

September 2, 2014

Members of the Tribunal
Mr. V.V. Veeder, Esq.
Professor Dr. Guido Santiago Tawil
Professor Brigitte Stern

c/o Mr. Marco Tulio Montañés-Rumayor
Secretary of the Tribunal
ICSID
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433

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

Dear Members of the Tribunal,

We write on behalf of El Salvador in response to the Tribunal's invitation to comment on the *amicus curiae* submission from a coalition of six Salvadoran community, research, environmental, human rights, and religious organizations, all members of the *Mesa Nacional Frente a la Minería Metálica de El Salvador* ("La Mesa", El Salvador's National Roundtable on Metallic Mining).

The *amicus* brief provides a unique and valuable perspective to the Tribunal

As in the jurisdictional stage, the latest *amicus curiae* submission provides a perspective and insight different from that of the disputing parties to assist the Tribunal in understanding matters in the scope of the dispute. The non-governmental organizations represent many citizens that live in the vicinity of the proposed mine and exploration areas that are the subject matter of this arbitration. They also represent citizens that live in areas where other mining projects are on hold because of the *de facto* moratorium on metallic mining. All of these citizens have a direct interest in the outcome of this arbitration and provide a unique perspective that is useful for the Tribunal to decide this case.

As described in the first *amicus* submission,

Claimant makes no secret of the fact that it spent years vigorously engaging in the political process to secure approval for its controversial mining plans. . . . For years, Claimant asserts, it sought to engage the potentially affected local communities, to hear their views and bring them meaningfully into the process. Only now that it perceives that the communities will not give it the answer it wants does it pretend that this is really a dispute against *the Republic*, and that communities somehow do not matter.

The potentially affected local communities do matter. It is their land, their livelihoods, their well-being and fundamental rights that are at stake here. As NGOs constituted out of local communities, and actively engaged in empowering those local communities, and assisting them in leveraging their democratic rights and opinions within the national political process, *amici* are uniquely poised to offer a critical perspective different from those of the formal parties to the dispute.¹

Accordingly, the *amicus curiae* submissions provide an important perspective regarding the members' environmental concerns about metallic mining in El Salvador and their knowledge of the consequences of Claimant's exploration and lobbying activities in the department of Cabañas. In the first submission, *amici* described "how the underlying dispute is inherently between Claimant and the potentially affected communities, *not* the government" and disputed Claimant's arguments based on "its so-called 'green' mining practices."²

Foreshadowing Claimant's focus at this stage on dismissing the community's concerns and labeling the moratorium as "political," *amici* argued that "political" simply refers to public debate about an important policy decision:

This "political" character of the public policy dialogue, particularly over issues of such importance as the use of natural resources, is neither wrong, dirty, nor in breach of international law, as the investor would like to present it. The investor in the recently-decided *AES Summit* case tried a similar tactic, seeking to characterize Hungary's move to lower electricity prices for its citizens as an inherently illegitimate

¹ *Amicus Curiae* Submission by Member Organizations of *La Mesa Frente a la Minería Metálica de El Salvador* (The El Salvador National Roundtable on Mining), May 20, 2011, ("First *Amicus Curiae* Submission") at 1.

² First *Amicus Curiae* Submission at 2.

"political" response to the public's outrage over the perception that power generators were enjoying "luxury profits." The *AES Summit* tribunal did not dispute the "political" nature of Hungary's acts—in fact, it noted that the investor had become "something of a political lightning rod," and that the politics of which the investor complained were driven in part by "upcoming elections"—but found the "political" label to be of little consequence. Indeed, the tribunal noted that while the reality of democratic politics "may not be seen as desirable in certain quarters," nonetheless "it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public." This understanding is correct: the term "political" should be properly understood in the Aristotelian tradition as the high art of governance of the polis, underscoring democratic decision-making, in contrast with dictatorial, autocratic or corrupt regimes. When Pac Rim attacks the "political" nature of the policy shifts it dislikes, it reveals that its complaints are not a legal dispute over a particular measure, but rather a disagreement with broader changes in political dynamics in El Salvador.³

Amici rightly note that Pac Rim only sought ICSID arbitration because it could not convince the local communities to accept its project: "Pac Rim knowingly took the risk to continue its work because it thought that its political clout, largely exercised through backroom deals and arm-twisting, could circumvent the practice of good governance and the government's accountability to the law and to the people."⁴

Amici respond to Claimant's allegations against them

The views of La Mesa, and specifically of the member organization, the Association for Economic and Social Development ("ADES"), are especially important at this stage of the proceeding because Claimant has made numerous unfounded allegations attacking these organizations' actions and motivations.

As El Salvador noted in its Rejoinder, Claimant attacked mining opponents in its written pleadings on the merits, asserting that "ADES is probably dedicated to opposition activities for profit;" "the anti-mining activists use fear and misinformation as their primary tool and they are not concerned with the truth or learning about the truth;" and the people opposed to mining are either "opposed to any kind of development" or "people who have an economic interest in opposing mining."⁵ Claimant has alleged that the affected communities

³ First *Amicus Curiae* Submission at 5-6.

⁴ First *Amicus Curiae* Submission at 9.

⁵ Rejoinder, para. 268 (quoting Witness Statement of Cristina Elizabeth (Betty) García Cabezas, Mar. 28, 2014, paras. 73-74, and Witness Statement of Gilberto Vásquez, Mar. 14, 2014, para. 13.

fully support its projects and that the Government had no environmental or technical concerns but failed to permit Pac Rim's activities for solely political reasons. El Salvador, on the other hand, points to community opposition as a significant factor in the Ministry of Environment's decision to step back and study the potential benefits and risks of metallic mining before moving forward with metallic mining projects.

La Mesa and ADES are in the best position to respond to Claimant's attacks on all opponents of metallic mining in El Salvador. These non-governmental organizations explain that Pac Rim's attacks are untrue: "The testimony of ADES, one of the organizations signing this *amicus curiae* brief that works directly with local communities in Cabañas, makes clear that most of the population has opposed mining, due to the risks that mining poses on the scarce water resources in the territory."⁶

Amici observe that "Pac Rim's project never received a social license to operate."⁷ In fact, as *amicus* previously described for the Tribunal, opposition to Pac Rim's project started in the communities and it was only their organization that focused the Government's attention on the issue:

the real opposition to Pac Rim's mining plans was *not* generated at the level of government ministries, but rather at the level of the local, potentially affected communities. Local communities and NGOs, including *amicus*, in reflection of their hard-fought empowerment and awareness of their own rights, and in a legitimate exercise of the democratic process in the post-Civil War political environment, refused to accept Pac Rim's plans to dig mines under their own lawfully owned land, build dangerous waste ponds, and otherwise threaten the continuity of their environment, livelihoods, and way of life.⁸

As El Salvador has pointed out in the pleadings, Pac Rim responded to the community opposition by launching a substantial public relations campaign and belittling the opposition. *Amici* describe "Pac Rim's divide-and-conquer strategy" of spending millions of dollars on "community projects, parties, and payments . . . made to several mayors of the region," which has created "'corrosive communities,' in which 'an intense sociopolitical polarity [has] developed between proponents and opponents of mining [that has led] to social

⁶ *Amicus Curiae* Submission by Member Organizations of *La Mesa Frente a la Minería Metálica de El Salvador* (The El Salvador National Roundtable on Mining), July 25, 2014, ("Second *Amicus Curiae* Submission") at 10.

⁷ Second *Amicus Curiae* Submission at 10.

⁸ First *Amicus Curiae* Submission at 2-3. See also Second *amicus curiae* submission at 12 ("The *amicus curiae* brief submitted by *amicus* at the jurisdictional stage describes how 'La Mesa' emerges in El Salvador from the first hand experiences of affected communities and their commendable efforts to organize and protect themselves. Here it only remains for us to underli[n]e that La Mesa continues its work towards the strengthening of a representative democracy in El Salvador that may be sufficiently robust to safeguard the environment and human rights.").

tensions, emotional stress, disintegration of civil society, political turmoil, and violence."⁹ *Amici* note that this social conflict is particularly damaging given El Salvador's recent history of civil war and political divisions and the "consequences for community members who have led the opposition to Pac Rim's plans have been particularly violent—and in some cases fatal."¹⁰

The amicus brief confirms that Claimant could not obtain the required authorizations from landowners for the requested concession

Amici confirm, contrary to Claimant's latest submissions, that Pac Rim could not obtain the required authorizations for the surface area of the requested concession: "At the individual level, people who owned land in Pac Rim's concession area simply refused to sell Pac Rim their land or allow it to operate there."¹¹ According to *amicus*, this requirement is an important part of respecting the rights of the local population:

[the land surface ownership or authorization] requirement gives expression to Principle 10 of the Rio Declaration, as the owners of the land within the concession area would be directly affected by the proposed mining; therefore they are entitled to participate in the legal process relating to the exploitation concession. One way to ensure said participation is to require the authorization of the owners of the surface pieces of land located within the mining exploitation area. . . . Principle 10 crystallizes a notion of governance that gives expression to a foundational democratic principle: the right of people to participate in decisions that affect them.¹²

The amicus brief contributes to a better understanding of the moratorium

Understanding the local community's strong opposition to metallic mining is important to understanding the moratorium.

In a country such as El Salvador, which suffers from water scarcity and high population density, the public debate on the use of natural resources and environmental protection has led the government to protect the public from the threats posed by extractive industries. This democratic dialogue is an expression of the founding principles of sustainable development. International law on foreign investment,

⁹ Second *Amicus Curiae* Submission at 10.

¹⁰ Second *Amicus Curiae* Submission at 10. In light of the divisions and conflict generated within the local communities by Claimant's earlier public relations campaigns, El Salvador notes with concern that Claimant's new owner OceanaGold appears to be reviving public relations activities directed to the local communities and collecting signatures in support of mining.

¹¹ First *Amicus Curiae* Submission at 3.

¹² Second *Amicus Curiae* Submission at 7-8.

including investment arbitration, should not constitute an obstacle to the attainment of sustainable development.¹³

As *amici* explain in their latest submission, the State is obligated to protect the environment and the people from proposed investment projects that could harm them. El Salvador, thus, must "design[] and apply[] a normative framework to protect effectively the enjoyment of rights from the environmental, health and safety risks caused by the activities of third parties" and "take effective measures to respond to risks resulting from programs or projects, regardless of whether they are conducted by the State or third parties, so as to prevent the materialization of environmental damage that interferes with the enjoyment of human rights."¹⁴ The *amicus curiae* submission describes a case before the European Court of Human Rights where the State was held responsible for not properly assessing the risk and taking suitable measures to prevent cyanide water pollution caused by mining operations.¹⁵ As noted by *amici*, "[c]ompliance with this international obligation does not constitute a wrongful act."¹⁶

Specifically, with regard to the Ministry of Environment's responsibilities, *amici* describe that "an incomplete or deficient environmental impact assessment, or an incomplete or deficient economic feasibility study, does not satisfy the procedural obligation of the State" because the State must "ensure that the public enjoys timely access to accurate environmental information, including a proper environmental impact assessment."¹⁷

Amici specifically note El Salvador's obligations under the United Nations' Stockholm Declaration on the Human Environment; the International Covenant on Economic, Social and Cultural Rights; and the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights to protect the environment for current and future generations. "To sum up, in the face of the environmental hazards caused by extractive industries, the State is required to take suitable measures to prevent human rights infringements."¹⁸ *Amici* observe that international law requires States to "protect the right to live in a healthy environment, the right to health and a life of dignity, the right to property and lands, and the right to water and food," all of which "are fundamental to the attainment of the sustainable development of the territory and to the protection of local communities that reside therein."¹⁹ Given these obligations, El Salvador had to implement "a normative framework designed to protect these rights against the risks posed by extractive industries," especially considering its "high population density and

¹³ Second *Amicus Curiae* Submission at 10.

¹⁴ Second *Amicus Curiae* Submission at 1, 3.

¹⁵ Second *Amicus Curiae* Submission at 4 (citing the *Tatar v. Romania* case, heard by the European Court of Human Rights).

¹⁶ Second *Amicus Curiae* Submission at 1.

¹⁷ Second *Amicus Curiae* Submission at 5.

¹⁸ Second *Amicus Curiae* Submission at 6.

¹⁹ Second *Amicus Curiae* Submission at 12.

scarcity of water resources."²⁰ Accordingly, investors must respect and carefully abide by the Salvadoran legal requirements established for the issuance of mining concessions.

The Salvadoran people have a vital interest in this arbitration

Finally, as the *amici* note, they have a significant interest in this proceeding. The applicant organizations describe:

there is little doubt that the Tribunal's decision over the merits of this case will impact on the communities that *amici* represent, including their lands, their livelihoods, and even their well-being and fundamental rights. Consequently, *amici* have a significant interest in the procedure, and it is critically important that their voices be heard and their perspectives be appreciated.²¹

Thus, the Tribunal's consideration of the *amicus curiae* submissions is not only important for providing materially relevant information for this proceeding, but also for ensuring that the views of those most affected by this Tribunal's decisions are heard and respected.

Sincerely,



Luis A. Parada

²⁰ Second *Amicus Curiae* Submission at 12.

²¹ Letter requesting leave to submit *amicus curiae* brief on the merits, July 25, 2014, at ii.