on the unacknowledged premise that the doctrine of abuse of process can somehow displace the relevant legal instruments and serve as a stand-alone basis for declining to exercise jurisdiction. Respondent's position seeks to elevate a concept that normally functions as an aggravating factor, reinforcing the justification for a remedy provided for in a legal text, into the sole basis to dismiss Pac Rim Cayman's claims. Respondent's position is unsustainable.

75. Indeed, the *Rompetrol* tribunal cautioned against the very position Respondent takes here. There, the respondent (the State of Romania) conceded that the claimant had the requisite nationality to bring its claims, but argued, among other things, that the arbitration was an abuse of process because the claimant was actually controlled by Romanian nationals. On this basis, the respondent urged the tribunal to dismiss the claims as an abuse of process. The tribunal, however, viewed this proposition with great skepticism:

Marshaled as it is as an objection at this preliminary stage, this is evidently a proposition of a very far-reaching character; it would entail an ICSID tribunal, after having determined conclusively (or at

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<sup>113</sup> See Shrake Statement, para. 11; Witness Statement of Steven K. Krause, dated 31 December 2011 (hereinafter "**Krause Statement**"), para. 31; Hearing Tr., p. 455:1-456:12. At the same time, it made sense to maintain Pac Rim Cayman as the holder of the investment both because of (a) the ease with which the assets in El Salvador could still be sold or transferred if such a decision were ever to be made (*See* Hearing Tr., pp. 518:1-8; 518:20-519:4, 532:13-533:6 (testimony of Thomas Shrake)); and (b) the fact that the domestication would itself not be a taxable event in the United States or Canada (*see* Krause Statement, para. 32; Hearing Tr., pp. 531:13-532:2). Furthermore, the fact that Pacific Rim neglected to de-register one of its other holding companies at that time does nothing more than prove that Pacific Rim was more focused on managing the holding of its current assets than on companies that had become irrelevant to its business and investments. *See* Hearing Tr., p. 453:8-21 (testimony of Thomas Shrake).

<sup>114</sup> *See* Rejoinder, paras. 53-55 (and citations therein); Counter-Memorial paras. 278-279.

least *prima facie*) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding nevertheless not to entertain the application to hear the dispute. Given that an ICSID tribunal, under the Washington Convention as interpreted, is bound to exercise a jurisdiction conferred on it, so far-reaching a proposition needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in the case-law under it.<sup>115</sup>

76. Respondent's position here is indistinguishable from that of the respondent in *Rompetrol*. Respondent maintains that it *does not even matter* whether Claimant has otherwise established the Tribunal's jurisdiction; Pac Rim Cayman's allegedly "post-interference" change of nationality is, according to Respondent, sufficient to form a basis for dismissal of its claims, obviating the need for the Tribunal to even consider Respondent's objections arising from CAFTA, the ICSID Convention, or the Investment Law.<sup>116</sup>

77. Yet Respondent has not identified *a single instance* in which a tribunal dismissed a proceeding based *solely* on a finding of abuse of process. While Respondent characterizes the *Phoenix* case as such an instance, in fact the *Phoenix* tribunal's analysis centered on whether or not the purported investment actually qualified as an investment under the applicable instrument of consent. Ultimately the tribunal dismissed the claims because there was no genuine foreign investment: "the whole operation was not an economic investment, based on the actual or future value of the companies."<sup>117</sup> This stands in stark contrast to the rule Respondent endorses here,

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<sup>115</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (Apr. 18, 2008), para. 115 (hereinafter "*Rompetrol*") (RL-106) (emphasis in original). The tribunal went on to deny the respondent's request.

<sup>116</sup> See Objections, paras. 3-4; Reply, para. 2. During the Hearing, Respondent was at pains to discourage the Tribunal from even inquiring into its purported legal objections to jurisdiction, stating that it believed it would be "unnecessary for the Tribunal to address other objections." Hearing Tr., p. 7:15-16; 106:18-107:1.

<sup>117</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), para. 140 (hereinafter "*Phoenix*") (RL-50). Counsel for Respondent at the Hearing insinuated that there was allegedly no new influx of capital after Pac Rim Cayman's December 2007 domestication to Nevada. Hearing Tr., p. 79:21-80:1. At the same time, counsel for Respondent sought to suggest that Claimant could not have understood President Saca's public statements as first published on 11 March 2008 to constitute confirmation of a ban on metallic mining, because Claimant indeed invested additional funds in its Salvadoran projects in the three to four months following the original Saca announcement. Hearing Tr., p. 598:12-19. Clearly Respondent cannot have it both ways. In any event, as Claimant has explained in response to questions from the Tribunal, Claimant did not "acquire" its investment after the fact, unlike the claimant in *Phoenix*. Claimant has held the investment for many years, and Claimant's legal personality did not change when it domesticated to Nevada. Hearing Tr., p. 689:20-696:12.

(continued...)

according to which the Tribunal could simply dispense with any legal analysis in favor of alleged equitable considerations.

78. In sum, there is no legal or jurisprudential basis for Respondent's assertion that the Tribunal can dismiss the claims of Pac Rim Cayman based on the equitable doctrine of abuse of process without regard for whether or not the Tribunal has jurisdiction under the ICSID Convention, CAFTA, and the Investment Law of El Salvador.

**B. Respondent Has Not Met Its Burden Of Proving Abuse Of Process, Even Under Its Own, Newly Created Test**

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79. Respondent concededly bears the burden of proving its allegation that Pac Rim Cayman has abused the arbitral process in bringing its claims.<sup>118</sup> That allegation furthermore must be proven to the heightened standard of proof applicable to accusations of bad faith, fraud, and other serious wrongdoing in international proceedings. Such allegations must, at a minimum, be proven by clear and convincing evidence.<sup>119</sup> That international tribunals do not lightly find such abuse is borne out by both jurisprudence and commentary.<sup>120</sup> While Respondent now protests that a "subjective" finding of bad faith is not part of the doctrine of abuse of process,<sup>121</sup> in reality Respondent itself has consistently attributed just such subjective motivations to Claimant throughout these proceedings, accusing Claimant of "concealment,"<sup>122</sup> "manipulation,"<sup>123</sup>

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(continued...)

Claimant's interest in the investment is therefore distinguishable from that of an investor acquiring an investment after the fact.

<sup>118</sup> See Reply, para. 17 ("El Salvador accepts that it has the burden of proof with respect to the factual and legal basis of its objections that are not strictly tied to the requirements for jurisdiction, like Abuse of Process and Denial of Benefits.").

<sup>119</sup> See Counter-Memorial para. 378, n.460 (referring to *Chevron and Oil Platforms*). For further elaboration on the standard of proof required where there are allegations of a lack of good faith, see, e.g., *Dadras International and Per-Am Construction Corp. v. The Islamic Republic of Iran and Tehran Redevelopment Co.*, Award, dated 7 November 1995, in XXII Y.B.Comm. Arb. 504 (1997), paras. 123-124 (explaining that respondent Iran's defense of fraud, involving "fraudulent conduct and intent to deceive," must be proven by clear and convincing evidence) (CL-200); *Aryeh v. Iran*, 1997 WL 1175787 (Iran-U.S. Cl. Trib.), para. 159 (22 May 1997) (citing *Dadras* for finding that Iran's defense of forgery of contract must be proven by clear and convincing evidence) (CL-201); *Oil Field of Texas v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 308, para. 25 (1986) (stating that the burden was on the respondent "to establish its defence of alleged bribery ... If reasonable doubts remain, such an allegation cannot be deemed to be established") (CL-202).

<sup>120</sup> Counter-Memorial, paras. 378-379; Rejoinder, paras. 51-74.

<sup>121</sup> Hearing Tr., pp. 15:4-5, 577:18-578:3.

<sup>122</sup> *Id.*, pp. 15:16-17, 16:20-21.

“seeking to create an illusion,”<sup>124</sup> “attempt[ing] to hide the truth,”<sup>125</sup> “cynical gaming of the international system,”<sup>126</sup> weaving a “tangled web” of deception,<sup>127</sup> and acting in “bad faith.”<sup>128</sup> In fact, the very notion of abuse of process is predicated on the bad motivations of the accused party, as the *Rompetrol* tribunal observed.<sup>129</sup>

80. Respondent has not even attempted to meet this burden, relying on inflammatory rhetoric instead of evidence. In addition, at the Hearing, Respondent for the first time unveiled what it called “the two-prong test” for determining whether an abuse of process has occurred.<sup>130</sup> According to Respondent, a tribunal should first determine whether “the corporate form was manipulated in a way that allowed the Claimant to access jurisdiction where it otherwise would not have been able to do so.”<sup>131</sup> If it was, according to Respondent, a tribunal should then determine whether the change of nationality occurred “after the alleged interference with the investment or after the dispute began or became foreseeable.”<sup>132</sup>

81. This is not “the” test or any valid test for determining whether there has been an abuse of process. Respondent’s insistence that only two facts are relevant ignores the very doctrine it so zealously invokes. Every tribunal to consider allegations of abuse of process has underscored the necessity of looking at the entire universe of facts in determining the merits of such

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(continued...)

<sup>123</sup> *Id.*, pp. 6:18-21, 7:2-4, 10:4-8, 12:18-21, 13:1-5, 16:14-15, 16:18-19, 19:5-6, 54:4-6, 58:19-20, 69:3-5, 70:5-7, 72:8-12, 86:10-11.

<sup>124</sup> *Id.*, p. 73:4-6.

<sup>125</sup> *Id.*, p. 59:14-17.

<sup>126</sup> *Id.*, p. 72:12-18.

<sup>127</sup> *Id.*, p. 21:20-21.

<sup>128</sup> *Id.*, pp. 15:14-15, 16:14-15, 19:10-16, 21:15-18.

<sup>129</sup> See *Rompetrol*, para. 115 (**RL-106**). Respondent itself appeared to adopt this view when it argued at the Hearing that bad faith was “inherent” in Pac Rim Cayman’s change of nationality because of the purposes Respondent (wrongly) alleges were behind that change. See Hearing Tr., p. 15:9-12 (arguing that “treaty-shopping” after dispute has arisen “cannot be considered good faith. Bad faith is inherent in this type of manipulation”).

<sup>130</sup> Hearing Tr., p. 14:8-22.

<sup>131</sup> *Id.*, p. 14:16-18.

<sup>132</sup> *Id.*, p. 14:20-22.

allegations.<sup>133</sup> And as Claimant has demonstrated, the facts of this case prove beyond any doubt that there has been no abuse of process in this proceeding.<sup>134</sup>

82. But even assuming *arguendo* that the Respondent's purported test had any validity, Respondent has not even met the requirements of its own test. With respect to the first prong, its own counsel and fact witness, Mr. Parada, admitted that Pac Rim Cayman's change of nationality was unnecessary for Pac Rim Cayman or its parent, Pacific Rim Mining Corp., to gain access to ICSID jurisdiction or to submit claims under CAFTA. According to his testimony, Mr. Parada himself suggested to Pac Rim Cayman's counsel in November or December 2007 that Pacific Rim Mining Corp. could bring CAFTA claims through its U.S. shareholders.<sup>135</sup> For its part, Claimant has always maintained not only that a CAFTA proceeding could have been initiated by the U.S. shareholders of Pacific Rim Mining Corp., but also that its Investment Law claims separately and independently provide a basis for ICSID jurisdiction.<sup>136</sup> There was therefore no need for Pac Rim Cayman to engage in a "bad faith" change of nationality in December 2007, which, according to Respondent's own two-prong test, is a necessary precondition for any finding of abuse of process.<sup>137</sup>

**C. The Relevant Temporal Inquiry Is When The Dispute Arose, Not When The "Interference" First Occurred Or A Dispute Became Foreseeable**

83. As for the second prong of its test, Respondent itself does not seem quite able to decide what its own "test" entails. Respondent identifies three different moments in time and suggests that a change in nationality after any of these, followed by an invocation of CAFTA benefits, would be an abuse of process. The temporal aspect of the abuse of process analysis is thus a moving target; apparently a tribunal is meant to keep looking until it finds a comparison that fits.

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<sup>133</sup> See Rejoinder, paras. 48, 54 and citations therein. Respondent's claim that the *Phoenix* and *Mobil* tribunals supposedly applied this two-part test (*see* Hearing Tr., p. 14:8-15 (claiming that ICSID case law establishes such a test)) is simply false, as even a cursory reading of these two decisions immediately reveals. The *Phoenix* tribunal in particular took care to examine a wide range of factors before determining that there had been an abuse of process in that case, although its focus ultimately centered on the economic reality of the investment. *See Phoenix*, para. 114 (listing *Salini* factors to be examined with abuse of process).

<sup>134</sup> Hearing Tr., pp. 152:19-211:1; 265:1-272:20; Rejoinder paras. 46-127; Counter-Memorial paras. 374-425.

<sup>135</sup> *See* Hearing Tr., p. 319:3-11. Mr. Parada later made such a suggestion in a July 2008 email to Respondent (Parada Statement, Annex K).

<sup>136</sup> Counter-Memorial, para. 141; Rejoinder, paras. 113-117; *see also* Counter-Memorial, paras. 428-474; Rejoinder, paras. 281-356.

<sup>137</sup> *See* Hearing Tr., p. 14:16-18.

Respondent's use of the term "interference with the investment" (which it repeated throughout the hearing, but never defined),<sup>138</sup> as well as its effort to pinpoint the genesis of an abuse of process at the point in time at which a dispute became merely *foreseeable* (whether or not such a "foreseeable" dispute was different from the one that later arose) — in short, its unabashed attempt to cast as wide a temporal and lexical net as possible — further betrays the results-driven nature of its argument.<sup>139</sup> Indeed, if the Tribunal were to accept Respondent's proposal that any change of corporate structure and invocation of treaty protections after the first "interference" with an investment or the existence of any issue that "*may someday be litigated*"<sup>140</sup> is *ipso facto* an abuse of process, a huge proportion of arbitration claims hitherto considered perfectly acceptable could be branded as abusive. Such a result would be completely inconsistent with the existing jurisprudence, which emphasizes the rarity of abuse of process both in investor-State arbitration and in other contexts. It would, moreover, severely restrict the protections actually available to foreign investors and their investments under CAFTA, undermining CAFTA's purpose of encouraging investment and promoting certainty.<sup>141</sup>

84. That Respondent is determined to define the earliest point in time at which a dispute (*i.e.*, any dispute) may even have been *foreseeable* as the demarcation point after which a change of corporate structure followed by invocation of CAFTA benefits necessarily becomes abusive was confirmed by its answer to the Tribunal's question as to "what the birth of a dispute means exactly in practice."<sup>142</sup> Respondent replied that the birth of a dispute occurs at the "very beginning" of a conflict between the parties, regardless of whether it ever causes damages or

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<sup>138</sup> See Hearing Tr., pp. 7:4-5; 10:8-10; 12:5-6; 14:19-22; 15:7-9; 17:17-21; 20:3-5; 20:18-20; 22:1-4; 22:17-18; 24:12-15; 25:11-15; 35:17-19; 35:21-22; 44:14-17; 60:2-6; 67:4-15; 70:10-13; 581:15-17; 582:4-12; 583:3-5; 601:22-602:2; 756:20-757:5; 761:18-21.

<sup>139</sup> Significantly, Respondent's proposed test would also place the *Mobil* claimants' claims based on Venezuela's alleged nationalization measures — which the tribunal found did *not* implicate an abuse of process — within the scope of abusive claims. See *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), paras. 204, 206(a) (hereinafter "*MobilP*") (RL-51). Respondent's reference to multiple alternative time periods also gives the lie to Respondent's insistence that its test should be adopted because it allegedly provides a clear and simple rule. See Hearing Tr., p. 578:11-12.

<sup>140</sup> See Hearing Tr., p. 586:6-9 (emphasis added).

<sup>141</sup> CAFTA Preamble (wherein the CAFTA Parties resolve to "ensure a predictable commercial framework for business planning and investment").

<sup>142</sup> Hearing Tr., p. 552:6-7 (question from President Veeder).

ripens into an actual dispute.<sup>143</sup> This test is patently designed to favor the finding of abuse of process as frequently as possible, the antithesis of how the doctrine of abuse of process has been hitherto understood and applied.<sup>144</sup>

85. By contrast, the notion of when a dispute arises (or crystallizes) as a specific point in time that defines a change in relations between the parties is well established, and is based on a stable body of jurisprudence both in investor-State and State-to-State arbitrations. As Claimant has explained,<sup>145</sup> the moment when a dispute arises is when the host State has taken action that implicates its responsibility on the international plane and thereby caused damage to the foreign investor and/or its covered investment;<sup>146</sup> the investor has articulated its complaint to the State; and the State has responded negatively or not at all.<sup>147</sup> While it is true that the concept of a dispute arising or crystallizing has generally been articulated outside the context of abuse of process, it nevertheless provides the best guidance available for the Tribunal to determine at what point relations between the parties changed, putting them on opposing sides of a legal dispute, in order to evaluate Respondent's abuse of process allegations.

86. The core of Respondent's abuse of process allegation relates to this issue of timing: If the dispute arose before Pac Rim Cayman's change of nationality, then, Respondent contends, an abuse of process has occurred. We have shown why the dispute did not arise until March 2008 at the earliest, when President Saca for the first time revealed the existence of a ban on metallic

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<sup>143</sup> See Hearing Tr., p. 584:19-22 (Respondent arguing that abuse of process inquiry "focuses on the moment in which the State took action which affected the investment, which is at the very beginning of a dispute").

<sup>144</sup> See Counter-Memorial, paras. 378-379; Rejoinder, paras. 51-57.

<sup>145</sup> See Counter-Memorial, paras. 207-217, 401-404, 414-416, 422; Rejoinder, paras. 260-267; Hearing Tr., pp. 741:2-745:13.

<sup>146</sup> See para. 87 *infra* and n.154-156.

<sup>147</sup> See *Mobil*, paras. 200-202 (equating the term "dispute" with formal communications from the investor to the state referencing an 'investment dispute,' and invoking ICSID jurisdiction); *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), paras. 94-98 (CL-81) (noting that a dispute "begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party"); *Helnan Int'l Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 Oct. 2006), para. 52 (CL-80) (noting that, "in the case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise").

mining.<sup>148</sup> Contrary to Respondent’s representations, Claimant’s notice of intent and notice of arbitration are fully consistent with the articulation of the claims in this phase of the proceedings.<sup>149</sup> Claimant has always based its claims on Respondent’s politically motivated ban on mining permits.<sup>150</sup> The recitation of facts in the notice of intent and notice of arbitration does no more than recapitulate the progression of Respondent’s conduct, culminating in President Saca’s statements confirming the existence of a mining ban and thus putting that conduct in context, enabling Claimant to understand for the first time that the conduct breached CAFTA obligations and deprived Claimant’s investments of their entire value.<sup>151</sup> Respondent’s derisive comments as to Claimant’s inability to pinpoint the precise moment in time that the ban began only highlights Respondent’s own disingenuousness, both in this arbitration and in its treatment of Claimant and its investments, since Respondent has consistently sought to obfuscate the fact that the mining ban even existed. In any event, the Tribunal need not determine the precise

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<sup>148</sup> See paras. 10-11, *supra*; Hearing Tr., pp. 204:8-211:1; Counter-Memorial, paras. 194-202, 212, 215, 217, Rejoinder, para. 231-239, 245-259. In addition, at the Hearing, Claimant demonstrated, *inter alia*, that if its parent company, Pacific Rim Mining Corp., had believed that there was a dispute with El Salvador in December 2007, it would have had to disclose that belief in connection with a private placement financing it conducted in early 2008. During closing argument, the Tribunal asked a question with respect to the Companies’ 2008 Annual Report (C-33) – specifically, about the description of a private placement as having been “conducted on a best-efforts/commercially reasonable basis.” Hearing Tr., p. 689:12-13. Under U.S. securities laws, a private placement is an offering of securities that the U.S. Securities and Exchange Commission (SEC) exempts from certain registration requirements because it is limited to a certain number of sophisticated investors with high net worth. A “best efforts” basis simply means that there was no obligation to sell a certain number of shares. “Commercially reasonable” is the standard by which the sales price is assessed. In such a placement, as in any sale of securities traded on a U.S. exchange, any material fact – e.g., a company’s belief that it has a material dispute with the Government where its most significant asset is based – must be disclosed to potential investors. As Respondent’s counsel noted at the hearing, Pacific Rim Mining Corp. has conducted several additional private placement financings since President Saca’s March 2008 statement and Mr. Shrake’s April 2008 letter in response. However, by the time of those additional financings, the dispute was in fact being publicly disclosed by the company in its periodic securities filings. See, e.g., C-33 (disclosing in July 2008 that the Companies pursue “legal options under El Salvadoran law and international treaties including CAFTA”).

<sup>149</sup> See paras. 32-43, *supra*.

<sup>150</sup> *Id.*

<sup>151</sup> This understanding of how the dispute evolved accords with the understanding of the various non-governmental organizations that filed an *amicus* submission in this proceeding. According to them, it was through their efforts over a period of years that “the issue of metals mining” became “a ‘central issue of Salvadoran politics.’” (*Amicus* Submission at 3 (internal citations omitted)). They claim to have fomented “swells of resistance” leading eventually to then President Saca’s announcement of “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.” (*Id.* at 4). It was at that point, with President Saca’s confirmation of the practice of withholding permits for metallic mining, that Respondent’s conduct breached its obligations under CAFTA and caused the damages at issue; in other words, it was at that point, not earlier, that a dispute arose.

moment in time at which the ban was imposed. Claimant did not become aware – indeed, could not have become aware — of the ban’s existence until in or around March 2008, and it was therefore only at or after that point in time that the dispute arose.

87. The fact that Claimant’s damages occurred only after its change of nationality further confirms that the dispute arose after that point in time.<sup>152</sup> As the *Phoenix* tribunal explained, the point in time at which damages occurred is a key factor in evaluating the existence of an abuse of process. In the words of the tribunal, ICSID jurisprudence suggests that “a corporation cannot modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, **after damages have occurred.**”<sup>153</sup> Indeed, many tribunals have linked the point in time at which a dispute arose to the moment at which damages occurred.<sup>154</sup> In addition, as Claimant has explained, CAFTA defines a dispute in terms of the existence of a claim, which in turn entails the existence of damages.<sup>155</sup> Since Pac Rim Cayman’s damages did not occur until 2008, its invocation of CAFTA’s protections after following its change of nationality in December 2007 was not abusive.

88. Nor has Claimant ever “hidden” its change of nationality from Respondent.<sup>156</sup> Aside from the fact that it officially notified Respondent of the change in 2008, President Sacá and other top Salvadoran officials participated in a meeting with Pac Rim and the Ambassador of the United States in June 2008 to discuss the dispute then in the making.<sup>157</sup> Respondent could

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<sup>152</sup> See Counter-Memorial, paras. 160-161; Rejoinder, paras. 249-251.

<sup>153</sup> *Phoenix*, para. 92 (emphasis added) (RL-50).

<sup>154</sup> See, e.g., *id.*, paras. 135-137 (refusing to exercise jurisdiction where the claimant sought to bring “pre-existing disputes” before the tribunal because the “damages claimed by Phoenix had already occurred” and the “initial request to ICSID” had already been submitted prior to its acquisition of the investment); *Walter Bau*, paras. 9.67-9.68 (determining that it could not “consider disputes which had come into existence before the date of the coming into force of the Treaty” precisely because an investor could not “claim damages retrospectively for matters which had given rise to disputes prior to that date”) (emphasis added).

<sup>155</sup> See Counter-Memorial, paras. 209-11; Rejoinder, para. 262 (“As was pointed out in Claimant’s Counter-Memorial, for there to be a ‘dispute’ within the meaning of CAFTA, there must be an allegation of breach of an obligation under CAFTA and an allegation of loss or damage by reason of or arising out of the breach. This stems from the way the term ‘dispute’ is used in CAFTA, and in particular the recognition that for there to be a dispute there must be a ‘claim’, the elements of which are an allegation of breach, an allegation of loss or damage, and an allegation of a causal link between the two.”) (citation omitted).

<sup>156</sup> Hearing Tr., p. 15:16-27; Objections, paras. 49-56.

<sup>157</sup> Counter-Memorial, paras. 148-149; Rejoinder, para. 351; Shrake Statement, paras. 118-119; NOA, Exh. 3, resubmitted as C-12.

therefore hardly be unaware that Pac Rim Cayman was then a United States national. Even if Respondent failed to take note of that information at that time, Respondent's official acknowledgement of the change was included with Pac Rim Cayman's notice of arbitration.<sup>158</sup> No "concealment" has occurred here.

89. Respondent's desperation to find support for its abuse of process claim is perhaps most glaringly evident in the highly unusual step it has taken of presenting one of its own counsel as a fact witness on this issue. And yet, for all the dramatic flair that this step implies, nothing Mr. Parada said in his testimony in any way suggested that the dispute arose before March 2008. Leaving aside the credibility issues raised by Mr. Parada's testimony,<sup>159</sup> even taken at face value, Mr. Parada's version of events only confirms that, as of 7 March 2008, there was at most a "potential" dispute "in the making" that contained the possibility of ripening into an actual dispute.<sup>160</sup> (Even assuming *arguendo* that there was a "potential" dispute over delays, the dispute that crystallized concerned not delays but the *de facto* ban.)

90. For all of these reasons, and based on the full factual record of this case, there is no basis for dismissing Claimant's claims as an abuse of the international arbitral process.

## **V. THE TRIBUNAL HAS JURISDICTION UNDER THE INVESTMENT LAW**

### **A. Respondent Has Consented To Arbitrate Claims Arising Under The Investment Law**

91. Under Article 25(1) of the ICSID Convention, once given, consent to ICSID jurisdiction cannot be unilaterally withdrawn. In this case, not only did Respondent consent to ICSID

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<sup>158</sup> See NOA, Exh. 3, resubmitted as C-12.

<sup>159</sup> That testimony was riddled with internal contradictions and farfetched claims based on perceived innuendos and assumptions for which the contemporaneous records provided no support whatsoever. See Hearing Tr., pp. 655:20-664:7.

<sup>160</sup> Parada Statement, Annex D (7 March 2008 e-mail from Parada to Ms. Valencia); Hearing Tr., pp. 664:8-666:17. As Claimant demonstrated, the contemporaneous records produced by Mr. Parada actually confirm that the dispute arose in 2008:

[E]ven as late as July of 2008, Mr. Parada is still expressing uncertainty. Even at that date the situation has not advanced much beyond the possible dispute in the making that may result in arbitration. In other words, Mr. President, the contemporaneous documents Mr. Parada has produced only confirm Claimant's position that no dispute arose until sometime in 2008.

Hearing Tr., p. 666:10-17.

jurisdiction in plain and unequivocal terms in Article 15 of the Investment Law, it subsequently relied upon that same consent to tout itself as an attractive destination for foreign investment before the United Nations Conference on Trade and Development.<sup>161</sup> Yet, in this arbitration, it attempts to undo the implications of its earlier actions by baldly asserting that it did not “intend” to consent to arbitration “at the time” that the Investment Law was enacted. This attempt must be rejected by the Tribunal.

92. In the first place, evidence of Respondent’s *ex post* characterization of its subjective “intent at the time” is not relevant here because the text of Article 15 is plain in providing consent to arbitration and has been consistently interpreted as such by arbitral tribunals, as well as by international and Salvadoran commentators.<sup>162</sup> Indeed, even the arguments relied upon by Respondent to cast ambiguity upon the meaning of Article 15 only underscore just how clear the provision is.

93. *First*, Respondent attempts to analogize Article 15 of El Salvador’s Investment Law to Article 22 of the Venezuela’s Investment Law. The two provisions are not analogous. Article 22 of the Venezuelan law refers to a submission to international arbitration only when such means of dispute resolution is provided for “*according to the terms of the respective treaty or agreement. . . .*”<sup>163</sup> In contrast, Article 15 of El Salvador’s law plainly provides that foreign investors may submit to ICSID arbitration *all* “*disputes arising between [the] foreign investors and the State, regarding their investments in El Salvador. . . .*”<sup>164</sup> Unlike the Venezuelan

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<sup>161</sup> See Investment Policy Review. El Salvador. United Nations Conference on Trade and Development, New York and Geneva (2010) (CL-147); Counter-Memorial, paras. 435-439; Rejoinder, paras. 304-306.

<sup>162</sup> See *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, Award, ICSID Case No. ARB/03/26 (Aug. 2, 2006) (RL-30); *Mobil* (RL-51); *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/08/15 (30 Dec. 2010) (CL-151); CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2<sup>nd</sup> ed. 2009) (relevant excerpts), paras. 396-397, at 197 (CL-41); Roberto Oliva de la Cotera, *Sistema de Protección de Inversiones Extranjeras y el Arbitraje del CIADI en la Republica de El Salvador* (CL-148); Counter-Memorial, paras. 428-442; Rejoinder, paras. 291; 298-299.

<sup>163</sup> *Mobil*, para. 68 (quoting the English translation of the Venezuelan investment law). The original Spanish version of Article 22 provides that disputes maybe submitted to arbitration, “en los términos del respectivo tratado o acuerdo” (*Id.*, para. 67, quoting the Venezuelan investment law) (RL-51).

<sup>164</sup> The Spanish version of the Article 15 reads as follows: “En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia: (a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI) [...]”.

provision, the Salvadoran provision does not condition the submission of such disputes to international arbitration on the existence of a separate instrument of consent. The Investment Law itself is the instrument of consent.

94. *Second*, Respondent attempts to attribute significance to the fact that Article 15 does not contain the exact same language as is used in some of El Salvador's BITs or in CAFTA.<sup>165</sup> But, that just shows that there are a *variety* of manners in which a state may validly express its consent to arbitration, including the manner used by Respondent in Article 15.<sup>166</sup> In fact, Article 15 is almost *identical* to dispute resolution clauses included in El Salvador's BITs with Argentina, Ecuador, Switzerland, Chile and Paraguay, among others.<sup>167</sup> Respondent has never once suggested that the text of the dispute resolution clauses in any of *these* treaties does not provide for its unambiguous consent to arbitration. Instead, Respondent simply asserts, without any explanation, that these BITs are somehow "not relevant" to interpretation of the Investment Law.<sup>168</sup> This is plainly untrue. Respondent cannot contest that these exact BITs are the ones that were "taken into consideration" by the drafters of Article 15, since they stated as much in their *Exposición de Motivos*.<sup>169</sup>

95. *Third*, Respondent alleges that the Salvadoran Constitution somehow prohibited the state from giving its consent to arbitration in the Investment Law.<sup>170</sup> This allegation is spurious. The Salvadoran Constitution simply does not address the issue of the Legislative Assembly's authority to enact laws that provide the state's consent to arbitration, and Respondent has not identified any provision that would suggest otherwise.<sup>171</sup>

96. Moreover, notwithstanding its assertions now as to what its intent was when it adopted the Investment Law, there is *no* evidence in the record that Respondent did not subjectively

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<sup>165</sup> See Objections, paras. 369-372; Hearing Tr., p. 124:2-18; 126:16-21.

<sup>166</sup> See Rejoinder, paras. 292-294.

<sup>167</sup> See Counter-Memorial, paras. 460-462 and note 553.

<sup>168</sup> Reply, para. 250.

<sup>169</sup> See Statement of Purpose ("*Exposición de Motivos*") of the Investment Law of El Salvador (**RL-101**), p. 4.

<sup>170</sup> See Hearing Tr., p. 127:17-21.

<sup>171</sup> See Counter-Memorial, paras. 463-466; Rejoinder, paras. 307-312.

intend to consent to arbitration in that provision.<sup>172</sup> The lack of any such evidence is all the more significant in light of the nature of the inquiry that Respondent is asking the Tribunal to pursue. In short, Respondent invites the Tribunal simply to accept its assertion about what it supposedly intended in Article 15, and then to “interpret” Article 15 on that basis.<sup>173</sup> As Respondent is well aware, this cannot be done: *nemo debet esse iudex in propria causa*.

97. Indeed, it would be all the more preposterous for the Tribunal to accept such an invitation here, given that Respondent has repeatedly acknowledged outside the context of this arbitration that it did in fact intend to consent to arbitration in Article 15.<sup>174</sup> The implications of these acknowledgements cannot be ignored by the Tribunal, notwithstanding Respondent’s attempts to downplay their significance. To this day, for example – and despite there now being clear evidence in the record of Respondent’s affirmation to the *Inceysa* tribunal that Article 15 contained its consent to ICSID arbitration – Respondent continues to pretend that this is of no importance because the issue of consent was “not before the tribunal” in that case. That Respondent *conceded* the issue (presumably because its counsel in that case realized that it

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<sup>172</sup> In fact, the only direct evidence of what was considered by the Legislative Assembly during its adoption of the law was submitted by Claimant. See PowerPoint Presentation made before the *Asamblea Legislativa (CL-149)*. That evidence – a presentation entitled “*Proyecto de Ley de Inversiones*” – plainly indicates the Legislative Assembly’s awareness of the fact that El Salvador was consenting to ICSID jurisdiction over disputes with foreign investors. See also WIO Trade Policy Review Body: Review of El Salvador. Press Release PRESS/TRPB/52 (27 Nov. 1996) (CL-150); Counter-Memorial, paras. 456-459; Rejoinder, paras. 300-303. Respondent has never even attempted to rebut this evidence. Likewise, it has not put forward any counter-evidence from the legislative history, despite the fact that such history is undoubtedly available to it. See *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, Declaration of Jose Roberto Tercero Zamora, p. 14 (C-91) and *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, Hearing Transcript, 3 May 2005 (pp. 321-323, 344-349) (C-92), in which Respondent’s expert, Dr. Tercero Zamora, cited from and summarized the official, stenographic transcription of the legislative debate over the adoption of the Investment Law.

<sup>173</sup> It is remarkable how many times Respondent invites the Tribunal to accept its own self-interested conclusions at face value. See, e.g., Objections, para 365: “El Salvador, like Venezuela, did not intend for Article 15 of the Investment Law to constitute unilateral consent to arbitration...”; para. 373: “Here, El Salvador’s intention was not to provide unilateral consent in its Investment Law;” para. 378: “El Salvador, did not intend to consent to arbitration in Article 15 of the Investment Law;” Reply, para. 243: “El Salvador never intended for Article 15 of the Investment Law to constitute consent to arbitration for purposes of Article 25 of the ICSID Convention.” Respondent has never produced a shred of evidence in support of these declarations.

<sup>174</sup> See Investment Policy Review. El Salvador. United Nations Conference on Trade and Development, New York and Geneva (2010) (CL-147); *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, El Salvador’s Objections to Jurisdiction (p. 74-75) (C-89); see also *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, Hearing Transcript, 3 May 2005 (pp. 347-348) (C-88); *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, Declaration of Jose Roberto Tercero Zamora (p. 8) (C-90), *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, Declaration of Jose Roberto Tercero Zamora (p. 14) (C-91) and *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, Hearing Transcript, 3 May 2005 (pp. 321-323, 344-349) (C-92).

would have been frivolous to argue otherwise) does not mean that it was not *before* the tribunal.<sup>175</sup>

98. On the other hand, even Respondent's *own* evidence, minimal as it is, likewise indicates that it intended to provide consent to arbitration in Article 15. As clarified in the *Exposición de Motivos* to the Investment Law, submitted by Respondent, the Salvadoran Legislative Assembly was alerted to the fact that the draft text of Article 15 was based upon the dispute resolution provisions in BITs *previously* signed by El Salvador. In fact, as mentioned above, the proposed text of Article 15 was almost identical to those earlier treaty provisions. Yet, the Legislative Assembly – which Respondent insists did not intend to provide consent in Article 15 – made *no changes* to the draft text of that provision. Regardless of Respondent's inaccurate arguments about the “restrictive interpretation” that should be afforded to unilateral acts,<sup>176</sup> the Legislative Assembly undoubtedly *knew* that it was approving language in Article 15 that had been used to provide consent in other international instruments previously enacted by that same legislative body. Respondent has provided no explanation whatsoever of why this language was not modified by the Legislative Assembly if it truly had a different intent with respect to the meaning of Article 15.

**B. Claimant Has Standing To Submit Claims To Arbitration Under The Investment Law**

99. Not satisfied with attempting to deny its own obligations under the Investment Law, Respondent also persists in arguing that Pac Rim Cayman somehow does not qualify to invoke its rights under the Investment Law. The second argument is as unfounded as the first.

100. *First*, Claimant plainly qualifies as a “Foreign Investor,” as that term is defined in the Investment Law.<sup>177</sup> Respondent's claim to the contrary relies upon the notion that only cash

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<sup>175</sup> In addition, Respondent asserted that the representations made by Salvadoran officials to UNCTAD about the meaning of Article 15 should not be relied on by the Tribunal as evidence of El Salvador's intent or understanding because UNCTAD's report was issued in April 2010. Reply, paras. 245-246. Respondent does not explain why the date of the report is of any relevance to that issue. In Claimant's submission, the frivolity of Respondent's position on the meaning of Article 15, coupled with these attempts to obscure its own view of the issue, should result in an award against Respondent of all costs involved in defending its objections on this issue. See Counter-Memorial, paras. 434, 439; Rejoinder, paras. 283-284.

<sup>176</sup> As Claimant has already explained, expressions of consent made within a treaty framework are not subject to restrictive interpretation. See Counter-Memorial, paras. 444-450; Rejoinder, paras. 282; 286-289.

<sup>177</sup> The definition of “Foreign Investor” is very broad and includes any foreign or natural legal persons who make investments in El Salvador. See Investment Law, Art. 2(d) (RL-9); Rejoinder, para. 331.

funds transferred directly from Claimant's bank account into the bank accounts of the Salvadoran Enterprises, after Pac Rim Cayman became a U.S. entity, can meet the definition of "foreign investment" under the Investment Law. However, the relevant definition contains no such qualifications. It only requires that investments (which include both tangible and intangible assets, such as intellectual property<sup>178</sup>) be transferred by the investor from abroad, in accordance with the provisions of the Investment Law.<sup>179</sup> Respondent has not identified any limitations imposed by the Investment Law on either the nationality of the foreign investor,<sup>180</sup> or on the channels through which the investment travels on its route into El Salvador.

101. Furthermore, in this case, even El Salvador's *Oficina Nacional de Inversiones (ONI)* – the very agency charged with administering foreign investment under the Investment Law – has repeatedly recognized the status of Claimant's contributions of tangible assets to PRES and DOREX as foreign investments.<sup>181</sup> Such investments were consistently registered by the *ONI* in the name of Pac Rim Cayman (before the domestication)<sup>182</sup> or Pac Rim Cayman LLC (after the domestication).<sup>183</sup> The agency never raised any questions or concerns about the company's change of nationality (of which it was duly notified), nor did it ever suggest that the company did not qualify as a foreign investor, or intimate that the wiring of funds on its behalf from bank accounts in Canada (of which it was also admittedly on notice) was of any relevance to that issue.<sup>184</sup>

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<sup>178</sup> See Investment Law, Arts. 2(a), 2(b) and 3 (RL-9).

<sup>179</sup> *Id.*, Art. 2(b) (RL-9).

<sup>180</sup> See Rejoinder, paras. 331-332.

<sup>181</sup> In accordance with Article 17 of the Investment Law, ONI's registration of foreign capital amounts to a designation of that capital as "foreign investment."

<sup>182</sup> See MINEC, Resolution No. 288-R (21 June 2005) (C-36).

<sup>183</sup> See MINEC Resolutions No. 368-MR (30 July 2008) and No. 387-MR (13 Aug. 2008) (C-12).

<sup>184</sup> In fact, Article 17 of the Investment Law expressly provides that a certification of registration of foreign investment by the ONI "**will grant the holder the status of foreign investor. . .**" (emphasis added). As Respondent's counsel noted during the jurisdictional hearing, the *ONI* was well aware that the funds it registered **in the name of Pac Rim Cayman** throughout the 2004 to 2008 period were being wired from bank accounts in Canada. See Hearing Tr., p. 110:16-20. Obviously, this fact did not impact its determination that Claimant qualified as a foreign investor making investments in El Salvador. To the contrary, Respondent's counsel affirmed at the hearing that Pac Rim Cayman was "registered as the owner of the Salvadoran enterprises, and **as the registered owner was the only one that could claim – that could claim protections under the Investment Law.**" Hearing Tr., pp. 120:19-121:1 (emphasis added).

102. *Second*, Respondent’s argument that the Investment Law somehow requires or permits the Tribunal to pierce the Claimant’s corporate veil in determining its jurisdiction under the ICSID Convention is specious. Ironically, Respondent says this is a question of “statutory interpretation” that is distinct from, and irrelevant to, the question of abuse of process in the context of Claimant’s CAFTA claims.<sup>185</sup> It even criticizes Claimant for allegedly confusing the two questions and accuses it of not providing a response to its veil-piercing argument.<sup>186</sup> Yet, Respondent has not referred to a *single* rule of statutory interpretation in presenting its argument on this issue. It has not identified *any* language in the Investment Law that could possibly be construed as permitting or requiring veil-piercing. And, it has not even mentioned – much less explained – whether or when veil-piercing would be appropriate under Salvadoran law generally.

103. Instead, Respondent bases its case for veil-piercing under the Investment Law squarely upon the decision of the International Court of Justice in the *Barcelona Traction* case.<sup>187</sup> Thus, Respondent’s own pleadings make it clear that its veil-piercing argument does *not* raise any issues of statutory interpretation, and in fact has nothing whatsoever to do with the text of the Investment Law. To the contrary, the argument is concerned solely with the issue of the Tribunal’s authority to revert to residual principles of general international law in determining the scope of its jurisdiction under the ICSID Convention. As Claimant has explained, the general rule in international law is that corporate nationality is determined by reference to place of incorporation or corporate seat.<sup>188</sup> Veil-piercing is available, if ever, only in exceptional circumstances.<sup>189</sup>

104. In this case, Respondent has not provided any credible evidence of the existence of such circumstances and, as a result, veil-piercing by reference to general principles of international

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<sup>185</sup> Reply, paras. 258-260.

<sup>186</sup> *Id.* Respondent alleged that “[t]he fact that the same facts trigger the denial of benefits provision in CAFTA and provide clear evidence of an abuse of the arbitration system has nothing to do with whether piercing the corporate veil is possible under the Investment Law, a question of statutory interpretation which has nothing to do with CAFTA’s denial of benefits provision.” Incredibly, Respondent made this assertion after it had argued in its own prior briefing that the Tribunal’s findings on abuse of process and denial of benefits should “determine the outcome” of its veil-piercing argument. (Objections, para. 415).

<sup>187</sup> See Objections, paras. 383-386, 397-398.

<sup>188</sup> See Rejoinder, paras. 340-347.

<sup>189</sup> *Id.*, paras. 348-349.

law is no more justified than is dismissal on grounds of abuse of process.<sup>190</sup> As already noted, Respondent has not provided any alternative basis upon which the Tribunal could pursue such an extraordinary course of action and thus its argument must be rejected.

**C. The Investment Law Claims And CAFTA Claims Are Separate Claims, Not Separate Proceedings**

105. During the course of the jurisdictional hearing, Respondent took every opportunity to reaffirm that its allegation of abuse of process is the “primary” objection to the Tribunal’s jurisdiction: Respondent even implied that this is the *only* issue that the Tribunal need decide.<sup>191</sup> However, Respondent is faced with the inconvenient reality that this objection – extraordinary as it is even with respect to Claimant’s CAFTA claims – is simply not applicable to claims brought under the Investment Law. Indeed, Respondent has provided no convincing explanation of how the standards it has relied upon in formulating its allegation of abuse of process could be relevant in the context of the Investment Law claims.

106. Instead, Respondent has asserted without explanation that Claimant’s supposed abuse of process “taints” the entire proceeding, and has alleged that Claimant’s domestication somehow “facilitated” its access to international arbitration.<sup>192</sup> These arguments are spurious, given that Claimant has plainly been entitled to invoke the protections of the Investment Law – including El Salvador’s consent to ICSID arbitration under the law – since it first invested in El Salvador as a Cayman Islands company in 2004. Indeed, as already explained, Claimant has actually been registered as a “foreign investor” for purposes of the Investment Law since 2005, and its domestication to Nevada had no impact whatsoever upon that designation.

107. Perhaps recognizing that there is no substantive legal basis for an abuse of process objection to Claimant’s Investment Law claims, Respondent relies heavily on the argument that the claims must be dismissed on procedural grounds. Respondent argued in the first instance that maintenance of the Investment Law claims would violate the CAFTA waiver provision because it would amount to maintenance of a separate “proceeding” from the CAFTA “proceeding.”<sup>193</sup>

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<sup>190</sup> See Counter-Memorial, para. 471; Rejoinder, paras. 350-351.

<sup>191</sup> Hearing Tr., p. 7:13-16; see also pp. 106:18-107:1; 120:1-121:1.

<sup>192</sup> *Id.*, p. 7:6-12.

<sup>193</sup> See Objections, paras. 428-429; 450, 454; Reply, paras. 262-263.

Apparently, this initial argument was made with deliberate disregard or misunderstanding of the Tribunal's Decision on the Preliminary Objections, which held that the two proceedings are in fact "indivisible."<sup>194</sup>

108. During the Hearing, Respondent seemed to take a different tack. Claimant understands Respondent's new position to be that, since the proceedings are "indivisible," the dismissal of Claimant's CAFTA claims necessarily entails dismissal of the Investment Law claims. In the alternative, Respondent's contends, the CAFTA waiver provision precludes the Tribunal from maintaining the Investment Law claims *in the absence of* the CAFTA claims because a partial dismissal would violate the proceeding's indivisibility.<sup>195</sup>

109. Respondent's new theory rests upon a fundamental misunderstanding of the difference between a "proceeding" and a "claim."<sup>196</sup> Indeed, even where they arise under the same instrument of consent, claims being raised in the same proceeding are not monolithic, at least not in the absence of some special rule to the contrary. Thus, courts and tribunals regularly preside over cases wherein the claims being advanced are not all subject to the same substantive law, or to the same grounds for preliminary dismissal.<sup>197</sup>

110. Likewise, such courts and tribunals regularly reject some claims for lack of jurisdiction, while allowing other claims made in the same proceeding to go forward. In fact, this is precisely what happened in the *Mobil* case, upon which Respondent's abuse of process argument heavily relies. In that case, the claimants made claims under Venezuelan law as well as under the Venezuela-Netherlands BIT. The two sets of claims were heard in the same proceeding.<sup>198</sup> At

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<sup>194</sup> Decision on Preliminary Objections, para. 253.

<sup>195</sup> See Hearing Tr., pp. 8:19-9:11, 121:16-123:14, 617:11-618:3.

<sup>196</sup> Claimant here responds to the Tribunal's question of whether its earlier finding as to the indivisibility of these proceedings can be revisited. See Hearing Tr., p. 748:4-12. The Tribunal has already clarified that it is "not seeking to revisit the waiver itself." *Id.* But, for the reasons set out herein, Claimant does not believe that there is any reason to revisit the underlying finding, either, given that the finding is not *relevant* to the issue of whether the Tribunal should dismiss any of Claimant's claims at this stage.

<sup>197</sup> See, e.g., *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Arbitration No. ARB/04/19, Award (12 August 2008) (relevant excerpts) (CL-16); *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (21 July 2008) (relevant excerpts) (CL-29).

<sup>198</sup> There, as here, there was a "single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration registered once by the ICSID Acting Secretary-General under the ICSID Convention." See Decision on Preliminary Objections, para. 253.

the jurisdictional stage, the tribunal dismissed all claims under Venezuelan law because it determined that the law being invoked did not contain the respondent's consent to international arbitration.<sup>199</sup> Furthermore, it dismissed *some* of the claimants' treaty claims because they related to pre-existing disputes over tax and royalty measures.<sup>200</sup> But, the tribunal allowed the claimants' remaining claims under the treaty, related to Venezuela's alleged nationalization measures, to go forward.<sup>201</sup> With respect to these latter claims, it determined that the grounds upon which its jurisdictional determination was based *were simply not relevant*. The same can be said here with respect to Claimant's Investment Law claims.

111. Furthermore, there is no special rule that would justify altering the general permissibility of partial dismissal in this case. Respondent insinuates that a partial dismissal here would somehow transform the original proceeding into a new and different one, in violation of the Tribunal's earlier ruling and of CAFTA's waiver provision. Respondent has not provided any explanation of this theory. What is clear is that Claimant commenced this proceeding by invoking both CAFTA and the Investment Law, and the Tribunal has already held that this dual invocation of consent did not violate Claimant's waiver provision. Where the *commencement* of the proceeding did not violate the waiver, it can hardly be imagined that its *continuation* would somehow do so, regardless of which claims go forward and which do not. The Tribunal noted in its Decision on the Preliminary Objections that the maintenance of this ICSID arbitration would impose no unfairness on Respondent, nor would it subject Respondent to the risk of double recovery.<sup>202</sup> Clearly, adjudication of Claimant's Investment Law claims *in the absence of* the CAFTA claims does not raise any of these risks, either.

112. In short, it is the *proceedings* that are indivisible here, not the *claims*. There is nothing in the Tribunal's Decision on Preliminary Objections that must or should be revisited in evaluating whether to dismiss or not dismiss any of Claimant's claims on abuse of process grounds (or any other grounds). As already discussed, Claimant submits that dismissal of its CAFTA claims on the basis of an alleged abuse of process would be extraordinary and unjustified. But, whether or

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<sup>199</sup> *Mobil*, paras 140, 209 (RL-51).

<sup>200</sup> *Id.*, paras. 206, 209 (RL-51).

<sup>201</sup> *Id.* (RL-51).

<sup>202</sup> Decision on the Preliminary Objections, para. 253.

not the Tribunal agrees with us, it certainly cannot extend any potential dismissal to all *other claims*, without having any legal or equitable basis for doing so, simply because those claims are being heard as part of the *same proceeding*.

**VI. Conclusion**

113. For the reasons stated above, as well as those set out in Claimant's Counter-Memorial and Rejoinder, and presented by counsel at the Hearing, the Tribunal should deny all of the objections raised by Respondent with prejudice; enter a procedural order for concluding the remainder of this case in a single, expeditious phase; and grant such other relief as counsel may advise and the Tribunal may deem appropriate.



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Arif H. Ali  
Alexandre de Gramont  
R. Timothy McCrum  
Theodore R. Posner  
Crowell & Moring LLP  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
+1 202 624 2500 (tel.)  
+1 202 628 5115 (fax)  
aali@crowell.com  
adegramont@crowell.com  
rmccrum@crowell.com  
tposner@crowell.com

Counsel for Claimant