

**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  
COUNTERMEMORIAL IN RESPONSE TO RESPONDENT'S  
OBJECTIONS TO JURISDICTION**

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## I. PRELIMINARY STATEMENT

1. Pac Rim Cayman LLC (“Pac Rim Cayman”), on its own behalf and on behalf of its Enterprises, Pacific Rim El Salvador, S.A. de C.V. (“PRES”) and Dorado Exploraciones, S.A. de C.V. (“DOREX”), respectfully submits this Counter Memorial in opposition to the “Objections to Jurisdiction” filed by Respondent, the Republic of El Salvador (“Respondent,” “El Salvador,” or the “Government”). Pac Rim Cayman, PRES, and DOREX are collectively referred to herein as “Claimant.”

2. Before turning to the arguments asserted in Respondent’s new set of objections, it is important briefly to review the procedural history of this arbitration to date, and to observe that by the time the instant objections reach hearing (currently scheduled for the end of March 2011), the case will have been pending for nearly two years.

3. On 30 April 2009, Claimant filed this arbitration under the Dominican Republic – Central America – United States – Free Trade Agreement (“CAFTA”)<sup>1</sup> and the *Ley de Inversiones* of El Salvador (the “Investment Law”).<sup>2</sup>

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<sup>1</sup> Dominican Republic – Central America – United States Free Trade Agreement, Art. 10.20.4 (5 Aug. 2004), 43 I.L.M. 514 (2004) (“CAFTA”) (RL-1).

<sup>2</sup> Investment Law of El Salvador, Legislative Decree No. 732 (14 Oct. 1999) (with translation) (RL-9).

4. On 4 January 2010, Respondent filed its first set of preliminary objections, purportedly asserted under CAFTA Articles 10.20.4 and 10.20.5. Although Respondent was required to limit its objections to arguments made as “a matter of law” – and accepting the facts pled by Claimant as true – Respondent’s numerous arguments were based almost entirely on assertions of fact that were obviously in dispute, resulting in an extremely fact-intensive (and extremely expensive) initial phase of objections.

5. On 2 August 2010, this Tribunal – having received thousands of pages of memorials, exhibits, authorities, and expert statements, and having held a two-day hearing – rejected each and every one of Respondent’s numerous and largely fact-based arguments offered in support of its objections.<sup>3</sup>

6. On 3 August 2010 – literally hours after the dispatch of the Tribunal’s 2 August 2010 Decision – Respondent launched this second set of objections. All of the arguments and assertions included in the new objections – without exception – could easily have been included in the first set. Indeed, on 1 March 2010, Respondent had made an extensive submission to the Office of the United States Trade Representative (“USTR”), which purported to deny the benefits of CAFTA to Claimant, and which largely stated the same arguments and assertions now offered to the Tribunal in this second set of objections.<sup>4</sup> Notwithstanding the principle of

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<sup>3</sup> *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on the Respondent’s Preliminary Objection Under CAFTA Arts. 10.20.4 and 10.20.5 (2 Aug. 2010) (“Decision on Preliminary Objection”).

<sup>4</sup> Denial of Benefits Notification, Letter from El Salvador to the United States Trade Representative (1 Mar. 2010) (R-111).

transparency that is supposed to be one of the foundations of CAFTA,<sup>5</sup> Respondent submitted its letter to USTR in secrecy, and did not provide its USTR submission to Claimant or the Tribunal until *after* its 3 August 2010 letter initiating the instant rounds of objections.<sup>6</sup>

7. It should now be quite obvious that Respondent’s “bifurcated” objections are nothing but a subterfuge – designed to impose expense and delay and avoid reaching the resolution of this dispute. Had Respondent raised these new objections with its first set, the Tribunal would have easily disposed of them along with the others, and the parties would now be proceeding to resolve the actual claims at issue, instead of spending more time and resources on another round of meritless objections. In the meantime, following the Tribunal’s 2 August 2010 decision, Respondent and its representatives have broadly and publicly accused Claimant of having committed a “flagrant abuse of process” (“*flagrante abuso procesal*”) in bringing this arbitration<sup>7</sup> – which has only aggravated and exacerbated a dispute already described by the Tribunal as having “engendered substantial controversy and widespread disquiet . . . .”<sup>8</sup>

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<sup>5</sup> See, e.g., CAFTA Preamble (resolving to “ensure a predictable commercial framework for business planning and investment”); *id.* (resolving to “promote transparency”).

<sup>6</sup> Regrettably, USTR never brought it to our attention either. As discussed in Section V.C *infra*, USTR’s lack of response to Respondent’s 1 March 2010 may have been due to concerns about giving diplomatic protection in respect of a dispute already submitted to arbitration. See ICSID Convention, Art. 27(1). This underscores the untimeliness of Respondent’s provision of notice to the United States.

<sup>7</sup> *El Salvador busca frenar demanda de Pacific Rim*, [elsalvador.com](http://elsalvador.com) (9 Aug. 2010) (C-19); David Marroquín, *FGR asegura Tribunal no tiene competencia para resolver litigio Pacific Rim*, [elsalvador.com](http://elsalvador.com) (14 Aug. 2010) (C-20).

<sup>8</sup> Decision on Preliminary Objection, para. 56.

8. We will return to these points later in this Counter Memorial, when we ask the Tribunal to require Respondent to bear the costs of this part of the proceedings pursuant to ICSID Arbitration Rule 28(1)(b). Such a ruling is warranted by, *inter alia*, Respondent's abusive and dilatory tactics in pursuing both its first and second sets of objections; Respondent's obvious intent to impose as much burden and expense on Claimant as possible, when it knows Claimant has limited resources (as a result of Respondent's illegal conduct against it); and Respondent's numerous baseless accusations asserted against Claimant. It is also warranted by the utter lack of merit in Respondent's arguments in support of these new objections, to which we now turn.

## **II. SUMMARY OF THE NEW OBJECTIONS AND CLAIMANT'S RESPONSE**

9. Respondent offers four new objections based on (1) the assertion that Claimant is not an "investor" and does not satisfy certain timing requirements under CAFTA and the Investment Law; (2) a purported denial of benefits under CAFTA Article 10.12.2; (3) alleged abuse of process; and (4) alleged lack of "consent" under the Investment Law.

10. Even a brief summary of these objections shows that the Tribunal should dispose of them easily and expeditiously.

### **A. Objections (1)-(3)**

11. The first three objections – which comprise the bulk of Respondent's Memorial – are largely overlapping. They are all based on a remarkably disingenuous, deceptively selective, and otherwise distorted depiction both of Claimant and of Claimant's claims.

12. From the beginning of this arbitration, Respondent and its counsel have repeatedly sought to portray Pac Rim Cayman as the "sham" creation of a "large" Canadian

corporation, with no ties to the United States of America, set up for the sole purpose of asserting claims under CAFTA at ICSID. Respondent has made these false accusations not only to the Tribunal, but repeatedly to the media.

13. In fact, Pac Rim Cayman is a legitimate U.S. holding company existing under the laws of Nevada. As Respondent and its counsel know well, Pac Rim Cayman is part of a small group of companies that are commonly owned and controlled by a majority of shareholders in the United States (the “Pacific Rim Companies” or the “Companies”). The parent company of Pac Rim Cayman, Pacific Rim Mining Corp., is a publicly traded Canadian corporation that has been majority owned and controlled by U.S. shareholders since 2002.

14. As with most international businesses (even small ones), the Pacific Rim Companies are comprised of several different entities, located in different jurisdictions, each of which plays a different role in pursuing the Companies’ common end. Thus, Pacific Rim Mining Corp. has always served the accounting, marketing, and other administrative functions of the Companies from its small Vancouver office (which currently has one full-time employee in office space that is shared with several other companies).

15. At the same time, one of Pacific Rim Mining Corp.’s several U.S. subsidiaries – Pacific Rim Exploration Inc. (“Pac Rim Exploration”), a Nevada corporation headquartered in Reno – has always served as the exploration arm of the Companies. Since 1997, Pac Rim Exploration has employed and compensated most of the Companies’ senior geologists – who decide where and how the Companies will undertake their mining activities. These senior geologists include the President and CEO of Pacific Rim Mining Corp. – Mr. Thomas C. Shrake,

a U.S. citizen – who has largely run the technical and strategic side of the Companies from his offices in Reno since 1997, and who has always had his salary paid by Pac Rim Exploration.

16. Still another of Pacific Rim Mining Corp.’s U.S. subsidiaries – Dayton Mining (U.S.) Corp., also a Nevada corporation – held 49% of a Nevada mining joint venture, from which it earned over US\$20 million that was reinvested in El Salvador through Pac Rim Cayman.

17. Since 1997, Pac Rim Cayman has been one of the principal corporate entities through which the Pacific Rim Companies have invested in their subsidiaries outside of the United States. Since at least 2005, virtually all of the monies invested by the Pacific Rim Companies in El Salvador – which originated from the equity investments of the predominantly U.S. shareholders, and from profits made from the Companies’ mining operations in Nevada – have been made through Pac Rim Cayman. Even prior to its domestication to Nevada in December 2007, Pac Rim Cayman and its holdings were managed principally from the United States. The decisions as to *which* companies Pac Rim Cayman would hold – and how those holdings would be managed – have been made largely by executives of the Companies in Nevada (principally Mr. Shrake) for more than a decade. Moreover, since December 2007, Pac Rim Cayman has also directly owned Pac Rim Exploration, in addition to the Salvadoran subsidiaries. Pac Rim Cayman is hardly a “sham” company, without substance or presence in the United States.

18. In addition to misrepresenting the true nature of Pac Rim Cayman from the outset of this case, Respondent has repeatedly tried to misstate Claimant’s claims. Respondent’s argument that there was already an “existing dispute” between the parties as of December 2007 –

when Pac Rim Cayman was domesticated to Nevada as part of a larger restructuring of the Companies – once again ignores the basic allegations of the Notice of Arbitration, as well as the larger record now before the Tribunal. Specifically, Respondent confuses what could at most be described as a “disagreement” between Claimant and Respondent as to the requirements of Salvadoran law with an “investment dispute” as that term is used in CAFTA (*i.e.*, a claim that a measure of Respondent breaches obligations under CAFTA and thereby causes loss or damage to Claimant and/or its covered investments).

19. Respondent’s mischaracterization of a mere disagreement as a full-blown investment dispute depends, in turn, on its mistaken view of the measure at issue. Respondent treats a December 2004 missed deadline by El Salvador’s *Ministerio de Medio Ambiente y Recursos Naturales* (“MARN”) as if that were the sole or primary measure at issue.<sup>9</sup> In fact, as is clear from Claimant’s Notice of Arbitration, the measure at issue is Respondent’s *de facto* ban on mining operations, a practice which then-President Saca announced in March 2008. Whether that announcement imposed the ban in the first place or revealed its existence is hardly relevant for purposes of determining the Tribunal’s jurisdiction. In either case, the measure at issue did not become recognizable as such until after CAFTA had entered into force and after Claimant had acquired U.S. nationality. Therefore, the investment dispute (as opposed to a mere disagreement) could not possibly have existed before those key jurisdictional thresholds had been crossed. Even if Respondent contests the existence of a mining ban (despite the public

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<sup>9</sup> The Republic of El Salvador’s Memorial Objections to Jurisdiction, paras. 27-34 (15 Oct. 2010) (“Objections”).

statements of President Saca and his successor, President Funes), its characterization of the measure at issue as a single act or omission completed in December 2004 still is incorrect, because the failure of MARN to act in December 2004, together with subsequent failures to act by MARN and its sister ministry, *Ministerio de Economía* (“MINEC”), is a situation that continued to exist after the key jurisdictional thresholds were crossed, thus causing it to come within the scope of CAFTA’s Investment Chapter.<sup>10</sup>

20. Respondent’s view of MARN’s December 2004 failure to act and subsequent failures to act by MARN and MINEC as completed acts (rather than continuing acts or omissions) is based on its assertion that under Salvadoran law, Claimant’s applications for an environment permit and an exploitation concession were “presumptively denied” when, after 60 days following their submission, Respondent failed to rule on them one way or the other. In a twist of logic as well as a misrepresentation of Claimant’s allegations, Respondent argues that Claimant’s decision *not* to commence an administrative proceeding in El Salvador in 2004 (or alternatively, in 2006) is when this “dispute” arose.<sup>11</sup>

21. Respondent relies on and (once again) misstates Salvadoran law on this issue, but its arguments are also beside the point. Under Salvadoran law, Claimant perhaps could have commenced administrative action in El Salvador after the relevant administrative agencies had neither granted nor denied the applications within specified regulatory timeframes; but Claimant

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<sup>10</sup> See CAFTA, Art. 10.1.3. (RL-1).

<sup>11</sup> Objections, paras. 32, 287. Respondent offers several alternative years when this “presumptive denial” may have taken place. *Id.*, paras. 27, 32, 287, 295.

was under no obligation to do so.<sup>12</sup> Instead, Claimant tried to work with the Government in a constructive and productive manner. More fundamentally, whether Claimant had the right to pursue an administrative law action under Salvadoran law does not mean that a completed act constituting the measure at issue had occurred. It does not mean that conduct constituting the measure at issue was not continuing.

22. Rather than pursue an administrative claim in El Salvador following the inaction on its applications, Claimant continued to work cooperatively with the Government to address the Government's stated concerns. As stated in the Notice of Arbitration, Claimant's officials were "repeatedly assured by senior government officials that the permits would be issued imminently."<sup>13</sup> Claimant believed Respondent's representations. ***From 2006 and into 2008, Claimant dramatically increased its activities and investments in El Salvador in reliance on Respondent's representations.*** Thus, the investments of financial capital made by Pac Rim Cayman into El Salvador for the fiscal years 2006-2008 were as follows:

1 May 2005 – 30 April 2006:	US\$5.8 million
1 May 2006 – 30 April 2007:	US\$10.3 million
1 May 2007 – 30 April 2008:	US\$11 million <sup>14</sup>

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<sup>12</sup> See discussion *infra* at Section IV.D.

<sup>13</sup> Claimant's Notice of Arbitration, para. 73 (30 Apr. 2009) ("Notice of Arbitration").

<sup>14</sup> Witness Statement of Stephen K. Krause ("Krause Statement"), para. 33; see also Pac Rim Cayman Unconsolidated Financial Statements 2004-2010 (C-PROTECTED-1). The Pacific Rim Companies' fiscal year ends on 30 April of the calendar year.

The Companies would not have continued to increase their activities and investments in El Salvador had they believed they had a “dispute” with the Government.

23. It was only in 2008, after then-President Saca appeared to announce a *de facto* ban on metallic mining that a dispute began to crystallize. Even after that announcement, however, Salvadoran officials told Claimant that the delays were purely for political reasons and that the project would eventually proceed. As late as June 2008, in a face-to-face meeting attended by the U.S. Ambassador to El Salvador, President Saca told Mr. Shrake personally that the permits would be issued to Claimant after elections scheduled for March 2009.<sup>15</sup> Further discussions ensued, in which Claimant sought a written commitment from the Saca Administration that the permits would in fact be issued following the elections. Claimant did not issue its Notice of Intent until 9 December 2008, after it became clear that President Saca had no intention of honoring his prior commitment.

24. Still, after submitting its Notice of Intent in December 2008, Claimant waited more than the 90 days required under CAFTA Article 10.16.2 to file its Notice of Arbitration, in the hopes that an amicable resolution could still be reached. In the meantime, President-elect Funes indicated that his administration would continue the *de facto* ban on metallic mining that had been commenced by the Saca Administration in 2008.<sup>16</sup>

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<sup>15</sup> Witness Statement of Thomas C. Shrake (“Shrake Statement”), para. 119.

<sup>16</sup> *Id.*, paras. 130-31.

25. Accordingly, on 30 April 2009, Claimant initiated this arbitration. This was nearly a year and a half after the Pacific Rim Companies decided to undertake the restructuring that resulted in Pac Rim Cayman's domestication to Nevada, among other changes to the Companies.

26. As set forth below,<sup>17</sup> based on Claimant's allegations, as well as the record facts now before this Tribunal, the claims easily meet all of the jurisdictional requirements under CAFTA and the Investment Law, including the definition of "investor" and the timing requirements of both instruments. The Tribunal should therefore reject Respondent's objections on these points.

27. Similarly, Respondent's invocation of CAFTA's denial of benefits provision (Article 10.12.2) also fails. That provision provides that – subject to CAFTA's Notification, Provision of Information, and Consultations provisions – a Party "may" deny the benefits of Chapter 10 to an enterprise *if* it has "no substantial business activities in the territory of any Party, other than the denying Party," *and* if it is owned or controlled by persons of a non-Party (or of the denying Party).<sup>18</sup> It is designed to allow Parties to deny the benefits of Chapter 10 when a person of a non-Party sets up an enterprise in a Party – even though that person of a non-Party have no other economic link to that Party – solely so the enterprise can assert CAFTA

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<sup>17</sup> See *infra* at Section III-VII.

<sup>18</sup> CAFTA, Art. 10.12.2 (RL-1).

claims that otherwise could not have been asserted by the person of the non-Party who owns or controls the enterprise.

28. In the context of CAFTA Article 10.12.2, “substantial” does not mean “large.” Rather, it means of substance (as opposed to merely form). Under CAFTA, the definition of “enterprise” includes, for example, a “sole proprietorship” and a “trust,” whose foreign investment decisions could be made by a sole proprietor or a single trustee located in the territory of a Party (and who might run the business from his or her home or even the office of another entity).

29. Contrary to Respondent’s suggestions, there is nothing inherently “insubstantial” about a holding company, which is simply “[a] company formed to control other companies, usu[ally] confining its role to owning stock and supervising management.”<sup>19</sup> Here, virtually all of Pac Rim Cayman’s substantial business activities – *i.e.*, the decisions as to what it would hold, and how those holdings would be managed – were made by U.S. executives (principally, Mr. Shrake) in the Reno, Nevada offices of the Pacific Rim Companies. Those decisions may not have required large numbers of employees or extensive facilities; but they were “substantial” within the meaning of CAFTA Article 10.12.2, and they were made in the United States.

30. Moreover, in addition to showing that Claimant has no “substantial activities” in the United States, Respondent would also have to show that Claimant is owned or controlled by persons of a non-Party to invoke CAFTA’s denial of benefits provision. But the ultimate

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<sup>19</sup> BLACK’S LAW DICTIONARY 298 (2004) (CL-69).

ownership and control of Claimant resides in the majority of U.S. shareholders who own and control Pacific Rim Mining Corp., thus indirectly owning and controlling Claimant. The purpose of the denial of benefits provision would plainly not be served by determining that the immediate owner and controller of an enterprise of a Party is a person of a non-Party and looking no further to determine whether there are persons of a Party further up the chain of ownership and control.

31. Finally, Respondent may not invoke CAFTA's denial of benefits provision retroactively. CAFTA is practically unique among trade agreements and investment treaties of the era in which it was concluded in that it contains a particularly robust notice and consultation requirement that must be met *before* a Party denies benefits to an investor of another Party. That Respondent failed to provide notice of its intention to deny benefits to Claimant's home State (the United States), or to Claimant itself for that matter, prior to the commencement of this arbitration provides a separate and independent reason for the Tribunal to reject Respondent's attempt to do so now.

32. With respect to Respondent's "abuse of process" objection, it is plainly frivolous. Declining jurisdiction for an abuse of process is an extraordinary remedy. It is seldom requested and almost never granted, and for good reason – it requires an affirmative showing of bad faith on the part of the Claimant. Such a remedy might be warranted in a case where the claimant and/or its affiliates set up a shell company in a jurisdiction where they have no other presence, solely to obtain access to arbitration which they would not otherwise have had, well after a dispute (not a mere "disagreement," but an actual "dispute" based on a claim that a specific measure of the respondent breached a legal obligation to the claimant thereby causing loss or damage to the claimant or its covered investments) was already pending or had clearly crystallized. In this case, however, Pac Rim Cayman and its subsidiaries have long been

managed from Nevada, where its affiliates have also long had a substantial presence. A substantial amount of the capital invested through Pac Rim Cayman into El Salvador is of U.S. origin. Moreover, no dispute had crystallized as of December 2007, when Pac Rim Cayman was domesticated to Nevada as part of an overall corporate restructuring, undertaken for entirely legitimate business reasons.<sup>20</sup>

33. Respondent's repeated assertions that Claimant has tried to "conceal its abuse"<sup>21</sup> (e.g., by allegedly trying to hide the fact that a company called Pac Rim Cayman is something other than a holding company) are as absurd as they are irresponsible. All of the information "uncovered" by Respondent in its "investigation" of Claimant comes from documents that the Pacific Rim Companies have made publically available for many years (principally through consolidated public filings), and/or that they provided to Respondent long before this arbitration.

**B. Objection (4)**

34. Respondent's last objection is that the Investment Law does not provide consent to arbitration under the ICSID Convention, because it does not specifically use the word "consent." This argument is also frivolous. Article 15 of the Investment Law clearly and specifically states that "[i]n the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to . . .

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<sup>20</sup> See discussion *infra* at Section III.D. Even if a dispute had crystallized as of or prior to December 2007, the Companies' majority U.S. shareholders and other U.S. entities – which had made substantial investments into El Salvador through Pac Rim Cayman – could have brought claims at ICSID under both CAFTA and the Investment Law, thus belying the suggestion that the Companies undertook the restructuring to obtain access to a forum that otherwise would not have been available to them.

<sup>21</sup> Objections, paras. 17-24.

the International Centre for Settlement of Investment Disputes (ICSID) . . . .”<sup>22</sup> This is literally a textbook example of a binding offer of consent by the host State through its domestic legislation. Professor Schreuer in his treatise on the ICSID Convention specifically offers Article 15 of the Investment Law as an example of a national investment law that “provide[s] unequivocally for dispute settlement by ICSID.”<sup>23</sup> Indeed, a previous ICSID tribunal easily concluded that Article 15 constitutes a clear “unilateral offer of consent” to foreign investors to submit their investment disputes with El Salvador to ICSID.<sup>24</sup> This objection, too, should be easily rejected by the Tribunal.

### **C. Overview of the Counter Memorial**

35. In the remainder of this Counter Memorial, we will set forth a statement of the relevant facts (Section III) and then demonstrate that:

- The facts pled by Claimant more than establish a *prima facie* case of jurisdiction under CAFTA and that the Tribunal should reject Respondent’s objections *ratione personae* and *ratione temporis* (Section IV);
- The Tribunal should reject Respondent’s invocation of CAFTA’s denial of benefits provision (Section V);

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<sup>22</sup> Investment Law, Art. 15 (unofficial translation). The original Spanish text provides: “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 . . . Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI) . . . .” (RL-9).

<sup>23</sup> See also CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY at 197 (2<sup>nd</sup> ed. 2009) (CL-70).

<sup>24</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*. ICSID Case No. ARB/03/26, Award, para. 332, (2 Aug. 2006) (RL-30).

- The Tribunal should reject Respondent’s objections for “abuse of process” (Section VI);
- The Tribunal should reject Respondent’s arguments under El Salvador’s Investment Law (Section VII); and
- The Tribunal should order Respondent to bear the costs of this part of the arbitration under ICSID Arbitration Rule 28(1) (Section VIII).

36. In addition to the authorities and exhibits submitted herewith, this Counter Memorial is also supported by the Witness Statements of:

- **Mr. Thomas C. Shrake**, who serves as the President and CEO of Pacific Rim Mining Corp.; the President, Treasurer, and Secretary of Pac Rim Exploration; the Treasurer of Dayton Mining (U.S.) Inc.; and one of the Managers of Pac Rim Cayman;
- **Ms. Catherine McLeod-Seltzer**, who serves as the Chairman of the Board of Pacific Rim Mining Corp. and a Manager of Pac Rim Cayman; and
- **Mr. Steven Krause**, a partner and director of Avisar Chartered Accountants, who serves on a part-time, contract basis as the Chief Financial Officer of Pacific Rim Mining Corp.

### III. STATEMENT OF FACTS

37. The Tribunal’s task at the jurisdictional phase is to “accept *pro tem* the facts as alleged by [Claimant] to be true and in that light to interpret [the relevant provisions of the treaty] for jurisdictional purposes . . . .”<sup>25</sup> As discussed in detail in Sections IV – VII *infra*, the facts as alleged in the Notice of Arbitration are more than sufficient to establish jurisdiction

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<sup>25</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 118 (8 Feb. 2005) (“*Plama*”) (RL-66) (quoting the separate opinion of Judge Higgins in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 ICJ Reports 803, 810). See also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, para. 62 (15 Apr. 2009) (the facts as pled by the claimant “have to be accepted *pro tem* at the jurisdiction phase”) (“*Phoenix Action*”) (RL-50).

*prima facie* under CAFTA and the Investment Law, and to require the denial of all of Respondent's objections. However, Respondent purports to have undertaken an "investigation" of Claimant – and has misleadingly and selectively presented portions of its alleged "findings" in support of its new objections, while obscuring or ignoring numerous key facts. Therefore, Claimant will set forth the actual relevant facts in detail below, which are confirmed in numerous public filings and submissions to the Government made by the Pacific Rim Companies over the course of many years.

38. Specifically, this Section of the Counter Memorial will summarize (A) the early history of the Pacific Rim Companies, including their significant presence in the United States dating back to 1997; (B) the merger of Pacific Rim Mining Corp. and Dayton Mining Corporation in 2002, which further augmented the Companies' presence and activities in the United States; (C) the financing, planning, and development of Claimant's El Salvador project, almost all of which occurred in or originated from the United States; (D) Claimant's cooperation with the Salvadoran Government to attempt to resolve delays in Claimant's permit applications, and the repeated assurances by high-level Salvadoran officials that the permits would be forthcoming, which continued into 2008; (E) the corporate reorganization of the Pacific Rim Companies in December 2007, which resulted in (among other things) Pac Rim Cayman's domestication to Nevada (from which it has always been managed); and (F) the *de facto* ban on

metallic mining announced by the Saca Administration in 2008 and continued by the Funes Administration through the present – *i.e.*, the key measure giving rise to this dispute.<sup>26</sup>

**A. Early Years**

39. As stated above, the Pacific Rim Companies are comprised of a small group of entities located in several different jurisdictions. The number and structure of the Companies have changed several times from 1997 to the present, based on the Companies' acquisition and disposition of assets and their overall business needs. But the basic management of the Companies, and the two locations from which the Companies as a group have been managed – Reno, Nevada, U.S.A., and Vancouver, Canada – have not changed.

40. In the United States, Mr. Thomas C. Shrake, the President and CEO of Pacific Rim Mining Corp., has always led the Companies' mining operations and overall mining strategy – including the choice of which mining assets to acquire and how to manage them – from his offices in Reno, Nevada, where the other senior geologists of the Companies are also based. Since 1997, Mr. Shrake has managed all of the Companies' holdings, including Pac Rim Cayman and its Salvadoran and other subsidiaries, from Reno.<sup>27</sup>

41. In Canada, the accounting, finance, shareholder-relations, marketing, and other administrative functions of the Companies have always been carried out in the Vancouver office

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<sup>26</sup> We note that with the exception of the continuation of the *de facto* ban on metallic mining by the Funes Administration, which post-dated the Notice of Arbitration, all of the facts contained herein are presented in at least summary form in the Notice of Arbitration.

<sup>27</sup> Shrake Statement, paras. 34-36, 54-55; Witness Statement of Catherine McLeod-Seltzer ("McLeod-Seltzer Statement"), paras. 27-28, 30-31.

of Pacific Rim Mining Corp., the publicly-traded company which is the ultimate parent corporation in the Pacific Rim Companies.

42. Neither the Reno nor the Vancouver office has ever been “large” in terms of its size or number of employees. Again, the Pacific Rim Companies are a small group of companies. There have never been more than five full-time employees based in Reno. There have never been more than seven full-time employees based in Vancouver.<sup>28</sup>

**1. The Formation of the Companies’ Management Team**

43. The current management of the Pac Rim Companies essentially dates back to 1997. Since that time, the two senior officers of the Companies have been Mr. Shrake and Ms. Catherine McLeod-Seltzer, who currently serves as the Chairman of the Board of Directors of Pacific Rim Mining Corp.

44. Both Mr. Shrake and Ms. McLeod-Seltzer are well-known figures in the mining world.

45. Mr. Shrake is a U.S. citizen who has worked and lived in Reno, Nevada from 1983 to the present (with the exception of a three-year period spent in Hermosillo, Mexico).<sup>29</sup> Prior to joining the Pacific Rim Companies, Mr. Shrake already enjoyed a well-established reputation for finding and developing mineral deposits both in the United States and in Latin America. Mr. Shrake’s extensive background in exploration geology is set forth in detail in his

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<sup>28</sup> Shrake Statement, para. 35.

<sup>29</sup> *Id.*, para. 1.

Witness Statement, but in short, over the past thirty years, he has found numerous significant mineral deposits in Latin America and the United States (many of them in Nevada).<sup>30</sup>

46. While Mr. Shrake is well-known as an exploration geologist, Ms. McLeod-Seltzer's reputation is for financing and putting together successful mining companies.<sup>31</sup> Her model has been to put the right management team in place and raise the financing; she then finds a talented exploration geologist to lead the technical side of the business. Ms. McLeod-Seltzer is a Canadian citizen.

47. In 1996, Ms. McLeod-Seltzer was looking for new mining companies to finance and develop. She was introduced to Pacific Rim Mining Corp., a small publicly traded Canadian company that had been founded in 1986. Pacific Rim Mining Corp. held an interest in the Diablillos silver project in Salta, Argentina through an Argentine subsidiary. Ms. McLeod-Seltzer believed that the Pacific Rim Companies had potential, but could accomplish more with better financing and a better overall management team. Accordingly, she led the acquisition of the Companies through a private placement financing and acquired control of the Companies.<sup>32</sup> Following her usual model, Ms. McLeod-Seltzer wanted to find an accomplished exploration

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<sup>30</sup> See *id.*, paras. 14-25.

<sup>31</sup> *Id.*, paras. 27-30; McLeod-Seltzer Statement, paras. 18, 20, 22.

<sup>32</sup> McLeod-Seltzer Statement, para. 21; see also Shrake Statement, paras. 27-28.

geologist to manage and lead the Companies' exploration and mining efforts. She knew Mr. Shrake by reputation and arranged for a meeting with him.<sup>33</sup>

48. Mr. Shrake found that he and Ms. McLeod-Seltzer share many of the same social values as well as the same philosophy for how a mining business should be run. Both for business reasons as well as personal conviction, Mr. Shrake and Ms. McLeod-Seltzer believe that mining companies operating in the developing world must adhere to the highest environmental and safety standards and must be committed to sustainable development.<sup>34</sup>

49. Following their meeting, Ms. McLeod-Seltzer offered Mr. Shrake the position of CEO of Pacific Rim Mining Corp. Mr. Shrake accepted it. Ms. McLeod-Seltzer assured him that he could establish an office in Reno, Nevada from which to manage and guide the mining operations of the Companies. Mr. Shrake began work in Reno in February 1997.<sup>35</sup>

## **2. The Formation of Pac Rim Exploration and Pac Rim Cayman and the Respective Roles of the Reno and Vancouver Offices**

50. As soon as he assumed the position of CEO of Pacific Rim Mining Corp. in early 1997, Mr. Shrake established offices in Reno, Nevada and hired an office manager.<sup>36</sup>

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<sup>33</sup> McLeod-Seltzer Statement, para. 23.

<sup>34</sup> Shrake Statement, para. 30; McLeod-Seltzer Statement, paras. 25-26.

<sup>35</sup> Shrake Statement, para. 34-36, 54-55.

<sup>36</sup> The offices were established at their current location, 3545 Airway Drive, Reno, Nevada 89511. From April 2001 to June 2003, they were relocated to the 3550 Barron Way, Suite 12-B, Reno, Nevada 89511, but then returned to the Airway Drive address. Ms. Marjorie L. Sherer, a U.S. citizen, was hired as the Reno office manager in 1997 and remains the office manager today. *Id.*, para 34.

51. At Mr. Shrake's direction, the Companies created Pac Rim Cayman in September 1997 as a subsidiary in the Cayman Islands for the purpose of holding the Companies' subsidiary in Argentina, which in turn held the Companies' interest in the Diablillos Silver Mine in Argentina.<sup>37</sup> Mr. Shrake was advised at the time that holding the Companies' foreign investments through subsidiaries in the Cayman Islands could create tax savings for the Companies.<sup>38</sup>

52. From 1997 to the present, Mr. Shrake has been responsible for managing Pac Rim Cayman and its holdings, which he has done from his offices in Nevada. Specifically, since 1997, Mr. Shrake has been principally responsible for determining what Pac Rim Cayman would hold and how those holdings would be managed (including the assets and subsidiaries that the Companies would later acquire in El Salvador). Thus, for example, in 1997, Mr. Shrake decided that the Companies would hold the Diablillos mine in Argentina through Pac Rim Cayman. Mr. Shrake later decided that the Companies would sell the Diablillos mine to help finance the El Salvador project, and, accordingly, Pac Rim Cayman divested itself of its ownership in the Diablillos mine. Similarly, Mr. Shrake determined that Pac Rim Cayman would hold the Companies' Salvadoran assets, and, as discussed below, Mr. Shrake was principally responsible for the Companies' acquisition and management of those assets. It was also on Mr. Shrake's recommendation that the Companies domesticated Pac Rim Cayman to Nevada in December 2007. Mr. Shrake and Ms. McLeod-Seltzer both officially hold the title of "Manager" of Pac

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<sup>37</sup> *Id.*, paras. 34, 40.

<sup>38</sup> *Id.*, para. 40.

Rim Cayman. But as acknowledged by Ms. McLeod-Seltzer in her witness statement, it has always been Mr. Shrake who has managed Pac Rim Cayman, along with its direct and indirect subsidiaries, from his offices in Reno.<sup>39</sup>

53. Also in 1997, and at Mr. Shrake's direction, the Companies established Pac Rim Exploration (originally called Andes Exploration Inc.) as a Nevada corporation. In addition to serving as the President and CEO of Pacific Rim Mining Corp., Mr. Shrake also serves as the President, Secretary, and Treasurer of Pac Rim Exploration. Since 1997, Pac Rim Exploration has served as the exploration arm of the Companies. Pac Rim Exploration has also paid (or substantially contributed to) the salaries and benefits of the Companies' senior geologists, including that of Mr. Shrake.<sup>40</sup> As discussed in greater detail below, the geologists employed by Pac Rim Exploration (including Mr. Shrake) planned and executed the exploration and development of the El Salvador project. Pac Rim Exploration also supervised and paid many of the outside firms and consultants that helped to plan and develop the El Salvador project.<sup>41</sup>

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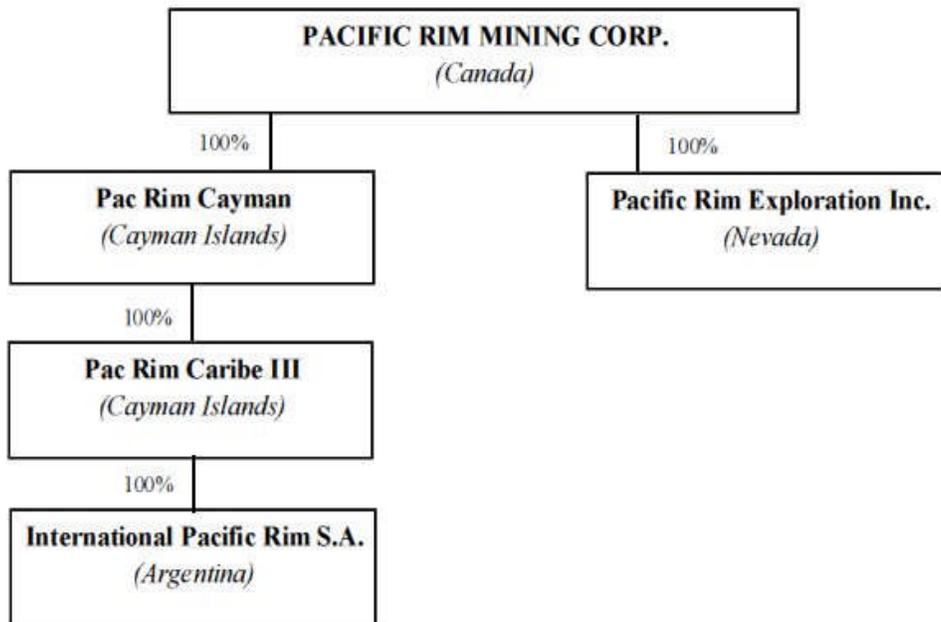
<sup>39</sup> McLeod-Seltzer Statement, paras. 27-28, 30; *see also* Shrake Statement, paras. 35-36.

<sup>40</sup> Shrake Statement, paras. 35, 39.

<sup>41</sup> *See* Discussion *infra* at Section III.B; Shrake Statement, paras. 34-35, 39, 66-67.

54. Thus, in 1997, the corporate structure of the Companies was relatively simple:<sup>42</sup>

**The Pacific Rim Mining Companies' Organizational Structure in 1997**



55. Mr. Shrake also hired two senior geologists in 1997: Mr. William T. Gehlen and Mr. David Ernst. Messrs. Shrake, Gehlen, and Ernst had served as the core geological team at Gibraltar Mines Ltd., based in Reno, where Mr. Shrake had been Vice-President for Exploration prior to joining the Pacific Rim Companies. They became the core geological team for the Pacific Rim Companies in 1997 and are still the core geological team for the Companies today.

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<sup>42</sup> The Pacific Rim Mining Companies' Organizational Structure (1997) (C-21).

Both Messrs. Gehlen and Ernst were instrumental in exploring and developing the Companies' El Salvador project.<sup>43</sup>

56. Today, Mr. Gehlen serves as the President of the Companies' Salvadoran subsidiaries, PRES and DOREX. He also serves as the Vice President of Exploration for Pacific Rim Mining Corp. and Pac Rim Exploration and maintains an office in the Companies' Reno offices. Since 2002, Mr. Gehlen has divided most of his time between El Salvador and Reno.<sup>44</sup>

57. Mr. Ernst serves as the Chief Geologist for both Pacific Rim Mining Corp. and Pac Rim Exploration. He has also devoted substantial amounts of his time to the El Salvador project since 2002. When not in the field, Mr. Ernst also maintains his office in Reno.<sup>45</sup>

58. Like Mr. Shrake, Mr. Gehlen and Mr. Ernst are both U.S. citizens and long-time Nevada residents.<sup>46</sup> Thus, the core geological team that controlled the mining operations of the Pacific Rim Companies from 1997 to the present consisted entirely of U.S. citizens working out of Reno, Nevada.<sup>47</sup>

59. It was common practice in that time frame for international mining companies to be organized in a structure that includes a publicly traded Canadian corporation as the ultimate

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<sup>43</sup> Shrake Statement, paras. 37-39, 61.

<sup>44</sup> *Id.*, paras. 39, 61.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, para. 37.

<sup>47</sup> *Id.*, para. 38.

parent company. As stated in a 1997 article entitled “Taxes and the Structuring of Investments in International Mining Ventures”:

[F]oreign promoters of public mining companies often choose to list on one of the Canadian Stock Exchanges as they can generally realize greater values by listing in Canada. Canada has a reputation as one of the world’s preeminent markets for the shares of mining companies. There is a long history of Canadian involvement in the mining field with the result that mining investors are both knowledgeable and experienced in the industry. Moreover, Canadian investors have traditionally been prepared to invest more in mining companies than investors in other jurisdictions. Public offerings by mining companies have historically been very successful in Canada.<sup>48</sup>

60. It is therefore not surprising that the Pacific Rim Companies were set up with a publicly-traded Canadian parent at the top of their corporate structure. Given that Pacific Rim Mining Corp. was the publicly-traded parent corporation, it made sense for the administrative and other “public company” functions to be performed by Pacific Rim Mining Corp. in Vancouver. Thus, Vancouver was where the accounting, marketing, audit, finance, and shareholder relations functions of the Companies resided. Both the Chief Financial Officer and the Vice President of Shareholder Relations, for example, maintained their offices in Vancouver.

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<sup>48</sup> Richard G. Tremblay and Rodrigo Valenzuela. Rocky Mountain Mineral Law Special Institute, “Mineral Development in Latin America, Chapter 13: Taxes and Structuring of Investment in International Mining Ventures” at 2 (Nov. 1997) (CL-71). As discussed below, the Pacific Rim Companies did not obtain a majority of U.S. shareholders until 2002, when they merged with Dayton Mining Corporation, another publicly-traded Canadian company.

But the geological and other core mining functions of the Companies resided in Reno. It was from Reno that Pac Rim Cayman and its mining subsidiaries were managed.<sup>49</sup>

61. Ms. McLeod-Seltzer assumed the title of President of Pacific Rim Mining Corp. in 1997 (which she held through 2005). She was based in Vancouver. Her focus was on finance, marketing, and shareholder relations. However, Ms. McLeod-Seltzer was also involved in a number of other projects unrelated to the Pacific Rim Companies. Accordingly, these other administrative functions, although located in Vancouver, often reported directly to Mr. Shrake in Reno.<sup>50</sup>

62. In January 2006, Mr. Shrake assumed the title of President of Pacific Rim Mining Corp., in addition to the title of CEO, and Ms. McLeod-Seltzer became Chairman of the Board of Directors. The press release issued at the time accurately describes the roles that Ms. McLeod-Seltzer and Mr. Shrake have always played, respectively, in Vancouver and Reno:

Ms. McLeod-Seltzer will continue *to participate in Pacific Rim's finance, marketing and administrative functions* as an Executive Officer of the Company.

Thomas Shrake, previously CEO of Pacific Rim, has been appointed President and Chief Executive Officer and *will continue*

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<sup>49</sup> Shrake Statement, para. 34-38, 54-56; McLeod-Seltzer Statement, paras. 28, 30; Krause Statement, para. 14.

<sup>50</sup> Shrake Statement, para. 34-38, 54-56; McLeod-Seltzer Statement, paras. 28, 30; Krause Statement, para. 14.

*to oversee the Company's technical direction and strategic plans.*<sup>51</sup>

63. Again, from 1997 to the present, Mr. Shrake performed those functions in Reno, Nevada, with the assistance of his geological team, who were also based in Reno.<sup>52</sup>

**B. The Merger with Dayton in 2002**

64. From 1997 to 2001, under Mr. Shrake's direction, the Companies continued to develop the Diablillos project in Argentina, and also acquired several additional projects in Argentina, which Pacific Rim Mining Corp. held through Pac Rim Cayman and several other subsidiaries. The geological team also spent considerable time looking at projects in Peru, which it ultimately decided not to pursue.<sup>53</sup> Thus, by 2001, despite significant exploration efforts in Argentina and Peru, the Companies had not found a project that met their overall strategic goals.

65. Mr. Shrake and his geological team in Reno decided to focus their strategy strictly on finding a specific type of deposit, known as "low-sulfidation type epithermal gold deposits." These deposits, which occur in clusters in locations along the Pacific Ocean Basin, have the

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<sup>51</sup> Pacific Rim Mining Corp., News Release # 06-01, "Pacific Rim Mining Makes New Corporate Appointments" (9 Jan. 2006) (emphasis added) (C-22); *see also* Shrake Statement, paras. 54-56; McLeod-Seltzer Statement, para. 27-28, 30.

<sup>52</sup> Shrake Statement, paras. 34-36; 54-56; McLeod-Seltzer Statement, paras. 27-28, 30.

<sup>53</sup> Shrake Witness Statement, para. 42.

potential to yield large amounts of high-quality gold in an environmentally clean manner, with relatively low extraction cost.<sup>54</sup>

### **1. Mr. Shrake Learns of the El Dorado Project**

66. In 2001, Mr. Shrake was attending a mining conference, when he learned about the details of the El Dorado project in El Salvador, which, at the time, was owned by Dayton Mining Corporation (“Dayton”), a publicly traded Canadian company. At the conference, Mr. Shrake was told that the El Dorado site was a low sulfidation gold deposit, with a resource estimate of around 300,000 ounces.<sup>55</sup> Mr. Shrake decided to travel to El Salvador to visit the site.

67. Upon visiting the site, Mr. Shrake concluded that El Dorado was exactly the type of deposit that the Companies had been seeking: a very large, high-quality, low sulfidation type epithermal deposit. Mr. Shrake also recognized that that the deposit likely contained far more than the 300,000 ounces estimated by Dayton. (To date over 1.4 million ounces of gold have been delineated and it is believed that significant resources remain to be explored.)<sup>56</sup>

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<sup>54</sup> *Id.*, para. 44; Pacific Rim Mining Corp., Project Overview – El Dorado (C-23).

<sup>55</sup> Shrake Statement, paras. 45-47. A mineral resource estimate is an estimation of the aggregate “measured resources,” “indicated resources,” and “inferred resources” located in a deposit, as those terms are defined by NI 43-101 and CIM Standards on Mineral Resources and Mineral Reserves. *See also* Claimant’s Response to Respondent’s Preliminary Objection, para. 164 (“Claimant’s Response to Respondent’s Preliminary Objection”) (describing “mineral resources” and “mineral reserves” as defined by CIM Definition Standards – For Mineral Resources and Mineral Reserves, CIM Standing Committee on Reserve Definitions, on Mineral Resources and Reserves: Definitions and Guidelines 4 (22 Nov. 2005)) (CL- 33).

<sup>56</sup> Pacific Rim Mining Corp., Management’s Discussion and Analysis for the fiscal year ended April 30, 2010, Section 3.1.6 Summary (C-24).

Furthermore, because of the nature of the deposit and its geology, it could be mined underground, in a manner that would pose minimal environmental risk, especially if accompanied by proper safety and environmental controls. While much of El Salvador is densely populated, the area where El Dorado is located is not. Later, the Companies determined that the surface entry to the mine and the related facilities would be located on a former cattle ranch. The mining operations would pose no disturbance to local residents, while at the same time providing hundreds of well-paid, skilled jobs for near-by communities.<sup>57</sup>

68. Mr. Shrake returned to the United States greatly interested in the El Dorado site. But he also knew that further due diligence was required.<sup>58</sup>

69. At the time, Ms. McLeod-Seltzer sat on the Board of Dayton, and Dayton's President and CEO, Mr. William Myckatyn, sat on the Board of Pacific Rim Mining Corp. Accordingly, Ms. McLeod-Seltzer and Mr. Myckatyn recused themselves from the discussions of a potential transaction between the Pacific Rim Companies and Dayton. Mr. Shrake led the due diligence and negotiation teams for the Pacific Rim Companies.<sup>59</sup>

70. The due diligence undertaken by the Pacific Rim Companies in El Salvador prior to the Dayton merger is summarized in the Notice of Arbitration. It was also discussed in Claimant's Response to Respondent's first set of objections and at the hearing on the first set of

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<sup>57</sup> Shrake Statement, paras. 47-49.

<sup>58</sup> *Id.*, paras. 50-51.

<sup>59</sup> *Id.*, para. 51; McLeod-Seltzer Statement, para. 29.

objections as well.<sup>60</sup> In sum, Mr. Shrake and his geological team studied detailed information about the El Dorado deposit and the exploration work carried there out by Dayton. They also studied El Salvador's mining, environmental, and investment laws, and its investment climate more generally. Beginning in the late 1990s, El Salvador had initiated numerous reforms in an effort to revive an economy that had been devastated by the country's twenty-year Civil War, which had lasted from 1972 to 1992. In 1996, El Salvador enacted a new *Ley de Minería*, or Mining Law.<sup>61</sup> In 1998, it also enacted a new *Ley del Medio Ambiente*, or Environmental Law.<sup>62</sup> And in 1999, El Salvador enacted its Investment Law. Moreover, in the period between 1996 and 2002, El Salvador ratified seventeen bilateral investment treaties.<sup>63</sup> President Francisco Flores, who served as El Salvador's President from 1999 to 2004, embraced and sought to increase El Salvador's economic reforms as well as its ties to the United States. President Flores was also strongly in favor of CAFTA and helped to solidify support for the treaty throughout the region.<sup>64</sup> El Salvador plainly wanted to attract foreign investment and to do so in an

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<sup>60</sup> Notice of Arbitration, paras. 44-49; Claimant Pac Rim Cayman LLC's Response to Respondent's Preliminary Objection, paras. 22-26 (26 Feb. 2010); Transcript of Hearings on Respondent's Preliminary Objection at 183:22-186:17 (31 May 2010) ("Preliminary Objection Transcript").

<sup>61</sup> Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001) ("Mining Law") (CL-5).

<sup>62</sup> Legislative Decree No. 233 published in Official Journal No. 70, Volume 339, 4 May 1998 (amended by Legislative Decree No. 237 published in Official Journal No. 47, Vol. 374, 9 Mar. 2007) ("Environmental Law") (CL-2).

<sup>63</sup> United Nations Conference on Trade and Development, El Salvador, Total Number of Bilateral Investment Treaties Concluded (1 June 2008) (C-25).

<sup>64</sup> CHRISTOPHER M. WHITE, THE HISTORY OF EL SALVADOR 113 (2009) (CL-72).

environmentally responsible way – all of which was appealing to Mr. Shrake and the Pacific Rim Companies.<sup>65</sup>

71. Mr. Shrake also traveled again to El Salvador to meet with high-ranking government officials, including Ms. Gina Navas de Hernández, the Director of the *Dirección de Hidrocarburos y Minas* (“Bureau of Mines”), part of the *Ministerio de Economía* (“MINEC”). Ms. Navas verified that Dayton’s permits were valid and in good standing. Mr. Shrake encountered enthusiasm from the officials he met, both for the El Dorado mining project and the possibility of the Pacific Rim Companies’ investment in the country.<sup>66</sup>

## **2. The Shareholders Approve the Merger**

72. Mr. Shrake had originally wanted the Pacific Rim Companies to acquire only Dayton’s assets in El Salvador. However, he ultimately concluded that a merger with Dayton in its entirety would be more advantageous for the Pacific Rim Companies, because Dayton held other assets that could be used to help finance the El Salvador project. Specifically, Dayton owned a subsidiary called Dayton Mining (U.S.) Inc., a Nevada corporation that held a 49% interest in a gold mining operation called the Denton-Rawhide Joint Venture (“Denton-Rawhide”). Located near Fallon, Nevada, the Denton-Rawhide mine was projected to generate revenue for a number of years and could be used to fund exploration activities in El Salvador. Dayton also owned an asset in Chile called the Andacollo Gold Mine, which the Companies

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<sup>65</sup> Shrake Statement, paras 51-52; David Gates “Q&A: Carlos Quintanilla Schmidt, VP of El Salvador” Business News Americas (18 July 2002) (C-26).

<sup>66</sup> Shrake Statement, para. 52.

eventually sold to the Trend Mining Company in 2005 for a total of US \$5.4 million. Those monies were also invested by the Companies in El Salvador.<sup>67</sup>

73. Following the positive results of the due diligence in El Salvador, and of Dayton overall, Mr. Shrake recommended that Pacific Rim Mining Corp.'s Board of Directors approve the merger. The Board did so and in turn recommended approval of the merger to the shareholders. Following the approval of their respective shareholders, the Pacific Rim Companies and Dayton merged in April 2002.

74. After the merger, the parent corporation of the amalgamated companies retained the name Pacific Rim Mining Corp. and remained a publicly-traded Canadian company. Mr. Shrake and Ms. McLeod-Seltzer retained the titles of CEO and President, respectively, of Pacific Rim Mining Corp. until January 2006 (when, as stated above, Mr. Shrake became the President and CEO, and Ms. McLeod-Seltzer became the Chairman of the Board). As before, Pacific Rim Mining Corp. retained its office in Vancouver, which remained principally responsible for the finance, accounting, shareholder relations and other administrative functions of the Companies. Likewise, Pac Rim Exploration retained its office in Reno, which, under Mr. Shrake's oversight, remained principally responsible for the core exploration and mining functions of the Companies. Each of these offices continued to function with only a handful of employees. In

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<sup>67</sup> Shrake Statement, para. 50; Krause Statement, para. 23; Pacific Rim Mining Corp., News Release # 05-13 "Pacific Rim Announces Fiscal 2006 First Quarterly Results" (7 Sept. 2005) (C-27).

the period just after the merger, there were six full-time employees based in the Vancouver office, and four full-time employees based in the Reno office.<sup>68</sup>

### **3. The Increased U.S. Presence**

75. As a result of the merger, the Pacific Rim Companies had a significantly increased presence in the United States. Following the merger in April 2002, Pacific Rim Mining Corp. held two direct subsidiaries in Nevada: Pac Rim Exploration and Dayton Mining (U.S.) Inc. Pacific Rim Mining Corp. was now traded on the American Stock Exchange as well as the Toronto Stock Exchange. The 2002 Annual Report – issued in August 2002, a few months after the merger – announced:

In April 2002, Pacific Rim Mining Corp. merged with Dayton Mining Corporation to create a new exploration and development company with ample working capital and future cash flow to aggressively move its very attractive El Dorado exploration project forward.

\* \* \* \*

To reflect the new entity in the gold industry that we believe the merger has created, Pacific Rim now trades under the stock symbol PMU on the Toronto Stock Exchange (TSX) and the American Stock Exchange (AMEX).<sup>69</sup>

76. The publicly available, consolidated financial reports filed by the Companies from 2002 forward reported substantial assets and revenues in the United States.<sup>70</sup> They further

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<sup>68</sup> Shrake Statement, paras. 55-56.

<sup>69</sup> Pacific Rim Mining Corporation, 2002 Annual Report, at 2 (“Annual Report”) (C-28).

<sup>70</sup> Shrake Statement, para. 57; see 2002 Annual Report (C-28); 2003 Annual Report (R- 97); 2004 Annual Report (C-29); 2005 Annual Report (C-30); 2006 Annual Report (C-31); 2007 Annual Report

(continued...)

report that the Companies' "principal operating asset is its 49% ownership of the Denton-Rawhide Mine . . . located near Fallon, Nevada."<sup>71</sup> Thus, the 2002 Annual Report<sup>72</sup> reported the Companies' segmented information as follows:

	<b>Four Months Ended April 30, 2002</b>	<b>Year Ended December 31, 2001</b>	<b>Year Ended December 31, 2000</b>
<b>Total assets</b>			
Canada	\$ 2,682	\$ 1,064	\$ 4,231
<b>USA</b>	<b>18,445</b>	<b>19,274</b>	<b>20,131</b>
El Salvador	4,184	4,184	4,184
Chile	19	17	17
Total	\$ 25,330	\$ 24,540	\$ 28,563
<b>Total property, plant and equipment</b>			
Canada	\$ 11	\$ 2	\$ -
<b>USA</b>	<b>5,238</b>	<b>6,262</b>	<b>9,157</b>
El Salvador	4,184	4,184	4,184
Chile	17	17	-
Total	\$ 9,450	\$ 10,465	\$ 13,341
<b>Revenue, excluding interest income</b>			
Canada	\$ -	\$ -	\$ 674
<b>USA</b>	<b>5,303</b>	<b>14,913</b>	<b>11,159</b>
El Salvador	-	-	-
Chile	-	-	23,093
Total	\$ 5,303	\$ 14,913	\$ 34,926

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(C-32); 2008 Annual Report (C-33); 2009 Annual Report on Form 20F (C-34); and 2010 Annual Report on Form 20F (C-35).

<sup>71</sup> 2002 Annual Report, at 8 (C-28).

<sup>72</sup> *Id.*, at 23. The figures set forth are in thousands and in U.S. dollars.

77. As can be seen from this chart, for each asset category – total assets; total property, plant and equipment; and revenue – the value of the Companies’ assets in the United States significantly exceeded those in Canada. Every Annual Report from 2002 to the present reported that the Companies had significant assets in the United States.<sup>73</sup>

78. From 2002 forward, the Companies’ consolidated financial statements also reported that the Companies’ primary focus was on the El Dorado project in El Salvador – and that the Companies were funding that project in significant part from profits generated from their U.S. operations. Thus, for example, the 2003 Annual Report stated that “Pacific Rim’s cornerstone asset is the El Dorado gold project.”<sup>74</sup> It stated further:

Pacific Rim utilizes cash flow from its 49% interest in the Denton-Rawhide gold mine in Nevada to explore, define and advance its El Dorado and La Calera gold projects in El Salvador.<sup>75</sup>

79. Every subsequent Annual Report contains the same or similar information.<sup>76</sup> The 2002 Annual Report and subsequent Annual Reports provided the address of the Companies’

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<sup>73</sup> Shrake Statement, para. 57; *see* 2002 Annual Report (C-28); 2003 Annual Report (R-97); 2004 Annual Report (C-29); 2005 Annual Report (C-30); 2006 Annual Report (C-31); 2007 Annual Report (C-32); 2008 Annual Report (C-33); 2009 Annual Report on Form 20F (C-34); and 2010 Annual Report on Form 20F (C-35).

<sup>74</sup> 2003 Annual Report, at 2 (R-97).

<sup>75</sup> *Id.*, at “Corporate Profile” (R-97).

<sup>76</sup> 2004 Annual Report, at 1 (C-29); 2005 Annual Report, at 1 (C-30); 2006 Annual Report, at 1 (C-31); 2007 Annual Report, at 6 (C-32); 2008 Annual Report, at 17 (C-33).

“Exploration Office” in “Reno, Nevada USA.”<sup>77</sup> They identified two law firms that served as outside “Legal Counsel” to the Companies, one in the United States and one in Canada.<sup>78</sup> The 2003 Annual Report contained prominent pictures of the Companies’ exploration team, identified as “Tom Shrake CEO (USA)”; “Bill Gehlen, Exploration Manager (USA)”; and “David Ernst, Chief Geologist (USA)”.<sup>79</sup>

80. The quotations and citations of the preceding several paragraphs represent a tiny fraction of the abundant and publicly available record demonstrating the Companies’ substantial presence in and ties to the United States. Both since before the merger, and even more so afterwards, the Pacific Rim Companies have had a major U.S. presence. This has always been a matter of public record. It is also a matter of public record that substantial portions of the financial and intellectual capital invested by the Companies in El Salvador are of U.S. origin. And, as Respondent knows based on filings made with the Government since at least 2005, the Companies’ investments of financial capital in El Salvador have been made primarily through Pac Rim Cayman.<sup>80</sup>

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<sup>77</sup> 2002 Annual Report, at 25 (C-28); 2003 Annual Report, at 25 (R-97); 2004 Annual Report, at 41 (C-29); 2005 Annual Report, at 45 (C-30); 2006 Annual Report, at 44 (C-31); 2007 Annual Report, at 56 (C-32); 2008 Annual Report, at 57 (C-33).

<sup>78</sup> 2003 Annual Report, at 25 (R-97); 2004 Annual Report, at 41 (C-29); 2005 Annual Report, at 45 (C-30); 2006 Annual Report, at 45 (C-31); 2007 Annual Report, at 57 (C-32); 2008 Annual Report, at 57 (C-33). Since at least 1999, the U.S. law firm of Dorsey & Whitney LLP has served as the Companies’ U.S. securities counsel.

<sup>79</sup> 2003 Annual Report, at “Corporate Profile,” at 3, 5 (R-97).

<sup>80</sup> MINEC, Resolution No. 288-R (21 June 2005) (C-36).

## C. The Financing, Planning, and Development of the El Salvador Project

### 1. Financing

81. Immediately following the 2002 merger, the Pacific Rim Companies began to focus most of their resources in El Salvador. Prior to the merger, Mr. Shrake had directed the sale of the Diablillos mine in Argentina (which, as mentioned above, had been held through Pac Rim Cayman), so that the Companies would have significant cash to invest in El Salvador right away.<sup>81</sup>

82. As stated above, from 2002 forward, nearly all of the profits earned by the Companies from the Denton-Rawhide mine in Nevada – approximately US\$20 million – were reinvested by the Companies in El Salvador.<sup>82</sup> Typically, the profits from Denton-Rawhide were sent by Dayton Mining (U.S.) to Pacific Rim Corp. in Canada, which then invested them in El Salvador through Pac Rim Cayman. Occasionally, as discussed below, the monies were sent by Dayton Mining (U.S.) directly to Pac Rim Exploration, which then directly paid the fees of the engineering and environmental firms that were acting as consultants to the Companies on the El Dorado project, most of which were themselves located in the United States.<sup>83</sup>

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<sup>81</sup> Shrake Statement, para. 50. *See also* 2002 Annual Report, at 1, (C-28) (“Having sold the Diablillos silver-gold project to Silver Standard for \$3.4 million in December 2001, Pacific Rim was able to immediately accelerate the development of El Dorado.”).

<sup>82</sup> Krause Statèrent, para. 22.

<sup>83</sup> Krause Statèrent, paras. 16, 18, 20-22; *see also* Letter from Vector Colorado, LLC to Pacific Rim El Salvador at 4 (30 Dec. 2003) (C-37); Letter from Pacific Rim El Salvador to Call & Nicholas, Inc. (13 Feb. 2004) (C-38); Letter from Pacific Rim El Salvador to McClelland Laboratories, Inc. (1 Mar. 2004) (C-39); McIntosh Engineering, Engineering Services Agreement at 2 (8 Mar. 2004) (C-40); Mine & Mill

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83. In addition, the Companies also used the equity investments of shareholders to finance the El Salvador project.<sup>84</sup> Since 2002, a majority of the outstanding shares in Pacific Rim Mining Corp. have been owned by U.S. shareholders.<sup>85</sup> As stated above, when the Companies sold their assets in Chile in 2005, those monies, too, were reinvested in El Salvador.<sup>86</sup> Again, most of the direct investments of financial capital from these sources into El Salvador were made through Pac Rim Cayman.

84. At Mr. Shrake's direction, the Companies vested ownership of PRES – their main subsidiary in El Salvador – in Pac Rim Cayman on 30 November 2004. Again, Mr. Shrake had been advised that holding the Company's foreign investments through a Cayman Islands subsidiary could provide tax benefits for the Companies.<sup>87</sup> As indicated in the Companies' contemporaneous books and records, all of the investments that the Companies had made in El Salvador prior to November 2004 were then assigned to Pac Rim Cayman. In addition, from

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Engineering, Inc. – Preliminary Capital Cost Study for Pacific Rim El Salvador – El Dorado Project (Mar. 2004) **(C-41)**; SRK Consulting, Proposal for El Dorado Project Feasibility Study (Jan. 2006) **(C-42)**.

<sup>84</sup> Krause Statement, para. 24.

<sup>85</sup> Shrake Statement, para. 58.

<sup>86</sup> *Id.*, para. 50; Krause Statement, para. 23.

<sup>87</sup> Shrake Statement, paras. 40, 107; Krause Statement, para. 26. Prior to the 2002 merger, PRES had been known as Kinross El Salvador S.A. de C.V. Its name was changed to PRES in January 2003. *See also* Notice of Arbitration, paras. 50-51.

2005 forward, virtually all of the Companies' direct investments of financial capital into El Salvador were made through Pac Rim Cayman.<sup>88</sup>

## **2. Planning and Development**

85. As explained by both Mr. Shrake and Ms. McLeod-Seltzer, the ability to find valuable mineral deposits – and to develop them into mines that are financially profitable and environmentally sound – is both an art and a science. The intellectual property required for the endeavor is rare and often harder to find than the financial capital.<sup>89</sup>

86. Virtually all of the intellectual property provided by the Companies to the Enterprises in El Salvador is of U.S. origin. As stated above, Claimant's exploration of El Dorado and the other sites in El Salvador was planned and developed by the Companies' senior geologists – all U.S. citizens based in Nevada, and all employed and compensated by Pac Rim Exploration, a Nevada corporation.

87. Immediately following the 2002 merger, the Companies' core geological team, consisting of Messrs. Shrake, Gehlen, and Ernst, shuttled back and forth between Nevada and El Salvador to work on and develop the project.<sup>90</sup>

88. In addition, at Mr. Shrake's direction, the Companies transferred Mr. Frederick H. Earnest – a highly respected mining engineer who had been serving as the President of Dayton's

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<sup>88</sup> Krause Statement, para. 26.

<sup>89</sup> McLeod-Seltzer Statement, paras. 18, 22; Shrake Statement, para. 63.

<sup>90</sup> Shrake Statement, para. 61.

subsidiary in Chile – to El Salvador. Mr. Earnest became the President of PRES, a position he held from 2002 until he left the Companies toward the end of 2006. Like Messrs. Shrake, Gehlen, and Ernst, Mr. Earnest is a U.S. citizen. Following the merger, he was also employed by Pac Rim Exploration, which provided part of his compensation as well as an office in Reno.<sup>91</sup>

89. Also at Mr. Shrake’s direction, the Companies retained a number of the best mining design, environmental, and other consulting firms to assist on the El Salvador project. Nearly all of these firms were located in the United States, and worked primarily with Mr. Shrake and the Companies’ other geologists at Pac Rim Exploration to plan and develop the El Dorado mine.<sup>92</sup>

90. Thus, SRK Consulting (“SRK”) in Denver, Colorado – recognized as an industry leader in preparing mining feasibility studies – was selected to be the lead coordinator of a report that was designed (1) to satisfy the requirements under El Salvador’s Mining Law for an *Estudio de Factibilidad Técnico Económico* (a “Study of Technical and Economic Feasibility”) and (2) to meet the standards for a “Pre-Feasibility Study” as that term is used in connection with securities disclosure requirements for mining companies that are publicly traded in the United States and Canada.<sup>93</sup> Mine & Mill Engineering, based out of Salt Lake City, Utah, was selected

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<sup>91</sup> The rest of Mr. Earnest’s compensation was provided for by PRES. *Id.*, para. 62, n. 6. When DOREX was formed in June 2005, Mr. Earnest became its *Administrador Único y Representante Legal* (“Sole Administrator and Legal Representative”).

<sup>92</sup> *Id.*, paras. 63-67.

<sup>93</sup> As the Tribunal is aware, the parties dispute whether the Pre-Feasibility Study satisfied the requirements of the Mining Law. Later, as the Companies began work on what is known as a “Feasibility

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to design the mine's above-ground facilities. McIntosh Engineering Inc., based in Tempe, Arizona, designed the underground mine structure. McClelland Laboratories, Inc., based in Reno, Nevada, was selected to perform all of the necessary metallurgical testing. Call & Nicholas, based in Tucson, Arizona, conducted the rock mechanics and stability testing. And Vector Engineering, based out of Grass Valley, California and Denver, Colorado, performed all the hydro-geologic work regarding aquifers, designed the tailing impoundment design, and took the lead in preparing the *Estudio de Impacto Ambiental* ("Environmental Impact Statement") submitted by the Companies in conjunction with the environmental permit application.<sup>94</sup> In addition, portions of the core samples obtained by exploratory drilling conducted at El Dorado were analyzed in Reno, Nevada and stored in a storage facility in Colorado.<sup>95</sup>

91. Not only did these firms work closely with the Companies' U.S.-based geologic team in Reno to plan and develop the El Salvador project. As directed by the Companies, they typically sent their invoices to the Reno office, where they were paid by Pac Rim Exploration.<sup>96</sup>

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Study" for purposes of U.S. and Canadian securities laws, SRK's offices in Canada also worked on the project.

<sup>94</sup> Shrake Statement, paras. 64-65.

<sup>95</sup> The "core" is a cylinder of material retrieved by drilling below the surface of the ground. The core is examined by geologists for mineral percentages and the location of the minerals, which gives the Companies the information necessary to begin or abandon mining operations in a particular area. Exploration geologists consider the core samples to be among the "keys" to unlocking and understanding underground mineral deposits. *Id.*, para. 65.

<sup>96</sup> *Id.*, para. 66; *see also* Letter from Vector Colorado, LLC to Pacific Rim El Salvador at 4 (23 Dec. 2003) (C-37); Letter from Pacific Rim El Salvador to Call & Nicholas, Inc. (13 Feb. 2004) (C-38); Letter

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Pac Rim Exploration paid these invoices with monies it received from Dayton Mining (U.S.) Inc., which had been generated from the Companies' Nevada mining operations.<sup>97</sup>

92. Thus, virtually *all* of the intellectual property contributed by the Companies for investment by the Enterprises in El Salvador was created in the United States, and paid for in the United States with profits generated by mining operations in the United States.<sup>98</sup>

**D. Claimant's Efforts to Cooperate with Respondent During Regulatory Delays and Respondent's Repeated Assurances that the Permits Were Forthcoming**

93. As described in the Notice of Arbitration, the regulatory process that Claimant undertook to try to get an exploitation concession for El Dorado was slow-going.<sup>99</sup>

94. Though frustrating, these delays did not seem particularly surprising – and certainly did not appear to rise to the level of a violation of International Law or the Investment Law – at the time the Companies were encountering them. El Salvador's Mining Law and Environmental Law were both relatively new. There had been almost no gold mining activities in the country for many years. The Salvadoran officials responsible for regulating these activities – primarily the Bureau of Mines within MINEC and the *Ministerio de Medio Ambiente*

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from Pacific Rim El Salvador to McClelland Laboratories, Inc. (1 Mar. 2004) (C-39); McIntosh Engineering, Engineering Services Agreement at 2 (8 Mar. 2004) (C-40).

<sup>97</sup> Shrake Statement, paras. 66-67.

<sup>98</sup> *Id.*, para. 67.

<sup>99</sup> Notice of Arbitration, paras. 54-66.

y *Recursos Naturales* (“MARN”) – were overseeing an industry that was new and unknown to them.<sup>100</sup>

95. The Companies recognized these facts, and, accordingly, were prepared to work patiently, cooperatively, and constructively with Salvadoran officials as they moved through the regulatory process. As Mr. Shrake explains in his Witness Statement, it was Company policy to engage in constant dialogue with the Government’s officials on these issues – both because the Companies wanted to keep the Government apprised of its activities and plans, and also because they wanted to hear the Government’s concerns and input on a continual basis.<sup>101</sup>

96. As discussed below, the Companies believed they were moving the project forward (albeit slowly) – with the overall support of the Salvadoran government – through at least early 2008. With respect to the El Dorado exploitation concession, PRES believed that it had submitted all of the documents requested by the Government, except for an environmental permit, in December 2006. Indeed, PRES was informed by MINEC that it had submitted all of the documents requested by the Government, other than the environmental permit, in December 2006.<sup>102</sup>

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<sup>100</sup> Shrake Statement, para. 68.

<sup>101</sup> *Id.*, paras. 68-70.

<sup>102</sup> *Id.*, para 88; *see also* Letter from Bureau of Mines to Pacific Rim El Salvador (4 Dec. 2006) (R-6) (letter from MINEC to PRES stating that, but for the environmental permit, PRES had complied with all regulatory requirements).

97. Although in 2007 the Companies were unable to get MARN to engage on the issue of an environmental permit for exploitation concessions at El Dorado, the Companies were continuing their exploration activities at El Dorado and elsewhere under other permits that had been issued by MARN and MINEC. The Companies continued to do so well into 2008, during which time they were repeatedly assured by high-level Government officials that exploitation permits for El Dorado were forthcoming. Most important to the Companies, until 2008, the Salvadoran Government as a whole, and at its highest levels, represented that it strongly supported the Companies' work in El Salvador.<sup>103</sup>

98. Given Respondent's assertion that there was a "dispute" between the parties as of 2004, or, alternatively, as of December 2006,<sup>104</sup> the remainder of this Section will describe (1) the Companies' efforts to cooperate with Government officials at MARN and MINEC, as well as through the legislative process as the Government considered revisions to the Mining Law; and (2) the Government's repeated statements of support for the project and its representations that the permits would be forthcoming, which continued into 2008.

### **1. MARN, MINEC, and the Legislative Process**

99. The regulatory process for obtaining a mining concession is described in the Notice of Arbitration and was discussed at length in connection with Respondent's first set of

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<sup>103</sup> Shrake Statement, para. 89-97, 101-04.

<sup>104</sup> Objections, para. 32.

objections.<sup>105</sup> In sum, an applicant must first obtain an exploration license. An exploration licensee who completes the exploration phase is then entitled to apply for an exploitation concession.<sup>106</sup>

100. At the time of the 2002 merger, Dayton held two exploration licenses for El Dorado. One covered a portion of the site known as El Dorado Norte. The other covered a portion of the site known as El Dorado Sur. By 2004, the Companies had verified substantial gold deposits at the El Dorado Norte and El Dorado Sur license areas.<sup>107</sup>

101. Under the Mining Law, an applicant for an exploitation concession must submit, among other things, an environmental permit issued by MARN. In March 2004, PRES filed an application with MARN for an environmental permit. The Companies also worked to finalize the required Environmental Impact Statement (“EIA”) for submission to MARN. In August 2004, Mr. Earnest, the President of PRES, expressed concern to Ms. Navas, the Director of the Bureau of Mines, that MARN appeared to be moving slowly on the application. In response, Ms. Navas wrote Mr. Earnest a letter in which she assured him that PRES’s application for an

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<sup>105</sup> Notice of Arbitration, paras. 27-42; Decision on Preliminary Objection, paras. 122-62, 191-216, 245-56.

<sup>106</sup> As the Tribunal knows, whether a licensee who completes all of the requirements of the Mining Law is entitled and/or obtains an acquired right to an exploration concession is disputed by the parties.

<sup>107</sup> Shrake Statement, para. 71; 2004 Annual Report at 3 (noting that the measured and indicated resource total of the Minita, Coyotera, and Nueva Esperanza had reached 821,000 ounces of gold) (C-29).

exploitation concession would not be affected by any potential delay in receiving the environmental permit.<sup>108</sup>

102. PRES was in constant contact with MINEC as it prepared its application for an exploitation concession for El Dorado. For example, PRES had informed MINEC that it planned to submit an application for an exploitation concession that would cover the entire El Dorado Norte and El Dorado Sur exploration areas. In response, MINEC told PRES that it could not approve a concession covering such a large area. Accordingly, PRES worked with MINEC to define an acceptable portion over which PRES could solicit an exploitation concession. PRES agreed to remove certain areas from the original concession area it sought. These areas were called Huacuco, Pueblos, and Guaco. In consultation with MINEC, the Companies established a new subsidiary in El Salvador – DOREX, which, like PRES, was also directly held by Pac Rim Cayman. DOREX applied for and received exploration licenses, so that the Companies could continue their exploration activities in these areas, without losing their right to apply for exploitation concessions covering these areas at a later date.<sup>109</sup> This was one of the many ways

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<sup>108</sup> Letter from Ms. Gina Navas de Hernández, Director of Department of Mines to Pacific Rim (25 Aug. 2004) (English translation to Notice of Arbitration, Exh. 6). DOREX was established in June 2005. It applied for its exploration licenses for Huacuco, Pueblos, and Guaco in August 2005. It received its exploration licenses for those areas in September 2005, MINEC Resolution No. 205 (28 Sept. 2005) (C-43); MINEC Resolution No. 208 (29 Sept. 2005) (C-44); MINEC Resolution No. 211 (29 Sept. 2005) (C-45).

<sup>109</sup> Notice of Arbitration, para. 66; Shrake Statement, paras. 71-73.

in which the Companies believed that they were working with MINEC in a cooperative and constructive manner.<sup>110</sup>

103. In September 2004, PRES submitted its Exploitation EIA to MARN. By December 2004, PRES had not received any response. In a letter dated 15 December 2004, Mr. Earnest wrote to the Minister of the Environment, Mr. Hugo Barrera, asking for the reasons for the delay, and requesting a meeting. Mr. Earnest noted that more than 60 days had passed since the submission of the EIA.<sup>111</sup>

104. In its Memorial on Jurisdiction, Respondent highlights Mr. Earnest's 15 December 2004 letter to support its argument that a "dispute" between Claimant and Respondent arose at or around the time of this letter.<sup>112</sup> But Respondent fails to recount any of the events that followed the letter. In fact, the Government worked closely with the Companies over the next two years to address all of MARN's concerns relating to the El Dorado EIA.<sup>113</sup>

105. Thus, in February 2005, MARN responded to the EIA with a series of observations. In April 2005, PRES submitted a supplemental volume to MARN addressing those observations. PRES then received additional comments and input from MARN. In May through August 2005, PRES worked with MARN (which continued to provide PRES with

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<sup>110</sup> Shrake Statement, para. 73.

<sup>111</sup> Letter from PRES to the Minister of the Environment (15 Dec. 2004) (R-55).

<sup>112</sup> Objections, paras. 327-38.

<sup>113</sup> Shrake Statèrent, paras. 89-104.

comments and observations through August) and revised the EIA. PRES submitted the revised and updated Exploitation EIA to MARN in September 2005.<sup>114</sup>

106. In October 2005, in accordance with the Environmental Law and MARN's instructions, PRES published information related to the EIA in local newspapers in order to allow the public the opportunity to provide comments on the assessment. At the same time, PRES had public meetings with local community members to present and explain the EIA.<sup>115</sup>

107. In March 2006, MARN provided PRES with the observations that had been submitted during the public comment period. In July 2006, MARN supplemented these observations with thirteen additional comments. The provision of these additional comments was not specifically provided for within the permitting process, which was supposed to conclude with the public comment period. But again, the Companies wanted to be as cooperative, forthcoming, and flexible as possible. Thus, in September 2006, PRES filed a response to the public comments on the EIA, and in October 2006, filed a response to MARN's additional thirteen comments.<sup>116</sup>

108. In December 2006, PRES presented MARN with a design for a state-of-the-art water treatment facility. During their many meetings with community members, the Companies' officials heard frequent concerns over water supply. The water supply near the El Dorado site

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<sup>114</sup> Shrake Statement, paras. 76-77; Notice of Arbitration, paras. 58-59.

<sup>115</sup> Shrake Statement, para. 78; Notice of Arbitration, para. 60.

<sup>116</sup> Shrake Statement, para. 79; Notice of Arbitration, paras. 60-61.

comes from a tributary of the Rio Lempe, which has long been polluted by fertilizers, insecticides, defoliates, detergents, and bacteria. These waters serve the local communities for farming, laundry, bathing, and sanitation. In the rainy season, water was plentiful (albeit polluted); but in the dry season, it was scarce.

109. To address these concerns, the Companies designed a reservoir system that would collect rainwater during the rainy season. PRES would then use this stored water in its operations. Therefore, PRES would never utilize the already scarce polluted river water for use in its operations. In addition, some of the mining operations would discharge water into a local tributary, after first running it through the water treatment facility. This discharged water would be in a state clean enough to meet federal discharge standards in the United States.<sup>117</sup> These plans, if implemented, would have *increased* the amount of clean water available to residents in the area.<sup>118</sup> This is another example of how the Companies and the Government worked closely together to reach a result that – but for the subsequent conduct of the Government – would have yielded significant benefits for all parties involved.

110. Having presented MARN with a plan for the state-of-the-art water treatment facility in December 2006, the Companies believed that they had addressed every concern raised

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<sup>117</sup> Shrake Statement, paras. 80-82; Notice of Arbitration, paras. 62-63.

<sup>118</sup> Shrake Statement, para. 82; Notice of Arbitration, paras. 62-63.

by MARN throughout the extended EIA review process. The Companies expected that MARN would issue the environmental permit shortly.<sup>119</sup>

111. During this same time frame, officials of the Companies were in constant contact with MINEC, both to apprise MINEC on its progress on the environmental permit and to discuss numerous other issues in connection with the overall application process. As the Tribunal is aware from Respondent's first set of objections, in March 2005, shortly after PRES's submission of an application for an exploitation concession at El Dorado, Ms. Navas informed PRES that several persons in MINEC were of the view that the Mining Law required PRES to acquire ownership of, or authorization to use, the entire land surface overlaying the concession.<sup>120</sup>

112. The Companies and their Salvadoran counsel believed the issue was clear and that the Mining Law did not require ownership of or authorization to use the entire land surface overlaying the concession (an issue that, as the Tribunal knows, remains in dispute among the parties). Even Government officials who thought the language did not unambiguously support the Companies' position agreed that a requirement to obtain ownership or authorization for the entire land surface made no sense and was inconsistent with other Salvadoran law.<sup>121</sup>

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<sup>119</sup> Shrake Statement, para. 88.

<sup>120</sup> See Claimant Pac Rim Cayman's Rejoinder on Respondent's Preliminary Objection, paras. 133-42 (12 May 2010) ("Rejoinder on Respondent's Preliminary Objection"); Decision on Preliminary Objections, paras. 192-93, 197-98; Shrake Statement, para. 84.

<sup>121</sup> Shrake Statement, paras. 84-88.

113. Different Government officials suggested various ways to address the issue, including advising PRES to request an “authentic interpretation” (“*una interpretación auténtica*”) and proposing a legislative amendment to clarify and resolve the issue. The Companies tried both approaches. Ultimately, neither approach moved forward. But it was never clear to the Companies whether the Government reached a consensus view on this point.<sup>122</sup>

114. It should be observed, that here too, the Companies’ efforts were meant to be constructive and helpful. The Companies’ proposals for amendments to the Mining Law were hardly limited to the land ownership issue. In addition, the Companies offered proposals:

- to increase the royalty payments that would be paid by concessionaires to the Government;
- to add enhanced environmental rules and protections;
- to levy an additional tax against mining operations, with the revenues going directly to a mining division of MARN to increase the agency’s ability to properly regulate the industry; and
- to establish Legacy Funds at all mining operations, which would provide millions of dollars in capital to local communities to establish new businesses once the mining resources are exhausted and the operations ceased.<sup>123</sup>

These proposals were summarized by Mr. Shrake in a letter he sent to the Minister of the Economy on 13 June 2006.<sup>124</sup> None of these proposals was ever adopted either.

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<sup>122</sup> *Id.*, paras. 86-87.

<sup>123</sup> *Id.*, para. 87.

<sup>124</sup> Letter from Mr. Thomas C. Shrake to Ms. Yolanda de Gavidia (13 June 2006) (C-15).

115. Again, as discussed at length in the first round of objections, if the Bureau of Mines had asked PRES to revise its application for an exploitation concession to include a smaller concession area, PRES could have done so – indeed, as discussed above, it had taken the same approach in response to the Bureau’s advice previously.<sup>125</sup> At the same time, Mr. Shrake believed that if a legislative solution could be implemented, such a solution would be preferable to reducing the concession area or trying to buy or acquire authorization to use more surface land. Accordingly, the Companies pursued that approach while waiting for MARN to act on its application for an environmental permit.<sup>126</sup>

116. As also described at length in the first round of objections, in October through December 2006, PRES and Ms. Navas exchanged correspondence concerning documentation requested by the Bureau of Mines concerning PRES’s application for an exploitation concession for El Dorado. The correspondence ended in a letter from Ms. Navas dated 4 December 2006,<sup>127</sup> which Respondent contends was delivered to PRES but subsequently “withdrawn.”<sup>128</sup> (Respondent has never offered any evidence to support the assertion that the letter was formally or even informally withdrawn.) Although the parties dispute the facts surrounding the letter, and the legal significance (if any) of whether or not it was “withdrawn,” PRES believed that, as of December 2006 (which is also when PRES submitted its proposal for the water treatment

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<sup>125</sup> Shrake Statement, para. 86.

<sup>126</sup> *Id.*, para. 88.

<sup>127</sup> Letter from Bureau of Mines to Pacific Rim El Salvador (4 Dec. 2006) (R-6).

<sup>128</sup> Preliminary Objection, para. 63, n.38.

facility), it had submitted all of the documentation needed to obtain the exploitation concession for El Dorado – except, again, for the environmental permit.<sup>129</sup>

## **2. Respondent’s Repeated Statements of Support for the Project and its Assurances that the Permits Would Be Issued**

117. Respondent asserts that even if the parties’ “dispute” did not exist in 2004, then it must have existed in “December 2006, when according to the Notice of Arbitration, all official communications between the Ministry of the Environment and Pacific Rim El Salvador ceased.”<sup>130</sup> Actually, the Notice of Arbitration alleges that “[f]rom December 2006 through December 2008, . . . MARN ceased all *official communication* with the company *in regards to its application*” for an environmental permit for its exploitation concession for the El Dorado site.<sup>131</sup> That is, after the submission of the plan for the water treatment facility in December 2006, MARN never ruled on the application one way or the other, and never officially communicated with PRES about the El Dorado application until 5 December 2008 – when, as stated in the Notice of Arbitration, “MARN requested that PRES provide the information about the same water treatment plant that PRES had already submitted in December 2006.”<sup>132</sup> Moreover, although DOREX also experienced delays on its applications, MARN and DOREX

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<sup>129</sup> Shrake Statement, para. 88.

<sup>130</sup> Objections, para. 31.

<sup>131</sup> Notice of Arbitration, para. 64 (emphasis added).

<sup>132</sup> *Id.*

were at least engaged in discussions regarding DOREX's applications for exploitation concessions in 2007 and 2008 (as discussed further below).<sup>133</sup>

118. Furthermore, the Notice of Arbitration specifically alleges that even after December 2006, "the Enterprises *continued to meet with MARN* in the hope of achieving a negotiated solution to what they considered to be only a temporary impasse, *and were repeatedly assured by senior government officials that the permits would be issued imminently.*"<sup>134</sup> As stated in the Notice of Arbitration, it was only in 2008 – following reports of public remarks by President Saca that he opposed the granting of any pending permits – that the Companies had reason to believe that the Government was acting "with the unlawful, discriminatory, and politically motivated aim of preventing the Enterprises' mining operations."<sup>135</sup> Even after those remarks, President Saca privately assured Mr. Shrake that the permits would be issued, as discussed further below.<sup>136</sup>

119. Perhaps PRES could have filed an administrative action in El Salvador in 2007, but it was under no obligation to do so.<sup>137</sup> And again, the Companies wanted to work cooperatively with the Government – and were repeatedly reassured by the Government that it supported the Companies' work in El Salvador and that the permits would be forthcoming. Such

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<sup>133</sup> See also *id.*, paras. 70-71.

<sup>134</sup> *Id.*, para. 73 (emphasis added).

<sup>135</sup> *Id.*, para. 74.

<sup>136</sup> Shrake Statement, para. 119.

<sup>137</sup> See Discussion *infra* at Section IV.D.4.B.

reassurances date back to the due diligence meetings that Mr. Shrake held with Salvadoran officials in 2002. They continued after PRES had submitted its applications in December 2004 and after PRES had updated its El Dorado applications in December 2006.<sup>138</sup>

120. Thus, for example, in October 2005, Mr. Shrake and Mr. Earnest met with El Salvador's Vice President, Ms. Ana Vilma de Escobar, and the Minister of the Economy, Ms. Yolanda de Gavidia. The Government's officials at this meeting stated that the Saca Administration strongly supported the El Dorado project.<sup>139</sup>

121. In May 2006, Mr. Shrake and Ms. McLeod-Seltzer visited El Salvador and met with a number of Salvadoran officials, including the Vice President and the Minister of the Economy. Again, these high-ranking officials expressed great enthusiasm and support for the Companies' project, offered to help the Companies, and did not express any concerns about PRES's or DOREX's ability to obtain the necessary permits to continue and expand their work.<sup>140</sup>

122. The only time prior to 2008 that any senior Salvadoran official was reported as expressing any opposition to mining came in July 2006, when Mr. Hugo Barrera, the Minister of the Environment, was reported as stating that he "personally" found mining to be "inconvenient"

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<sup>138</sup> See Shrake Statement, paras. 89-90.

<sup>139</sup> *Id.*, para. 92.

<sup>140</sup> McLeod-Seltzer Statement, para. 32; Shrake Statement, para. 92.

(“*no conveniente*”) for El Salvador.<sup>141</sup> Mr. Shrake was sufficiently concerned that he immediately flew from Reno to San Salvador, where he met first with Yolanda de Gavidia, the Minister of the Economy, who assured him that Mr. Barrera’s statements did not represent Administration policy, and that the Administration still supported the Companies’ project. Mr. Shrake later met with Mr. Barrera, who himself downplayed the remarks and said they did not represent official policy.<sup>142</sup> Indeed, Mr. Barrera left his position at MARN within six months of his reported statement.<sup>143</sup>

123. In the meantime, in November 2006, officials representing the Salvadoran Government visited Mr. Shrake in Nevada. The delegation included Mr. Guillermo Antonio Gallegos, who, at the time, was a senior member of President Saca’s ARENA Party and the Majority Leader of El Salvador’s Congress. The delegation also included Mr. Edgar Bonilla, who at the time was the Mayor of Sensuntepeque and also a member of the ARENA Party. Mr. Shrake had invited the delegation to tour the Midas Mine, an underground gold mine in north-central Nevada, because he thought it would give them a good idea of what the Companies’ project at El Dorado would look like. The delegation members told Mr. Shrake they were impressed and again expressed enthusiasm and support for the project.<sup>144</sup>

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<sup>141</sup> Edgardo Rivera, *Gobierno no avala minas*, El Mundo (1 July 2006) (C-46).

<sup>142</sup> Shrake Tatemmen, para. 93.

<sup>143</sup> *Id.*, para. 93; Lorena Baires, *Más cambios en el gabinete de Gobierno*, elsalvador.com (7 Dec. 2006) (C-47).

<sup>144</sup> Shrake Tatemmen, para. 94. As Mr. Shrake recounts in his Witness Statement, he had taken Mr. Francisco de Sola on a similar tour of the Midas Gold Mine in Nevada in August 2006. Mr. de Sola is a

(continued...)

124. In December 2006, as stated above, PRES submitted its proposal for a water treatment facility to MARN and thought that its application for an environmental permit at El Dorado was then complete.

125. In January 2007, Mr. Peter Neilans, who then served as the Chief Operating Officer at Pacific Rim Mining Corp., traveled to El Salvador, where he met with the new Minister of the Environment, Mr. Carlos José Guerrero Contreras. Mr. Neilans reported to Mr. Shrake that Minister Guerrero committed to “push the bureaucratic process forward.”<sup>145</sup>

126. Based on the Government’s repeated statements of support, and the repeated assurances that the permits necessary for conducting exploitation at El Dorado, the Companies continued their work and investment in El Dorado. Thus, in March 2007, the Companies reported significant new discoveries of gold from their exploration drilling in El Dorado Sur at the so-called “Balsamo deposit.”<sup>146</sup> In April 2007, the Companies reported that they were using four exploration drills at the Balsamo deposit and planned to add another.<sup>147</sup> In August 2007, the

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(continued)

prominent Salvadoran businessman and a board member of El Salvador’s Business Council for Sustainable Development (which had originally recommended the creation of MARN). Mr. de Sola expressed similar enthusiasm and support for the Companies’ work in El Salvador.

<sup>145</sup> Shrake Statement, para. 96.

<sup>146</sup> Pacific Rim Mining Corp. – News Release # 07-02, “Pacific Rim Mining’s High Grade Balsamo Gold Discovery Continues to Grow” (6 Mar. 2007) (C-48).

<sup>147</sup> Pacific Rim Mining Corp. – News Release # 07-05, “Balsamo Gold Zone on Pacific Rim Mining’s El Dorado Project Continues to Yield High Gold Grades and Take Shape” (10 Apr. 2007) (C-49).

Companies reported that the “[o]n-going delineation drilling at the Balsamo deposit [was] nearing completion.”<sup>148</sup>

127. Also in August 2007, DOREX submitted EIAs for the Guaco and Pueblos exploration areas. In November 2007, MARN acknowledged receiving the Guaco EIA, and requested DOREX to respond to observations on it. In January 2008, MARN acknowledged receipt of the Pueblos EIA, and requested that DOREX respond to observations on it. DOREX responded to MARN concerning its observations regarding the Guaco license in February 2008 and the Pueblos license in March 2008.<sup>149</sup> Although DOREX experienced delays elsewhere, the fact that MARN was continuing to communicate and work with the Companies on other sites also reinforced the Companies’ belief that overall, their projects were moving forward with the support of the Government in 2008.

128. Indeed, in each of the years 2006, 2007, and 2008, the Companies *increased* the amount of money they were investing in El Salvador. According to the Companies’ contemporaneous books and records, for the Companies’ fiscal year 2006, Pac Rim Cayman invested US\$5.8 million in El Salvador. For the fiscal year 2007, Pac Rim Cayman invested

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<sup>148</sup> Pacific Rim Mining Corp. – News Release # 07-07, “Pacific Rim Mining’s Balsamo Gold Deposit Delineation Nearing Completion; Another Gold-Bearing Vein Discovered” (2 Aug. 2007) (C-50).

<sup>149</sup> Shrake Statement, para. 99-102; Notice of Arbitration, paras. 70-71.

US\$10.3 million in El Salvador. And for the fiscal year 2008, Pac Rim Cayman invested US\$11.5 million. (The Companies' fiscal year ends on 30 April of that calendar year).<sup>150</sup>

129. In January 2008, the Companies reported updated estimates of gold and silver resources at El Dorado, which at that time included total “measured and indicated resources of 1,430,000 gold equivalent ounces.”<sup>151</sup> Also in January 2008, Mr. Shrake traveled to El Salvador, where he again met with senior officials of the Government, including Mr. Guillermo Gallegos, who, at the time was a senior member of President Saca's ARENA party and the Majority Leader in the Congress of El Salvador. As mentioned above, Mr. Gallegos had been among the Salvadoran congressional delegation that had earlier visited Mr. Shrake in Nevada to tour a Nevada mining site. Mr. Gallegos told Mr. Shrake that he was confident that the permits would be issued, and, moreover, that the proposed amendments to the Mining Law (which included the clarification of any outstanding issue concerning the surface property issue) would be approved in February of 2008.<sup>152</sup>

130. In the meantime, during the 2006-2008 time frame, the Companies also devoted considerable time and effort not only to exploration efforts – which employed over 250 Salvadorans – but also to contributing to the community in other respects. Thus, for example,

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<sup>150</sup> Krause Statement, para 33; *see also* Pac Rim Cayman Unconsolidated Financial Statements 2004-2010 (**C-PROTECTED-1**). Only after President Saca's March 2008 statements did the Companies begin to scale back dramatically their investments in El Salvador.

<sup>151</sup> Pacific Rim Mining Corp. – News Release, “El Dorado Gold Project M&I Resources Top 1.4 Million Gold Equivalent Ounces With an Additional 0.3 Million Gold Equivalent Ounces Inferred” (17 Jan. 2008) (**C-51**).

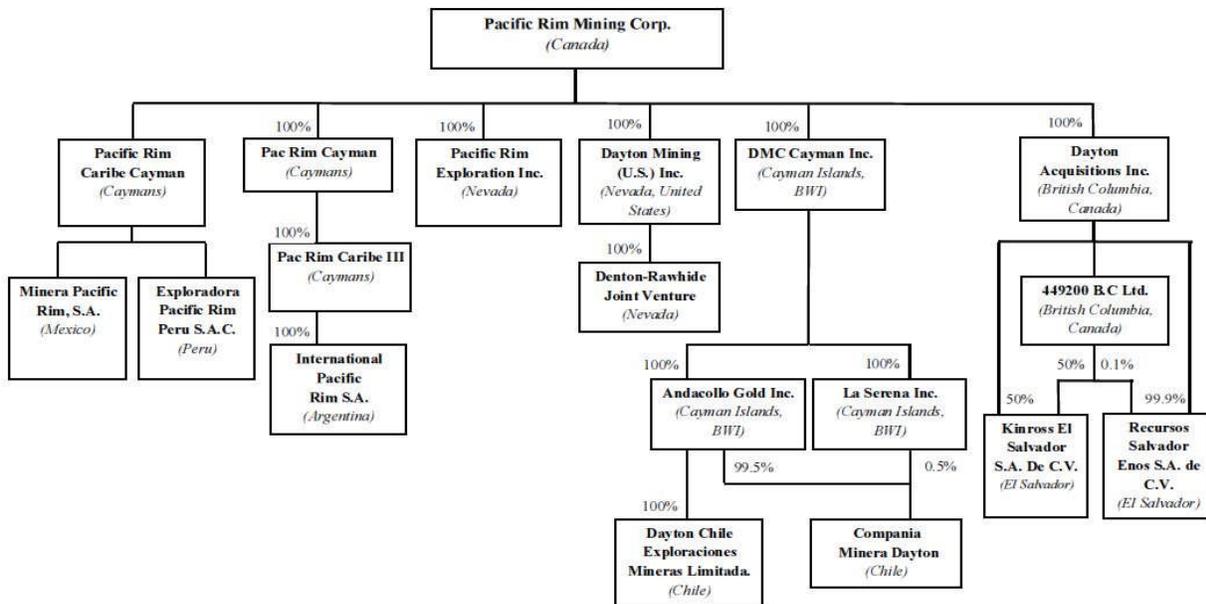
<sup>152</sup> Shrake Statement, para. 101.

the Companies funded health services and infrastructure projects; established environmental education programs in the local schools; established the first recycling program in the region; helped clean refuse from the local river system; and planted over 40,000 trees.<sup>153</sup>

**E. The December 2007 Corporate Reorganization**

131. As a result of the 2002 merger with Dayton, the Pacific Rim Companies had acquired a complex and unwieldy corporate structure. Immediately following the merger, it looked as follows:<sup>154</sup>

**The Pacific Rim Companies' Organizational Structure Immediately Following the 2002 Merger with Dayton**



<sup>153</sup> Macleod-Seltzer Statement, para. 33; Pacific Rim Mining Corp., 2009 Annual Presentation, (Feb. 2009) at 14 (C-52); Pacific Rim Mining Corp. News Release # 08-07, “Pacific Rim Suspends Further Drilling in El Salvador Until Mining Permit Granted; Local Staffing Reduced” (3 July 2008) (C-53).

<sup>154</sup> Pacific Rim Companies’ Organizational Structure Immediately Following the 2002 Merger With Dayton (C-54).

132. The post-merger structure made little business sense in several respects. For example, immediately following the merger, the Companies' foreign subsidiaries were held by a variety of different holding companies, some of which were incorporated in Canada, others of which were incorporated in the Cayman Islands. The Companies also held entities in jurisdictions where they had no activities.<sup>155</sup>

133. The Companies were leanly staffed and, after the 2002 merger, were focused largely on exploration activities in El Salvador. It took several years for the Companies eventually to unwind this structure, which they did through several reorganizations undertaken both to dispose of assets and to position the Companies better on tax, administrative, and regulatory issues.<sup>156</sup>

134. Thus, as summarized above, in November 2004, the Companies vested ownership of PRES in Pac Rim Cayman. PRES had previously been held by a pre-merger subsidiary of Dayton (a Canadian entity called 449200 B.C. Ltd.). As stated, Mr. Shrake was advised at the time that, for tax reasons, it would be preferable for the Companies to hold PRES through a Cayman Islands entity.<sup>157</sup>

135. In 2005, the Companies underwent another restructuring when they sold their interest in the Andacollo Gold Mine in Chile. The Companies effectuated that sale by selling

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<sup>155</sup> Krause Statement, para. 25; Shrake Statement, para. 106.

<sup>156</sup> Krause Statement, para. 25; Shrake Statement, para. 107; McLeod-Seltzer Statement, para. 36.

<sup>157</sup> Krause Statement, para. 26; Shrake Statement, para. 107.

another Cayman Islands holding company (DMC Cayman Inc.), which in turn owned another Cayman Islands holding company (Andacollo Gold Inc.), which in turn owned one of the Companies' Chilean subsidiaries (Compañía Minería Dayton), which in turn owned the Companies' interest in the Andacollo Gold Mine. After the sale of DMC Cayman Inc. in 2005, these entities disappeared from the corporate organizational structure.<sup>158</sup>

136. In 2007, the Companies were looking for ways to save money. As reported in the Companies' 2007 Annual Report, for the fiscal year ended 30 April 2007, the Companies recorded a loss of US\$9.4 million, as compared to a loss of US\$600,000 for the fiscal year ended 30 April 2006.<sup>159</sup> The dramatic increase in losses arose mainly from an increase in exploration activities undertaken in El Salvador in 2007 (as mentioned above, the Companies were increasing the money invested in El Salvador in this time frame), combined with less cash flow being generated by Denton-Rawhide in Nevada and other investments of the Companies.<sup>160</sup> Accordingly, the Companies were looking for ways to cut costs wherever possible.<sup>161</sup>

137. One way for the Companies to save costs was to deactivate subsidiaries in jurisdictions where the Companies had not conducted business for some time, but still paid various fees and costs, and devoted administrative time, in order to maintain the subsidiaries in good standing. In particular, as of 2007, the Companies still maintained subsidiaries in Mexico

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<sup>158</sup> Krause Statement, para. 28.

<sup>159</sup> *Id.*, para. 29; 2007 Annual Report, at 5 (C-32).

<sup>160</sup> Krause Statement, para. 29; 2007 Annual Report, at 5 (C-32).

<sup>161</sup> Krause Statement, para. 29; Shrake Statement, para. 109.

(Minería Pacific Rim, S.A.) and Peru (Explorada Pacific Rim Peru, S.A.C.), even though the Companies had not done any work in Mexico or Peru for some time. The Companies owned the Mexican and Peruvian subsidiaries through a Cayman Islands subsidiary called Pacific Rim Caribe. To save costs, the Companies decided to dissolve all three of these corporations.<sup>162</sup>

138. This led to an examination of the overall corporate structure of the Companies. There were administrative costs involved in maintaining Pac Rim Cayman as a Cayman Islands entity. At the same time, the Companies were advised that there would be no adverse tax consequences to domesticating Pac Rim Cayman to Nevada – the jurisdiction from which it had been effectively managed by Mr. Shrake since 1997. In other words, the Companies believed that by domesticating Pac Rim Cayman to Nevada, they could eliminate the costs of maintaining Pac Rim Cayman in the Cayman Islands, without losing any tax benefits. It made no sense to manage a Cayman Islands company from Nevada, if that company could be domesticated to Nevada with cost savings and no adverse tax consequences.<sup>163</sup>

139. As part of this overall assessment of the Companies’ organizational structure, Mr. Shrake also considered the Companies’ potential avenues of recourse *if* a dispute were ever to arise with El Salvador in the future. National elections were scheduled for March 2009, and it was no secret that many members of the main opposition party, the *Farabundo Marti National Liberation Front* (“FMLN”), were opposed to metallic mining of any type. In addition, as Mr.

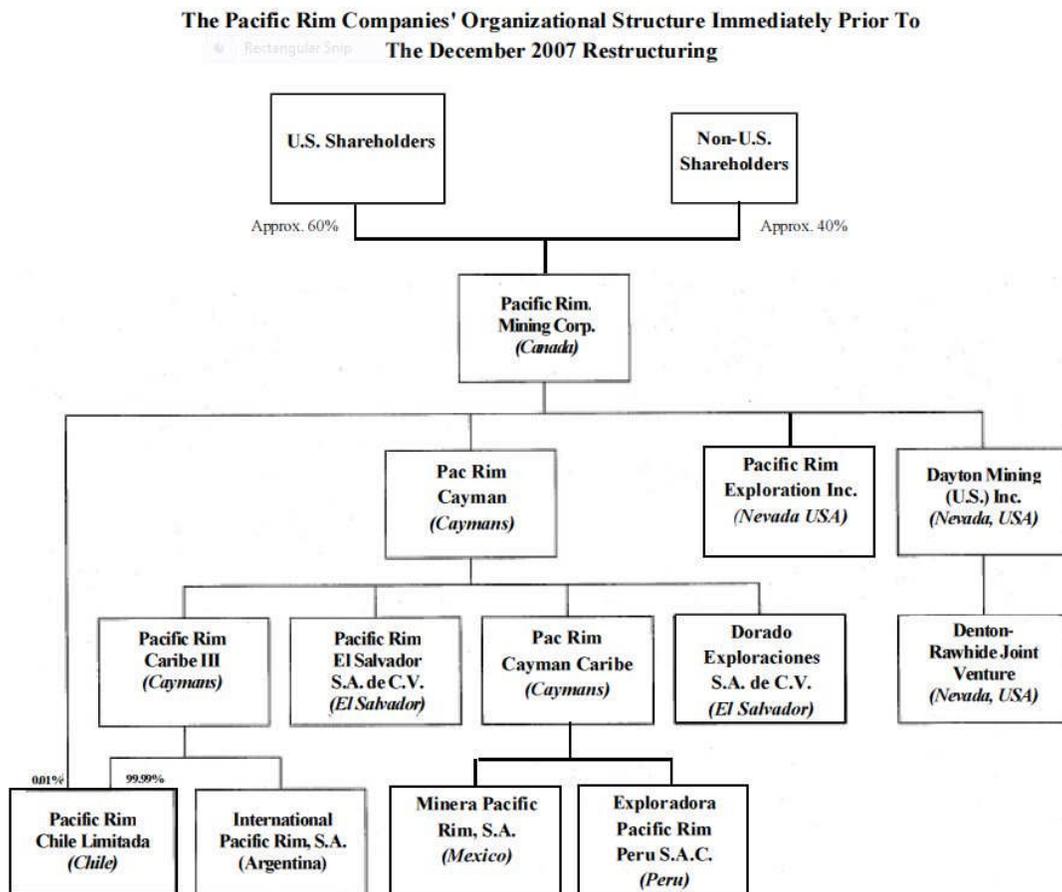
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<sup>162</sup> Krause Statement, para. 30; Shrake Statement, para. 108; McLeod-Seltzer-Statement, para. 36.

<sup>163</sup> Krause Statement, para. 31; Shrake Statement, paras. 110-11; McLeod-Seltzer-Statement, para. 36.

Shrake watched the legislative process unfold in connection with the proposed amendments to the Mining Law, it occurred to him that amendments could also be enacted that would adversely affect the Companies' substantial investments in El Salvador.

140. Prior to the December 2007 reorganization, the corporate structure was as follows.<sup>164</sup>



<sup>164</sup> The Pacific Rim Companies' Organizational Structure Immediately Prior to the December 2007 Restructuring. (C-55).

141. Had there been a dispute with El Salvador prior to the domestication of Pac Rim Cayman to Nevada in December 2007, the majority shareholders in the United States and certain of Pacific Rim Mining Corp.'s U.S. subsidiaries could have asserted claims against El Salvador at ICSID under CAFTA and under the Investment Law. In 2007 (as today), a majority of U.S. shareholders indirectly owned the Salvadoran subsidiaries through their majority shareholding in Pacific Rim Mining Corp.<sup>165</sup> In addition, Pac Rim Exploration and Dayton Mining (U.S.) Inc. – both Nevada corporations – had made substantial investments in El Salvador.<sup>166</sup> Thus, if a dispute had crystallized prior to December 2007, Pac Rim Exploration, Dayton Mining (U.S.) Inc., and/or the U.S. shareholders all could have brought claims against El Salvador at ICSID under CAFTA and the Investment Law. Similarly, Pac Rim Cayman, as a Cayman Islands entity, could have brought claims at ICSID under the Investment Law.<sup>167</sup> And Pacific Rim Mining Corp. could have brought claims under the Investment Law at the ICSID Additional Facility.<sup>168</sup> Mr. Shrake believed that, if a dispute with El Salvador ever arose, it would be preferable for the Companies to bring a single arbitration proceeding rather than for different entities and/or shareholders to pursue different proceedings in different fora. This factor was not

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<sup>165</sup> Shrake Statement, para. 58.

<sup>166</sup> *Id.*, paras. 66-67; Krause Statement, paras. 4, 22.

<sup>167</sup> The United Kingdom expressly included the Cayman Islands when it signed and ratified the ICSID Convention in 1966. *See* United Kingdom, Foreign & Commonwealth Office, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (C-55).

<sup>168</sup> *See* Discussion *infra* at Section VII.B.

originally what led the Companies to undertake the reorganization, but it was one that Mr. Shrake considered in recommending that the reorganization be undertaken.<sup>169</sup>

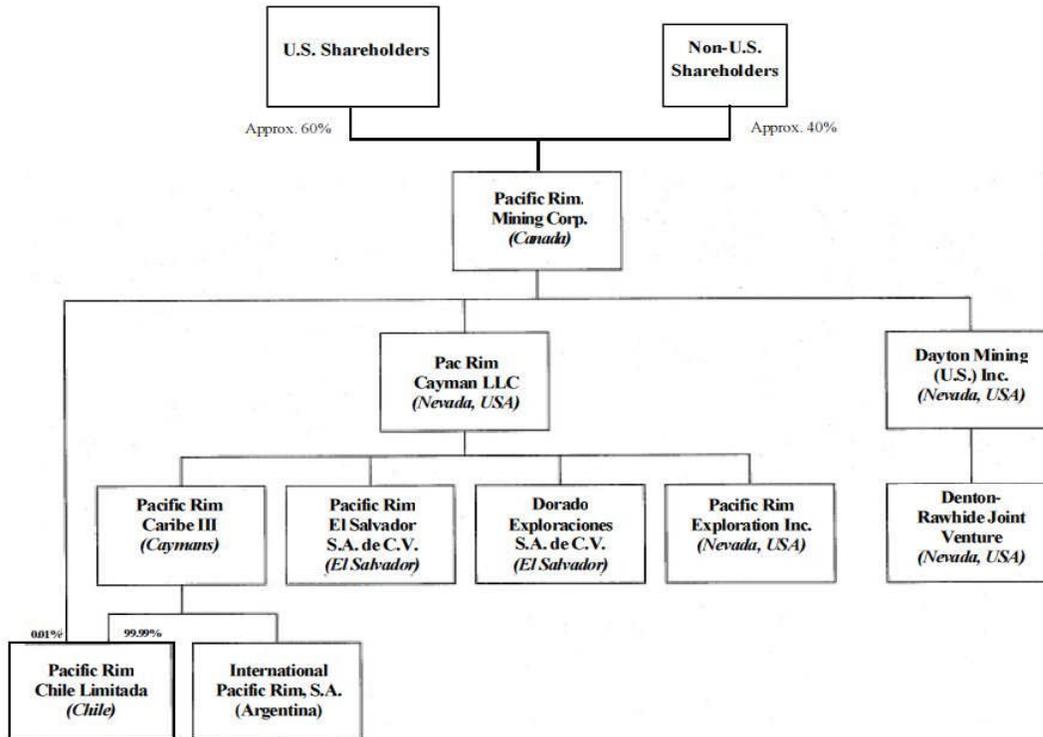
142. By consent resolution dated 4 December 2007, the Board of Directors of Pacific Rim Mining Corp. approved the reorganization, so that the corporate structure would appear as follows<sup>170</sup>:

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<sup>169</sup> Shrake Statement, para. 112. Mr. Shrake recalls advising the Board that the CAFTA issue was a consideration in favor of undertaking the reorganization. *Id.* para. 113.

<sup>170</sup> The Pacific Rim Companies' Organizational Structure As Provided For In The 4 December 2007 Resolution of the Board of Directors (C-57). See Consent Resolution of the Directors of Pacific Rim Mining Corp. (4 Dec. 2007) (C-58). The employee at Pacific Rim Mining Corp. who was supposed to prepare the necessary paperwork to dissolve Pacific Rim Caribe failed to do so, and was let go in 2008 as part of Company-wide layoffs. Pacific Rim Mining Corp. only discovered this omission as counsel was preparing this Counter Memorial; it has since taken the requisite steps to dissolve Pacific Rim Caribe.

**The Pacific Rim Companies' Organization As Provided For In The 4 December 2007  
Resolution Of The Board Of Directors**



143. It must be emphasized again that as of 4 December 2007, when the Board approved the reorganization, neither Mr. Shrake nor anyone else on the Board believed that the Companies had a dispute with El Salvador.<sup>171</sup> There was frustration with the pace of the regulatory process, and a belief that the exploitation permits for El Dorado should have been granted previously. But at the same time, the Companies were making considerable exploration progress at El Dorado and other sites. Officials at the highest level of the Salvadoran government – including the new Minister of the Environment who had taken office at the beginning of 2007 – had expressed support for the Companies’ work in El Salvador, and had

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<sup>171</sup> Shrake Statement, paras. 112-14; McLeod-Seltzer Statement, para. 36.

repeatedly assured the Companies that the permits would be issued soon. Accordingly, the Companies did not commence any type of legal proceeding against the Government in El Salvador or elsewhere. The Companies continued their exploration activities under licenses issued by the Government, and continued their efforts to work cooperatively with the Government through meetings with executive officials and participation in the legislative process, including into 2008.<sup>172</sup>

**F. President Saca’s Announcement of the *De Facto* Ban on Metallic Mining**

144. On 11 March 2008, President Saca was reported as making remarks that were widely interpreted as imposing a *de facto* ban on metallic mining in El Salvador. A press report recounting the remarks is included as Exhibit 7 to the Notice of Arbitration. As the Tribunal set forth the English translation of the press report in its entirety in its 2 August 2010 Decision, we will do the same here. The press report stated:

**Salvador – Mining**

**President of El Salvador asks for caution regarding mining exploitation projects.**

The President of El Salvador, Elías Antonio Saca, stated on Tuesday that “in principle” he is against the granting of permits for new mining exploitations in the country and asked the Congress to review this issue in depth.

“The issue of mining is a matter that must be reviewed in depth. I understand that the members of the House of Representatives have formed a committee (and) that a law must be made, the Ministry of

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<sup>172</sup> Shrake Statement, para. 114.

the Environment and the Ministry of the Economy are working hand in hand with the representatives,” Saca stated at a press conference.

“What I am saying is that, in principle, I am not in favor of granting those permits,” the President said in reference to the 26 mining projects that are applying for exploitation permits.

Mining exploitation is opposed by the church and the left-wing opposition, since it is believed to contaminate the aquifers and to destroy the environment in general, within the limited territory of 20,742 km<sup>2</sup> belonging to El Salvador.

“We want to generate a space to reflect on the benefits or disadvantages of mining. And after we reflect on it, and we’re shown proof that green mining exists and that it is possible to grant the exploitation permits, which is what we have not given them, at that time, a law must be made to make everything very clear,” emphatically declared President Saca.

Last February, the Salvadoran Congress began the consultations for the approval of this controversial law with warnings, from environmental organizations and the Church, asking representatives to act “prudently” while alleging that the health of the population is at stake.

One of the first persons to oppose these mining projects was the archbishop of San Salvador, Fernando Sáenz, who considered the use of cyanide and cadmium for gold exploitation unacceptable, since they were “extremely poisonous” and because they “contaminate the aquifers.”

Mining companies, to diminish criticism, have emphasized in several messages the advantages of the so-called “green mining” for the country, which, with new techniques – they claim – may reduce damages to the environment.<sup>173</sup>

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<sup>173</sup> Decision on Preliminary Objection, para. 77 (providing English translation of Exhibit 7 to Claimant’s Notice of Arbitration) (emphasis added).

145. As stated in the Notice of Arbitration, “PRC and the Enterprises were astonished by President Saca’s assertions,” which suddenly put an entirely new light on the administrative delays they had been facing in attempting to get an environmental permit and exploitation concession.<sup>174</sup> Again, the Companies were entirely in favor of carefully regulating the mining industry to ensure that only environmentally sound projects were approved. That is why the Companies had spent well over two years working with MARN to address all of its concerns – as well as the concerns expressed by the local community – and to develop a mine-design with environmental protections that set new standards for environmentally safe and clean mining in the Americas.<sup>175</sup> PRES has not received a single negative comment from MARN concerning the substance of application for an environmental permit for exploitation at El Dorado since the submission of its proposal for a water treatment facility in December 2006. To the contrary, senior officials of the Government ensured the Companies that El Salvador’s laws would be enforced and that the permit would be issued.<sup>176</sup> Moreover, through the end of 2007, MARN had been requesting DOREX to address its observations concerning DOREX’s applications for Pueblos and Guaco; DOREX continued to address those observations in submissions made to MARN in, respectively, February and March of 2008.<sup>177</sup>

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<sup>174</sup> Notice of Arbitration, para. 76.

<sup>175</sup> Shrake Statement, paras. 75-97.

<sup>176</sup> Shrake Statement, para. 97; Pacific Rim Mining Corp., Social and Environmental Responsibility (C-59).

<sup>177</sup> Notice of Arbitration, paras. 70-71; Shrake Statement, paras. 98-99; after President Saca’s March 2008 remarks, DOREX never heard further from MARN on its Pueblos and Guaco applications. Notice of Arbitration, para. 72.

146. Suddenly, with national elections approaching, the Government's senior official was reported as stating that the existing laws did not matter – and that the repeated commitments and representations made by the Government to the Companies had been false. The Companies interpreted the reports of President Saca's March 2008 remarks as indicating that the Government was willing to abandon – and indeed, was abandoning – its mining and environmental laws for the sake of political expedience.<sup>178</sup> What had previously appeared to be delays now seemed to be very real threats to the Companies' entire investment in El Salvador.

147. On 14 April 2008, Mr. Shrake wrote a letter to President Saca, which stated:

We have been unable to obtain a formal response from the government with respect to our proposed exploitation project for El Dorado. Similarly, our other exploration projects are awaiting receiving their respective permits, as well as our new applications for exploration licenses.

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Through the press, we have noticed that you have stated that you are opposed to awarding us our operating permits. In these public statements, you have stated that, "In principle I do not agree with granting these permits. But if it is demonstrated to me through the studies done by the Ministry of the Environment and the Ministry of the Economy that gold can be produced, thus growing the economy without damaging any resources like water from the use of cyanide, I am willing to work with the assembly on a law to establish things properly."

Our project, Mr. President, does just what you ask and responds to your concern. Modern mining technology does not damage water tables and also denatures the cyanide so that it does not produce any harmful effects. Therefore, there is no damage to people's

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<sup>178</sup> Shrake Statement, para. 116.

health, nor to water nor the environment. Additionally, El Salvador has certain geological characteristics that minimize the risk of environmental impact.

Our technology provides the maximum industrial safety possible and the design of our mine in El Salvador is one of the safest in the world. This project exceeds the safety standards of industrialized countries like the United States, as well as those established in good mining practices and in international agreements. Recently, on April 2nd of this year, our experts demonstrated to the *ad hoc* Mining Commission of the Legislative Assembly what I mentioned in the previous paragraph.

I would also like to explain to you that the situation of Pacific Rim in El Salvador is extremely critical and precarious. Should we not receive a response on behalf of your government that addresses our rights as investors, our company would be in unavoidable situation of having to initiate the resolution of controversies procedure established in the Free Trade Agreement between Central America, the United States and the Dominican Republic (CAFTA-DR).<sup>179</sup>

The letter concluded by requesting a meeting with President Saca “so that we can present the details of our project and exchange the best possible solutions.”<sup>180</sup>

148. Following the dispatch of his 14 April 2008 letter, Mr. Shrake met with various high-level Government officials to try to arrange a meeting with President Saca. These meetings included a three-hour session in May 2008 in Washington, D.C. with El Salvador’s Ambassador to the United States, René de León, who had always been supportive of the Companies’ work in

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<sup>179</sup> Letter from Tom Shrake to President Elías Antonio Saca González (14 Apr. 2008) (English translation to Notice of Arbitration, Exh. 8).

<sup>180</sup> Letter from Tom Shrake to President Elías Antonio Saca González (14 Apr. 2008) (English translation to Notice of Arbitration, Exh. 8).

El Salvador. Ambassador de León told Mr. Shrake that he was sure that President Saca's March 2008 remarks had been made only for political reasons.<sup>181</sup>

149. Finally, the U.S. Ambassador to El Salvador, Charles T. Glazer, arranged for Mr. Shrake to meet with President Saca in San Salvador on 25 June 2008. The meeting was attended by President Saca; Mr. Shrake; Ambassador Glazer; Mr. Donn-Allan Titus, the Economic Counselor at the U.S. Embassy to El Salvador; Mr. Carlos José Contreras Guerrero, who, as mentioned above, had become Minister of the Environment in January 2007; and Ms. Yolanda de Gavidia, the Minister of the Economy.<sup>182</sup> At the meeting, President Saca said that he was not opposed to mining but was worried that issuing permits to PRES would cost his ARENA party votes in the upcoming elections. President Saca stated that his Administration would issue PRES both the environmental permit and exploitation concession for El Dorado in April 2009, after the national elections scheduled for March 2009. President Saca then told Mr. Shrake that he should meet with Ministers Guerrero and de Gavidia to find a solution that would not hurt the ARENA party in the upcoming elections.<sup>183</sup>

150. Later in the day on 25 June 2008, at President Saca's direction, Mr. Shrake met with Minister Guerrero. Although President Saca had requested Minister de Gavidia to attend this meeting as well, she did not appear, and resigned her position as Minister of the Economy

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<sup>181</sup> Shrake Statement, para. 118.

<sup>182</sup> *Id.*, para. 119.

<sup>183</sup> *Id.*, para. 119.

the next day.<sup>184</sup> Mr. Shrake and Minister Guerrero were not able to come to any sort of agreement at this meeting.<sup>185</sup>

151. Despite President Saca's assertions to Mr. Shrake at their 25 June 2008 meeting that he was in favor of mining – and his encouragement to Mr. Shrake to work with his Ministers to find a satisfactory arrangement – President Saca continued to make anti-mining statements in public. In a press interview dated 15 July 2008, President Saca stated:

[F]or now, I will not grant mining permits, until two requirements are satisfied.<sup>186</sup>

152. The first requirement, according to President Saca, was that new mining legislation needed to be passed. To the best of Claimant's knowledge, as of the date of this Counter Memorial, there have been no changes to El Salvador's Mining Law.

153. The second requirement, President Saca said, was that MINEC and MARN must complete a "study" on the environmental effects of mining on the entire country. President Saca, however, did not say what the study would entail or whether it had been started.<sup>187</sup> When

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<sup>184</sup> *Id.*, para. 119; see also *Yolanda de Gavidia deja el Ministerio de Economía*, [elsalvador.com](http://elsalvador.com) (27 June 2008) (C-60).

<sup>185</sup> Shrake Tatemen, para. 120.

<sup>186</sup> See *Saca afirma que no concederá permisos de extracción minera* (15 July 2008) (C-61). The original Spanish text of the article reads: "Al ser consultado sobre declaraciones de la empresa canadiense Pacific Rim, que podría iniciar un proceso de arbitraje internacional contra el Estado, Saca dijo que 'hoy por hoy no daré ningún permiso para la minería, mientras no se cumplan' dos requisitos."

<sup>187</sup> Shrake Statement, paras. 122-23; Notice of Arbitration, paras. 77-78.

Claimant filed its Notice of Arbitration on 30 April 2009 (*i.e.*, nine months after President Saca's statements to the press in July 2008), there was no evidence that any such study had been commenced. About a year and a half after this arbitration was commenced – in September 2010 – the Salvadoran press announced that a contract to conduct a study on the nationwide environmental affects of mining had just been awarded.<sup>188</sup> That award was announced shortly after this Tribunal had rejected El Salvador's first round of objections in this case.

154. Following President Saca's July 2008 interview, Mr. Shrake no longer believed that the Government's officials (and in particular, President Saca) were dealing with him in good faith.<sup>189</sup> In the meantime, the Companies' financial situation continued to deteriorate. On 29 February 2008 – just prior to President Saca's reported comments in mid-March – Pacific Rim Mining Company's stock had been trading at approximately US\$1.21 per share. By 30 June 2008, the share price had fallen to US\$0.80 – a decline of more than 30%. In addition, the profits from the Denton-Rawhide facility in Nevada – which had significantly funded the operations in El Salvador – were continuing to dry up.<sup>190</sup>

155. In July 2008, the Companies suspended drilling activities in El Salvador and began to make workforce reductions. Over 200 employees in El Salvador were laid off at the end of July 2008. In September 2008, Mr. Shrake traveled to Vancouver to lay off employees in

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<sup>188</sup> Shrake Statement, para. 123; MINEC, Adjudication Notice, Winning Bid for the Environmental Assessment of the Mining Sector of El Salvador (1 Sept. 2010) (C-62).

<sup>189</sup> Shrake Statement, para. 153.

<sup>190</sup> Shrake Statement, para. 153.

that office. Also in November 2008, Pacific Rim Mining Corp. vacated the offices it had previously leased, and moved into smaller office space in Vancouver, which it shares with a number of other companies. There have been further layoffs in El Salvador, Canada, and the United States. There is currently one full-time employee in the Vancouver office; three full-time employees in the United States; and five full-time employees in El Salvador.<sup>191</sup>

156. Following several additional efforts to reach an amicable solution with the Government, Claimant submitted its Notice of Intent under CAFTA Article 10.16 on 9 December 2008.<sup>192</sup>

157. On 9 February 2009, President Saca was quoted in the press as stating:

While Elías Antonio Saca is in the Presidency, he will not grant a single permit [for mining exploration], not even environmental permits, which are issued prior to [the mining permits] being granted by the Ministry of the Economy.

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[Claimant is] about to file an international complaint, and I would like to reaffirm, I would prefer to pay the \$90 million than give them a permit.<sup>193</sup>

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<sup>191</sup> Shrake Statement, paras. 125-126; Pacific Rim Mining Corp. News Release # 08-07, “Pacific Rim Suspends Further Drilling in El Salvador Until Mining Permit Granted; Local Staffing Reduced” (3 July 2008) (C-53); Pacific Rim Mining Corp. – Corporate Announcement “Pacific Rim is Moving” (26 Nov. 2008) (C-63); Pacific Rim Mining Corp., News Release # 08-10, “Pacific Rim Mining Announcement Head Office Cutbacks” (18 Sept. 2010) (C-64).

<sup>192</sup> Shrake Statement, para. 127.

<sup>193</sup> See Notice of Arbitration, para. 78 (quoting *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 Mar. 2008) (C-1)).

158. Also, in February 2009, it was reported in the press that the newly installed Archbishop in San Salvador had stated his opposition to mining in El Salvador and wanted the leading Presidential candidates to state their opinions. It was further reported that the FMLN's Presidential candidate, Mr. Mauricio Funes, immediately stated that he agreed with the Archbishop and proposed to ban mining in an open letter styled "*Bienvenido Buen Pastor.*"<sup>194</sup>

159. On 15 March 2009, Mr. Funes won the presidential elections in El Salvador. Following the elections, the Companies' representatives again reached out to both President Saca and President-elect Funes to see if a negotiated solution could be reached.<sup>195</sup> Unable to obtain such a solution, Claimant filed this arbitration 30 April 2009.

160. Again, the shares of Pacific Rim Mining Corp. had been trading at around US\$1.21 prior to President Saca's announcement of the mining ban in March 2008. By 15 April 2009, just prior to the date Claimant filed its Notice of Arbitration, the share price had fallen to just under US\$0.17. The market value of Pacific Rim Mining Corp. had fallen from approximately US\$140 million to approximately US\$20 million – a decline of about US\$120 million (or 85%) in little more than a year.<sup>196</sup>

161. As can be seen from the following chart representing the share price of Pacific Rim Mining Corp. from 2006 to the present, the share price remained relatively stable from

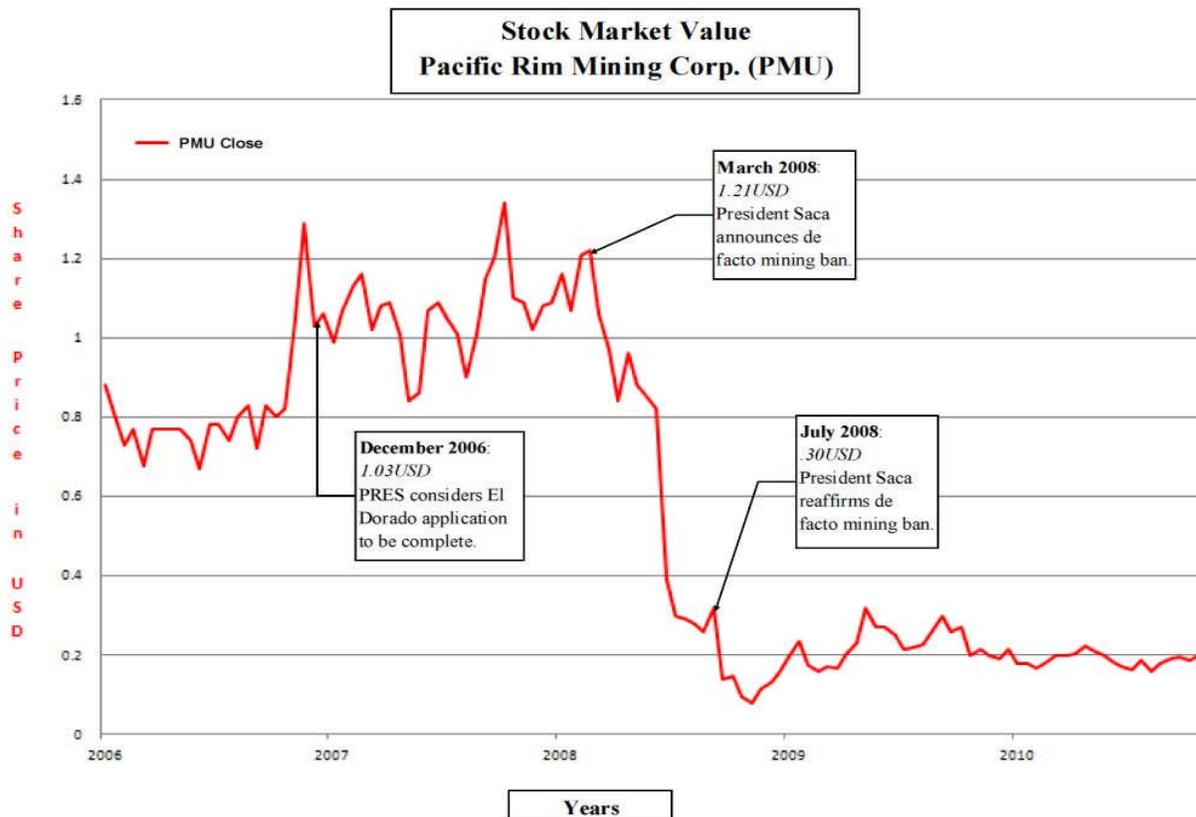
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<sup>194</sup> Shrake Tatemen, para 130; *Un año de espera*, DiaroCoLatino.com (19 May 2010) (C-65).

<sup>195</sup> Shrake Statement, para. 131.

<sup>196</sup> Shrake Statement, para. 132.

December 2006 – when the Companies considered PRES’s application for an environmental permit for exploitation at El Dorado. During the period December 2006 through March 2008, the Companies continued to increase their exploration activities and their investments in El Salvador – again, based on the Government’s repeated representations that the laws would be followed and the permits issued. It was only when President Saca announced El Salvador’s *de facto* ban on mining, in March 2008, that the share price began to fall precipitously – never to recover.<sup>197</sup>



<sup>197</sup> Stock Market Value – Pacific Rim Mining Corp. (C-66).

#### **IV. THE FACTS AS PLEAD BY CLAIMANT FIRMLY ESTABLISH THE JURISDICTION OF THIS TRIBUNAL UNDER CAFTA**

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162. As previously stated, for the purposes of jurisdiction, the Tribunal is to accept *pro tem* the facts alleged by the Claimant, and then to determine whether those facts fall within the scope of the treaty, law, and/or other legal instrument under which the Claimant has commenced the arbitration.<sup>198</sup>

163. The facts as plead by Claimant in its Notice of Arbitration establish the Tribunal's jurisdiction over this investment dispute under CAFTA, which Respondent's objections fail to undermine.<sup>199</sup> This dispute involves claims by Pac Rim Cayman on behalf of itself and its Enterprises with respect to a *de facto* mining ban that was either imposed by El Salvador in March 2008 or, at a minimum, first acknowledged by El Salvador in that time period. The mining ban breaches El Salvador's obligations under CAFTA, and has caused loss or damage to Claimant and its investments in El Salvador. Even if the Tribunal were to accept Respondent's assertion that, despite the public statements of two successive heads of State, the *de facto* mining ban does not exist, the individual instances of Respondent's failure to grant Claimant's mining-related applications are continuing or composite acts or omissions that breach CAFTA obligations and have caused loss or damage to Claimant and, therefore, are within the scope of

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<sup>198</sup> See para. 25 *supra*; para.180, *infra*; see also, Claimant's Rejoinder on Respondent's Preliminary Objection, paras. 74-83.

<sup>199</sup> As discussed in Section VII *infra*, they also establish the Tribunal's jurisdiction over this investment dispute under El Salvador's Investment Law.

CAFTA's Investment Chapter. As such, the dispute meets the requirements of jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*.

**A. Respondent Consented to Submit this Dispute to ICSID and Claimant Has Established its *Prima Facie* Case that the Tribunal Has Jurisdiction *Ratione Materiae*, *Ratione Personae*, and *Ratione Temporis***

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164. The types of claims that may be submitted to arbitration under CAFTA are spelled out in Article 10.16 of CAFTA, read together with the other instruments under which the claims are submitted (in this case, the ICSID Convention).

165. CAFTA Article 10.16.1 provides that a claimant may submit – on its own behalf and/or on behalf of an enterprise of the respondent that is owned or controlled by the Claimant – a claim that the respondent has breached an obligation set forth in CAFTA's Investment Chapter, and that the claimant and/or the enterprise “has incurred loss or damage by reason or, or arising out of, that breach.” Further, CAFTA Article 10.1.1 states that CAFTA's Investment Chapter “applies to measures adopted or maintained by a Party relating to [as relevant here] (a) investors of another Party; [and] (b) covered investments.” Therefore, the conduct constituting the breach must be a “measure,” and it must relate to investors of another Party or covered investments. CAFTA Article 2.1 defines a measure to “include[ ] any law, regulation, procedure, requirement or practice.”

166. In addition, Article 25(1) of the ICSID Convention requires that a dispute submitted to ICSID must be a “legal dispute arising directly out of an investment . . . which the parties to the dispute consent in writing submit to the Centre.”

167. Here, Pac Rim Cayman, on its own behalf as well as on behalf of PRES and DOREX – the enterprises in El Salvador that Pac Rim Cayman owns and controls – claims that El Salvador has breached obligations of Section A of CAFTA’s Investment Chapter, including obligations with respect to national treatment (Article 10.3), most-favored-nation treatment (Article 10.4), the minimum standard of treatment (Article 10.5), and expropriation and compensation (Article 10.7), and has also breached obligations set forth in investment authorizations it received in El Salvador.<sup>200</sup>

168. The measure through which El Salvador has breached these obligations is a *de facto* ban on metallic mining that specifically included or targeted Claimant – a practice that was announced by President Saca in March 2008 (and reaffirmed by President Saca and his successor on multiple occasions thereafter) – and that is evidenced by (in addition to the numerous public statements by President Saca and his successor) the failure of agencies of the Salvadoran Government to grant PRES and DOREX permits and concessions to which they were entitled under Salvadoran law, both before and after the March 2008 announcement.<sup>201</sup> This measure of

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<sup>200</sup> See Notice of Arbitration, paras. 10, 87-88; Decision on Preliminary Objection, paras. 16, 220. The breach of these investment authorizations gives rise to claims under CAFTA as well as under the Investment Law of El Salvador.

<sup>201</sup> We use the term “*de facto* mining ban” throughout this Counter Memorial to refer to Respondent’s practice of repeatedly and consistently failing to grant permits and concessions necessary to operate a mine. The existence of this practice may or may not be the result of a deliberate policy choice. President Saca’s statements beginning in March 2008, and President Funes’s statements beginning in February 2009 strongly suggest that Respondent did make a deliberate policy choice, either in or around March 2008 or earlier, to put a stop to further mining activity. But, even if that is not the case, the cumulative effect of Respondent’s acts and omissions (as described in our Notice of Arbitration) is the same as if it were. In either case, PRES and DOREX are prevented from operating their mining investment, effectively rendering that investment worthless, as a result of inaction by agencies of Respondent. That repeated and consistent inaction in response to applications by PRES and DOREX, which began before

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El Salvador plainly relates to Pac Rim Cayman (which, as discussed in more detail below, is an “investor of another Party” (*i.e.*, a Party other than El Salvador)) and to its investments in El Salvador, which are “covered investments.” CAFTA defines a “covered investment” as, “with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.”<sup>202</sup> The term “investment” is defined, in turn, to mean “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”<sup>203</sup>

169. Pac Rim Cayman’s investments in El Salvador include, *inter alia*, its ownership of PRES and DOREX; intellectual property rights; licenses, authorizations, permits, and similar rights conferred to domestic law (including rights to exploitation concessions); financial capital; and other tangible and intangible property and property rights. All of these things come within the above-quoted definition of “investment.” Moreover, these investments were in existence as of CAFTA’s March 1, 2006 entry into force as between the United States and El Salvador and

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CAFTA became applicable to Claimant and has continued since, is what we mean when we refer to the “*de facto* mining ban.” Even if the Tribunal were to accept Respondent’s denial of the *de facto* mining ban’s existence, the individual instances of Respondent’s failure to act in accordance with Salvadoran law in response to Claimant’s mining-related applications are continuing acts or omissions that breach CAFTA obligations. Therefore, they may be considered measures at issue in their own right, quite apart from their status as manifestations of the mining ban.

<sup>202</sup> CAFTA, Art. 2.1. (CL-73).

<sup>203</sup> CAFTA, Art. 10.28. (RL-1).

were expanded thereafter, including through additional capital infusions by Pac Rim Cayman. Accordingly, Pac Rim Cayman’s investments in El Salvador meet the definition of “covered investment.”

170. Because the measure at issue – *i.e.*, the practice of consistently and repeatedly declining to grant applications for mining-related permits and concessions, amounting to a *de facto* mining ban – relates to both Pac Rim Cayman and its covered investments, it comes within the scope of CAFTA’s Investment Chapter as defined in CAFTA Article 10.1.1.

171. Claimant claims loss or damage by reason of or arising out of Respondent’s breaches, which loss or damage is far in excess of the US\$77 million-plus in out-of-pocket expenses incurred in making its investments in El Salvador.

172. Moreover, this dispute is a legal dispute arising directly out of Pac Rim Cayman’s investments in El Salvador. El Salvador consented in writing to submit this dispute to ICSID in Article 10.17 of CAFTA. Claimant so consented in its Notice of Arbitration.<sup>204</sup>

173. Having made the foregoing *prima facie* case, Claimant has plainly established jurisdiction *ratione materiae* and, indeed, Respondent does not lodge an objection on this ground.

174. With respect to jurisdiction *ratione personae*, Article 10.16 specifies that a claim must be brought by a “claimant” – defined as “an investor of a Party that is a party to an

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<sup>204</sup> Notice of Arbitration, para. 22.

investment dispute with another Party” – against a “respondent” – defined as “the Party that is a party to an investment dispute.”<sup>205</sup> Article 25(1) of the ICSID Convention adds that the dispute must be “between a Contracting State . . . and a national of another Contracting State.”

175. In this case, Pac Rim Cayman is an investor of a Party, the United States. As will be explained in more detail below, in response to Respondent’s objection on this point, it is an enterprise organized under the laws of the U.S. State of Nevada that made an investment in the territory of another Party, El Salvador. Moreover, it is a party to an investment dispute with that other Party, a fact Respondent does not deny. Accordingly, it satisfies the definition of a “claimant.” El Salvador, as the Party that is a party to this investment dispute, unquestionably meets the definition of a “respondent.” And, as both the United States and El Salvador are Contracting States under the ICSID Convention, the requirements of Article 25(1) of that treaty are met.

176. With respect to jurisdiction *ratione temporis*, CAFTA contains several provisions relevant to timing. First, CAFTA’s Investment Chapter “does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [CAFTA].”<sup>206</sup> Second, at least 90 days before submitting a claim to arbitration a claimant is to deliver a notice of intent to the respondent.<sup>207</sup> Third, six months must have elapsed

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<sup>205</sup> CAFTA, Art. 10.28 (RL-1).

<sup>206</sup> *Id.*, Art. 10.1.3 (RL-1).

<sup>207</sup> *Id.*, Art. 10.16.2 (RL-1).

since the events giving rise to the claim.<sup>208</sup> Fourth, a claim is barred if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.”<sup>209</sup> Finally, as relevant to Respondent’s objections, because CAFTA’s Investment Chapter applies to measures of a Party relating to investors of another Party and to covered investments, the conduct at issue must have occurred or continued to occur after the claimant became an investor of a Party.

177. In this case, the measure on which Pac Rim Cayman bases its claim is the *de facto* ban on the issuance of mining licenses, a practice evidenced by multiple and continuing acts and omissions and explicitly announced by El Salvador’s President in March 2008. Respondent disagrees with this identification of the measure at issue, and we address that disagreement in detail below. For present purposes, we note that the announcement of the ban in March 2008 occurred after CAFTA’s March 2006 entry into force and after Pac Rim Cayman incorporated in Nevada, thus becoming an investor of a Party, in December 2007. To the extent acts and omissions by agencies of the Salvadoran government in furtherance of the mining ban may have begun before March 2008, the ban was not recognizable as such, and Pac Rim Cayman could not have become aware of its existence or of these acts and omissions’ relationship to the ban until March 2008. Indeed the relevance of the March 2008 announcement as a watershed event distinguishing prior acts and omissions from later acts and omissions is illustrated quite

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<sup>208</sup> *Id.*, Art. 10.16.3 (RL-1).

<sup>209</sup> *Id.*, Art. 10.18.1 (RL-1).

graphically by the dramatic fall in the share price for Pac Rim Cayman's parent, Pacific Rim Mining Corp., following the announcement.<sup>210</sup> Although share price is only one means for measuring loss or damage, the fact that Pacific Rim Mining Corp.'s market value began to fall precipitously after President's Saca's March 2008 announcement – losing approximately US\$120 million (or about 85%) of its value – is dramatic evidence of the extent to which Claimant suffered damage and loss.

178. Pac Rim Cayman delivered a notice of intent to Respondent on December 9, 2008, and it filed its notice of arbitration on April 30, 2009, more than 90 days thereafter, and more than six months after the events giving rise to its claims, but less than three years after it first became aware of Respondent's breaches and its loss or damage incurred as a result of those breaches. Accordingly, the requirements of jurisdiction *ratione temporis* are met.

179. In the remainder of this Section, we respond to Respondent's objection to the Tribunal's jurisdiction *ratione personae* and its two objections to the Tribunal's jurisdiction *ratione temporis* and demonstrate why none of them are well-founded.

## **B. Respondent Bears the Burden of Proof with Respect to its Jurisdictional Objections**

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180. It is axiomatic in international law that the party making an assertion bears the burden of proving it (*actori incumbit probatio*).<sup>211</sup> As the party objecting to the Tribunal's

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<sup>210</sup> Stock Market Value – Pacific Rim Mining Corp. (C-66).

<sup>211</sup> See, e.g., MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 116 (Kluwer Law Int'l. 1996) (CL-74). Kazazi confirms, moreover,

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jurisdiction, Respondent bears the burden of proving the factual and legal bases for its objections. As stated by the tribunal in *Chevron v. Venezuela*, because of the well-established presumption that a claimant's allegations are accepted *pro tem* for the purposes of establishing jurisdiction, "the Respondent bears the burden of proof to disprove the Claimant's allegations. That means that, if the evidence submitted [by a respondent] does not conclusively contradict the Claimants' allegations, [the Claimants' allegations] are assumed to be true for the purposes of the *prima facie* test."<sup>212</sup>

181. Thus, for example, having asserted that "[t]he *measure* at issue in this case took place in December 2004,"<sup>213</sup> before CAFTA had entered into force and before Pac Rim Cayman had become a U.S. enterprise, Respondent bears the burden of sustaining that assertion. Specifically, it is Respondent's burden to establish that, contrary to the *prima facie* case set forth in Pac Rim Cayman's notice of arbitration, there did not exist a practice of consistently failing to act on Claimant's mining-related applications which either came into being as a practice with President Saca's March 2008 announcement or became acknowledged as such at that time.

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that this principle applies equally to the party claiming a fact in defense as to the party asserting the claim in the first instance. *Id.* at 369.

<sup>212</sup> *Chevron Corp and Texaco Petroleum Corp v Ecuador*, Interim Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 355 (2008), (1 Dec. 2008) ("*Chevron*"), para. 112 (CL-75). Put another way, Claimant has made a *prima facie* case establishing the Tribunal's jurisdiction. That caused the burden to shift to Respondent. It is now Respondent's burden to disprove our *prima facie* case by demonstrating a lack of jurisdiction.

<sup>213</sup> Objections, para. 301.

182. The duty of a respondent State to prove its objections to the jurisdiction of an international arbitral tribunal has been confirmed on multiple occasions. For example, in *Canfor v. United States*, the tribunal stated that “where a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the tribunal from deciding on the merits of the claims, the respondent has the burden of proof that the provision has the effect which it alleges.”<sup>214</sup>

183. As set forth in this Section, Respondent has failed to meet its burden of proving the factual and legal bases for its objections to the Tribunal’s jurisdiction *ratione personae* and *ratione temporis*. It has failed to rebut Pac Rim Cayman’s *prima facie* showing that Pac Rim Cayman is an investor of a Party within the meaning of CAFTA. And, it has failed to rebut Pac Rim Cayman’s *prima facie* showing that the measure constituting a breach of Respondent’s CAFTA obligations and resulting in loss or damage to Pac Rim Cayman either arose in 2008 or was a practice that had not ceased to exist prior to 2008.

**C. Respondent Has Not Met its Burden of Establishing its Objection To the Tribunal’s Jurisdiction *Ratione Personae***

184. Respondent challenges the Tribunal’s jurisdiction *ratione personae* on the ground that Pac Rim Cayman was not an investor of a Party at the time it “made” its investment in El Salvador.<sup>215</sup> This argument is wrong, inasmuch as it assumes that a person first must attain the

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<sup>214</sup> *Canfor Corp. v. United States*, Decision on Preliminary Question, Ad hoc UNCITRAL Arbitration Rules, IIC 42 (2006) (6 June 2006), para. 176 (CL-76).

<sup>215</sup> Respondent refers to this argument as part of its objection to the Tribunal’s jurisdiction *ratione temporis*. See Objections, para. 8. However, as the essence of the argument pertains to Pac Rim

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status of “national or enterprise of a Party” and only later acquire an investment in the territory of another Party in order to be considered an “investor of a Party.”

185. Respondent refers to Article 10.28 of CAFTA, which defines “investor of a Party” to mean “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party.”<sup>216</sup> Respondent argues that Article 10.28 means that a person must be “a Party or state enterprise thereof, or a national or an enterprise of a Party” at the time that it “attempts to make, is making, or has made an investment in the territory of another Party.” In Respondent’s view, if the order of operations is reversed, such that a person “attempts to make, is making, or has made an investment in the territory of another Party” and only later becomes (as relevant here) “a national or an enterprise” of the first Party, then the person is not an “investor of a Party.” Respondent contends that that is what happened here – *i.e.*, that Pac Rim Cayman acquired an investment in El Salvador when it was an enterprise of the Cayman Islands and only later attained its status as an enterprise of a Party (the United States) – and that, therefore, Pac Rim Cayman is not an investor of a Party.

186. To begin with, Respondent’s proposed interpretation finds no support in the definition of “investor of a Party.” While the definition contains a status requirement – *i.e.*, the person must be a national or an enterprise of a Party – and a conduct requirement – *i.e.*, the

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Cayman’s status as an investor of a Party, the better characterization is as an objection to jurisdiction *ratione personae*.

<sup>216</sup> Objections, para. 256.

person must attempt to make, or have made an investment in the territory of another Party – it says nothing about the first requirement being met before the second is met.

187. Moreover, context expressly contradicts Respondent’s interpretation. Notably, CAFTA defines “covered investment” to mean “with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.”<sup>217</sup> Thus, an investment may be a “covered investment” if it came into existence before CAFTA entered into force and remained “in existence as of the date of entry into force.” In that scenario, however, acquisition of the investment necessarily would precede the investor’s attaining the status of “national or enterprise of a Party,” since there was no such thing as a “Party” until CAFTA entered into force. Respondent’s interpretation cannot be reconciled with the definition of “covered investment.”

188. Moreover, following Respondent’s logic, a national or enterprise of a Party would not be an investor of a Party if it acquired an investment in the territory of another Party through sale, assignment, or other transfer from a person of a non-Party that made the original investment. For example, a U.S. enterprise that purchased from a French enterprise shares of an El Salvadoran enterprise<sup>218</sup> would not be an investor of a Party, because possession of the shares by a person of a Party (the U.S. enterprise) occurred after the investment was made in El

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<sup>217</sup> CAFTA, Art. 2.1 (CL-73).

<sup>218</sup> CAFTA’s definition of “investment” contains an illustrative list of “[f]orms that an investment may take,” which includes “shares.” *Id.*, Art. 10.28 (RL-1).

Salvador. However, that very theory has been rejected by a number of previous investor-State tribunals.

189. In *Fedax v. Venezuela*, Venezuela argued that promissory notes the State had issued to a Venezuelan company which then were acquired as a result of endorsement by a Netherlands Antilles company did not constitute an “investment” within the meaning of Article 25 of the ICSID Convention. The tribunal disagreed, finding that the notes’ status as an investment was not affected by acquisition on the secondary market, and that their acquisition by a foreign person could trigger ICSID jurisdiction.<sup>219</sup>

190. Relying on *Fedax*, the tribunal in *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of Congo* recently reached the same conclusion. In that case, a Cayman Islands company transferred a debt owed by the DRC to a U.S. company. The DRC challenged the status of the U.S. company’s holding as an investment covered by the U.S.-DRC Bilateral Investment Treaty, and the tribunal rejected that challenge.<sup>220</sup>

191. In numerous other cases, corporate claimants or the overall corporate structure in which they reside have undergone nationality changes *after* the date on which investment commenced, without affecting their status as “investors” under the relevant treaty (and without

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<sup>219</sup> *Fedax NV v. Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/96/3, IIC 101 (1997), paras. 39-40 (11 July 1997) (CL-77).

<sup>220</sup> *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/05/21, IIC 332 (2008), Decision on Jurisdiction, paras. 74-84 (29 July 2008) (CL-78).

otherwise affecting the tribunal’s jurisdiction).<sup>221</sup> Tribunals recognize that international companies are typically comprised of multiple entities that undergo changes from time to time.<sup>222</sup>

192. Without language to the contrary in the treaty at issue – and there is none in CAFTA – such changes do not prevent an enterprise of the United States that “attempts to make, is making, or has made an investment in the territory of another Party” from being an “investor of a Party” under the Treaty, simply because it was an entity of the Cayman Islands when it started making its investments. Given CAFTA’s plain language, Respondent’s contention that Pac Rim Cayman is not an investor of a Party must be rejected.

**D. Respondent Has Not Met Its Burden Of Establishing Its Objections To The Tribunal’s Jurisdiction *Ratione Temporis***

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193. Respondent’s objections to the Tribunal’s jurisdiction *ratione temporis* also are without merit. Respondent states two such objections, both based on the erroneous premise that the measures on which Pac Rim Cayman bases its claims are individual instances in which Salvadoran government agencies failed to grant licenses to PRES within the time period specified in the relevant law, which failures occurred prior to Pac Rim Cayman’s becoming an investor of a Party in December 2007, and in some cases prior to CAFTA’s March 2006 entry into force (*i.e.*, more than three years before filing of the notice of arbitration) and did not

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<sup>221</sup> See, e.g., *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, para. 216 (21 Oct. 2005) (RL-60). *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, paras. 88-86 (27 Sept. 2001) (RL-59); *Saluka Investments BV v. Czech Republic*, Partial Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 210, paras. 302–03 (2006) (17 Mar. 2006) (“*Saluka*”) (RL-74).

<sup>222</sup> See *Aguas del Tunar* (RL-60).

constitute continuing or composite acts or omissions.<sup>223</sup> In fact, the measure constituting the breach under Pac Rim Cayman’s claim is the *de facto* ban on mining of which Pac Rim Cayman did not become aware – and, indeed, could not have become aware – until March 2008, when El Salvador’s President either imposed the practice or first acknowledged its existence as a practice. It was the President’s announcement that either put the ban in place or definitively established that Respondent’s prior omissions – *i.e.*, its repeated failures to provide PRES and DOREX the mining permits and concessions to which they were entitled – were the product not of ordinary bureaucratic delay, but of a deliberate policy decision. In either case, it is the ban that constitutes a practice in breach of El Salvador’s CAFTA obligations as a result of which Pac Rim Cayman has suffered loss or damage. Respondent’s attempt to portray “the *measures* that Claimant alleges to be violations of CAFTA” as measures that “occurred prior to the date when Claimant and its alleged investment became covered by the protections of the Treaty”<sup>224</sup> has no merit, as we will demonstrate in this Section.

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<sup>223</sup> See, *e.g.*, Objections, para. 277 (“The principal measure for which Claimant wants to allege CAFTA violations . . . happened at the end of 2004.”), para. 285 (“the only measure about which [Pac Rim Cayman] may complain is the failure to act on the environmental permit within 60 days of the application”), para. 287 (“the *measure* that gave rise to this arbitration is MARN’s failure to act when there was a duty to act within the time period provided for in the relevant law”).

<sup>224</sup> *Id.*, para. 283.

**1. The Measure That Breached Respondent's CAFTA Obligations and Caused Loss Or Damage To Pac Rim Cayman Was The *De Facto* Mining Ban President Saca Acknowledged In March 2008**

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194. The measure giving rise to Pac Rim Cayman's claims of breach of CAFTA obligations and loss or damage resulting therefrom is the *de facto* mining ban that President Saca first acknowledged in March 2008.<sup>225</sup> It was that measure (which continues through the present) that has destroyed Claimant's investments in El Salvador, thus effecting an expropriation, a fact recognized by the market, as reflected in the steep drop in value of the shares of Pac Rim Cayman's parent, Pacific Rim Mining Corp., following President Saca's announcement in March 2008 and his subsequent pronouncements concerning the ban (including pronouncements that specifically targeted Claimant).<sup>226</sup> Likewise, it was that measure that denied Claimant the treatment required under El Salvador's obligations to accord national treatment, most-favored-nation treatment, and fair and equitable treatment.

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<sup>225</sup> *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA, 11 Mar. 2008, (C-1); see footnote 201,0 *supra*, explaining use of the term "*de facto* mining ban" in this Countermemorial.

<sup>226</sup> *Stock Market Value – Pacific Rim Mining Corp. (C-66)*. Respondent asserts that "the vast majority of the investment and damages that could possibly be claimed – assuming a finding of liability – would have taken place before the change of nationality, and therefore would not have been protected under CAFTA." Objections, para. 261. While this assertion does not relate to Respondent's jurisdictional objection (as even Respondent acknowledges) and does not warrant a full response at this time, it is worth noting that the assertion is incorrect. Pac Rim Cayman's investment in El Salvador continued to have considerable value after Pac Rim Cayman became a U.S. investor in December 2007. It was only after President Saca announced the *de facto* mining ban in March 2008 that its value plummeted. Under CAFTA Article 10.7.2(b), an investor whose investment has been expropriated is entitled to compensation "equivalent to the fair market value of the expropriated investment *immediately before the expropriation took place*." (Emphasis added) (RL-1).

195. The delays and the irregularities in Respondent’s application of Salvadoran regulatory law (including, for example, the failure to comply with certain specified time limits, the addition of requirements not specified in the applicable Salvadoran laws and regulations, *etc.*) are not irrelevant to Pac Rim Cayman’s claims. They provide valuable historical context for understanding Respondent’s CAFTA breaches. They constitute evidence and factual bases for Pac Rim Cayman’s claims – as do Respondent’s repeated assurances prior to and even after March 2008 that the permits would be forthcoming.<sup>227</sup> However, the delays and procedural irregularities under Salvadoran administrative law do not in and of themselves constitute the measures principally claimed to have breached Respondent’s CAFTA obligations and caused loss or damage to Pac Rim Cayman. To the extent the *de facto* ban was not adopted in March 2008, but instead took shape as a practice at an earlier date and simply continued through and beyond March 2008, those earlier measures may well have been manifestations of the ban’s existence. However, they did not become recognizable as individual instances of a common practice until President Saca made his March 2008 announcement, at which point any rational observer would have concluded that they were part of a continuing practice that had come into existence at some point prior to the date.

196. As explained in Pac Rim Cayman’s notice of arbitration:

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<sup>227</sup> Notice of Arbitration, para. 91. *See generally Société Générale v. Dominican Republic*, LICA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, para. 87 (19 Sep. 2008) (“*Société Générale*”) (RL-78) (recognizing that other tribunals, “while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless did not exclude the consideration of prior acts for ‘purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force’ or the relevance of prior events to breaches taking place after the treaty’s entry into force”).

In March 2008, after several months of discussion with MARN officials over the reasons why the Enterprises' application for environmental permits remained unresolved, President Saca made a public declaration against mining. The declaration represented a radical change in the Government's position with respect to mining and was a radical departure from controlling Salvadoran law. But it cast new light on the extraordinary delays, the administrative irregularities, and ultimately, the silence, that PRC had endured from MINEC and MARN over the proceeding months.<sup>228</sup>

197. Moreover, the measure first acknowledged by President Saca in March 2008 was confirmed by further remarks made by President Saca in July 2008 and February 2009,<sup>229</sup> as well as by his successor, President Funes, in May 2010.<sup>230</sup> As President Funes said less than a year ago, “[N]o mining exploitation projects will be authorized.”<sup>231</sup> Amplifying that clear statement, he added:

I do not need to pass a decree for such authorization not to be given, since that would mean questioning the president's word. The authorization of mining exploitation projects is not included either in the governmental programs or in the Five Year Plan . . .

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<sup>228</sup> Notice of Arbitration, para. 107; *see also id.*, paras. 73-74; *see also President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 Mar. 2008) (C-1).

<sup>229</sup> Notice of Arbitration, paras. 77-78; *see also Saca afirma que no concederá permisos de extracción minera* (15 July 2008) (C-61).

<sup>230</sup> *Un año de espera*, DiaroCoLatino.com (19 May 2010) (C-65).

<sup>231</sup> *No to Mining: Presidential Commitment*, PRENSA GRAPHICA (13 Jan. 2010) (C-3).

<sup>232</sup> *Id.* The original Spanish text states: “No necesito emitir un decreto para que esa autorización no se dé, eso sería dudar de la palabra del presidente. No existe en los programas del gobierno, no está en el Plan Quinquenal la autorización de proyectos de explotación minera.”

198. It must be emphasized that the nature of the measure being claimed is that of a continuing practice consisting of composite acts and omissions on the part of Respondent. As the tribunal stated in *Société Générale v. Dominican Republic*:

While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force.<sup>233</sup>

199. Precisely when the pre-March 2008 delays and procedural irregularities became designed to effectuate a *de facto* ban on metallic mining generally (and/or Claimant's activities specifically) is at present known only to Respondent. The Government only made this practice known in March 2008, when President Saca first announced it.

200. This is why Respondent's insistence that "the *measure* that gave rise to this arbitration . . . took place in December 2004"<sup>234</sup> so completely mischaracterizes the subject of the dispute and the allegations of Claimant's Notice of Arbitration. In retrospect, the administrative lapses and irregularities put Respondent's subsequent acknowledgment of a *de facto* mining ban into context. But, at the time, it would have been impossible for Claimant to recognize each individual lapse as evidence of an unwritten government practice, particularly when high-level

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<sup>233</sup> *Société Générale*, para. 91(RL-78).

<sup>234</sup> Objections, para. 287.

officials of the Government repeatedly assured Claimant that there was no such practice. It was only in March 2008 that the practice was revealed.<sup>235</sup>

201. Accordingly, the measure at issue in this dispute is comparable to the measure found by the *Railroad Dev. Corp. v. Guatemala* tribunal to come within CAFTA's temporal scope. As here, the respondent in that case argued that the dispute had arisen prior to CAFTA's entry into force. The tribunal rejected that argument on the ground that "an easily identifiable measure" was "taken by Guatemala after CAFTA had entered into force."<sup>236</sup> Whether that measure constituted a new act or the continuation of a pre-existing act, it provided adequate basis for the tribunal's jurisdiction *ratione temporis*. So too, here, the *de facto* mining ban is a measure that first became identifiable (easily or otherwise) when President Sacca announced it in March 2008. Whether it was newly implemented at that time or had evolved as an unwritten practice for years and only came to light at that time, it plainly comes within CAFTA's temporal scope.

202. El Salvador's response is two-fold. First, in a single sentence at the end of its 19-page argument in support of its objection to the Tribunal's jurisdiction *ratione temporis*, El Salvador asserts that statements by its own head of State "are not 'measures adopted or maintained' by a Party for purposes of CAFTA, and in any event, are not measures that gave rise

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<sup>235</sup> See Notice of Arbitration, paras. 73-75.

<sup>236</sup> Objections, para. 304 (citing *Railroad Dev. Corp. v. Guatemala*, Second Decision, paras. 125, 138 (RL-80)).

to this dispute before the Tribunal.”<sup>237</sup> Second, it argues that the relevant temporal focus is on when the dispute was “born,” and that regardless of what happened subsequently, the dispute was born upon MARN’s first missed deadline, in December 2004. Neither of these arguments is well-founded, as we now will demonstrate in Subsections 2 and 3, respectively.

**2. Respondent Fails To Rebut Pac Rim Cayman’s *Prima Facie* Showing That The *De Facto* Mining Ban Is A Measure Adopted Or Maintained By El Salvador, Which Gave Rise To This Dispute**

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203. Curiously, Respondent does not refute the existence of a *de facto* mining ban first acknowledged by President Saca in March 2008. It refers to the ban as an “alleged” ban and to statements by President Saca and President Funes as “alleged” statements.<sup>238</sup> And, it asserts that it “emphatically denies” the ban’s existence.<sup>239</sup> But it makes no attempt to refute the statements or to demonstrate that, contrary to those statements, there is no mining ban. As the moving party, Respondent thus has failed to meet its burden of producing evidence to support its objections to Pac Rim Cayman’s *prima facie* case.

204. Instead of refuting the existence of a mining ban, Respondent first asserts that statements by two successive heads of State “are not ‘measures adopted or maintained’ by a Party.”<sup>240</sup> But Pac Rim Cayman’s contention is not that the statements themselves are measures.

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<sup>237</sup> Objections, para. 321.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*, para. 47.

<sup>240</sup> *Id.*, para. 321.

Rather, the statements either acknowledged or implemented or continued the existence of an unwritten practice, which is a measure. As previously discussed, CAFTA defines a “measure” to “include[] any law, regulation, procedure, requirement, or practice.”<sup>241</sup> That definition plainly is broad enough to encompass the unwritten practice at issue here.<sup>242</sup>

205. Respondent suggests that an unwritten practice ordered by a head of State, and implemented by the bureaucracy outside the State’s legal framework, cannot constitute a “measure” under CAFTA. That is an extraordinary proposition with implications not only for CAFTA’s Investment Chapter, but for its trade-related chapters too (given that the defined term “measure” applies treaty-wide). One logically may assume that the pronouncements of a head of State will be heeded by ministers and lower-level functionaries throughout the bureaucracy and not be brushed aside as idle rhetoric. Moreover, in this case, those pronouncements have quite obviously been implemented. (At the very least, Claimant has made allegations to that effect, which have not been denied much less rebutted by Respondent.) If Respondent were correct in its theory that such conduct does not constitute a “measure” under CAFTA, a head of State could make a pronouncement identifying a practice that in turn is followed throughout the government; the practice may be blatantly inconsistent with the State’s treaty obligations; and the State would avoid all responsibility because, on this theory, the practice is not a measure.<sup>243</sup> Of course,

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<sup>241</sup> CAFTA, Art. 2.1 (CL-73).

<sup>242</sup> See Section VI, *infra*.

<sup>243</sup> The tribunal in *Eastern Sugar v. Czech Republic* accepted evidence of the Czech government’s intentions based on newspaper interviews of a Minister and other government officials. The tribunal did not accept the Respondent’s attempts to characterize these statements as “mere political

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CAFTA’s definition of “measure” expressly includes a “practice” – which is precisely what Claimant has alleged in this case. Here, as in its first set of objections, Respondent has tried hard to ignore the central allegation of the Notice of Arbitration. But again, Claimant’s allegations must be accepted *pro tem* at the jurisdictional phase, unless Respondent presents evidence that “conclusively contradicts” those allegations.<sup>244</sup> Respondent has failed even to approach that burden.

**3. Respondent’s Reliance On The Date When The Dispute Allegedly Was “Born” Is Misplaced**

206. Evidently recognizing the difficulty it faces in demonstrating that El Salvador’s *de facto* mining ban did not give rise to this dispute, Respondent instead asserts that the dispute was allegedly “born” in December 2004, before Pac Rim Cayman became an investor of a Party, and indeed before CAFTA entered into force. Respondent contends that the dispute is therefore outside the Tribunal’s jurisdiction *ratione temporis*. Respondent’s contention is fundamentally misplaced because, unlike certain other investment treaties, CAFTA does not define its temporal scope according to when a dispute arose (or was “born”). Rather, CAFTA follows the general rule in international law that a treaty applies to covered measures except for acts or facts that

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pronouncements,” since there was no contemporaneous government effort to “set the record straight.” See *Eastern Sugar BV v. Czech Republic*, Partial award and partial dissenting opinion, SCC 088/2004, IIC 310 (2007) (27 Mar. 2007), para. 244 (CL-79).

<sup>244</sup> *Chevron*, para. 112 (CL-75).

occurred before entry into force or situations that ceased to exist before entry into force.<sup>245</sup> The only temporal limitations on access to CAFTA’s arbitration forum that relate to when a dispute arose are the ones identified in Articles 10.16.3 and 10.18.1. That is, a claim may not be submitted to arbitration if fewer than “six months have elapsed since the events giving rise to the claim.”<sup>246</sup> And, it may not be submitted to arbitration if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.”<sup>247</sup> Apart from these provisions, there are no limitations based on when a dispute arose (or was “born,” or “crystallized,” *etc.*).

207. But, even if identifying the date on which a dispute was “born” were relevant, Respondent misunderstands what that concept means. Respondent uses the term “born” in the way one might use the word “originate.” But the “origins” or “genesis” of the dispute – or how far back one might be able to trace the “seeds” or “roots” of the dispute – is not the standard for determining whether a dispute has arisen for purposes of determining jurisdiction *ratione temporis*.<sup>248</sup>

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<sup>245</sup> Compare *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 28, 1155 U.N.T.S. 331 (“Vienna Convention”) (CL-10) with CAFTA, Art. 10.1.3 (RL-1).

<sup>246</sup> CAFTA, Art. 10.16.3 (RL-1).

<sup>247</sup> *Id.*, Art. 10.18.1 (RL-1).

<sup>248</sup> We are aware of only one investor-State arbitration case that uses the word “born” in the context of determining jurisdiction *ratione temporis* – *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) (“*Mobil*”) (RL-51) – which, as discussed below, uses the term in an entirely different manner than Respondent uses it here.

208. Claimant and Respondent may have disagreed about the application of certain provisions in El Salvador’s Mining and Environmental Law prior to 2008. Indeed, Pac Rim Cayman or its Salvadoran subsidiaries may have been able to pursue an administrative complaint in El Salvador as a result of the Government’s delays or inaction prior to 2008. But that does not mean that there was a “dispute” as that term is used in CAFTA (or, as discussed below, the Investment Law) prior to 2008.

209. While CAFTA does not define the term “dispute,” or “investment dispute,” it is clear from context that the term requires the existence of a claim that the respondent State has breached an obligation (whether under CAFTA itself or under an “investment agreement” or “investment authorization”) *and* that the claimant (or an enterprise of the respondent State owned or controlled by the claimant) “has incurred loss or damage by reason of, or arising out of, that breach.”<sup>249</sup>

210. Thus, Article 10.15 provides that “[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation. . . .” That provision presumes that the existence of an investment dispute means that the investor has acquired the status of a “claimant,” meaning that it has a “claim” under CAFTA against the respondent. Article 10.16, in turn, articulates the elements of a “claim” as consisting of allegations of (i) breach of an obligation as specified in CAFTA, (ii) loss or damage to the claimant or an enterprise of the respondent owned or controlled by the claimant, and (iii) a causal

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<sup>249</sup> CAFTA, Art. 10.16.1 (RL-1).

nexus between the breach and the loss or damage. If an investor has no knowledge or reason to have knowledge of any of these elements, then it cannot state a “claim;” hence it cannot have the status of a “claimant;” hence there cannot be an “investment dispute.”<sup>250</sup>

211. It follows that a mere disagreement between an investor and a host State over the latter’s application of its laws does not necessarily constitute a dispute within the meaning of CAFTA – particularly where, as here, the host State has denied that there is any disagreement and/or has proposed solutions to resolve it. While the investor may feel aggrieved, the act or omission of which it complains will not necessarily constitute a breach of a CAFTA obligation; nor will it necessarily cause loss or damage even if it does constitute a breach of a CAFTA obligation. The existence of such an act or omission cannot be equated with the existence of a dispute under CAFTA. Investment arbitration jurisprudence confirms the distinction between a mere disagreement and an actual dispute.<sup>251</sup>

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<sup>250</sup> See generally CAFTA, Art. 10.18.1 (RL-1) (three-year limitations period for submitting claim to arbitration runs from when “claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage”).

<sup>251</sup> See, e.g., *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) (distinguishing between “divergence” and “dispute,” noting that “in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in 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. Consequently, different views of parties in respect of certain facts and situations become a ‘divergence’ when they are mutually aware of their disagreement. It crystallises as a ‘dispute’ as soon as one of the parties decides to have it solved, whether or not by a third party”); *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), para. 96 (CL-81) (“[T]here tends to be a natural sequence of events that leads to a dispute. It 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

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212. Nevertheless, Respondent ignores that distinction. It repeatedly and incorrectly refers to MARN's failure, as of December 2004, to grant an environmental permit for El Dorado within the 60-day period prescribed by statute as "the measure" or "the principal measure" on which Claimant bases its claims.<sup>252</sup> Respondent refers to the parties' differing views as to the propriety of MARN's failure to grant the permit in 2004 (and later, in 2006-07) as a "disagreement,"<sup>253</sup> although Claimant in effect put aside any "disagreement" in order to work constructively with Respondent. Respondent then elevates what it has characterized as a "disagreement" to an actual "dispute." Claimant does not now and never has contended that any "disagreement" dating back to December 2004 (or even prior to March 2008) is the subject of this dispute or that MARN's failure to act at those times constitutes a measure in and of itself constituting a breach of Respondent's CAFTA obligations. As stated in the Notice of Arbitration, and as described above, Claimant continued to work patiently and constructively with Respondent, as Respondent repeatedly assured Claimant that the permits would be

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claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.... This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.") (citation omitted).

<sup>252</sup> See, e.g., Objections, paras. 277-78, 283-296, 301, 311, 327.

<sup>253</sup> *Id.*, para. 277.

forthcoming.<sup>254</sup> Respondent's administrative delays and misinterpretations of Salvadoran law is relevant as context, but it does not have the legal significance Respondent ascribes to it.

213. The cases cited by Respondent on this point presented circumstances very different from those at issue here. In particular, they involved differences that actually had ripened into disputes (involving claims of both breach and damage) prior to key jurisdictional conditions being met.

214. Respondent incorrectly relies on the findings of the ICSID tribunal in *Mobil v. Venezuela*.<sup>255</sup> That tribunal indeed found that it did not have jurisdiction over disputes "born before" restructurings that caused claimants to be investors under the Netherlands-Venezuela BIT. However, it clearly understood the concept of a dispute being "born" to mean something more than a mere difference between the investor and the host State. The existence or "birth" of a dispute in that case was evidenced by two letters from the claimants to the respondent State complaining of increases in royalties payable under joint venture projects; requesting the designation of representatives to discuss an amicable settlement; recalling Venezuela's consent to ICSID arbitration under its Investment Law; and confirming their own consent to ICSID arbitration.<sup>256</sup> The tribunal explained, "It results from those letters that in June 2005 there were already pending disputes between the Parties relating to the increase of royalties and income

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<sup>254</sup> See Notice of Arbitration, paras. 54-73.

<sup>255</sup> Objections, paras. 265-66 (citing *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, paras. 205-06 ("*Mobil*") (10 June 2010) (RL-51)).

<sup>256</sup> *Mobil*, para. 200 (RL-51).

taxes decided by Venezuela.”<sup>257</sup> This was almost a year before the 2006 reorganization that resulted in the claimants acquiring Dutch nationality. Under these circumstances, the tribunal found that it lacked jurisdiction under the BIT over disputes “born” before the reorganization. However, the tribunal found it had jurisdiction over claims arising from the nationalization of claimants’ investments starting in 2007.<sup>258</sup>

215. The facts of *Mobil* stand in stark contrast to the present case. There, the pendency of disputes was found to “result[] from” claimants’ formal written complaints to the respondent alleging breaches and damages and expressly taking the first steps towards arbitration. Here, the “disagreement” portrayed by Respondent as giving rise to a dispute bears none of these traits. MARN’s December 2004 failure to issue an environmental permit within the period prescribed by law did not in itself constitute breach of a treaty obligation resulting in loss or damage, let alone result in a formal communication of the kind found in *Mobil* to constitute the birth of a dispute. To the contrary, from Claimant’s vantage point, the parties were continuing to work together to resolve MARN’s concerns and to proceed with the El Dorado project – which explains why, among things, Claimant continued to increase the levels of its investments in El Salvador from one year to the next, all the way into 2008.

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<sup>257</sup> *Id.*, para. 202.

<sup>258</sup> *Id.*, para. 206.

216. Respondent also attempts to draw conclusions from the award in the *Phoenix Action v Czech Republic* arbitration.<sup>259</sup> However, the *Phoenix Action* award has no application to the instant case, because it was abundantly clear that the claimant there had acquired an investment which had been engaged for months, if not years, in active disputes involving formal litigation and investigations. Moreover, it was clear that the breaches under the treaty in question, and the related damages, had also occurred prior to the making of the investment. As described by the *Phoenix Action* tribunal:

Phoenix bought an “investment” that was already burdened with the civil litigation as well as the problems with the tax and customs authorities. The civil litigation was ongoing since fourteen months, the criminal investigation was ongoing since twenty months, and the bank accounts had been frozen for eighteen months. The Claimant was therefore well aware of the situation of the two Czech companies in which it decided to “invest”. In other words, all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.<sup>260</sup>

217. Like *Mobil*, this situation in *Phoenix Action* is readily distinguishable from the circumstances of this case and provides no basis for focusing on December 2004 as the moment when the dispute arose. The pre-March 2008 delays and “disagreements” between Claimant and Respondent bear no resemblance to the litigation, investigations, and frozen bank accounts that preceded the claimant’s acquisition of its investment in *Phoenix Action*. Indeed, contrary to

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<sup>259</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) (“*Phoenix Action*”) (RL-50).

<sup>260</sup> *Phoenix Action*, para. 136 (RL-50).

Respondent's apparent intent in citing *Mobil* and *Phoenix Action*, these cases actually serve to underscore the point that in this case a "dispute" as that term is used in CAFTA (and similarly in the instruments at issue in *Mobil* and *Phoenix Action*) had not arisen prior to March 2008.

218. Nor does *Société Générale v. Dominican Republic* support Respondent's position. As relevant here, that award confirms that a breach must have occurred after an investor became covered by the applicable treaty in order for a tribunal to have jurisdiction *ratione temporis* over the investor's claims.<sup>261</sup> However, Respondent neglects to mention that the *Société Générale* tribunal expressly recognized that it "may take into account *prior acts and events* resulting in such Treaty breaches."<sup>262</sup> Unlike Respondent in this case, that tribunal acknowledged the relevance of such "prior acts and events," whether as context, as evidence of conduct that came into existence before jurisdictional conditions were met and continued in existence thereafter, or as "composite acts" (*i.e.*, acts which in the aggregate result in a treaty breach).<sup>263</sup>

219. As discussed in Subsection 4, below, even if the measure at issue in this dispute is viewed as having begun with MARN's omission in December 2004, the historical development of the measure is relevant for precisely the reason identified by the *Société Générale v. Dominican Republic* tribunal. Far from undermining this Tribunal's jurisdiction *ratione temporis*, the historical context supports an understanding of the *de facto* mining ban as a

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<sup>261</sup> *Société Générale*, para. 107 (RL-78).

<sup>262</sup> *Id.*, para. 3 (emphasis added).

<sup>263</sup> *Id.*, paras. 87-88, 91 (RL-78).

continuing or composite measure that may have begun before March 2008, even though it did not become recognizable as a discrete measure until March 2008.

220. Before turning to that discussion, it is worth making one last observation regarding Respondent's mischaracterization of when the dispute was "born," and hence when, in its view, is the relevant time period on which to focus in determining whether the Tribunal has jurisdiction *ratione temporis*. Useful insight into CAFTA's temporal scope can be gained by comparing it with the scope provisions of other investment treaties. Article 10.1.3 of CAFTA provides that the Investment Chapter "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [CAFTA]." Put in a positive sense, the Chapter *does* bind a Party in relation to any act or fact that took place or any situation that continued (*i.e.*, did not cease) after the date of CAFTA's entry into force.

221. By contrast, Article 2 of the Chile-Peru Bilateral Investment Treaty provides:

This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. ***It shall not, however, apply to differences or disputes that arose prior to its entry into force.***<sup>264</sup>

222. Similarly, article 10 of the Netherlands-Venezuela Bilateral Investment Treaty provides:

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments which have been made

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<sup>264</sup> *Acuerdo entre la República de El Salvador y la República de Chile para la promoción y protección recíproca de las inversiones*, Art. 2 (8 Nov. 1996) (CL-82) (emphases added).

before that date, but shall not apply to *any disputes* concerning an investment *which arose, or any claim* concerning an investment *which was settled before its entry into force*.<sup>265</sup>

223. Unlike CAFTA’s scope provision, these clauses exclude “disputes” that arose before entry into force of the treaty (and, in the case of the Chile-Peru BIT, excludes the broader category of “differences” that arose before entry into force). Under Respondent’s characterization of the facts, such a clause in CAFTA might have deprived the Tribunal of jurisdiction *ratione temporis*. But the fact that CAFTA contains no such restrictions with respect to pre-existing differences or disputes – and indeed provides jurisdiction over “any situation” that did not “cease[ ] to exist before the date of entry into force of [CAFTA]” – confirms that even under the distorted depiction of Claimant’s allegations offered by Respondent, the Tribunal would still have jurisdiction over this case.

**4. Even If The Mining Ban Originated Before March 2008, It Is A Continuing Or Composite Measure Over Which The Tribunal Has Jurisdiction *Ratione Temporis***

224. As already noted, President Saca’s March 2008 public statement regarding the existence of a mining ban may have marked the actual imposition of the ban. Alternatively, it may have confirmed a practice that pre-dated his announcement, and possibly even CAFTA’s entry into force. Under either scenario, the ban, as it relates to Pac Rim Cayman, is a measure covered by CAFTA. Under the first scenario, it is an act or fact that took place after CAFTA’s March 2006 entry into force and after Pac Rim Cayman’s December 2007 domestication to

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<sup>265</sup> Netherlands-Venezuela Bilateral Investment Treaty (CL-83).

Nevada. Under the second scenario, it is a situation that continued (*i.e.*, did not cease to exist) after CAFTA's entry into force and after Pac Rim Cayman's Nevada incorporation. It is this second scenario that we address in this Subsection.

225. The *Société Générale* decision, discussed above, recognized that acts or omissions pre-dating the attachment of jurisdiction may be relevant to establishing a treaty breach to the extent that the acts or omissions have a "continuing" or "composite" character.<sup>266</sup> That is consistent with the provision in CAFTA Article 10.1.3 drawing into CAFTA's scope a "situation" that did not cease to exist before CAFTA's entry into force. It also is consistent with the principles of international law embodied in Article 28 of the *Vienna Convention on the Law of Treaties* and Articles 13-15 of the International Law Commission's *Draft Articles on State Responsibility*.

226. Those principles are relevant to the extent the *de facto* mining ban is a measure that pre-dated President Saca's March 2008 announcement. Because the ban, unlike a law or regulation, is not a written measure, and because it consists largely of failures to act, its existence could only be eventually inferred from the course of conduct of government agents over time. President Saca's public statements changed that. They expressly confirmed the existence of the ban and thus put past omissions in a new light. Whereas past inaction by government agents previously may have been seen as isolated instances of inefficiency or incompetence (or even

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<sup>266</sup> *Société Générale*, paras. 87-88, 91 (RL-78).

trying to sort through the complexities of a relatively new law), now they could be understood as a practice furthering a deliberate government policy. The President's announcement made the contours of Respondent's measure visible. Under the aforementioned principles, the Government's omissions are relevant even if they occurred before the domestication of Pac Rim Cayman to Nevada.

227. Respondent disputes the characterization of inaction by Salvadoran government agencies prior to March 2008 as part of a continuing measure or as composite acts culminating in a breach of CAFTA obligations. In Respondent's view, "the measure at issue was exhausted" when the first of several omissions occurred in December 2004.<sup>267</sup> Respondent seeks support for this position from several investor-State arbitral awards, none of which actually provides that support, as we now will show.

**a. International Law Precedents Do Not Support Respondent's Suggestion That The Tribunal Ignore Acts And Omissions Prior to December 2007**

228. In *Mondev v. United States*, the tribunal agreed that there may be situations in which acts occurring before a treaty's entry into force are relevant to determining whether acts occurring after its entry into force are treaty breaches.<sup>268</sup> It found, however, that as a factual matter, the conduct at issue in that case could not be construed as a continuing measure that encompassed both the actions of Boston city authorities pre-dating NAFTA's entry into force

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<sup>267</sup> Objections, para. 317.

<sup>268</sup> *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, para. 58, 70 (11 Oct. 2002) ("*Mondev*") (RL-82).

and the actions of Massachusetts courts following NAFTA's entry into force.<sup>269</sup> Those facts are readily distinguished from the facts at hand. At issue here is not the conduct of different branches of government occurring at different times. Rather, it is a practice consisting of repeated acts and omissions by agencies within the same branch of government (the executive branch) in pursuit of the same policy objective which became discernible as a practice only when the President made public statements confirming the practice in March 2008.

229. *Railroad Dev. Corp. v. Guatemala*, another case cited by Respondent, simply stands for the proposition that for an act to be considered a continuing act, conduct must occur both before and after the treaty enters into force.<sup>270</sup> That is precisely what happened in the present case. As we will discuss in more detail, below, Respondent's delays under Salvadoran regulatory law began in December 2004, before CAFTA entered into force. At that time, the delays may have been somewhat frustrating to Claimant, but also appeared to be relatively trivial. Claimant engaged in regular discussions with Salvadoran government agencies to address the concerns that appeared to be delaying the issuance of permits. Those discussions continued well into 2008, after CAFTA entered into force, and after Pac Rim Cayman became an investor of the United States. Although Claimant's frustration may have grown as the delays continued, overall progress on the project continued, and Claimant continued to increase the amount of its investments in El Salvador into 2008. Respondent's conduct in 2008 then

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<sup>269</sup> *Id.*, para. 70 (RL-82).

<sup>270</sup> *Railroad Dev. Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, para. 124 (18 May 2010) (RL-80).

established that the continuing pattern of declining to issue permits was, in fact, the expression of a conscious policy decision.

230. Respondent cites *Feldman v. Mexico* for the proposition that a tribunal “may not deal with acts or omissions that occurred before [the date of NAFTA’s entry into force].”<sup>271</sup> However, as the *Mondev* tribunal later observed, that statement by the *Feldman* tribunal was “too categorical, as indeed the United States conceded in argument.”<sup>272</sup>

231. Respondent also mischaracterizes the findings of the tribunal in *MCI v. Ecuador*. This is evident, for example, from Respondent’s partial quotation from paragraph 62 of the award in that case. As Respondent quotes, the tribunal did distinguish between acts and omissions pre-dating a treaty’s entry into force and those post-dating entry into force.<sup>273</sup> What Respondent leaves out is that the tribunal distinguished between those two categories “as violations of the BIT.” Acts and omissions completed before entry into force would not be considered violations of the BIT.<sup>274</sup> However, contrary to Respondent’s portrayal, the *MCI* tribunal did not dismiss acts and omissions completed before entry into force as irrelevant. In fact, it expressly found that such acts and omissions may be considered “for purposes of

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<sup>271</sup> Objections, para. 312 (quoting *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, Dec. 6, 2000, para. 62 (RL-83)).

<sup>272</sup> *Mondev*, para. 69 (RL-82).

<sup>273</sup> Objections, para. 313.

<sup>274</sup> *M.C.I. Power Group L.C., and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, para. 62 (31 July 2007) (RL-84).

understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.”<sup>275</sup> It is precisely for such purposes that Claimant relies on Respondent’s acts and omissions prior to March 2008.

232. Finally, a relevant authority not cited by Respondent is the award of the tribunal in *Chevron v. Ecuador*. The respondent in that case made an argument similar to that of Respondent here, suggesting that Article 15 of the ILC *Draft Articles* supports the conclusion that a composite act “must be based exclusively on post-BIT conduct.”<sup>276</sup> The tribunal disagreed, concluding that Article 15(2) of the *Draft Articles* “does not, however, establish that pre-BIT acts may not be taken into account in evaluating when” the violation of the treaty’s obligations arose.<sup>277</sup>

**b. The Link Between Respondent’s Conduct Before And After December 2007 Establishes That The Mining Ban Is A Continuing Or Composite Act**

233. Contrary to Respondent’s assertion, the measure at issue in this dispute was *not* “exhausted when MARN did not respond to Claimant within the 60-day time period prescribed in the law.”<sup>278</sup> Respondent’s argument on this point relies on a mischaracterization of

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<sup>275</sup> *Id.*, para. 93; *see also id.*, para. 135 (will take into account events pre-dating treaty’s entry into force “in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date”); ILC *Draft Articles*, Article 15, *Commentary*, para. 11 (RL-84) (tribunal may “tak[e] into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent”).

<sup>276</sup> *Chevron*, para. 300 (CL-75),

<sup>277</sup> *Id.*, para. 301.

<sup>278</sup> Objections, para. 317.

Salvadoran law and a disregard for the extensive and continuing interaction between PRES and MARN that took place following expiration of the 60-day period. Respondent states that under Salvadoran law, applications of the type made by PRES in 2004 and later were “presumed to have been denied” after 60 days had passed without a decision to approve such applications, and that PRES was required to initiate an administrative action within those 60 days or else lose the right to do so.<sup>279</sup>

234. This is simply an incorrect description of Salvadoran law. As with Respondent’s various assertions concerning Salvadoran law in the first set of objections, this is not an issue which the Tribunal can or should decide now. However, in El Salvador, as in many civil law jurisdictions in Latin America, the principle of “administrative silence” is designed to help applicants pursue administrative remedies when an administrative agency fails to take action (one way or the other) on an application. It enables – but does not require – an applicant to pursue an administrative remedy based on administrative silence, and, as such, is designed to benefit the applicant, not the Government. Under the Constitution of El Salvador, “[e]very person has the right to petition . . . the legally established authorities, to have those petitions resolved, **and to be notified of the decision.**”<sup>280</sup> Moreover, there is certainly no obligation to pursue administrative remedies where, as here, high-level Government officials repeatedly assert

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<sup>279</sup> Respondent makes this assertion repeatedly. *See, e.g.*, Objections, paras. 26-30, 278, 285, 287-90, 294-95, 317, 318 and 334.

<sup>280</sup> Constitution of El Salvador, Art. 18 (CL-1). The original Spanish provides: “Toda persona tiene derecho a dirigir sus peticiones por escrito, de manera decorosa, a las autoridades legalmente establecidas; a que se le resuelvan, y a que se le haga saber lo resuelto.”

that there has been no denial. (Indeed, if the Salvadoran Government believed that the permits had been “presumptively denied” in 2004, or for that matter, in 2006, then they have engaged in an extraordinary fraud by repeatedly representing afterwards that the permits would be granted and otherwise inducing Claimant to continue investing millions of dollars in the country.)

235. Moreover, the fact that the measure at issue, even as defined by Respondent, was not “exhausted” 60 days after PRES filed its application for an environmental permit is evidenced by MARN’s continued engagement in discussions on the application with PRES and Pac Rim Cayman well after the 60-day period. The same observation can be made of the other applications on which MARN or MINEC failed to act. PRES and DOREX continued to make requests to Respondent, receive requests from Respondent, and otherwise worked with Respondent’s officials into 2008. Indeed, Respondent admits that “the Bureau of Mines tried to work with the company to resolve problems with the [concession] application after [March 2005],” even though the application was allegedly “presumptively denied.”<sup>281</sup> Such interaction would have been inexplicable if the measure at issue indeed had been “exhausted.” If Respondent’s characterization were correct, that would have been a futile exercise for both sides, since there would have been no pending applications to be discussed.

236. Moreover, one must wonder why Respondent represented to PRES throughout the period through 2008 that it should continue to operate, expend funds, and work toward preparing

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<sup>281</sup> Objections, para. 295.

the mine site for full operations.<sup>282</sup> As explained by Mr. Shrake in his witness statement, Claimant had a continuous expectation, based on repeated and explicit encouragement and assurances by Respondent from the first days of the investment through 2008, that if all of the Salvadoran legal requirements were met and the necessary information provided, the licenses and applications would be granted.<sup>283</sup>

237. The fact that President Saca himself assured Claimant in June 2008 that the licenses would be granted after the March 2009 election<sup>284</sup> demonstrates that, at the highest levels of government, Respondent did not consider previous delays and failures to act to be the last word on PRES's applications. And, the fact that Pac Rim Cayman, PRES, and DOREX did not begin to scale back their operations in El Salvador until July 2008 evidences their belief that prospects for a viable operation continued to exist, at least to that time.<sup>285</sup>

**c. Conduct Breaching The CAFTA Obligations At Issue Typically Is Of A Continuing Or Composite Nature**

238. The foregoing facts support an examination of conduct occurring even before Pac Rim Cayman became an investor of the United States in December 2007. Such conduct is part of the continuing or composite measure that culminated in an unmistakable breach of Respondent's CAFTA obligations as of March 2008. An analysis that considers all of the

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<sup>282</sup> Shrake Statement, paras. 101-03.

<sup>283</sup> *Id.*, para. 103, 114.

<sup>284</sup> *Id.*, para. 119.

<sup>285</sup> *Id.*, para. 125.

conduct evidencing the continuing or composite measure is particularly appropriate given the nature of the claims Pac Rim Cayman has submitted, especially its claims of breach related to expropriation and fair and equitable treatment.

239. As indicated in the *Commentary* to the *ILC Articles*, “the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and the particular breach.”<sup>286</sup> For example, a creeping expropriation (as opposed to a *de jure* expropriation) is a breach of a treaty obligation that is likely to be based on conduct stretching over a period of time.<sup>287</sup> In this case, Pac Rim Cayman’s claim of breach of CAFTA’s provision on expropriation (article 10.7.1) is based on conduct that appears to have begun prior to 2008, but first became recognizable as an expropriation in 2008.

240. Similarly, as in this case, a breach of the obligation to afford fair and equitable treatment (CAFTA, article 10.5) is likely to involve a course of conduct consisting of continuing

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<sup>286</sup> *ILC Articles*, Article 14, *Commentary*, paras. 1 and 4 (RL-79). As also noted in the *Commentary* to Article 12 of the *ILC Articles* (para. 1), “[I]n the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.”

<sup>287</sup> The *ILC Commentary* refers, by way of illustration, to a seizure of property not involving formal expropriation that had occurred over the eight years before Greece recognized the competence of the European Court of Human Rights. The Court held that the conduct beginning before the applicable treaty entered into force was relevant to a determination that an expropriation occurred after it entered into force. *ILC Articles*, Article 14, *Commentary*, paras. 4, 9 (RL-79), citing *Papamichalopoulos and Others v. Greece*, Eur.Court H.R., Series A, No. 260–B (1993). See also *Enron Corporation and Ponderosa Assets v. Argentina*, ICSID Case No ARB/01/3, IIC 292 (2007), Award (22 May 2007) (CL-84), para. 244 (observing that government measures should be assessed “in their cumulative effects” to determine whether they constitute expropriation); *Siemens AG v. Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8, IIC 227 (2007), paras. 263–64 (6 Feb. 2007) (similar finding regarding creeping expropriation and “composite acts”) (CL-85).

or composite acts and omissions, rather than a single act or breaching event.<sup>288</sup> An important element of Pac Rim Cayman’s fair and equitable treatment claim concerns Respondent’s actions contrary to the ongoing, legitimate and reasonable expectations Pac Rim Cayman acquired as a result of Respondent’s own representations.<sup>289</sup> In this case, Pac Rim Cayman’s expectations were formed at the time of the original investment and continued as a result of the repeated assurances of Respondent throughout the events in question and into 2008. Claimant reasonably expected that the exploitation license would be granted if the requirements of Salvadoran law necessary for the approval of the license were followed.

241. An important element of Pac Rim Cayman and PRES’s expectations in this case, and of the fair and equitable treatment standard generally, is the expectation of an investor to be provided a stable and predictable legal framework by its host government. An investor’s entitlement to that expectation is supported by the preamble of the CAFTA, whereby Respondent and the other CAFTA Parties confirmed their resolve to “ENSURE a predictable commercial

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<sup>288</sup> See *Metalclad Corporation v. Mexico*, ICSID Case No ARB(AF)/97/1, IIC 161 (2000), Award, (30 Aug. 2000), para. 99 (CL-24) (“The totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly . . . .”); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, ICSID Case No ARB/97/3, IIC 307 (2007), Award, (20 Aug. 2007), paras. 7.5.31–7.5.32 (CL-14) (“It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached.”).

<sup>289</sup> See generally *Saluka*, paras. 302–03 (RL-74) (“The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations which is the dominant element of the standard.”).

framework for business planning and investment.”<sup>290</sup> Pac Rim Cayman’s expectation was specifically addressed in the Notice of Arbitration as follows:

Under the legal framework established by the Mining Law, the mining company assumes the great risks inherent in the exploration phase. However, it undertakes those risks with the expectation that, if it is able to prove that a discovery of a valuable mineral deposit has been made and otherwise complies with the requirements of the Mining Law, it will be able to obtain an exploitation concession. Without that expectation, no one would undertake exploration. Only during the exploitation phase can a mining company extract metal from the land and begin to generate a return on the substantial upfront investment it has made during the exploration phase. Receiving an exploitation concession after demonstrating that the discovery of a valuable mineral deposit has been made and otherwise complying with the requirements of the Mining Law represents the benefit to be derived from the large expense incurred by a mining licensee during the exploration phase. In short, the promise of an exploitation concession is the reason why companies undertake their investments in the first place.<sup>291</sup>

242. Claimant fully and reasonably expected that by complying with Salvadoran laws it would receive its necessary permits and concessions. The relationship between PRES and DOREX, on the one hand, and agencies of the Respondent, on the other, spanned a number of years, before and after CAFTA’s entry into force, and before and after Pac Rim Cayman was

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<sup>290</sup> CAFTA, Preamble (CL-8). The CAFTA is thus consistent with the interpretation that numerous tribunals have accepted with respect to the content of the fair and equitable treatment standard. For example, the *Saluka* tribunal noted that a failure to provide a “predictable and transparent” investment framework could constitute a breach of the legitimate expectations element of the fair and equitable treatment standard. *See id.*, para. 348 (RL-74); *see also PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey*, Award and Annex, ICSID Case No ARB/02/5, IIC 198 (2007) (19 Jan. 2007), paras. 253–254 (CL-86).

<sup>291</sup> Notice of Arbitration, para. 38, *see also* para. 53.

domesticated to Nevada. It was events occurring after December 2007 that definitively established the existence of breaches of CAFTA and that resulted in loss or damage to Claimant. However, pre-December 2007 events can now be viewed with the benefit of hindsight as leading to the eventual deprivation of the very investment that Claimant had been encouraged by Respondent to make and expand. Accordingly, the Tribunal should examine President Saca's March 2008 announcement in light of the earlier acts and omissions leading up to that express acknowledgment of the *de facto* mining ban.

**d. The Measure At Issue Is A Continuing Or Composite Act, Not A Completed Act With Continuing Effects**

243. Perhaps recognizing that individual failures of MARN and MINEC to act in the period before December 2007 cannot be isolated from subsequent events, Respondent argues that the linkage to subsequent events is not that of a continuing or composite act, but rather, a completed act, the effects of which continue to be felt.<sup>292</sup> This distinction is addressed in Article 14(1) of the *ILC Articles*, which states that “[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.” Essential to this distinction is the question of when the measure at issue was completed. In this case, the measure at issue is a *de facto* mining ban that was not completed prior to March 2008; indeed, its existence was only first acknowledged at that time. As explained in the Notice of Arbitration, prior to 2008,

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<sup>292</sup> Objections, paras. 305-319.

The Enterprises legitimately believed that MARN's inaction was an unofficial temporary aberration, perhaps the result of bureaucracy, incompetence, inter-agency lack of communication, or some combination of those factors. As such, the Enterprises continued to meet with MARN in the hope of achieving a negotiated solution to what they considered to be only a temporary impasse, and were repeatedly assured by senior government officials that the permits would be issued imminently.

In 2008, it became clear that the Government's delay tactics with respect to the issuance of the Enterprises' various permits had been designed and implemented with the unlawful, discriminatory, and politically motivated aim of preventing the Enterprises' mining operations.<sup>293</sup>

244. In other words, although hindsight allows one to conclude that Respondent was misleading Claimant with what turned out to be false promises and misrepresentations,<sup>294</sup> it was certainly not apparent to Claimant at the time that its continuing efforts to secure the necessary permits were in fact futile. For there to be continuing "effects" of a completed measure, as opposed to a continuing breach, the earlier measures that allegedly gave rise to the dispute must have been final. Moreover, that finality must have been known to all parties concerned. The fact that discussions between Claimant and Respondent continued in 2008, and promises continued to be made by officials of Respondent in 2008, makes Respondent's suggestion that the measures at issue are merely completed measures with lingering effects untenable.

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<sup>293</sup> Notice of Arbitration, paras. 73-74.

<sup>294</sup> A further example is the fact that by 2008 representatives of Respondent insisted that the investments continue costly exploration work, and file annual reports. *See* Notice of Arbitration, para. 80.

## 5. Conclusion On Jurisdiction *Ratione Temporis*

245. For the reasons set forth in this Section, Respondent has failed to rebut Claimant's demonstration that the conditions of jurisdiction *ratione temporis* are met. Respondent simply ignores the *de facto* mining ban which either was imposed in March 2008 or was first revealed as such by Respondent in March 2008. In either case, it is that ban that constitutes the measure claimed to breach Respondent's CAFTA obligations and cause loss or damage to Pac Rim Cayman. Whether it came into existence in March 2008 or first became recognizable as a measure at that time, the practice at the heart of Pac Rim Cayman's claim occurred or continued to occur after CAFTA's entry into force and after Pac Rim Cayman became an investor of a CAFTA Party.

246. Respondent largely ignores events post-dating Pac Rim Cayman's December 2007 domestication to Nevada, focusing instead on earlier failures of MARN and MINEC to act on applications by Pac Rim Cayman and PRES. Respondent treats those as individual, isolated events whose only link to the post-December 2007 period is the possible continuing effects they may have had. However, particularly in light of President Saca's March 2008 pronouncement of a mining ban, as later confirmed by his successor, President Funes, these earlier events cannot be viewed in isolation. When the events of December 2004 through the present are examined in their totality, it becomes clear that they are part of a practice that may have come into existence before Pac Rim Cayman was covered by CAFTA, but did not cease to exist before that time, and indeed continues to this day. Accordingly, the Tribunal should reject Respondent's objections to its jurisdiction *ratione temporis*.

**V. RESPONDENT’S ATTEMPT TO DENY CAFTA’S BENEFITS TO PAC RIM CAYMAN FAILS TO MEET ANY OF THE CONDITIONS OF CAFTA ARTICLE 10.12.2**

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247. Respondent’s belated effort to deny the benefits of CAFTA to Pac Rim Cayman fails to meet the requirements of CAFTA Article 10.12.2. As the party seeking to deny benefits, Respondent bears the burden of proving the applicability of an exception to the ordinary rule extending CAFTA’s benefits to an investor of a Party,<sup>295</sup> as well as establishing the timeliness of its invocation of that exception. Despite its vitriolic rhetoric concerning so-called “shell” companies, Respondent has not met this burden. Respondent’s denial of benefits objection fails on three grounds.

248. First, Pac Rim Cayman has substantial business activities in the territory of the United States. That is true when it is looked at purely as a single holding company, which, along with its holdings, have been continuously managed from Nevada since 1997; and that is true when it is looked at as part of a group of companies (*i.e.*, the Pacific Rim Companies) with several affiliated, Nevada-based entities (including Pac Rim Cayman), which together contributed substantial financial capital, intellectual property, personnel, and oversight to the Companies’ Salvadoran operations.

249. Second, the persons who ultimately own and control Pac Rim Cayman are predominantly persons of the United States, rather than persons of a non-Party.

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<sup>295</sup> See CAFTA, Art. 10.1.1(a) (RL-1).

250. Third, Respondent failed to comply with the notice requirements for invoking CAFTA’s denial of benefits provision, thus precluding it from invoking that provision at this late date.

251. The denial of benefits provision (Article 10.12.2), like all CAFTA provisions, must be interpreted consistently with the ordinary meaning of its text, in context and in light of CAFTA’s object and purpose.<sup>296</sup> Text, context, and object and purpose support the proposition that a host Party (also referred to in this discussion as “the denying Party”) may deny the treaty’s benefits where a person with no economic ties whatsoever to any Party other than the host Party sets up a “shell” company in the territory of another Party, uses the shell to make an investment in the territory of the host Party, and on that basis seeks to be covered by CAFTA’s protections. But that is far from the situation in this case.

252. Here, the parent of U.S. investor Pac Rim Cayman, Pacific Rim Mining Corp., is majority owned by United States persons and has been engaged in the mining business in the United States for years. Its Nevada-based corporate family includes enterprises – such as Pac Rim Cayman’s sister company, Dayton Mining (U.S.) Inc. and Pac Rim Cayman’s wholly-owned subsidiary, Pacific Rim Exploration Inc. – that perform mining and related operations in Nevada, make investments outside the United States, and manage those investments from the United States under the direction of its Nevada-based President and CEO. Pac Rim Cayman is an integral member of that corporate family. In addition to being part of a group of enterprises

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<sup>296</sup> *Vienna Convention on the Law of Treaties*, Art. 31 (CL-10).

that is engaged in substantial business activities in the United States, Pac Rim Cayman is itself engaged in the substantial business activities of holding and managing investments in El Salvador from its headquarters in Nevada. This business model is a classic example of a company furthering CAFTA's objective of strengthening regional economic integration through the establishment of a link between economic activities in the United States and economic activities in El Salvador. It is the antithesis of the circumstances warranting denial of CAFTA's benefits.<sup>297</sup>

253. Article 10.12.2 provides:

Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

254. The Article contains three conditions on a Party's exercise of its prerogative to deny the benefits of Chapter 10 to an investor that is an enterprise of another Party. First, the enterprise must have no substantial business activities in the territory of any Party other than the denying Party (in this case, El Salvador). Second, persons of a non-Party or of the denying Party

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<sup>297</sup> The importance of economic integration to the CAFTA Parties and its relevance to a denial of benefits analysis warrant emphasis. Promotion of "regional economic integration" is the first objective identified in CAFTA's preamble, and the goal of integration is referred to no fewer than three times in the preamble (*i.e.*, promotion of "regional economic integration"; "strengthening and deepening [the Central American Parties'] regional economic integration"; and "contribut[ing] to hemispheric integration"). Given competing interpretations of CAFTA's denial of benefits provision, the Tribunal should adopt the one that is consonant with this paramount objective.

must own or control the enterprise. Third, the denying Party's exercise of its prerogative is made expressly "[s]ubject to" its compliance with notice and consultation provisions of CAFTA (in contrast to other free trade agreements of the era to which the United States is Party, which contain no such requirement at all, or which require the provision of notice "to the extent practicable" but do not make the denial of benefits "subject to" such notice).<sup>298</sup> We examine each of these conditions in turn and demonstrate that none of them are met in this case.

**A. Pac Rim Cayman Has Substantial Business Activities In The United States**

**1. CAFTA Does Not Discriminate Among Investors Based On Corporate Form**

255. There has never been any dispute that Pac Rim Cayman is a holding company.

Claimant has explicitly acknowledged that Pac Rim Cayman is a holding company.

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<sup>298</sup> In the period from 2003 through the present, the United States has concluded 10 free trade agreements containing investment chapters and three bilateral investment treaties that have entered into force. *See* Free Trade Agreements at <http://www.ustr.gov/trade-agreements/free-trade-agreements/> (last accessed 22 Dec. 2010); United States Bilateral Investment Treaties (Updated 3 Mar. 2008) at <http://www.state.gov/e/eeb/ifd/bit/117402.htm> (last accessed 22 Dec. 2010). Of these, only CAFTA and the U.S.-Panama Free Trade Agreement (which was largely modeled on CAFTA) make a Party's denial of benefits to an investor of another Party "subject to" the fulfillment of notice-related obligations under both the agreement's transparency provisions and its State-to-State consultation provisions. The U.S.-Chile Free Trade Agreement, Art. 10.11.2, makes denial of benefits subject to State-State consultation obligations only, not transparency obligations. Free Trade Agreement, U.S.-Chile, 1 Jan. 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> (last accessed 24 Dec. 2010) (CL-87). The U.S.-Korea Free Trade Agreement includes a notice provision in its denial of benefits article. *See* U.S.-Korea Free Trade Agreement, Art. 11.11.2 (CL-88). However, there the right to deny benefits is not made "subject to" the provision of notice and is qualified in other ways that make it weaker than the corresponding condition in CAFTA. The exceptional nature of the notice requirement in CAFTA as contrasted to other agreements concluded by the United States in this period underscores its significance.

256. Respondent suggests that that Claimant has somehow tried to “conceal” the fact that Pac Rim Cayman is a holding company. The notion that anyone would try to hide the nature of a company called Pac Rim Cayman – which was previously domiciled in the Cayman Islands and then domesticated to Nevada under the same name – is best described as silly.

257. Nonetheless, Respondent devotes a significant part of its Memorial to reciting a litany of facts dedicated to establishing that Pac Rim Cayman is none other than a holding company.<sup>299</sup> According to Respondent, “[p]assive ownership is not an ‘activity,’ much less ‘substantial.’”<sup>300</sup> On Respondent’s case, no holding company could ever qualify as having “substantial business activities” for purposes of Article 10.12.2.<sup>301</sup> Nor could other entities specifically defined as an “enterprise” under CAFTA (*e.g.*, a “trust”), in which a single person might hold and manage assets elsewhere, qualify as having “substantial business activities.”

258. Ironically, in adopting this position, it is Respondent that opportunistically elevates form over substance as a means of gaining an advantage in this arbitration, the very transgression of which it accuses Claimant.<sup>302</sup> However, the determination as to whether an entity has substantial business activities in its home State necessitates a detailed factual inquiry

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<sup>299</sup> See Objections, paras. 123-56.

<sup>300</sup> *Id.*, para. 181.

<sup>301</sup> Thus, according to Respondent, the fact that Claimant identified itself as a holding company in its Nevada Business Registration “proves beyond doubt” that it “is a shell subsidiary conducting no business activities in the United States.” *Id.*, para. 130.

<sup>302</sup> See, *e.g.*, *id.*, para. 18 (describing 2007 reorganization of Pac Rim Cayman and affiliates as a “gaming of the system”).

that cannot be satisfied by merely checking the box marked “holding company” and listing all the facts that demonstrate Pac Rim Cayman’s status as such a company. It is Respondent that bears the burden of proving that it is entitled to deny benefits to Pac Rim Cayman.<sup>303</sup> It has not done so.

259. Respondent’s position reflects what has become a standard argument by respondent states seeking to avoid the jurisdiction of international tribunals such as this one by insinuating that “the use of a holding company to channel investment is . . . illegitimate or an abuse of the corporate form.”<sup>304</sup> But invariably, those arguments are made in cases in which the holding company is set up in a jurisdiction to which the investors have “no real connection.”<sup>305</sup> This is the first case of which we are aware in which the argument has been made with respect to a holding company that is incorporated in the jurisdiction where the holding company and its holdings are substantially managed, from which a substantial amount of the investment made through the holding company has originated, and where a majority of the ultimate owners of the investment reside.

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<sup>303</sup> See *AMTO LLC v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 Mar. 2008, §§64-65 (“*AMTO v. Ukraine*”) (RL-69).

<sup>304</sup> See Rachel Thorn & Jennifer Doucleff, “Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of ‘Investor,’” in Michael Waibe, Asha Kaushal, et al. (eds.), *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (2010) pp. 3-28 at 11 (“Thorn & Doucleff”) (CL-89). Thus it comes as no surprise that the entire first half of Respondent’s Memorial on Objections to Jurisdiction consists of an argument that Pac Rim Cayman’s claim is an abuse of process.

<sup>305</sup> See, e.g., *Saluka*, para. 240 (RL-74).

260. CAFTA, of course, does not discriminate among investors based on corporate form. An investor of a Party is covered by CAFTA's Investment Chapter to the extent measures of another Party relate to the investor or to its investments in the territory of that other Party. That is so regardless of the form in which the investor does business.<sup>306</sup>

261. Moreover, Respondent's position flies in the face of basic economic realities. Far from being "passive" vehicles for questionable purposes, holding companies have been described as "the fundamental building block of the global economy,"<sup>307</sup> a "common and legal device for corporate organization [that] face the same legal obligations of corporations generally."<sup>308</sup> A holding company is a "company formed to control other companies, usu[ally] confining its role to owning stock and supervising management."<sup>309</sup> All corporate entities are legal fictions; they are given substance by, *inter alia*, the people who run them, the capital that finances them, and the things that they own or make. With respect to a holding company, some person or persons must decide what it will hold and how those holdings will be managed and financed. In this

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<sup>306</sup> CAFTA, Art 10.1.1 (Scope and Coverage) (RL-1).

<sup>307</sup> *Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 Sept. 2001, para. 67 (RL-59).

<sup>308</sup> *Agua del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005), para. 245 ("*Agua del Tunari*") (RL-60); *see also id.*, paras. 321-323 (in rejecting characterization of holding company as "simply a corporate shell," finding "noteworthy" the company's portfolio, combined employment by the company and its subsidiaries, and company's net turnover).

<sup>309</sup> BLACK'S LAW DICTIONARY 298 (2004) (CL-69).

case, Pac Rim Cayman and its holdings were managed predominantly from the United States, with capital (financial and otherwise) that originated in significant part from the United States.<sup>310</sup>

262. The fact that Pac Rim Cayman is a holding company does not disqualify its business activities in the United States from being “substantial.”

**2. A Company’s Business Activities In A State Are Substantial If The Company Has A Real And Continuous Link With The State**

263. On the contrary, as Respondent admits, and as it even acknowledges other tribunals have found, there is no checklist for the number or type of business activities that qualify as “substantial.” Respondent correctly notes that the drafters of CAFTA left open the definition of substantial business activities, but it incorrectly attributes that decision to a desire to “permit States and tribunals to make a determination based on the specific facts and circumstances of each case as to whether the company had a sufficient magnitude of business activities.”<sup>311</sup> That unsupported assertion is wrong for two reasons. First, it wrongly assumes that the lack of a definition of “substantial business activities” implies an intent to leave a determination of whether substantial business activities exist to the subjective judgment of “States and tribunals.” However, the lack of a definition does not imply the lack of an objective

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<sup>310</sup> Respondent’s assertion that Pac Rim Cayman has “abandoned its claim that it is ‘an environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas’” (Objections, para. 7 (quoting Notice of Arbitration, para. 14) is similarly vacuous. Holding companies, of course are defined by their holdings. No one would accuse a holding company that owns insurance subsidiaries of misrepresenting itself as an insurance company, or a holding company that owns financial institutions as misrepresenting itself as a financial company).

<sup>311</sup> Objections, para. 177.

standard. It simply means that the undefined term must be interpreted according to its ordinary meaning in context and in light of CAFTA’s object and purpose.

264. Second, Respondent’s reference to “a sufficient magnitude of business activities” suggests – again, without support – that “substantial” in the context of Article 10.12.2 is a quantitative concept. Respondent cites selectively from dictionary definitions of the term “substantial.”<sup>312</sup> However, it ignores the context in which that term is used, as well as CAFTA’s object and purpose. Its disregard for context is illustrated, for example, by its reference to Claimant’s use of the word “substantial” in *entirely different contexts*, as if this were at all relevant to the interpretative exercise at hand.<sup>313</sup> Claimant does not disagree that “substantial” *can* be used in a quantitative sense (for example, to describe “the deposits of gold and silver located in El Dorado”), but that is not the sense in which it is used in Article 10.12.2.

**a. Business Activities Are “Substantial” If They Have Substance And Not Merely Form**

265. Dictionary definitions of “substantial” that Respondent neglects to cite include:

1) (a) consisting of or relating to substance; (b) not imaginary or illusory: real, true; (c) important, essential; 2) ample to satisfy and nourish; 3) (a) possessed of means: well-to do; (b) considerable in quantity: significantly great; 4) firmly constructed; 5) being largely but not wholly that which is specified.<sup>314</sup>

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<sup>312</sup> *Id.*, para. 176.

<sup>313</sup> *See id.*, para. 176, n.170.

<sup>314</sup> Merriam-Webster Dictionary Online, definition of “substantial” (CL-90).

Of these, the meaning that is relevant to Article 10.12.2 is the first definition offered, that is, business activities that are substantive, important, or essential, as opposed to imaginary or illusory.

266. That “substantial” as used in Article 10.12.2 refers to activities that have substance, as opposed to merely form, is supported by context. For example, shortly after CAFTA’s article on denial of benefits is an article on “Special Formalities” (Article 10.14). The latter article recognizes that a Party may impose certain requirements on the form in which an investor of another Party does business in the host Party’s territory. Such requirements may relate, for instance, to residency in the territory or manner of establishment under the host Party’s laws. These requirements have nothing to do with the substance of a company’s business, and therefore are referred to as “formalities.” The juxtaposition of the phrase “substantial business activities” in Article 10.12.2 and the phrase “special formalities” in Article 10.14 supports an interpretation of “substantial” as meaning the opposite of “formal,” as opposed to having an indeterminate quantitative meaning as Respondent suggests.

267. This interpretation finds further support in CAFTA’s object and purpose. CAFTA seeks, among other things, to “promote regional economic integration,”<sup>315</sup> “ensure a predictable commercial framework for business planning and investment,”<sup>316</sup> and “substantially increase

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<sup>315</sup> CAFTA, Preamble, (CL-8).

<sup>316</sup> *Id.*

investment opportunities in the territories of the Parties.”<sup>317</sup> Those objectives are served by encouraging enterprises with business activities in the territory of one Party to extend their activities to the territory of other Parties through investment. This linkage of activities within the region is the essence of regional economic integration. A test that makes the availability of CAFTA’s benefits dependent upon the host State’s subjective determination of whether an investor’s business activities in its home State have reached “a considerable or important level or magnitude” would have the very opposite effect. Such a test would make the “commercial framework for business planning and investment” *unpredictable*. Uncertainty as to whether a potential host would view an investor’s business activities in its home State as “important,” and thus whether CAFTA’s protections would be available to the investor in the host State, would discourage, rather than promote regional economic integration.

268. In sum, leaving the phrase “substantial business activities” undefined does not imply an intent of CAFTA’s drafters to have States and tribunals use their subjective judgment to determine whether a company’s business activities in its home State are “of a considerable or important level or magnitude.” Rather, it reflects an intent to ensure that *investors* would have the maximum flexibility to structure their investments in a way that made business sense.<sup>318</sup> As Deputy U.S. Trade Representative Peter Allgeier explained in U.S. congressional hearings on

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<sup>317</sup> *Id.*, Art. 1.2.1(d), (CL-8).

<sup>318</sup> Thorn & Doucleff at 10 (stating that, in negotiating this language in BITs, NAFTA, and DR-CAFTA, “[T]he United States appears to have been concerned that a precise definition [of substantial business activities] could disadvantage US investors by constraining how they structure their investment activities”) (internal citation omitted) (CL-89).

CAFTA, “It would be difficult, if not impossible, to come up with a generic definition suitable for all business arrangements in all sectors.”<sup>319</sup>

269. Leaving the term “substantial” undefined recognizes that need for flexibility, while at the same time ensuring that an investor entitled to CAFTA’s benefits would have “a real and continuous link” with the Party in which it was incorporated.<sup>320</sup> Thus, notwithstanding Respondent’s insistence to the contrary, the CAFTA denial of benefits provision is not concerned with the form in which an investor does business in its home State; nor is it concerned with the magnitude of its business in its home State. Rather, the provision is concerned with ensuring that companies, whatever form they may take, have a genuine connection to the State in which they are organized, as well as to the host State of the investment. Determining whether that connection exists requires a fact-specific analysis.<sup>321</sup>

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<sup>319</sup> Implementation of the Dominican Republic – Central America Free Trade Agreement (DR-CAFTA): Hearing Before the H. Comm. On Ways and Means, 109<sup>th</sup> Cong. (2005), Testimony of Peter F. Allgeier at 193 (“Allgeier Testimony”) (CL-91).

<sup>320</sup> The equation of “substantial business activities” in the territory of a Party with a “real and continuous link” with that Party comes from explanatory documents that have accompanied the U.S. President’s transmittal of trade agreements and investment treaties to the U.S. Congress. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., The United States Statement on Administrative Action at 145 (Nov. 1993) ((CL-92); transmittal packages for Bilateral Investment Treaties with Latvia (1996) (CL-93); Trinidad & Tobago, (1996) (CL-94); Ukraine (1996) (CL-95); Albania (1998) (CL-96); Honduras (2000) (CL-97); Azerbaijan (2001) (CL-98); Bahrain (2001) (CL-99); Bolivia (2001) (CL-100); Croatia (2001) (CL-101); Jordan (2003) (CL-102); Mozambique (2005) (CL-103); Uruguay (2006) (CL-104).

<sup>321</sup> Allgeier testimony at 193 (CL-91).

**b. Domestic Corporate Law Provides Useful Guidance**

270. As Ambassador Allgeier explained in his U.S. congressional testimony on CAFTA, such fact-dependent analyses of companies’ business activities are “well recognized in U.S. corporate and tax law.”<sup>322</sup> Respondent picks up on that testimony and states that “[a]lthough U.S. law is not controlling, the test for ‘substantial business activity’ used by the United States . . . is worth noting.”<sup>323</sup>

271. Claimant agrees that while “U.S. law is not controlling,” useful guidance can be gained from considering how “substantial business activity” and related concepts are analyzed in U.S. law. However, Claimant disagrees with Respondent’s suggestion that there is one U.S. law test (“*the* test”) or that the test identified by Respondent is relevant.

272. Respondent refers to temporary U.S. tax regulations not promulgated until several years after CAFTA entered into force.<sup>324</sup> These regulations, moreover, pertain to significant new legislation that went into effect in 2004, at the same time that CAFTA was being finalized, and over a decade after a “substantial business activities” condition was included in NAFTA’s denial of benefits clause. It therefore appears unlikely that the U.S. drafters had this later development of U.S. law in mind when drafting CAFTA.

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<sup>322</sup> *Id.* at 193.

<sup>323</sup> Objections, para. 177.

<sup>324</sup> *Id.*, para. 177. *See* U.S. Internal Revenue Service Regulations, 26 C.F.R. § 1.7874-2T (2010) (CL-105). The regulations went into force in June 2009 and are due to expire by 2012; they replaced a previous set of temporary regulations that were promulgated in 2006. *See* 74 Fed. Reg. 27926 (12 June 2009) (CL-106).

273. On the other hand, the transmittal letters for other U.S. treaties containing denial of benefits provisions have linked the substantial business activities exception for denial of benefits purposes to the concept of a company's center of administration or principal place of business, as a proxy for ensuring that the company has a "real and continuous link" with its place of incorporation or the denying party.<sup>325</sup> U.S. courts have long been accustomed to determining a company's "principal place of business" for various reasons, including determining whether parties to litigation have diversity of citizenship, which in some cases is necessary for the exercise of federal jurisdiction.<sup>326</sup> The history of CAFTA's denial of benefits provision suggests that this jurisprudence, rather than the tax regulations on which Respondent relies, is an appropriate point of reference for understanding the phrase "substantial business activities" as used in CAFTA Article 10.12.2.

274. "Substantial business activities" and "principal place of business" are not identical concepts, but they are related. Since the early 1990s, U.S. investment treaties have consistently

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<sup>325</sup> See, e.g., Message From the President Transmitting Treaty Between the Government of the United States of America and the Government of the Republic of Honduras concerning the Encouragement and Reciprocal Protection of Investment ("[T]he United States could deny benefits to a company that is a subsidiary of a shell company organized under the laws of Honduras if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of Honduras that maintains its *central administration or principal place of business in the territory of, or has a real and continuous link with, Honduras.*"), Art. XII (b) (emphasis added) (CL-97). See also treaties listed *supra* n. 320; Thorn & Doucleff at 9 (citing U.S.-Kyrgyzstan Bilateral Investment Treaty Letter of Submittal (1993) and U.S. General Accounting Office Assessment of Major Issues Delivered to the U.S. Congress (1993), relating to NAFTA denial of benefits provision) (CL-89).

<sup>326</sup> Under the Constitution of the United States, the enumerated bases for federal courts to exercise jurisdiction include cases "between Citizens of different States" and cases between citizens of a U.S. State and citizens of foreign States. This is commonly referred to as diversity jurisdiction. U.S. Const., Art. III, § 2.

included a “no substantial business activities” condition in their denial of benefits clauses.<sup>327</sup> Beginning with NAFTA, this approach to denial of benefits also has been employed consistently in U.S. free trade agreements. The rationale is articulated in the NAFTA “Statement of Administrative Action” (“SAA”), a document that accompanied the U.S. President’s transmittal of NAFTA to the U.S. Congress for its approval. The NAFTA SAA explains that under NAFTA’s denial of benefits article,

shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.<sup>328</sup>

275. Thus, the “no substantial business activities” condition for denying benefits is not met where a company has its principal place of business in the territory of a trade agreement Party other than the denying Party. Put another way, if a company has its principal place of business in a State, then it has substantial business activities in that State.

276. The U.S. federal statute governing the jurisdictional inquiry referenced above provides that a corporation’s citizenship for this purpose is that of the U.S. state where it is

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<sup>327</sup> The language was first included in the 1994 U.S. Model Bilateral Investment Treaty and appears in most BITS concluded since then. *See supra* n. 320.

<sup>328</sup> North American Free Trade Agreement, U.S.-Can.-Mex., The United States Statement of Administrative Action, at 145 (Nov. 1993) (CL-92). This rationale is articulated verbatim in explanatory material accompanying the transmittal of various bilateral investment treaties to the U.S. Congress. *See supra* n. 320.

incorporated *and* that of the state where it has its “principal place of business.”<sup>329</sup> (In other words, the corporation may be a citizen of multiple states.) While not controlling here, the test the U.S. Supreme Court has recently confirmed is the appropriate method for determining a corporation’s principal place of business is the so-called nerve center test – *i.e.*, the place where a corporation’s business activities are coordinated.<sup>330</sup> That will normally coincide with a corporation’s headquarters, as long as the headquarters is the *actual* center of direction and control.<sup>331</sup> Furthermore, since the 1970s, U.S. courts have recognized that the “nerve center” test is particularly appropriate for determining the principal place of business of a holding company, precisely because such a company does not have a center of manufacturing or other physical measures of business activity that would lend itself to the quantitative approach.<sup>332</sup>

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<sup>329</sup> 28 U.S.C. § 1332(c)(1) (CL-107). The principal place of business requirement test was added to the statute nearly 60 years ago, and drew on similar language in the U.S. Bankruptcy Act. *See Hertz Corp. v. Melinda Friend*, No. 08-1107, slip op. (2010) (CL-108).

<sup>330</sup> *Hertz Corp. v. Melinda Friend*, No. 08-1107, slip op. at 14 (2010).

<sup>331</sup> *Id.* Notably, in confirming that this is the correct approach to determining a corporation’s principal place of business for purposes of the statute conferring diversity jurisdiction on federal courts, the Supreme Court explicitly rejected a quantitative approach that would measure “the total amount of business activities that the corporation conducts [in a state] and determining whether they are ‘significantly larger’ than in the next-ranking State.” *Id.* at [15]. Just as a quantitative approach is not an appropriate basis for determining a company’s principal place of business, it is not – contrary to Respondent’s suggestion – an appropriate basis for determining whether its business activities in a given State are substantial.

<sup>332</sup> *See, e.g., Lugo-Vina v. Pueblo Int’l*, 574 F.2d 41 (1st Cir. 1978), n.2 (CL-109); *Topp v. CompAir, Inc.*, 814 F.2d 830, 834 (1st Cir. 1987) (CL-110); *Taber Partners v. Merit Builders, Inc.*, 987 F.2d 57, 61 (1st Cir. 1993) (CL-111); *Matsumura v. Benihana Nat. Corp.*, No. 06 Civ. 7609 (NRB), 2007 WL 1489758, 5 (S.D.N.Y. May 21, 2007) (CL-112). *See also* Moore’s Federal Practice § 102.54 (describing *Hertz* test and variety of tests used by U.S. courts prior to *Hertz*) (CL-113).

277. Given the link between “substantial business activities” and “principal place of business” identified in U.S. documents explaining the investment treaty denial of benefits clause, and given the roots of the latter concept in U.S. jurisprudence, the “nerve center” test commonly applied by U.S. courts provides an appropriate lens through which to examine whether the “no substantial business activities” condition of CAFTA Article 10.12.2 is met. We stress that we are not urging the Tribunal to equate “substantial business activities” with “principal place of business;” nor are we suggesting that U.S. courts’ interpretations of the term “principal place of business” are governing. Rather, we are saying that U.S. courts’ examination of the factors that determine a corporation’s principal place of business are helpful in determining whether a corporation has substantial business activities in a given territory.

**c. Pac Rim Cayman’s Business Activities In The United States Are Substantial**

278. There can be no question that Pac Rim Cayman has substantial business activities in the United States within the meaning of CAFTA Article 10.12.2. To borrow the terminology of the aforementioned U.S. jurisprudence, Pac Rim Cayman’s nerve center at all relevant times was the United States. All substantive management and investment decisions were made in Nevada, principally by Pac Rim Cayman’s U.S. Manager Mr. Shrake, a U.S. citizen.

279. Pac Rim Cayman was set up in the Cayman Islands in 1997 on the advice of Mr. Shrake as part of the Pacific Rim Companies in order to hold certain of the Companies’ foreign assets.<sup>333</sup> Mr. Shrake, who has lived and worked in Nevada nearly continuously since 1983 (with

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<sup>333</sup> See *supra* Section III.

the exception of a three-year stay in Mexico in the early 1990s), was responsible for the management of Pac Rim Cayman and its holdings from its inception.<sup>334</sup> Since 1997, Mr. Shrake has exercised the primary responsibility for determining what assets Pac Rim Cayman would hold and managing those assets, including the El Salvador assets.<sup>335</sup> Indeed, it was Mr. Shrake who made the decision that Pac Rim Cayman would hold the Companies' Salvadoran assets and who was responsible for the Companies' acquisition and management of them.<sup>336</sup> It was also at Mr. Shrake's direction, as approved by the Board of Directors of Pacific Rim Mining Corp. (on which Mr. Shrake also sits), that the Companies domesticated Pac Rim Cayman to Nevada in December 2007.

280. Likewise, Mr. Shrake was responsible for hiring other geological experts – who also lived and worked in the United States – to explore and advise on potential investments for Pac Rim Cayman.<sup>337</sup> The geological team in Nevada planned and developed the El Dorado investment, largely from the Pacific Rim Companies' Reno, Nevada, offices.<sup>338</sup> At Mr. Shrake's direction, in 1997 the Companies established Pac Rim Exploration as a Nevada corporation of which Mr. Shrake serves as the President, Secretary, and Treasurer. Since 1997, Pac Rim Exploration has served as the exploration arm of the Companies, and has been responsible for

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<sup>334</sup> *See id.*

<sup>335</sup> *See id.*

<sup>336</sup> *See id.*

<sup>337</sup> *See id.*

<sup>338</sup> *See id.*

deciding where and how to explore for mineral deposits. Pac Rim Exploration has also paid (or substantially contributed to) the salaries and benefits of the Companies' senior geologists, including Mr. Shrake.<sup>339</sup> Pac Rim Exploration also supervised and paid many of the outside firms and consultants that helped to plan and develop the El Salvador project, with profits that its sister Nevada company, Dayton Mining (U.S.) Corp., earned from mining operations in Nevada.<sup>340</sup>

281. In sum, from 1997 to the present, every activity that Pac Rim Cayman and its holdings have undertaken has been substantially planned and executed from Nevada, primarily by Mr. Shrake, one of Pac Rim Cayman's Managers. Further, since 2007 (*i.e.*, before Respondent's breaches of its obligations under CAFTA), Pac Rim Cayman has held Pac Rim Exploration, the exploration arm of the Pacific Rim Companies. To the extent that the "nerve center" test may serve to inform the Tribunal's analysis of whether Pac Rim Cayman conducts substantial business activities in the United States, it is clear that the nerve center of Pac Rim Cayman is and always has been Nevada, the central locus of strategic decision-making and the execution of the Companies' investment strategy.

**d. International Jurisprudence Supports Claimant's Interpretation Of "Substantial Business Activities"**

282. The limited international jurisprudence interpreting the phrase "substantial business activities" in other treaties lends further support to Claimant's approach, which focuses

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<sup>339</sup> *See id.*

<sup>340</sup> *See id.*

on an enterprise's real and continuous links with its home State, and the substantive importance of its activities, rather than the magnitude of its assets or activities within its home State.<sup>341</sup> The *AMTO* tribunal's analysis of the "substantial business activities" requirement in the Energy Charter Treaty ("ECT") denial of benefits provision provides an example of just such an analysis in the context of similar, and similarly undefined, treaty language. Like CAFTA, the ECT permits host states to deny benefits of that treaty under certain circumstances, including cases in which the investor is an entity owned by nationals of a third State and the entity has no "substantial business activities" in the State in which it is organized.<sup>342</sup>

283. In *AMTO*, Ukraine sought to deny the benefits of the ECT to AMTO on the ground that it was a mere mailbox company without substantial business activities in its home country, Latvia.<sup>343</sup> Much like *Pac Rim Cayman*, AMTO was a holding company with two full-time employees.<sup>344</sup> A report from a law firm describing its business activities explained that its

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<sup>341</sup> The majority of tribunals considering denial of benefits provisions under the ECT have found that the notice of denial came too late to be effective and so have not reached the issue of substantial business activities. See, e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), para. 108, 240 (finding exercise too late) ("*Plama*") (RL-66); *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. 456-69 ("*Yukos*") (RL-72). The tribunal in *Pan American v. Argentina* rejected Argentina's argument that one of the claimants did not have substantial business activities in the United States because its U.S. parent companies did have substantial business activities in the United States, but it did not engage in a sustained analysis of how it reached that conclusion. See *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006), para. 221 (RL-77).

<sup>342</sup> Energy Charter Treaty, 34 ILM 360 (1995), Art. 17(1) ("ECT") (CL-114).

<sup>343</sup> *AMTO v. Ukraine* § 26(h) (RL-69).

<sup>344</sup> *Id.* at § 68.

“main activity [was] in the field of financial investments by participating as a shareholder in companies in Finland, Ukraine, USA and Russia.”<sup>345</sup> Although the report referenced agreements and share certificates relating to these investments, AMTO did not provide copies of these documents to the tribunal.<sup>346</sup> It did, however, provide a tax certificate showing that it had paid four types of tax (including social insurance taxes for its two employees) from 2000 to 2007; a bank statement with a “brief statement of the activity” of the account between 1998 and March 2007; and a statement from its landlord confirming that it had rented an office in Riga, Latvia from 2000 through March 2007.<sup>347</sup> The bank statement provided “no evidence of payments in respect of day-to-day business activities,” and AMTO apparently had no other bank account.<sup>348</sup>

284. Because the ECT does not define substantial business activities, the tribunal analyzed the meaning of the term in light of the purpose of the ECT’s denial of benefits provision, which it determined was “to exclude from ECT protection investors which have adopted a nationality of convenience.”<sup>349</sup> The purpose, in other words, was to prevent abuse of the corporate form, and not to establish an additional test that would exclude otherwise *bona fide* claimants. Thus, the tribunal concluded:

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

Accordingly, “substantial” in this context means “of substance, and not merely of form”. It does not mean “large”, and the materiality not the magnitude of the business activity is the decisive question.<sup>350</sup>

285. In other words, the appropriate test is not one based on magnitude of assets or activity within the home State, as Respondent urges, but one based on materiality that more closely resembles the nerve center test described above. The tribunal went on to conclude that AMTO had substantial business activities in Latvia because it conducted “investment related activities” from its Latvia office, including the “employment of a small but permanent staff.”<sup>351</sup>

286. Similarly, the *Petrobart* tribunal found that Kyrgystan could not deny benefits pursuant to Article 17(1) of the ECT because the claimant had substantial business activities, not in the State in which it was incorporated, but in another Contracting Party through the company that managed it:

Petrobart provides the following information about its status and activities. Petrobart is managed by Pemed Ltd, a company registered in England with its principal office in London, which is handling many of Petrobart's strategic and administrative matters. Petrobart therefore has substantial business activities in the Area of a Contracting Party, i.e. the United Kingdom, in the meaning of Article 17 of the Treaty.<sup>352</sup>

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<sup>350</sup> *Id.* at § 69 (RL-69).

<sup>351</sup> *Id.*

<sup>352</sup> *Petrobart Ltd. v. Kyrgystan*, Award (29 Mar. 2005) para. 346 (“*Petrobart Ltd.*”) (CL-115).

This decision is instructive for two reasons. First, it shows that the “handling” of “strategic and administrative matters” is sufficient to qualify for substantial business activities. Second, it shows that the activities of an affiliate can serve to confirm that the claimant has substantial business activities.

287. Respondent argues that AMTO’s “limited activities . . . differ substantially” from those of Pac Rim Cayman in the United States,<sup>353</sup> but that argument simply does not withstand scrutiny in light of the facts in this case. On the contrary, the facts unequivocally demonstrate Claimant Pac Rim Cayman does have substantial business activities in the United States.<sup>354</sup> Indeed, Pac Rim Cayman has had a “real and continuous link” with the United States for many years, beginning *long before* it was domesticated to Nevada, which, as demonstrated above, has always been Pac Rim Cayman’s nerve center, even when it was a Cayman Islands corporation.

288. For the same reasons, there is no basis for Respondent’s assertion that the 2007 reorganization of the Companies was designed to wrongfully obtain the benefits of CAFTA. At that point, no one at the Pacific Rim Companies had arbitration in mind.<sup>355</sup> Indeed, Respondent

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<sup>353</sup> Objections, paras. 179-81.

<sup>354</sup> *See supra* Section III.C.

<sup>355</sup> McLeod-Seltzer Witness Statement, para. 36, 38. In any event, where no dispute has yet arisen, a corporate reorganization for purposes of obtaining the protections of a treaty is a legitimate business decision. *See Aguas del Tunari*, para. 332 (RL-60). Indeed, it is precisely because they expect investors to make such decisions that many states see BITs and multilateral treaties with investment protections as desirable, since they are believed to attract greater foreign investment. *See, e.g.*, Jennifer Tobin and Susan Rose-Ackerman, “Foreign Direct Investment and the Business Environment in Developing Countries” (3 Jan. 2005) (CL-116); Jeswald W. Salacuse, Nicholas P. Sullivan, “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,” 46 Harv. Int’l L.J. 67 (2005) (CL-117).

had not yet taken the actions that crystallized the dispute and gave rise to the present claims. The reorganization was undertaken for a number of reasons, including, but not limited to, prospective nationality planning in case a dispute with El Salvador arose in the future. Thus, Pac Rim Cayman carries out “substantial business activities” in the United States, and has done so since long before its investment in El Salvador.<sup>356</sup> Moreover, its reorganization as a U.S. company in 2007 both served a rational business purpose and reflected the real locus of the conduct of its business activities. In light of these facts, Respondent cannot invoke CAFTA Article 10.12.2 to deny the benefits of the Agreement to Pac Rim Cayman.

**3. Pac Rim Cayman Is An Integral Part Of A Family of Companies That Collectively Carry Out Substantial Business Activities In The United States**

289. Even assuming, *arguendo*, that Pac Rim Cayman’s business activities were not themselves “substantial” for purposes of Article 10.12.2, Respondent’s invocation of the provision would be unavailing, because the Pacific Rim Companies as a group carry out substantial business activities in the United States. Pac Rim Cayman’s business activities are an integral part of the substantial business activities carried out in the United States by that group.

290. Respondent argues that the business activities of the corporate group of which Pac Rim Cayman is a member are irrelevant for purposes of determining whether the “substantial

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<sup>356</sup> Thus, even if Respondent were correct that, for purposes of Art. 10.12.2, a company’s business activities must be measured at the time of the investment, Claimant’s history demonstrates that it meets this test. As explained below, however, the appropriate time to measure a claimant’s business activities is when the Party seeking to deny benefits attempts to exercise its right to do so.

business activities” prong of Article 10.12.2 has been met.<sup>357</sup> Once again, however, Respondent’s insistence on a formalistic approach to this factual inquiry ignores economic reality and fails to satisfy its burden of establishing that the requirements of Article 10.12.2 have been met.

291. As noted above, the substantial business activities requirement is designed, not to exclude mechanistically holding companies from the protections of the Agreement or to impose an additional threshold requirement on claimants seeking to avail themselves of the benefits of the Agreement, but to ensure that the protections of the Agreement are extended only to those companies with a “real and continuous link” to their home States. The role of a company in the activities of a larger corporate family centered in the same home State clearly may meet this test – particularly where the inquiry focuses on the materiality of the corporation’s business activities. In this case, Pac Rim Cayman’s activities as an integral component of a group of companies working together in Nevada demonstrate that it has substantial business activities within the meaning of Article 10.12.2.

292. When examining the economic activities of an enterprise to determine how the enterprise relates to another enterprise, tribunals routinely consider the broader context in which the enterprises operate. For example, in *Aguas del Tunari*, jurisdiction under the Netherlands-Bolivia Bilateral Investment Treaty depended on whether a Dutch holding company (“IWH”) ultimately controlled the Bolivian enterprise that was the claimant in that case. In urging the

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<sup>357</sup> Objections, para. 157.

tribunal to disregard the holding company, Bolivia argued that it was a mere “shell.” The tribunal rejected that argument based on its examination of the broader corporate family and the role IWH fulfilled in that family. It found that because IWH facilitated a joint venture relationship, ensuring that the company’s two owners would have to work together, it could not be considered to be a mere shell.<sup>358</sup> Moreover, the tribunal found it “noteworthy” that, *inter alia*, “IWH **and its consolidated subsidiaries** employed an average of 55 employees.”<sup>359</sup> In other words, it looked down the ownership chain as well as up the chain to determine the holding company’s status.

293. The *Petrobart* award cited above further confirms that the activities of an affiliate can help fulfill the requirement that a claimant have substantial business activities. There, the tribunal found that the “strategic and administrative matters” carried out on behalf of the claimant by a management company in the U.K. qualified as substantial business activities.<sup>360</sup>

294. Similarly, in *S.D. Myers*, the tribunal declined to confine its analysis to the business of the claimant in isolation from the corporate family of which it was a part. There, the question was whether the tribunal had jurisdiction to consider a NAFTA claim, where an investment in Canada (Myers Canada) was owned not by the U.S. claimant itself (S.D. Myers),

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<sup>358</sup> *Aguas del Tunari*, paras. 319-22 (RL-60).

<sup>359</sup> *Id.*, para. 322 (emphasis added) (RL-60).

<sup>360</sup> *Petrobart Ltd. v. Kyrgyzstan*, Award (29 Mar. 2005), para. 346 (CL-115).

but by members of the family that owned the U.S. claimant. Based on its analysis of the complete corporate picture, the tribunal found that it had jurisdiction.

295. Among other facts, the *S.D. Myers* tribunal found significant that the same family member who served as “the authoritative voice” in the U.S. business fulfilled the same function in respect of the Canadian affiliate.<sup>361</sup> The tribunal concluded that, particularly in light of the objectives of NAFTA, it did “not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs.”<sup>362</sup> Among the objectives of which the tribunal took particular note was the objective of “ensur[ing] a predictable commercial framework for business planning and investment,”<sup>363</sup> an objective that is common to both NAFTA and CAFTA. Further, the recognition in NAFTA, as in CAFTA, that an investment may be held by an investor indirectly gave the tribunal additional comfort that *S.D. Myers*’ claims were within the scope of NAFTA.<sup>364</sup>

296. Similarly here, the Tribunal should not permit corporate formalities to obscure economic realities. Instead, in undertaking the fact-specific analysis that Article 10.12.2 calls for, it should acknowledge that Pac Rim Cayman operates not in isolation from other members of the Pacific Rim corporate family, but as an integral member of that family. Accordingly, it

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<sup>361</sup> *S.D. Myers, Inc. v. Government of Canada, Ad hoc*—UNCITRAL Arbitration Rules (First Partial Award and Separate Opinion, 13 Nov. 2000, para. 227 (CL-146).

<sup>362</sup> *Id.* para. 229.

<sup>363</sup> *Id.* para. 196.

<sup>364</sup> *Id.*

should determine whether business activities in the United States are substantial by analyzing how Pac Rim Cayman operates together with the other members of the corporate family. Such an analysis will reinforce the conclusion that Respondent is not entitled to deny CAFTA benefits to Pac Rim Cayman because Pac Rim Cayman, as part of the group of the Pacific Rim Companies, in fact has substantial business activities in the U.S.

**4. Substantial Business Activities Must Exist As of the Date the Host Party Seeks To Deny Benefits**

297. Pac Rim Cayman was established as a Nevada company in December 2007 and has had substantial business activities in the United States at least from that date. Arguably, it had substantial business activities in the United States from an even earlier date, because its activities were being managed from the United States even during the time it was a Cayman Islands company. However, determining whether it had substantial business activities in the United States at such earlier date is irrelevant for present purposes. What matters here is that Pac Rim Cayman had substantial business activities in the United States before El Salvador purported to deny CAFTA benefits, which occurred no earlier than 1 March 2010, when El Salvador notified the United States (but not Pac Rim Cayman) of its intent to deny benefits.<sup>365</sup> In fact, Pac Rim Cayman had substantial business activities in the United States since well before its claim under CAFTA arose (*i.e.*, before El Salvador breached its obligations under CAFTA and Pac Rim Cayman suffered loss or damage as a result of that breach).

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<sup>365</sup> Pac Rim Cayman first learned of El Salvador's 1 March 2010 letter of intent to deny benefits when El Salvador attached that letter to the Tribunal in correspondence dated 3 September 2010.

298. Respondent asserts that the question is whether Pac Rim Cayman had substantial business activities in the United States “at the time of the decision to make the investment [in El Salvador].”<sup>366</sup> It cites no authority for that assertion.<sup>367</sup> Instead, it refers to its understanding of “the purpose and intent of the denial of benefits clause.”<sup>368</sup> Respondent’s assertion is incorrect, as we now will show.

**a. The Text And Context Of Article 10.12.2 Support Analyzing An Investor’s Business Activities As Of The Moment The Host State Seeks To Deny Benefits**

299. Article 10.12.2 is framed as a conditional right of a host Party. The Party “may deny” CAFTA’s benefits to an investor if certain conditions are met. The conditions are articulated in the present tense. Thus, Article 10.12.2 specifies that the potential target of the denial of benefits “*is* an enterprise of such other Party [*i.e.*, the home Party],” that it “*has* no substantial business activities in the territory of any Party, other than the denying Party,” and that “persons of a non-Party, or of the denying Party, *own or control* the enterprise.”<sup>369</sup>

300. The use of the present tense makes unmistakable that the conditions must exist as of the date the host Party seeks to deny benefits. Had the Parties intended the right to deny

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<sup>366</sup> Objections, para. 185.

<sup>367</sup> Respondent suggests that the parties and the tribunals in the *AMTO* and *Tokios Tokelès* cases “assumed” that “‘substantial business activities’ should correspond to the time of the investment,” but rightly refrains from going so far as to argue that the tribunals in those cases ever addressed this question. Objections para. 185 n.176. As such, these cases offer no guidance on the issue.

<sup>368</sup> Objections, paras. 183-185.

<sup>369</sup> CAFTA, Art. 10.12.2 (emphasis added) (RL-1).

benefits to depend on conditions in existence at an earlier point in time they certainly could have drafted Article 10.12.2 accordingly, as they did in other CAFTA articles. For example, in Article 10.18.4, the Parties made an investor's right to submit certain types of claims to arbitration conditional on the investor's not having "previously submitted" the same alleged breaches to other forms of dispute settlement. There, a right to do something in the future (submit a claim to arbitration) depends on a condition that did or did not occur in the past (previous submission of the dispute to another form of dispute settlement). That the Parties did not similarly condition a Party's right to deny benefits on conditions that occurred in the past contradicts Respondent's interpretation of Article 10.12.2.

**b. CAFTA's Object And Purpose Support Analyzing An Investor's Business Activities As Of The Purported Denial Of Benefits**

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301. As previously noted, Respondent's argument with respect to timing is based on what Respondent believes to be the "purpose and intent" of the denial of benefits clause. Without citing any support, it states that the purpose and intent are "to protect legitimate investors of State-Parties to a treaty while preventing nationality-shopping."<sup>370</sup> Respondent further asserts that "concern arises" when an investor restructures after the investment, because the investor "may be trying to improperly gain access to treaty protections."<sup>371</sup> From these premises, Respondent concludes that in order to overcome a denial of benefits, an investor must have had substantial business activities in its home State at the time its investment in the host

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<sup>370</sup> Objections, para. 185.

<sup>371</sup> *Id.*, para. 187.

State was made. Absent substantial business activities in the home State at that time, CAFTA benefits may be denied even years later, notwithstanding the substantial business activities in which an investor may have engaged in its home State since that time. In short, in Respondent's view, nothing can erase the original sin of having lacked substantial business activities in the home State at the time the investment in the host State was first made, and therefore nothing can save the investor from being punished for that sin.

302. Yet, contrary to Respondent's view, there is nothing wrong with an investor's decision to structure its business activities in order to gain CAFTA's benefits after investing in the territory of a CAFTA Party and before a dispute with that Party has arisen. Respondent itself admits as much, acknowledging that "prospective nationality planning has generally been accepted by arbitral tribunals, even if the nationality of the foreign investor has been selected to gain tax advantages or treaty protection in the event of future disputes."<sup>372</sup> One such instance was in the *Aguas del Tunari* case, where the tribunal noted that it was "not uncommon in practice" to "locate one's operations in a jurisdiction perceived to provide a beneficial legal and regulatory environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT."<sup>373</sup>

303. Indeed, it is precisely in the expectation and the desire that investors will structure their investments in order to take advantage of treaty protections that so many States enter into

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<sup>372</sup> *Id.*, para. 17.

<sup>373</sup> *Aguas del Tunari*, para. 330(d) (RL-60). See also CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY at 182 (2009 ed.) (CL-70).

bilateral and multilateral investment treaties.<sup>374</sup> CAFTA's own objectives include "substantially increas[ing] investment opportunities."<sup>375</sup> The substantive protections contained in Chapter 10 of CAFTA are clearly designed to meet the goal of attracting investment into the territories of the Parties – *i.e.*, encouraging investors to structure their investments so as to come within the ambit of CAFTA's protections, thereby benefiting both themselves and the host States receiving additional investment.

304. "[C]reat[ing] effective procedures . . . for the resolution of disputes" is another objective of CAFTA.<sup>376</sup> That objective supports a reading of the denial of benefits clause that favors access to the forums that are created in CAFTA for the resolution of disputes, including investor-State arbitration under Chapter 10. Analyzing an investor's business activities in its home State at the moment it made its investment in the host State, regardless of what transpires from that time to the moment the host State purports to deny benefits, is inconsistent with the objective of providing access to effective procedures for the resolution of disputes. In effect it would allow a host State to deny such procedures to an investor, penalizing the investor for simply recognizing and seeking to preserve the legal benefits to which, as an investor, it is entitled by CAFTA.

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<sup>374</sup> See, *e.g.*, Jennifer Tobin and Susan Rose-Ackerman, "Foreign Direct Investment and the Business Environment in Developing Countries" (5 Jan. 2005) (CL-116); Jeswald W. Salacuse, Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," 46 Harv. Int'l L.J. 67 (2005) (CL-117).

<sup>375</sup> CAFTA, Art. 1.2.1 (d) (CL-8).

<sup>376</sup> *Id.*, Art. 1.2.1(f) (CL-8).

305. Penalizing an investor for taking prudent steps to protect itself in the event that the host State *later* purports to deny CAFTA's benefits to the investor would only serve to discourage investors from investing in the territories of the Parties, and would, moreover, undermine CAFTA's purpose of providing for the settlement of investment disputes.

306. Accordingly, the relevant question under CAFTA article 10.12.2 is whether an investor *has* substantial business activities in the territory of its home Party on the date on which the host Party seeks to deny benefits to the investor. In this case, Pac Rim Cayman had substantial business activities in the United States on that date (which was no earlier than 1 March 2010), and indeed it has had substantial business activities in the United States for years.

#### **5. Conclusion Regarding Substantial Business Activities**

307. For all of the reasons set forth in this Section, Pac Rim Cayman has substantial business activities in the United States and has had such activities at all relevant times. This is so whether Pac Rim Cayman is examined in isolation or whether it is examined as part of the family of companies in which it plays an integral role. That it happens to be a holding company does not change the fact that it and the Pacific Rim Companies collectively have a real and continuous link with the United States. Pac Rim Cayman's investment in El Salvador furthers the corporate mission of the Pacific Rim Companies and, in so doing, advances CAFTA's objective of promoting regional economic integration. In brief, Pac Rim Cayman has done precisely what the CAFTA Parties hoped that CAFTA would encourage investors to do. For this reason, Respondent's attempt to deny CAFTA's benefits to Pac Rim Cayman should be rejected.

**B. U.S. Persons Own And Control Pac Rim Cayman**

308. Respondent presumes that the second condition for denial of benefits is met because Pac Rim Cayman’s corporate parent is an enterprise established under the laws of Canada, which is not a Party to CAFTA.<sup>377</sup> Implicit in that presumption is the view that ownership and control as referred to in Article 10.12.2 means immediate ownership and control only, and that a denying Party (or a tribunal) need not look beyond a non-Party owner or controller to determine whether persons of a Party possess ultimate ownership and control of the enterprise that is an investor of a Party. That view finds no support in the language of Article 10.12.2 which, as relevant here, looks to whether persons of a non-Party “own or control” the enterprise, not whether they *directly* own or control the enterprise. Context and CAFTA’s object and purpose demonstrate that the treaty’s benefits may not be denied on the basis of direct ownership and control by a person of a non-Party where persons of a Party possess ultimate ownership and control.

309. While Pacific Rim Mining Corp. is the parent of Pac Rim Cayman, it is the shareholders of Pacific Rim Mining Corp. who ultimately own Pac Rim Cayman and, by virtue of their rights as owners, control it. Those shareholders are predominantly persons of the United States, a Party to CAFTA other than the denying Party. Accordingly, the second condition for invoking denial of benefits does not apply.

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<sup>377</sup> See Objections, paras. 111-114.

**1. Article 10.12.2 Requires Looking Beyond The Immediate Owner Of An Enterprise Where That Owner Happens To Be A Person Of A Non-Party**

310. The focus of the denial of benefits provision is on “an investor of another Party that is an enterprise of such other Party.” In addition to lacking substantial business activities in the territory of that “other Party” (*i.e.*, the home Party), the enterprise must be owned or controlled by persons of a non-Party (or of the denying Party). The denial of benefits provision recognizes that an enterprise that has made an investment in the territory of the host Party is itself, in turn, an investment of the persons who own and control it, and the provision requires a determination of the nationality of those persons (who are, by definition, investors).

**a. Definition Of “Investment” Provides Context**

311. The relationship between an investor and an investment is addressed in Article 10.28 of CAFTA, which defines the term “investment.” The definition attributes an investment to an investor that “owns or controls [it], directly or indirectly.” Thus, an investor-investment relationship exists where a person owns or controls the asset that has the characteristics of an investment, such as an enterprise, whether that ownership or control is direct or indirect.

312. This definition of the investor-investment relationship is essential in determining whether a given person and that person’s investment in the territory of a Party are covered by CAFTA’s Investment Chapter. As relevant here, that chapter applies to “measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) covered

investments.”<sup>378</sup> Where there is an investment in the territory of a Party alleged to be covered by CAFTA, the question is whether that investment is attributable to a person of another Party. That question is answered affirmatively if a person of another Party owns or controls the investment, even if the ownership or control is indirect. The fact that there may be persons in the chain of ownership or control in between the investment in the host Party and the person of another Party who ultimately owns or controls the investment does not preclude attribution of the investment to that ultimate owner or controller.<sup>379</sup>

313. Because the denial of benefits provision recognizes that an enterprise of a Party that owns or controls an investment in the territory of another Party is itself an investment owned or controlled by investors, the definition of the investor-investment relationship in Article 10.28 applies here as well. In determining whether the denial of benefits provision may apply to an enterprise, the context provided by the definition of “investment” requires an analysis that looks not only to the enterprise’s immediate owner, if that owner happens to be a person of a non-Party, but to persons further up the ownership chain that ultimately may own or control the enterprise. If those latter persons are persons of a Party other than the host Party, then the host Party may not deny benefits under Article 10.12.2. Contrary to the presumption El Salvador

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<sup>378</sup> CAFTA, Art. 10.1.1 (RL-1).

<sup>379</sup> By the same token, where the immediate owner or controller of an investment is an investor of a Party, the fact that persons further up the ownership chain may be persons of non-Parties does not preclude attribution of the investment to the immediate owner or controller. While that is not the situation here, the basic point is essentially the same. As was recognized by a tribunal interpreting a definition of “investment” similar to the definition now at issue, “The phrase, ‘directly or indirectly,’ in modifying the term ‘controlled’ creates the possibility of there simultaneously being a direct controller and one or more indirect controllers.” *Aguas del Tunari*, para. 237 (RL-60).

makes in its Objections, there is no basis for concluding the analysis upon determining that the enterprise's immediate corporate parent is a person of a non-Party.

**b. Investor-State Arbitral Awards And Decisions Provide Guidance**

314. The question of what it means for persons to “own or control” an enterprise has been analyzed in many investor-State arbitrations. The question usually presented is whether an investment in the territory of the respondent State is owned or controlled by a person of another State. Sometimes that question arises in the context of a jurisdictional challenge under Article 25(2)(b) of the ICSID Convention, which contemplates a claim by an enterprise that has the same nationality as the respondent where, “because of foreign control, the parties have agreed [that the claimant] should be treated as a national of another [ICSID] Contracting State for the purposes of [the ICSID] Convention.” Respondents have contested ICSID jurisdiction due to an alleged absence of “foreign control” of a locally established enterprise, as that term is used in the ICSID Convention.<sup>380</sup> In other cases, the ownership or control question arises because the respondent questions whether the person of another Party to an investment treaty who allegedly owns or controls an investment in the respondent's territory in fact possesses ownership or control (or, whether the person in fact is a person of another Party).<sup>381</sup>

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<sup>380</sup> See, e.g., *Sempra Energy Int'l v. Argentina*, Decision on Objections to Jurisdiction (11 May 2005), paras. 38-58 (discussing Argentina's argument that local company did not satisfy foreign control test) (CL-118); *LG&E Energy Corp. and ors v. Argentina*, Decision on Jurisdiction, 30 Apr. 2004, paras. 48-63 (finding foreign control although investors acted through local companies) (CL-119).

<sup>381</sup> See, e.g., *Rumeli Telekom S.A. v. Republic of Kazakhstan*, Award, 29 July 2008, paras. 241-57, 324-27 (rejecting Kazakhstan's argument that the claimants were controlled by Turkey, which was thus the “real party in interest”) (RL-91); *Rompetrol Group NV v. Romania*, Decision on Preliminary

(continued...)

315. Decisions and awards addressing the question of ownership and control consistently have found that the concept must be applied flexibly.<sup>382</sup> Further, the prevailing view among ICSID tribunals is that the foreign control test in Article 25(2)(b) of the ICSID Convention is intended to expand rather than restrict jurisdiction.<sup>383</sup> Thus, tribunals have overruled objections to jurisdiction where the ultimate owner or controller of an investment met the necessary nationality requirements even though an intermediate owner or controller did not. Other tribunals have overruled objections to jurisdiction where an intermediate owner or controller met the necessary nationality requirements even though the ultimate owner or controller did not. While a tribunal has not yet interpreted the concept of ownership and control in CAFTA’s definition of “investment” – or its use in the context of the denial-of-benefits

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(continued)

Objections, 18 Apr. 2008, paras. 71-110 (rejecting respondent’s argument that a control test supposedly revealing local control of a foreign company would defeat jurisdiction) (RL-106); *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction, 29 Apr. 2004, paras. 21, 30 (rejecting objection to jurisdiction based on supposed Ukrainian control of Lithuanian company) (RL-70); *Generation Ukraine, Inc. v. Ukraine*, Award, 16 Sept. 2003, paras. 15.8-15.9 (rejecting respondent’s argument that claimant was really controlled by Canadian nationals) (RL-42).

<sup>382</sup> See, e.g., *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (“*Aucover*”), Decision on Jurisdiction, 27 Sept. 2001, ICSID Case No. ARB/00/5, para. 113 (RL-59) (“The concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights, etc.”). See also *Tokios Tokelès v. Ukraine*, para. 68 (quoting argument of scholar C.F. Amerasinghe that “Article 25 of the Convention allows tribunals to be ‘extremely flexible’ in using various methods to determine the nationality of juridical entities”) (RL-70).

<sup>383</sup> See, e.g., *Tokios Tokelès v. Ukraine*, paras. 47 (citing *Wena Hotels*), 68 (citing Amerasinghe for proposition that, while tribunals have flexibility to determine nationality of corporate entities under Article 25 of the ICSID Convention, “every effort should be made to give the Centre jurisdiction by the application of the flexible approach”) (RL-70); *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 June 1999), para. 41 (CL-120).

provision – the reasoning of other decisions is instructive given the similarity of the terms at issue.

316. For example, in *TSA Spectrum de Argentina SA v. Argentina*, a case under the Netherlands-Argentina Bilateral Investment Treaty, where the claimant was an enterprise of Argentina, the tribunal interpreted the term “foreign control” under Article 25(2)(b) of the ICSID Convention. Although Article 25(2)(b) of the ICSID Convention, like Article 10.12.2 of CAFTA, does not expressly direct a tribunal to consider the ultimate owner or controller of the enterprise, the *TSA* tribunal found that

[i]t would not be consistent with the text, if the tribunal, when establishing whether there is foreign control, would be directed to pierce the veil of the corporate entity national of the host State and to stop short at the second corporate layer it meets, rather than pursuing its objective identification of foreign control up to its real source. . . .<sup>384</sup>

317. In *Waste Management Inc. v. Mexico*, a tribunal interpreting the definition of “investment” in NAFTA rejected Mexico’s jurisdictional objection based on direct ownership of an investment in Mexico by a Cayman Islands company. The tribunal explained, “It is not disputed that at the time the actions said to amount to a breach of NAFTA occurred, Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present

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<sup>384</sup> *TSA Spectrum de Argentina SA v. Argentina*, Award, 19 Dec. 2008, ICSID Case No. ARB/05/5, para. 147 (RL-105); *see also id.*, para. 154 (observing that in no other case interpreting Article 25(2)(b) of the ICSID Convention has a tribunal “stopped short at the second corporate layer or rung, refusing to pursue control to its real source”).

claim.”<sup>385</sup> The *Waste Management* tribunal’s point was not that holding companies are, by definition, mere “shells” to be disregarded in analyzing a company’s ownership structure, but that the existence of a holding company that has a control relationship with an enterprise should not preclude an inquiry into what other entities may have a control relationship with the same enterprise. In reaching its determination, the tribunal acknowledged NAFTA’s denial of benefits article as a mechanism to “deal with possible ‘protection shopping.’” It observed, however, that “[t]here is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor.”<sup>386</sup> In other words, the presence of non-Party entities in between an investment and the ultimate beneficial owners of an investment does not defeat jurisdiction (if the ultimate beneficial owners are persons of a Party), ***nor does it support denial of benefits.***

318. Similarly, in *Siag and Vecchi v. Egypt*, a case under the Italy-Egypt Bilateral Investment Treaty, the tribunal pierced through intermediate entities between the Egyptian investment and the Italian persons who ultimately owned and controlled the investment. The fact of companies in between that happened to be Egyptian did not cause the dispute to lose its

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<sup>385</sup> *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004, para. 85 (RL-76).

<sup>386</sup> *Id.*, para. 80 (RL-76); *see also Plama*, para. 170 (RL-66) (“ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity’s management, operation and the selection of members of its board of directors or any other managing body”).

character as an investment dispute between a Party to the treaty and a national of the other Party to the treaty.<sup>387</sup>

**c. Additional Contextual Support In Article 10.12.1**

319. Article 10.12.1 provides additional support for a control analysis that looks beyond an immediate owner that happens to be a person of a non-Party. That provision allows a Party to deny CAFTA's benefits to an investor of a Party that is an enterprise owned or controlled by persons of a non-Party where the denying Party does not maintain diplomatic relations with that non-Party or imposes certain economic sanctions on the non-Party or persons of the non-Party. Under El Salvador's approach, which looks only to the immediate owner of an enterprise, this provision could be invoked only if persons of a disfavored non-Party directly owned or controlled the enterprise that had made an investment in the territory of the denying Party. For example, under that interpretation, if an enterprise of El Salvador owned an investment in the United States and the El Salvadoran enterprise was owned by a Canadian parent, which in turn was owned by a state-owned enterprise of Cuba, the United States would not be able to deny CAFTA's benefits to the El Salvadoran enterprise and its investment. Under El Salvador's approach, the analysis would stop at the Canadian parent, and because the United

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<sup>387</sup> *Siag and Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction (11 Apr. 2007), para. 207 (CL-121); *see also SOABI v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction (1 Aug. 1984), paras. 35-38 (CL-122) (tribunal piercing through immediate ownership of Senegalese investment to determine that Belgian owners of Panamanian investor had ultimate control over Senegalese investment); *African Holding Company of America, Inc. and Société Africaine de Construction S.A.R.L. v. Democratic Republic of Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction (29 July 2008), paras. 99-104 (CL-122) (tribunal piercing through immediate ownership of Congolese investment to determine that U.S. persons had ultimate ownership and control of Cayman Islands investor).

States has diplomatic relations with Canada and does not impose sanctions on Canada or, generally speaking, Canadian persons, the United States could not invoke Article 10.12.1.

320. However, United States law for many years pre-dating the entry into force of CAFTA has imposed severe restrictions on doing business with Cuba, including enterprises owned, directly *or indirectly*, by the government of Cuba.<sup>388</sup> It is implausible that the United States would have entered into an agreement with the other CAFTA Parties that would preclude it from continuing to enforce those restrictions.<sup>389</sup> Accordingly, the reference to ownership or control of an enterprise in Article 10.12.1 must be understood as encompassing indirect as well as direct ownership and control, and that understanding provides additional contextual support for interpretation of the identical reference in Article 10.12.2.

**d. CAFTA's Object And Purpose**

321. Furthermore, CAFTA's object and purpose confirms an interpretation of the denial of benefits clause that requires an analysis of indirect ownership and control of an

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<sup>388</sup> See, e.g., United States Department of the Treasury, Office of Foreign Assets Control, *Cuba: What You Need to Know About U.S. Sanctions Against Cuba* at 14-15 (3 Sep. 2009), (CL-123).

<sup>389</sup> Indeed, the transmittal letters for U.S. BITs with denial of benefits provisions explicitly refer to the U.S. desire to preserve its right to deny benefits to Cuban companies. See, e.g., Letter of Transmittal, U.S.-Jordan BIT ("Article XII(a) preserves the right of each Party to deny the benefits of the Treaty to a company owned or controlled by nationals of a non-Party country with which the denying Party does not have normal economic relations, e.g., a country to which it is applying economic sanctions. For example, at this time the United States does not maintain normal economic relations with, among other countries, Cuba and Libya."). The same language appears in transmittal letters for other BITs with denial of benefits provisions. See transmittal packages for BITs with Latvia (1996) (CL-93); Trinidad & Tobago (1996) (CL-94); Ukraine (1996) (CL-95); Albania (1998) (CL-96); Honduras (2000) (CL-97); Azerbaijan (2001) (CL-98); Bahrain (2001) (CL-99); Bolivia (2001) (CL-100); Croatia (2001) (CL-101); Jordan (2003) (CL-102); Mozambique (2005) (CL-103); Uruguay (2006) (CL-104).

enterprise, rather than concluding the analysis upon identifying a direct owner or controller that is a person of a non-Party. Among other objectives, CAFTA seeks “to . . . substantially increase investment opportunities in the territories of the Parties.”<sup>390</sup> It also seeks to “ensure a predictable commercial framework for business planning and investment;” “create new opportunities for economic and social development in the region;” and “contribute to hemispheric integration.”<sup>391</sup>

322. Each of these objectives supports an interpretation of the text of the Investment Chapter that encourages investment in the territory of a Party by extending the chapter’s protections to a broad universe of investors. The denial of benefits provision presumes that an investor is covered by the chapter – as an investor of a Party that has made an investment in the territory of another Party – but allows the host Party to deny the chapter’s benefits to that investor due to the limited nature of the investor’s contacts with its home Party (as discussed in Section V, above, its lack of a “real and continuous link” with the home Party). Ownership and control of the investor is one aspect of contacts with its home Party (the other being substantial business activities). Looking past the immediate, non-Party owner of an enterprise to determine whether there are persons of a Party that ultimately own and control the enterprise, thus ensuring its entitlement to CAFTA’s protections, is consonant with “substantially increas[ing] investment opportunities in the territories of the Parties” and “ensur[ing] a predictable commercial framework for business planning and investment,” among other objectives. Invoking denial of benefits based solely on the nationality of the direct owner of an enterprise is not.

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<sup>390</sup> CAFTA, Art. 1.2.1(d) (CL-8).

<sup>391</sup> *Id.*, Preamble (CL-8).

323. The tribunal in the *Aguas del Tunari* case made a similar observation regarding interpretation of the Netherlands-Bolivia Bilateral Investment Treaty which, like CAFTA, has as one of its objects “to stimulate investment.” The tribunal stated, “[I]f an investor can not ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated.”<sup>392</sup> Likewise, if an investor of a Party such as Pac Rim Cayman may be denied the benefits of CAFTA even when ownership and control of the investor ultimately rests with persons of that Party, this will engender uncertainty, and CAFTA’s own effort to stimulate investment will be frustrated.

324. Indeed, the objectives of increasing investment and providing a predictable commercial framework are particularly compelling where, as here, the question before the tribunal is whether to permit benefits to be denied to an investor and investments covered by CAFTA. When foreign control is being analyzed as part of an inquiry into jurisdiction, it is an open question whether particular investors or investments are covered by the relevant treaty or not. But here, Pac Rim Cayman and its investments in El Salvador have already crossed the jurisdictional threshold. For purposes of El Salvador’s denial of benefits objection, there is no question that Pac Rim Cayman and its investments are covered by CAFTA. The only question is whether, notwithstanding their coverage, El Salvador has the right to take the extraordinary step of denying CAFTA’s protections to them. We submit that it would be contrary to the above-

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<sup>392</sup> *Aguas del Tunari*, para. 247 (RL-60).

quoted objectives to do that on the basis of anything less than the clearest evidence, a standard that El Salvador does not even come close to meeting.

**2. U.S. Persons Own And Control Pac Rim Cayman**

325. Piercing through the direct parent of Pac Rim Cayman to identify the persons that ultimately own and control it – as must be done in view of the foregoing analysis – reveals that since Pac Rim Cayman became a Nevada company in 2007 (and even before then) a majority of the ultimate beneficial ownership of Pac Rim Cayman has been in the hands of U.S. persons. By virtue of their majority beneficial ownership of Pac Rim Cayman, U.S. persons indirectly control Pac Rim Cayman. Additionally, day-to-day management of Pac Rim Cayman is in the hands of Mr. Shrake, who is a U.S. national resident in Nevada.

**a. Ownership Of Pac Rim Cayman**

326. It is not disputed that Pac Rim Cayman's parent is Pacific Rim Mining Corp., a company incorporated under the laws of Canada. However, for the reasons discussed above, for denial of benefits purposes it is insufficient to end the ownership and control analysis there. Rather, the Tribunal must examine the ownership of Pacific Rim Mining Corp., because the shareholders of that company are the indirect owners of Pac Rim Cayman. It is these persons that ultimately stand to win or lose from the investment activities of Pac Rim Cayman in El Salvador.

327. The shareholding in Pacific Rim is described in the witness statement of Mr. Shrake. As explained there, following the 2002 merger with Dayton, a majority of the outstanding shares in Pacific Rim Mining Corp. were owned by U.S. shareholders. Since the merger, Pacific Rim Mining Corp. has monitored shareholding through a variety of means,

including, for example, reports generated by Broadridge Financial Solutions, Inc. (“Broadridge”), a proxy processing firm; reports generated by a firm called Computershare, Ltd., which assists the Companies in sending out mailings to shareholders’ and reports on trading volume on the U.S. and Canadian stock exchanges on which Pacific Rim Mining Corp. is traded. For each of the years 2003 to 2010, a majority of the outstanding voting securities in Pacific Rim Mining Corp. has been held by residents of the United States. For the past four years, about 60% of the outstanding voting securities have been held by U.S. residents (and that percentage was closer to 70% in prior years).<sup>393</sup>

328. Regarding the relationship between “U.S. residents” and “persons of the United States,” it should be recalled that CAFTA Article 2.1 defines a “person” of a Party as “a national or an enterprise of a Party.” A national, in turn, is “a natural person who has the nationality of a Party according to Annex 2.1 or a permanent resident of a Party.” Annex 2.1 states that, for the United States, “a natural person who has the nationality of a Party” means “national of the United States’ as defined in the existing provisions of the *Immigration and Nationality Act*” (*i.e.*, the provisions of that Act in effect on the date of CAFTA’s entry into force). That rule is consistent with general principles of international law, which provide that the law of the relevant Party ordinarily determines a person’s nationality or legal residence for purposes of a treaty.<sup>394</sup>

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<sup>393</sup> Shrake Statement, para. 59.

<sup>394</sup> See, e.g., *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (2007), Decision on the Application for Annulment and Separate Opinion, para. 55. Indeed, it is a fundamental principle of international law that States determine who is and is not a national (or a legal resident). See Oppenheim’s International Law (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) §378 (CL-124).

Accordingly, the manner in which U.S. law (in particular, the Immigration and Nationality Act) defines and uses the concepts of nationality and residence is determinative for purposes of construing the meaning of these terms with respect to U.S. nationals and permanent residents.

329. The information gathered by Broadridge does not indicate the nationality of Pacific Rim’s shareholders, but it does indicate their residence.<sup>395</sup> The address information Broadridge gathers is reported to the U.S. Securities and Exchange Commission, and Pacific Rim has been advised by counsel that this information suffices to identify shareholders who are U.S. residents for purposes of U.S. law relating to securities regulation.<sup>396</sup> Further, when U.S. laws and regulations require that a majority of the shareholders of a corporate entity be of a specified nationality in order for certain benefits to be available to the entity, residence typically is used as a proxy for nationality.<sup>397</sup> The Pacific Rim shareholders with addresses of record in the United

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<sup>395</sup> The U.S. Immigration and Nationality Act defines residence as simply a place where one is or has been living for some length of time, in contrast to one’s domicile, which designates a place to which an individual intends to return. 8 U.S.C. § 1101 (a)(33) (“The term ‘residence’ means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.”) (CL-125).

<sup>396</sup> Shrake Statement, paras. 58-59.

<sup>397</sup> For example, the statute establishing the U.S. Overseas Private Investment Corporation (“OPIC”) makes political risk insurance and other services provided by OPIC available only to “eligible investors.” As relevant here, “eligible investor” is defined to include “corporations, partnerships, or other associations including nonprofit associations, created under the laws of the United States, any State or territory thereof, or the District of Columbia, *and substantially beneficially owned by United States citizens.*” 22 U.S.C. § 2198(c)(2) (emphasis added) (CL-126). OPIC’s official Handbook states: “Where shares of stock of a corporation with widely dispersed public ownership are held in the names of trustees or nominees (including stock brokerage firms) with addresses in the United States, such shares may be deemed to be owned by U.S. citizens unless the investor has knowledge to the contrary.” OPIC Handbook at 17 n.\* (CL-127). The United States Agency for International Development applies a similar rule of thumb in determining eligibility for financing of suppliers of services. See 22 C.F.R. § 228.31(b) (CL-128).

States should therefore also be deemed U.S. persons for purposes of CAFTA (*i.e.*, enterprises, nationals, or permanent residents of the United States).<sup>398</sup>

330. At all relevant times, a majority of the ownership of Pacific Rim Mining Corp. has been in the hands of U.S. persons. Accordingly, given Pacific Rim Mining Corp.'s 100 percent ownership of Pac Rim Cayman, majority ownership of Pac Rim Cayman is indirectly in the hands of U.S. persons.

**b. Control Of Pac Rim Cayman**

331. With majority ownership comes control. The shareholders of Pacific Rim Mining Corp. have rights to exercise various powers, which rights give them ultimate control over the company and, indirectly, over its wholly-owned subsidiary, Pac Rim Cayman. These rights are set forth in the Company Act Articles of Pacific Rim Mining Corp.<sup>399</sup> They include rights to vote shares at general meetings of the company,<sup>400</sup> elect directors,<sup>401</sup> and give consent to (or withhold consent from) proposals to alter the company's capital structure.<sup>402</sup>

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<sup>398</sup> In the vast majority of cases, citizens will be permanent residents of the United States, and non-citizens may be as well. According to 8 U.S.C. § 1101 (a)(20), “lawfully admitted for permanent residence” means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” (CL-125).

<sup>399</sup> Pacific Rim Mining Corp., Articles of Incorporation, filed as part of 6-K on 1 Feb. 2005, Arts. 9.1-9.2 (“Pacific Rim Articles”) (C-69).

<sup>400</sup> *Id.*, Art. 11.1.

<sup>401</sup> *Id.*, Arts. 12.1 & 13.1.

<sup>402</sup> *Id.*, Art. 6.2.

332. The tribunal in *Aguas del Tunari* expressly found control to be inherent in majority ownership. There, the issue was whether a Dutch holding company indirectly controlled an investment in Bolivia, or whether control resided exclusively with non-Dutch persons further up the ownership chain. Bolivia argued that even though the Dutch company indirectly held a majority stake in the investment, actual control was held by other, non-Dutch persons. The tribunal disagreed. It found instead that “Claimant’s view that ‘control’ is a quality that accompanies ownership finds support generally in the law.”<sup>403</sup> Moreover, the tribunal found that this proposition does not depend on the exercise of “actual day-to-day or ultimate control.”<sup>404</sup> In other words, persons may possess control even if they do not exercise that control in the daily operations of an enterprise, choosing instead to delegate that responsibility to others, as owners frequently do, and as the ultimate beneficial owners of Pac Rim Cayman do.

333. Further support for the proposition that control is inherent in ownership comes from the decision on jurisdiction of the tribunal in *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*. There, the tribunal was interpreting Article 25(2)(b) of the ICSID Convention in light of a concession agreement between the government of Venezuela and an enterprise (“Aucoven”), which had been majority owned by a Mexican enterprise (“ICA

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<sup>403</sup> *Aguas del Tunari*, para. 245 (RL-60); see also *id.*, para. 264 (“where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase ‘controlled directly or indirectly’ exists.”).

<sup>404</sup> *Id.*, para. 264; see also *id.*, para. 234 (“[T]here is no indication from any of the dictionaries consulted that ‘control’ necessarily entails a degree of active exercise of powers or direction. If the Parties had intended this result, a better choice of word for the BIT would have been ‘managed’ rather than ‘controlled.’”).

Holding”) and later came to be majority owned by a U.S. subsidiary of ICA Holding (“Icatech”). The concession agreement provided for ICSID arbitration if a majority of Aucoven came to be owned by a person of an ICSID Contracting State (the United States being such a State, and Mexico not being such a State). The question was whether majority ownership by Icatech satisfied the “foreign control” requirement of Article 25(2)(b) of the ICSID Convention, even though day-to-day control of Icatech was in the hands of its Mexican parent. The tribunal found:

Direct shareholding confers voting right, and therefore, the possibility to participate in the decision-making of the company. Hence, even if it does not constitute the sole criterion to define ‘foreign control’, *direct shareholding is certainly a reasonable test for control.*<sup>405</sup>

334. In this case, because U.S. persons possess majority ownership of Pacific Rim Mining Corp. and, indirectly, of its wholly-owned subsidiary, Pac Rim Cayman, they also possess control of the company and its subsidiary. Because U.S. persons own and control Pac Rim Cayman, an essential predicate for denying benefits to Pac Rim Cayman under CAFTA Article 10.12.2 is missing and El Salvador’s invocation of that provision must fail.

**c. Day-to-day Management of Pac Rim Cayman Is In The Hands of Mr. Shrake, Who Is A U.S. National**

335. In addition to ultimate beneficial ownership, and thus control, of Pac Rim Cayman being in the hands of U.S. persons, it should be recalled that day-to-day management of Pac Rim Cayman is in the hands of Mr. Shrake, who also is a U.S. person.

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<sup>405</sup> *Aucoven*, Decision on Jurisdiction, para. 121 (emphasis added) (RL-59).

336. As the tribunal in *International Thunderbird Gaming Corp. v. Mexico* explained, “[c]ontrol can . . . be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise. . . .”<sup>406</sup> Similarly, in *Vacuum Salt Products Limited v. Ghana*, the tribunal acknowledged that a person with the power to “steer . . . the fortunes” of an enterprise may control the enterprise.<sup>407</sup> The *LETCO* tribunal also found foreign control where French nationals “dominated the company decision-making structure,” observing that “[i]t appears from the evidence presented that a majority, if not all, of LETCO’s directors, as well as the General Manager, were at all times French nationals.”<sup>408</sup>

337. When it came to daily decision making for Pac Rim Cayman and its Salvadoran Enterprises, Mr. Shrake at all relevant times had and still has the power “to effectively decide and implement the key decisions of the business activity” of the Pacific Rim Companies, including Pac Rim Cayman, and indeed to steer their fortunes. In particular, his responsibilities include:

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<sup>406</sup> *International Thunderbird Gaming Corp. v. Mexico*, Award (26 Jan. 2006), UNCITRAL Arbitration Rules, para. 108 (CL-129).

<sup>407</sup> *Vacuum Salt Products Limited v. Ghana*, Award, 16 Feb. 1994, ICSID Case No. ARB/92/1 at 30 (CL-130). The *Vacuum Salt* tribunal found that the individual concerned did not have the power to “steer the fortunes” of the Ghanaian enterprise at issue there. While that individual was the founder of the enterprise and, like Mr. Shrake, had valuable technical expertise, he was “subject to the direction of the Managing Director,” who was a Ghanaian national. *Id.* Those facts distinguish that case from the present case. As Catherine McLeod-Seltzer attests, not only does Mr. Shrake have valuable technical expertise as a “mine finder,” he also controls the Pacific Rim Companies’ exploration and mining operations on a day-to-day basis. Thus, unlike the individual at issue in *Vacuum Salt*, Mr. Shrake really does have the power to “steer the fortunes” of the Pacific Rim Companies.

<sup>408</sup> *LETCO v. The Government of the Republic of Liberia*, Award (31 Mar. 1986), 26 I.L.M 647, at 653 (1987) (CL-131).

- Manager of Pac Rim Cayman and “effectively [its] chief executive,”<sup>409</sup> deciding what assets Pac Rim Cayman would hold, how it would hold them, and making the decision to domesticate Pac Rim Cayman and reorganize the Companies in 1997;<sup>410</sup>
- Serving as President, Treasurer, and Secretary of Pac Rim Cayman’s wholly-owned subsidiary, Pac Rim Exploration, responsible for hiring and working directly with geologists in carrying out exploration activities in El Salvador and elsewhere; and
- Serving as President and CEO of Pacific Rim Mining Corp. and establishing an office in Reno, Nevada, including hiring the Reno office employees and also the geologists who designed and implemented the Salvadoran project, and who acted as officers of the Salvadoran Enterprises.

In addition, the officers of the Companies who assisted him in these tasks were primarily U.S. citizens (*i.e.*, Messrs. Gehlen, Earnest, Ernst, and Wood).

### **3. Conclusion On The Ownership and Control Prong of Denial of Benefits**

338. For the reasons set forth in this Section, El Salvador errs in assuming that the ownership and control condition for invoking denial of benefits is met due to Pac Rim Cayman’s immediate ownership by a Canadian parent. The reference to ownership and control in CAFTA Article 10.12.2 requires the Tribunal to pierce through the immediate non-Party owner of the Claimant to determine whether persons of a Party have indirect ownership and control of the Claimant. Upon doing so, the Tribunal will find that the ultimate beneficial owners of Pac Rim Cayman are U.S. persons, that by virtue of their majority ownership of Pac Rim Cayman’s parent

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<sup>409</sup> Shrake Statement, paras. 34-36, 54-65.

<sup>410</sup> *Id.*

they indirectly control Pac Rim Cayman, and that U.S. control of Pac Rim Cayman is further evidenced by day-to-day decision making for Pac Rim Cayman by a Manager who is a U.S. national. For all of these reasons, in addition to the other reasons set forth in this part of Pac Rim Cayman's Counter Memorial, the Tribunal should reject El Salvador's denial of benefits objection.

**C. Respondent Failed To Provide Advance Notice To The United States and To Pac Rim Cayman**

339. Not only is Respondent barred from denying CAFTA's benefits to Pac Rim Cayman on substantive grounds, it also is barred from doing so on procedural grounds. Article 10.12.2 requires advance notice to interested State Parties of a Party's intent to exercise its right to deny benefits to the investor under that provision. At a minimum, and as explained below, such advance notice must be provided before a dispute is submitted to investor-State arbitration. In this case, however, Respondent waited until March 2010 – 15 months after Pac Rim Cayman provided El Salvador with its notice of intention to submit its claims to arbitration and 9 months after its actual submission of its claims to arbitration – 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 too late and is therefore ineffective.

340. Furthermore, the same considerations that have led ECT tribunals to find that there must be advance notice to investors of an intention to deny benefits under that treaty pertain here: the treaty language granting the right to deny benefits is permissive, not mandatory. In order to give effect to the object and purpose of CAFTA, investors must have advance notice that permits them to plan their investments accordingly. Here, Respondent did not provide notice to Claimant until its letter of 3 August 2010 setting forth its preliminary

objections. Not only did Respondent wait to give notice to Claimant until over a year after Claimant's Notice of Arbitration, but it did so following extensive pleadings focused almost entirely on disputed facts; a two-day hearing before the Tribunal; and a ruling by the Tribunal rejecting Respondent's preliminary objections under Articles 10.20.4 and 10.20.5. By any measure, Respondent's belated effort to exercise its right to deny CAFTA's benefits to Claimant comes too late and is therefore ineffective.

**1. CAFTA Article 10.12.2 Requires A Party To Provide Notice Of Its Intent To Deny Benefits Before the Investor Submits A Dispute To Arbitration**

**a. Notice To Other State Parties**

341. A CAFTA Party's right to deny benefits to an investor of another CAFTA Party is a conditional right. In addition to the substantive provisions previously discussed, the right is "[s]ubject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations)." This procedural condition is extremely rare among free trade agreements and bilateral investment treaties negotiated by the United States since the conclusion of NAFTA in 1993. All of those later agreements contain denial of benefits clauses, but most of them do not contain the procedural condition at issue here. The denial of benefits clause in the U.S.-Chile Free Trade Agreement is made subject to that agreement's State-to-State consultations provision, but not to any provisions from the agreement's chapter on transparency.<sup>411</sup> The denial of benefits clause in the U.S.-Korea Free Trade Agreement contains an advance notice provision, but it applies only if the denying Party has actual knowledge of particular facts warranting the denial of benefits and

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<sup>411</sup> Free Trade Agreement, U.S.-Chile, 1 Jan. 2004, Art. 10.11(2) (CL-87).

only “to the extent practicable.”<sup>412</sup> The discretion allowed to the denying Party in that Agreement serves to highlight the mandatory nature of the advance notice requirement in CAFTA. Indeed, the only other post-NAFTA agreement to which the United States is a Party that contains an advance notice requirement identical to CAFTA’s is the U.S.-Panama Free Trade Agreement, which was modeled largely on CAFTA.<sup>413</sup>

342. The essentially unique status of the advance notice requirement in CAFTA Article 10.12.2 underscores its importance to the Parties. Providing advance notice before denying benefits to the investor of a Party was so important to them that they restored this text to the denial of benefits clause, even though it had fallen out of fashion in other agreements of the era. Moreover, as a comparison with the counterpart to CAFTA’s Article 10.12.2 in the U.S.-Chile Free Trade Agreement demonstrates, the Parties viewed advance notice as important not only as a trigger for State-to-State consultations, but also as an instance of the transparency promoted by Article 18.3 of CAFTA.<sup>414</sup>

343. Article 18.3 resides in CAFTA’s chapter on “Transparency.” It provides as follows:

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<sup>412</sup> Free Trade Agreement, U.S.-S.Korea, Art. 11.11.2 (CL-88).

<sup>413</sup> See Free Trade Agreement, U.S.-Pan., Art. 10.12.2. (CL-132).

<sup>414</sup> As explained in a U.S. Government document summarizing provisions of CAFTA, “The [CAFTA] Parties recognize that without a high standard of regulatory transparency, the benefits of market-opening trade commitments can be lost through arbitrary or unfair government regulations. Accordingly, the Agreement includes provisions that will ensure that each Party observes fundamental transparency principles.” Statement on How the Dominican Republic-Central America-United States Free Trade Agreement Makes Progress in Achieving U.S. Purposes, Policies, Objectives, and Priorities at 8-9 (CL-133).

1. To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.
2. On request of another Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not that other Party has been previously notified of that measure.
3. Any notification or information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.

Thus, denial of benefits under CAFTA is expressly conditioned on the denying Party's taking steps to ensure that it is acting transparently and with full notice to other States Parties to the Agreement. No denial can be effective unless and until the denying Party has provided such notice.

344. Moreover, the denying Party's compliance with Article 10.12.2's notice and consultation provisions must occur before a dispute is submitted to arbitration. This is so for reasons that will be described in greater detail below. But for present purposes it suffices to note that if the denying Party can provide notice to the other Party of its intent to deny benefits for the first time in the middle of a dispute, then operation of the denial of benefits provision under CAFTA will be no different from operation of the denial of benefits provisions under agreements and BITs that do not contain notice and consultation requirements. This procedural condition that the CAFTA Parties inserted is a conscious departure from the prevailing trend in drafting similar clauses would be rendered a nullity, contrary to ordinary rules of treaty interpretation.

345. Article 10.12.2 does not indicate when its requirement of notice to and consultation with interested CAFTA Parties prior to the exercise of a denial of benefits must be

met. However, when it is considered that one of the dispute settlement options available to investors is arbitration under the ICSID Convention,<sup>415</sup> and when CAFTA Article 10.12.2 is considered in light of Article 27(1) of the ICSID Convention, it becomes clear that the notice and consultation required as a precondition for denying CAFTA's benefits must occur *before* a Notice of Arbitration is filed with the Secretariat. Were it otherwise, the prospect for consultations between an investor's home State and the host State contemplated by CAFTA Article 10.12.2 would be rendered a nullity by virtue of the preclusion in ICSID Convention Article 27(1) of the home State's giving diplomatic protection to an investor once a dispute has been submitted to arbitration.

346. Article 27(1) of the ICSID Convention requires that Contracting States refrain from providing diplomatic protection or espousing a claim once the parties have consented to arbitration:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State *shall have consented to submit or shall have submitted to arbitration* under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.<sup>416</sup>

347. The fact that diplomatic protection with respect to a dispute must cease when the parties to a dispute "shall have consented to submit or shall have submitted [the dispute] to arbitration" under the Convention means that any consultation between the home and host States

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<sup>415</sup> CAFTA, Art. 10.16.3(a) (RL-1).

<sup>416</sup> ICSID Convention, Art. 27(1) (emphasis added).

must also cease at that time. Thus, any notice and consultation must occur *before* filing of the Notice of Arbitration, which includes the claimant's consent to arbitration.<sup>417</sup>

348. The notice and consultation requirement in CAFTA's denial of benefits clause functions, in part, as a means of ensuring that interested States Parties to the Agreement have an opportunity to engage in the diplomatic protection of their injured nationals before the host State denies the benefits of the Agreement to those nationals. In other words, before a Party can deny the benefits of the Agreement to an investor, the investor's home State must have a chance to present its own views on the matter and to assist its national in settling the dispute, *i.e.*, it must have a chance to provide diplomatic protection.

349. While "diplomatic protection" in its classic sense is often considered to refer to espousal,<sup>418</sup> its meaning in Article 27(1) clearly goes beyond that classical definition, since the bringing of an international claim on behalf of an injured national is listed as a separate prohibited action. The work of the International Law Commission confirms that the protections a State may offer to its injured nationals are not limited to espousal.<sup>419</sup>

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<sup>417</sup> See CAFTA, Arts. 10.17 and 10.18 (RL-1).

<sup>418</sup> See ILC, Draft of Articles on Diplomatic Protection with commentaries, Art. 1, para. 6 (2006) (CL-134).

<sup>419</sup> ILC, Preliminary Report on Diplomatic Protection, Mohamed Bennouna, Special Rapporteur, A/CN.4/484, Feb. 4, 1998 at 2, 4 (stating that "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State," and that "The State retains, in principle, the choice of means of action.") (CL-135).

350. ICSID jurisprudence likewise confirms that a State's efforts to assist in the settlement of a dispute after the parties have consented to arbitration may violate Article 27(1). In *Banro American Resources*, the tribunal indicated that if the U.S. government had taken certain steps falling short of espousal to assist the claimant, that may have violated the Convention, since it "would go against [the] aim and purpose [of the ICSID Convention] to expose the host State to, at the same time, *both diplomatic pressure and an arbitration claim.*"<sup>420</sup>

351. The issue also arose in the *Aguas del Tunari* case, where the tribunal sought clarification as to statements made by members of the Dutch government concerning whether the claimant in that dispute could invoke the protections of the Netherlands-Bolivia BIT.<sup>421</sup> In seeking this clarification, the tribunal was careful to emphasize that it was *not* requesting the Netherlands' views of the specific case at hand, because to do so might violate Article 27(1) of the ICSID Convention:

The Tribunal recognizes the obligation of the Netherlands under [Article 27 of] the ICSID Convention not to provide diplomatic protection to its nationals in the case of investment disputes covered by the Convention. In this sense, the Tribunal wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal's jurisdiction in this matter, rather it seeks only to secure the comments of the Netherlands as to specific documentary

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<sup>420</sup> *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, Award, (1 Sept. 2000), ICSID Case No. ARB/98/7, para. 19 (emphasis added) (CL-136).

<sup>421</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005, ICSID Case No. ARB/02/3 (RL-60).

bases for written responses which the Dutch government provided to parliamentary questions.<sup>422</sup>

352. The Dutch government, for its part, was equally circumspect in its reply. The only information it provided consisted of “comments of a general nature that possibly may be relevant to the task of confirming an interpretation under Article 32 [of the Vienna Convention on the Law of Treaties].”<sup>423</sup> It did not provide any information as to whether there was a subsequent agreement by the parties as to the proper interpretation of the treaty as contemplated by Article 31 of the Vienna Convention, which the respondent had argued was the case; for this reason, the tribunal did not rely on the Dutch document in reaching its decision.<sup>424</sup>

353. In this case, Claimant provided its Notice of Intent to Respondent on 8 December 2008. It did not file its Notice of Arbitration until 30 April 2009. Respondent thus had nearly five months in which to provide notice to the United States and to consult with it concerning its intention to deny CAFTA benefits to Claimant. It was, moreover, required to do so in that time period by CAFTA Article 10.12.2, as understood in light of ICSID Convention Article 27(1). (In view of CAFTA’s requirement that a claimant and respondent “initially seek to resolve the dispute through consultation and negotiation,”<sup>425</sup> Respondent also could have and should have notified Pac Rim Cayman during this period of its intent to deny benefits.) By seeking to engage

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<sup>422</sup> *Aguas del Tunari*, para. 258 (quoting letter sent to Legal Advisor of the Foreign Ministry of the Netherlands) (RL-60).

<sup>423</sup> *Id.*, para. 260.

<sup>424</sup> *Id.*

<sup>425</sup> CAFTA, Art. 10.15 (RL-1).

in the notice and consultation process only in March 2010, over a year after Claimant's Notice of Intent was submitted and nearly a year after the Notice of Arbitration was submitted, Respondent put the United States in the position of risking a violation of Article 27(1) if it consulted with Respondent following Respondent's notice. Not surprisingly, the United States has apparently not requested consultations in response to Respondent's belated notice.<sup>426</sup>

354. Moreover, according to Respondent, it already had in its possession all of the information it believed it needed to provide notice to the United States in a timely manner. According to its Memorial, "[t]he factual record established that El Salvador always believed it was dealing with a Canadian investor, from when the investment was made until the present arbitration was filed."<sup>427</sup> If that assertion is true, then Respondent had every reason to provide notice of its intent to deny the benefits of CAFTA to the "Canadian investor" immediately. (Of course, the assertion is remarkably disingenuous, give the abundant evidence available to Respondent concerning Claimant's substantial U.S. presence, ranging from the numerous statements in Pacific Rim Mining Corp.'s Annual Report to the visit of Salvadoran officials to see Mr. Shrake in Nevada and tour mining operations there. While untrue, however, the assertion entirely undermines any argument on Respondent's part that it could not have provided the requisite notice of its intent to deny the benefits of CAFTA to the United States (or Claimant) in a timely manner.

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<sup>426</sup> See Objections, para. 251.

<sup>427</sup> *Id.*, para. 417.

**b.     The Object and Purpose of CAFTA Also Require  
Advance Notice To Investors**

355.     As with the similar denial of benefits provision in the ECT, the denial of benefits provision in CAFTA must be interpreted to require advance notice to investors. Such notice is necessary to give effect to the object and purpose of CAFTA to foster greater regional integration, to promote transparency, and to ensure a predictable and stable investment climate. Among other things, the object and purpose of CAFTA is to “substantially increase investment opportunities in the territories of the Parties,”<sup>428</sup> to “create effective procedures for the implementation and application of this Agreement . . . and for the resolution of disputes,”<sup>429</sup> and to “ensure a predictable commercial framework for business planning and investment.”<sup>430</sup> These goals cannot be met if investors do not know whether their investments will be covered by CAFTA’s protections until they are in the midst of an investment arbitration with a CAFTA Party. Notice to investors is therefore necessary in order to give effect to the object and purpose of CAFTA.

356.     The permissive language of Article 10.12.2 fails to provide such notice to investors. Claimant had no notice of Respondent’s intention to deny CAFTA benefits to it until a few months ago, long after the investment had been made and almost a year-and-a-half after Claimant had submitted its Notice of Arbitration. Notice that is provided after a dispute has

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<sup>428</sup> CAFTA, Art. 1.2(1)(d) (CL-8).

<sup>429</sup> *Id.*, Art. 1.2(1)(f).

<sup>430</sup> *Id.*, Preamble.

arisen and been submitted to binding arbitration, many years after the investment had been made, cannot be given effect without seriously undermining CAFTA's goals of fostering regional integration, transparency, and predictability for investors.

357. CAFTA Article 10.12.2 states that Parties "may" deny benefits. According to dictionaries of standard usage, "may" means having "permission" or being "free to" undertake the indicated activity.<sup>431</sup> It is thus "used to indicate possibility or probability."<sup>432</sup> As such, it indicates permission to do something, but not whether or not the relevant action will ever occur.<sup>433</sup> Thus, unless and until a Party notifies the investor that it has determined to exercise that right, the investor has no way of knowing that its investment is not covered by the protections of CAFTA. Permitting a Party to deny benefits, not only after the investment is made, but after arbitration has begun, would severely undermine CAFTA's goal of fostering greater certainty and predictability in commercial activities and investment.<sup>434</sup>

358. Respondent's argument that the denial of benefits provision itself constitutes sufficient notice does not stand up to scrutiny, since a Party has the full discretion to choose – or not – to exercise the right to deny benefits to an investor.<sup>435</sup> In this regard, there is no material

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<sup>431</sup> Merriam-Webster Online Dictionary, definition of "may" (CL-137).

<sup>432</sup> *Id.*

<sup>433</sup> Merriam-Webster Online Dictionary, definition of "right" as a "power or privilege to which one is justly entitled." (CL-138).

<sup>434</sup> CAFTA, Preamble (CL-8).

<sup>435</sup> *See* Objections, para. 215.

difference between CAFTA Article 10.12.2 and ECT Article 17(1), which provides that parties “reserve[] the right” to deny benefits, and which has repeatedly been found to require advance notice to investors.<sup>436</sup> Both treaties do no more than indicate that State Parties have a *right* to deny benefits under certain conditions; they do not indicate whether or when a particular party will exercise that right.

359. Respondent’s effort to find a material difference between these two expressions is entirely misplaced.<sup>437</sup> Respondent argues that there is an important distinction between the two instruments because, in its words, the ECT merely “reserv[es] . . . a right,” while “CAFTA affirmatively provides that States may deny benefits and establishes the requirements.”<sup>438</sup> Yet Respondent fails to explain how the reservation of a right differs in any respect from the meaning of the word “may,” which similarly preserves the right of a CAFTA Party to deny benefits if the treaty’s conditions are met and if it so chooses.<sup>439</sup> Nor does it acknowledge that ECT Article 17(1) imposes much the same conditions as CAFTA Article 10.12.2 on the denial of benefits that

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<sup>436</sup> See ECT, Art. 17(1) (“Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.”) (CL-114).

<sup>437</sup> See *id.* para. 215.

<sup>438</sup> *Id.*

<sup>439</sup> Indeed, if anything, the language of the ECT would appear to state the right to deny benefits in stronger terms by explicitly referencing the power of States to make reservations to treaties. Cf. *Vienna Convention on the Law of Treaties*, Art. 2(1)(d) (defining “reservation” as “a unilateral statement, however, phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

must be met before a party can exercise its right. Thus, in order to deny benefits under ECT Article 17(1), an ECT Contracting State must establish that the entity at issue is owned or controlled by a person of a third state, and that it has no substantial business activities in the Contracting Party in which it is organized.<sup>440</sup> There is therefore no basis to conclude, as Respondent strives to do, that the language of CAFTA Article 10.12.2 differs so substantially from that of ECT Article 17(1) that jurisprudence interpreting the latter to require advance notice to investors is irrelevant here. On the contrary, the strong similarity between the two provisions indicates that decisions construing ECT Article 17(1) are directly on point for the issue of notice under CAFTA Article 10.12.2.

360. These decisions uniformly reject the argument that Article 17(1) itself provides notice to the investor. As the *Plama* tribunal explained,

[T]he existence of a “right” is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so.<sup>441</sup>

Under these circumstances, the *Plama* tribunal went on, “a putative covered investor has legitimate expectations of [the advantages of the treaty] until that right’s exercise. *A putative*

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<sup>440</sup> ECT, Article 17(1) (CL-114).

<sup>441</sup> *Plama*, para. 155 (RL-66).

*investor therefore requires reasonable notice* before making any investment in the host State whether or not that host State has exercised its right” to deny benefits.<sup>442</sup>

361. Further, and as the *Plama* tribunal noted with respect to ECT Article 17(1), the CAFTA drafting Parties could have chosen – but did not choose – to draft the denial of benefits provision so as to provide explicit notice to investors that the right would be exercised whenever the conditions were met, as is the case with other treaties.<sup>443</sup> For this reason, Article 10.12.2, like ECT Article 17(1), “is at best only half a notice.”<sup>444</sup> Article 10.12.2 informs investors that a denial of benefits is *possible* under CAFTA, but provides no notice whatsoever that a State actually intends to exercise its right to deny benefits to it.

362. The drafters of CAFTA could have written Article 10.12.2 differently. For example, the 1995 *ASEAN Framework Agreement on Services* in its Article VI stipulates that:

The benefits of this Framework *shall be denied* to a service supplier who is a natural person of a non-member State or a juridical person owned or controlled by persons of a non-member State constituted under the laws of a member State, but not engaged in substantive business operations in the territory of Member States.<sup>445</sup>

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<sup>442</sup> *Id.*, para. 161 (RL-66).

<sup>443</sup> *Id.*, para. 156 (RL-66) (citing 1995 *ASEAN Framework Agreement on Services* Art. VI, which provides that benefits “shall be denied” when conditions are met).

<sup>444</sup> *Id.*, para. 157.

<sup>445</sup> See Katia Yannaca-Small, “Who Is Entitled To Claim? National Challenges,” in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS* 211 (2010, Katia Yannaca-Small, ed.) (quoting 1995 *ASEAN Framework Agreement on Services*, Art. VI) (CL-139).

Instead, the drafters decided to make the ability of Parties to deny the benefits of Chapter 10 permissive – therefore requiring advance notice to investors if they intend to invoke the denial of benefits provision.

363. In arguing that the ECT’s denial of benefits clause should not be construed to require advance notice to investors, respondents have asserted that, absent a requirement that foreign investors register when making their investments, it is difficult to require States to identify specific potential investors as to which they intend to deny benefits before the investment is made. But it cannot be the case that individual investors must obtain assurances of a State’s intentions as to their access to the benefits of CAFTA. Requiring that would be “[t]o place on an individual investor the task of obtaining express assurance as to the extension of advantages” and would transform CAFTA from a multilateral instrument into “an invitation to establish, case-by-case, bilateral relations between investors and the host State.”<sup>446</sup> Possible solutions suggested by the *Plama* tribunal include publication of a State’s intentions in its official gazette; legislation; or an exchange of letters between the State concerned and potential investors or classes of investors.<sup>447</sup>

364. In any event, notice to the investor that comes nearly a year-and-a-half after arbitration has begun is clearly insufficient to provide the predictable commercial and investment framework CAFTA is meant to promote. It also contradicts another important goal of CAFTA,

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<sup>446</sup> *Yukos*, para. 448 (quoting Expert Opinion of James Crawford vis-à-vis ECT denial of benefits provision) (RL-72).

<sup>447</sup> *Plama*, para. 157 (RL-66).

which is to promote transparency. The Preamble identifies promotion of transparency as one of the goals of CAFTA, as does Article 1.2 laying out CAFTA's objectives. Indeed, Article 1.2 indicates that all of CAFTA's objectives should be read through the prism of, *inter alia*, transparency.<sup>448</sup> Article 1.2, furthermore, requires Parties to interpret the entire Agreement "in light of its objectives set out in paragraph 1." With respect to denial of benefits, and as noted above, the exercise of the right to deny CAFTA benefits is expressly conditioned on notification and consultation pursuant to Article 18.3, the notice provision contained in the CAFTA chapter devoted to transparency. As also noted above, this requirement is largely absent from other free trade agreements and bilateral investment treaties of the period, further underscoring the importance the Parties placed on furthering the goal of transparency.

365. Under Article 18.3, transparency requires that a Party seeking to deny benefits to an investor notify "any other Party with an interest in the matter" of a measure that might "substantially affect that other Party's interests under this Agreement." The fact that any denial of benefits can only take effect once notice has been provided under Article 18.3 confirms that the Parties considered that they would have an interest in the relevant investment dispute that would be "substantially affected" by that denial. That interest is the same one that States have historically had in ensuring that their nationals abroad receive appropriate treatment and protections under international law. However, the investors themselves are ultimately the actual stakeholders in any such dispute. The requirement that notice be provided to their home States

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<sup>448</sup> CAFTA, Art. 1.2.1 (identifying "objectives for this Agreement" to include "transparency") (CL-8).

thus also functions to ensure that the investors receive information (albeit indirectly) affecting their investment interests in the territory of the denying Party. This enables investors to either negotiate with the denying Party to resolve the dispute or seek the assistance of their home States before the denial takes effect. Only if they receive notice *in advance* of the actual exercise of the denial of benefits – and at a minimum, in advance of the commencement of arbitration<sup>449</sup> – will investors be able to avail themselves of these protections.

366. Respondent’s confidence that the notice provided to interested CAFTA Parties ensures that an investor’s rights will be protected against a state’s “judging its own case” as to whether it is entitled to deny benefits to the investor<sup>450</sup> is also misplaced. While the notice requirement provides an opportunity for a Party to advocate on behalf of its national, that Party is obviously not required to do so, and its decision in that regard is necessarily a political one. At the same time, if the investor does not receive separate notice, it cannot advocate on its own behalf before the authorities of its home State to press for such protection. Even if given the chance to present its case before its home State, an investor’s rights may still be left unprotected by that State if the State in question does not see a compelling diplomatic interest in intervening in the matter. Indeed, it is precisely because of the uncertainty of an investor’s ability to obtain diplomatic assistance and/or diplomatic protection from its home government that institutional mechanisms for direct settlement of investor-State disputes have flourished in the past 50 years.

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<sup>449</sup> As explained above, once arbitration has commenced, the notice and consultation requirement of CAFTA Article 10.12.2 would come into conflict with ICSID Article 27(1), which prohibits the exercise of diplomatic protection once the parties have consented to arbitration.

<sup>450</sup> Objections, para. 216.

This very difficulty led directly to the establishment of ICSID, as a note from Aron Broches in the early stages of treaty negotiations makes clear:

The necessity of espousal of his case by his national Government before an international claim can be lodged, introduces a political element. An investor may well find that his national Government refuses to espouse a meritorious case because it fears that to do so would be regarded as an unfriendly act by the host Government. And this consideration is even more likely to cause the national Government to refrain from acting if the merits of the investor's case are not wholly clear in its view, thus withholding from the investor an opportunity to have his case judged by an impartial tribunal.<sup>451</sup>

367. These considerations become all the more important here because – on Respondent's reading – Article 10.12.2 permits denial of *all* benefits of CAFTA, including access to dispute settlement by an impartial tribunal. To adopt Respondent's reading of the Agreement would permit a State to make its own, necessarily self-interested determination as to whether it could deny benefits to an investor after a dispute had already arisen, and would further permit it to deny benefits to that investor without notice *and without providing access to international dispute settlement*. Only if the investor's home State had a compelling political reason to intervene would the investor have any recourse for obtaining relief on the international plane. Even then, political calculations and the needs of diplomatic relations are always subject to change, potentially leaving the investor with no remedy in the end. For all of these reasons,

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<sup>451</sup> See, e.g., "Settlement of Disputes between Governments and Private Parties," Note by A. Broches transmitted to the Executive Directors, 28 Aug. 1961 at para. 2(b) (CL-140). The need for direct settlement of investment disputes arose from the fact that investors' rights were subordinated to political considerations.

notice to the investor – and not only to the investor’s home State – is required for purposes of Article 10.12.2 and for the furtherance of CAFTA’s object and purpose.

368. Respondent, however, did not provide timely notice to Claimant of its intention to deny CAFTA benefits to it. As already noted above, it did not notify Claimant of this intention until August 2010, long after Claimant had submitted its claims to arbitration under CAFTA.<sup>452</sup>

**2. Any Denial Of Benefits Following The Timely Provision Of Notice Can Only Take Effect Prospectively**

369. Even if Respondent were able to provide effective notice of its intention to deny CAFTA benefits to Claimant in the midst of this arbitration, that notice could only take effect prospectively and could not operate to divest this Tribunal of jurisdiction, or to deprive Claimant of its claims under CAFTA. Notice provided pursuant to Article 10.12.2 can only take effect prospectively; otherwise, there effectively would be no notice at all. Decisions interpreting Article 17(1) of the ECT again provide the appropriate guidance for this Tribunal, as the permissive language of that provision is materially indistinguishable from that of CAFTA Article

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<sup>452</sup> Respondent’s reliance on the *EMELEC* decision as support for its argument that a State may seek to exercise a denial of benefits to an investor for the first time at the jurisdictional phase of an arbitral proceeding (Objections, paras. 224-27) is unavailing in light of the specific conditions imposed by CAFTA Article 10.12.2, including its insistence on transparency. The relevant instrument in that case was the U.S.-Ecuador BIT, which – in contrast to CAFTA Article 10.12.2 – does not condition the denial of benefits on notice and consultation with the other State Party. Thus, under that BIT, an assertion of a right to deny benefits to an investor may be raised in an arbitral proceeding before ICSID without generating a conflict with ICSID Article 27(1), unlike CAFTA Article 10.12.2, as explained above. Absent that context, the denial of benefits in the context of an arbitration may be seen as just another defense as to the merits of the claim – which is precisely how the *EMELEC* tribunal viewed it. *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 2 June 2009, para. 71 (“If the Tribunal should agree to hear the merits of the present case, only then would it be appropriate to examine the substantive requirements for the denial of benefits, i.e. the determination of whether EMELEC has substantial business activities in the territory of the United States.”) (RL-73).

10.12.2. Where the issue of timely notice has been raised, ECT tribunals have uniformly found that advance notice to the investor of an intent to deny benefits is required. As the *Plama* tribunal reasoned,

If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the 'long term' for such an effect (if at all); and indeed such unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date.<sup>453</sup>

370. The *Yukos* tribunal reached a similar conclusion. In that case, the respondent had announced its intention to exercise its right to deny benefits to the claimant in its first memorial on jurisdiction, much as Respondent here has done.<sup>454</sup> According to the tribunal, this was too late, as the denial of benefits could not be retrospective: "To treat denial as retrospective would, in the light of the ECT's 'Purpose,' as set out in Article 2 of the Treaty ('The Treaty establishes a legal framework in order to promote long-term cooperation in the energy field . . .') be incompatible 'with the objectives and principles of the Charter.'"<sup>455</sup>

371. In much the same way, permitting Respondent to retrospectively deny CAFTA benefits to Pac Rim Cayman would defeat the objectives of CAFTA. As noted above, those

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<sup>453</sup> *Plama*, para. 162 (RL-66).

<sup>454</sup> *Yukos*, para. 447 (RL-72).

<sup>455</sup> *Id.*, para. 458. Other ECT tribunals have not addressed the issue because it was apparently not raised by the parties. See, e.g., *Petrobart*, para. 63 (addressing argument that denial of benefits was raised too late as a procedural matter in the proceedings at hand, and therefore not reaching retrospective denial issue) (CL-115).

objectives include the creation of a predictable business planning and investment framework, the increase of investment opportunities, and effective procedures for resolving disputes, along with the promotion of transparency, particularly in investment disputes. These objectives cannot be met if a denial of benefits has retroactive effect, depriving an investor of protections under CAFTA long after the investment is made and the events giving rise to the dispute have occurred.

372. Giving retroactive effect to a denial of benefits would also undermine the notice and consultation requirement of CAFTA Article 10.12.2. Just as the home State loses the right to provide diplomatic protection once an investor has consented to arbitration before ICSID as a result of Article 27(1) of the ICSID Convention, the investor, for all practical purposes, loses the right to seek diplomatic protection from its home State. In addition, even assuming it were appropriate to provide notice of the intent to exercise the right to deny benefits pursuant to Article 10.12.2 after the initial investment is made, in no event can such notice be provided to the investor *after* the parties have consented to arbitrate a dispute before ICSID, because a State may not unilaterally withdraw its consent to arbitration once that consent has been perfected.<sup>456</sup>

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<sup>456</sup> ICSID Convention, Art. 25(1) (“When the parties have given their consent, no party may withdraw its consent unilaterally.”). The irrevocability of the parties’ consent is the same whether the offer of consent is made through national legislation or a treaty, such as CAFTA. See CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY at 254 (CL-70).

### **3. Conclusion On Failure To Provide Timely Notice**

373. In sum, Respondent's attempt to deny CAFTA's benefits to Pac Rim Cayman fails not only because the substantive conditions for denial of benefits are not met, but because Respondent failed to provide timely notice to the United States or to Pac Rim Cayman. A denial of benefits under Article 10.12.2 of CAFTA is made "subject to" transparency and consultation obligations, which makes this denial of benefits clause virtually unique among agreements and treaties of this era. For those obligations to be met in any meaningful way, at a minimum the denying Party must provide notice of its intent to deny benefits to the home Party before the target of that denial submits a dispute to arbitration. As a matter of due process and consistency with CAFTA's object and purpose, such advance notice also must be provided to the investor. Here, the denying Party did not provide notice to Pac Rim Cayman's home State, the United States, until over 10 months after arbitration was initiated, and it did not provide notice to Pac Rim Cayman itself until nearly 16 months after arbitration was initiated. Because these notices were untimely, Respondent's purported denial of benefits is ineffective and must be rejected. Even if these notices were not untimely, any denial of benefits can take effect only prospectively and thus can have no effect on this Tribunal's jurisdiction to hear Pac Rim Cayman's claims; nor can it have any effect on the merits of those claims.

### **VI. RESPONDENT'S OBJECTION BASED ON AN ALLEGED "ABUSE OF PROCESS" IS UNFOUNDED AND MUST BE REJECTED**

374. Under the banner of "abuse of process," Respondent reargues its objections to the Tribunal's jurisdiction *ratione temporis* and its claim of entitlement to deny CAFTA's benefits to Pac Rim Cayman. Like its jurisdictional argument, its "abuse" argument is based on the fundamentally flawed premise that the measure at issue in this dispute is MARN's original failure in December 2004 to act on PRES's application for an environmental permit. Respondent

erroneously contends the “dispute” was “born” at that moment, making Pac Rim Cayman’s subsequent acquisition of U.S. nationality an improper attempt to gain access to CAFTA’s investor-State arbitration forum in order to litigate an existing dispute. As evidence of the alleged improper motive behind Pac Rim Cayman’s acquisition of U.S. nationality, Respondent points to the supposed absence of substantial business activities that forms the basis for its denial of benefits argument.

375. For the reasons discussed in Sections IV and V, above, demonstrating that Respondent’s jurisdictional objections and invocation of denial of benefits are unfounded, its abuse of process argument is equally unfounded. Additionally, given the implication of bad faith inherent in an allegation of abuse of process, Respondent’s burden of proof with respect to that allegation is even greater than its burden with respect to the subsidiary allegations on which it is predicated. As it has not even met the lesser burdens, it certainly has not met the greater burden.

376. We briefly recall our key conclusions on jurisdiction and denial of benefits as they are relevant to the discussion in this Section. With respect to jurisdiction, Respondent’s entire case is based on a fundamental mischaracterization of the facts and of the allegations of Claimant’s Notice of Arbitration. Individual omissions by MARN and MINEC in the period from 2004 through 2006 did not give rise to a “dispute” as that term is used in CAFTA. That is, they did not, on their own, support a claim of breach of CAFTA obligations resulting in loss or damage. The act supporting Pac Rim Cayman’s claims of breach resulting in loss or damage is Respondent’s *de facto* ban on mining as announced by President Saca in March 2008. To the extent that ban may have pre-dated the March 2008 announcement and been manifested by the earlier failures to act, those failures only became recognizable as applications of a discrete measure in breach of CAFTA obligations with the announcement. As relevant to Respondent’s

abuse of process argument, since the act giving rise to the dispute did not occur until March 2008 or, alternatively, only became recognizable as a continuing or composite act in breach of CAFTA obligations at that time, Pac Rim Cayman’s domestication to Nevada in December 2007 could not have been “a *retrospective* gaming of the system to gain jurisdiction for an *existing* dispute.”<sup>457</sup>

377. That fact alone would be sufficient basis for dismissing Respondent’s abuse of process argument. But the argument is undermined even further by Respondent’s mischaracterization of Pac Rim Cayman’s activities in the United States. Respondent’s repeated reference to Pac Rim Cayman as a “shell” company in a transparent attempt to cast suspicion on its motives for its domestication to Nevada ignores Pac Rim Cayman’s substantial business activities in the United States, as discussed in Section III, above. Whether examined individually or as part of the corporate family in which it plays an integral role, Pac Rim Cayman’s center of operations is, and has been since well before December 2007, Nevada, the United States. From that home base, it holds and manages its investments in El Salvador, and manages its wholly-owned subsidiary, Pac Rim Exploration. In fact, Pac Rim Cayman had been operating from Nevada even during the period when it was incorporated in the Cayman Islands, thus belying Respondent’s suggestion that incorporation in Nevada was a last-minute, opportunistic gambit to manufacture CAFTA jurisdiction.

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<sup>457</sup> Objections, para. 18.

**A. Respondent Must Meet a High Burden To Establish An Abuse Of Process**

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378. As described by one tribunal, dismissal of a claim for abuse of process is an “extraordinary remedy.”<sup>458</sup> Pac Rim Cayman does not disagree that an ICSID tribunal has an inherent power to prevent abuses of process.<sup>459</sup> However, the standard for establishing an abuse of process at the jurisdictional phase of an investor-State arbitration is very high, given the indictment of the claimant’s good faith that is implicit in finding an abuse.<sup>460</sup> As Respondent acknowledges, allegations of abuse of process are rarely successful.<sup>461</sup> In dealing with accusations similar to Respondent’s, the *Rompetrol v. Romania* tribunal made the following observations:

Marshalled 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 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. . . . [I]t is plain enough to the Tribunal that, as the question has been put by the Respondent in the specific circumstances of this case, the abuse of process argument is one

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<sup>458</sup> *Chevron Corp. v. the Republic of Ecuador* (“*Chevron*”), Interim Award, (1 Dec. 2008), para. 146 (CL-75).

<sup>459</sup> Objections, para. 81-89; *id.* para. 82 (citing *Waste Management II*, para. 48 (RL-58)).

<sup>460</sup> See *Chevron*, para. 143 (CL-75) (“there is ‘a general agreement that the graver the charge the more confidence must there be in the evidence relied on’”) (quoting *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, 2006 I.C.J. Rep. p. 225 (Nov. 6, 2003), Separate Opinion of Judge Higgins, para. 33).

<sup>461</sup> In the seven cases involving allegations of abuse of process that Respondent cites, respondents were unsuccessful in all but two (*Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) (RL-50), and *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 Sept. 2009) (RL-56)).

that *seeks essentially to impugn the motives behind the Claimant's Request for Arbitration*. It may or it may not be appropriate for an ICSID tribunal to enquire into the question whether either a Claimant or a Respondent party is actuated by a proper motive in advancing or defending its interests in prosecuting or defending an arbitration. That question remains at large, and the Tribunal expresses no view on it now. But, if it were appropriate to do so, the decision would obviously be very closely dependent on the special circumstances of the particular case. From all this it follows automatically, without the need for further demonstration, that this Tribunal, at this very preliminary stage, before it has had even the benefit of the Claimant's case laid out in detail in a Memorial, let alone the supporting evidence, could not in any event be in a position either to assess a question of motive or to determine its relevance to the case before it.<sup>462</sup>

379. As noted by the *Rompetrol* tribunal, the essence of the abuse of process allegation by the respondent in that arbitration, as is the case here, was to impugn the motives behind the claimant's initiation of the arbitration. The tribunal observed that it could not make such an assessment of a "far-reaching character" at the preliminary stage of the arbitration, in particular as it had not even had the benefit of the case being laid out before it in detail with supporting evidence. Here, of course, Respondent has been putting together its abuse-of-process arguments for nearly two years (while distracting and otherwise burdening Claimant and the Tribunal with its prior set of meritless objections). Respondent rests its arguments by ignoring the abundant evidence of Pac Rim Cayman's substantial ties to and business activities in the United States, as well as the key facts and allegations concerning Respondent's conduct toward Claimant. Respondent has failed even to approach the high burden of demonstrating an abuse of process by

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<sup>462</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 Apr. 2008, para. 115 (as cited with approval by *Chevron*, para. 146) (emphasis added) (RL-106).

Claimant. Moreover, even though Claimant is not required to do so at this juncture of the arbitration, Claimant has produced evidence that resoundingly defeats any notion that it has engaged in any such abuse. The Tribunal can and should decide the issue against Respondent now and should do so with prejudice.

**B. Respondent Fails To Meet Its Burden Of Establishing An Abuse Of Process**

380. As noted above, Respondent's abuse of process argument essentially restates its objection to jurisdiction *ratione temporis* and its argument on denial of benefits. The difference here is that these other arguments now are overlain with arguments impugning Pac Rim Cayman's motives. We already have demonstrated why the predicate arguments are flawed. It follows, *a fortiori*, that the abuse of process argument also is flawed.

381. In its abuse of process challenge, Respondent specifically alleges that:

Claimant i) has shown a lack of good faith in carrying out and concealing its abuse, ii) changed its nationality well after the date of the measures that allegedly harmed Claimant, iii) has shown no legitimate business purpose for moving the shell company from the Cayman Islands to the United States, and iv) never made El Salvador aware that the Canadian investor was preparing to claim U.S. nationality.<sup>463</sup>

382. As we will show in this section, each of these charges is meritless.

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<sup>463</sup> Objections, para. 90.

## 1. Pac Rim Cayman Has Not Concealed Its Actions

383. Respondent's allegation that Pac Rim Cayman has concealed the conduct that led to its acquisition of U.S. nationality (points (i) and (iv) of the above-quoted charge) is baseless. Respondent's representation to the Tribunal that it "always believed it was dealing with a Canadian investor, from when the investment was made until the present arbitration was filed"<sup>464</sup> cannot possibly be asserted in good faith.

384. To begin with, anyone who bothered to look at the Annual Reports of Pacific Rim Corp. – filed on behalf of all of the Pacific Rim Companies – would have known of the Companies' substantial presence in the United States. Among other things, these public filings repeatedly announced from 2002 to the present that:

- The Pacific Rim Companies had substantial assets, including mining operations, in Nevada;<sup>465</sup>
- The El Salvador operations were being significantly financed by profits made from the Companies' Nevada mining operations (*e.g.*, "Pacific Rim utilizes cash flow from its 49% interest in the Denton-Rawhide gold mine in Nevada to explore, define and advance its El Dorado and La Calera gold projects in El Salvador");<sup>466</sup>

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<sup>464</sup> *Id.*, para. 412

<sup>465</sup> Shrake Statement, para. 57; *see* 2002 Annual Report (C-28); 2003 Annual Report (R-97); 2004 Annual Report (C-29); 2005 Annual Report (C-30); 2006 Annual Report (C-31); 2007 Annual Report (C-32); 2008 Annual Report (C-33); 2009 Annual Report on Form 20F (C-34); and 2010 Annual Report on Form 20F (C-35).

<sup>466</sup> 2003 Annual Report, at "Corporate Profile" (R-97); *see also* 2004 Annual Report, at 1 (C-29); 2005 Annual Report, at 1 (C-30); 2006 Annual Report, at 1 (C-31); 2007 Annual Report, at 6 (C-32); 2008 Annual Report, at 17 (C-33).

- The Companies have always maintained their “Exploration Office” in Reno, Nevada USA<sup>467</sup>;
- The Companies’ senior geologists working in El Salvador, including the CEO of Pacific Rim Mining Corp., Mr. Shrake, are all from the “USA”;<sup>468</sup> and
- One of the Companies’ two outside law firms is “Dorsey & Whitney, Seattle, WA, USA”<sup>469</sup>

385. Nearly all of the senior officers from the Companies that visited or worked in El Salvador were U.S. citizens (including Messrs. Shrake, Gehlen, Earnest, Ernst, and Wood). Indeed, high-ranking officials of the Salvadoran Government *visited Mr. Shrake in Nevada in 2006 to tour Nevada mining operations.*<sup>470</sup>

386. Mr. Shrake also met on a number of occasions with the Salvadoran Ambassador to the United States.<sup>471</sup> And the U.S. Ambassador and other representatives from the U.S. Embassy in San Salvador attended a number of meetings between the Government and officers of the Companies.<sup>472</sup>

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<sup>467</sup> 2002 Annual Report, at 25 (C-28); 2003 Annual Report, at 25 (R-97); 2004 Annual Report, at 41 (C-29); 2005 Annual Report, at 45 (C-30); 2006 Annual Report, at 44 (C-31); 2007 Annual Report, at 56 (C-32); 2008 Annual Report, at 57 (C-33).

<sup>468</sup> 2003 Annual Report, at “Corporate Profile,” at 3, 5 (R-97).

<sup>469</sup> 2003 Annual Report, at 25 (R-97); 2004 Annual Report, at 41 (C-29); 2005 Annual Report, at 45 (C-30); 2006 Annual Report, at 45 (C-31); 2007 Annual Report, at 57 (C-32); 2008 Annual Report, at 57 (C-33). Since at least 1999, the U.S. law firm of Dorsey & Whitney LLP has served as the Companies’ U.S. securities counsel.

<sup>470</sup> Shrake Statement, para. 94.

<sup>471</sup> *Id.*, para. 118.

<sup>472</sup> *Id.*, para. 119.

387. During the “investigation” that Respondent allegedly conducted of Claimant prior to filing its Denial of Benefits letter with the U.S. Trade Representative on 1 March 2010, Respondent had no trouble finding “Pacific Rim Mining Corp.” in the Nevada phone book.<sup>473</sup> Nor did Respondent have trouble finding the Companies’ Reno office – which is plainly marked as “Pacific Rim Mining Corp.” – as demonstrated by a photograph apparently taken on 10 February 2010 and included in Respondent’s Memorial.<sup>474</sup>

388. Respondent goes to considerable lengths to distort and misrepresent the record in order to make its allegations of “concealment” against Claimant. In addition to ignoring or distorting the evidence cited above, Respondent inexplicably asserts that Claimant failed to “mention anywhere in the 55 pages of its Notice of Arbitration” that Pac Rim Cayman was originally incorporated in the Cayman Islands.<sup>475</sup> That assertion is intended to mislead the Tribunal. In fact, Exhibit 3 to the Notice of Arbitration is a July 2008 Resolution by El Salvador’s Ministry of the Economy (*i.e.*, MINEC). That Resolution granted Claimant’s application made several months earlier

to modify the Foreign Capital records kept in favor of the company **PAC RIM CAYMAN**, domiciled *in the Cayman Islands* in respect of the change of corporate name and domicile of such

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<sup>473</sup> Denial of Benefits Notification Letter from El Salvador to the United States Trade Representative (1 Mar. 2010) (RL-111).

<sup>474</sup> Objections, para. 140.

<sup>475</sup> *Id.*, para 13.

company for **PAC RIM CAYMAN LLC**, domiciled *in the State of Nevada, United States of America* . . . .<sup>476</sup>

389. Indeed, this is not the first time that Respondent’s counsel have made this misrepresentation to the Tribunal concerning Claimant’s Notice of Arbitration. In a letter to the Tribunal dated 16 September 2010, Respondent’s counsel asserted that Claimant “went through a year of proceedings without disclosing the change in its nationality.”<sup>477</sup> In a letter to the Tribunal dated 17 September 2010, Claimant promptly corrected this misrepresentation, and called the Tribunal’s attention (as well as that of Respondent’s counsel) to Exhibit 3 of the Notice of Arbitration.<sup>478</sup> That Respondent’s counsel continues to make the same misrepresentation to the Tribunal in its Memorial unfortunately demonstrates the extent to which Respondent and its counsel are willing to go in order to portray Claimant in an unfavorable light. Particularly given the severity of its accusations against Claimant, we respectfully submit that this deliberate breach of counsel’s duty of candor should not go without notice or mention by the Tribunal. There has never been any “concealment” by Claimant concerning its nationality. By contrast, Respondent’s misrepresentations to the Tribunal on this issue are both irresponsible and egregious.

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<sup>476</sup> Notice of Arbitration, Exh. 3 (emphasis added). The Spanish original reads: **RESUELVE** . . . Modificar los registros de Capital Extranjero que se llevan a favor de la sociedad **PAC RIM CAYMAN**, del domicilio de Islas Caymán, en el sentido del cambio de razón social y domicilio que ha tendido dicha sociedad por **PAC RIM CAYMAN LLC**, del domicilio del Estado de Nevada, Estados Unidos de Norte América . . . .”

<sup>477</sup> Respondent’s Letter to the Tribunal dated 16 September 2010, at 3.

<sup>478</sup> Claimant’s Letter to the Tribunal dated 17 September 2010, at 3.

## 2. Pac Rim Cayman Is Not A “Shell Company”

390. As in its denial of benefits argument, Respondent, in its abuse of process argument, seeks to portray Pac Rim Cayman as a “shell company.” It adds to that mis-portrayal a charge of “no legitimate business purpose” for incorporating in the United States.

391. Respondent equates the undefined and pejorative term “shell company” with the well-defined and entirely legitimate concept of a holding company. Thus it attributes great significance to statements it characterizes as Pac Rim Cayman “admit[ting] that it was merely ‘a holding company,’”<sup>479</sup> as if that status were something that needed to be hidden for fear of losing CAFTA protections, while “admit[ting]” it is somehow self-incriminating.

392. However, as discussed in Section V above, there is absolutely no basis for Respondent’s suggestion that holding companies are, by definition, not entitled to the protections of CAFTA, and that the very fact of being a holding company triggers one of the three conditions for invoking denial of benefits under CAFTA Article 10.12.2 (*i.e.*, the “no substantial business activities” condition). Indeed, that position no doubt would come as a great surprise to the many companies that rely on holding companies as the vehicles through which they make direct investments around the world, never suspecting that by doing so they may be depriving their

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<sup>479</sup> Objections, para. 52.

investments of protection under the numerous investment treaties that have become a common feature of the international business landscape.<sup>480</sup>

393. We have previously demonstrated in detail the substantial business activities that Pac Rim Cayman has had in the United States at all relevant times, and we will not repeat that discussion here.<sup>481</sup> As also set forth above in detail, the domestication of Pac Rim Cayman to Nevada was done for entirely legitimate business reasons. As explained above, the Pacific Rim Companies underwent a number of structural changes to their corporate form both before and after the 2002 merger with Dayton. The 2007 reorganization in which Pac Rim Cayman was domesticated to Nevada included several changes to the overall corporate structure. The impetus for the reorganization was originally to deactivate several subsidiaries where the Companies had not conducted business for some time, but still paid various fees and costs, and devoted administrative time, to maintain the subsidiaries in good standing. This led to an examination of the overall corporate structure of the Companies. There were administrative costs involved in maintaining Pac Rim Cayman as a Cayman Islands entity. At the same time, the Companies were advised that there would be no adverse tax consequences to domesticating Pac Rim Cayman to Nevada – the jurisdiction from which it and its holdings had always been managed.

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<sup>480</sup> Indeed, Respondent’s counsel represents many of the world’s largest international insurance and financial services companies – nearly all of which are organized in complex corporate structures that typically include numerous holding companies incorporated in multiple jurisdictions.

<sup>481</sup> See Section III, *supra*.

394. As part of this assessment of the Companies’ overall structure, Mr. Shrake also considered the Companies’ potential avenues of recourse if a dispute were ever to arise with El Salvador. As Respondent concedes, there is nothing wrong with *prospective* nationality planning.<sup>482</sup> As stated by the tribunal in *Aguas del Tunari*,

[I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.<sup>483</sup>

Thus, “strategic changes in the corporate structure” do not “rise to the level of fraud or abuse of the corporate form.”<sup>484</sup>

395. Moreover, Pac Rim Cayman’s status as a Nevada corporation reflected its actual operational and economic substance. This is not a case where a new company appeared on the investor’s organizational chart in a jurisdiction to which the investor previously had no connection. Pac Rim Cayman and its holdings had always been managed primarily by Mr. Shrake in Nevada. A significant portion of the financial capital invested in El Salvador through Pac Rim Cayman originated in Nevada. Virtually all of the intellectual property invested in Pac Rim Cayman’s holdings similarly originated from Nevada.

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<sup>482</sup> Objections, para. 17.

<sup>483</sup> *Aguas de Tunari*, para. 330(d) (RL-60).

<sup>484</sup> *Id.*, para. 330.

396. Respondent's chart of allegedly "misleading" statements made by Pac Rim Cayman about its "corporate identify" is itself grossly misleading. For example, the use of the word "repatriation" as opposed to "domestication" is immaterial. In 1997, Mr. Shrake had decided to set up an off-shore company in the Cayman Islands to hold certain of the Companies' holdings. In 2007, he decided to bring Pac Rim Cayman back "onshore," *i.e.*, to repatriate or domesticate it to the place from which it had always been managed.<sup>485</sup>

397. The assertion that Pac Rim Cayman does not have its "own" offices, phone number, office equipment, *etc.*, also misses the point: Pac Rim Cayman is not a manufacturing or sales company; it does not need office equipment or employees. It simply needed a person or persons to decide what it would hold and how those holdings would be managed. Those decisions were made, for the most part, by Mr. Shrake, assisted by his geologic team, in Nevada. (Moreover, it is hardly unusual for affiliated companies to share the same offices, telephone numbers, and office equipment. It is not surprising that Respondent's investigation "uncovered" a telephone number for "Pacific Rim Mining Corp." in the Reno phone book, but not one for Pac Rim Cayman or Pac Rim Exploration.)

398. The assertion that Claimant never made any "investments" in El Salvador is also untrue. As explained above, virtually all of the financial capital that the Companies invested in

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<sup>485</sup> Shrake Statement, paras. 107-11; Krause Statement, paras. 29-32.

El Salvador was accounted for through Pac Rim Cayman.<sup>486</sup> The assertion that Pac Rim Cayman does not have “shareholders” is also wrong: shareholding can be direct or indirect.

399. In sum, and ironically, all of Respondent’s assertions that Pac Rim Cayman is a “shell” company are themselves empty rhetoric, without any substance or legitimacy. They can and should be easily brushed aside by the Tribunal.

**3. The Investment Dispute Did Not Arise Until After Pac Rim Cayman Acquired U.S. Nationality**

400. Like its objection to jurisdiction *ratione temporis*, Respondent’s abuse of process argument rests fundamentally on the premise that an investment dispute between Pac Rim Cayman and Respondent already existed when Pac Rim Cayman domesticated in Nevada thus becoming an investor of the United States. For Respondent’s argument to prevail: a dispute must have arisen; for jurisdictional reasons, the dispute must have been ineligible for submission to the arbitral forum provided by CAFTA; and thereafter Pac Rim Cayman must have taken action to fabricate conditions giving the appearance that the CAFTA jurisdictional requirements were met at the relevant time. If the dispute did not arise until after Pac Rim Cayman became an investor of the United States, then the entire argument falls apart.

401. Thus, critical to Respondent’s argument is the question of when the investment dispute arose. The answer to that question depends, in turn, on what the measure at issue is. For there to be an investment dispute, there must be a measure claimed by the investor to breach a

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<sup>486</sup> Objections, para. 56.

CAFTA obligation and cause loss or damage to the investor and/or its investment in the territory of the respondent State. These characteristics distinguish a “dispute,” as that term is used in CAFTA, from a mere disagreement.<sup>487</sup> If the measure at issue did not come into existence until after Pac Rim Cayman acquired U.S. nationality, then by definition there could be no investment dispute until after Pac Rim Cayman acquired U.S. nationality. In that case, Pac Rim Cayman could not have acquired U.S. nationality for the purpose of gaining CAFTA jurisdiction over an existing dispute, and there could be no abuse of process.

402. Pac Rim Cayman has maintained consistently that the measure at issue is El Salvador’s *de facto* ban on mining, which President Saca first announced in March 2008. That announcement either brought the ban into existence or caused the repeated failures of Salvadoran ministries to act on mining applications by PRES and DOREX over the prior three years to become recognizable as individual manifestations of a measure – the ban – which had developed as an unwritten practice at some earlier date. In either case, the measure did not materialize as a basis for a claimed breach of CAFTA obligations until March 2008, several months *after* Pac Rim Cayman acquired U.S. nationality.

403. In response, Respondent asserts that the real measure at issue is not the *de facto* mining ban, but rather the original failure by MARN to grant an environmental permit to PRES within the 60-day period prescribed by Salvadoran law, which occurred in December 2004. Respondent contends that with this lapse, the application for a permit was presumed denied, and

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<sup>487</sup> See discussion at Section IV.D, *supra*.

that the essential disagreement between Pac Rim Cayman and Respondent flowed from that presumed denial.

404. That position is critically flawed for several reasons which already have been discussed. Among other problems, it mischaracterizes the significance of the original failure to act as a matter of Salvadoran law; it ignores the interaction between Pac Rim Cayman, PRES, and DOREX, on the one hand, and Respondent, on the other, that took place after MARN's December 2004 lapse; it confuses a simple disagreement with a "dispute" within the meaning of CAFTA; and it ignores the link between the series of omissions leading up to President Saca's March 2008 announcement and the announcement itself.<sup>488</sup>

405. In its abuse of process argument, Respondent makes certain additional points, none of which cures the essential flaw in its theory regarding the measure at issue.

**a. The Consistent Refusal of Respondent's Agencies To Grant Mining Licenses Is A Practice In Furtherance Of An Anti-mining Policy**

406. First, with respect to the *de facto* mining ban, Respondent, "emphatically denies that such a policy exists or ever existed."<sup>489</sup> Despite this emphatic denial, Respondent makes no attempt to refute or otherwise explain the statements of two successive heads of State making quite clear that the policy does exist. Instead, Respondent argues that the statements of its heads of State and the policy reflected in those statements do not meet CAFTA's definition of

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<sup>488</sup> See discussion at Section IV.D *supra*.

<sup>489</sup> Objections, para. 47.

“measure” and therefore cannot be the measure giving rise to the dispute at hand.<sup>490</sup> This amounts to a straw-man argument, which misconstrues the measure at issue.

407. The measure at issue is not the statements by President Saca and, later, President Funes. Nor is it the policy reflected in those statements. Rather, it is the practice manifesting the policy articulated in those statements. Specifically, it is the *practice* of consistently failing to grant licenses and permits, thus furthering a *de facto* ban on the operation of mining investments.

408. “Practice” unquestionably falls within CAFTA’s broad definition of “measure.” “Practice” is expressly identified among the different categories “include[d]” within the term “measure.”<sup>491</sup> While CAFTA does not define the term “practice,” its ordinary meaning, as relevant here, is “a repeated or customary action;” “the usual way of doing something.”<sup>492</sup>

409. Various international dispute settlement panels have had occasion to consider the concept of a practice as a measure that may be the object of dispute settlement. For example, like dispute settlement under CAFTA’s Investment Chapter, dispute settlement in the World Trade Organization (“WTO”) must be addressed to a “measure.”<sup>493</sup> Several WTO panels have

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<sup>490</sup> *Id.*, paras. 46-48.

<sup>491</sup> CAFTA, Art. 2.1 (“measure includes any law, regulation, procedure, requirement, or practice”) (CL-73).

<sup>492</sup> Merriam-Webster online dictionary, definition of “practice” (CL-141).

<sup>493</sup> *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) , Art. 3.3 (WTO dispute settlement system exists to deal with “situations in which a Member considers that any benefits accruing to it directly or indirectly under the

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had occasion to consider the distinction between an unwritten practice and other types of measures (such as laws and regulations). In doing so, one panel explained succinctly that a practice is “a repeated pattern of similar responses to a set of circumstances.”<sup>494</sup> Moreover, the WTO Appellate Body has explained that “the mere fact that a ‘rule or norm’ is not expressed in the form of a written instrument” does not preclude it from having the status of a measure that is susceptible to challenge in dispute settlement.<sup>495</sup> In such instances, the Appellate Body has required a complaining party to “clearly establish, through arguments and supporting evidence, at least that the alleged ‘rule or norm’ is attributable to the responding [WTO] Member; its precise content; and indeed, that it does have general and prospective application.”<sup>496</sup>

410. In a case of particular relevance here, the United States challenged as inconsistent with WTO rules a *de facto* European Union moratorium on the approval of biotech products (*i.e.*, genetically modified organisms). As in the present dispute, the moratorium was an unwritten measure evidenced in part by the consistent rejection by respondent State officials of applications for approval. The complaint concerned not the individual rejections themselves, but

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covered agreements are being impaired by *measures* taken by another Member” (emphasis added)), Art. 4.4 (requiring a request for consultations to identify “the measures at issue”), Art. 6.2 (requiring a request for establishment of a dispute settlement panel to “identify the specific measures at issue”) (CL-142)

<sup>494</sup> Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, para. 7.22, adopted 29 July 2002, DSR 2002:VI, 2073, (CL-144).

<sup>495</sup> Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R, para. 192, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417 (CL-144).

<sup>496</sup> *Id.* para. 198.

the unwritten practice manifested by the rejections. A WTO dispute settlement panel found that the moratorium itself was a *de facto* measure, distinct from the individual acts or omissions that evidenced its existence.<sup>497</sup> The panel went on to find that “the general *de facto* moratorium on approvals constitutes a challengeable EC measure.”<sup>498</sup>

411. In reaching that conclusion, the WTO panel explained, “[I]f *de facto* measures could not be challenged, Members could circumvent their WTO disciplines. For they could then achieve through *de facto* measures what they would not be allowed to achieve through *de jure* measures.”<sup>499</sup> The panel also observed that “the moratorium is a measure which is the result of other measures (decisions).”<sup>500</sup>

412. Similarly, Respondent’s *de facto* mining ban is a measure which is the result of other measures – in particular, the individual acts and omissions by MARN and MINEC which collectively constitute the practice of prohibiting the operation of mining investments.

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<sup>497</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, paras. 7.1271-7.1272, adopted 21 November 2006, DSR 2006:III-VIII, 847 (CL-145).

<sup>498</sup> *Id.* para. 7.1295; *see also id.* paras. 7.1290-7.1294. An issue for this WTO panel was whether the *de facto* moratorium was simply a “practice” and whether that insulated it from challenge in the WTO. This was an issue because, unlike under CAFTA, under WTO rules a “practice” generally is *not* considered a measure susceptible to challenge in dispute settlement. The *EC – Biotech* panel recognized that the moratorium at issue could, in some sense, be considered a “practice.” However, that did not dissuade it from finding that the moratorium was a challengeable measure. *Id.* paras. 7.1275-7.1277. In the present case, because CAFTA expressly includes “practice” within the definition of “measure,” the fact that the *de facto* mining ban or moratorium may be a practice does not affect its susceptibility to challenge in this arbitration.

<sup>499</sup> *Id.* para. 7.1291.

<sup>500</sup> *Id.* para. 7.1292.

Respondent simply is wrong when it asserts that “only the *measures* necessary to *apply* or *implement* a policy can constitute a breach of CAFTA.”<sup>501</sup> It is true that Respondent’s *de facto* mining ban has been implemented through acts and omissions that constitute measures. But in focusing on the status of those individual acts and omissions as measures, Respondent obscures the fact that the ban effected through those acts and omissions also is a measure, just as the moratorium on approvals of GMO products was treated as a measure in the *EC – Biotech* case.

413. Finally, Respondent is incorrect in asserting that “it was the earlier measures,” and not the *de facto* ban brought to light in March 2008, “that allegedly harmed Claimant.”<sup>502</sup> Pac Rim Cayman does not dispute that Respondent’s individual failures to approve mining-related applications starting in December 2004 prejudiced the interests of Pac Rim Cayman, PRES, and DOREX. However, the harm from those individual acts and omissions is distinct from the harm resulting from the *de facto* mining ban itself, which either was imposed or first acknowledged as such in President Saca’s March 2008 announcement. By making it impossible to derive any value from Pac Rim Cayman’s Salvadoran investments, the ban in effect expropriated those investments, which is something the individual failures of MARN and MINEC to act had not done on their own, but which they did do collectively. This consequence

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<sup>501</sup> Objections, para. 47 (emphasis in original).

<sup>502</sup> *Id.*, para. 48.

was recognized almost immediately by the market, as reflected in the precipitous drop in the share price of Pac Rim Cayman’s parent, Pacific Rim Mining Corp.<sup>503</sup>

**b. The Absence Of An Existing Dispute When Pac Rim Cayman Acquired U.S. Nationality Distinguishes This Case From *Phoenix Action* And *Mobil***

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414. Respondent places particular emphasis on the decision of the tribunal in the *Phoenix Action v. Czech Republic* arbitration, asserting that that decision is “applicable to the present case.”<sup>504</sup> It also seeks support from the decision in *Mobil v. Venezuela*.<sup>505</sup> In fact, neither decision supports Respondent’s argument. Instead, they undermine its argument inasmuch as they highlight what it means for a dispute to be in existence when a claimant acquires the nationality necessary to trigger jurisdiction, and in doing so they help to demonstrate that in this case there was no dispute in existence when Pac Rim Cayman acquired U.S. nationality.

415. The key conclusion of the *Phoenix Action* tribunal was that it lacked jurisdiction over claimant’s claims, because the purported investment did not qualify as a protected investment under the ICSID Convention and the Israel-Czech Republic BIT.<sup>506</sup> As stated by the tribunal,

The evidence indeed shows that the Claimant made an “investment” not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against

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<sup>503</sup> Stock Market Value – Pacific Rim Mining Corp. (C-66).

<sup>504</sup> Objections, para. 19; *see also id.* paras. 91-100.

<sup>505</sup> *Id.*, paras. 20-22, 97-100.

<sup>506</sup> *Phoenix Action*, paras. 144-145 (RL-50).

the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the “investment” was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a bona fide transaction and cannot be a protected investment under the ICSID system.<sup>507</sup>

416. By the time *Phoenix Action* acquired its investment, the investment already was engaged in a dispute with the respondent State – not merely a disagreement, but an actual legal dispute involving claims of breached obligations and damages resulting therefrom.<sup>508</sup> By acquiring the investment and thus purporting to create the jurisdictional conditions necessary for arbitration under the Israel-Czech Republic BIT, the investor sought to “transform” the dispute into a BIT dispute.

417. By contrast, in the present case, there was no pre-existing dispute (domestic or otherwise) to be “transformed” into an international dispute. As already discussed, a “dispute” under CAFTA requires that there be a measure that is breaching CAFTA obligations and thereby causing loss or damage to the claimant. The measure at issue in this case, the *de facto* mining ban, either did not come into existence or did not become recognizable as a measure until several

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<sup>507</sup> *Id.*, para. 142 (RL-50).

<sup>508</sup> *Id.*, para. 136 (RL-50) (“*The timing of the investment* is a first factor to be taken into account to establish whether or not the Claimant’s engaged in an abusive attempt to get access to ICSID. Phoenix bought an ‘investment’ that was already burdened with the civil litigation as well as the problems with the tax and customs authorities. The civil litigation was ongoing since fourteen months, the criminal investigation was ongoing since twenty months, and the bank accounts had been frozen for eighteen months. The Claimant was therefore well aware of the situation of the two Czech companies in which it decided to ‘invest’. In other words, all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made.” (Emphasis in original)).

months after Pac Rim Cayman acquired U.S. nationality. As the measure did not exist, the dispute did not and could not exist, and an abuse of process of the kind described in *Phoenix Action* could not occur.

418. Entirely absent from this case are the domestic litigation, frozen accounts, and other indicia of a live dispute that led the *Phoenix Action* tribunal to question the good faith of the claimant in that case in acquiring its investment in the Czech Republic. Indeed, the circumstances at the time Pac Rim Cayman acquired U.S. nationality suggest a very different relationship between PRES and the government of El Salvador. Far from being adversarial towards one another, in December 2007, the parties were actively engaged in discussions to address concerns and find an acceptable resolution to meet what seemed to be the shared objective of exploiting the mineral resources at the center of PRES's project.<sup>509</sup>

419. In addition to the circumstances surrounding the timing of the investment, the substance of the investment also was a basis for the *Phoenix Action* tribunal to doubt the investor's good faith. The tribunal described the investment as a "strange string of transactions" and a "mere redistribution of assets."<sup>510</sup> By contrast, Respondent points to no such circumstances in this case. Although it repeatedly dismisses Pac Rim Cayman as a mere "shell company,"

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<sup>509</sup> Note also that Pac Rim Cayman formally submitted its CAFTA claims in April 2009 – a full 16 months after Pac Rim Cayman's acquisition of U.S. nationality in December 2007. This stands in stark contrast to the *Phoenix Action* case in which claimant notified its claim "even before the registration of its ownership of the two Czech companies in the Czech Republic." *Phoenix Action*, para. 138 (RL-50).

<sup>510</sup> *Phoenix Action*, para. 139 (RL-50).

Respondent points to no evidence showing that Pac Rim Cayman's acquisition of U.S.-nationality was anything other than a legitimate corporate transaction.

420. Furthermore, the nature of the economic activity in El Salvador of Pac Rim Cayman and PRES is far different from the activity of the *Phoenix Action* investor in the Czech Republic. The goal of Pac Rim Cayman's investment has always been completely and solely directed at the development of the El Dorado and other sites for the exploitation of the resources discovered at them. These were active mining investments. Substantial resources were expended to bring them to the point of production. Having identified the mineral resources and reserves and done the necessary preliminary work to permit their safe extraction, the only impediment to realization of the investment's objective was Respondent's failure to issue the necessary permits. In fact, it was not until the summer of 2008 that drilling at the El Dorado site was suspended and the workforce reduced.<sup>511</sup> By contrast, in *Phoenix Action*, the investments in question were inactive and were not engaged in any real and productive economic activity.<sup>512</sup>

421. In sum, *Phoenix Action* does not support Respondent's charge of an abuse of process by Pac Rim Cayman in this case. By showing what it means for a claimant to act in bad faith to fabricate the jurisdictional conditions for pursuing arbitration under an investment treaty,

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<sup>511</sup> Pacific Rim Mining Corp. Press Release # 08-07 "Pacific Rim Suspends Further Drilling in El Salvador Until Mining Permit Granted; Local Staffing Reduced" 3 July 2008 (C-53).

<sup>512</sup> *Phoenix Action*, para. 140 (RL-50) ("The true nature of the operation raises also doubts. There are strong indicia that no economic activity in the market place was either performed or even intended by Phoenix. No business plan, no program of re-financing, no economic objectives were ever presented, no real valuation of the economic transactions were ever attempted. ... It is not contested by the Claimant that, at the time of the alleged investment, when Phoenix bought the two Czech companies, they had no activity." (Emphases in original)).

it actually reinforces the merit of Pac Rim Cayman’s *prima facie* establishment of the bases for the Tribunal’s jurisdiction.

422. Respondent’s reliance on the decision in *Mobil v. Venezuela* is equally unavailing. Respondent is correct that the tribunal in that case drew a distinction between disputes existing before an investor acquired the nationality that would give it access to treaty-based arbitration and disputes arising afterwards.<sup>513</sup> (The distinction was relevant in that case, because the treaty at issue, the Netherlands-Venezuela Bilateral Investment Treaty, contains a scope provision that excludes disputes that arose before the treaty entered into force.) However, Respondent neglects to mention the circumstances the tribunal took into account to determine whether a dispute had arisen before or after the claimant acquired Dutch nationality. As discussed above, the *Mobil* tribunal focused on letters from the claimant to the respondent from before claimant’s acquisition of Dutch nationality in which the claimant identified specific legal claims and took the first steps towards initiating ICSID arbitration.<sup>514</sup>

423. These facts contrast sharply with the “disagreement” Respondent alleges to have existed between it and Pac Rim Cayman prior to Pac Rim Cayman’s acquisition of U.S. nationality. The very absence of indicia of a “dispute” such as were identified in *Mobil* further reinforces the conclusion that the present dispute arose only after Pac Rim Cayman acquired U.S.

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<sup>513</sup> See Objections, para. 99.

<sup>514</sup> See *supra*, Section V.

nationality, thus precluding a finding that Pac Rim Cayman engaged in an abuse of process in acquiring U.S. nationality.

**C. Conclusion On Abuse Of Process**

424. For the reasons set forth in this Section, the Tribunal must reject Respondent's charge that the dispute should be dismissed due to "abuse of process." That severe charge, implying as it does a lack of good faith on Pac Rim Cayman's part, carries with it a correspondingly high burden of proof, which Respondent has not even come close to meeting. Instead, Respondent merely has re-stated its flawed arguments on jurisdiction and denial of benefits, overlaying them with allegations of concealment and improper motive.

425. The predicate arguments on jurisdiction and denial of benefits are wrong for all of the reasons discussed in other Sections. Respondent fundamentally mischaracterizes the measure at issue, and from there erroneously asserts that a dispute has existed since December 2004, when in fact it did not arise until March 2008. It compounds that first error with the equally erroneous suggestion that because Pac Rim Cayman is a U.S. holding company, its activities lack substance, and its motives for acquiring U.S. nationality are inherently suspect. Finally, Respondent accuses Pac Rim Cayman of concealing its corporate reorganization, despite plentiful evidence demonstrating that Pac Rim Cayman acted with the fullest transparency. Because none of the elements of Respondent's abuse of process argument is supported by evidence or applicable law, the argument must be rejected.

**VII. THIS TRIBUNAL HAS JURISDICTION UNDER ARTICLE 15 OF THE INVESTMENT LAW OF EL SALVADOR**

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426. In its Objections, Respondent argues that Article 15 of the Investment Law does not constitute El Salvador's unilateral consent to ICSID arbitration for purposes of Article 25 of the ICSID Convention. Respondent goes on to argue that, irrespective of whether Article 15 does contain El Salvador's consent to ICSID arbitration, Claimant cannot be considered a "foreign investor" under the Investment Law because Claimant is a "holding company" that has not made any investments in El Salvador at any time. Next, Respondent argues that the Tribunal should decline jurisdiction because it must pierce a corporate veil, find that Claimant is a "shell company," determine that the real party in interest is a Canadian company, and conclude that the "dispute brought by Claimant is not a dispute between El Salvador and a national of another Contracting State." Finally, Respondent attempts to reincarnate its argument that the Tribunal should decline to assert jurisdiction under the Investment Law in light of Claimant's CAFTA waiver. (Respondent throws in several other arguments – for example, that the Investment Law provides for mandatory conciliation, before the consent to arbitration may be invoked – but these are so superfluous and meritless as to warrant neither repetition nor response in this submission.)

427. As demonstrated below, the text of the Salvadoran Investment Law is clear, and expressly contains Respondent's unilateral offer of consent to ICSID arbitral jurisdiction. Claimant's position is supported by the rulings of previous ICSID tribunals, general principles of international law, as well as Salvadoran law and the views of various commentators and international organizations. As also demonstrated below, Respondent's various efforts to manufacture ambiguity in the text of Article 15 and on that basis to press the Tribunal to engage in a complicated interpretative exercise is plainly incorrect, unnecessary and should be rejected. The same conclusion should also easily be reached by the Tribunal with respect to Respondent's

arguments that the Tribunal should (i) decline to accord Claimant the status of a foreign investor for the purposes of Article 15 of the Investment Law, and (ii) find that there is no dispute between El Salvador and a national of a Contracting State of the ICSID Convention. Finally, with respect to Respondent’s efforts to relitigate the CAFTA waiver issue, this issue has been extensively briefed, hotly debated, argued in two-day hearing and should not be revisited by the Tribunal.

**A. Article 15 of the Investment Law contains El Salvador’s Consent to ICSID Jurisdiction**

**1. A Previous ICSID Tribunal has Already Determined that Article 15 of the Investment Law Provides for ICSID Jurisdiction**

428. Respondent vigorously maintains that the issue of whether Article 15 of the Investment Law contains El Salvador’s consent to ICSID jurisdiction has not been previously decided. Specifically, Respondent stresses that this issue was not before the *Inceysa v. El Salvador* tribunal.<sup>515</sup> Rather, Respondent maintains, to the extent that the *Inceysa* tribunal addressed the Investment Law, it did so as “*obiter dicta* and was not the result of a reasoned analysis.”<sup>516</sup> Respondent’s position before this Tribunal is incorrect. It is also disingenuous.

429. Notwithstanding Respondent’s protestations to the contrary, it is evident from the *Inceysa* award that the tribunal in that case did consider the issue of El Salvador’s consent to

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<sup>515</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, (2 August 2006) (“*Inceysa*”) (RL-30).

<sup>516</sup> Objections, para. 339.

ICSID jurisdiction under the country's Investment Law.<sup>517</sup> This is readily apparent from the fact that at pages 96 to 101, the tribunal specifically noted that "Claimant seeks to base the jurisdiction of the Centre to hear contractual claims on Article 15 of the Investment law." It then quoted Article 15 in full in reaching its conclusion that the text of the Investment Law "clearly" provides El Salvador's consent to ICSID jurisdiction for disputes arising with foreign investors with respect to rights granted by such law.<sup>518</sup> The tribunal's holding on the jurisdictional effect of Article 15 could not have been more unequivocal, and is quoted below:

"[Article 15 of the Investment Law] clearly indicates that the Salvadoran State, by Article 15 of the Investment Law, made to the foreign investors a unilateral offer of consent to submit, if the foreign investor so decides, to the jurisdiction of the Centre, to hear all "disputes referring to investment" arising between El Salvador and the investor in question."<sup>519</sup>

430. Nowhere in the entire award is there any suggestion of controversy regarding the threshold issue of whether Article 15 contains El Salvador's unilateral consent to the dispute resolution mechanisms set out therein. In fact, quite the opposite. The award is replete with references to the fact that Article 15 mandates El Salvador to submit to whichever dispute resolution mechanism is elected by the investor. El Salvador did not challenge that proposition in *Inceysa*, and should not be allowed to do so now.

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<sup>517</sup> *Inceysa*, paras. 302, 331-334.

<sup>518</sup> *Inceysa*, paras. 332.

<sup>519</sup> *Id.*, para. 332.

431. Respondent attempts to avoid the undeniable consequences of the *Inceysa* award for its position in this arbitration by arguing that the tribunal denied jurisdiction under the Investment Law on the grounds of Claimant’s fraud and illegal investment in El Salvador, rather than on a critical analysis of whether the Investment Law contains a consent to ICSID arbitration.<sup>520</sup> Indeed, Respondent argues that it did not even have an opportunity to present its arguments on whether the text of Article 15 provides consent to ICSID jurisdiction.<sup>521</sup> The Tribunal should not allow itself to be misled by Respondent’s attempted dissimulation.

432. In *Inceysa*, El Salvador had ample opportunity to address whether Article 15 contains El Salvador’s consent to ICSID arbitration. In that case, the claimant attempted to found jurisdiction on three instruments – a bilateral investment treaty, a contract and the Investment Law. El Salvador challenged jurisdiction under each of these instruments. However, insofar as the Investment Law was concerned, it raised no challenge to the fact that Article 15 of that law plainly sets forth El Salvador’s consent to submit disputes relating to a foreign investor’s rights under that law (and Salvadoran law in general) to ICSID arbitration.

433. In fact, far from contesting whether Article 15 contains El Salvador’s consent to ICSID jurisdiction, in *Inceysa*, El Salvador affirmatively recognized that the Law contains such a consent. This is evidenced clearly from a section of El Salvador’s brief quoted by the *Inceysa* tribunal in which El Salvador acknowledged that Article 15 of the Investment Law contains a

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<sup>520</sup> *Inceysa*, paras. 335-37.

<sup>521</sup> Respondent states that “... this issue was simply not before the *Inceysa* tribunal and was not even briefed by the parties in that case.” (emphasis added), Objections, para. 339.

dispute resolution provision that investors with claims related to rights or benefits granted by such law can invoke:

“[...] to invoke the particular alternate dispute provision set forth in the law – arbitration before ICSID – a foreign investor’s claim must have as its essential cause of action a right or benefit conferred by that Law.”<sup>522</sup>

434. In light of the foregoing, there should be little doubt in the Tribunal’s mind that it may properly assert jurisdiction in these proceedings over Respondent based on the consent contained in Article 15 of the Investment Law. El Salvador’s attempts to re-write its legislation in the context of these arbitration proceedings should not be countenanced. All parties are required to appear before international tribunal’s with clean hands and to plead in good faith. Claimant respectfully submits, that by attempting to resile from its official positions on the scope and effect of the consent contained in Article 15 of the Investment Law, El Salvador has breached this cardinal requirement.<sup>523</sup> This conclusion is even more evident in light of the evidence discussed below.

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<sup>522</sup> Memorial on Objections to Jurisdiction filed by the Republic in the *Inceysa* case at 94, cited by the tribunal. *Inceysa*, para. 283 (RL-30). Text in Spanish: “[...] para invocar la particular disposición sobre resolución alternativa de disputas establecida en la ley –arbitraje ante el CIADI- el reclamo de un inversionista extranjero debe tener como su causa de acción esencial un derecho o beneficio conferido por esa Ley.”

<sup>523</sup> In light of Respondent’s attempts to resile in these proceedings from the submissions it made in the *Inceysa* arbitration on the jurisdictional import of Article 15 of the Investment Law, together with this counter-memorial, Claimants are also submitting a request that El Salvador produce all of its memorials and expert reports submitted in the *Inceysa* arbitration. Claimant has also requested that El Salvador produce the transcript of the hearings in that arbitration.

**2. Respondent's Official Position on the Scope and Effect of Article 15 of the Investment Law has been Presented to and Recorded by UNCTAD**

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435. The disingenuity of Respondent's made-for-arbitration objection to the jurisdictional import of Article 15 of the Investment Law is all the more apparent in light of a recent report issued by UNCTAD entitled *Investment Policy Review: El Salvador*.<sup>524</sup> As the Tribunal is well aware, UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment, as part of its work on trade and development.

436. The preface to the report describes the role of the Government of El Salvador in its preparation:

“The *Investment Policy Review of El Salvador*, initiated at the request of the Salvadorean Government, was carried out by means of a fact-finding mission in May 2009, and is based on information current at that date. The mission received the full cooperation of the relevant ministries and agencies, in particular El Salvador's investment promotion agency, PROESA. The mission also had the benefit of the views of the private sector, both foreign and domestic, and of the resident international community, particularly bilateral donors and development agencies. This draft was discussed with stakeholders at a national workshop in San Salvador on 17 February 2010.”<sup>525</sup>

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<sup>524</sup> UNCTAD's investment policy reviews “are intended to help countries improve their investment policies and to familiarize governments and the international private sector with an individual country's investment environment. The reviews are considered by the UNCTAD Commission on Investment, Enterprise and Development.” *Investment Policy Review. El Salvador*. United Nations Conference on Trade and Development, New York and Geneva, (2010) at iii (CL-147).

<sup>525</sup> *Id.*

437. There is additional evidence confirming the Government of El Salvador’s express recognition that the Report accurately portrays the Salvadoran legal framework. At the Report’s official presentation on April 26, 2010, the Ambassador of El Salvador to the United Nations (Mr. Byron Fernando Larios López) expressly thanked UNCTAD on behalf of El Salvador for undertaking the investment policy review and noted that the Report “provides objective information about the legal framework existing in the country and gives you some idea about the rules and regulations in the country...”<sup>526</sup> Likewise, Mr. Luis Enrique Córdova (Director PROESA) also thanked UNCTAD for preparing the Investment Policy Review of El Salvador and described the Report as a “comprehensive review of the investment policy underway in our country...”<sup>527</sup>

438. The scope and effect of Article 15 of the Investment Law is specifically addressed in the Report in the section dealing with “General standard of treatment and protection” of foreign investors. The Report states:

“The Law on Investment allows foreign investors to submit disputes with the State to international conciliation or arbitration under the International Centre for Settlement of Investment Disputes (ICSID). El Salvador does not require the exhaustion of local administrative or judicial remedies as a condition for **its consent to recourse to ICSID, which is granted by law**. In addition, El Salvador allows investors originating from states that are not members of ICSID to access its conciliation and arbitration

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<sup>526</sup> Audio available at: <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=5406&lang=1>.

<sup>527</sup> *Id.*

mechanism through the ICSID Additional Facility.”<sup>528</sup> (emphasis added)

UNCTAD’s findings on the jurisdictional purpose and effect of Article 15 are as clear and unequivocal as those of the *Inceysa* tribunal. Those findings were the result of extensive consultations – as is the practice of international organizations – with the responsible agencies in the Salvadoran Government. No doubt senior officials within these agencies would have reviewed the report’s findings carefully and discussed them at length with the UNCTAD secretariat prior to the Report’s official release. After all, the Report had been commissioned by the Government of El Salvador.

439. Respondent’s efforts therefore to challenge this Tribunal’s jurisdiction on the basis of arguments that are in direct contradiction of positions that it has taken in other settings should not be countenanced by this Tribunal. Rather, they should be appropriately sanctioned.

**3. International and Salvadoran Commentators Have Recognized that Article 15 Contains El Salvador’s Unilateral Consent to ICSID Arbitration**

440. Aside from at least one ICSID tribunal and an international organization dedicated to issues of foreign investment and trade, scholars have also accepted that Article 15 of the Investment Law contains El Salvador’s unilateral consent to ICSID arbitration.

441. For example, in discussing the fact that the drafters of the ICSID Convention specifically recognized that host States may unilaterally consent to ICSID (or arbitral jurisdiction

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<sup>528</sup> Investment Policy Review. El Salvador. United Nations Conference on Trade and Development, New York and Geneva, (2010) at 36 (CL-147).

more broadly) in national legislation, in their recent book, *The ICSID Convention: A Commentary*, Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, note that “[s]ome national investment laws provide unequivocally for dispute settlement by ICSID.”<sup>529</sup> As an example of one such unequivocal consent, the authors cite Article 15 of the Salvadoran Investment Law. The authors then go on to acknowledge that the “[*Inceysa*] Tribunal concluded that this provision [*i.e.*, Article 15 of the Salvadoran Investment Law] constituted a unilateral offer of consent to submit to the jurisdiction of the Centre to hear disputes regarding investments arising between El Salvador and an investor.”<sup>530</sup>

442. In addition, legal commentators in El Salvador have expressed their views regarding the Investment Law, and share the view that it contains the State’s unilateral consent to ICSID jurisdiction. For example, Roberto Oliva de la Cotera<sup>531</sup> has stated that Article 15 gives foreign investors access to ICSID arbitration, granting them the choice to select the forum where their claims will be heard, with the State being forced to accept such choice.<sup>532</sup> According to his interpretation of Article 15, the access to ICSID arbitral jurisdiction “is not subject to the

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<sup>529</sup> CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 463 (2<sup>nd</sup> ed. 2009) (relevant excerpts), para. 394, at 197 (CL-41).

<sup>530</sup> *Id.*, para. 397.

<sup>531</sup> Salvadoran lawyer specialized in Administrative Law, Universidad Dr. Jose Matias Delgado Law School graduate with a doctoral degree from the University of Salamanca, Spain.

<sup>532</sup> Roberto Oliva de la Cotera. *Sistema de Protección de Inversiones Extranjeras y el Arbitraje del CIADI en la República de El Salvador*. Paper published by the Universidad Autónoma de Mexico as a result of the Conference “*Congreso de Arbitraje en Materia de Inversion*”, (June 2010) at 6 (CL-148).

fulfillment of any requirement”<sup>533</sup> and no further or new consent is needed.<sup>534</sup> Finally, he concludes that:

We observe complete freedom on the part of the investor, which derives from the fact that he can grant his consent at a later time, according to his own interests, independently from the State’s position, who previously manifested its consent.<sup>535</sup>

In light of the foregoing, there should be no reason for the Tribunal to deviate from what is now well-accepted with respect to the jurisdictional import of Article 15 of the Salvadoran Investment Law, simply because Respondent now finds it convenient for the purposes of this arbitration to put forward a different view; and one that is very different from what it has previously stated in other settings.

443. Below, we address certain of the arguments that El Salvador has put forward in an attempt to support its position in these proceedings. (The fact that, in the interests of parsimony, we have not addressed all of El Salvador’s arguments should in no way be accepted as acceptance in any respect of respondent’s submissions.)

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<sup>533</sup> *Id.* at 12.

<sup>534</sup> *Id.* at 16.

<sup>535</sup> “Se observa una completa libertad por parte del inversor, que deriva de la situación que con posterioridad puede prestar su consentimiento, según sus intereses, con independencia de la posición del Estado, quien exteriorizó su consentimiento con anterioridad.” *Id.* at 17.

**4. Response To El Salvador’s Submissions On Article 15**

**a. Article 15 Should Not Be Interpreted Restrictively**

444. Respondent proposes a restrictive interpretation of the Investment Law, on the basis that any unilateral act of a State, including national legislation, should be interpreted restrictively.<sup>536</sup> Contrary to Respondent’s position, ICSID tribunals that have analyzed national laws as unilateral acts of the State that may contain consent to jurisdiction, have not interpreted such laws restrictively. This is evident even from the ICSID precedent upon which Respondent attempts to rely.

445. In *SPP v Egypt*, the tribunal interpreted Article 8 of Egypt’s Law No. 43 to determine whether it contained Egypt’s consent to the Centre’s jurisdiction. For its analysis, the *SPP* tribunal applied “general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations”<sup>537</sup> and expressly rejected a restrictive interpretation of jurisdictional instruments.<sup>538</sup>

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<sup>536</sup> Objections, paras. 337-378.

<sup>537</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, Apr. 14, 1988 (“*SPP v. Egypt*”), para. 61 (RL-89).

<sup>538</sup> “...jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith...” *SPP v. Egypt*, para. 63. See also, *Ceskslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999), para. 34 (RL-93). The tribunal in *CSOB v. Slovak Republic* rejected a restrictive interpretation citing *Amco Asia v. Indonesia*.

446. In *Zhinvali*, the tribunal determined it should follow the guidance of national law, but “always subject to ultimate governance by international law.”<sup>539</sup> There is absolutely no evidence that the tribunal attempted or intended to interpret the Georgian investment law restrictively.

447. In *Mobil v. Venezuela* the tribunal concluded that national laws must be interpreted “according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States.”<sup>540</sup> The *Mobil* tribunal also specifically rejected a restrictive interpretation for unilateral acts of the State, such as national legislation, that may contain manifestations of consent to jurisdiction under the ICSID Convention, because they are formulated in the framework and on the basis of a treaty.<sup>541</sup>

448. Thus, there is no support in ICSID jurisprudence for the proposition that any unilateral act of a State, including national legislation, should be interpreted restrictively.

449. Furthermore, the decisions of the International Court of Justice with regard to unilateral declarations of States, summarized in the International Law Commission’s Guiding Principles (“ILC Guiding Principles”), do not support a restrictive interpretation of manifestations of consent under the ICSID Convention. Respondent attempts to rely mainly on section 7 of the ILC Guiding Principles. However, under this principle, a restrictive

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<sup>539</sup> *Zhinvali Development Limited v. Republic of Georgia*. ICSID Case No.ARB/00/01, Award, (24 Jan. 2003), para. 339 (RL-90).

<sup>540</sup> *Mobil*, para. 85 (RL-51).

<sup>541</sup> *Mobil*, para. 90.

interpretation is appropriate only when there is “doubt as to the scope of the obligations resulting from such declaration”.<sup>542</sup> In the present case, as discussed above, the text of Article 15 contains clear and specific terms, and there is no doubt regarding the scope of the consent provided thereby.

450. Under Respondent’s “restrictive” interpretation, a legislative text cannot be considered to manifest a State’s consent if it does not include the word “consent” or “make the resolution of disputes by arbitration mandatory”.<sup>543</sup> However, under Article 25 of the ICSID Convention, the only requirement of the manifestation of consent is that it must be made “in writing”. Contrary to what Respondent maintains, there is no requirement that a specific formula be used, neither is reference to certain words mandatory.

**b. Article 15 Must be Interpreted and Applied According to its Own Terms**

451. Article 15 of the Investment Law must be interpreted according to its own terms.

The relevant section of the Investment Law states as follows:

In the case of disputes arising among foreign investors and the State, regarding their investments in El Salvador, the investors may submit the controversy to:

a) The International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by conciliation and arbitration, in accordance with the Convention on Settlement of

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<sup>542</sup> Principle 7. Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Report of the International Law Commission. Fifty-eight session. General Assembly. Official Records Sixty-first session, Supplement No. 10 (A/61/10). (RL-92)

<sup>543</sup> Objections, para. 340.

452. The language of Article 15 of the Investment Law, reproduced above, is clear in providing a unilateral offer of consent to ICSID jurisdiction, which the investor is free to accept at any time. Under the Investment Law, ICSID arbitration is not the only dispute settlement mechanism available to investors, and an investor is given the option to submit its claims before the local courts. The option given to the investor explains the use of the term “may” (“*podrán*”), which is in fact a permissive, rather than a mandatory term. However, once the investor makes a choice, and accepts the offer of consent contained in the Investment Law, by initiating an arbitration proceeding for example, the State is bound by the offer it made earlier, and arbitration becomes mandatory for the State.

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<sup>544</sup> The original Spanish text of Article 15 of the Investment Law reads:

En caso que surgieren controversias o diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los tribunales de justicia competentes, de acuerdo a los procedimientos legales.

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), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI);

b) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con los procedimientos contenidos en el Mecanismo Complementario del CIADI; en los casos que el Inversionista extranjero parte en la controversia sea nacional de un Estado que no es parte contratante del Convenio del CIADI.

453. In addition, the grammatical structure of the provision is critical, and thus must be taken into consideration for its interpretation. The relevant section of the Salvadoran Investment Law provides that “*the investors* may submit...”, while the other laws referred to by Respondent as containing mandatory language do not have “*the investors*” as the subject of the sentence. The Egyptian law states “*investment disputes* ... shall be settled”, while the Georgian law provides “[*d*]isputes between a foreign investor and governmental body...shall be settled”. The difference in the subject of the sentences obviously has an impact on the verb chosen in each case. This reinforces the fact that the permissive verb “may” (“*podrán*”) was used in the Investment Law to express that the provision grants an option to the investor, without diminishing the obligation of the State to be bound by an arbitration procedure when the investor exercises such option.

**c. Article 15 of the El Salvadoran Investment Law Bears no Comparison to Article 22 of the Venezuelan Investment law**

454. Respondent argues that Article 15 of the Investment Law refers to multiple avenues of dispute resolution that are open to investors. It then attempts to assimilate the text of the Investment Law to the text of the Venezuelan investment law: “Like the Venezuelan law, it is descriptive rather than prescriptive and it is not a jurisdictional instrument.”<sup>545</sup> However, the two texts are very different, and therefore, the conclusions of the *Mobil* tribunal regarding the Venezuelan investment law are not applicable to the Salvadoran Investment Law.

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<sup>545</sup> Objections, para. 366.

455. The relevant text of the Venezuelan investment law states:

“Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which are applicable the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment disputes between States and Nationals of other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, **if it so provides**, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.”<sup>546</sup> (emphasis added)

Contrary to Article 15 of the Investment Law, Article 22 of the Venezuelan investment law is ambiguous.<sup>547</sup> In the *Mobil* case, both Venezuela, as the respondent State, and the claimants agreed that this provision created an obligation to go to arbitration only under certain conditions, but disagreed on how to interpret such conditions.<sup>548</sup> The text of Article 15 of the Salvadoran Investment is not comparable to this provision. Article 15 simply does not require the fulfillment of any conditions, it provides for an open and unconditional consent by the State which the investor can accept at any time.

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<sup>546</sup> *Mobil*, para. 68 (citing Venezuelan Investment Law, Art. 22) (RL-51).

<sup>547</sup> The *Mobil* tribunal concluded that the text of the Venezuelan investment law was ambiguous and obscure. *See Mobil*, para. 111.

<sup>548</sup> *See Mobil*, para. 98.

**d. El Salvador intended to provide consent to ICSID jurisdiction when the Investment Law was promulgated**

456. Respondent contends that El Salvador did not intend for Article 15 of the Investment Law to constitute unilateral consent to arbitration for purposes of Article 25 of the ICSID Convention. However, the legislative history of the promulgation of the Investment Law clearly indicates the contrary.

457. For example, a slide contained in a power point presentation made before the *Asamblea Legislativa* when the proposal was being debated, expressly refers to international arbitration.<sup>549</sup> The slide on dispute resolution states:

- “LOCAL ADMINISTRATIVE AND JUDICIAL PROCEDURE: LOCAL AND FOREIGN.
- **INTERNATIONAL ARBITRATION ADMINISTERED BY ICSID: FOREIGN INVESTMENT.**<sup>550</sup>

458. The slide makes it clear that the text of Article 15 was understood to allow international arbitration under ICSID for claims filed by foreign investors with respect to their rights under the Investment Law. The members of the *Asamblea Legislativa* were well-aware of this issue and promulgated the Investment Law fully cognizant of the fact that the wording of Article 15 provided a consent to ICSID jurisdiction.

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<sup>549</sup> Presentation Titled “*Proyecto de Ley de Inversiones*” (CL-149). (emphasis added)

<sup>550</sup> The original slide in Spanish provides: “*CAPITULO V: SOLUCION DE CONTROVERSIAS.* ▪ *VIA ADMINISTRATIVA Y JUDICIAL INTERNA: NACIONALES Y EXTRANJEROS.* ▪ *ARBITRAJE INTERNACIONAL BAJO ADMINISTRACION CIADI: INVERSION EXTRANJERA.*”

459. In addition to the debates within the *Asamblea Legislativa* of El Salvador, the proposed changes to the investment regime in El Salvador were also being discussed internationally. In 1996, when commenting on El Salvador's investment regime, the representative of El Salvador before the WTO Organ Evaluating El Salvador's Commercial Policies expressly referred to the new investment law that at that time had already been proposed, and highlighted that El Salvador's new law would guarantee foreign investors access to international arbitration.<sup>551</sup>

460. According to Respondent, the BITS signed by El Salvador "contemporaneously" with the promulgation of the Investment Law provide clear evidence that El Salvador's intention to consent cannot be established from the text of the Investment Law. Respondent erroneously relies on the texts of BITS signed by El Salvador in 1999 and 2000. This reliance is misguided because the proposal containing the text of the Investment Law was made to the *Asamblea Legislativa* in June, 1998.<sup>552</sup> Therefore, none of the BITS on which the Respondent attempts to rely had been signed at the time the Investment Law was drafted.

461. Reviewing the text of the BITS that in fact are contemporaneous with the drafting of the Investment Law (those signed between 1994 and 1998), most use the verb "may"

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<sup>551</sup> WTO. Trade Policy Review Body: Review of El Salvador. Press Release PRESS/TPRB/52 (27 November 1996). "A new law investment law, intended for parliamentary approval in the first quarter of 1997, would ensure rights, including access to domestic courts and domestic or foreign arbitration, promote transparency and simplify registration procedures, including the elimination of prior authorization." (CL-150).

<sup>552</sup> Proposal made by Minister Eduardo Zablah Touche dated June 2, 1998 (RL-101).

(“podrá”) when consenting to ICSID jurisdiction in their dispute settlement provisions.<sup>553</sup> The language used in such treaties is clearly consistent with the language used in the Investment Law and, as explained in the *Exposición de Motivos*, was taken into account by the drafters of the law.<sup>554</sup>

462. In addition, the fact that the word “consent” or references to “mandatory” arbitration were included in some BITS is not sufficient to conclude that the absence of such mandatory language or the use of the word “consent” in the Investment Law evidences that El Salvador did not intend to consent to ICSID jurisdiction.

e. **There Is No Constitutional Restriction Prohibiting El Salvador’s Unilateral Consent To ICSID Arbitration**

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<sup>553</sup> “If the dispute has not been solved in a six-month term, counted from if was set forth by one of the Parties, it **may** be submitted, at the request of the investor...” Article X, Agreement between the Government of the Republic of Ecuador and the Government of the Republic of El Salvador for the Reciprocal Promotion and Protection of Investments, signed May 16, 1994, “If these consultations do not allow for the resolution of the dispute in a term of six months counted from when the consultations were requested the investor **may** submit, at his choice, the dispute...” Article 9. Agreement between the Republic of El Salvador and the Swiss Confederation on Reciprocal Promotion and Protection of Investments, signed February 16, 1995, “If the dispute has not been solved in a six-month term, counted from if was set forth by one of the Contracting Parties, it **may** be submitted, at the request of the investor...” Article 10. Agreement between the Republic of El Salvador and the Argentine Republic for the Reciprocal Promotion and Protection of Investments signed May 19, 1996, “If by these consultations a solution of the dispute is not reached in a term of three months counted from when the settlement was requested, the investor **may** submit the dispute...” Article 8. Agreement between the Republic of El Salvador and the Republic of Chile for the Reciprocal Promotion and Protection of Investments, signed November 8, 1996 and “If these consultations do not allow for the resolution of the dispute in a term of six months counted from when the settlement of the dispute was requested, the investor **may** submit the dispute...” Article 9. Agreement between the Government of the Republic of El Salvador and the Government of the Republic of Paraguay on the Reciprocal Promotion and Protection of Investments signed January 30, 1998.

<sup>554</sup> The *Exposición de Motivos* is included in the proposal dated June, 1998 (RL-101).

463. Respondent contends that there is a “constitutional restriction concerning the instruments in which the State can consent to arbitration”.<sup>555</sup> In making this argument, it relies on a provision of the Salvadoran Constitution that simply acknowledges that the State may agree in treaties or contracts to submit disputes to international arbitration:

“The aforementioned does not prevent the Salvadoran State from submitting, in treaties and contracts, to arbitration or to an international tribunal for a decision in the event of a dispute.”<sup>556</sup>

464. As can be clearly observed from the above text, this provision does not restrict in any way the authority the State has to promulgate laws that contain offers to arbitrate. The cited provision is only intended to clarify that the previous provisions contained in Article 146, *do not prevent* the State from entering into contracts or treaties that contain arbitration clauses. The previous paragraphs of Article 146 provide:

Treaties shall not be signed or ratified or concessions granted if they in any way alter the governmental form, or harm or infringe

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<sup>555</sup> Objections, para. 376.

<sup>556</sup> Article 146 of the Constitution of El Salvador (emphasis added). The complete text of Article 146 in Spanish reads as follows:

*“Art. 146.- No podrán celebrarse o ratificarse tratados u otorgarse concesiones en que de alguna manera se altere la forma de gobierno o se lesionen o menoscaben la integridad del territorio, la soberanía e independencia de la República o los derechos y garantías fundamentales de la persona humana.*

*Lo dispuesto en el inciso anterior se aplica a los tratados internacionales o contratos con gobiernos o empresas nacionales o internacionales en los cuales se someta el Estado salvadoreño, a la jurisdicción de un tribunal de un estado extranjero.*

*Lo anterior no impide que, tanto en los tratados como en los contratos, el Estado salvadoreño en caso de controversia, someta la decisión a un arbitraje o a un tribunal internacionales.”*

the integrity of the territory, the Republic's sovereignty or independence or the fundamental rights and guarantees of the human person.

That provided in the previous paragraph is applicable to international treaties and contracts with national government or national or international companies in which the Salvadoran State accepts the jurisdiction of the courts of a foreign state.

465. By referring to these previous paragraphs Article 146 clarifies that the general rule by which the State may enter into arbitration agreements, remains in force notwithstanding the limitations imposed. That is to say, the Constitution considers that such arbitration agreements would not affect the State's sovereignty or independence, in contrast to the submission to the courts of a foreign country. Therefore such arbitration provisions are not included in the prohibition contained in the first paragraph of article 146.

466. Respondent contends that the fact that this article is included in the section about treaties is not relevant and that it refers generally to international arbitration. However, as just explained, this provision is meant to clarify the scope of agreements that can be entered into, and is not a general rule with regard to the State's policy towards arbitration, and therefore it has no effect over the promulgation of laws.

**B. Claimant is a "Foreign Investor" Under The Investment Law**

467. Respondent argues that Claimant does not meet the definition of a "foreign investor" under the Investment Law. According to Respondent, "Claimant qualifies as a foreign legal person, but does not meet the affirmative requirement of having made investments in El

Salvador.”<sup>557</sup> Respondent alleges that Claimant is only a holding company and made no qualifying investments.

468. This argument is wrong for the same reasons Respondent’s argument that Claimant is not an “investor of a Party” for CAFTA purposes is wrong. As discussed in Section V above, Claimant’s status as a foreign investor and, in particular, as an investor of the United States, does not require that it first have attained U.S. nationality and only then have made its investment in El Salvador. It must have the status of a U.S. national (which Claimant unquestionably does), and it must have ownership and control of an investment in El Salvador (which Claimant unquestionably does). But there is no requirement, under either CAFTA or the Investment Law, with respect to the order in which those conditions are met. In point of fact, however, Claimant’s investments in El Salvador were made both before and after it acquired U.S. nationality. And in any event, even prior to its acquisition of U.S. nationality, Claimant, as a Cayman Islands company, would have had every right to invoke Article 15 of the Investment Law, as the United Kingdom’s justification of the ICSID Convention has been extended to the Cayman Islands.<sup>558</sup>

469. Rather than repeating what has already been discussed *in extensu* above, Claimant submits that Respondent has always recognized that Claimant is a foreign investor and has repeatedly certified as such. In support of its rebuttal of Respondent’s attempts to deny Claimant

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<sup>557</sup> Objections, para. 380.

<sup>558</sup> United Kingdom, Foreign & Commonwealth Office, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (C-56).

the status of a foreign investor under the Investment Law, Claimant relies on its submissions and supporting evidence set out in earlier Sections of this counter-memorial.

**C. The Claimant is a National of a Contracting State**

470. Respondent argues that Claimant is not “a national of another contracting State” under Article 25 of the ICSID Convention, but a national of Canada. It claims that Claimant is a shell company and that a Canadian company is abusing its corporate personality to gain the benefits of CAFTA and the ICSID Convention.

471. As set forth in Sections V and VI the Respondent’s denial of benefits and abuse of process arguments are unfounded, and the Claimant’s incorporation in the United States should not be disregarded. There is no basis under the Investment Law for piercing the corporate veil. However, even if the Tribunal were to accept Respondent’s suggestion to do so in this case, it should not stop the veil piercing exercise when it reaches Pacific Rim Mining Corp., as Respondent proposes. Rather, it should extend its analysis to the beneficial owners of Pacific Rim Mining Corp., because these are the persons who ultimately own – and, by virtue of ownership, control – Pac Rim Cayman. As discussed in Section III above, a majority of the persons who ultimately own and control Pac Rim Cayman are U.S. persons.

**D. The CAFTA Waiver Does Not Preclude Jurisdiction Under The Investment Law**

472. Notwithstanding its acknowledgment that it is raising in this jurisdictional phase “the same objection” that it raised in preliminary objection phase based on Claimant’s CAFTA

waiver, in its memorial Respondent exhausts multiple pages of copy-pasted arguments in its efforts to convince the Tribunal to re-visit its well-reasoned rejection of those arguments.<sup>559</sup> Respondent attempts to rest to its challenge to the Tribunal’s earlier decision on the CAFTA waiver by arguing that “[t]here are several elements of the waiver issue that can be more fully developed at this stage”<sup>560</sup> and that there is a need for a “more careful analysis of the CAFTA waiver requirement”.<sup>561</sup> Respondent concludes that “this issue merits careful analysis and a reasoned decision”.<sup>562</sup>

473. No matter how Respondent tries to re-package its earlier arguments, the Tribunal should see Respondent’s efforts for what they plainly are: an attempt to disguise as jurisdictional consent-based arguments, all of what it previously argued in its preliminary objections. The Tribunal should decline Respondent’s invitation to re-visit an issue that was extensively briefed, vigorously argued and finally determined on the basis of careful reasoning in the Tribunal’s decision on the Respondent’s Preliminary Objections. The Tribunal’s rejection of Respondent’s waiver-based objections could not have been more categorical or unequivocal.<sup>563</sup>

474. For the avoidance of doubt, Claimant relies on all of its prior written and oral submissions addressing Respondent’s waiver-based objections and arguments, as well as the

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<sup>559</sup> Objections, para. 433.

<sup>560</sup> *Id.*, para. 439.

<sup>561</sup> *Id.*, para. 443.

<sup>562</sup> *Id.*, para. 445.

<sup>563</sup> *See* Decision on Respondent’s Preliminary Objections, paras 250 to 254.

findings of the Tribunal on the CAFTA waiver issue in its 2 August 2010 Decision on Respondent's Preliminary Objections.

**VIII. THE TRIBUNAL SHOULD ORDER RESPONDENT TO BEAR THE COSTS OF THIS PART OF THE PROCEEDING UNDER ICSID ARBITRATION RULE 28(1)(b)**

475. In deciding the first round of objections brought by Respondent, the Tribunal denied Claimant's request for costs under CAFTA Article 10.20.6, stating:

[T]he Tribunal is conscious that this was the first application made under CAFTA Article 10.20.4 and also the first time that the expedited procedure under Article 10.20.5 was invoked for a preliminary objection under 10.20.4. There was thus something to be learnt for all involved; and what might seem inappropriate after that lesson would not have seemed so beforehand, at the time when it mattered. In any event, in the Tribunal's view, the Respondent's Preliminary Objections cannot be regarded, even now, as "frivolous" within the meaning of CAFTA Article 10.20.6.<sup>564</sup>

Accordingly, the Tribunal decided not to make any order as to costs under CAFTA Article 20.20.6 at that stage.<sup>565</sup>

476. We respectfully disagree with the Tribunal's conclusion that Respondent's first set of objections was not frivolous within the meaning of CAFTA Article 10.20.6. It is

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<sup>564</sup> Decision on Preliminary Objection, para. 263.

<sup>565</sup> *Id.*, para. 265. It is questionable whether Respondent's counsel even had time fully to digest the Tribunal's 2 August 2010 decision before lodging Respondent's second set of objections on 3 August 2010 – literally hours after the ICSID Secretariat's dispatch of the decision to the parties. It is therefore unlikely that Respondent benefited from whatever lessons were to be learnt from its first set of objections before launching into its second.

impossible to accept that Respondent’s multiple fact-laden arguments – offered to support an objection to be decided “as a matter of law” and assuming the claimant’s allegations “to be true” – were made for any reason other than to impose burden, cost, and delay on Claimant, and to bifurcate and thereby extend the objections phase of this case.

477. We submit that Respondent’s improper tactics were obvious at the time. But given its second round of objections, no one could possibly miss the game that Respondent has been trying to play.

478. All of Respondent’s objections in this second round could and should have been asserted in the first round. Indeed, at the same time the parties were briefing the first round of objections, Respondent was already “working” on its second set, including submitting its lengthy “denial-of-benefits” submission to the Office of the U.S. Trade Representative (“USTR”) on 1 March 2010 (but failing to disclose that submission, or the purported basis therefor, to Claimant or the Tribunal until *after* it had lodged its second round of objections five months later, on 3 August 2010).

479. The reason Respondent withheld its new objections for a second set is readily apparent: two rounds of objections are (at least) twice as costly and time-consuming as one. Respondent knows that Claimant has limited resources. It is therefore trying to wage a war of attrition to avoid reaching the merits.

480. The late Professor Thomas W. Wälde wrote of “equality of arms” between the parties as a foundation principle of investment arbitration procedure. As stated by Professor Wälde:

A government sued on the basis of an investment treaty, signed to encourage foreign and private investment by promising effective protection, should prosecute its case vigorously but within the framework of the principles of “good faith” arbitration, the applicable arbitration rules, and with respect to “equality of arms.”<sup>566</sup>

That equality of arms may be threatened, however, if one party employs the “[f]ull use (or abuse) of the arbitral procedure,” which “can grow the cost of arbitration beyond what the ‘war chest’ of the other party can bear.” As Professor Wälde acknowledged, such abuse of the arbitral procedure is not easy for tribunals to control:

Tribunals have difficulty restricting the exploitation of procedural tactics that are available under the applicable rules. Since tribunals are wary about creating grounds for subsequent challenge for not providing a fair hearing, the incentive is, rather, to accommodate the party which uses procedural obstruction both for delay and for depleting the opponent’s “war chest,” particularly if it is a State.<sup>567</sup>

481. The cost provisions of CAFTA Article 10.20.6 represent one of the tools available to tribunals to prevent respondents from abusing the otherwise salutary provisions of Articles 10.20.4 and 10.20.5, by using them not to resolve frivolous claims expeditiously, but rather to add an additional layer of time and (in this case, massive) costs upfront. Regrettably, the Tribunal decided not to deploy that tool here, thereby encouraging Respondent’s efforts to continue manipulating the procedures available to it to impose further costs and delay on a

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<sup>566</sup> Thomas W. Wälde, “Equality of Arms” in Investment Arbitration: Procedural Challenges,” in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS* 161 (2010, Katia Yannaca-Small, ed.) (footnote omitted) (CL-139)

<sup>567</sup> *Id.* at 174.

Claimant that can scarcely afford them. (Indeed, Respondent’s tactics to date have been quite successful in further depleting Claimant’s limited resources.)

482. But another tool available to the Tribunal resides in ICSID Arbitration Rule 28(1)(b), which provides that “[w]ithout prejudice to the final decision on the payment of the cost of the proceedings, the Tribunal may, unless otherwise agreed by the parties, decide:”

with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

As stated by Professor Schreuer with respect to Rule 28(1)(b):

The apportionment of costs need not relate to the entire proceeding. The Tribunal may charge one party the costs or a major share of the costs of a particular part of the proceedings. Often this will be in reaction to undesirable conduct by a party in the proceeding.<sup>568</sup>

483. Numerous tribunals in investor-state cases have apportioned the costs of a particular phase to a party where, as here, the party is effectively taking a second “bite at the cherry” rejecting Respondent’s first set of objections<sup>569</sup>), and, in doing so, raises arguments that are without merit, or that could have been raised previously, or that were made previously but were rejected.<sup>570</sup> Respondent’s second set of objections commits all of these offenses.

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<sup>568</sup> CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 463 (2<sup>nd</sup> ed. 2009) (relevant excerpts), para. 61:27 at 1231 (CL-41).

<sup>569</sup> Decision on Preliminary Objections, para. 113.

<sup>570</sup> See, e.g., *Compañía de Aguas del Aconquija AS and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision dated 28 May 2003, paras. 20, 21, and Award (Resubmitted Case) dated 20 August 2007, paras. 10.2.3-10.2.6;

(continued...)

Moreover, Respondent's choice to bring its objections in two "bites" is obviously intended to impose cost and delay.

484. An order requiring Respondent to pay the costs of this part of the proceeding is a comparatively modest remedy; Rule 28(1)(b) does not appear to encompass the attorneys' fees and related expenses incurred by the parties in connection with the proceedings, but rather only the "related costs" as "determined by the Secretary-General". We can assure the Tribunal, however, that such an order would be extremely meaningful to Claimant, and would restore at least some small measure of "equality of arms" between the parties. It will also hopefully discourage Respondent from pursuing similar tactics as the case proceeds.

485. Finally, it would discourage other state parties from pursuing such tactics in other cases brought under CAFTA. Respondent in this case has effectively created a "blueprint" for making CAFTA proceedings as expensive and protracted as possible, and for making sure that only a claimant with significant resources can reach the merits of the case. The Tribunal should not sanction that blueprint. Accordingly, it should at least decide that Respondent should bear the costs of this part of the proceeding.

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(continued)

*Genin v. Estonia*, ICSID Case No. ARB/99/2, Decision on Request for Supplementary Decisions and Rectification dated 2 April 2002, paras. 19-21.

**IX. CONCLUSION**

486. For the reasons stated above, the Tribunal should deny all of objections asserted by Respondent with prejudice; order Respondent to bear the costs of this part of the proceeding; 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 that the Tribunal may deem appropriate.

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/s/

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