INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

THE REPUBLIC OF EL SALVADOR'S MEMORIAL OBJECTIONS TO JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treaties

Laws

Cases

Other Authorities

I. INTRODUCTION

1. Pacific Rim Mining Corp. is a Canadian company that applied for an environmental permit and a mining exploitation concession in El Salvador through one of its subsidiaries in 2004. The environmental permit and the concession were not granted. Three years later, in December of 2007, Pacific Rim Mining Corp. changed the nationality of another subsidiary, Pac Rim Cayman, from the Cayman Islands to the United States. In 2009 this Canadian company used Pac Rim Cayman to stand in its place as the Claimant to initiate this arbitration. A review of the facts underlying this series of events reveals that Pacific Rim Mining Corp. and Pac Rim Cayman have abused the provisions of CAFTA and the international arbitration process by changing Pac Rim Cayman's nationality to a CAFTA Party to bring a pre-existing dispute before this Tribunal under CAFTA.

2. Before detailing the jurisdictional defects which pervade this arbitration, it is useful to recall that Pac Rim Cayman maintained at the very start of this arbitration that the local subsidiary it holds for Pacific Rim Mining Corp., Pacific Rim El Salvador ("PRES"), had a "perfected right" to a mining exploitation concession in El Salvador. Pac Rim Cayman alleged that PRES had already met all the legal requirements to obtain the concession, except for the environmental permit that El Salvador's Ministry of the Environment ("MARN") neither approved nor denied in 2004. However, in addition to that dispute with MARN, PRES and Pacific Rim Mining Corp. also had a parallel discussion with the Ministry of Economy ("MINEC") between 2004 and 2007 regarding PRES's lack of compliance with two other requirements equally necessary to obtain a mining exploitation concession: ownership or authorization for the surface area of the requested concession and submission of a Feasibility Study. The contemporaneous evidence presented during the Preliminary Objections showed that the Government rejected the attempts by PRES to reinterpret and change the mining law, or to have an entirely new mining law passed in 2007, so that the law would conform to PRES's pre-

existing application for the concession, instead of PRES changing its application to make it conform to the requirements of the law. Claimant must have known the facts regarding the concession application but still initiated this arbitration alleging that PRES had complied with all the requirements to obtain the concession except for the environmental permit, for which it faulted El Salvador. Ultimately, Claimant was forced to admit during oral argument on the Preliminary Objections that there was no "perfected right" to the concession. Indeed, because Claimant had not met two other requirements for the granting of the concession, El Salvador demonstrated that Claimant's Notice of Arbitration was based on a false factual and legal premise.

3. In this phase of the proceedings, El Salvador will demonstrate that, in addition to the lack of any legal merit in this case, the existence of this arbitration itself constitutes an abuse of the international arbitration system by a Canadian company that is neither a national of a Contracting State to the ICSID Convention nor a national of a Party to CAFTA. The Claimant standing before the Tribunal is a mere shell subsidiary without any substantial business activities. It is a surrogate for the Canadian parent and the result of the Canadian company's manipulation of the shell company's nationality and corporate form for the sole purpose of asserting jurisdiction over a dispute that already existed well before the change of nationality.

4. El Salvador has organized its objections to jurisdiction into four separate groups. Each group of objections is independent of the others, and each objection has its own independent legal consequences. Nonetheless, the facts set forth in the second objection, the denial of benefits under CAFTA, provide additional background for the other objections, particularly to the objection related to abuse of process.

5. In its first objection to jurisdiction, El Salvador requests that the Tribunal dismiss the entire case as a result of Claimant's abuse of process by changing its nationality to bring a pre-existing dispute before this Tribunal. For purposes of this objection, the important and well established facts are: i) a dispute existed between the Canadian company, including its shell surrogate Pac Rim Cayman, and the Government of El Salvador, over measures allegedly taken

by the Government well before Pac Rim Cayman's change of nationality, and ii) Pac Rim Cayman is attempting to bring that pre-existing dispute, and the damages that allegedly resulted from that dispute, to arbitration before this Tribunal pursuant to a Treaty under which neither Claimant nor its Canadian company are entitled to claim benefits.

6. The first objection to jurisdiction (abuse of process) would in and of itself be sufficient for the Tribunal to dismiss the entire case. In the interest of completeness, however, El Salvador has included additional objections that would require this entire case to be dismissed. The second and third objections would each also independently dispose of all CAFTA claims, while the last objection would independently dispose of the claims under the Investment Law.

7. In its second objection, El Salvador provides the support for its prior invocation of the denial of benefits provision in CAFTA Article 10.12.2, to deny all benefits of CAFTA Chapter 10, including the provisions on dispute settlement by international arbitration, to Pac Rim Cayman. El Salvador based its decision to invoke the denial of benefits provision on the facts that Pac Rim Cayman is owned and controlled by a Canadian company and Pac Rim Cayman does not have "substantial business activities" in the United States or in any other CAFTA Party. In fact, 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," and has been forced to admit that it is merely a holding company with no employees, no office, no phone number, and not even a desk to its name. Accordingly, El Salvador followed the CAFTA procedures necessary to invoke its denial of benefits rights and notified the United States Government in March of this year of its decision to invoke the denial of benefits provision in this case. The CAFTA claims brought in this arbitration must be dismissed as a result of the denial to Claimant of the benefits of CAFTA Chapter 10.

8. In the third objection, El Salvador shows that independent of the first two objections, there is no jurisdiction *ratione temporis* under CAFTA because the change of

nationality occurred after the measures, facts, acts or any omissions that led to this dispute took place.

9. Finally, in the last objection El Salvador provides multiple reasons independent of the abuse of process to find no jurisdiction for this dispute under the Investment Law of El Salvador.

II. THIS ARBITRATION MUST BE DISMISSED AS A RESULT OF CLAIMANT'S ABUSE OF PROCESS

10. Arbitral tribunals have the duty to protect the integrity of the system of international arbitration and ensure the proper administration of justice, and it is well established in international jurisprudence, including the decisions in arbitrations under the ICSID Convention, that tribunals have the inherent power to dismiss proceedings that constitute an abuse of the international arbitration system, even in cases where the tribunal under normal circumstances would have jurisdiction.[1]

11. The doctrine of Abuse of Process, also called Abuse of Right, exists to protect parties from misuse of international arbitration system. The doctrine is rooted in the universal requirement of good faith and in the inherent powers of arbitral tribunals to determine their own jurisdiction and to protect the integrity of the international arbitration system. As El Salvador will show in this Section, Claimant and its parent company, Pacific Rim Mining Corp., have abused the international arbitration system and process by belatedly and inappropriately changing Claimant's nationality to initiate a CAFTA arbitration neither Claimant nor its parent had a right to initiate.

[1] *See e.g.*, Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 British Yearbook of Int'l Law 195, 205 (2005) (**Authority RL-49**) (quoting 1964 dictum by Lord Morris: "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. . . . A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.").

A. Claimant changed its nationality in December 2007 in an attempt to gain CAFTA jurisdiction over a pre-existing dispute

12. Pac Rim Cayman, the Claimant in this arbitration, is alleging that El Salvador has breached the provisions of CAFTA and the Investment Law of El Salvador by failing to approve an environmental impact study and issue an environmental permit, and not granting a mining exploitation concession, *based on applications filed in 2004*.

13. Pac Rim Cayman brought these claims as a national of the United States. In paragraph 2 of its Notice of Arbitration, Pac Rim Cayman stated that "PRC [Pac Rim Cayman] is a U.S. investor organized under the laws of Nevada, United States of America . . . ." Although it is true that Pac Rim Cayman is a national of the United States now and was a national of the United Sates when it filed the Notice of Arbitration in April 2009, Pac Rim Cayman did not mention anywhere in the 55 pages of its Notice of Arbitration that *it was originally a Cayman Islands holding company that did not change its nationality to the United States until December 2007*.[2] Thus, Pac Rim Cayman was not a United States national at the time the events forming the basis for this dispute occurred in the years prior to December 2007.

14. Pac Rim Cayman was originally incorporated in the Cayman Islands in 1997, as a holding company for Pacific Rim Mining Corp., a Canadian company, the real party in interest in this arbitration.

15. Pac Rim Cayman remained a Cayman Islands company for the next ten years, until it was de-registered from the Cayman Islands on December 11, 2007, and registered two days later as a limited liability company in the state of Nevada, United States of America.

16. In January of 2008, just one month after the change of nationality, the Canadian parent, Pacific Rim Mining Corp., began to assert in its regulatory filings to the United States Securities and Exchange Commission that CAFTA protections were available for its investments in El Salvador. It is inconceivable—and Claimant does not claim—that the basis for this arbitration arose in the *one month* time period between the incorporation of Claimant as a United

[2] The term "national of a Party" as used in this Memorial also refers to an "enterprise of a Party."

States entity, in December 2007, and the assertion of CAFTA protections for its investments in El Salvador in January 2008. Rather, it is clear that once the United States entity was formed, the Canadian company immediately sought to apply CAFTA to the already long existing facts related to its 2004 application for an environmental permit submitted as a necessary precondition to obtain a mining exploitation concession. In line with these statements of the Canadian parent company, with its new United States nationality, Pac Rim Cayman filed the Notice of Intent in December 2008 and the Notice of Arbitration in April 2009.

17. To be clear, El Salvador is not alleging that the Canadian company's decision to create a holding company in the Cayman Islands in 1997, or the subsequent transfer of its interests in El Salvador to the holding company in 2004, is an abuse of process. Absent specific restrictions in the relevant treaty or instrument of consent, *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.

18. What Claimant and its parent company did in the present case, however, is not *prospective nationality planning* but a *retrospective* gaming of the system to gain jurisdiction for an *existing* dispute based on *existing* facts over which there would not otherwise be jurisdiction. This is an abuse of the international arbitration system and process.

19. The doctrine of Abuse of Process is firmly established in international law. The International Court of Justice and ICSID tribunals have long recognized their inherent power to dismiss abusive claims. The ICSID tribunal in *Phoenix Action v. Czech Republic* was the first to dismiss an arbitration based on a direct invocation of the doctrine of abuse of process in a decision, discussed below, that is applicable to the present case.[3]

20. After the decision in *Phoenix Action*, another ICSID tribunal, in *Mobil v. Venezuela*, considered a situation of change of nationality that was in some aspects similar to the case brought by Pac Rim Cayman before this Tribunal.

[3] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 (**Authority RL-50**).

21. As in the case now before this Tribunal, the *Mobil v. Venezuela* case also involved a situation where a dispute existed before the change of nationality. The *Mobil v. Venezuela* tribunal indicated that if the claimants in that case had tried to do what Pac Rim Cayman is doing in this case—using a change of nationality to assert jurisdiction over a dispute born prior to the change of nationality—it would have constituted an abuse of process or abuse of right. The tribunal used the following categorical language:

> [w]ith respect to pre-existing disputes . . . the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs."[4]

22. The similarity between the two cases ends with the presence of a pre-existing dispute being brought before this Tribunal. The present case involves a dispute that was born before the change of nationality. In *Mobil v. Venezuela*, the facts set forth in the Notice of Arbitration related to both a pre-existing dispute and a new dispute that arose after the change of nationality. The claimants in *Mobil v. Venezuela* at some point took this admonition to heart, followed the internationally recognized rules of process, and limited their claims to alleged breaches of the treaty and damages that took place *after the change of nationality*. Pac Rim Cayman, by contrast, has persisted in its attempt to abuse the CAFTA process by maintaining this arbitration for alleged breaches that took place *before the change of nationality*.

23. The abusive nature of the change in nationality is compounded by conduct of Claimant and its Canadian parent intended to conceal the nature and purpose of their actions. As discussed in detail below, Pac Rim Cayman and its Canadian parent have used a combination of superficial changes in corporate organization and misleading statements to try to obscure the fact

[4] *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, para. 205 (**Authority RL-51**).

that the Canadian parent company changed the nationality of one of its shell holding companies for the sole purpose of bringing a CAFTA arbitration that it did not have the right to initiate.

24. In sum, Pac Rim Cayman has been named as the Claimant in this arbitration through impermissible *retrospective nationality planning*, in an attempt to abusively obtain CAFTA protection in relation to a dispute that predated the change of nationality. In addition, Pac Rim Cayman has tried to conceal this abuse through misleading words and actions. El Salvador hopes the Tribunal will not allow this abuse of process to stand.

B. The facts and *measures* that gave rise to this dispute took place before Claimant's change of nationality

1. All the facts that gave rise to the dispute took place between 2004 and 2006

25. The change of nationality occurred long after the facts that gave rise to the dispute and the measures alleged by Claimant. According to the Notice of Arbitration and other documents already submitted in this arbitration, the facts underlying the claims in this arbitration occurred between 2004 and 2006, while Pac Rim Cayman's change of nationality occurred at the end of 2007.

26. Pacific Rim El Salvador applied for the environmental permit and submitted an Environmental Impact Study in 2004. Pac Rim Cayman admits in the Notice of Arbitration that under the laws of El Salvador the environmental permit had to be approved or denied within 60 business days after submitting the original Environmental Impact Study.[5]

27. It is undisputed that if a request for an environmental permit is not acted upon within 60 days, the law provides that the permit is presumed to have been denied. Applicants

[5] NOA, para. 41 ("In any case, the permit must be either granted or denied within sixty (60) working days of submission of the original EIA [*Estudio de Impacto Ambiental*, or Environmental Impact Study]"); para. 57 ("In September 2004, PRES filed its Exploitation EIA with MARN. By December 2004, the company had not yet received a response to its EIA"); and para. 64 ("From December 2006 through December 2008, however, MARN ceased all official communication with the company in regards to its application, notwithstanding the fact that Salvadoran law clearly stipulates that MARN must take definitive action on EIA submissions ***within 60 business days***, and even under exceptional circumstances, ***within a maximum of 120 business days***.") (emphasis in original).

then have the right to challenge this presumptive denial. The right to challenge the presumptive denial is explicitly provided in the Environmental Law for the environmental permit.[6] It is also established generally in the Salvadoran Law on Administrative Proceedings for all applications submitted to government ministries.[7] Thus, under Salvadoran law, the applicant here, Pacific Rim El Salvador had a right in December 2007 to challenge the presumptive denial of its environmental permit. That right to go to court to challenge the presumptive denial, in turn, also lasted for 60 days.[8]

28. Indeed, the facts show that the company was well aware of this time limit in the law, and its effect, in 2004. The President of Pacific Rim El Salvador sent a letter to the Minister of the Environment after the 60-day period had ended without a response stating that more than 60 business days had passed without a decision from MARN and that the delay was harming the company.[9] Pacific Rim El Salvador copied its local counsel on that letter, which indicates that the company was aware of the legal significance of the 60 days and of it legal rights under Salvadoran law.[10]

29. Upon the expiration of the 60-day period, the administrative law doctrine of denial by administrative silence gave Pacific Rim El Salvador the right to file a petition to the Chamber of Administrative Litigation of the Supreme Court of El Salvador to challenge the denial. Pacific Rim El Salvador and its beneficial owner Pacific Rim Mining Corp., however, chose not to take the legal steps necessary to challenge the denial or force a prompt decision on their environmental permit under Salvadoran law.

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[6] Environmental Law of El Salvador, Art. 24 (CL-2).
[7] Law of Administrative Proceeding of El Salvador, Art. 3 (CL-44).
[8] Law of Administrative Proceeding, Art. 12 ("The timeframe for filing a challenge in a case of presumed denial shall be sixty days from the day after the request is considered to have been denied, pursuant to the provisions of Article 3 b).") ("El plazo para interponer la demanda en el caso de denegación presunta, será de sesenta días, contados desde el siguiente a aquél en que se entienda desestimada la petición, de acuerdo con lo dispuesto en la letra b) del artículo 3.").
[9] Letter from PRES to Minister of the Environment, Dec. 15, 2004 (**Exhibit R-55**).
[10] Letter from PRES to Minister of the Environment, Dec. 15, 2004.

30. In short, as a matter of law, the application for the environmental permit was effectively denied in December 2004, and Pacific Rim El Salvador lost the right to challenge that denial in court 60 days later.[11] Therefore the facts giving rise to this dispute, and the company's right to seek immediate legal redress under the law of El Salvador, had largely taken place as of December 2004. To use the words of the *Mobil v. Venezuela* tribunal, the dispute was unquestionably born by that date.[12]

31. It is true that for the next two years there were communications between MARN and Pacific Rim El Salvador with regard to the application for the environmental permit, including a submission of a new environmental impact study in 2005. But even under the most generous approach to Claimant's statement of facts, the facts that gave rise to this dispute would at most extend until December 2006, when according to the Notice of Arbitration, all official communications between the Ministry of the Environment and Pacific Rim El Salvador ceased.[13]

32. Thus, Claimant knew or should have known by December 2006, if not by December 2004, that the time period under Salvadoran law for MARN to issue a decision on the environmental permit had expired in December 2004, that without the environmental permit it could not obtain the mining exploitation concession, that its application had been presumptively denied as a matter of law, and that it had the right to challenge that denial of its application by administrative silence in Salvadoran courts. Claimant chose not to exercise that right and lost it 60 days after the denial.

33. Claimant's claims against El Salvador are inextricably linked to the environmental permit, because, as Claimant acknowledges, without the environmental permit, the Ministry of Economy cannot grant a mining exploitation concession, even if all other requirements are met.[14] Therefore, even if the company had somehow cured the two other defects in its mining exploitation concession application (failure to show ownership or authorization for the 12.75 km^2

[11] Law of Administrative Proceeding, Art. 12.
[12] *Mobil v. Venezuela*, paras. 206, 209.
[13] NOA, para. 64.
[14] NOA, para. 65.

surface area of the concession and failure to submit a feasibility study), there would be no independent breach of CAFTA and of the Investment Law stemming from the lack of action by the Ministry of Economy in granting the mining exploitation concession.

34. All of the facts related to the December 2004 application for the mining exploitation concession occurred before the change in nationality. As was made clear in the Preliminary Objections phase, Pacific Rim El Salvador filed an application for a mining concession for the El Dorado area in December 2004 but failed to meet other legal requirements necessary to have that application approved (land ownership/authorization for the area of the concession and submission of a feasibility study). The company was made aware of the fatal defects in its application in March 2005, and again in October 2006. As admitted by Claimant during the Preliminary Objections briefing, the company voluntarily decided not to try to correct these defects or file an amended application.[15] Instead, the company tried to get the administration to change its interpretation of the mining law. When this effort failed, the company attempted to amend the mining law. When that effort, too, failed, the company lobbied for the passage of a new mining law to change the legal requirements to forgive the two defects in its application. The significant point is that all of these actions took place between 2005 and 2007, before the change of nationality.[16]

35. Thus all of the facts underlying Claimant's claims took place prior to Pacific Rim Mining Corp.'s change of nationality of its Cayman Islands shell holding company—the Claimant—to the United States in order to seek the jurisdiction of this Tribunal over the dispute.

[15] Claimant's Rejoinder on Respondent's Preliminary Objection, para. 49 ("Claimant could have revised the application . . . or Claimant could have proceeded with the application, hoping that the Bureau of Mines would ultimately resolve its apparent uncertainty on this issue in Claimant's favor. Claimant chose the latter course.").
[16] El Salvador's Reply (Preliminary Objections), paras. 81-94.

2. CAFTA claims relate to *measures*

36. CAFTA Article 10.1 makes it clear that CAFTA Chapter Ten applies to measures. CAFTA Article 2.1, "Definitions of General Application," provides that "**measure** includes any law, regulation, procedure, requirement, or practice."

37. In order to fit within the scope of CAFTA Chapter 10, a measure must be "adopted or maintained by a Party" and "relat[e] to" investors of another Party or covered investments.[17] In other words, measures are actions by or attributable to the State that have an actual effect on investors or investments of a national or an enterprise of another CAFTA Party.

38. A measure may also be a failure to act when there is a legal duty to act. In *RDC v. Guatemala*, for example, the tribunal identified three measures involved in the arbitration, two of which were alleged failures to act.[18]

3. The alleged *measures* that gave rise to this arbitration took place before December 2007

39. In the Notice of Arbitration, Pac Rim Cayman defined its claims as follows:

> PRC's claims arise out of unlawful and politically motivated *measures* taken by the Government of President Elías Antonio Saca González, through the *Ministerio de Medio Ambiente y Recursos Naturales* ("MARN") and MINEC, against Claimant's investments.[19]

40. The *measures* Pac Rim Cayman complains about in this arbitration were allegedly "taken by the Government . . . through" MARN and MINEC. These concrete measures are the alleged *failure of MARN and MINEC to act* upon Claimant's applications for the environmental permit and the El Dorado Concession application, respectively.[20] Thus, as in the *RDC v.*

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[17] The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004("CAFTA") (RL-1) Article 10.1.1.
[18] *Railroad Development Corporation v. Republic of Guatemala,* ICSID Case No. ARB/07/23*,* Decision on Objection to Jurisdiction, Nov. 17, 2008, paras. 52, 62 (RL-6). Two of the measures were Guatemala's alleged failure to pay into the trust fund and its alleged failure to remove squatters from the right of way.
[19] NOA, para. 7 (emphasis added).
[20] NOA, paras. 81, 91, 107, 108.

Guatemala arbitration, where there was an allegation of a failure to act when there was a legal duty to act, the measure complained of here is MARN's failure to act on the application for the environmental permit needed for the exploitation application to be even considered.

41. Specifically, regarding the Ministry of the Environment, the company complains that MARN did not issue a decision on the environmental permit that was one of the requirements to obtain the Mining Exploitation Concession for El Dorado. But as El Salvador has shown before, the failure of MARN to grant or deny that application within 60 business days of its submission was a presumed denial of the application, and thus the *measure* of which Claimant complains occurred in December 2004, a fact the company recognized with a letter to the Minister of the Environment.[21]

42. The failure to grant or deny the environmental permit is the only measure on which Claimant actually bases its claims for El Dorado. Indeed, as stated explicitly in the Notice of Arbitration, Claimant's entire case is based on its allegation that the only reason Claimant has not obtained the mining exploitation concession for El Dorado is MARN's failure to grant an environmental permit:

> As a result of the Government's *inaction*, PRES has been unable to obtain the exploitation concession to which it is legally entitled, and which it legitimately *expected to receive upon complying with the requirements of the environmental permitting process. With the exception of the environmental permit that remains unjustifiably withheld by the government,* PRES has met all of the requirements to receive the concession.[22]

43. With regard to the Ministry of Economy, Claimant complains that MINEC did not grant the concession applied for by the company in December 2004. But, as stated above, its claim is based on MARN's alleged failure to grant an environmental permit. As El Salvador has shown before and the company itself has admitted, MINEC could not have legally granted the concession without the environmental permit, even assuming the company had complied with all

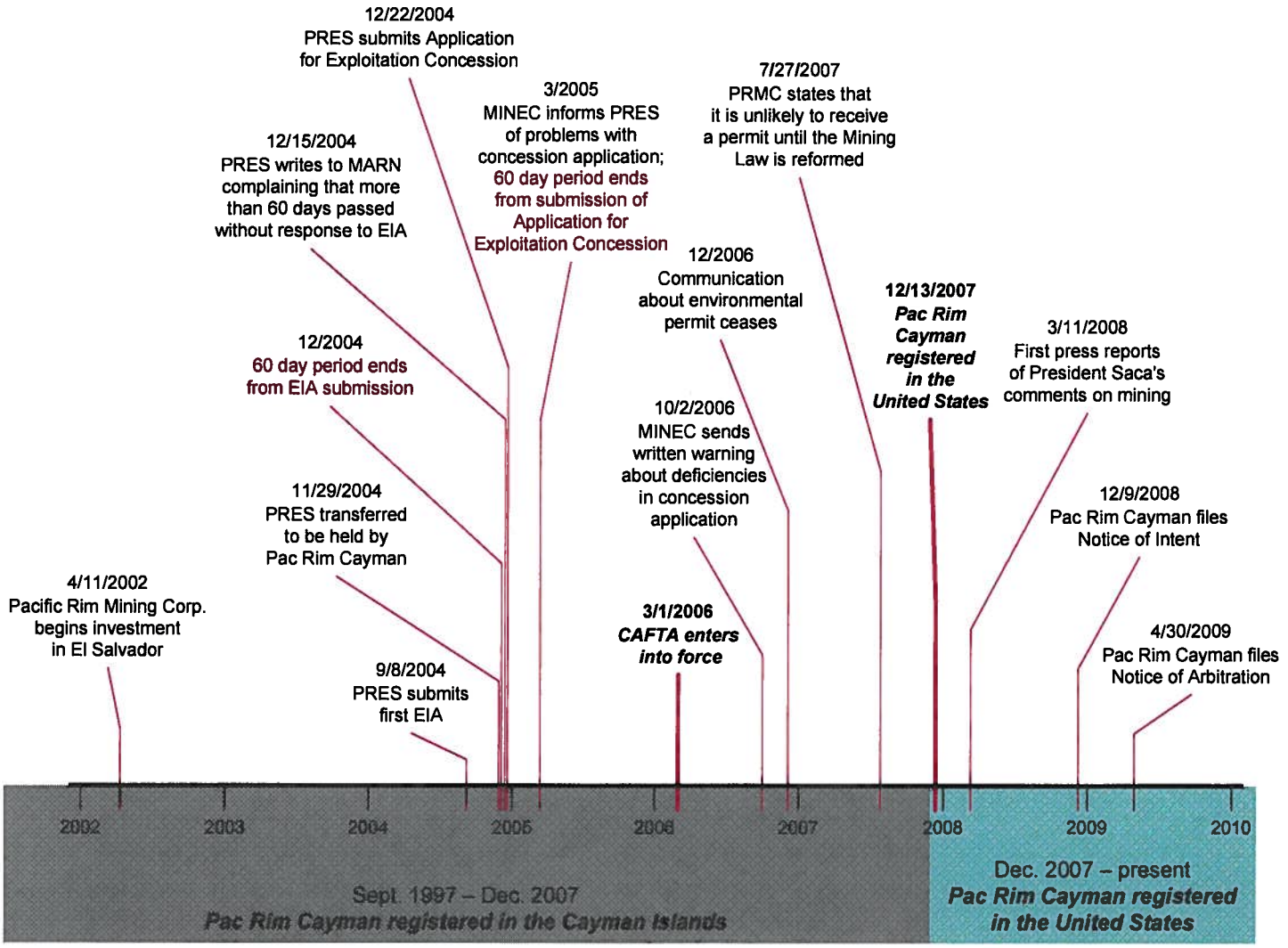
[21] Letter from PRES to Minister of the Environment, Dec. 15, 2004.
[22] NOA, para. 65 (emphasis added). *See also* El Salvador's Preliminary Objections, para. 37.

the other requirements under the mining law, which it did not. In any event, all facts and communications between the company and MINEC took place between 2004 and 2006, and the company's attempt to change the law took place in 2007.[23] Thus all measures, actions and possible omissions that allegedly gave rise to the dispute took place prior to the change in nationality.

44. Finally, Claimant includes claims related to exploration licenses for areas near El Dorado. For the first of these areas, Huacuco, the EIA was submitted in February 2006.[24] The Government did not grant or deny the environmental permit within 60 business days, and by December 2006, communication about the Huacuco permit ceased.[25] Thus, the relevant measure—not approving or denying the environmental permit within the time limit provided by Salvadoran law—also occurred long before December 2007. The EIAs for Guaco and Pueblos were submitted in August 2007.[26] Again, the Government did not act upon the permits within 60 days. By November 2007 the company could have challenged the presumed denial of these environmental permits. Instead, Pacific Rim Mining Corp. changed the nationality of its subsidiary and initiated CAFTA arbitration.

45. Below is a timeline of events from Pacific Rim Mining Corp.'s original investment in El Salvador in 2002 to the filing of the Notice of Arbitration in 2009.

[23] El Salvador's Reply (Preliminary Objections), paras. 81-94.
[24] NOA, para. 68.
[25] NOA, para. 69.
[26] NOA, para. 70.


12/22/2004
PRES submits Application for Exploitation Concession
3/2005
MINEC informs PRES of problems with concession application; 60 day period ends from submission of Application for Exploitation Concession
7/27/2007
PRMC states that it is unlikely to receive a permit until the Mining Law is reformed
12/15/2004
PRES writes to MARN complaining that more than 60 days passed without response to EIA
12/2006
Communication about environmental permit ceases
12/13/2007
Pac Rim Cayman registered in the United States
3/11/2008
First press reports of President Saca's comments on mining
12/2004
60 day period ends from EIA submission
10/2/2006
MINEC sends written warning about deficiencies in concession application
11/29/2004
PRES transferred to be held by Pac Rim Cayman
12/9/2008
Pac Rim Cayman files Notice of Intent
4/11/2002
Pacific Rim Mining Corp. begins investment in El Salvador
3/1/2006
CAFTA enters into force
4/30/2009
Pac Rim Cayman files Notice of Arbitration
9/8/2004
PRES submits first EIA
2002
2003
2004
2005
2006
2007
2008
2009
2010
Sept. 1997 – Dec. 2007
Pac Rim Cayman registered in the Cayman Islands
Dec. 2007 – present
Pac Rim Cayman registered in the United States

4. Claimant has attempted to confuse the *measure* that gave rise to the dispute with facts that occurred after the dispute arose

46. In an attempt to hide that the change in nationality occurred after the measure affecting its investment, Claimant tries to portray the dispute in terms of alleged statements in March 2008 by then-President Saca, as if those statements were somehow capable of retroactively delaying the ripening of the parties' dispute from 2004 to 2008. This position is unsupportable.

47. Claimant attempts to accomplish this sleight of hand by reference to a "policy"[27] or a *de facto* ban on mining, allegedly in place in El Salvador since 2006 during the Government of former President Saca, a policy which was allegedly reaffirmed in 2008.[28] El Salvador emphatically denies that such a policy exists or ever existed. But even assuming for the sake of argument that such a policy existed, only the *measures* necessary to *apply* or *implement* a policy can constitute a breach of CAFTA. Indeed, even according to Claimant, the alleged policy or *de facto* ban was "implemented" through the *measures* alleged in the Notice of Arbitration, all of which took place prior to the change of nationality in 2007.[29] In this case, the measure at issue took place in December 2004, when MARN did not grant or deny the environmental permit within the 60 business days provided for under the law of El Salvador.

48. It is clear from the Notice of Arbitration that Claimant recognizes that CAFTA does not apply to policies in a vacuum, but to *measures*. And a policy is not a measure. Public

[27] NOA, para. 77.
[28] NOA, paras. 9, 107. *See also* Claimant's Response to El Salvador's Preliminary Objections, paras. 5-12, 55-56, 136.
[29] NOA, para. 74 ("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.") (emphasis added). *See also* Claimant's Response to El Salvador's Preliminary Objections, para. 179 ("The failure of the Government to act on Claimant's applications was not simply the result of bureaucratic delay or incompetence. Rather, *it was the result of the imposition by El Salvador's President of a* de facto *ban on all mining activities in the country*.") (emphasis added); Claimant's Rejoinder on Respondent's Preliminary Objection, para. 4 ("Claimant's allegations that former President Saca (followed by current President Funes) illegally declared a *de facto* ban on all metallic mining activities in El Salvador, and that the administrative agencies responsible for mining in the country have, *as a result*, *failed to take any action on Claimant's pending applications*.") (emphasis added).

statements of a head of state, in a situation alleged by Claimant in this case, are not *measures* if they are not accompanied by specific action that causes harm to investors. In this case, the statements are not the measures that allegedly harmed Claimant. Indeed, any statements by President Saca in 2008 and 2009, or by President Funes in 2009 or 2010, could not have done any more damage than what the Government had allegedly already done by not timely granting or rejecting the environmental permit and the application for the concession. Even accepting Claimant's description of events in the Notice of Arbitration, the press reports cannot be understood as *measures* that caused harm to Claimant. Claimant asserts that the 2008 statements only made Claimant aware of the alleged governmental *rationale* behind the measures that occurred many years before.[30] Even if Claimant is to be believed that those statements revealed the Republic's true "motives" in taking the measures it took years before, it was the earlier measures—not granting the applications in 60 business days—and not the later statements, that allegedly harmed Claimant. In any event, the dispute already existed well before December 2007, when the change of nationality took place. This is all that is required for a finding of abuse of process.

C. Claimant attempted to conceal its abuse

1. Claimant has been less than forthcoming about Pac Rim Cayman's identity

49. Claimant did not mention the change of nationality in the Notice of Intent or in the 55 pages of its Notice of Arbitration. What is worse, Claimant took active steps before initiating the arbitration to try to conceal the abuse related to the change of nationality, and has made misleading statements in the course of this arbitration to further obscure this abuse.

50. Although these objections to jurisdiction are legally self-standing and independent of each other, El Salvador directs the Tribunal's attention not only to the facts presented in this Section but also to those in the next Section related to the denial of benefits provision in CAFTA.

[30] NOA, para. 74.

The more extensive treatment of the facts in that Section reinforces the evidence of Claimant's abuse of process and of Claimant's attempts to hide its abuse.

51. From the very beginning of this arbitration, in the Notice of Intent, Notice of Arbitration, and in the course of El Salvador's Preliminary Objections, Claimant Pac Rim Cayman has presented itself as an operational mining company conducting mining exploration and exploitation in Latin America. In the Notice of Arbitration, for example, Claimant Pac Rim Cayman describes itself as "an environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas."[31]

52. Claimant changed its story only *after* Claimant realized that El Salvador had already submitted to the United States Government evidence that Pac Rim Cayman is only a shell company that does not have business activities in the United States or anywhere else. At that point Claimant was compelled to admit that it was merely "a holding company."[32] This less than candid response belies what the same Claimant had said only one month earlier, when it was still trying to sustain the appearance that it was an operational company.[33] Even as it admitted that it is a holding company, however, it also made the disingenuous claim that it had never denied being a holding company. Claimant's words are carefully chosen. It may be a narrowly correct statement to say that Claimant "never disputed that Pac Rim Cayman is a holding company,"[34] but it is plainly true that Claimant made misleading statements in its Notice of Intent, Notice of Arbitration, and its August 17, 2010 letter to the Tribunal, specifically alleging facts suggesting that Pac Rim Cayman is much more than a holding company.

[31] NOA, para. 14.
[32] El Salvador filed its objections to jurisdiction on August 3, 2010. Claimant wrote two letters asserting facts related to the jurisdictional objections. The first letter, dated August 17, 2010, suggested that Claimant was "repatriated" to the United States. (**Exhibit R-56**). The second letter, dated September 13, 2010, accepted that Claimant is a holding company and that the facts about it not having activity in the United States are not in dispute. (**Exhibit R-57**).
[33] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 2, 3, 4, 6.
[34] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 5.

53. The following table shows how Claimant was forced to change its original misleading description of itself based on the facts it has now been forced to admit are true:

At first, Claimant Pac Rim Cayman ("PRC") asserted:	**Intervening factor:**	**Claimant then changed the story to:**
"PRC is a growth-oriented, environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas." (Dec. 9, 2008, NOI, ¶ 6) "PRC is an environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas." (Apr. 30, 2009, NOA, ¶ 14) At the hearing on the Preliminary Objections, immediately after defining "Pac Rim" as "the U.S. sub" as opposed to "Pacific Rim," the Canadian parent, Mr. Ali asserted, "Pac Rim is an environmentally conscious and socially responsible company. . . . Pac Rim's intent, its business model is to use the safest and most environmentally friendly mining methods in the world and bring them to El Salvador." (Transcript Day 1, May 31, 2010 at 205-207).	*On September 3, 2010, PRC became aware that El Salvador had already submitted evidence of PRC's lack of business activities to the United States Government*	"To be clear, Claimant does not dispute and has never disputed that Pac Rim Cayman is a holding company. Pac Rim Cayman was a holding company before December 2007 and remains a holding company today." (Sept. 13, 2010 Letter to the Tribunal, at 5)

54. Claimant, Pac Rim Cayman, has thus been less than forthcoming in this arbitration about its identity and activities. Contrary to Claimant's assertions, Pac Rim Cayman is not a mining company, it is not growth-oriented, and it is not dedicated to extracting minerals. Pac Rim Cayman conducts no operations whatsoever. In fact, it is a holding company of a Canadian exploration company. Pac Rim Cayman was "dedicated to" nothing more than holding the Canadian company's shares in certain subsidiaries, and now is "dedicated to" being a surrogate Claimant with a newly-acquired nationality of convenience abusing the international arbitration process by initiating an arbitration for a dispute it did not have a right to initiate under CAFTA.

55. Aside from those incorrect statements, Claimant included other misleading statements in its Notice of Arbitration and other communications to the Tribunal which created the false impression that Pac Rim Cayman is active in the United States and was involved in the projects in El Salvador. The statements are calculated to mislead the Tribunal to reach the following false conclusions: that i) Pac Rim Cayman is an operational company, ii) Pac Rim Cayman had business activities in the United States before December 2007, iii) Pac Rim Cayman was involved in the decision to invest and directly invested in El Salvador, and iv) the Salvadoran Government knew it was dealing with a company incorporated in the United States. None of these propositions are true.[35]

56. Claimant's misleading statements are quoted below alongside the truth that El Salvador has now been able to uncover.

[35] The truth is skewed by Claimant's substitution of "[PRC]" where quotes actually referenced its Canadian parent Pacific Rim Mining Corp. and by Claimant's decision to not provide certain dates (or bury them with unrelated facts).

Pac Rim Cayman's Misleading Statements about its Corporate Identity

Representation	How it is inaccurate
"in December 2007, the Pacific Rim Companies were restructured so that PRC - which has always been a direct subsidiary of Pacific Rim - was repatriated to Nevada . . . ." "PRC was repatriated to Nevada as a Nevada limited liability company, and became the direct or indirect owner of all foreign subsidiaries." "PRC was repatriated from a jurisdiction where it had no real business operations to the jurisdiction from which it was actually managed." (Aug. 17, 2010 Letter to the Tribunal, at 2, 3, 4)	**PRC could not be "repatriated" as it had never been a U.S. company that could be "expatriated" to the Cayman islands and then "repatriated" to the United States; to the contrary, PRC was created in the Cayman Islands in 1997, as a holding company for its Canadian parent. It never before had any business activities in the United States.**
"PRC is a Nevada entity not merely in form but in substance as well. It maintains actual offices in Reno, Nevada, the location from which it has always been managed." (Aug. 17, 2010 Letter to the Tribunal, at 6) "The present case bears no resemblance to *Phoenix.* PRC's Salvadoran operations have been consistently managed out of Nevada since 2002. The corporate reorganization in 2007 did not involve creating a shell corporation in a jurisdiction where the company had no real business operations." (Aug. 17, 2010 Letter to the Tribunal, at 4)	**PRC is a "shell company" which does not have its own offices, phone number, office equipment, employees, etc.** As Claimant later admitted, "Respondent's request [for] evidence concerning Pac Rim Cayman's employees, officers, bank accounts, contracts, leases, board minutes, websites, telephone numbers, equipment, furniture, insurance policies, employee handbooks, job postings, budget sheets, UCC filings, *etc.* - has nothing to do with the bases for jurisdiction as set forth by the Claimant. The sole purpose of these requests is to establish that Pac Rim Cayman is a holding company - a fact that Claimant does not deny." (Sept. 13, 2010 Letter to the Tribunal, at 7) Claimant admitted that the "basic facts", *i.e.*, about PRC having no office, no phone number or e-mail, no employees, and no activity apart from being the named Claimant in this arbitration "do not seem to be in dispute." (Sept. 13, 2010 Letter to the Tribunal, at 12)

Representation	How it is inaccurate
"Since 2002, Pacific Rim, PRC, and the Enterprises have spent many tens of millions of U.S. dollars in El Salvador on infrastructure, community development initiatives, and mineral exploration and development activities related to the El Dorado Project. Their activities in El Salvador have been undertaken in reliance on and with the reasonable investment-backed expectation of being able to engage in income-generating mine development pursuant to a legally authorized exploitation concession." (NOA, ¶ 53) "At a press conference, President Saca announced that he intended to revisit the entire legal framework that was already in place to regulate mining in El Salvador, the very system on which PRC and the Enterprises had relied in investing many tens of millions of dollars in the country." (NOA, ¶ 75)	**PRC was not even made the holding company for Pacific Rim Mining Corp.'s shares in Pacific Rim El Salvador until November 30, 2004, after Pacific Rim Mining Corp. had decided to invest in El Salvador in early 2002 and made investments from 2002 to late 2004.** **As a mere holding company, Claimant never made any investments in El Salvador and did not itself "rely" on anything.** In fact, Claimant elsewhere admitted that "[o]n November 30, 2004, Pacific Rim vested sole ownership rights in PRES in its subsidiary, PRC." (NOA, ¶ 51) This admission belies Claimant's attempt, just two paragraphs later, to associate PRC with Pacific Rim's earlier work in El Salvador.
"PRC - which has been capitalized *entirely* on the legitimate expectation that its Enterprises will undertake successful, environmentally and socially responsible exploitation . . . will suffer irreparable harm to its shareholder relations, its overall business reputation, and ultimately, to its very existence." (NOA, ¶ 104) "The ultimate aim of the Enterprises is to employ a local Salvadoran labor force in order to develop and produce precious metals within El Salvador, thereby generating profits for the Enterprises, for their employees, for the shareholders of PRC, and for the country of El Salvador." (NOA, ¶ 116) "unless the Government reverses its conduct immediately, PRC will have lost the entire US$ 77 million that it has directly expended to date in furtherance of PRES's and DOREX's exploration licenses and eventual exploitation concessions in El Salvador." (NOA, ¶ 103)	**PRC does not have "shareholders" or a "business reputation" and this holding company did not "directly expend" any money in El Salvador.** In fact, Pacific Rim Mining Corp. is the "sole Member" of PRC.[36] Also, by the time PRC was associated with the project, much of the investment was already completed—"During 2002 and 2003, PRES carried out significant exploration activities at the El Dorado site under valid exploration licenses. By early 2004, PRES had verified the substantial gold ore deposits at the El Dorado Norte and El Dorado Sur license areas. PRES immediately undertook the necessary steps to secure an exploitation concession from MINEC, and accordingly, in March 2004, filed an application with MARN for an environmental permit . . . ." (NOA, ¶ 54)[37]

[36] Letter from Claimant to ICSID, June 4, 2009 (**Exhibit R-58**).

[37] El Salvador will also show, if it becomes necessary, that the amount claimed to have been invested is highly inflated. *See, e.g.*, NOA, Exhibit 8, Letter from T. Shrake to President Saca, Apr. 14, 2008

Representation	How it is inaccurate
In the NOA, Claimant states that, "[i]n a press interview dated July 15, 2008, President Saca was specifically asked about PRC and the Enterprises' pending permits." (NOA, ¶ 77)	**The 2008 press report never referred to Pac Rim Cayman, but rather mentioned that the "Canadian company Pacific Rim" might try to bring arbitration through U.S. shareholders.** The article actually reported: "When asked about statements by the Canadian company Pacific Rim, which could initiate international arbitration proceedings against the State, Saca said . . . ." Claimant did not provide the rest of the article, which says: "For its part, Pacific Rim has threatened to initiate an arbitration under CAFTA because the government has not granted the exploitation permit. Thomas Shrake, the company's representative, said recently that among its shareholders are U.S. investors, therefore the arbitration will be conducted under the agreement."[38]

(asserting that the company had invested $30 million) (**Exhibit R-59**). *Compare* NOA, para. 128 (claiming $77 million in out-of-pocket expenses).

[38] "Saca afirma que no concederá permisos de extracción minera, Cadena Global, July 15, 2008 (**Exhibit R-60**) ("Al ser consultado sobre declaraciones de la empresa canadiense Pacific Rim, que podría iniciar un proceso de arbitraje internacional contra el Estado, Saca dijo . . . ."); ("Por su parte, Pacific Rim ha amenazado con iniciar un arbitraje en el marco del TLC . . . . Thomas Shrake, representante de la empresa, afirmó recientemente que entre sus socios existen inversionistas estadounidenses por lo que el arbitraje se enmarcará en lo pactado en ese acuerdo."). *Compare* NOA, para. 77, n. 50.

Representation	How it is inaccurate
In the NOA, Claimant mentions a letter from "Mr. Tom Shrake, who serves both as a Director and a Manager of PRC" to President Saca (NOA, ¶ 76)	**The April 2008 letter threatening CAFTA arbitration was written by Mr. Shrake in his role as President and CEO of the Canadian company.** The letter does not refer to "Pac Rim Cayman" but rather to the situation of "Pacific Rim" in El Salvador and it is signed by Tom Shrake, "President and CEO" (NOA, Exhibit 8). Claimant is trying to take advantage of the confusing situation it has created by making the President and CEO of the Canadian company also the Manager of PRC. But the fact that the letter was from the Canadian company is confirmed by comparing Exhibit 1, the waiver, signed by Thomas C. Shrake on behalf of PRC, "Manager". Nor was Shrake President of the Salvadoran subsidiary—letters from PRES in April 2008 were signed by W. Gehlen as President.
"Specifically, PRC is an enterprise of the United States of America, duly organized under the laws of the state of Nevada, which has made an investment in the territory of El Salvador. The United States of America is a Party to CAFTA, which it passed into law on August 2, 2005. CAFTA was implemented by the United States on February 28, 2006 by virtue of Presidential Proclamation 7987." (NOA, ¶ 100)	**In the context of claiming to meet jurisdictional requirements, Claimant mentions that CAFTA entered into force in 2006, but is careful not to mention that PRC was incorporated in Nevada only in December 2007.**
"Pac Rim Cayman's direct ownership of Pacific Rim Exploration Inc. - which, as explained in the 17 August letter, has always been a Nevada corporation, and which employed and compensated multiple professional geologists who developed and worked on the El Salvador project - also establishes 'substantial business activities' in Nevada within the meaning of CAFTA Article 10.12.2." (Sept. 13, 2010 Letter to the Tribunal, at 6)	**Even after admitting that Pac Rim Cayman is just a holding company, Claimant continues to try to conceal Pac Rim Cayman's lack of activity by attempting to attribute to Pac Rim Cayman the activities of other subsidiaries that were unrelated to Pac Rim Cayman at the time the activities took place.** In fact, Pacific Rim Exploration existed independently of Pac Rim Cayman until PRC was moved to the United States in December 2007—thus the geologists it employed before that date (when most of the work in El Salvador was done), while PRC was in the Cayman Islands, have nothing to do with Pac Rim Cayman. (Exhibits A and B to Aug. 17 letter).

2. Claimant's response to El Salvador's Request for Information further demonstrates that earlier attempts to conceal its abuse of process must be rejected

57. When forced to submit documentation to support its allegations regarding its identity, Claimant provided documents on October 6, 2010 that only confirm that Pac Rim Cayman is a shell company moved to the United States to gain access to CAFTA.

58. Despite El Salvador's clarification in the Request for Information that the information provided should only apply to Pac Rim Cayman and not its parent company or a separate subsidiary of the parent company, 16 of the 26 documents provided make no mention of Pac Rim Cayman, referring only to Pacific Rim Mining Corp. and its subsidiary Pacific Rim Exploration.[39]

59. Indeed, the documents provided that do relate to Claimant unequivocally confirm that Pac Rim Cayman is a holding company with no employees and no activity. The documents do not suggest any legitimate business reason for the move to the United States. In fact, most of the documents that mention Pac Rim Cayman are specifically and solely related to the change in nationality. Pac Rim Cayman was given a federal employer identification number in January 2008, but Pac Rim Cayman's name was incorrect on the notice about the assignment of the number.[40] Pac Rim Cayman apparently never corrected its name and submitted no evidence of having used the number to file tax forms. The only documents dated later than January 2008 are two consents from Pac Rim Cayman's one shareholder, the parent company, to waive notice of annual meetings for the two years that Pac Rim Cayman has existed, because there is nothing to discuss aside from naming the managers (who are officers of the parent company) which is necessary for the forms that must be filed with the Nevada Secretary of State.

60. Moreover, the documentation provided in October 2010 contains additional evidence confirming that Pac Rim Cayman is not a "mining company"[41] and disproving

[39] The full submission, "Claimant's documents submitted Oct. 6, 2010," is provided as a separate exhibit folder with this Memorial.
[40] Internal Revenue Service Notice to Pacific Rim Cayman LLC, Jan. 28, 2008 (**Exhibit R-61**).
[41] NOA, para. 14; NOI, para. 9.

Claimant's suggestion that the change in nationality "reflects the actual economic and operational substance of the Pacific Rim Companies."[42] On Pac Rim Cayman's Nevada Business Registration form, none of the boxes for activity, such as "Mining," "Service," or "Leasing" are checked. Instead, the company checked the box "Other" and, at item 15, when asked to "Describe in Detail the Nature of Your Business in Nevada," the company simply filled in "Holding Company."[43] In this and other documents, the address of the Canadian headquarters is provided—refuting Claimant's recent attempts to emphasize Pacific Rim Mining Corp.'s activity in the United States.[44]

D. Pac Rim Cayman's change of nationality was necessary to attempt to gain jurisdiction under CAFTA

61. The evidence before this tribunal demonstrates that the actual investor in El Salvador in the El Dorado and other mining projects relevant to this arbitration is the Canadian company Pacific Rim Mining Corp. A Salvadoran subsidiary of the Canadian investor, which was held from 2004 to the end of 2007 through a Cayman Islands holding subsidiary, applied for the environmental permit, submitted an Environmental Impact Study and applied for an exploitation concession for the El Dorado project in 2004. After December 2004 when the environmental permit was not granted within the statutory period and the Salvadoran subsidiary was informed that it otherwise did not meet the requirements of the Mining Law of El Salvador for an exploitation concession, it initiated efforts to convince the Government to adopt a different interpretation of the Mining Law. When that attempt failed, and it was clear that there was no chance that its applications would be approved, the company made an effort to have the mining law rewritten. By 2007, the Canadian investor, Pacific Rim Mining Corp., faced a situation in

[42] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 5.
[43] Nevada Business Registration, Jan. 15, 2008 (**Exhibit R-62**).
[44] *See, e.g.*, Lease documents provided by Claimant on Oct. 6, 2010 (**Exhibit R-63**) (including lease expiration notice from 2005 addressed to Pacific Rim Mining Corporation and notification of rent increase from 2009 addressed to Pacific Rim Exploration in Vancouver, Canada); Agreements for technical work provided by Claimant on Oct. 6, 2010 (**Exhibit R-64**) (mentioning Pacific Rim Mining Corp. as contracting party to the agreements).

which its applications had been denied by operation of law, it had not been able to change the law, and communication on the matter with the relevant government ministries had come to an end. As a result of this realization, sometime in 2007 the investor began to consider the option of using international arbitration to put pressure on the Government of El Salvador to grant the concession.

62. But the Canadian company could not initiate international arbitration in its own name for at least two reasons: i) in addition to the fact that Canada is not a Contracting State to the ICSID Convention, there were no international treaties with dispute settlement provisions that could benefit a Canadian company with an investment in El Salvador, and ii) the dispute settlement provisions of the Investment Law of El Salvador, which make reference to two non-ICSID options, were not available to Pacific Rim Mining Corp. because it had transferred ownership of the Salvadoran investment to Pac Rim Cayman in 2004.

63. The Canadian investor would have also been ill-advised to initiate arbitration through its Cayman Islands holding company. As the nominal foreign investor in the records of the National Investment Office (*Oficina Nacional de Inversiones*, "ONI"), only Pac Rim Cayman could attempt to invoke the dispute settlement provisions of the Investment Law. But Pac Rim Cayman could also expect significant problems initiating international arbitration under the Investment Law, because, in addition to the lack of a statement of consent to arbitration in the Investment Law, Pac Rim Cayman was a holding company without any presence or business activities in the Cayman Islands (or anywhere else). As such, Pac Rim Cayman would be vulnerable to a jurisdictional challenge on the grounds that it was not a bona fide company in the Cayman Islands or a bona fide foreign investor in El Salvador.

64. Finally, neither Canada nor the Cayman Islands were parties to CAFTA, an attractive new treaty with many protections for investors of CAFTA Parties that had entered into force for El Salvador in March 2006.

65. So, sometime in 2007, the Canadian company decided to change Pac Rim Cayman's nationality from the Cayman Islands to the United States. After ten years of being a

Cayman Islands company, Pac Rim Cayman was de-registered in the Cayman Islands on December 11, 2007, and registered two days later as a limited liability company in Nevada, using the address of the small office that the Canadian parent company has maintained in Reno, Nevada since 1997.

66. The significance of the change of nationality was immediately apparent when the Canadian company made the first reference to the protections of CAFTA and the Investment Law for its investments in El Salvador in filings to the United States Government in January 2008, only one month after the change of nationality.

67. Pac Rim Cayman filed the Notice of Intent in December 2008 and initiated this arbitration in April 2009 regarding events and measures that took place before its change of nationality, seeking damages for alleged losses that could have only been incurred before the change of nationality.

68. Pac Rim Cayman's change of nationality, plus the initiation of international arbitration under CAFTA with respect to measures, facts, acts, and alleged damages that predate the change in nationality, constitute abuse of process.

69. The change in nationality also allowed Pac Rim Cayman to attempt to use the address and presence of the Canadian company and another small direct subsidiary of the Canadian parent, Pacific Rim Exploration, in a small office in Reno, Nevada, to create the appearance that Pac Rim Cayman had legitimate business activities in the United States and that it was not merely a shell company, thus also facilitating the invocation of ICSID jurisdiction.

70. This abuse of process by a Canadian company—changing the nationality of a shell company to initiate an international arbitration and adjusting its corporate organization chart to create the appearance that this company is more than just a shell—must be rejected.

E. This arbitration must be dismissed as a result of Claimant's abuse of process

71. The result of a finding that Claimant has engaged in abuse of process is the dismissal of the entire arbitration. Abuse of process is much more serious than a mere mistaken assertion of jurisdiction. It is a deliberate act of a claimant to manipulate the system of arbitration to bring claims that it does not have a right to initiate. Even Claimant admitted that a tribunal can deny jurisdiction upon finding an abuse of process.[45]

1. The origin of the doctrine of abuse of process

72. The doctrine of abuse of process originated in the Chancery courts. The doctrine was used to "prevent a misuse of its procedure, or to avoid the risk that 'the administration of justice might be brought into disrepute among right-thinking people.'"[46] According to the English courts: "from early times . . . the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing—the court had a right to protect itself against such as abuse."[47]

2. Recognition of the inherent powers to dismiss cases by the International Court of Justice

73. Like the common law courts, the International Court of Justice has found that it has the inherent power to dismiss disputes to safeguard the administration of justice.[48] For example, in the Northern Cameroons case, the Court recalled its statement in the *Nottebohm*

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[45] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 6 (noting that where a holding company is located to establish jurisdiction over a pre-existing dispute, "a tribunal might conclude that the claimant was attempting to abuse the corporate form, and, on that basis, deny jurisdiction.").

[46] Chester Brown, *The Relevance of the Doctrine of Abuse of Process in International Adjudication*, Transnational Dispute Management, July 2, 2009, at 7 (**Authority RL-52**) (quoting the House of Lords in *Hunter v. Chief Constable of the West Midlands* (1982)). The author mentions that the U.N. Convention on the Law of the Sea, concluded in 1982, grants tribunals the power to dismiss claims that are "an abuse of legal process" and that several human rights conventions include similar provisions on admissibility. *Id.* at 8.

[47] Brown, *Inherent Powers*, at 205 (citing 10 App. Cas. 210, 220-221 (1885) (RL-49).

[48] Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*, 59 Hastings L. J. 241, 305 (2007) (**Authority RL-53**) ("the ICJ has suggested that it has the inherent power to decline jurisdiction in order to safeguard the administration of justice, the underlying aim of any system of dispute settlement"). *See also* Brown, *Inherent Powers* at 232 (noting that as of 2000, the doctrine of abuse of process had arisen in nine ICJ cases).

case: "the seising of the Court is one thing, the administration of justice is another." The Court continued,

> It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[49]

74. Likewise, in the Nuclear Tests case, the Court commented that it "possesses an inherent jurisdiction enabling it to take such action as may be required . . . to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character'."[50] The Court continued that this inherent jurisdiction empowers it "to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[51]

3. ICSID tribunals have recognized the inherent power to dismiss cases

75. The findings of the ICJ that it has an inherent power to refuse to hear cases to protect judicial integrity and safeguard its functions are relevant to ICSID tribunals. Using such

[49] Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December, 1963 I.C.J. Reports 15, 29 (**Authority RL-54**).
[50] Nuclear Tests Case (Australia v. France), Judgment of 20 December, 1974 I.C.J. Reports 253, para. 23 (**Authority RL-55**).
[51] Nuclear Tests Case, para. 23.

a power where there has been an abuse of rights makes sense "to preserve the legitimacy of international dispute settlement."[52]

76. Indeed, ICSID tribunals have clearly recognized the inherent power of tribunals to protect States from abusive arbitration claims.

77. The tribunal in *Mobil v. Venezuela*, for example, noted that "in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law" including good faith, misuse of power, or abuse of right.[53] The tribunal cited with approval Hersch Lauterpacht's statement that "[t]here is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.'"[54]

4. The Tribunal's inherent power to terminate a case brought through abuse of process is derived from several sources

78. The doctrine of abuse of process relates to the universal principle of good faith. Proceedings initiated in violation of the principle of good faith, including those based on manipulating and abusing the dispute resolution system, are not protected by international agreements. Several international arbitral tribunals have recognized and applied the general principle of good faith.[55]

79. Not only should tribunals be able to dismiss claims that violate the general principle of good faith, but tribunals can also base the inherent power to dismiss claims to prevent an abuse of process on a functional justification. Tribunals need to be empowered to ensure the fulfillment of their functions, including the functions of ensuring the proper administration of international justice, developing the law, and considering public interests.[56]

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[52] Bjorklund at 305. *See also* Brown, *Relevance of the Doctrine* at 8 ("And the basis on which international courts may do so is in the exercise of their inherent powers to regulate proceedings before them and to ensure the proper administration of international justice.").
[53] *Mobil v. Venezuela*, para. 169 (RL-51).
[54] *Mobil v. Venezuela*, para. 172 (citing Hersch Lauterpacht, Development of International Law by the International Court).
[55] *See Mobil v. Venezuela*, para. 170; *Phoenix Action v. Czech Republic*, para. 107 (RL-50); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)06/2, Award, Sept. 17, 2009, para. 157 (**Authority RL-56**).
[56] *See* Brown, *Inherent Powers* at 231-237.

80. The doctrine of inherent powers is necessary to enable international tribunals to fulfill their functions when faced with unique situations.[57]

5. Tribunals have developed criteria to identify abuse of process by assessing the actions of claimants

81. The particular facts and circumstances of any case dictate whether or not there has been an abuse of process.[58] Thus, several arbitral tribunals have declined to find abuse of process based on the facts in those cases, although the tribunals have not disputed that, if they were to find an abuse of process, they would have the power to dismiss the claims.

82. In *Waste Management II*, the parties and the tribunal all acknowledged that there may be an inherent power to prevent abuse of process. Mexico argued that the claimant's initiation of serial proceedings before domestic courts and two arbitral tribunals was an abuse of process and "that the Tribunal should exercise its inherent power to prevent such an abuse of process."[59] In fact, as noted by the tribunal "the Claimant *accepted that such an inherent power might exist* in extreme cases, but denied that it was applicable" in that case, because it argued that it had not acted in bad faith.[60] The tribunal likewise agreed that such a power could exist "for the purpose of protecting the integrity of the Tribunal's processes or dealing with genuinely vexatious claims."[61]

83. Based on the facts and circumstances of that case, however, the tribunal found that there was no abuse of process.[62] The tribunal considered the claimant's forthrightness to be

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[57] Paola Gaeta, *Inherent Powers of International Courts and Tribunals in* Man's Inhumanity to Man 353, 366-367 (L.C. Vohrar et al. eds., 2003) (**Authority RL-57**) (suggesting that the instruments creating international tribunals "cannot be as detailed and specific as national codes, which regulate all possible procedural problems").

[58] *Mobil v. Venezuela*, para. 177 ("Under general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.").

[59] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002, para. 48 ("*Waste Management II* Decision on Preliminary Objection") (**Authority RL-58**).

[60] *Waste Management II* Decision on Preliminary Objection, para. 48 (emphasis added).

[61] *Waste Management II* Decision on Preliminary Objection, para. 49.

[62] *Waste Management II* Decision on Preliminary Objection, para. 50 ("In particular, the Tribunal does not consider that, on the evidence available to it, there is any basis for saying that the present claim was brought in bad faith or that it is not a *bona fide* claim.").

an important consideration in determining that the claimant had not acted in bad faith. The tribunal concluded that although the claimant had "no doubt erred in the manner in which it commenced the first proceedings," the claimant "was open in its approach."[63]

84. In *Autopista Concesionada de Venezuela v. Venezuela*, the tribunal also examined whether or not there was an abuse of process without questioning its power to act to prevent any such abuse. The tribunal found that the assertion of jurisdiction based on shares being held by a U.S. corporation was not abusive because, in that case, the U.S. company was incorporated "well before the conclusion of the Agreement, the share transfer and the emergence of the present dispute," and it was "subject to economic, tax and social regulations in the United States, a country which is not considered a tax or regulatory heaven."[64] Based on those specific facts, the tribunal found that the named claimant could not "be regarded as a corporation of convenience."[65] The tribunal clarified that its decision was not a general endorsement of a particular approach to determining nationality, but that it merely applied the provisions agreed to by the parties in the particular circumstances of that case.[66]

85. A majority of the tribunal in *Aguas del Tunari v. Bolivia* did not consider the evidence in that case sufficient to show abuse of the corporate form, although it, too, indicated that the claims should be dismissed for lack of jurisdiction if there was abuse of process. The only reason the majority of the tribunal did not find that there had been abuse of process was because the changes in the corporate form predated not only the time when the dispute became a legal dispute for purposes of the BIT, but it also *predated the time when the dispute became foreseeable*.

86. In *the Aguas del Tunari* case, the respondent objected that the true party in interest changed the nationality of a Cayman Islands company in such a way that made it 100%

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[63] *Waste Management II* Decision on Preliminary Objection, para. 50.
[64] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, Sept. 27, 2001, para. 123 ("*Aucoven v. Venezuela*") (**Authority RL-59**).
[65] *Aucoven v. Venezuela*, para. 126.
[66] *Aucoven v. Venezuela*, para. 142.

owned by a newly-created holding company in the Netherlands in December 1999, after popular discontent had already surfaced over a concession granted in September 1999. More vigorous opposition surfaced in early 2000 that eventually led to the rescission of the concession in April 2000, the breach complained about in the arbitration under the BIT between Bolivia and the Netherlands.

87. In considering the respondent's allegation of abuse of process, the tribunal noted that the corporate changes "involved significantly more operations than AdT's concessionary rights and duties," and that "it 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."[67] Thus, where the change of nationality happened *before* the events leading to the dispute occurred, the majority of the tribunal decided that there was not a sufficient basis to find abuse of the corporate form. But the tribunal highlighted that it would "bear in mind *its duty to protect the integrity of ICSID jurisdiction* during the merits phase as the Parties submit their full memorials and supporting evidence."[68] The majority in *Aguas del Tunari* limited its decision to a case in which the majority tribunal decided that *the events leading up to the dispute were not foreseeable at the time the change of nationality took place*. The dispute did not arise until several months after the change in nationality and corporate restructuring.

88. Further, in *Bayindir v. Pakistan*, where the claimant submitted BIT claims based on its contractual rights, the respondent argued that "that there is an 'inherent power and duty for an international Tribunal to guard against this kind of abuse of process.'"[69] As in the other cases, the tribunal did not dispute that it could make use of such an inherent power, but found that there

[67] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005, para. 330 (**Authority RL-60**).
[68] *Aguas del Tunari*, para. 331 (emphasis added).
[69] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005, para. 170 (**Authority RL-61**).

was no abuse based on the circumstances. The tribunal considered that the late withdrawal of the contract claims would be addressed by the allocation of costs and that the claimant's other procedural errors did not amount to abuse.[70]

89. These cases show that tribunals have consistently recognized the inherent power to dismiss claims for abuse of process to protect the system. The tribunals have considered the circumstances of each case to determine whether there has been an abuse of process in order "to give 'effect to the object and purpose of the ICSID Convention' and to preserve 'its integrity'."[71] In doing so, the cases provide examples of the factors to consider in determining a question of abuse of process. These include whether or not the claimant acted in good faith, the timing and purpose of changes in corporate form, and the claimant's openness and the respondent's awareness of the changes and their jurisdictional effects.

90. In this case all of these factors point to an abuse of process. 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.

6. The findings in *Phoenix Action* and *Mobil v. Venezuela* are directly relevant to the facts of this case

91. In *Phoenix Action v. Czech Republic*, the tribunal determined that there had been an abuse of process and dismissed the entire case. In that case, a host country national used an Israeli company to acquire an interest in two Czech companies that had already been involved in disputes with the Czech Government and then quickly initiated ICSID arbitration. The

[70] *Bayindir v. Pakistan*, paras. 171-172.
[71] *Mobil v. Venezuela*, para. 184.

respondent alleged that there was no jurisdiction because the claimant was a company created solely to gain access to ICSID.[72]

92. The tribunal noted that "international agreements like the ICSID Convention and the BIT have to be analyzed with due regard to the requirements of the *general principles of law*, such as the principle of non-retroactivity or the principle of *good faith*, also referred to by the Vienna Convention."[73] Moreover, the tribunal stated that, where doubts are raised, tribunals must "*conduct a contextual analysis of the existence of a protected investment*" and consider "*the purpose of the international protection of the investment*."[74]

93. In that case, therefore, the tribunal noted that the purpose of the Washington Convention is to encourage and protect international investment.[75] The tribunal determined that ICSID protection should not extend to investments not made in good faith or in cases amounting to abuse of the ICSID arbitration system.[76]

94. The tribunal in *Phoenix Action* highlighted the principle of good faith as being "of utmost importance."[77] According to the tribunal,

> The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties 'to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage . . . . This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.[78]

[72] *Phoenix Action*, para. 34 (RL-50).
[73] *Phoenix Action*, para. 77 (emphasis in original).
[74] *Phoenix Action*, para. 79 (emphasis in original).
[75] *Phoenix Action*, para. 87.
[76] *Phoenix Action*, para. 100.
[77] *Phoenix Action*, para. 106.
[78] *Phoenix Action*, para. 107.

95. Accordingly, the tribunal noted its duty "to prevent an abuse of the system of international investment protection under the ICSID Convention, *in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected*."[79] The tribunal noted several relevant factors to consider, including: the timing of the investment, the timing of the claim, and the true nature of the operation.[80]

96. The tribunal rejected the claimant's pursuit of arbitration on the grounds that this was an abuse of the international investment arbitration system.[81] The tribunal refused to extend treaty protection where the claimant had abusively manipulated the system. The tribunal, in addition to dismissing the entire case, awarded arbitration costs to the respondent.

97. In *Mobil v. Venezuela*, the tribunal explicitly stated that treaty abuse by the claimants in restructuring their investment would exclude jurisdiction.[82]

98. In that case, the respondent argued that the claimants created a "corporation of convenience" in the Netherlands "in anticipation of litigation" and "for the sole purpose of gaining access to ICSID jurisdiction."[83]

99. The tribunal explained that restructuring can be "legitimate corporate planning" or an "abuse of right." Whether restructuring is legitimate or abusive wholly "depends upon the circumstances in which it happened."[84] For example, the tribunal clarified that restructuring to gain treaty protections would be "a perfectly legitimate goal *as far as it concerned future disputes*."[85] As to pre-existing disputes, the tribunal explained that restructuring would

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[79] *Phoenix Action*, para. 113 (emphasis added).
[80] *Phoenix Action*, paras. 136, 138, 140.
[81] *Phoenix Action*, para. 144.
[82] *Mobil v. Venezuela*, para. 149.
[83] *Mobil v. Venezuela*, para. 27. The respondent further argued that the claimants created the new corporation long after the investment and after they had notified the Government of the existence of a dispute. *Id.*, para. 47.
[84] *Mobil v. Venezuela*, para. 191.
[85] *Mobil v. Venezuela*, para. 204 (emphasis added).

constitute "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs."[86]

100. The finding in *Mobil* that restructuring can be abusive was in accord with the findings of the *Phoenix Action* tribunal. That tribunal was unequivocal: "an international investor cannot modify *downstream* the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed."[87] Following the same reasoning, the *Mobil* tribunal determined that it had jurisdiction *only* for disputes born after the restructuring for each investment, and that it did *not have jurisdiction* "with respect to any dispute born before those dates."[88] But if the claimant had tried to use the change of nationality to cover the dispute related to tax rate changes that had already taken place, that would be an abuse of process or right that would result in lack of jurisdiction over the entire case.

7. This Tribunal should use its inherent power to dismiss this case for abuse of process

101. In sum, ICSID tribunals have the inherent power to dismiss proceedings that amount to abuse of process. This power comes from several sources: from the right to determine jurisdiction and admissibility in light of the duty to protect the integrity of the system of international arbitration; from the general principle that disputing parties must seek to resolve their dispute in good faith; and from tribunals' need to ensure the proper administration of justice. This inherent power has been recognized by several tribunals. Indeed, tribunals have explicitly recognized that corporate restructuring after an investment was made and after the facts underlying the dispute occurred is an abuse of process.

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[86] *Mobil v. Venezuela*, para. 205. The tribunal noted that even the claimants acknowledged this by invoking jurisdiction "only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed." *Id.*
[87] *Phoenix Action*, para. 95 (emphasis added).
[88] *Mobil v. Venezuela*, para. 206.

102. As in *Phoenix Action*, the circumstances of this case justify use of the inherent power to dismiss proceedings based on an abuse of process. In this case, a Canadian company engaged in abuse of process by changing a subsidiary holding company's nationality to the United States in order to invoke CAFTA protection, after the date of the measures alleged to give rise to the dispute, and then initiating arbitration before this Tribunal to seek redress for its grievances, while obscuring the change in nationality and misrepresenting the nature of the subsidiary.

F. The Investment Law claims are so inextricably related to Pac Rim Cayman's abuse of process that they must also be dismissed

103. Pac Rim Cayman's abuse of process through its change of nationality has implications beyond CAFTA. In addition to allowing Pac Rim Cayman to use its new United States nationality to initiate CAFTA arbitration against El Salvador, the change of nationality also facilitated Pac Rim Cayman's efforts to gain ICSID jurisdiction to bring its claims under the Investment Law under the ICSID Convention.

104. As explained above, the change in nationality was used by a shell company to use the address of its Canadian parent in Reno, Nevada, plus the activities of a United States subsidiary that was transferred by the Canadian parent to Pac Rim Cayman, to try to appear as a viable claimant to try to avoid jurisdictional challenges regarding the nationality requirements under the ICSID Convention.

105. In addition, as the Tribunal noted in its decision of August 2, 2010 on El Salvador's Preliminary Objections, the proceeding under the Investment Law is closely and inextricably related to the proceeding under CAFTA. As the Tribunal observed, "these arbitration proceedings are indivisible, being the same single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration registered once by the ICSID Acting Secretary-General under the ICSID Convention." Being indivisible, the fate of one must befall the other. Dismissal of the CAFTA claims as a result of Claimant's blatant abuse

of process must also result in the dismissal of the claims under the Investment Law of El Salvador, all based on the same measures.

III. INDEPENDENT OF THE ABUSE OF PROCESS OBJECTION, ALL CAFTA CLAIMS MUST BE DISMISSED UNDER THE DENIAL OF BENEFITS PROVISION OF CAFTA ARTICLE 10.12.2

106. This entire arbitration should be dismissed as a result of Claimant's abuse of process. However, this Section will show that the CAFTA claims would also have to be dismissed independent of Claimant's abuse of process, as a result of El Salvador's invocation of the Denial of Benefits provision of CAFTA Article 10.12.2.

107. States enter into investment treaties to encourage investment and provide reciprocal benefits and obligations among the Parties to the treaty. But as early as 1956, a commentator noted that States were hesitant to extend treaty benefits to foreign corporations, fearing that "such commitments could become a cloak under cover of which rights would be gained by interests of third countries" and that denial of benefits provisions were a safeguard against "this possibility of a 'free ride' by third-country interests."[89]

108. These concerns motivated the inclusion of denial of benefits clauses in treaties such as NAFTA and CAFTA. As explained in Meg Kinnear's treatise on NAFTA, "the concern addressed by NAFTA is the establishment by a non-NAFTA entity of a shell company in NAFTA territory for the sole purpose of bringing a Chapter 11 claim . . . ."[90] It is precisely this concern highlighted by Ms. Kinnear that is implicated by the facts of this case. Here, the facts demonstrate unequivocally the creation by a non-CAFTA entity, Pacific Rim Mining Corp., of a shell company in the United States, Claimant here, through a change of nationality, for the sole purpose of bringing a CAFTA claim. These facts constitute not only abuse of process (as

[89] Herman Walker Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 388 (1956) (**Authority RL-62**).
[90] *Article 1113 – Denial of Benefits*, *in* Investment Disputes under NAFTA, An Annotated Guide to NAFTA Chapter 11, 1113-1, 1113-6, n. 33 (Meg N. Kinnear, Andrea K. Bjorklund et al. eds., 2006) (**Authority RL-63**).

demonstrated in Section II above) but also are inextricably related to the grounds for invocation of the denial of benefits clause, as El Salvador has done in this case.

109. CAFTA includes a denial of benefits clause similar to the NAFTA clause to prevent non-CAFTA investors from using a shell company to bring claims under Chapter 10. Specifically, under CAFTA Article 10.12.2, a CAFTA Party may deny the benefits of the entire investment chapter, including the section on dispute resolution, to an enterprise of another Party and its investments 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."

110. El Salvador has invoked the denial of benefits clause in CAFTA Article 10.12.2 to deny all benefits of Chapter 10 to Pac Rim Cayman, the Claimant in this arbitration, because it is an enterprise that has no substantial business activities in the territory of any other Party and is owned *and* controlled by a corporation of a non-Party, Canada.

A. Pac Rim Cayman is owned *and* controlled by a Canadian company

111. As Claimant has now admitted, Pac Rim Cayman is a mere holding company owned *and* controlled by a Canadian company, Pacific Rim Mining Corp. Although for purposes of invoking the denial of benefits provision in CAFTA, it would be enough to demonstrate that Pac Rim Cayman is either owned *or* controlled by a Canadian company; in this case Pac Rim Cayman is both owned *and* controlled by the Canadian company.

1. Pac Rim Cayman is owned by Pacific Rim Mining Corp.

112. According to the Annual Report of Pac Rim Cayman's parent company, Pacific Rim Mining Corp., covering the year 1997, Pac Rim Cayman was incorporated in 1997 "to hold the shares of the company's subsidiaries."[91] The Canadian parent is "the sole Member" of Pac

[91] Pacific Rim Mining Corp., 1998 Annual Report, April 30, 1998, Notes to Consolidated Financial Statements at 22 (**Exhibit R-65**). Pacific Rim Mining Corp. created a few other holding companies the same year—Pac Rim Caribe, Pac Rim Caribe II, and Pac Rim Caribe III. *See id.*

Rim Cayman.[92] Pac Rim Cayman is thus owned by a person of a non-Party, Canada, meeting the first of two alternative requirements to invoke the denial of benefits clause.

2. Pac Rim Cayman is also controlled by Pacific Rim Mining Corp.

113. Pacific Rim Mining Corp. is the sole owner of Pac Rim Cayman and appoints the "managers" of the company. Pac Rim Cayman is a non-operational entity created to hold the parent company's assets or shares.[93] As Claimant acknowledged in its September 13, 2010 letter to the Tribunal,

> Claimant does not dispute . . . that Pac Rim Cayman is a holding company. Pac Rim Cayman was a holding company before December 2007 and remains a holding company today.[94]

There is thus no doubt that Pacific Rim Mining Corp. controls Pac Rim Cayman.

3. Pacific Rim Mining Corp. is a Canadian company

114. Pacific Rim Mining Corp. is a company organized under the laws of Canada.[95] Canada is not a Party to CAFTA.[96]

B. Pac Rim Cayman has no substantial business activities

115. Pac Rim Cayman is a shell company with no substantial business activities in the United States or anywhere else,[97] and thus meets the other requirement under CAFTA Article 10.12.2.

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[92] Letter from Claimant to ICSID, June 4, 2009 (R-58).
[93] *See* William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations*, § 2821 (2010) (**Authority RL-64**) (defining holding company as "a corporation organized to hold the shares of another or other corporations").
[94] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 5 (R-57). *See also id.* at 7 ("The sole purpose of these requests is to establish that Pac Rim Cayman is a holding company – a fact that Claimant does not deny.").
[95] NOA, para. 2.
[96] *See, e.g.*, List of CAFTA Parties included in the CAFTA Preamble, at 1.
[97] There is no evidence or suggestion of Pac Rim Cayman having "substantial business activities" in any CAFTA Party, in addition to not having business activities in the United States. Therefore the discussion of business activity will focus on the United States.

1. Pac Rim Cayman had no business activities prior to its change of nationality

116. Because Claimant has attempted to create the impression that Pac Rim Cayman had business activities before its change to United States nationality that relate to alleged activities in the United States, the facts regarding its corporate history are relevant to establishing that it has no business activities in the United States. As indicated above, Pac Rim Cayman was incorporated in the Cayman Islands in 1997 as a wholly-owned holding company for Pacific Rim Mining Corp. According to Claimant, the Cayman Islands is "a jurisdiction having no connection to the business."[98] The only function of the company was to passively hold shares of its Canadian parent. A holding company, owned entirely by the parent company, with no operations, incorporated in a tax haven jurisdiction unrelated to the business, is the quintessential example of a *shell company*.[99]

117. Pac Rim Cayman, the Cayman Islands shell company, had no connection to the projects in El Salvador when Pacific Rim Mining Corp. began working in El Salvador. The Canadian parent company obtained its interest in the El Dorado project in El Salvador by merging with another Canadian company, Dayton Mining Corporation, in April 2002.[100] Initially, and for over two years, Pacific Rim Mining Corp. held its interests in El Salvador through wholly-owned Canadian subsidiaries.[101]

118. More than two years after Pacific Rim Mining Corp. began work on the El Dorado project, and after it had submitted the first version of its Environmental Impact Study to the Ministry of the Environment, Pacific Rim Mining Corp. transferred its Salvadoran subsidiary, Pacific Rim El Salvador, to be held by Pac Rim Cayman.[102]

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[98] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 7 (R-56).
[99] *See* Jack P. Friedman, Dictionary of Business Terms, 628 (3d ed. 2000) (defining a "shell corporation" as a "company that is incorporated but has no significant assets or operations") (**Authority RL-65**).
[100] *See* NOA, para. 43, n. 32.
[101] Pacific Rim Mining Corp., Annual and Transitional Report (foreign private issuer) (Form 20-F) at 15 (Aug. 27, 2002) ("Pacific Rim Mining Corp.'s 2002 20-F") (**Exhibit R-66**).
[102] Pacific Rim Mining Corp., Annual and Transitional Report (foreign private issuer) (Form 20-F) at 18 (July 28, 2005) ("Pacific Rim Mining Corp.'s 2005 20-F") (**Exhibit R-67**) (mentioning for the first time that Pac Rim Cayman holds the interest in the El Salvador property).

119. In the Notice of Arbitration, Claimant explains that, "[o]n November 30, 2004, Pacific Rim vested sole ownership rights in [Pacific Rim El Salvador] in its subsidiary, [Pac Rim Cayman]."[103] Thus, it was not until the end of 2004 that the name Pac Rim Cayman was even associated with the projects in El Salvador. At that time Pac Rim Cayman was, and had always been incorporated in the Cayman Islands and had no business activities beyond holding ownership interests for its parent. It is well understood that "a holding company is generally held not to be doing or transacting business through its subsidiary where the separate corporate entities are maintained."[104]

120. For the next three years, Pacific Rim Mining Corp. did not make any changes to the corporate structure of Pac Rim Cayman. So from the end of 2004 through the end of 2007, the Canadian company held its Salvadoran interests through its Cayman Islands subsidiary, Pac Rim Cayman and thus no mining or investment activities in El Salvador at issue in this case were associated, in any way, with a national of the United States or any other CAFTA Party.

121. It was not until December 2007 that Pacific Rim Mining Corp. elected to de-register Pac Rim Cayman in the Cayman Islands and re-incorporate ("domesticate") this holding company in Nevada.[105] No reasons for this change were given in the incorporation paperwork in Nevada and Pacific Rim Mining Corp. did not issue a press release about its "restructuring." Like the Cayman Islands, Nevada is recognized as a corporate tax haven,[106] but it had the added benefit for Pacific Rim Mining Corp. of being located within a CAFTA Party.

122. In sum, Pac Rim Cayman has always been a mere holding company moved around and used by Pacific Rim Mining Corp. for its own purposes.

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[103] NOA, para. 51. El Salvador recognized Pac Rim Cayman's ownership rights on August 11, 2005. *See id*.
[104] Fletcher Cyclopedia, § 2821.
[105] *See* Cayman Islands Gazette, Issue No. 01/2008, Jan. 7, 2008, at 14 (noting that Pac Rim Cayman was de-registered effective December 11, 2007) (**Exhibit R-68**). *See also* Articles of Domestication, Pac Rim Cayman LLC, Office of the Secretary of State, Nevada, Dec. 13, 2007 (**Exhibit R-69**).
[106] *See* Nevada Secretary of State Website, "Why Nevada?" (**Exhibit R-70**).

2. Pac Rim Cayman does not have substantial business activities in the United States

123. Pac Rim Cayman's status as a shell company did not change when its nationality was moved to the United States. It continued to have no business activities, and clearly did not have substantial business activities, which is the standard under CAFTA.

124. The facts of this case show that Pac Rim Cayman did not have business activities of *any kind whatsoever* beyond the formal ownership of shares in other companies, much less the *substantial* business activities of the type one would expect to see in a company which claims to be actively managing alleged investments in El Salvador of $77 million in a gold mining exploration project.

125. El Salvador's extensive review of the facts in this case, conducted in late 2009 and early 2010, shows no sign of Pac Rim Cayman having had *any* business activities in the United States before or after its registration in Nevada on December 13, 2007.

a. The documentation provided by Claimant in response to El Salvador's request for information confirms that Pac Rim Cayman has no substantial business activities

126. The documents provided by Claimant on October 6, 2010 confirm and provide additional evidence that Pac Rim Cayman is a shell company registered in the United States solely to gain access to the protections provided under Chapter 10 of CAFTA.

127. First, the majority of the documentation provided does not even mention or relate to Claimant Pac Rim Cayman. Of the total 26 documents provided by Claimant, 16 documents do not even *mention* the Claimant, Pac Rim Cayman, much less establish that Claimant had *any* business activities in the United States. Seven of these documents are tax forms for Pacific Rim Exploration, two are leases for the office space in Reno addressed to Pacific Rim Mining Corp. or Pacific Rim Exploration (the Canadian company and its actual U.S. subsidiary), one is an insurance policy beginning in March 2010 for Pacific Rim Exploration, one is for storage rented by Pacific Rim Exploration, and five relate to technical work contracted by Pacific Rim Mining

Corp. Thus, these 16 documents confirm that Pacific Rim Mining Corp. and its subsidiary Pacific Rim Exploration are the only entities conducting *any* activity through the Reno office.

128. Even in December 2009, two years after Pac Rim Cayman was registered in Nevada, the landlord for the office space where Claimant alleges it, Pac Rim Cayman, has offices, sent information about the lease to:

> Pacific Rim Exploration, Inc.
> #410-625 Howe Street
> Vancouver, BC V6C2T6[107]

129. Second, the few documents provided by Claimant that do relate to Pac Rim Cayman do not provide any support for Claimant's suggestion that Pac Rim Cayman "manages" any of the work in the United States or El Salvador. Indeed, these documents show just the opposite: that Pac Rim Cayman is a holding company with no employees and no activity.

130. Specifically, Claimant provided the Nevada Business Registration for Pac Rim Cayman filed January 15, 2008.[108] This form provides the parent company's Canadian address as i) Pac Rim Cayman's "Corporate/Entity Address," ii) the "Location of Nevada Business Operations," and iii) the "Location of Business Records." None of the boxes for activity, such as "Mining," "Service," or "Leasing," are checked. Instead, the company checked the box "Other" and, at item 15, where asked to "*Describe in Detail the Nature of Your Business in Nevada*," the company simply filled in "*Holding Company*." This document alone proves beyond doubt that Pac Rim Cayman is a shell subsidiary conducting no business activities in the United States.

131. Moreover, on the supplemental tax form provided with the Business Registration form, the company checked the boxes: "Corporation with no employees" and "I do not purchase tangible personal property for storage, use or other consumption in Nevada."[109] As a result, Pac Rim Cayman had no monthly receipts and no sales or use taxes to report. The only item that Pac

[107] Letter from Longley Business Park to Pacific Rim Exploration in Canada, Dec. 21, 2009 (**Exhibit R-71**).
[108] Nevada Business Registration, Jan. 15, 2008 (R-62).
[109] Nevada Department of Taxation, Supplemental Registration, Jan. 2008 (**Exhibit R-72**).

Rim Cayman had to report to the U.S. state in which it is incorporated was its $100 Business License Fee. Thus, when Pac Rim Cayman was registered in the United States, it was absolutely clear that Pac Rim Cayman had no employees, no activities, and no tax liability.

132. According to the Operating Agreement submitted by Claimant, the move of Pac Rim Cayman to the United States did not involve any influx of capital.[110] The financial structure or financial control of Pac Rim Cayman did not change when it was moved from the Cayman Islands to the United States. The capital of the company remained the same.

133. Finally, Claimant provided consents waiving notice of any annual meeting for 2008 and 2009 from Pac Rim Cayman's sole member—Pacific Rim Mining Corp. Each consent "waives notice of the annual meeting of the Company and waives notice of the purpose thereof."[111] The only resolutions for both years were related to the list of managers. Pac Rim Cayman has to maintain a list of managers to comply with Nevada regulations. In 2008, April Hashimoto "resigned as a Manager" of Pac Rim Cayman, after she was terminated from her position with Pacific Rim Mining Corp. In 2009, there were no changes. This lack of corporate activity, although probably to be expected for a holding company conducting no activity, would be shocking for a company managing or directing a large investment project.

134. Thus, in response to El Salvador's request for documents supporting Claimant's allegations that Pac Rim Cayman should not be denied benefits as a holding company owned by a Canadian company without substantial business activities in the United States, Claimant provided:

- Evidence that Pac Rim Cayman has no employees.[112]
- Evidence that Pac Rim Cayman is not named on the lease for the one office the parent company has in Nevada.[113]

[110] Operating Agreement of Pac Rim Cayman LLC, a Single Member, Nevada Limited Liability Company, Dec. 11, 2007 (**Exhibit R-73**).
[111] "Written Consent in Lieu of 2008 Annual Meeting of the Sole Member of Pac Rim Cayman LLC," Dec. 18, 2008 (**Exhibit R-74**); "Unanimous Consent in Lieu of 2009 Annual Meeting of the Sole Member of Pac Rim Cayman LLC," Dec. 1, 2009 (**Exhibit R-75**).
[112] Nevada Business Registration (R-62).
[113] Lease documents provided by Claimant on Oct. 6, 2010 (R-63).

- Evidence that Pac Rim Cayman has not paid any taxes in the United States, except a $100 license fee to the state of Nevada.[114]
- Evidence that the El Dorado technical reports were contracted for by the parent company.[115]
- Evidence that Pac Rim Cayman's managers have had no meetings and made no corporate decisions, except to provide the required list of managers to be registered in Nevada.[116]
- No evidence of any payment records involving Pac Rim Cayman.
- No evidence of Pac Rim Cayman having any bank account.
- No evidence of Pac Rim Cayman having any assets.
- No evidence that the decision to move from the Cayman Islands to the United States had any legitimate business purpose.

b. Pac Rim Cayman does not have its own phone number, physical location, office equipment, website, or e-mail address

135. As the documents (and lack thereof) provided by Claimant demonstrate, Pac Rim Cayman is a shell company moved around for the purposes of the Canadian parent, Pacific Rim Mining Corp. The registration of Pac Rim Cayman in the state of Nevada did not change its status as a shell company with no substantial business activity.

136. The lack of business activity is evidenced by the absence of any indicators of activity which one would normally expect to see with a functioning corporation. For example, Pac Rim Cayman does not have its own internet website or phone number. A June 2009 letter from Pac Rim Cayman to ICSID lists its website as "www.pacrim-mining.com" and its e-mail address as "general@pacrim-mining.com."[117] This is the home page of the parent company Pacific Rim Mining Corp., and an e-mail address for its Canadian office. Additionally, a Google search for "Pac Rim Cayman" shows that Pac Rim Cayman does not maintain a website accessible from U.S.-based Internet protocol addresses as of October 2010.

137. Moreover, "Pac Rim Cayman" is not listed in either the 2008 or 2009 Reno, Nevada Yellow Pages,[118] and a whitepages.com search for a business called "Pac Rim Cayman"

[114] Nevada Department of Taxation, Supplemental Registration (R-72).
[115] Agreements for technical work provided by Claimant on Oct. 6, 2010 (R-64).
[116] Consents in lieu of annual meetings (R-74 and R-75).
[117] Letter from Claimant to ICSID, June 4, 2009 (R-58).
[118] "Nevada Reno, Sparks, Carson City and Surrounding Communities Including White Pages," Nov. 2008, at 376-377, 891-892 & Nov. 2009 at 346-347, 745-746 (**Exhibit R-76**).

in Reno, Nevada yields no results.[119] Claimant did not dispute any of these facts or provide evidence to the contrary in its response to the request for documents.

138. The initial Dun & Bradstreet Report requested by El Salvador in November 2009 did not list a phone number for Pac Rim Cayman, and a new Report updated at the request of El Salvador in January 2010 simply lists the phone number that already existed for the Canadian parent, Pacific Rim Mining Corp., as the number for Pac Rim Cayman.[120]

139. Claimant may attempt to argue that it has business activities in the United States by virtue of the fact that the Canadian parent company, Pacific Rim Mining Corp., had a small U.S. office before Pac Rim Cayman was registered in the United States. But that office was not Pac Rim Cayman's before and is not Pac Rim Cayman's even now. In fact, the Canadian company had a U.S. office since at least 1997.[121] The parent company's address—3545 Airway Drive, #105, Reno, Nevada 89511—is the address used on the forms submitted to register Pac Rim Cayman with the Nevada Secretary of State in December of 2007. This is the same address listed for Pacific Rim Exploration, another subsidiary of the Canadian parent Pacific Rim Mining Corp.

140. This is the only U.S. office of the Canadian parent, Pacific Rim Mining Corp., and the only address given for Pac Rim Cayman. There is no evidence that Pac Rim Cayman had or has any business activities or staff at this office. In fact, as shown in this photograph from February 2010, the front of the small office is labeled "Pacific Rim Mining Corp." and does not mention Pac Rim Cayman.

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[119] *See* search results from www.whitepages.com (last searched Jan. 12, 2010) (**Exhibit R-77**).
[120] *See* Pac Rim Cayman LLC, Dun & Bradstreet Business Information Report, accessed Nov. 13, 2009 (**Exhibit R-78**) and Pac Rim Cayman LLC, Dun & Bradstreet Business Information Report, accessed Jan. 15, 2010 (**Exhibit R-79**). Dun & Bradstreet did not even have a report on Pac Rim Cayman before the November 2009 report, which was prepared at the request of counsel for El Salvador.
[121] Lease documents provided by Claimant on Oct. 6, 2010 (R-63).

Photo of 3545 Airway Drive, Suite 105, Reno, Nevada (Feb. 2010).

141. In addition, Pac Rim Cayman does not seem to own any office equipment. According to county tax records, the only business that declares office property at that address is Pacific Rim Exploration. Even though such a declaration is a legal requirement for tax purposes, there is no record of any such declaration in the name of Pac Rim Cayman. As the tax information shows, the vast majority of office furniture and equipment was acquired in 1997, with only one item, a computer, acquired since 2006.[122]

142. The documents Claimant provided in response to the request for information confirm that this is a small office leased by Pacific Rim Mining Corp., in its own name and for a different subsidiary.[123] This office would exist with or without Pac Rim Cayman.

c. Pac Rim Cayman does not have its own employees

143. In addition to not having its own office, office equipment, phone number, or e-mail address, Pac Rim Cayman does not have employees. Indeed, on its Supplemental Registration with its Nevada Business Registration Form, Pac Rim Cayman affirmed that it is a company "with no employees."[124]

[122] Office of Washoe County Assessor, Personal Property Declaration of Pacific Rim Exploration Inc., obtained Feb. 16, 2010 (**Exhibit R-80**).
[123] Lease documents provided by Claimant on Oct. 6, 2010 (R-63).
[124] Nevada Department of Taxation, Supplemental Registration (R-72).

144. Pac Rim Cayman has no board of directors. Instead it has two "managers," Tom Shrake and Catherine McLeod-Seltzer, who are also officers of Pacific Rim Mining Corp.[125] Ms. McLeod-Seltzer is the Chairman of Pacific Rim Mining Corp. and she works in Canada. The only other two names Pac Rim Cayman provided to the Nevada Department of State on the lists of managers or managing members, submitted upon registration in Nevada and a year later, are also officers or employees of Pacific Rim Mining Corp. at the Canadian headquarters.[126] Claimant has provided no evidence that either of these two "managers" actually conduct any business for the Claimant, as opposed to for the Canadian parent company. Nor has Claimant provided any evidence that these "managers" are paid or employed by the Claimant. They are not.

145. Before receiving the documents that confirm that Pac Rim Cayman has no employees, El Salvador searched available sources for this information. As of November 2009, there was no information publicly available regarding the number of Pac Rim Cayman employees. The first Dun & Bradstreet Report showed no information regarding employees, but based on follow-up contact with the company's representatives, the Dun & Bradstreet Report accessed in January 2010 reported four employees, including partners.[127] Dun & Bradstreet communicated that, according to the information it received from the company's representative, the four employees of Pac Rim Cayman included Thomas Shrake—the only officer at the Reno, Nevada location, and also the President, CEO, and a director of Pacific Rim Mining Corp., and the President, Secretary, and Treasurer of Pacific Rim Exploration.

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[125] Articles of Organization, Pac Rim Cayman LLC, Doc. 20070846285-12, filed Dec. 13, 2007 (**Exhibit R-81**).

[126] *See* Initial List of Managers or Managing Members and Resident Agent of Pac Rim Cayman LLC, filed Jan. 17, 2008 (listing Thomas Shrake in Nevada, Catherine McLeod-Seltzer in Canada, and April Hashimoto in Canada); Annual List of Managers or Managing Members and Registered Agent of Pac Rim Cayman LLC, filed Dec. 22, 2008 (replacing Ms. Hashimoto with Ronda Fullerton in Canada) (**Exhibit R-82**).

[127] Pac Rim Cayman LLC, Dun & Bradstreet Business Information Report, accessed Jan. 15, 2010 (R-79).

146. In fact, the parent company, Pacific Rim Mining Corp., has reported having three or four employees in the United States in each year from 2002 through 2010.[128] Notably, the number of U.S. employees of the parent company did not increase when Pac Rim Cayman was registered in Nevada. The employees now allegedly associated with Pac Rim Cayman are the same employees reported earlier by the Canadian parent company, Pacific Rim Mining Corp., as its own employees, and, according to the documents Claimant recently provided, these employees have been employed by the other subsidiary, Pacific Rim Exploration.[129]

147. El Salvador's searches for a federal employer identification number ("EIN") for Pac Rim Cayman in all available databases found no matches.[130] The documents provided by Claimant on October 6, 2010 show that the company received a taxpayer identification number from Nevada and a federal employer identification number, both in January 2008.[131] There is no evidence of either of these numbers being used. In fact, the federal employer identification number was assigned to "Pacific Rim Cayman." Pac Rim Cayman's apparent failure to notify the Internal Revenue Service that its name and information were incorrect is further evidence that Pac Rim Cayman had no intention of using, and did not use the federal employer identification number.

148. The publicly available information, confirmed by the documents provided by Claimant, reveals that Pacific Rim Mining Corp. has had a small office in Nevada for many years with a handful of "employees," including the Pacific Rim Mining Corp. President and CEO, Thomas Shrake. At the end of 2007, Pacific Rim Mining Corp. registered its holding company Pac Rim Cayman in Nevada. Now the holding company exists as a registered Nevada entity, but it does not have an office or employees independent of what the Canadian corporation already

[128] *See, e.g.*, Pacific Rim Mining Corp.'s 2002 20-F at 35 (R-66) (reporting four full time employees in the United States); Pacific Rim Mining Corp., Annual and Transitional Report (foreign private issuer) (Form 20-F) at 61 (July 29, 2009) (**Exhibit R-83**) (reporting three employees in the United States).
[129] Pacific Rim Exploration W-3 and W-2 Forms for 2008 and 2009 (**Exhibit R-84**).
[130] *See* EIN database search results (**Exhibit R-85**).
[131] State of Nevada Department of Taxation, Letter providing Nevada State Business License to Pac Rim Cayman LLC, Jan. 25, 2008 (**Exhibit R-86**); Internal Revenue Service Notice to Pacific Rim Cayman LLC, Jan. 28, 2008 (R-61).

maintained in Nevada. Pac Rim Cayman is a holding company and its only alleged business activities are its "holding activities."[132]

d. Pac Rim Cayman has no stated business purpose

149. Pac Rim Cayman's Articles of Organization state no purpose[133] and the company's filings with the Nevada Secretary of State are minimal—only the required Articles and lists of managers. As noted above, the company has no board of directors and is "managed" by the parent company's President and Chairman, though no evidence of any active "management" has been discovered, as there is nothing to manage. In addition, the parent company, Pac Rim Cayman's sole shareholder, waived the annual meeting of Pac Rim Cayman in 2008 and 2009 and only ratified resolutions related to the company's list of managers that must be maintained for the Nevada Secretary of State.[134]

e. Pac Rim Cayman is not listed on any stock exchange

150. Pac Rim Cayman does not directly access U.S. capital markets; its shares are held by Pacific Rim Mining Corp., a Canadian company. Pac Rim Cayman is not listed on any U.S. stock exchange so American investors do not invest directly in it.

151. The parent company's shares are traded on the Toronto exchange and, until recently, were also on the NYSE Amex exchange. For the purposes of U.S. Securities Law, Pacific Rim Mining Corp., the Canadian parent, was designated a "foreign private issuer" which allowed it to follow modified disclosure requirements in the United States. In order to maintain that status, Pacific Rim Mining Corp. could not have a majority of officers or directors who were U.S. citizens or residents, it had to have less than 50% of its assets in the United States, and its business could not be administered principally in the United States.[135]

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[132] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 6 (R-57).
[133] Articles of Organization, Pac Rim Cayman LLC, Doc. 20070846285-12, filed Dec. 13, 2007 (R-81).
[134] Consents to waive annual meetings (R-74 and R-75).
[135] Pacific Rim Mining Corp. recently had to delist its shares from the NYSE Amex exchange. In December 2009, it had to submit a Compliance Plan to NYSE Amex to maintain its listing because of its "stockholders' equity of less than $6,000,000 while sustaining losses from continuing operations and net losses in its five most recent fiscal years." *See* Pacific Rim Mining Corp., "Pacific Rim Mining Announces Fiscal 2010 Third Quarter Results," PMU News Release #10-04, Mar. 16, 2010 (R-54). In

f. Pac Rim Cayman is only mentioned in the news as Claimant in this arbitration

152. According to a Westlaw search for business reporting about Pac Rim Cayman, there was no business or other reporting mentioning Pac Rim Cayman in 2007 or 2008 *prior to its filing of the notice of intent for this arbitration*.[136] Since the filing of the Notice of Intent, the only reporting mentioning Pac Rim Cayman is news about the current CAFTA arbitration and Pacific Rim Mining Corp.'s recent financial reports.[137] One would expect that if Pac Rim Cayman were operating in and managing the work in El Salvador from the United States, there would be some reporting of its activities; instead, the news search confirms that Pac Rim Cayman only became noteworthy when it was used to initiate this arbitration.

g. There are no UCC filings, financial reports, or payment records involving Pac Rim Cayman

153. There is no evidence Pac Rim Cayman has made any Uniform Commercial Code ("UCC") filings with the Nevada Secretary of State, or any other U.S. state as of 2009.[138] A UCC filing is a specific procedure used to secure rights in commercial activity and many business credit transactions whereby a business will take a security interest, or lien, in a creditor's property as collateral. Any such security interest must be documented as part of the public record and UCC filings are standard reporting items on Dun & Bradstreet credit reports. The lack of any UCC filings is further indication that a company does not conduct business activities in the United States.

August 2010, Pacific Rim Mining Corp. announced that it was voluntarily delisting from NYSE Amex because it could not meet the terms of the Compliance Plan related to increasing shareholders' equity. Pacific Rim Mining Corp., "Pacific Rim Notifies NYSE Amex of its Intent to Delist," PMU News Release #10-08, Aug. 19, 2010 (**Exhibit R-87**).

[136] *See* Westlaw search results (1/1/2007 through 11/30/2008) (**Exhibit R-88**). ALLNEWSPLUS is Westlaw's largest news database, containing over 11,000 newspapers, worldwide magazines and newswires from Thomson Dialog and Thomson Financial.

[137] *See* Westlaw search results (12/1/2008 through 8/27/2010) (**Exhibit R-89**). Of the 90 results, 42 relate to the CAFTA arbitration and the other 48 relate to Pacific Rim Mining Corp.'s financial reporting.

[138] For each U.S. state, the secretary of state maintains files for certain documentation provided for under the Uniform Commercial Code that relates to financing statements, notices of liens, judicial fact findings, etc. *See* search results from Office of the Secretary of State, Nevada, for "PAC RIM CAYMAN" (Last searched Apr. 29, 2009) (**Exhibit R-90**).

154. Pac Rim Cayman did not exist in the Dun & Bradstreet database before El Salvador requested information about Pac Rim Cayman after this arbitration was initiated. Dun & Bradstreet is a leading source of information on businesses and its global commercial database contains more than 140 million business records.[139] Pac Rim Cayman's absence from the database means that no individual or other company had contacted Dun & Bradstreet for credit information on Pac Rim Cayman in anticipation of conducting business with Pac Rim Cayman.

155. Dun & Bradstreet accesses approximately 400 million payment records each year and is often able to provide an assessment of a company's creditworthiness on the basis of those records, but was unable to assess the creditworthiness of Pac Rim Cayman due to the lack of any payment records involving Pac Rim Cayman.[140] Even with a requested follow-up with the company's listed management, Dun & Bradstreet was unable to obtain any financial information.

156. El Salvador has invested in an exhaustive, expensive, and time-consuming search to prove the negative—that Pac Rim Cayman does *not* conduct business in the United States. All available information indicates that Pac Rim Cayman was merely registered in Nevada as a vehicle to initiate this arbitration. Otherwise, there is no news, no contact, and *no business activities* related to or carried out by the named Claimant Pac Rim Cayman. The documents Claimant provided, and items that were notably absent, confirm that Pac Rim Cayman has no employees, no revenue, no lease, no assets, and no bank account.[141]

3. Activities of the parent company and other subsidiaries cannot overcome Pac Rim Cayman's lack of business activities

157. The activities of Pacific Rim Mining Corp. and its other subsidiaries cannot count toward the business activities that Pac Rim Cayman is lacking in the United States. Pac Rim Cayman is a shell company with none of its own business activities.

[139] About D&B, http://www.dnb.com/US/about/index.html (last visited Sept. 7, 2010) (**Exhibit R-91**).
[140] Pac Rim Cayman LLC, Dun & Bradstreet Business Information Reports (R-78 and R-79).
[141] Claimant's documents submitted Oct. 6, 2010.

158. Claimant tries to muddy the waters by referring to irrelevant facts and by mentioning the activity of *other* subsidiaries as if they were the activities of Pac Rim Cayman.

159. For example, the August 17, 2010 letter to the Tribunal alleges,

- Pac Rim Cayman has "actual offices in Reno, Nevada, the location from which it has always been managed."[142] This statement is misleading at best because the parent company—*not* Pac Rim Cayman—has one small office in Nevada with minimal staff. This office does not belong to Pac Rim Cayman and has not been leased to Pac Rim Cayman, it has the parent company's name on the sign on the front of the building, and all communications related to leasing this office make no mention of Pac Rim Cayman;[143]
- "a holding company previously incorporated in a jurisdiction having no connection to the business (*i.e.*, the Cayman Islands) was migrated to the actual hub of the business."[144] This is misleading because whether or not Pac Rim Cayman had any connection to or activities in the Cayman Islands is completely irrelevant to whether it has any business activities in the United States, which it does not;
- "PRC directly owns PacRim Exploration."[145] This is misleading because Pacific Rim Exploration was a separate subsidiary, directly owned by Pacific Rim Mining Corp. until after Pac Rim Cayman was registered in the United States in December 2007. In fact, the movement of Pacific Rim Exploration to become a subsidiary of Pac Rim Cayman after the change in nationality was part of this attempt to create CAFTA jurisdiction for a dispute that did not belong in CAFTA.

[142] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 6.
[143] Lease documents provided by Claimant on Oct. 6, 2010 (R-63).
[144] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 7.
[145] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 7.

160. These allegations, even if they were true, would not overcome Pac Rim Cayman's lack of substantial business activities in the United States. As Exhibits A and B to Claimant's August 17, 2010 letter to the Tribunal show, before moving its Cayman Islands holding company to the United States, Pacific Rim Mining Corp. had two U.S. subsidiaries—Dayton Mining (U.S.) Inc. and Pacific Rim Exploration. Any activity of these two companies is obviously not attributable to an unrelated subsidiary incorporated in the Cayman Islands.[146]

161. Indeed, for several years while Pac Rim Cayman was a Cayman Islands company, Pacific Rim Mining Corp. explained how *it* financed the El Salvador exploration operations without any reference to Pac Rim Cayman. Pacific Rim Mining Corp. apparently had profits to invest from the Denton-Rawhide gold heap leach operation in Nevada until it sold this interest in late 2008, but the Denton-Rawhide mine was at all times held by Dayton Mining (U.S.) Inc., which is and always has been a separate subsidiary from Pac Rim Cayman. The Denton-Rawhide operation is not related to nor was it ever held by Pac Rim Cayman, as clearly demonstrated on the two charts Claimant provided with its letter as Exhibits A and B.

162. Despite Claimant's references to irrelevant facts, one cannot disregard that the activities it describes in the United States are of separate and distinct subsidiaries, nor can one ignore that Pac Rim Cayman was not even a U.S. entity until December 2007. Claimant alluded to the same extraneous facts in its subsequent letter dated September 13, 2010. After asserting that *the "substantial business activities" of Pac Rim Cayman are its "investment and holding activities,"* Claimant reiterated that Thomas Shrake has worked out of Nevada since 2002, that Pacific Rim Exploration employed geologists who worked in El Salvador, and that earnings from Dayton Mining (U.S.) Inc.'s holdings in Nevada financed Pacific Rim Mining Corp.'s work.[147]

163. Claimant's letters confusingly mix facts, subsidiaries, and timing in an attempt to bury the important indisputable facts: Pac Rim Cayman just became a U.S.-registered entity in

[146] Exhibits A and B to Letter from Claimant to the Tribunal, Aug. 17, 2010 (**Exhibit R-92**).
[147] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 6.

December 2007 and Pac Rim Cayman conducts no business activities in the United States, or anywhere else. It defies reason and the text of CAFTA itself to suggest that a holding company can be moved to a new nationality and then claim that it engaged in all the business activities which are attributable, at best, *to other subsidiaries of the parent company* at that location going back six years.[148]

4. Reno, Nevada is *not* the hub of Pac Rim Cayman's alleged business activities

164. All evidence available to the Republic flatly contradicts the statement that Reno, Nevada is "the actual hub of the business."[149] The claim is contradicted not only by the lack of activity, employees, and news out of Reno, but also by all of Pacific Rim Mining Corp's representations to the Salvadoran and U.S. Governments.

165. Contrary to the misleading assertions by Claimant, money sent to the enterprises in El Salvador has not been sent by Pac Rim Cayman from the United States, but rather by Pacific Rim Mining Corp. from Canada. Also, Pacific Rim Mining Corp.'s press communications about this arbitration since December 2008 to the present provide contact information for the Canadian headquarters with Barbara Henderson, Vice President of Investor Relations (in Canada, not affiliated with Pac Rim Cayman) listed as the contact person.[150] Thus, even since filing the arbitration with Pac Rim Cayman as the named Claimant, Pacific Rim Mining Corp. in Canada continues to refer to the dispute as its own and to control all the action.

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[148] Although the language of the denial of benefits provision in the Energy Charter Treaty is materially different from the language of CAFTA Article 10.12.2 so that the interpretation of the Energy Charter Treaty is inapplicable to the CAFTA provision, El Salvador notes that even the tribunal in *Plama v. Bulgaria* expressly rejected the possibility of looking to related companies' activities to overcome lack of substantial business activity by the named claimant. In that case, the tribunal noted that the claimant had no substantial business activities in Cyprus and explained, "contrary to the Claimant's pleading, this shortfall cannot be made good with business activities undertaken by an associated but different legal entity, Plama Holding Limited ('PHL'), even where PHL owns or controls the Claimant." *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, para. 169 (emphasis added) (**Authority RL-66**).

[149] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 7 (R-56).

[150] *See e.g.*, Pacific Rim Mining Corp., News Release, *Pacific Rim Files Notice of Intent to Seek CAFTA Arbitration*, Dec. 9, 2008 (**Exhibit R-93**); Pacific Rim Mining Corp., News Release, *Pacific Rim Mining Corp.: CAFTA Proceedings Begin as Tribunal Constituted*, Nov. 19, 2009 (**Exhibit R-94**).

166. As the Acting United States Trade Representative explained at the Congressional hearing on implementing CAFTA, the meaning of "substantial business activities" is "necessarily fact-dependent."[151] Accordingly, the meaning of "substantial business activities" in this case depends on the alleged investment and activity in El Salvador. Given that Claimant claims to be managing the operations in El Salvador from Reno, the lack of activities in the United States is especially noteworthy. If Pac Rim Cayman were actually managing the investment in El Salvador one would expect it to have *at least* its own office, a bank account, and employees in the United States. The El Salvador operations are, in fact, substantial, involving an alleged $77 million invested by Pacific Rim Mining Corp. and its predecessors, dozens of employees (52 full-time and 12 part-time employees in El Salvador as of June 30, 2005 and 32 employees in April 2009),[152] and a request for the rights to extract gold from 12.75 square kilometers of property for 30 years. The pre-feasibility study submitted in January 2005 estimated free cash flow of more than $40 million based on 490,758 ounces of gold.[153] Since then, the price for gold has dramatically increased and, in June 2006, Pacific Rim Mining Corp. announced an updated resource estimate for the El Dorado project in which the estimated resources "increased to 1.2 million gold equivalent ounces."[154] Given the magnitude of the operations and plans in El Salvador, one would expect to be able to find information about the location from which they are managed without too much searching. All searches, however, indicate that the projects in El Salvador have been managed by Pacific Rim Mining Corp., a Canadian company.

[151] Implementation of the Dominican Republic – Central America Free Trade Agreement: Hearing Before the House Committee on Ways and Means, 109th Cong. 193 (Apr. 21, 2005) (statement of Ambassador Peter F. Allgeier) (**Exhibit R-95**).
[152] Pacific Rim Mining Corp.'s 2005 20-F at 46 (R-67); Pacific Rim Mining Corp.'s 2009 20-F at 58 (R-83).
[153] Pre-Feasibility Study, at x, Table 5 (C-9).
[154] Pacific Rim Mining Corp., Annual Report (Form 40-F), Ex. 99.1, Annual Information at 31 (July 31, 2006) (**Exhibit R-96**).

167. Pacific Rim Mining Corp.'s representations to the Canadian, United States, and Salvadoran governments reflect the same conclusion, making no mention of its small office in Nevada as a "hub" of activity.[155]

168. For example, the Environmental Impact Study ("EIA") submitted in September 2005 begins by explaining that Pacific Rim El Salvador is a subsidiary of the Canadian company, Pacific Rim Mining Corp., with interests in the Rawhide project in the United States and another project in Chile.[156] The EIA directs readers to the Canadian company's website for more information.

169. Contracting with outside vendors, including commissioning the pre-feasibility study and other technical work for the El Salvador projects, has been done by Pacific Rim Mining Corp., not Pac Rim Cayman.[157] The technical agreements submitted by Claimant in response to El Salvador's request for information confirm the same—it was not Pac Rim Cayman but Pacific Rim Mining Corp. that entered into contracts.[158] The 2009 Annual Report submitted by Pacific Rim El Salvador for the Santa Rita exploration license supports the same conclusion. In its first appendix, it contains certificates of analysis "Submitted by: Pacific Rim Mining Corporation" in 2008.[159] Indeed, the Annual Reports submitted to the Government of El

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[155] *See, e.g.*, 2003 Annual Report to Canada at 6 (**Exhibit R-97**) ("Pacific Rim Mining Corp. is a Canadian-based gold exploration company with assets in North, Central and South America. Pacific Rim is utilizing cash flow from its interest in the Denton-Rawhide gold mine in Nevada to explore, define and advance its two key gold projects in El Salvador: El Dorado and La Calera."); Pacific Rim Mining Corp.'s 2006 40-F, Ex. 99.1 at 8, 11, 19 (R-96) ("The Company is a British Columbia based mineral resource corporation engaged, through its subsidiaries, in the acquisition, exploration and, if warranted, development of precious metals properties, primarily gold and silver."); Pacific Rim Mining Corp.'s 2009 20-F at 17 (R-83) ("The Company's principal place of business is located at Suite 1050, 625 Howe Street, Vancouver, British Columbia, V6C 2T6 and its registered and records office is located on the 10th Floor, 595 Howe Street, Vancouver, British Columbia, V6C 2T5. The Company through its subsidiaries has administration offices in Nevada and El Salvador.").

[156] Environmental Impact Study, Sept. 2005, at 1-1 (C-8).

[157] *See, e.g.*, the covers of the Pre-Feasibility Study (C-9); Mine Development Associates Technical Report, Nov. 26, 2003 (R-46); and Mine Development Associates Technical Report Update, Mar. 3, 2008 (**Exhibit R-98**).

[158] Agreements for technical work provided by Claimant on Oct. 6, 2010 (R-64).

[159] 2009 Annual Report of Exploration Work Done by Pacific Rim El Salvador in the Santa Rita Exploration License Area (July 2009). (Examples of appendices attached as **Exhibit R-99**).

Salvador did not mention Pac Rim Cayman until the Report submitted in early 2009 mentioned that Pac Rim Cayman would pursue CAFTA claims.[160]

170. Second, even since Pac Rim Cayman has been registered in the United States, the Canadian parent has continued to transfer money to the Salvadoran interests from Canada. The requests to the *Oficina Nacional de Inversiones* ("ONI") of the Ministry of Economy to register investments reflect this reality. There is no evidence that Pac Rim Cayman even has a bank account; El Salvador requested information about any bank accounts and Claimant provided no information about any bank accounts in its response.[161]

171. Before Pac Rim Cayman's change in nationality in December 2007, Pacific Rim El Salvador's requests to register more than $5 million in 2005 and more than $6 million in 2006 included bank certifications showing that the funds had been sent by Pacific Rim Mining Corp. and its Canadian predecessors.[162] Likewise, after Pac Rim Cayman's nationality change at the end of 2007, Pacific Rim El Salvador's request to ONI to register $12 million transferred to El

[160] *See* 2008 Annual Report of Exploration Work Done by Pacific Rim El Salvador in El Dorado (Jan. 14, 2009) § 1.b (**Exhibit R-100**) ("PACRIM continues to seek an amicable solution . . . . However, until such solution is attained, its only shareholder Pac Rim Cayman LLC, will proceed with a claim under Salvadoran Law and the United States-Dominican Republic-Central America Free Trade Agreement in order to maintain its rights in regard to the activities conducted by PACRIM in El Salvador."). *Compare* 2004 Annual Report of Exploration Work Done by Pacific Rim El Salvador in El Dorado (Dec. 13, 2004) at 23, 32, and 36 (**Exhibit R-101**) (including no mention of Pac Rim Cayman, but stating that Pacific Rim Mining Corp. contracted and coordinated with Mine Development Associates, and determined that the project was feasible through internal studies); 2005 Annual Report of Exploration Work Done by Pacific Rim El Salvador in El Dorado (Dec. 10, 2005) (**Exhibit R-102**) (including no mention of Pac Rim Cayman); 2006 Annual Report of Exploration Work Done by Pacific Rim El Salvador in El Dorado (Dec. 19, 2006), at Table 6 (R-16) (including no mention of Pac Rim Cayman, and referring to the Pacific Rim Mining Corp. website for information on the resource estimates); 2007 Annual Report of Exploration Work Done by Pacific Rim El Salvador in El Dorado (Jan. 22, 200[8]) (R-17) (including no mention of Pac Rim Cayman).

[161] Claimant's documents submitted Oct. 6, 2010.

[162] *See* Letter from PRES to ONI, received July 14, 2005, including auditor's certification and certifications from Banco Hipotecario and Banco de Comercio, April 2005 (**Exhibit R-103**); Letter from PRES to ONI, received Aug. 28, 2006, including certification of Scotiabank, El Salvador, July 28, 2006 (**Exhibit R-104**). Adding to the confusion, the 2005 auditor's certification refers to the investing company as *Pacific Rim Cayman*.

Salvador between June 2006 and September 2007 included a certification from Scotiabank that the $12 million had been sent by Pacific Rim Mining Corp. from Canada.[163]

172. Finally, on December 8, 2008, the day before Pac Rim Cayman delivered the Notice of Intent to El Salvador, Pacific Rim El Salvador requested that ONI register more than $7 million that entered El Salvador between October 2007 and September 2008.[164] According to the attached certification from Scotiabank, each deposit of the money Pacific Rim El Salvador sought to register had been sent through "Olympia Trust Company" in Canada.[165] The ONI requested additional information regarding the identity of the sender of the funds.[166] Pacific Rim El Salvador has not submitted that information up to this date, and therefore the investment has not been registered.

5. Pac Rim Cayman does not have substantial business activity by any definition

173. Claimant cannot dispute the evidence indicating that it has no business activities in the United States, so it instead focuses on the meaning of the word "substantial." In its August 17, 2010 letter to the Tribunal, Claimant pointed to the decision of the tribunal in an arbitration before the Stockholm Chamber of Commerce ("SCC"), *AMTO v. Ukraine*, in which the tribunal interpreted the term "substantial" as it is used in the Energy Charter Treaty ("ECT") to mean "of substance, and not merely of form."[167]

174. El Salvador does not agree that one SCC tribunal's analysis for purposes of the Energy Charter Treaty is applicable to CAFTA, nor does it agree with this interpretation of "substantial business activities." But even if *AMTO* were relevant to this case, which it is not, the facts and circumstances of *AMTO* are not analogous to Pac Rim Cayman's absolute lack of business activities in the United States.

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[163] Resolution 368-MR, July 30, 2008, including Certification of Scotiabank, El Salvador, Nov. 15, 2007 (**Exhibit R-105**).
[164] Letter from PRES to ONI, received Dec. 15, 2008 (**Exhibit R-106**).
[165] Certification of Scotiabank, El Salvador, Oct. 21, 2008 (**Exhibit R-107**).
[166] Letter from ONI to PRES, Dec. 22, 2008 (**Exhibit R-108**).
[167] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 6 (R-56).

175. In regard to the interpretation of CAFTA, the *AMTO* tribunal's analysis of an entirely different treaty, the Energy Charter Treaty, is not applicable, and is questionable as an interpretation of that treaty. The CAFTA text does not create a form-versus-substance test for "substantial business activities" but rather a requirement that the activities be "substantial" as that term is normally understood in common and legal usage.

176. Common definitions of "substantial" include "involves an essential part, point, or feature"; "[o]f ample or considerable amount, quantity, or dimensions"; as well as, specifically for actions, "firmly or solidly established; . . . of solid worth or value; weighty, sound."[168] Black's Law Dictionary defines substantial as "[o]f real worth and importance; of considerable value; valuable."[169] Any of these meanings would be reasonable to qualify "business activities" and to give meaning to the requirement to help determine which enterprises can be denied benefits. "Substantial business activities" as used in the denial of benefits provision of CAFTA is meant to convey a meaning of a considerable or important level or magnitude in business activities.[170]

177. The drafters of CAFTA purposefully left the meaning of "substantial business activities" open 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. At the Congressional Hearing on CAFTA implementation, Ambassador Peter F. Allgeier, Acting United States Trade Representative, explained with regard to this inquiry under CAFTA Article 10.12.2, "[t]he fact-dependent nature of an inquiry into the existence of substantial business activity is well recognized in U.S. corporate and tax law." Although U.S. law is not controlling, the test for "substantial business activity" used by the United States Government, which at the very least the United States participants in CAFTA had

[168] Oxford English Dictionary Online (2010) (**Authority RL-67**).
[169] Black's Law Dictionary 1428 (6th ed. 1990) (**Authority RL-68**).
[170] In fact, Claimant used the word "substantial" to mean "considerable" many times in the Response to the Preliminary Objections to describe, for example, the deposits of gold and silver located in El Dorado, its investment in El Salvador, and the amount of evidence presented by El Salvador with its preliminary objections. Response to Preliminary Objections, paras. 4, 35, 42, 92, 177.

in mind when drafting Article 10.12.2, is worth noting. The Internal Revenue Service Regulations provide a facts and circumstances test for "substantial business activities" and state that "substantial" should be measured against all the activities of the affiliated group of companies. The Regulations provide the following factors for consideration: historical presence; operational activities involving property, employees, and sales in the country; substantial managerial activities; ownership; and existence of activities in the country that are "material to the achievement of the [affiliated companies'] overall business objectives."[171]

178. Pac Rim Cayman, having been transferred to the United States apparently for the sole purpose of initiating this arbitration, with no operational activities, no employees, and no revenue generation in the United States, would not meet the U.S. Government's test for "substantial business activities." Moreover, the activities in the United States are in no way "substantial" in comparison to the overall activity of the Canadian parent Pacific Rim Mining Corp. and its alleged investment and proposed project in El Salvador.

179. Additionally, even though El Salvador rejects the notion that an interpretation of the requirement for the ECT provision by an SCC tribunal is applicable to CAFTA Article 10.12.2, it is notable that Pac Rim Cayman *lacks even* the business activities that were considered "substantial" for purposes of the *AMTO* case. The claimant in *AMTO* had paid residents income tax and social insurance obligatory payments for two full-time employees, had paid an entrepreneurial activity risk state fee in Latvia, had a bank account in a Latvian Bank from 1998 to 2007, and had been renting an office in Riga from 2000 to 2007.[172] Based on the evidence, the tribunal determined that the claimant had "substantial business activity in Latvia, on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff."[173]

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[171] United States Internal Revenue Service Regulations, 26 C.F.R. § 1.7874-2T (2010) (**Exhibit R-109**).
[172] *AMTO LLC v. Ukraine*, SCC Case No. 080/2005, Final Award, Mar. 26, 2008, § 68 (**Authority RL-69**).
[173] *AMTO*, § 69.

180. Even these limited activities, of course, differ substantially from Pac Rim Cayman's situation in the United States. First, Pac Rim Cayman does not have a history in the United States and was a Cayman Islands-registered company when the investment began and when the facts underlying the dispute occurred in El Salvador. Second, Pac Rim Cayman does not have employees and does not pay any taxes to the U.S. Government.[174] Third, Pac Rim Cayman claims to be using an administrative office that the parent company has had in the United States since many years before Pac Rim Cayman was registered there, and has provided no evidence whatsoever that it actually uses, or even has the capacity to use the office. Claimant's existence in the United States is purely one of mere form; it has no activities of substance, much less substantial business activities within the meaning of CATFTA Article 10.12.2.

181. Faced with the facts, including its failure to show even the minimal signs of activities existing in *AMTO*—an office, a small staff, and a bank account—Claimant tried in its September letter to introduce a novel argument that "the investment and holding activities of Pac Rim Cayman . . . constitute 'substantial business activities' within the meaning of CAFTA Article 10.12.[2]."[175] This last-ditch effort must be rejected. First, Pac Rim Cayman has no actual investment activities; it is merely a passive holder of the shares of a foreign subsidiary that is an investment vehicle for its Canadian parent. Second, "substantial business activities" must mean more than simply holding the shares of foreign subsidiaries. Passive ownership is not an "activity," much less "substantial." Moreover, if this were the standard, the denial of benefits provision would be meaningless. It would be impossible to deny benefits to any company, as every shell company set up by a non-Party national to try to gain CAFTA jurisdiction will have "holding" activities related to the investments of the non-Party parent company.

182. This case is not like *AMTO* and, pursuant to the text of CAFTA Article 10.12.2, El Salvador has the right to deny the benefits of CAFTA to Pac Rim Cayman.

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[174] Claimant's documents submitted Oct. 6, 2010.
[175] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 6 (R-57).

6. The time to measure "substantial business activities"

183. El Salvador has shown that Pac Rim Cayman did not have substantial business activities in the United States at any time it was registered in the United States. Therefore, for purposes of the Tribunal's analysis, it should be unnecessary to discuss the appropriate timeframe for measuring the existence *vel non* of "substantial business activities." Nonetheless, for the sake of completeness, El Salvador here demonstrates that even if it were to be *assumed* (contrary to all of the facts) that Claimant had "substantial business activities" in the United States after it was registered there in late 2007, this still would not assist Claimant's position because the purpose and intent of the denial of benefits clause requires "substantial business activities" to exist at the time of the investment, and in any event, before arbitration is imminent.

184. All the evidence shows that Pac Rim Cayman does not have and has never had substantial business activities in the United States. A theoretical question may arise as to on what date the fact of whether significant business activities exist must be ascertained. Although it is unnecessary for the Tribunal to determine this question in this case because Pac Rim Cayman had no substantial business activities at any time, El Salvador submits that the purpose and intent of the denial of benefits clause requires "substantial business activities" to exist at the time of the investment, and in any event, before arbitration is imminent.

a. The relevant "substantial business activities" must exist before the motivation to nationality-shop arises, a time when Pac Rim Cayman was not even registered in the United States

185. The dual purposes of denial of benefits clauses, to protect legitimate investors of State-Parties to a treaty while preventing nationality-shopping, are best achieved by looking to substantial business activities at the time of the decision to make the investment.[176] This timing would allow for consideration of the expectations of both the investor and the host State.

[176] Although there is limited case law on this point, it appears that tribunals and parties have assumed that the "substantial business activities" should correspond to the time of the investment. *See, e.g. AMTO*, §§ 19-21, 68; *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Apr. 29, 2004, paras. 2, 37 (noting that the claimant began its investment in Ukraine in 1994 and submitted evidence of substantial business activities in Ukraine—*i.e.*, financial, employment, and production information—for the period from 1991 to 1994) (**Authority RL-70**).

186. Denial of benefits clauses have been inserted into treaties for decades in order to prevent third parties from improperly claiming the benefits of the treaty. The right to deny benefits protects States from having non-Party investors manipulate their corporate organization to take advantage of treaty provisions at their convenience.

187. The movement of enterprises, *i.e.* the nationality-shopping, which the denial of benefits provision seeks to prevent, occurs after the investment. If a subsidiary exists in, and has a continuous economic link with, a Party before the investment is made and during the investor's interactions with the host State, then there is less concern about nationality-shopping. The concern arises where an investor moves an enterprise and establishes "business activities" in a new nationality *after* the investment. Such an investor may be trying to improperly gain access to treaty protections. Accordingly, to avoid application of the denial of benefits clause, an enterprise claiming nationality of a Party must have "substantial business activities" in the territory of that Party at the time of investment.

188. Notably, the factual background of the *AMTO* dispute *corresponds* to the dates during which the claimant had activities in Latvia. The claimant invested in the nuclear energy industry in Ukraine in late 1999. In 2002 and 2003, the claimant sued a State entity for amounts due pursuant to contracts and obtained a favorable judgment. Its ability to collect, however, was impacted by six bankruptcy proceedings commenced between March 2002 and December 2003.[177] According to the tribunal, the bankruptcy proceedings were "fundamental" to the ECT claims.[178] The claimant's evidence of renting an office in Riga from 2000 through 2007 and holding a bank account in Riga from 1998 through 2007 covered the time of investment and the period during which the dispute arose up through the arbitration.

189. By contrast, in this case, Pac Rim Cayman was not involved at the time of investment and had no connection whatsoever to the United States until several years later. Based on the facts and circumstances, especially Pac Rim Cayman's registration in the territory

[177] *AMTO*, §§ 19-21.
[178] *AMTO*, § 21.

of the CAFTA Party in December 2007, Pac Rim Cayman should be denied the benefits of CAFTA for Pacific Rim Mining Corp.'s investment that began in 2002.

b. Even if the Tribunal decides to consider "substantial business activities" after the investment, Pac Rim Cayman still did not have "substantial business activities"

190. In the alternative, the denial of benefits clause could require one to look for "substantial business activities" during the period when the facts that give rise to the dispute take place. This timing would not have the advantage of considering each party's expectations, but would contribute to preventing nationality-shopping *after* the facts that give rise to the dispute take place.

191. In this case, Claimant was registered in the United States after the facts that gave rise to the dispute took place. This issue is more fully discussed above, related to the abuse of process objection. Here, it should be sufficient to recall that Pacific Rim El Salvador first applied for an environmental permit from the Ministry of the Environment in September 2004 and that Pacific Rim El Salvador wrote to the Ministry in December 2004 noting that the Ministry had not responded to its environmental permit application, that the law required the Ministry to respond within 60 days, and that Pacific Rim El Salvador was being harmed by the delay. In addition, the exploration concession application was filed in December 2004, Pacific Rim El Salvador was told that it did not meet the land control requirement in early 2005, and Pacific Rim spent much of 2006 and 2007 trying to change the legal requirements. By the end of 2007, according to Claimant, a year had passed with *no communication* from the Ministry of the Environment related to the environmental permit.[179] Clearly the dispute with the Government of El Salvador had arisen before the change of nationality. During those three years, Pac Rim Cayman was registered in the Cayman Islands and had *no* "business activities" in the United

[179] NOA, para. 64. Pursuant to Article 3 of the Law of Administrative Proceeding (*Ley de Jurisdicción Contencioso Administrativa*), applicants are given the right to challenge the presumed denial of a pending application if the Government has not responded *within 60 days*. Article 24 of the Environmental Law explicitly states that this presumptive denial provision applies to the evaluation of Environmental Impact Studies.

States. Accordingly, El Salvador should be able to deny the benefits of CAFTA to Claimant without further discussion of later alleged activities.

192. The final alternative date for measuring "substantial business activities" would be upon filing the notice of arbitration. The Republic deems that considering an entity's business activities at this point would contradict the purpose of the denial of benefits clause. It would allow an enterprise with no involvement in the investment to be registered in a Treaty Party after a dispute arises, manufacture business activities, and then file arbitration. Such action would directly contradict the purpose of the denial of benefits provision and render States powerless against nationality-shopping. Any investor of any non-Party could move a subsidiary after a dispute arose in order to initiate CAFTA arbitration and States would be unable to invoke their right to deny benefits if the investor was clever enough to establish some business activities before initiating arbitration.

193. El Salvador rejects any interpretation of the denial of benefits clause that deprives it of its meaning. To protect CAFTA Parties from abusive tactics, there must be a requirement of substantial business activities in the territory of the claimed nationality before arbitration becomes likely.

194. Nevertheless, El Salvador submits that, for purposes of this case, no matter when "substantial business activities" are measured, Pac Rim Cayman would be found lacking. Claimant's only argument for having activities stems from the fact that at the same time as it changed Pac Rim Cayman's registration to the United States, Pacific Rim Mining Corp. transferred its other subsidiary, Pacific Rim Exploration, to be held by Pac Rim Cayman. But, Pacific Rim Exploration is merely another subsidiary of the Canadian parent company Pacific Rim Mining Corp. which was moved around to try to create the appearance of substantial business activities to make this arbitration possible. Therefore, Pacific Rim Exploration's activities, or lack thereof, in the United States cannot be relevant to an analysis of whether Pac Rim Cayman, the Claimant in this arbitration, had or has substantial business activities in the United States at the relevant times for purposes of the denial of benefits clause.

195. Any attempt to count Pacific Rim Exploration's business activities after December 2007 as activities by Pac Rim Cayman should be rejected as not only impermissible, but also as yet another sign of abuse of process. But in any case, the publicly available information shows that even Pacific Rim Exploration does not have significant business activities in the United States to justify the magnitude of the investment and operations in El Salvador. Like Pac Rim Cayman, Pacific Rim Exploration filed minimal filings to become a Nevada entity; it has Thomas Shrake as CEO, President, Treasurer, and Secretary, and Catherine McLeod-Seltzer as director.[180] According to a Dun & Bradstreet Report accessed in January 2010, Pacific Rim Exploration reported four employees, including officers; had three payment experiences in twelve months totaling $1,150; and had no public filings, such as UCC statements.[181]

196. Thus Pac Rim Cayman *is* like a letter-box company set up in the United States with no business activities there. The investment in El Salvador originated in Canada and was always funded from Canada. At the time of the investment as well as during the time in which the dispute arose, Pac Rim Cayman was incorporated in the Cayman Islands with no connection to the United States. Years later, Pac Rim Cayman was moved to the United States. Moving Pac Rim Cayman to the United States and placing another subsidiary under it in December 2007 does not change Pac Rim Cayman's status as a holding company with no business activities in the United States. Even when Pac Rim Cayman was used to initiate this arbitration, Pac Rim Cayman did not have "substantial business activities" in the United States to justify its claiming the benefits of CAFTA.

197. There has been no allegation and there is no evidence that Pac Rim Cayman has business activities in other CAFTA Parties, besides El Salvador, the denying Party. As a result, Pac Rim Cayman can and should be denied the benefits of CAFTA pursuant to CAFTA Article 10.12.2.

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[180] "Pacific Rim Exploration Inc. Business Entity Information," Office of the Secretary of State, Nevada, filed Mar. 20, 1997 (**Exhibit R-110**).
[181] Pacific Rim Exploration Inc., Dun & Bradstreet Business Information Report, accessed Jan. 15, 2010. (R-79).

C. Interpretation of the Energy Charter Treaty related to scope and prospective application is irrelevant in interpreting the materially different CAFTA denial of benefits provision

198. This is the first time a CAFTA party is invoking the denial of benefits provision under CAFTA. The similarly worded denial of benefits provision in NAFTA also has never been invoked.

199. Although tribunals have addressed the so-called denial of benefits clause in the ECT, the provision in that treaty is so materially different from the CAFTA provision that those decisions are irrelevant in interpreting the CAFTA denial of benefits provision.

1. The scope of the provision in CAFTA is broader than the scope of the provision in the ECT

200. The CAFTA denial of benefits provision has a significantly different scope than Article 17 of the ECT because under CAFTA the dispute resolution provisions are included within the benefits to be denied. As a result, the CAFTA provision, unlike what tribunals have determined for the ECT provision, is directly related to jurisdiction.

201. CAFTA Article 10.12.2, under the title "Denial of Benefits," 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.[182]

202. On the other hand, ECT Article 17, titled "Non-Application of Part III in Certain Circumstances," provides:

> 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

[182] CAFTA Article 10.18.2 (emphasis added).

> activities in the Area of the Contracting Party in which it is organized.[183]

203. The ECT provision only applies to Part III, "Investment Promotion and Protection," which contains the substantive protections of investments. The ECT dispute settlement provisions are in Part V. By contrast, CAFTA Article 10.12.2 applies to *all* of Chapter 10, which includes both substantive protections and dispute settlement.

204. This difference is crucial. The tribunals interpreting the ECT determined that the denial of advantages provision did not affect jurisdiction *because* its application is limited to Part III, which does not include the dispute settlement provisions. For example, the tribunal in the Yukos Oil shareholders' arbitrations against Russia stated, "[s]ince Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant."[184] In contrast, the CAFTA denial of benefits provision encompasses the dispute settlement provisions and therefore clearly affects jurisdiction. The dispute resolution mechanism offered to investors of other CAFTA Parties is thus one of the benefits that is denied to, among others, shell company subsidiaries of non-Party corporations.

205. Consequently, the right to submit a claim and the consent provisions of CAFTA are expressly included within the denied benefits. This differs completely from the consent provision of the ECT, which is located outside the scope of the denial of benefits provision in Article 17. Consent was central to the *Plama* tribunal's analysis. That tribunal stated that under Article 26(3)(a) of the ECT the respondent "expressed unconditionally its written consent required under the ICSID Convention."[185] The tribunal added that it would "require a gross

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[183] Energy Charter Treaty, Art. 17, Dec. 17, 1994 (emphasis added) (**Authority RL-71**).
[184] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009, para. 441 (**Authority RL-72**). *See also Plama v. Bulgaria*, para. 148 (RL-66) ("Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III. As a matter of language, it would have been simple to exclude a class of investors completely from the scope of the ECT as a whole, as do certain other bilateral investment treaties; but that is self-evidently not the approach taken in the ECT.").
[185] *Plama v. Bulgaria*, para. 140.

manipulation of the language [of Article 17] to make it refer to Article 26 in Part V of the ECT."[186] In sharp contrast to the text of the ECT, Article 10.12.2 of CAFTA expressly applies to the whole Chapter, including the statement of consent to arbitration in Article 10.17. When the CAFTA denial of benefits provision is invoked, the putative claimant is denied the right to submit a claim under Article 10.16 and denied the benefit of the Party's consent under Article 10.17.

206. Thus, the different scope of the CAFTA provision, applying to the whole Chapter, materially distinguishes the CAFTA provision from the ECT provision. The reason given by the ECT tribunals for why Article 17 would not affect jurisdiction is completely inapplicable to CAFTA Article 10.12. Where the language of Article 17 would have to be manipulated to cover the dispute settlement provisions, CAFTA Article 10.12 expressly includes all the CAFTA dispute settlement provisions.

207. When all the benefits of Chapter 10 are denied, there is no right to submit claims, no obligations on which to claim breaches, no consent to arbitration on behalf of the State, and, therefore, no jurisdiction for CAFTA arbitration.

2. The ECT tribunal's interpretation that benefits must be denied prospectively is inapplicable to the CAFTA provision

208. Given that the CAFTA denial of benefits provision, unlike the ECT provision, relates to consent and jurisdiction, any discussion of retroactive versus prospective application is not necessary. The provision applies when the issue is raised and determined, and if the conditions are found to be met, then there is no jurisdiction to examine the merits of the claims.

209. But, in any event, the discussion of the merits in *Plama v. Bulgaria* deciding that Article 17 should apply prospectively, reasoning which was adopted by the tribunal in the three cases brought by Yukos Oil shareholders against Russia, highlights at least three additional important differences between the ECT provision and CAFTA Article 10.12.2.

[186] *Plama v. Bulgaria*, para. 147.

a. The CAFTA provision is stronger than a reservation of a right

210. ECT Article 17 differs from other denial of benefits provisions because it provides that each contracting Party "reserves the right to deny the advantages" of Part III to certain entities.[187] The *Plama* tribunal considered it important that a reservation of a right meant that a Party "is not required to exercise that right; and it may never do so."[188] Both the *Plama* tribunal and the tribunal for the Russian cases noted that the provision could easily have been drafted differently.[189]

211. In fact, the CAFTA provision *is* drafted differently than the ECT expressly to provide States the right to deny benefits. The CAFTA Parties did not "reserve the right to deny" the benefits of CAFTA but rather affirmatively stated that any Party "may deny" the benefits of Chapter 10 if certain conditions are met. Just as the *Plama* tribunal noted that "it would clearly not be permissible for the Tribunal to re-write Article 17(1) ECT in the Respondent's favor"[190] given its interpretation of the text, it would be impermissible to rewrite CAFTA Article 10.12.2 to impose additional restrictions on the denial of benefits where it clearly establishes an affirmative right for the Parties and specifies the conditions for its use.

b. The CAFTA provision requires notification to affected CAFTA Parties, not to potential future investors

212. The CAFTA provision also differs from the ECT provision because it specifies the requirements for its uses, including notice to affected Parties. The *Plama* tribunal decided that the ECT denial of benefits provision could only be applied after notice was given to the investor. It mentioned NAFTA Article 1113(2) "as an example of a term providing for the denial of benefits which provides for a form of prior notification and consultation; and whilst the wording is materially different from Article 17(1) ECT, this term does suggest that the Tribunal's interpretation is not unreasonable as a practical matter."[191]

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[187] ECT, Art. 17(1) (emphasis added).
[188] *Plama v. Bulgaria*, para. 155.
[189] *Yukos Universal v. Russia*, para. 456; *Plama v. Bulgaria*, para. 156.
[190] *Plama v. Bulgaria*, para. 156.
[191] *Plama v. Bulgaria*, para. 157.

213. Unlike the ECT provision, the CAFTA provision clearly specifies the type of notice required. CAFTA Article 10.12.2 specifically makes the invocation of the denial of benefits provision subject to the CAFTA provision requiring notification to the other CAFTA Party.

214. The specific CAFTA provision regarding notification in the event of denial of benefits provides that a denying Party must 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."[192] The CAFTA text, specifying that a denying Party shall notify other affected CAFTA Parties, makes no mention of notifying investors. An additional requirement to notify investors, *found nowhere in the text*, cannot be imposed on Article 10.12.2.

215. Potential investors and claimants are notified by the express denial of benefits provision in CAFTA Chapter 10. Unlike the ECT's reservation of a right, CAFTA affirmatively provides that States may deny benefits and establishes the requirements. Potential claimants know the two conditions where benefits may be denied: the enterprise is owned or controlled by persons of a non-Party and the enterprise does not have substantial business activities in any Party other than the denying Party. Enterprises that meet the two conditions of Article 10.12.2 have been thereby notified since CAFTA entered into force that a Party may deny the benefits of CAFTA to them, subject to notifying affected State-Parties.

216. The additional protection that the *Plama* tribunal considered important—to prevent respondent States from judging their own cases—is covered by the express requirement of State notification included in CAFTA. The CAFTA Party notified of another Party's intent to deny benefits has the opportunity to advocate on behalf of an enterprise where the notified Party considers that the enterprise should be allowed the benefits of CAFTA; that Party can even

[192] CAFTA Article 18.3.1.

initiate consultations and activate the State-to-State dispute settlement provisions if it does not agree with the denial of benefits to one of its nationals.

217. Thus, the text of the Treaty, common sense, and the protection provided by the State notification requirement all support not imposing an additional notice requirement.

c. Application of the denial of benefits provision to prevent jurisdiction over claims by Pac Rim Cayman is consistent with the objectives of CAFTA

218. Finally, the *Plama* tribunal considered the "ECT's express 'purpose'" to establish "a legal framework in order to promote long-term co-operation in the energy field . . ." and found that any retrospective effect would not be "consistent with this 'long-term' purpose."[193]

219. But there is no inconsistency in applying the denial of benefits clause of CAFTA to prevent jurisdiction in cases such as the one before this Tribunal. The CAFTA Parties deliberately included the denial of benefits provision and made it applicable to the dispute settlement section of Chapter 10 to prevent the use of shell companies (*i.e.*, companies controlled by non-Party investors with no substantial business activities) to manipulate access to CAFTA arbitration. Giving effect to this express provision in CAFTA and preventing jurisdiction where shell companies are used to initiate claims is not only consistent with the purposes of CAFTA, but also necessary to preserve the integrity of the CAFTA mechanism.

220. First, the CAFTA objectives mention diversifying trade "between the Parties" and facilitating cross-border movement of goods and services "between the territories of the Parties."[194] Not allowing enterprises owned or controlled by non-Parties to use the system fits precisely within these objectives. Indeed, allowing non-Parties to abuse CAFTA by re-registering subsidiaries after having invested would run counter to the purpose of encouraging trade and opportunities between CAFTA Parties.

221. A second objective that supports denying jurisdiction to Pac Rim Cayman is the goal of providing "effective procedures for the implementation and application of this

[193] *Plama v. Bulgaria*, para. 161 (emphasis omitted).
[194] CAFTA Article 1.2.

Agreement . . . and for the resolution of disputes."[195] The CAFTA Parties purposefully included the denial of benefits provision in their Agreement and made it applicable to dispute resolution. The CAFTA objective includes, therefore, effective application of this provision. On the other hand, imposing additional requirements, not found in the text of the Treaty, for Parties to broadcast additional notice—*i.e.*, of what they will do if an investor moves its interests around and eventually registers a holding company in a CAFTA Party—would frustrate the Parties' intent and prevent effective implementation of the Agreement.

222. Thus, applying the denial of benefits clause in this case is consistent with and, in fact, essential to the CAFTA objectives.

D. Tribunals interpreting the denial of benefits clauses in BITs have not imposed advance notice requirements

223. Several decisions related to denial of benefits clauses support the Republic's view that the clause applies as a preliminary matter and that there is no advance notice requirement.

1. Denial of benefits is properly raised with objections to jurisdiction

224. Recently, when a similar issue was raised in *EMELEC v. Ecuador*, the ICSID tribunal found that the objections to jurisdiction was "the proper stage of the proceedings" to announce denial of benefits.[196] In that case, the claimant was a company incorporated in the U.S. state of Maine and its shares were fully owned by a company incorporated in the Bahamas.[197]

225. The tribunal did not impose any notice requirement or mention prospective application; instead, the tribunal simply noted that "[s]ince EMELEC is a 'company of the other Party,' Ecuador has the power to deny it the advantages of the BIT if the company has no substantial business activities in the United States."[198] Like the Parties to the U.S.-Ecuador BIT,

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[195] CAFTA Article 1.2.
[196] *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, June 2, 2009, para. 71 (**Authority RL-73**).
[197] *EMELEC v. Ecuador*, para. 2.
[198] *EMELEC v. Ecuador*, para. 71.

the CAFTA Parties have the "power" to deny Treaty benefits to companies that claim a nationality of a Treaty Party but have no substantial business activities there.

226. Importantly, the tribunal continued, "Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, *i.e.*, upon raising its objections on jurisdiction."[199] Likewise, El Salvador properly announced the denial of benefits to Pac Rim Cayman upon raising its objections to jurisdiction.

227. The *EMELEC* tribunal, however, did not determine the denial of benefits issue. For issues of procedural economy, the tribunal focused on the first objection to jurisdiction, about the legal capacity of the claimants, which could in and of itself end the proceedings.[200] Deciding that issue in the respondent's favor, the tribunal held that it lacked jurisdiction without needing to determine the other objections to jurisdiction.[201]

2. Another tribunal recognized Treaty drafters' option to include denial of benefits provisions to limit consent

228. The tribunal in *Tokios Tokelės v. Ukraine* also recognized that contracting Parties can limit their consent by including denial of benefits clauses in their treaties.[202]

229. In that case, the respondent argued, based on the prevalence of denial of benefits clauses in international investment agreements, that the tribunal should deny jurisdiction because the claimant did not have "substantial business activity" in Lithuania. The tribunal noted that many investment treaties include denial of benefits clauses, and considered that "[t]hese investment agreements confirm that state parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country."[203] But, the Ukraine-Lithuania BIT, on which the arbitration was based, did not include a denial of benefits provision.

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[199] *EMELEC v. Ecuador*, para. 71 (emphasis added).
[200] *EMELEC v. Ecuador*, para. 74.
[201] *EMELEC v. Ecuador*, paras. 131, 136.
[202] *Tokios Tokelės v. Ukraine* (RL-70).
[203] *Tokios Tokelės v. Ukraine*, para. 36.

230. Since there was no denial of benefits clause, the tribunal was limited to only considering the claimant's nationality of incorporation. The majority asserted that it could not "impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history."[204] Since the claimant was incorporated in Lithuania, and there was no provision to deny benefits based on foreign ownership or control and lack of activities, the majority found that it did have jurisdiction.

231. Nevertheless, the majority reiterated that "Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT."[205] The majority therefore went out of its way to emphasize that contracting States can include denial of benefits clauses in their agreements and that these clauses limit the States' consent. Moreover, it added, "[o]nce that consent is defined . . . tribunals should give effect to it."[206] The chairman of the arbitral tribunal dissented, because in his view, ICSID jurisdiction should not extend to a dispute between Ukraine and a company controlled by Ukrainians, even if the tribunal would have to look beyond the corporate structure to identify the real investor.[207]

232. In the present case, the Parties did limit their consent by including a denial of benefits clause in CAFTA and that clause should be given effect. The Parties expressly determined in which circumstances tribunals are to look beyond the place of incorporation to

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[204] *Tokios Tokelės v. Ukraine*, para. 36.
[205] *Tokios Tokelės v. Ukraine*, para. 39.
[206] *Tokios Tokelės v. Ukraine*, para. 39. *See also Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, paras. 240-241 (**Authority RL-74**) (expressing "sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty" but noting that the Parties had to define who was entitled to Treaty protection and that "it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.").
[207] *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil, Apr. 29, 2004, para. 21 (**Authority RL-75**) (explaining that jurisdiction should have been denied due to "the simple, straightforward, objective fact that the dispute before this ICSID Tribunal is not between the Ukrainian State and a foreign investor but between the Ukrainian State and an Ukrainian investor—and to such a relationship and to such a dispute the ICSID Convention was not meant to apply and does not apply.").

identify the real investor in order to protect CAFTA arbitration from being exploited by non-CAFTA Party investors.

233. Like the tribunals that considered the BIT provisions, this Tribunal should view the provision as affecting admissibility, consent and jurisdiction. But unlike the claimants in *Generation Ukraine* and *Pan American Energy*, discussed below, Pac Rim Cayman cannot overcome either of the required conditions, and therefore El Salvador is entitled to deny benefits to Pac Rim Cayman.

E. Commentary on NAFTA Article 1113(2) supports the view that the denial of benefits provision affects jurisdiction and that an additional prior notification requirement should not be imposed

234. Although the denial of benefits provision in NAFTA has not been at issue before a tribunal, one tribunal's comments as well as commentators' views lend support to the Republic's interpretation of the similar CAFTA clause.

235. Meg Kinnear's treatise on the NAFTA Investment Chapter, for example, expressly rejects requiring notification before initiation of the arbitration:

> Given that a [NAFTA] Party cannot know which enterprises in another Party may some day attempt to file a NAFTA Chapter 11 claim, and given the rapidity with which ownership and control of a corporation may change, it cannot mean that a Party needs to notify the other Party before a claim is submitted to arbitration under Chapter 11.[208]

236. Thus, as the treatise reasonably concludes, "'Prior notification' most likely means that, before asserting Article 1113 as a defense before a tribunal, the respondent Party must notify, and commence consultations with, the Party in which the claimant is located."[209] This is precisely what has been done in this arbitration.

237. This view was echoed by the tribunal in the *Waste Management II* Award. First, the tribunal noted that the denial of benefits provision is a preliminary matter; if an enterprise is

[208] An Annotated Guide to NAFTA Chapter 11 at 1113-7 (emphasis added) (RL-63).
[209] An Annotated Guide to NAFTA Chapter 11 at 1113-7.

denied the benefits of CAFTA, the arbitration cannot proceed. The tribunal included the denial of benefits in its discussion of "the conditions for commencing arbitrations."[210]

238. The *Waste Management II* tribunal described the NAFTA denial of benefits provision as "deal[ing] with possible 'protection shopping.'" According to the tribunal, this provision "addresses situations where the investor is simply an intermediary for interests substantially foreign, and it allows NAFTA protections to be withdrawn in such cases (subject to prior notification and consultation)."[211] The tribunal recognized that protections can be "withdrawn" when a non-Party investor moves an enterprise to the territory of a Party to qualify for treaty protection.

239. The *Waste Management II* tribunal, however, addressed a very different fact pattern, where the beneficial owner was a United States company, which was the claimant in that case. It therefore emphasized that NAFTA clearly intended to protect the investor no matter the location of intermediate holding companies. The tribunal cautioned, "[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements."[212] Because the investment in that case was indirectly owned or controlled by the claimant, an investor of the United States, the tribunal found that "[t]he nationality of any intermediate holding companies [wa]s irrelevant."[213]

240. CAFTA intended the same scope—to protect investors of CAFTA Parties in other CAFTA Parties. Because the investment in El Salvador was owned and controlled by Pacific Rim Mining Corp., a non-Party, its movement of intermediate holding companies is irrelevant. CAFTA spells out in detail the requirements to deny benefits. The evidence shows that the requirements are met in this case: Pac Rim Cayman, the claimant in this arbitration, is owned by a Canadian company and was not a U.S. entity at the time of the investment or during the time

[210] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, para. 80 ("*Waste Management II* Award") (emphasis added) (**Authority RL-76**).
[211] *Waste Management II* Award, para. 80 (emphasis added).
[212] *Waste Management II* Award, para. 85.
[213] *Waste Management II* Award, para. 85.

when the dispute arose *and* Pac Rim Cayman did not have substantial business activities in the United States even after it was registered as a U.S. entity in December 2007.

241. CAFTA was adopted to increase investment and movement of goods and services between CAFTA Parties, not for the use of Pac Rim Cayman, the holding company of a Canadian investor recently moved to the United States and conducting no business activities there. Given these facts and circumstances, El Salvador invokes its right under CAFTA Article 10.12.2 to deny the benefits of CAFTA to Pac Rim Cayman. As a result, this Tribunal has no jurisdiction to entertain CAFTA claims submitted by Pac Rim Cayman.

F. The facts of Pac Rim Cayman's ownership are clearly distinguishable from other cases where claimants overcame the ownership or control prong of the denial of benefits clause

242. Pac Rim Cayman is wholly-owned by Pacific Rim Mining Corp. The case for denying benefits to Pac Rim Cayman is substantially stronger than the case presented by the respondents in *Generation Ukraine v. Ukraine* and *Pan American Energy v. Argentina*. In neither of those cases, however, did the tribunals mention a prior notification obstacle.

243. In *Generation Ukraine v. Ukraine*, the respondent's objection relying on the denial of benefits provision was dismissed for lack of evidence. The tribunal criticized the "paucity" of the respondent's factual submissions, recalling that the evidence for third-country control included one occasion where the Canadian Ambassador assisted the claimant, one Canadian national serving as President for a time of the company, an office in Toronto, and a statement on the letterhead that the company was a "United States, Canada, Ukraine venture."[214] The tribunal commented that even if those assertions were true, the respondent would still be "a long way from displacing the clear manifestation of control by a *U.S.* national (Mr Laka), who owns 100% of the share capital of the Claimant, Generation Ukraine."[215]

[214] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, para. 15.8 (RL-42).
[215] *Generation Ukraine*, para. 15.9 (emphasis in original).

244. The case at hand is clearly distinguishable. Pac Rim Cayman is 100% owned by a Canadian company. Thus, this case is the reverse situation of *Generation Ukraine*—here, *Claimant* is a long way from displacing the clear evidence that it is owned and controlled by a Canadian company and has no substantial business activity in the United States. Here, there is ample evidence of Canadian ownership and control, and a paucity of evidence that Pac Rim Cayman conducts or manages business activities in the United States.

245. The tribunal in *Pan American Energy v. Argentina* also considered the denial of benefits clause. That tribunal first rejected the claimants' submission that the *jus standi* objection, which included the denial of benefits objection, should be addressed at the merits stage, finding instead that it pertained to jurisdiction.[216] The tribunal then dismissed the respondent's objection because the claimant could show that it was controlled by other U.S., not non-Party, companies.

246. Again, the facts and circumstances of Pac Rim Cayman in the United States are clearly distinguishable. In *Pan American Energy*, the claimants showed that the named claimant and the parent company were U.S. companies existing in the United States for decades.[217] Considering that the claimants showed their existence in the United States since 1930, 1958, and 1977, the tribunal also noted that "the expansion of the investments occurring between 1991 and 1997 was, at least partly, motivated by the perspective of [the BIT's] entering into force."[218] Specifically turning to the denial of benefits objection, the tribunal expressed simply that the claimants had "convincingly shown that, as a matter of fact, [Pan American Energy] is controlled by BP America and BP Argentina, which are both US companies and have both substantial business contacts in the United States."[219]

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[216] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, para. 209 (**Authority RL-77**).
[217] *Pan American Energy v. Argentina*, para. 211.
[218] *Pan American Energy v. Argentina*, para. 212.
[219] *Pan American Energy v. Argentina*, para. 221.

247. In this case, the facts are markedly different: Pac Rim Cayman is owned and controlled by Pacific Rim Mining Corp., a Canadian company, and was moved to the United States after the investment in El Salvador was made, after CAFTA entered into force, and after the facts underlying the dispute had taken place.

G. El Salvador provided notification to the United States Government

248. The Republic complied with the notification requirement to invoke the denial of benefits provision of CAFTA.

249. CAFTA Article 10.12.2 states that a Party may deny the benefits of Chapter 10 "[s]ubject to Article 18.3 (Notification and Provision of Information) and 20.4 (Consultations)."

250. CAFTA Article 18.3.1 provides, "[t]o 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." The second paragraph of Article 18.3 provides that, upon request by another Party, a Party shall provide information and respond to questions related to any actual or proposed measures.

251. Having gathered sufficient evidence and concluded that it could invoke the denial of benefits provision, El Salvador promptly notified the Government of the United States of its intent and included relevant information and exhibits for the U.S. Government to review.[220] The Government of El Salvador made itself available to provide any additional information, answer questions, or otherwise discuss the matter with the Government of the United States. The notification was delivered to the United States Government on March 5, 2010. To this date, the United States Government has not requested additional information or consultations.

252. Under CAFTA Article 20.4.1, "Any Party may request in writing consultations with any other Party with respect to any actual or proposed measure or any other matter that it

[220] Denial of Benefits Notification Letter from El Salvador to the United States Trade Representative, Mar. 1, 2010 (**Exhibit R-111**). The complete set of exhibits submitted with the Notification to the U.S. Government is provided as **Exhibit R-112**.

considers might affect the operation of this Agreement." Consultations may be requested by the other Party, in this case the United States, if it chooses to do so. However, actually holding consultations is not required as part of the process to invoke the right to deny benefits. The only requirement is notification, which has already been done.

H. Application of the denial of benefits provision requires the dismissal of all CAFTA claims in this arbitration

253. All of the requirements of Article 10.12.2 have thus been met, and El Salvador has denied the benefits of Chapter 10 to Pac Rim Cayman, and as a result, Pac Rim Cayman's CAFTA claims against the Republic of El Salvador must be dismissed.

254. The CAFTA Parties included Article 10.12.2 to prevent non-Party investors from using, among others, shell companies as in the present case, and manipulating the system to invoke the CAFTA benefits through the shell company. In this case, where Pac Rim Cayman is a holding company, owned and controlled by a Canadian corporation, and Pac Rim Cayman has no substantial business activities in the United States, El Salvador can rely on the protection of Article 10.12.2 to deny benefits to Pac Rim Cayman as a claimant. Once the benefits of Chapter 10, including the dispute resolution provisions of Article 10.16, are denied to Claimant, Claimant has no right to submit claims, Claimant does not have the Republic's consent to arbitration, and the Tribunal has no jurisdiction over any CAFTA claims. Therefore, all of the CAFTA claims must be dismissed.

IV. EVEN WITHOUT THE ABUSE OF PROCESS AND THE DENIAL OF BENEFITS OBJECTIONS, THERE IS NO JURISDICTION UNDER CAFTA

255. Setting aside for a moment that this arbitration must be dismissed due to Claimant's abuse of process, and that in the alternative, the CAFTA proceedings must be dismissed as a result of the invocation of the Denial of Benefits provision, Claimant's change of nationality has other significant consequences for this arbitration that create additional independent barriers to jurisdiction under CAFTA.

A. Pac Rim Cayman does not qualify as an investor of a Party under CAFTA

256. CAFTA Article 10.28 defines investor of a Party as (i) "a national or an enterprise of a Party," (ii) "that attempts to make, is making, or has made an investment in the territory of another Party . . . ." Under this provision, to be considered as an investor under CAFTA, an enterprise has first to be a national or an enterprise of a Party and *as such*, attempt to make, be making, or have made an investment in the territory of another Party.

257. Pac Rim Cayman became an enterprise of a Party on December 13, 2007, when it registered in the State of Nevada. All transactions in which it may have been involved before that date were *not* made as an investor under CAFTA. Since it was not an enterprise of a Party until December 2007, Pac Rim Cayman has *not* attempted to make, is *not* making *nor* has it made, an investment in El Salvador.

258. According to the Notice of Arbitration, in November 30, 2004, "Pacific Rim *vested* sole ownership rights in PRES in its subsidiary, PRC."[221] At the time this transaction was executed, regardless of its legal significance to qualify as an investment, Pac Rim Cayman was not an enterprise of a Party for purposes of CAFTA. Therefore, Pac Rim Cayman could not have been an "investor of a Party" at the time of the alleged "investment" in El Salvador, or even when CAFTA entered into force in March 2006.

[221] NOA, para. 51 (emphasis added).

259. As admitted by Claimant, Pac Rim Cayman is a shell company whose only purpose is to hold shares on behalf of Pacific Rim Mining Corp.[222] Thus, in addition to not being an investor of a Party at the relevant time, Pac Rim Cayman has not attempted to make, is not making, and has not made, an investment in El Salvador, much less as an "enterprise of a Party." Its sole purpose is to hold shares, and for purposes of this arbitration to hold CAFTA standing on behalf of its parent Pacific Rim Mining Corp. Claimant is not an investor of a Party for purposes of this arbitration. It is a company registered in the United States, thereby fulfilling the first element of the definition of an investor of a Party in CAFTA. However, it admittedly fails to fulfill the second requirement of attempting to make, making, or having made an investment in El Salvador, as an enterprise of a Party. Therefore, Claimant is not an investor of a Party for purposes of CAFTA.

B. There is no jurisdiction over any alleged breaches or damages that may have occurred before Claimant became a national of a CAFTA Party

260. Claimant cannot make any claims or attempt to recover any damages with regard to any measure, act, or fact that took place before Claimant became a national of a CAFTA Party on December 13, 2007. Prior to that date, Claimant was a national of the Cayman Islands and did not qualify for CAFTA protection.

261. This uncontroversial statement, which El Salvador requests the Tribunal to make its own in the event this arbitration is allowed to continue, would have a profound effect on this case. This is because 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.

262. The investment at the core of this case was made by Pacific Rim Mining Corp., a Canadian company, beginning in April 2002.[223] On November 30, 2004, Pacific Rim Mining Corp. transferred the rights over its investment in El Salvador to its wholly-owned subsidiary Pac

[222] Letter from Claimant to the Tribunal, Sept. 13, 2010.
[223] NOA, paras. 43-49.

Rim Cayman, a company incorporated in the Cayman Islands, now Claimant in this proceeding.[224] The exploration licenses covering the area requested for the El Dorado mining exploitation concession, and therefore the right to explore in that area, expired on January 1, 2005.

263. But only in December 2007 was Pac Rim Cayman de-registered from the Cayman Islands and registered in the state of Nevada, United States. Therefore, from April 2002 to December 2007, the investment made in El Salvador by Pacific Rim Mining Corp. was not covered by the provisions of CAFTA. From April 2002 to December 2007, Pac Rim Cayman was not an investor from a CAFTA Party and thus was not a covered investor.

1. An investor cannot benefit from a Treaty before the investor became a national of a contracting State to the Treaty

264. The fact that treaty protections do not extend to entities before they become investors of contracting States should be uncontroversial. In fact, this principle has been emphatically confirmed in several recent cases.

265. The tribunal in *Mobil v. Venezuela*, for example, emphasized that a State can only be held responsible for actions and omissions after the claimant is an investor of a contracting State to the relevant treaty. There, the claimant had restructured its investments through a Dutch entity before submitting claims under the BIT between the Netherlands and Venezuela. The tribunal determined that the restructuring could be legitimate as to future disputes, but that it could obviously not extend jurisdiction to events that had taken place before the restructuring. The tribunal commented that the claimants themselves seemed to recognize this by invoking jurisdiction "on the basis of the consent expressed in the Treaty only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed."[225]

[224] NOA, para. 51.
[225] *Mobil v. Venezuela*, para. 205 (emphasis added).

266. Therefore, the tribunal in *Mobil v. Venezuela* remarked that, independent of the abuse of process that would have resulted if Claimant had tried to bring claims related to its allegations about the earlier actions of the government, it would not have had jurisdiction with respect to any "dispute born before" the restructuring was complete.[226]

267. Although not dealing with a change of nationality, the tribunal in *Phoenix Action* also recognized in a similar manner that it would not have jurisdiction over disputes for which the ICSID Convention would not have been applicable at the relevant time.[227] Where the named claimant, an Israeli entity, had acquired the investment just before initiating arbitration, the tribunal considered that it could "easily dispose[] of" the issue of jurisdiction *ratione temporis*. There would clearly be no jurisdiction for claims arising prior to the date the named claimants became involved "because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix 'invested' in the Czech Republic."[228]

268. The *Phoenix Action* tribunal explained that obligations under investment treaties only arise in relation to investments of nationals of other contracting parties. Accordingly, "such obligations cannot be breached by the host State until there is such an investment of a national of the other State."[229] That tribunal therefore denied jurisdiction for any alleged claims predating the acquisition of the investment by the named claimant and noted that modifying corporate structure after damages have occurred "cannot give birth to a protected investment."[230]

269. The *Phoenix Action* tribunal highlighted that a similar issue had arisen in a UNCITRAL case, *Société Générale v. Dominican Republic*, and noted that the reasoning of the two tribunals converged. In fact, the situation in *Société Générale* was similar to the situation before this Tribunal. There the claimant was complaining of acts and events that took place "before the Treaty had entered into force" and before "the Claimant had acquired the investment

[226] *Mobil v. Venezuela*, para. 206.
[227] *Phoenix Action*, para. 54.
[228] *Phoenix Action*, para. 67.
[229] *Phoenix Action*, para. 68 (emphasis added).
[230] *Phoenix Action*, paras. 71, 92.

as a French national."[231] The respondent argued that until November 2004, the investment was owned by a company registered in the United States and that any damages up to that point were therefore caused to the United States entity and could not be claimed by the French claimant under the treaty with France.[232]

270. The tribunal in *Société Générale* agreed with the respondent, noting that "if the intention had been to allow for claims relating to any investment, independently of whether the claimant is eligible as a national of the other Contracting Party, one would have expected a clear and unequivocal expression of intention to that effect."[233] In that treaty, as in CAFTA, protected investments were defined by requirements of nationality.

271. The tribunal in *Société Générale* was therefore unequivocal that the date of acquiring the nationality of a contracting State is central to determining jurisdiction. It noted that "the investment might have been made before or after the date of the Treaty, but that the treaty violation falling under the Tribunal's jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party."[234] Consequently, the treaty would not apply to any acts or omissions occurring when the investor had a different nationality.

272. According to the tribunal, this limitation was the only reasonable conclusion. Because an investment treaty is "designed to protect only the nationals and companies of the Contracting Parties," an investment cannot be protected until it belongs to an investor of a contracting State.[235] The tribunal concluded that it would only have jurisdiction "over acts and omissions that took place after . . . the investor had become a qualifying . . . national."[236]

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[231] *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, Sept. 19, 2008, para. 67 (**Authority RL-78**).
[232] *Société Générale v. Dominican Republic*, para. 96.
[233] *Société Générale v. Dominican Republic*, para. 104.
[234] *Société Générale v. Dominican Republic*, para. 105 (emphasis added).
[235] *Société Générale v. Dominican Republic*, para. 106.
[236] *Société Générale v. Dominican Republic*, para. 107 (emphasis added).

273. The *Société Générale* tribunal also found support for its conclusion in the law of diplomatic protection. It found that "the principle that a claimant must have the nationality of the relevant Contracting Party at the time of the breach . . . exists unless a different rule is expressed."[237] Moreover, the tribunal asserted that "[t]he principle upheld in *Mihaly* to the effect that no one can transfer a better title than he actually has without the consent of the host State is equally applicable here to a situation in which no one can claim without such consent a retroactive application of treaty rights to acts that occurred before the Claimant became an investor under the Treaty."[238]

274. As these tribunal decisions demonstrate, there is no jurisdiction for disputes arising out of facts occurring before an investment becomes a protected investment, *i.e.* before the investment belongs to an investor who is a national of a contracting State.

2. Pac Rim Cayman was not an investor of a CAFTA Party until December 2007

275. In the case before this Tribunal, there can be no jurisdiction related to measures that occurred before Pac Rim Cayman was an investor of a CAFTA Party. Like the claimants in *Phoenix Action* and *Société Générale*, Claimant wants to bring claims related to events that occurred before it was entitled to Treaty protection. But, like the tribunals in those cases, this Tribunal must find that it lacks jurisdiction for measures and alleged damages that occurred before Pac Rim Cayman was moved from the Cayman Islands to a CAFTA Party, the United States.

276. CAFTA is intended to protect investors of the State Parties within the territories of other State Parties. The State Parties did not take on commitments to investors of other States who could decide to move to a CAFTA State for the Treaty benefits after alleged damages have occurred. At the relevant time, *i.e.* in December 2004, and up until December 2007, Claimant

[237] *Société Générale v. Dominican Republic*, para. 109.
[238] *Société Générale v. Dominican Republic*, para. 111.

was incorporated in the Cayman Islands, did not meet the definition of "investor of a party" in CAFTA Article 10.28, and therefore was not entitled to CAFTA protection.[239]

277. The principal measure for which Claimant wants to allege CAFTA violations—the Government's failure to grant an environmental permit for El Dorado within 60 business days—happened at the end of 2004. Claimant's Salvadoran subsidiary knew of the disagreement and tried to sway the Government since at least December 2004.

278. Moreover, any other alleged breaches also occurred *before Claimant was an investor of a CAFTA Party*, and are therefore outside the scope of CAFTA protection. Claimant's December 22, 2004 application for an exploitation concession was presumed to have been denied by March 2005 when 60 days passed without a decision to admit the application. In addition, the EIAs for the three additional exploration areas, submitted in February 2006 and August 2007, were presumed to be denied as of April 2006 and October 2007. Consequently, all the measures that Claimant wants to use as the basis to allege CAFTA claims, *i.e.*, the failures of MARN and MINEC to respond to its applications within the period provided by the law, took place before Claimant was registered in a CAFTA Party and could invoke CAFTA protections.

279. Under these circumstances, the change of Claimant's registration to a CAFTA Party in December 2007 does not convert the earlier events into acts and omissions affecting a "protected investment" under CAFTA. At the time of the alleged breaches, there was not even a protected investment under CAFTA. As in the cases explained above, claims can only be brought for damages occurring after Pac Rim Cayman could qualify as an investor of a contracting State. In this case, Claimant suffered no damages after it was registered as a national of a CAFTA Party and therefore, there are no CAFTA claims for which there could be jurisdiction *ratione temporis*.

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[239] CAFTA Article 10.28 defines **investor of a Party** as "a Party or state enterprise thereof, or a national or enterprise of a Party . . . ." Claimant is not a Party or state enterprise of a Party, or a natural person to qualify as a national of a party. Claimant did not meet the definition of **enterprise of a Party**, which is defined in Article 10.28 as "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there" until after it was registered in the state of Nevada on December 13, 2007.

3. In addition, the *measure* giving rise to this dispute predates CAFTA

280. CAFTA does not apply retroactively. CAFTA Chapter 10 begins by specifically stating that it "applies to measures adopted or maintained by a Party . . . ." This statement means that Chapter 10 applies to measures that, being "*adopted or maintained by a Party*" are measures adopted or maintained *after CAFTA entered into force*. For greater certainty, Chapter 10 expressly provides that CAFTA "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 [the] Agreement."[240]

281. CAFTA entered into force for El Salvador and the United States on March 1, 2006. But since Claimant was not an enterprise of a CAFTA country at that time, the date when CAFTA rights and obligations became effective for this Claimant would be, at the earliest, December 13, 2007 (when Claimant became a national of a CAFTA Party), or, at the latest, on July 30, 2008 (when ONI, the relevant agency of the Ministry of Economy, registered Claimant's new United States nationality, after the company requested the new registration on June 16, 2008).[241]

282. The Investment Chapter of CAFTA applies to *measures* adopted or maintained by a Party relating to investors of another Party and covered investments.[242]

a. The measure that gave rise to this dispute took place in December 2004

283. In the present case, the *measures* that Claimant alleges breach the CAFTA provisions are the alleged failures by MARN and MINEC to act upon Claimant's applications for an environmental permit and for a mining exploitation concession for El Dorado, respectively.[243]

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[240] CAFTA Article 10.1.3.
[241] Letter from PRES to ONI, received June 16, 2008 (requesting that ONI register the change of nationality of Pac Rim Cayman from the Cayman Islands to the United States) (**Exhibit R-113**).
[242] CAFTA Article 10.1 ("This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments . . . .").
[243] NOA, paras. 81, 91, 107, 108.

These alleged omissions by MARN and MINEC, the *measures* that Claimant alleges to be violations of CAFTA, occurred prior to the date when Claimant and its alleged investment became covered by the protections of the Treaty.

284. In reality, there is only one measure on which Claimant bases its claims for El Dorado: the measure related to the environmental permit. Indeed, Claimant's entire case is based on the allegation that the only reason why Claimant has not obtained the mining exploitation concession for El Dorado is MARN's failure to grant an environmental permit:

> As a result of the Government's *inaction*, PRES has been unable to obtain the exploitation concession to which it is legally entitled, and which it legitimately *expected to receive upon complying with the requirements of the environmental permitting process. With the exception of the environmental permit that remains unjustifiably withheld by the government,* PRES has met all of the requirements to receive the concession.[244]

285. While it was amply demonstrated in El Salvador's Preliminary Objections that Claimant was wrong with regard to meeting all other requirements for obtaining a concession, it is correct that the only measure about which it may complain is the failure to act on the environmental permit within 60 days of the application. This is because MINEC could not have granted a mining exploitation concession without an environmental permit. As Claimant itself acknowledged in the Notice of Arbitration, in order for the application for a mining exploitation concession to be admitted for consideration, let alone granted, an applicant must submit the relevant environmental permit issued by MARN.[245] An environmental permit is granted by MARN only after it has approved an applicant's Environmental Impact Study (*Estudio de Impacto Ambiental* or "EIA"). Claimant did not submit an environmental permit with its mining concession application because MARN did not issue the environmental permit.[246] MINEC could not have legally admitted, much less granted, the application for the mining exploitation

[244] NOA, para. 65 (emphasis added). *See also* El Salvador's Preliminary Objections, para. 37.
[245] NOA, paras. 35-42.
[246] NOA, para. 57.

concession without the environmental permit.[247] Therefore, Claimant's claim is only related to MARN's alleged failure to issue an environmental permit in the time period provided for in the law. This is the relevant *measure* for the claims alleged in this arbitration.

286. Although there were other communications between PRES and MARN after the Environmental Impact Study was presumptively denied, those communications do not change the fact that December 2004 was when Claimant was first aware of the alleged violation and knew that it was suffering damages as a result of it.

287. Thus, 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. This *measure* took place in December 2004, well before CAFTA entered into force in March 2006. As a result, the protections of CAFTA cannot apply to Claimant's claims based on the *measure* that gave rise to the dispute.[248]

288. The facts related to that measure began in March 2004, when Claimant filed its application for an environmental permit before MARN.[249] Claimant did not submit an EIA with its application for the environmental permit, but submitted the EIA in September 2004.[250]

289. Pursuant to Article 24(a) of the Environmental Law, MARN has 60 business days to evaluate an EIA before granting or denying an environmental permit. A provision allowing for a 60 day extension was not invoked in this case, so only the original time limit of 60 business days applied.

290. If MARN fails to respond in 60 days, the presumed denial of the application by administrative silence (*denegación presunta*) operates by law and gives the applicant the right to

[247] NOA, para. 35.
[248] Please see the timeline at the end of Section II.B.3.
[249] NOA, para. 54.
[250] NOA, para. 57.

consider the application denied and to challenge the denial before the Administrative Litigation Chamber of the Supreme Court.[251]

291. Claimant was aware of this time limit to decide on the application for the environmental permit. On December 15, 2004, the company wrote to the Minister of the Environment, indicating that the 60-day time limit referred to in the Environmental Law had already expired with no response from MARN, and that this delay was causing damage to the company.[252]

292. The lacking environmental permit is inextricably linked to any claims about the El Dorado exploitation concession application. Claimant applied for the exploitation concession in December 2004, without the environmental permit. Claimant had secured authorization from the Director of Mines to submit the application without the environmental permit, as long as the delay in submitting the permit did not last too long.[253] But even though the Bureau of Mines allowed the submission of an incomplete application, the Bureau of Mines could not have admitted the application for the mining exploitation concession for adjudication without the environmental permit.[254] Furthermore, as explained in El Salvador's Preliminary Objections, MINEC could not have granted Claimant a mining exploitation concession for at least two other independent reasons: Claimant's failure to comply with the land ownership requirement and Claimant's failure to submit a Feasibility Study.

293. Thus, with respect to MARN, the only measure that Claimant can identify is MARN's failure to act within the 60-day time limit mandated in the Environmental law. This measure is also the basis stated by Claimant for any claim related to the application for a mining exploitation concession, and is necessarily the measure upon which such a claim is based

[251] Environmental Law, Art. 24(c). *See also* Law of Administrative Proceeding, Art. 3 (providing for presumed denial of an application when the authority or officer does not communicate its decision to the interested party within 60 days from when the application was submitted).
[252] Letter from PRES to Minister of the Environment, Dec. 15, 2004 (R-55).
[253] NOA, para. 57, and Exhibit 6 to the NOA.
[254] NOA, para. 35. According to the Mining Law, an environmental permit is one of the requirements that must accompany a concession application. *See* Mining Law of El Salvador, Art. 37(c) (RL-7).

because MINEC could not have granted an exploitation concession without the environmental permit.

294. But even if, for the sake of argument, the lack of a final communication from MINEC regarding the inadmissibility of the application for a mining exploitation concession could be regarded as a separate measure, that measure would also have taken place before CAFTA entered into force. In accordance with Salvadoran Law, if a Ministry does not respond within 60 days from the submission of an application, the application is presumed to have been denied, and the applicant has the right to challenge the denial in court.[255] Thus, when the Bureau of Mines did not admit the application within 60 business days, the application for the El Dorado mining exploitation concession was presumed to have been denied by March 2005.

295. Just like the environmental permit, the concession application was presumptively denied after 60 business days passed without a response, *i.e.*, by March 2005. Even though the Bureau of Mines tried to work with the company to resolve problems with the application after that date, those later events do not change the fact that as of March 2005, the application for an exploitation concession had been presumptively denied, and it is that denial of permission to extract gold that allegedly harmed Claimant. The denial of the concession application is a one-time act with definite effects that had happened by March 2005.

296. CAFTA was not in force when either the environmental permit or the exploitation concession was applied for, and CAFTA was not in force when the applications were presumptively denied after 60 business days passed without a response. These measures took place long before CAFTA entered into force, and as a result, CAFTA Chapter 10 does not apply to Claimant's failure to obtain an environmental permit or the exploitation concession.

[255] Law of Administrative Proceeding, Art. 3 (CL-44).

b. An international law obligation has to exist for the relevant treaty to be breached

297. CAFTA does not apply retroactively. Pursuant to CAFTA Article 10.1.1, Chapter 10 applies only to measures adopted by or maintained by a Party, necessarily after CAFTA entered into force. Article 10.1.1 adheres to the "basic principle" that for State responsibility to exist under a treaty, an alleged breach under such treaty "must occur at a time when [the] State is bound by the obligation."[256]

298. In this respect, Article 13 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Draft Articles") stipulates as follows:

> An act of a State does not constitute a breach of an international obligation *unless* the State is bound by the obligation in question at the time the act occurs.[257]

299. The Commentary to Draft Article 13 notes that this stipulation provides an important guarantee for States "against the retrospective application of international law in matters of State responsibility."[258]

300. The basic principle of state responsibility enunciated in CAFTA Article 10.1.1 was recognized by the tribunal in *RDC v. Guatemala*. That tribunal recognized that the consent of the Contracting Parties is limited to breaches of obligations arising under the Treaty, which can only occur after the Treaty enters into force.[259]

301. The *measure* at issue in this case took place in December 2004. Any alleged damages resulting from that measure occurred before CAFTA entered into force and thus could not constitute the basis for alleged breaches of the Treaty. Therefore, the Tribunal does not have

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[256] *Report of the International Law Commission on the work of its fifty-third session*, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries thereto" U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) ("ILC Draft Articles") (**Authority RL-79**).
[257] ILC Draft Articles, Art. 13 (emphasis added).
[258] ILC Draft Articles, Art. 13, Commentary (1).
[259] *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010, para. 116 ("*RDC v. Guatemala* Second Decision") (**Authority RL-80**).

jurisdiction *ratione temporis* over Claimant's claims. Claimant is attempting to allege breaches of treaty obligations that did not exist when the measures took place.

c. CAFTA does not apply to measures, acts or facts that took place before CAFTA entered into force

302. In addition to the fact that there were no obligations on which to base breaches of CAFTA before its entry into force, pursuant to Article 10.1.3, CAFTA 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 the Agreement. Article 10.1.3 tracks the non-retroactivity principle as stated in Article 28 of the Vienna Convention on the Law of Treaties and therefore confirms, "for greater certainty", that CAFTA does not apply retroactively.[260]

303. That CAFTA does not apply retroactively to measures that took place before it entered into force, which is in the text of the Treaty itself, is uncontroversial.

304. The decision by the first CAFTA tribunal, in *RDC v. Guatemala*, supports this basic tenet of international law. Guatemala objected to the jurisdiction of the tribunal on three separate grounds, including an objection *ratione temporis.* Guatemala alleged that the dispute was a continuing dispute that had arisen prior to CAFTA's entry into force and that as a result, the claimant's claims based on such dispute fell outside the temporal scope of CAFTA. The decisive factor for the tribunal's determination of Guatemala's objection *ratione temporis* was that there was an easily identifiable *measure*, the *Lesivo* Resolution, taken by Guatemala *after* CAFTA had entered into force. The tribunal asserted jurisdiction only over the measure that had occurred after the Treaty's entry into force.[261]

[260] Vienna Convention on the Law of Treaties, Art. 28, May 23, 1969, 1155 U.N.T.S. 331 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.") (**Authority RL-81**).
[261] *RDC v. Guatemala* Second Decision, paras. 125, 138.

d. The measure at issue in this arbitration has been exhausted, and it does not constitute a continuing nor a composite act, parts of which could be covered by CAFTA

305. Claimant is trying to base its claims on a measure that occurred and had its effects in 2004.

306. In this respect, the tribunal in *Mondev v. United States* noted that events occurring before a treaty enters into force may be relevant in determining whether the State has "subsequently" committed a breach of the treaty but that in such a situation "it *must still be possible to point to conduct of the State after* [the treaty entered into force] *which is itself a breach*."[262] The tribunal concluded:

> The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.[263]

307. In *Mondev*, the claimant invested in a real estate project by signing an agreement with the City of Boston and the Boston Redevelopment Authority in 1978. The claimant channeled its investment through a company named Lafayette Place Associates. Certain contractual disputes arose between the parties and the investment company eventually initiated proceedings in March 1992 against the City of Boston and the Redevelopment Authority before the Massachusetts Superior Court. On appeal, the investment company lost its claims by decisions of the Massachusetts Supreme Judicial Court rendered after January 1, 1994 (when CAFTA entered into force).[264]

308. The United States argued that with the exception of the court decisions rendered after January 1, 1994, all the circumstances of the underlying dispute had arisen before NAFTA

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[262] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, para. 70 (emphasis added) (**Authority RL-82**).
[263] *Mondev*, para. 70.
[264] *Mondev*, paras. 1, 39.

entered into force.[265] For its part, the claimant argued that the alleged breaches were not perfected until the Supreme Judicial Court rendered its decision, and that that created a *continuing* situation covered by the treaty. The tribunal rejected this argument and concluded, for purposes of its determinations on jurisdiction, that only the conduct that occurred after NAFTA entered into force could arguably be the basis for a claim under the treaty.[266]

309. Likewise, in *RDC v. Guatemala*, the tribunal looked for specific conduct *after the Treaty entered into force*. As noted above, in the *RDC* arbitration, Guatemala argued that the claimant's claims referred to a dispute that had arisen before CAFTA entered into force and that as a result, its claims fell outside of the scope of the Treaty. The tribunal identified the measure at issue in that arbitration, the *Lesivo* Resolution, as a measure taken on a specific date *after* the Treaty entered into force. In the alternative, the tribunal considered that the *Lesivo* Resolution could be viewed as a part of a process: "part of a continuing act which started before the date of the entry into force of the Treaty and *continued* after such date."[267] Whether the *Lesivo* Resolution was considered as a separate act or as part of a process, the claims were allowed because there was an *act that occurred* after the Treaty entered into force which was *caught* by its provisions.

310. Therefore, if there is no Governmental conduct in the form of acts (or omissions where the Government has the legal obligation to act) *occurring* after the treaty enters into force to which claimants can point, there is no jurisdiction *ratione temporis* for acts or facts that took place, or situations that ceased to exist, before the Treaty entered into force.

311. In the present case, the Government conduct occurred in 2004 when the Government failed to respond to Claimant's applications within the 60-day time limit provided for by the laws of El Salvador.[268] This omission by the Government occurred in 2004 before CAFTA entered into force. It did not occur at any point after CAFTA entered into force in 2006.

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[265] *Mondev*, paras. 45, 47.
[266] *Mondev*, para. 75.
[267] *RDC v. Guatemala* Second Decision, para. 125 (emphasis added).
[268] NOA, paras. 57, 64.

312. For an omission to be covered by the provisions of a treaty, the omission has to occur *after* the treaty enters into force. In *Feldman v. Mexico* the tribunal noted that the principle of non-retroactivity of treaties applies equally to acts and omissions. The tribunal noted that before NAFTA entered into force no obligations could be said to have arisen under the treaty. Accordingly, the tribunal stated, "this Tribunal may not deal with *acts or omissions* that *occurred* before January 1, 1994."[269]

313. Similarly, the tribunal in *MCI v. Ecuador* "distinguishe[d] acts and omissions prior to the entry into force of the BIT *from acts and omissions subsequent* to that date," finding that only the latter could be violations of the treaty.[270]

314. The claimants in *MCI* argued that certain acts taken by Ecuador were continuing and/or composite acts, parts of which fell under the temporal scope of the treaty, and on this basis, alleged that the tribunal had jurisdiction to consider them.[271] The tribunal rejected the claimants' reliance on Articles 14 and 15 of the ILC Draft Articles and cases from the Inter-American Court of Human Rights and the European Court of Human Rights for the proposition that a continuing or composite act that starts before a treaty enters into force may be covered *ratione temporis* by a treaty.[272]

315. The tribunal found that the claimants' conclusions drawn from the ILC Draft Articles and the cited human rights cases did not support their position. With respect to the claimants' reliance on ILC Draft Articles 14 and 15 dealing with continuing and composite acts,

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[269] *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 (emphasis added) (**Authority RL-83**).
[270] *M.C.I. Power Group L.C., and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, para. 62 (**Authority RL-84**).
[271] *M.C.I. v. Ecuador*, para. 56.
[272] *M.C.I. v. Ecuador*, para. 90. ILC Draft Article 14 provides, "Extension in time of the breach of an international obligation: 1. The 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. 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation. 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

respectively, the tribunal noted that those Articles referred to international *wrongful acts*, which can only occur after a treaty has entered into force. Indeed, the tribunal noted that the claimants' arguments with respect to the "relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it."[273] Moreover, with respect to the claimants' reliance on human rights jurisprudence on the question of jurisdiction *ratione temporis*, also referred to in the ILC Draft Articles Commentary to Article 14, the tribunal noted that those decisions stressed the "*continuity* of those acts *after* the treaty giving rise to the breached obligation entered into force."[274]

316. All of the above decisions are in line with Commentary to what is now Article 28 of the Vienna Convention on the Law of Treaties, which deals with the non-retroactivity of treaties, and reinforces the rule that a breach of a treaty must be based on acts or facts that may independently constitute a violation of the treaty that take place after the treaty enters into force.[275]

317. In the present case, the measure at issue was exhausted when MARN did not respond to Claimant within the 60-day time period prescribed in the law. The presumed denial, *denegación presunta,* of Claimant's application gave Claimant the opportunity to challenge the denial of the environmental permit. On the date that the 60-day period expired, the measure and its effects were consummated. Therefore the situation at the core of the present dispute, formed by all the acts and events described above, *ceased* to exist before CAFTA entered into force.[276] The fact that Claimant's environmental permit was not granted is not the result of an omission from an ongoing obligation to act by the Government arising from Claimant's 2004 application.

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[273] *M.C.I. v. Ecuador*, para. 93.
[274] *M.C.I. v. Ecuador*, para. 83 (emphasis added).
[275] *Report of the International Law Commission covering the work of its sixteenth session*, at 178, U.N. Doc. A/5809 (1964), *reprinted in* 2 Y.B. Int'l L. Comm'n 173, U.N. Doc. A/CN.4/SER.A/1964/Add.1 (**Authority RL-85**).
[276] The American Heritage College Dictionary 1297 (4th ed. 2002) (**Authority RL-86**) (defining situation as: "The combination of circumstances *at a given moment*; a state of affairs.") (emphasis added).

318. Indeed, Claimant could have resubmitted its application for an environmental permit after CAFTA entered into force. This could have generated another measure by MARN, either granting or denying the permit, which would be covered by the Treaty. But once the Government did not respond within the time period prescribed in the law concerning the 2004 application, and the presumed denial operated by law, the measure of which Claimant here complains, *took place* for purposes of CAFTA and the law of El Salvador. The fact that Claimant could resubmit its application is evidence that the alleged omission by MARN to respond to Claimant's application did not extend in time past the 60-day adjudication period, much less up to the entry into force of the Treaty.

319. Claimant's claims are based on a measure that occurred and had its effects in 2004 when there were no CAFTA obligations.

e. Claimant's attempts to make presidential statements an alleged *de facto* ban on mining are irrelevant

320. Claimant recognizes that its claims are based on a measure that took place before the Treaty entered into force and tries to give relevance to certain statements made to the press by the former and current presidents of El Salvador.

321. In its submissions during the Preliminary Objections phase, Claimant complained that El Salvador ignored its claims based on an alleged *de facto* ban.[277] But the alleged *de facto* ban, as well as the alleged statements by two Presidents of El Salvador to the press, are not "measures adopted or maintained" by a Party for purposes of CAFTA, and in any event, are not measures that gave rise to this dispute before the Tribunal.

322. As discussed above, the only *measure* on which the vast majority of Claimant's case is based was MARN's failure to grant or deny the El Dorado environmental permit in the 60-day period provided for in the Environmental Law of El Salvador. That alleged failure took place by December 2004. Statements by then-President Saca in 2008 and 2009 cannot change the fact that the failure to act when there was a duty to act within a specified time period of 60

[277] Claimant's Response to El Salvador's Preliminary Objections, paras. 5-7.

days, and all potential damages associated with that *measure*, took place in December 2004, and in any event, before Claimant's change of nationality in December 2007.

323. The fact that Claimant feels that these alleged press statements explain why its application for an environmental permit was not granted,[278] does not turn these press statements into separate *measures* for purposes of CAFTA that would somehow fall within the temporal application of the Treaty.

C. CAFTA's three-year prescription period also precludes consideration of the dispute

324. CAFTA Article 10.18, titled "**Conditions and Limitations on Consent of Each Party**," includes the following limitation to consent in paragraph 1:

> No claim may be submitted to arbitration under this Section 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 (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

325. Even assuming that Claimant is able to convince the Tribunal that the measure that gave rise to the dispute extended beyond the date when CAFTA entered into force, March 1, 2006, the CAFTA Article 10.18.1 limitation, which does not allow claims more than three years after knowledge of breach and damages should have been acquired, would necessitate denying jurisdiction over the CAFTA claims related to the application for the El Dorado mining exploration concession.

326. CAFTA Article 10.18.1 categorically limits consent to submit a claim to arbitration to three years from the date when the claimant *first acquired, or should have first acquired*, knowledge of the alleged breach of CAFTA, and knowledge that the claimant or the

[278] NOA, para. 74.

enterprise has incurred loss or damage.[279] A determination of when a dispute became crystallized or when it became a full legal dispute, or whether there may be a continuing breach or dispute is irrelevant for the application of CAFTA Article 10.18.1. The only relevant fact is when the claimant first acquired, or should have first acquired, knowledge of the breach, and knowledge of damages.

327. As El Salvador has explained in previous Sections of this Memorial, the dispute before the Tribunal centers on MARN's alleged failure to grant or deny the environmental permit in the 60 days provided for by Salvadoran law. That is the *measure* that gave rise to the dispute before the Tribunal. It is indisputable that this *measure* took place before CAFTA entered into force. The 60-day time limit to grant or deny the environmental permit expired in early December 2004. Almost immediately, on December 15, 2004, the company sent a letter to the Minister of the Environment letting him know that more than 60 days had elapsed without a decision, and that the delay was causing damages to the company. This measure predated CAFTA's entry into force for El Salvador and the United States on March 1, 2006.

328. Thus in the present case there is actual evidence that by December 15, 2004, Claimant knew that MARN was in breach of its legal obligation under Salvadoran law to grant or deny the environmental permit within 60 days from the submission of the Environmental Impact Study, and that the company was suffering loss or damage as a result of this delay. Under Article 10.18.1, Claimant cannot submit a claim to arbitration alleging a breach of which it was aware and from which it was allegedly suffering damages more than three years before filing the Notice of Arbitration. Therefore, Claimant was precluded from submitting any claim to arbitration based on the failure to grant or deny the environmental permit.

[279] Claimant's alleged State of nationality, the United States, had endorsed this view, arguing that the NAFTA statute of limitations, with similar wording to the CAFTA provision, is "clear and rigid" and that therefore, "once an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2)." *Merrill & Ring Forestry, L.P. v. Government of Canada*, Submission of the United States of America, July 14, 2008, paras. 6, 17 (**Authority RL-87**).

329. Claimant cannot avoid this conclusion by arguing that this breach of Salvadoran law could not have constituted a breach of CAFTA because CAFTA had not yet entered into force. As demonstrated in the previous Section, there is no jurisdiction with respect to measures that took place before CAFTA entered into force, and the entry into force of CAFTA does not convert past measures into new breaches of CAFTA.[280] Such past measures are simply outside the scope of CAFTA. In any case, even if this alleged breach of Salvadoran law somehow could constitute a breach of CAFTA upon its entry into force, the three-year limitation on consent to arbitration would still apply. Claimant was aware of the alleged breach and its alleged damages on March 1, 2006, the date when CAFTA entered into force for El Salvador, and the Notice of Arbitration was filed on April 30, 2009, more than three years later. So even under an approach regarding the applicable dates that is most favorable to Claimant, the limitations period had expired prior to the filing of the Notice of Arbitration.

330. There is one more fact that Claimant might try to use to avoid the inevitable consequence of the passage of time: Claimant was not an investor of a CAFTA Party when CAFTA entered into force. In El Salvador's view it would be an additional sign of bad faith and additional proof of abuse of process if Claimant were to attempt to overcome the prescription period by arguing that the three-year time limit under CAFTA Article 10.18.1 did not start until December 2007, when Claimant's parent company moved Claimant to the United States for the sole purpose of gaining Treaty protection for claims arising from a measure Claimant was aware of in 2004.

331. Attempts by claimants to stretch the limitations period have been decisively rejected by tribunals and the United States Government in the context of NAFTA. In *Grand River v. United States*, for example, the tribunal rejected the claimants' attempt to shift the focus from the earlier measures to later related activities. That tribunal asserted, "this analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and

[280] *See Feldman v. Mexico*, para. 62 (RL-83).

related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[281]

332. The tribunal in *Mondev v. United States* also considered issues of timing and non-retroactivity of the treaty. That tribunal clarified that "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage" depending on the facts and the obligation allegedly breached.[282] In that case, the only *conduct* subject to the tribunal's jurisdiction was a couple of court decisions that came after the treaty entered into force and within the three year time period. The *Mondev* tribunal determined that there were no continuing wrongful acts on which to base claims of expropriation, finding that the alleged expropriation had to have occurred no later than the date of foreclosure and rights to purchase real estate had terminated when the option terminated.[283] Those measures could not be the basis for NAFTA claims.

333. Specifically turning to the time bar, the *Mondev* tribunal found that the issue was moot because it had already limited its jurisdiction to the court decisions that were less than three years old. The tribunal went on to comment, however, that it would have rejected the claimant's argument about being unaware of loss or damage until a later date, stating, "[i]t must have been known to Mondev, at the latest by 1 January 1994 [NAFTA's entry into force], that not all its losses would be met by the proceedings LPA had commenced in Massachusetts. . . . Thus if Mondev's claims . . . had been continuing NAFTA claims as at 1 January 1994, they would now be time-barred."[284]

334. Likewise, any alleged damages to Claimant were done when its applications were not granted within the time period provided for by law and were therefore presumed denied.

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[281] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction, July 20, 2006, para. 81 (**Authority RL-88**).
[282] *Mondev*, para. 58 (RL-82).
[283] *Mondev*, para. 73.
[284] *Mondev*, para. 87.

Claimant knew of this damage in 2004, and, at the very latest it knew of an alleged CAFTA breach when CAFTA entered into force, more than three years before it initiated this arbitration.

335. The United States specifically endorsed the reasoning of these earlier tribunals in its non-disputing Party submission to the *Merrill & Ring v. Canada* tribunal. The United States submitted,

> An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular 'date.' Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.[285]

336. In this case, the relevant events terminating Claimant's rights in El Salvador all occurred before Claimant was an investor of a CAFTA Party. In fact, the principal measures took place before CAFTA entered into force. Any alleged breaches or losses affecting Claimant before it was a CAFTA Party and/or based on any acts or facts that occurred before CAFTA entered into force should not sustain CAFTA claims. The applications filed in 2004 were not granted in the 60-day period provided by law and there is no conduct after the Treaty entered into force that constituted a violation of CAFTA. Finally, even if the Tribunal were to entertain the possibility that the 2004 measure could somehow support an allegation of a CAFTA breach, any loss or damage was known to Claimant at least by the time of CAFTA's entry into force, and therefore, any claims based on it are time-barred.

[285] *Merrill & Ring v. Canada*, Submission of the United States of America, para. 5 (emphasis in original) (RL-87).

V. EVEN WITHOUT THE ABUSE OF PROCESS OBJECTION, THERE IS NO JURISDICTION UNDER ARTICLE 15 OF THE INVESTMENT LAW OF EL SALVADOR

A. Article 15 of the Investment Law does not constitute consent to ICSID arbitration

337. Pursuant to Article 25 of the ICSID Convention, the jurisdiction of ICSID extends to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State, "which *the parties to the dispute consent in writing* to submit to the Centre."[286] Article 15 of the Investment Law of El Salvador does not constitute consent to arbitration for purposes of Article 25 of the ICSID Convention.

338. The need for a specific reference to consent in ICSID arbitration is clear and uncontroversial. Because consent of the parties "is the cornerstone of the jurisdiction of the Centre," and "consent to jurisdiction must be in writing,"[287] determining whether or not Article 15 of the Investment Law constitutes consent is a determination of the utmost importance. The evaluation of Article 15 thus requires a close analysis of the text of the provision alleged to constitute consent to ICSID arbitration and of the intent of the State when it promulgated that text.

339. No previous ICSID tribunal has been called upon to interpret Article 15 of the Investment Law. Claimant refers to a passage in the *Inceysa v. El Salvador* Award to support its claim that Article 15 of the Investment Law constitutes consent for purposes of Article 25 of the ICSID Convention.[288] But this issue was simply not before the *Inceysa* tribunal and was not even briefed by the parties in that case. The *Inceysa* case was decided on El Salvador's jurisdictional objection that the massive fraud perpetrated by the claimant to obtain the concession resulted in the lack of a protected investment under the BIT and the Investment Law of El Salvador. In fact, the reference to jurisdiction under the Investment Law only occupied

[286] ICSID Convention, Art. 25 (emphasis added).
[287] Report of the Executive Directors on the Convention, para. 23.
[288] Letter from Claimant to the Tribunal, Aug. 17, 2010 at 10 (citing *Inceysa Vallisoletana, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006, para. 332 (RL-30)).

four lines in an award of over one hundred pages and the tribunal did not discuss or state reasons for any conclusion about jurisdiction under the Investment Law. The reference in those four lines of the *Inceysa* Award to jurisdiction under the Investment Law was *obiter dicta* and was not the result of a reasoned analysis. That reference, therefore, should not prejudge the issue before this Tribunal.

1. National legislation is a unilateral act of State that must be interpreted restrictively

340. The Investment Law is a unilateral act of a sovereign State and as such, its text and any obligations alleged to arise from it have to be interpreted restrictively. The text of the Investment Law does not include the word "consent" or otherwise say that El Salvador consents to ICSID arbitration, nor does it make the resolution of disputes by arbitration mandatory. Absent a specific reference to consent in the Investment Law or a mandatory referral of disputes to arbitration, consent to arbitration under Article 25 of the ICSID Convention cannot be *presumed* to exist.

341. Previous ICSID tribunals examining national investment laws alleged to provide consent to arbitration have consistently treated national investment legislation as a unilateral act of the State.[289] Most recently, the tribunal in *Mobil v. Venezuela*, after reviewing the relevant ICSID cases considering the issue of consent in national legislation, noted that national legislation, being "a unilateral act of a sovereign state," must be interpreted differently than BITs.[290]

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[289] *See Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, Apr. 14, 1988, para. 61 (**Authority RL-89**) ("the jurisdictional issue in this case involves more than interpretation of municipal legislation. The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty."). *See also Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, Dec. 24, 1996 (RL-47); *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, Jan. 24, 2003 (**Authority RL-90**); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 (RL-35); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 (**Authority RL-91**); *Mobil v. Venezuela* (RL-51).

[290] *Mobil v. Venezuela*, para. 83.

342. ICSID tribunals have thus interpreted national investment laws allegedly containing consent to arbitration under the international law rules governing the interpretation of unilateral acts of States.[291] Indeed, the tribunal in *Mobil v. Venezuela* specifically referred to section 7 of the 2006 International Law Commission's Guiding Principles ("ILC Guiding Principles") applicable to unilateral declarations of States capable of creating legal obligations as the applicable authority on this issue.[292]

343. The International Court of Justice, as summarized in the ILC Guiding Principles, as well as ICSID tribunals, have applied the following rules to the interpretation of unilateral acts of States:

- First, in situations where the scope of a unilateral declaration is unclear, such declaration "must be interpreted in a restrictive manner."[293] The tribunal in *Mobil* recognized this rule for obligations said to arise under such declarations, which also have to be interpreted restrictively.[294]

- Second, a unilateral declaration may create legal obligations "*only if* it is stated in clear and specific terms."[295]

- Third, given that national laws are unilaterally drafted instruments, "emphasis on the intention of the depositing State" is required.[296] When interpreting a unilateral declaration alleged to constitute consent by a State to an international tribunal, "consideration must be given to the intention of the government *at the time it made the declaration*."[297]

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[291] *SPP v. Egypt*, para. 61 ("Resolution of this issue involves both statutory interpretation and treaty interpretation. Also, to the extent that Article 8 [of the relevant investment law] is alleged to be a unilateral declaration of acceptance of the Centre's jurisdiction, subject to reciprocal acceptance by a national of another Contracting State, the Tribunal must also consider certain aspects of international law governing unilateral juridical acts."). *See also Mobil v. Venezuela*, paras. 86-96.
[292] *Mobil v. Venezuela*, para. 89. *See Report of the International Law Commission*, "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto" U.N. GAOR, 58th Sess., U.N. Doc. A/61/10 (2006) ("ILC Guiding Principles") (**Authority RL-92**). The Commentaries to the ILC Guiding Principles "are explanatory notes reviewing the [relevant] jurisprudence from the International Court of Justice and pertinent state practice" on the subject.
[293] ILC Guiding Principles Commentary to § 7 (2).
[294] *Mobil v. Venezuela*, para. 89.
[295] ILC Guiding Principles Commentary to § 7 (1) (emphasis added). *See also SPP v. Egypt*, para. 61.
[296] *Mobil v. Venezuela*, para. 93 (citing Fisheries Jurisdiction (Spain v. Canada) 1952 I.C.J. Reports 93, 105).
[297] *SPP v. Egypt*, para. 107 (emphasis added).

- Fourth, given that unilateral declarations such as an investment law have no specific addressee, *i.e.*, are made *erga omnes*, the interpreter must proceed with "great caution in determining the legal effects of" such declarations.[298]

344. The above principles have been widely used. Tribunals relied on these principles in *Mobil v. Venezuela* and *SPP v. Egypt* to interpret the investment laws at issue in those arbitrations,[299] and in *CSOB v. The Slovak Republic* to interpret a Notice published by the Slovak Republic in its Official Gazette concerning the entry into force of the treaty at issue.[300] The International Court of Justice uses these principles to interpret unilateral acts of States, as evidenced in the ILC Guiding Principles.

345. Accordingly, El Salvador asks this Tribunal to interpret the text of Article 15 of the Investment Law on the basis of these principles.

2. The Investment Law of El Salvador is significantly different from national legislation that has been found to provide consent—it does not provide consent in "clear and specific terms"

346. The Investment Law of El Salvador is different from national investment laws in which tribunals have found consent to arbitration.

347. In accordance with the second ILC Guiding Principle identified above, ICSID tribunals have based a finding of consent to arbitration in national legislations on either (i) clear and specific references to consent, or (ii) clear and specific wording providing for mandatory referral of disputes to arbitration.

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[298] ILC Guiding Principles Commentary to § 7 (2).
[299] *Mobil v. Venezuela*, para. 89; *SPP v. Egypt*, para. 61 (RL-89).
[300] *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, para. 46 (**Authority RL-93**) ("Even if the Notice were to be characterized as a unilateral declaration by the Slovak State, it still needs to be asked whether it was 'the intention of the State making the declaration that it should become bound according to its terms', as required by the international law principles applicable to unilateral declarations. Pursuant to these principles, unilateral assumption of the contractual obligations is 'not lightly to be presumed…' and requires 'a very consistent course of conduct.' . . . Given this standard, the Tribunal considers that the Slovak Republic's intention to be bound by the treaty through the Notice has not been established.").

348. The text of the Investment Law of El Salvador does not include the word "consent" or a similar formulation in reference to ICSID arbitration or to anything else, nor does it make the resolution of disputes by arbitration mandatory.

349. Article 15 of the Investment Law provides:

> Should disputes or differences arise among local or foreign investors and the State, regarding the investments made by them in El Salvador, the parties may resort to the competent courts of justice, in accordance with legal proceedings.
>
> In case of disputes arising between foreign investors and the State, regarding their investments in El Salvador, the investors may refer the dispute to:
>
> a) The International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by means of conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) . . . .[301]

350. There are two important observations regarding the text of Article 15 of the Investment Law.

351. First, the Investment Law does not include any reference to consent. This is in contrast to the law of Albania at issue in *Tradex Hellas v. Albania*, which provides that "*[t]he Republic of Albania hereby consents* to the submission" of disputes to ICSID.[302] Given the clear

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[301] Investment Law of El Salvador, Art. 15 (RL-9; CL-4). The original Spanish text of Article 15 is: "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) . . . ."

[302] *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, Dec. 24, 1996 at 187 (RL-47).

wording expressing its consent to arbitration, Albania did not contest that Article 8 of its investment law constituted consent.

352. Likewise, the text of Kazakhstan's foreign investment law mentioned in *Rumeli v. Kazakhstan* expressly provided the State's consent to arbitration. The text of Article 27(3) of Kazakhstan's investment law makes a specific reference to "consent" when it states that once an investor chooses ICSID "*the consent of the Republic of Kazakhstan 'shall be presumed to have been granted.*'"[303] The respondent did not contest that Article 27 of its investment law constituted consent. The Investment Law of El Salvador, on the other hand, does not make reference to consent, either explicitly consenting to arbitration or stating that once the investor chooses arbitration, consent "shall be presumed."

353. Second, El Salvador's Investment Law does not contain clear and specific wording providing for mandatory referral of disputes to arbitration. The text of the Salvadoran law is significantly different from the Law concerning the Investment of Arab and Foreign Funds and Free Zones at issue in *SPP v. Egypt*, which provided that investment disputes "*shall be settled* in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or *within the framework of the [ICSID] Convention . . . .*"[304]

354. The *SPP* tribunal concluded that the text of Article 8 established a mandatory and hierarchic sequence of dispute settlement procedures and thus constituted "consent in writing" for purposes of Article 25 of the ICSID Convention.[305] The tribunal rejected Egypt's arguments that Article 8 did not contain any language expressing consent; that the expression "within the framework of the Convention" meant that a subsequent agreement was necessary for purposes of finding consent under the Convention; and that Article 8 did not refer expressly to arbitration

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[303] *Rumeli Telekom AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, para. 333 (emphasis added) (RL-91).
[304] *SPP v. Egypt*, para. 71 (quoting Article 8 of Law No. 43 Concerning the Investment of Arab and Foreign Funds and the Free Zones) (emphasis in original) (RL-89).
[305] *SPP v. Egypt*, paras. 82, 84, 86, 116.

because of the mandatory nature of the referral to ICSID.[306] But contrary to the Egyptian law, Article 15 of the Salvadoran Investment Law contains no mandatory referral of disputes to arbitration. The Investment Law merely states that foreign investors may refer ("*podrán remitir*") the dispute to ICSID. Article 15 does not say that the dispute *shall be* settled by ICSID arbitration.

355. Georgia's Investment Law provides another example of mandatory referral to arbitration distinguishable from the Salvadoran Law. In *Zhinvali v. Georgia*, the tribunal considered Article 16(2) of Georgia's Investment Law of 1996, which provides that: "[d]isputes between a foreign investor and governmental body, if the order of its resolution is not agreed between them, *shall be settled* by the Court of Georgia *or* at [ICSID]."[307] In that case, the respondent did not contest that Article 16(2) constituted consent, but argued that the claimant was under an obligation to submit any disputes to local courts pursuant to a previous law on concessions of 1994.[308] The tribunal found that the law of 1996 was applicable to the parties' dispute and that therefore the dispute was to be referred to arbitration. Contrary to Georgia's Investment Law of 1996, Article 15 of the Salvadoran Investment Law contains no mandatory referral of disputes to arbitration. Again, the statement that foreign investors may refer, "*podrán remitir*," the dispute to ICSID is significantly different than saying that the dispute *shall be* settled by ICSID arbitration.

356. The model dispute settlement clauses of experienced arbitral institutions provide further examples of both of these ways to locate consent in "clear and specific terms." The ICSID model clause specifically refers to consent, and the ICC model clause specifically refers to mandatory referral of disputes to arbitration.

357. The model dispute settlement clause provided by ICSID specifically refers to consent, in line with the first set of decisions discussed above:

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[306] *SPP v. Egypt*, para. 73.
[307] *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, Jan. 24, 2003, para. 337 (quoting Article 16(2) of the 1996 Georgian Investment Law) (emphasis added) (RL-90).
[308] *Zhinvali v. Georgia*, para. 329.

> The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") **hereby consent to submit** to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of or relating to this agreement for settlement by conciliation]/ [arbitration]/ [conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").[309]

358. The ICC, in line with the second set of decisions described above, drafted its model clause in the following terms:

> All disputes arising out of or in connection with the present contract **shall be finally settled** under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.[310]

359. Article 15 of the Investment Law, in contrast to all the above examples, does not state that El Salvador consents to arbitration or provide that disputes "shall be" settled by arbitration. Thus, under the Guiding Principles, the Salvadoran law should not be interpreted to constitute consent to arbitration as such a finding would not be based on "clear and specific terms" in the unilateral State act.

360. Even multilateral treaties like CAFTA, which would not be subject to the restrictive interpretation of unilateral acts of States, include a separate and specific provision regarding consent. CAFTA Article 10.17 entitled "Consent of Each Party to Arbitration" makes specific reference to consent, in addition to the provisions allowing the claimant to resort to ICSID arbitration in Article 10.16. The separate provision expressly provides that each Party to the Treaty "consents" to the submission of certain claims to arbitration, and in a separate paragraph further clarifies that the consent expressed under the previous paragraph, together with the submission of a claim to arbitration, satisfies the requirements for ICSID jurisdiction.

[309] ICSID model clause, available at ICSID's website (emphasis added).
[310] ICC model clause, available at ICC's website (emphasis added).

3. Lack of explicit consent in the text of the law, plus lack of evidence of intention to consent, means lack of consent

361. The tribunal in *Mobil v. Venezuela* recently decided that the ambiguous arbitration provision in the Investment Law of Venezuela, plus lack of evidence of Venezuela's intention to consent to arbitration, meant that Venezuela's Investment Law did not include a statement of unilateral consent to ICSID arbitration.

362. Article 22 of the Venezuelan Investment Law provides:

> 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 provision 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.[311]

363. Although the parties in *Mobil* agreed that Article 22 created an obligation to submit disputes to arbitration, presumably because of the "shall be submitted" language,[312] the parties disagreed on the meaning of the qualifier "if it so provides" and whether the Investment Law was consent to arbitration under the ICSID Convention, or merely meant that arbitration was to be used when a separate agreement provides consent.[313]

364. The tribunal first noted that, facing an ambiguous or obscure text, it needed to look further. The tribunal concluded that the claimants' arguments on *effet utile* were to be rejected because it agreed with the International Court of Justice that this principle is not applicable to the interpretation of unilateral acts of State. The Tribunal therefore focused only on whether Venezuela intended to provide consent to ICSID arbitration in the investment law. The

[311] *Mobil v. Venezuela*, para. 68 (quoting Venezuelan investment law, Art. 22) (emphasis added).
[312] *Mobil v. Venezuela*, para. 98.
[313] *Mobil v. Venezuela*, paras. 107-110.

key question for the tribunal was whether Venezuela's intention to consent to arbitration under the law was clear and unambiguous. The tribunal "arrive[d] to the conclusion that such intention [was] not established."[314] The manner in which the tribunal phrased this conclusion is important. Because of the gravity of consent to ICSID jurisdiction and the nature of investment laws as unilateral acts of States with effects *erga omnes,* providing consent for any and all investors from all countries, the intention to provide consent to arbitration cannot be presumed, it must be established.

365. El Salvador, like Venezuela, 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.

366. It is clear from the text of Article 15 that it was not intended to create dispute resolution jurisdiction. It refers to multiple avenues of dispute resolution that are open to investors under the rules governing those avenues. Like the Venezuelan law, it is descriptive rather than prescriptive and is not a jurisdictional instrument. For example, it states that foreign and domestic investors may resort to the competent courts of El Salvador. This provision does not create jurisdiction in those courts, it merely indicates that those courts are available to investors under the rules of competence and jurisdiction of Salvadoran courts. Similarly, the reference to dispute settlement under ICSID merely indicates that ICSID dispute settlement is available to foreign investors under the rules and procedures governing ICSID arbitration, including the requirement of specific written consent to jurisdiction before arbitration may be initiated. Investors "may refer the dispute" to dispute resolution under ICSID if the requirements for such submission are met. None of those requirements is waived. For El Salvador, therefore, the text of Article 15 is not ambiguous; it simply does not provide consent to jurisdiction.

367. Claimant will no doubt try to assert a contrary interpretation of the text of Article 15, which at most will demonstrate that the text is ambiguous. If the Tribunal finds

[314] *Mobil v. Venezuela*, para. 140.

such ambiguity in the text, the next step in the analysis of Article 15 as a unilateral act of State would be to determine whether a clear an unambiguous intention to consent to ICSID jurisdiction has been established by evidence external to the text.

368. In fact, the context and circumstances in which the Investment Law was drafted fully support El Salvador's reading of Article 15.

369. El Salvador's previous and contemporaneous commitments regarding consent to international arbitration for disputes with foreign investors are a crucial part of the context of Article 15 of the Investment Law. The textual difference between the Investment Law and the contemporaneous BITs signed by El Salvador provide clear evidence that El Salvador's intention to consent to international arbitration cannot be established from the text of the Investment Law or external evidence. The Investment Law entered into force in 1999. From 1993 to 2000, El Salvador signed at least 18 BITs with its foreign partners.[315] The treaties signed in 1999, the year the Investment Law was passed, as well as one treaty signed the following year, all contain language clearly and specifically providing consent to arbitration,[316] or providing that the investors "*shall be entitled* to submit" ("*tendrá derecho a someter*" in Spanish) disputes arbitration.[317] In other words, El Salvador included specific references to consent to arbitration

[315] El Salvador signed treaties with Argentina, Belgium-Luxembourg, Canada, Chile, the Czech Republic, Ecuador, France, Germany, Korea, Morocco, the Netherlands, Nicaragua, Peru, Spain, Switzerland, United Kingdom, United States, and Uruguay.

[316] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, United States of America-El Salvador, Art. IX, Mar. 10, 1999 ("Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration . . . .") (**Authority RL-94**); Agreement for the Promotion and Protection of Investments, United Kingdom of Great Britain and Northern Ireland-El Salvador, Art. 8(1), Oct. 14, 1999 ("Each Contracting Party hereby consents to submit to [ICSID] . . . .") (**Authority RL-95**); Agreement Concerning the Encouragement and the Reciprocal Protection of Investments, Belgium-Luxembourg Economic Union-El Salvador, Art. 9.2, Oct. 12, 1999 (**Authority RL-96**); Agreement for the Promotion and Protection of Investments, Canada-El Salvador, Art. XII, June 6, 1999 ("Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.") (**Authority RL-97**).

[317] Agreement for the Promotion and Reciprocal Protection of Investments, Czech Republic-El Salvador, Art. 8.2, Nov. 29, 1999 (**Authority RL-98**); Agreement on the Promotion and Reciprocal Protection of Investments, Morocco-El Salvador, Art. 9, Apr. 21, 1999 (**Authority RL-99**); Agreement for the Promotion and Reciprocal Protection of Investments, El Salvador-Uruguay, Art. 9, Aug. 24, 2000 (**Authority RL-100**).

or to mandatory arbitration with its treaty partners subject to the conditions of those agreements. But even with that contemporaneous experience, El Salvador did not include a specific reference to consent or to mandatory arbitration in its Investment Law.

370. The drafters of the Investment Law were familiar with and considered the language of these bilateral agreements. The *Exposición de Motivos* of the Investment Law, the official document explaining the law's object and purpose, submitted with the law to the Legislative Assembly for a vote, expressly stated that "in preparing the Draft Law . . . . the *various bilateral agreements* that El Salvador signed with other countries, *and the best practices recognized at the international level* as well as the appropriate mechanisms to encourage investments *have been considered*."[318]

371. The contemporaneous instruments all provide clear evidence that the intention of El Salvador, as regards the Investment Law, was not to consent to arbitration for purposes of Article 25 of the ICSID Convention. Since these BITs, which all include either an express consent to arbitration or mandatory provisions regarding arbitration, were used as reference to draft the Investment Law, the absence of this language in the Investment Law is clear evidence that El Salvador did not intend to consent to arbitration in its Investment Law.

372. The tribunal in *Mobil v. Venezuela* found nearly identical evidence in that case to be decisive. The tribunal observed

> that, at the time of the adoption of the Investment Law, Venezuela had already signed more than 15 BITs stating either that it gave 'its unconditional consent to the submission of disputes' to ICSID arbitration or that its disputes with foreign investors 'shall at the request of the nationals concerned be submitted to ICSID', or using both phrases. Comparable words were used in some national laws and in the ICSID model clauses. If it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well known formulas.[319]

[318] Statement of Purpose ("*Exposición de Motivos*") of the Investment Law of El Salvador at 4 (**Authority RL-101**) (emphasis added).
[319] *Mobil v. Venezuela*, para.139.

Similarly, if El Salvador had intended to give its advance consent to ICSID arbitration, it would have clearly expressed that intention by using one of these formulas, which are the same formulas El Salvador used in its BITs. El Salvador did not do this.

373. When interpreting a unilateral instrument, like the Investment Law, under the ILC Guiding Principles, the intention of the State is determinative. Here, El Salvador's intention was not to provide unilateral consent in its Investment Law.

4. El Salvador's Constitution provides additional evidence that El Salvador did not intend to unilaterally consent to ICSID arbitration through its Investment Law

374. The difference in drafting between the Investment Law and the BITs mentioned above reflects a restriction in Article 146 of the Constitution of El Salvador. Article 146 of the Constitution provides that El Salvador can consent to international arbitration in *treaties* and *contracts*, but does not mention national legislation. This difference is additional evidence that El Salvador did not intend to consent to ICSID arbitration in its Investment Law.

375. Article 146 of the Constitution of El Salvador provides:

> Treaties shall not be entered into or ratified, nor shall any concessions be granted that would in any way alter the form of government or damage or diminish the territorial integrity, sovereignty, or independence of the Republic or the fundamental rights and guarantees of individuals.
>
> The provisions of the previous paragraph shall apply to all international treaties or agreements entered into with governments or domestic or international companies in which the Salvadoran State is subject to the jurisdiction of a tribunal of a foreign state.
>
> 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*.[320]

376. The constitutional restriction concerning the instruments in which the State can consent to arbitration reasonably limits the Government to negotiate the submission of disputes

[320] Constitution of El Salvador, Art. 146 (emphasis added) (CL-1).

to international arbitration with its treaty partners or directly with investors. The Government needs to negotiate what type of disputes and under which conditions arbitration against the State can be initiated. No such bilateralism exists in the case of the Investment Law.

377. El Salvador is not arguing that Article 15 is unconstitutional or otherwise trying to use its domestic laws (*i.e.*, its Constitution) to evade international responsibility. El Salvador considers that the Constitution's provision for the State to consent to international arbitration in *treaties and contracts* without mentioning its domestic legislation, coupled with the lack of explicit consent or reference to mandatory arbitration in the Investment Law, is additional evidence that El Salvador did not intend to consent to ICSID arbitration in its Investment Law.[321]

378. Thus, the text of Article 15 of the Investment Law does not constitute consent to arbitration for purposes of Article 25 of the ICSID Convention. First, the text of Article 15 does not contain the word consent or a similar formulation and does not provide for mandatory referral of disputes to arbitration. Second, consent must be clear and ICSID tribunals have interpreted ambiguous clauses similar to Article 15 as not providing consent. Third, El Salvador did not intend to consent to arbitration in Article 15 of the Investment Law. Finally, it would be inconsistent with the Salvadoran Constitution for El Salvador to provide its consent to arbitrate unilaterally.

B. Claimant is not a foreign investor under the Investment Law

379. Even if there were consent to arbitration with foreign investors under the Investment Law, Claimant does not meet the definition of a foreign investor. "Foreign investor" is defined as "foreign natural and legal persons and Salvadorans located outside El Salvador without interruption for more than one year, who make investments in the country." The definition of "investments" and "foreign investments" are as follows:

[321] The fact that this provision is included in the section about treaties is not relevant to El Salvador's argument, as the provision specifically mentions contracts in addition to treaties, therefore making a general reference to an international arbitration exception that goes beyond treaties.

> a) Inversiones: Aquellos activos o recursos, ya sean en bienes tangibles e intangibles, prestación de servicios o financieros en moneda nacional o extranjera de libre convertibilidad, que se destinen a la ejecución de actividades de índole económica o a la ampliación o perfeccionamiento de las existentes, para la producción de bienes o servicios y la generación de fuentes de trabajo;
>
> b) Inversiones Extranjeras: Aquellas inversiones efectuadas con activos o recursos, ya sean en bienes tangibles e intangibles, prestación de servicios o financieros en moneda de libre convertibilidad, transferidos del exterior por inversionistas extranjeros, de conformidad a esta ley.

380. Claimant qualifies as a foreign legal person, but does not meet the affirmative requirement of having made investments in El Salvador. Claimant is a holding company that holds shares in a local company used by Pacific Rim Mining Corp. of Canada to carry out the operational aspects of its investments in El Salvador. However, as demonstrated in Section III.B.4 above, all of the foreign investments in El Salvador—that is, all of the "assets or resources. . . transferred from overseas"—were either transferred to El Salvador before Claimant became the holding company for Pacific Rim El Salvador or were made by Pacific Rim Mining Corp. through transfers from its accounts in Canada. There is no indication of any investments made by Claimant, Pac Rim Cayman, in El Salvador at any time. Claimant therefore is not a "foreign investor" under the Investment Law, and Article 15 of that law, whatever its scope might be, does not apply to Claimant.

C. The dispute brought by Claimant is not a dispute between El Salvador and a national of another Contracting State

381. Even if there were consent to arbitrate in the Investment Law and Claimant were a foreign investor within the meaning of that law, this Tribunal should decline jurisdiction in this case because this is not a dispute with an investor of a Contracting State. Article 25 of the ICSID Convention categorically provides that the jurisdiction of the Centre only extends to disputes arising out of investments "between a Contracting State and a national of another Contracting

State." Although the purported claimant is a national of the United States now and was a national of the Cayman Islands (a territory of the United Kingdom) earlier, this dispute is actually a dispute between a Contracting State and a national of a *non-contracting State*, Canada.

382. The named Claimant is admittedly a shell company. The real party in interest is a Canadian company, and Canada is not a party to the ICSID Convention. The Canadian company has abused the corporate personality to gain the benefits of CAFTA and the ICSID Convention through a shell company.

383. The International Court of Justice ("the Court" or "the ICJ") and several ICSID tribunals have consistently considered abuse of the corporate personality as a circumstance justifying looking beyond the corporate form, known as piercing or lifting the corporate veil.

1. Piercing the corporate veil is necessary in certain circumstances to identify the true party in interest

384. The need to pierce the corporate veil in certain circumstances is recognized in international law and the doctrine has been applied by international courts and tribunals.

385. In the *Barcelona Traction* case, the ICJ recognized the applicability of the doctrine of piercing the corporate veil in international law. The Court stated in its Judgment that:

> the process of lifting the [corporate] veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil . . . .[322]

[322] Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Judgment of 5 February, 1970 I.C.J. Reports 3, para. 58 (**Authority RL-102**). *See also* Oppenheim's International Law, Vol. I, 861 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (**Authority RL-103**) (noting that "subsidiaries are themselves separate legal persons, with their own nationality distinct from that of the parent company;" but that "[i]n *many situations . . . it is permissible to look behind the formal nationality of a company, as evidenced primarily by its place of incorporation and registered office, so as to determine the reality of its relationships to a state, as demonstrated by the national location of the control* . . . .") (emphasis added).

386. The Court identified several circumstances that, among others, justify piercing the corporate veil. The circumstances identified by the Court were:

> to *prevent the misuse of the privileges of legal personality*, as in cases of fraud or malfeasance, to protect third persons, such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.[323]

387. The principle of piercing the corporate veil has been invoked in ICSID arbitrations and ICSID tribunals have widely accepted its applicability.[324]

2. Piercing the corporate veil is possible in this case because the Investment Law does not limit the definition of "foreign investor" to place of incorporation

388. Piercing the paper-thin corporate veil is possible in this case because, unlike the BITs in previous cases where respondents have asked tribunals to pierce the corporate veil, the Investment Law does not restrict the definition of investor to place of incorporation for companies.

389. Application of the doctrine of piercing the corporate veil to identify the real party in interest in an arbitration has often been denied as a result of the specific definitions of "investor" contained in the BITs at issue.[325] Article 25 of the ICSID Convention leaves the concept of national of another Contracting State undefined. The Contracting Parties of the ICSID Convention are thus free to define, with limitations, who may qualify as a national of another Contracting State for purposes of the Convention.[326] Where the parties to a treaty have

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[323] Case Concerning the Barcelona Traction, Light and Power Company, Ltd., para. 56 (emphasis added).
[324] *Tokios Tokelės v. Ukraine* (RL-70); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 (**Authority RL-104**); *Yukos Universal v. Russia* (RL-72); *Saluka Investments B.V. v. The Czech Republic* (RL-74); *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, Dec. 19, 2008 (**Authority RL-105**).
[325] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, Apr. 18, 2008, paras. 83, 99 and 110 (**Authority RL-106**); *Yukos Universal v. Russia*, para. 415; *Saluka v. The Czech Republic*, para. 229.
[326] *See Tokios Tokelės v. Ukraine*, paras. 24-52; *Rompetrol Group v. Romania*, paras. 79-100.

defined "investor" solely based on nationality of incorporation, tribunals have considered that they are not able to look beyond the place of incorporation.

390. ICSID tribunals considering piercing the corporate veil have thus been restrained by the treaty parties' definition of investor. For example, in *Tokios Tokelės v. Ukraine*, the majority of the tribunal had to decide "whether the equitable doctrine of 'veil piercing,' to the extent recognized in customary international law, *should override* the terms of the agreement between the Contracting Parties and cause the Tribunal to deny jurisdiction in this case."[327] The claimant, a company incorporated in Lithuania, was 99% percent owned by Ukrainian nationals. The respondent argued that allowing a claim brought by a company owned by host-State nationals would defeat the object and purposes of the BIT and the ICSID Convention of protecting foreign investors and their investments. The BIT, however, defined "investor" as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."[328] Therefore, the tribunal found that the claimant fulfilled the BIT's definition of investor and allowed the claim to proceed.

391. Similarly, the tribunal in *Rompetrol v. Romania* rejected the "argument that a supposed rule of 'real and effective nationality' *should override* either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT."[329] The relevant BIT provision identified "legal persons constituted under the law of that Contracting Party" as investors.[330] The respondent objected that, although the claimant was incorporated in the Netherlands, it was wholly-owned by a Romanian national, but the tribunal noted that "the criterion refers simply and exclusively to the place of incorporation."[331] Therefore, like the majority of the tribunal in *Tokios Tokelės*, the *Rompetrol* tribunal found it

[327] *Tokios Tokelės v. Ukraine*, para. 53 (emphasis added).
[328] *Tokios Tokelės v. Ukraine*, para 28 (quoting Agreement for the Promotion and Reciprocal Protection of Investments, Ukraine-Lithuania, Feb. 8, 1994).
[329] *Rompetrol Group v. Romania*, para. 93 (emphasis added).
[330] *Rompetrol Group v. Romania*, para. 98 (quoting Agreement on encouragement and reciprocal protection of investments, Netherlands-Romania, Apr. 19, 1994).
[331] *Rompetrol Group v. Romania*, para. 99.

could not accept the respondent's objections, determined that the claimant was a national of the Netherlands for purposes of the BIT, and asserted jurisdiction.

392. There are in fact strong arguments indicating that those tribunals wrongly declined to look beyond the corporate form,[332] but El Salvador need not assert these arguments because the present case is fundamentally different from those cases. The relevant BITs in *Tokios Tokelės* and *Rompetrol* defined investor with respect to juridical persons based exclusively on place of incorporation. Accordingly, the tribunals decided they could not go beyond the definition agreed to by the parties to the treaties, because place of incorporation was the requirement for the determination of nationality under the BIT, and by extension, the ICSID Convention.

393. In the present case, the Investment Law does not include a definition of investor that restricts the Tribunal from looking beyond manipulated corporate form and determining as a matter of substance whether the dispute brought by Claimant is in fact a dispute between a Contracting State and a national of another Contracting State. The Tribunal is free to prevent mere form from prevailing over the true substance of the relationship between Claimant, Pacific Rim Mining Corp., the investment, and the Salvadoran State.

394. The Investment Law of El Salvador applies to national and foreign investors. As indicated above, Article 2.d) of the Investment Law defines foreign investors as foreign natural or juridical persons "who make investments in the country." The definition does not contain any reference to place of incorporation as the test, let alone the only test, for determining the nationality of juridical persons under the Investment Law. To the contrary, rather than focusing on the form of place of incorporation, the Salvadoran law includes the substantive requirement

[332] *See TSA Spectrum v. Argentina*, para. 146 (RL-105) ("In the two cases of *Tokios Tokelės v. Ukraine* and *Rompetrol Group N.V. v. Romania*, the Tribunals adopted the strict constructionist interpretation in spite of the control of the foreign companies by nationals of the host States. However, this interpretation has not been generally accepted and was also criticised by the dissenting President of the *Tokios Tokelės* Tribunal.").

that a foreign company "make investments in the country" in order to qualify as a foreign investor.

395. The definition of foreign investors in the Investment Law, although it applies to foreign juridical persons, does not automatically make the dispute brought by Claimant a dispute between a Contracting State and a national of another Contracting State for purposes of the ICSID Convention. In considering whether the present dispute is in fact between a Contracting State and a national of another Contracting State, the Tribunal is free to look beyond the place of incorporation to reach the substance behind the form. In fact, as discussed above, the Investment Law specifically directs the Tribunal to make a determination of whether Claimant actually made investments in El Salvador.

396. Therefore, in addition to the fact that there is no consent to submit to arbitration under the Investment Law and Claimant is not a foreign investor as defined in the Investment Law, the Tribunal should look beyond the named Claimant and not allow this case to proceed to the merits where the actual investor and the real party in interest is a national of a non-contracting State to the ICSID Convention.

3. Piercing the corporate veil is appropriate in this case

397. The circumstances that tribunals have recognized as justifying piercing of the corporate veil are present in the instant case.

398. In the *Barcelona Traction* case, the ICJ recognized abuse of the corporate personality as a circumstance that would justify piercing the corporate veil. The ICSID tribunals in *Tokios Tokelės* and *Autopista Concesionada de Venezuela, C.A. v. Venezuela* were likewise willing to acknowledge that in such a circumstance, the corporate veil may be pierced.[333] The *Tokios Tokelės* tribunal, recognizing the applicability of the principle in such a situation noted:

[333] *See Aucoven v. Venezuela*, para. 67 (RL-59) (recognizing that a tribunal may set aside corporate identity where "the corporation has engaged in abuse or fraud"). *See also Tokios Tokelės v. Ukraine*, para. 54.

> The Claimant manifestly did not create Tokios Tokelės for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose.[334]

399. The tribunal in *Aucoven* determined that there was no abuse in that case based on facts distinguishable from the present case. There, the tribunal considered that the named claimant was "an active corporation"; that the acquisition of the shares relevant to the dispute had occurred at a time when the named claimant "reoriented its activities towards the international market"; that the claimant had requested Venezuela's approval of the share transfer "at the very beginning of the project"; that the respondent had considered the consequences of and approved of the share transfer; and that the named claimant had been incorporated in the United States "well before the conclusion of the Agreement, the share transfer and the emergence of the present dispute."[335]

400. In the present case, on the other hand, the Canadian company is using a shell company to access ICSID, having transferred shares after the project started and having led El Salvador to believe at all times that it was dealing with a Canadian mining company and a Canadian investor. In light of the reasoning in the decisions by previous arbitral tribunals, this should be sufficient to decline jurisdiction in this case.

a. The Canadian parent company is the real investor, controlling the subsidiary and commingling assets

401. Prosper Weil wrote a forceful dissent in *Tokios Tokelės* based on the argument that corporate formality should not prevail to bring in a dispute to which "the ICSID Convention was not meant to apply and does not apply."[336] He wrote that the "single most important issue . .

[334] *Tokios Tokelės v. Ukraine*, para. 56.
[335] *Aucoven v. Venezuela*, paras. 70-71, 123-129.
[336] *Tokios Tokelės v. Ukraine*, Dissenting Opinion of Prosper Weil, para. 21 (RL-75).

. at the heart" of his dissent was that the determination of corporate nationality should not run counter to the purpose of the ICSID system.[337] Although he was focused on not extending ICSID arbitration to a dispute between a national and its own State, the same argument applies to not extending ICSID benefits and protections to a dispute with an investor of a non-contracting State.

402. When identifying the true investor, the Tribunal should consider the intent and expectations of the Parties. It is undisputed that the investment that is at the core of the present dispute was made in 2002 by Pacific Rim Mining Corp., a Canadian company, by merging with Dayton Mining Corporation, also a Canadian mining company, and thus acquiring the interests in El Salvador.[338] It is undisputed that, in its dealings with El Salvador, Pacific Rim Mining Corp. always represented itself to the Government of El Salvador as a Canadian corporation. Finally, it is undisputed that El Salvador relied on the investment now subject of the present dispute as having been made, and maintained, by a Canadian corporation.

403. The true corporate nature of the Claimant in this arbitration has been revealed by Claimant itself. By letter of August 17, 2010 to the Tribunal, Claimant candidly admitted that with respect to its nationality as a Cayman Islands corporation Pac Rim Cayman was only a shell corporation as "it never maintained any offices or other substantial business presence in the Cayman Islands."[339] By letter of September 13, 2010 Claimant affirmed this position and admitted that "Pac Rim Cayman was a holding company before December 2007 and remains a holding company today."[340]

404. Moreover, in opposing El Salvador's request for documents and information to establish that Pac Rim Cayman is a shell company with no substantial business activities in the United States or anywhere else, Claimant accepted that "[t]he basic facts do not seem to be in

[337] *Tokios Tokelės v. Ukraine*, Dissenting Opinion of Prosper Weil, para. 19.
[338] NOA, para. 43.
[339] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 3 (R-56).
[340] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 5 (R-57).

dispute," asserting that the parties only "disagree about the legal significance of these facts."[341] Among the facts asserted by El Salvador and admitted by Claimant is that Pac Rim Cayman was created and later moved to the United States at the will of Pacific Rim Mining Corp., the Canadian parent.

405. Pacific Rim Mining Corp. has not treated Pac Rim Cayman as a separate, independent entity, and neither should this Tribunal.

406. For example, according to the documentation submitted by PRES in its applications to register investments in El Salvador, all money transfers were ordered by Pacific Rim Mining Corp. from Canada, not Pac Rim Cayman from the United States.

407. In fact, Pacific Rim Mining Corp. directly finances lobbying activities related to the Salvadoran projects and these arbitration proceedings.

408. Pacific Rim Mining Corp. is the sole member of Pac Rim Cayman and is therefore the sole decision-maker behind what Pac Rim Cayman does. Even the document appointing counsel for Claimant in these proceedings, entitled Joint Written Consent of the Sole Member and Managers of Pac Rim Cayman, was signed by Pacific Rim Mining Corp. itself.[342] Mr. Thomas Shrake signed as both Pac Rim Cayman's manager and Pacific Rim Mining Corp.'s President and CEO. There can be little doubt as to the shell nature of Pac Rim Cayman and the real party in interest in this arbitration.

b. Piercing the corporate veil is particularly appropriate because of the timing of events

409. Timing is a decisive factor in determining whether the corporate form has been abused to gain access to ICSID arbitration, in which case the tribunal should look past the corporate form. The tribunal in *ADC v. Hungary* recognized that the principle of piercing the corporate veil applies to situations of misuse of the corporate form, in line with the Court in the

[341] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 5, 12.
[342] *See* Letter from Claimant to ICSID, Apr. 30, 2009 (**Exhibit R-114**).

Barcelona Traction case and with the tribunals in *Tokios Tokelės* and *Aucoven v. Venezuela*.[343] The *ADC* claimants were two Cypriot companies, but the respondent State opposed jurisdiction arguing that the investment had been made by Canadian companies and that, therefore, the claims did not belong to a national of a Contracting State to the ICSID Convention.[344]

410. Although the argument based on the principle of piercing the corporate veil was overcome by the definition of investor in the Hungary-Cyprus BIT, facts related to timing were highly relevant to the tribunal's decision. Indeed, the tribunal gave great weight to the fact that, at the time the investment was made, Hungary knew Cypriot companies were to be used and consented to it.[345] The tribunal also acknowledged that the Cypriot claimants had been incorporated in Cyprus *prior* to the execution of the relevant agreements with the Government and that there was evidence that the companies paid taxes in Cyprus and had other activities there.[346]

411. Timing was also very relevant to the tribunal's decision in the *Aucoven* arbitration. There, the tribunal determined that a share transfer was not abusive where the claimant had been incorporated in the United States as an active company since before the Agreement and the emergence of the dispute, and the claimants had requested Venezuela's approval of the share transfer "at the very beginning of the project."[347] That tribunal determined that Venezuela had considered the consequences of and approved of the share transfer, before the transfer took place.

412. The present case is very different. Here, the investment was originally made by a Canadian company and the Salvadoran Government's understanding had always been that it was dealing with a Canadian investor. The named Claimant was incorporated in the United States just weeks before the Canadian company began mentioning that it would resort to international arbitration.

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[343] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No.ARB/03/16, Award, Oct. 2, 2006, para. 358 (RL-104).
[344] *ADC v. Hungary*, para. 334.
[345] *ADC v. Hungary*, para. 352 (emphasis added).
[346] *ADC v. Hungary*, para. 353.
[347] *Aucoven v. Venezuela*, para. 124.

413. The Canadian company always presented itself as the investor managing the projects in El Salvador. Not only were all the investments transferred from Canada, but the pre-feasibility study was commissioned by the Canadian company and the revised Environmental Impact Study submitted to MARN in September 2005 stated that PRES was owned by Pacific Rim Mining Corp. in Canada. This happened after Pacific Rim Mining Corp. transferred ownership in the shares of the local vehicle for *its* investments in El Salvador to Pac Rim Cayman on November 30, 2004. None of the Annual Reports submitted to the Salvadoran Government mentioned the Cayman Islands. The Canadian Ambassador to El Salvador even spoke to the Ministry of the Economy on behalf of the Canadian company. Thus, El Salvador had no reason to believe that the Canadian mining company would manipulate a provision from El Salvador's Investment Law to try to initiate ICSID arbitration through an inactive holding company.

c. Piercing the veil is required to protect the integrity of international arbitration.

414. Allowing a shell company to proceed with an ICSID arbitration, where the real party in interest could not have done so itself, encourages treaty-shopping. The tribunal in *Saluka v. The Czech Republic* recognized this:

> The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping" which can share many of the disadvantages of the widely criticised practice of "forum shopping."[348]

415. There is abundant evidence that Pac Rim Cayman is a mere shell company used by Pacific Rim Mining Corp. to bring international arbitration. El Salvador established

[348] *Saluka v. The Czech Republic*, para. 240.

Claimant's bad faith change of nationality above in the Section dealing with abuse of process, and established Claimant's lack of connection to the United States in the Section on denial of benefits. A finding by the Tribunal that Claimant has abused the system of international arbitration should also determine the outcome of the present objection.

416. Although in fact irrelevant for determining jurisdiction *ratione personae*, Claimant's references to Mr. Shrake's nationality; to the alleged seat from where Pac Rim Cayman allegedly has been managed since 2002; to the origin of the capital invested in El Salvador; and to some unnamed alleged U.S. shareholders constitute a clear invitation to look beyond the formality of Claimant's place of incorporation to the substance of its activities in the United States and its relationship with the investments in El Salvador, or more accurately, its lack of both.[349]

417. This Tribunal should pierce the corporate veil in this case to undo the Canadian parent's abusive manipulation of the international arbitration system. The investment was originally made by a Canadian investor who later transferred its rights to a Cayman Islands holding company and then moved that shell company to the United States. The factual record establishes that El Salvador always believed it was dealing with a Canadian investor, from when the investment was made until the present arbitration was filed. The Tribunal is not restricted to a place of incorporation test for the determination of whether, in the present case, a non-national of the ICSID Convention is the real party in interest. The Tribunal is thus not constrained to make form prevail over substance, as the Investment Law contains no definition of investor that requires the Tribunal to accept the mere form of place of incorporation.

418. In these circumstances, it is appropriate to pierce the corporate veil to identify and prevent the real investor in interest, the Canadian corporation, from manipulating the system to gain access to ICSID. Piercing the veil in this instance will help protect the international arbitration system from future attempts at treaty shopping. The tribunal should recognize that

[349] Letter from Claimant to the Tribunal, Aug. 17, 2010.

this dispute does not involve an investor of a Contracting State and deny jurisdiction under the Investment Law.

4. Pac Rim Cayman's change in nationality was also an attempt to facilitate the Canadian company's access to ICSID arbitration

419. Pac Rim Cayman was a national of the Cayman Islands, a British territory, and thus, on its face, would have been able to meet the nationality requirement under the ICSID Convention (although not under CAFTA) even without the change in nationality. However, in the circumstances of this case, Pac Rim Cayman's change in nationality was also intended to make access to ICSID arbitration possible.

420. First, Pacific Rim Mining Corp., the Canadian parent company, could not initiate any international arbitration directly, ICSID or non-ICSID, so it was forced to use its shell subsidiary, Pac Rim Cayman. The Canadian parent could not initiate ICSID claims because Canada is not a Contracting State to the ICSID Convention. But the Canadian parent could not exercise the non-ICSID options under the Investment Law either, because it was not the registered investor with the *Oficina Nacional de Inversiones*, a requirement to invoke the protections of the Investment Law. So the Canadian parent would have had to use its shell subsidiary, Pac Rim Cayman, which was a national of the Cayman Islands when the Canadian company began considering arbitration.

421. But as Claimant itself has admitted in its August 17, 2010 letter to the Tribunal, Pac Rim Cayman did not have any presence, any employees, or any business activities in the Cayman Islands.[350] Pac Rim Cayman's only links to an ICSID Contracting State before December 13, 2007 were its place of incorporation and a post office box. As such, Pac Rim Cayman would have been a very weak claimant on jurisdictional grounds, embodying the definition of a "mailbox company" that Claimant tried to distance itself from in the same letter to the Tribunal.[351]

[350] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 3.
[351] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 7.

422. The Canadian parent company changed Pac Rim Cayman's nationality to the United States, moved another direct subsidiary to be held through Pac Rim Cayman, and registered Pac Rim Cayman at the small office that the Canadian parent has used for years in order to give Pac Rim Cayman the appearance of being a real company. A less careful respondent might not have questioned Pac Rim Cayman's *bona fides*.

423. Thus, Pac Rim Cayman's change of nationality in December 2007, in addition to manufacturing access to CAFTA, furthered Claimant's abuse of process with respect to overall ICSID jurisdiction under the Investment Law and under CAFTA. This is an additional reason justifying piercing the corporate veil and declining jurisdiction in this case.

D. Even if Article 15 of the Investment Law did constitute consent and did apply to Claimant, Claimant's request for arbitration would be inadmissible

424. In addition to the fact that the text of the Investment Law does not provide consent to arbitration and that ICSID jurisdiction should be denied to an investor of a non-Contracting Party, Claimant's Investment Law claims would in any event be inadmissible for not having sought conciliation before arbitration.

425. As noted above, the text of the Investment Law of El Salvador does not contain explicit consent to ICSID arbitration or make the resolution of disputes by arbitration mandatory. The text of the Investment Law is clear, however, that if a dispute is to be referred to ICSID under Article 15, such dispute is to be settled "by means of conciliation ***and*** arbitration."

426. The use of the conjunction "and" connects conciliation with arbitration so that both methods of dispute resolution need to be used, conciliation followed by arbitration. Therefore, even if Article 15 were somehow deemed to be consent for purposes of Article 25 of the ICSID Convention, such consent is to conciliation and arbitration. Because Claimant did not initiate conciliation prior to arbitration for its Investment Law claims, its request for arbitration would be inadmissible in any case.

427. Article 15 of the Investment Law does not use the conjunction "or" between conciliation and arbitration which would make both methods an alternative at the investor's choice. For example, in El Salvador's BITs with Peru and the United Kingdom, El Salvador and its partners specifically included the conjunction "or" between conciliation and arbitration, thereby providing both methods as alternatives for qualifying investors.[352] One of these treaties was signed before the Investment Law and the other was contemporaneous to the Investment Law. Both treaties were available as reference to the drafters of the Investment Law, who specifically mentioned that they took El Salvador's BITs into account as reference in drafting the law. The Investment Law does not provide the two options as alternatives, but rather includes conciliation and arbitration, indicating that conciliation is a prerequisite to arbitration. Therefore, even if Article 15 of the Investment Law were consent, Claimant's request for arbitration would still be inadmissible.

E. The CAFTA waiver precludes jurisdiction under the Investment Law

428. In the Preliminary Objections stage under CAFTA Article 10.20.5, El Salvador requested that the Tribunal enforce the Claimant's waiver to prevent Claimant from bringing duplicative *proceedings* under the Investment Law. El Salvador's Preliminary Objection under CAFTA Article 10.20.5 was limited to the effects of the waiver with respect to Claimant's non-CAFTA claims.[353] Given that the Tribunal did not grant El Salvador's Preliminary Objection, such impermissible duplication of *proceedings* survived to the present jurisdictional phase and will be addressed here as a jurisdictional objection due to lack of consent.

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[352] Agreement for the Promotion and Protection of Investments, Peru-El Salvador, Art. 11(2)(b), June 13, 1996 (providing for submission "to [ICSID] to resolve the dispute by conciliation or arbitration") (**Authority RL-107**); Agreement for the Promotion and Protection of Investments, United Kingdom of Great Britain and Northern Ireland-El Salvador, Art. 8, Oct. 14, 1999 (RL-95).

[353] El Salvador's Reply (Preliminary Objections), Section VI; Decision of the Tribunal on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, Aug. 2, 2010, paras. 250 *et seq.* ("Decision on Preliminary Objections").

429. El Salvador's position was and is that such duplication of *proceedings* violates Claimant's written waiver. In other words, by maintaining a *proceeding* under the Investment Law and a *proceeding* under CAFTA, albeit before the same Tribunal, Claimant is violating the terms of its waiver.[354]

430. As noted by the Tribunal, "[m]uch of the work required to bring these proceedings . . . to a conclusion has now been done."[355] Therefore, El Salvador will not restate in this jurisdictional phase its position concerning the proper interpretation of the text of CAFTA Article 10.18.2(b) in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

431. In its Reply during the Preliminary Objections, El Salvador reserved the right to challenge "the jurisdiction of the Centre for the CAFTA claims (because of the repudiated waiver), the competence of the Tribunal to decide the Investment Law claims (because of the waiver), and even the proper constitution of the Tribunal to decide claims under the Investment Law (because the Tribunal has been constituted as a CAFTA Tribunal)."[356]

432. El Salvador will, as announced, address the effect of the nullified waiver on its consent to arbitration under CAFTA and the ICSID Convention and the effect of maintaining the Investment Law proceedings on the Tribunal's constitution considering that this Tribunal was constituted following the procedures of CAFTA, which makes this Tribunal a CAFTA Tribunal.

[354] El Salvador must clarify that it has not argued and does not argue that this duplication of *proceedings* means that this ICSID arbitration comprises "two separate dispute settlement procedures" for purposes of its objection under CAFTA Article 10.18.2(b).
[355] Decision on Preliminary Objections, para. 264.
[356] El Salvador's Reply (Preliminary Objections), para. 235.

1. El Salvador's Preliminary Objection under CAFTA Article 10.20.5 does not prevent the Republic from pursuing its objection in this jurisdictional phase

a. CAFTA Article 10.20.4 explicitly preserves a Party's objections

433. An objection as to competence pursued under CAFTA's expedited procedure for preliminary objections does not prevent a respondent from raising the same objection later in the proceedings if the preliminary objection under the expedited procedure is not granted.

434. In its Preliminary Objections, El Salvador invoked the expedited procedure of CAFTA Article 10.20.5 for the Tribunal to consider the Objections.

435. CAFTA Article 10.20.4(d) unequivocally provides that a "respondent *does not waive any objection as to competence* or any argument on the merits merely because the respondent *did* or did not raise an objection under this paragraph *or make use of the expedited procedure set out in paragraph 5*."[357]

436. Thus, just as the Tribunal's dismissal of El Salvador's Preliminary Objections concerning El Dorado, Santa Rita, and the Other CAFTA claims does not mean that Claimant has prevailed on the merits on those claims, the Tribunal's dismissal of El Salvador's Objection as to the competence of the Tribunal based on the CAFTA waiver does not mean that the Tribunal has asserted its jurisdiction over the Investment Law claims.[358] This is the result of the expedited nature of a preliminary objection phase under Article 10.20.5.

b. The Tribunal's decision on the waiver issue was limited by the expedited procedure

437. The Decision of the Tribunal of August 2, 2010 reflects the limited nature of CAFTA's expedited procedure. Indeed, the Tribunal dealt with El Salvador's preliminary objection based on the waiver in only two paragraphs of its Decision.[359] Nowhere in these two

[357] CAFTA Article 10.20.4(d) (emphasis added).
[358] Decision on Preliminary Objections, para. 266(2).
[359] Decision on Preliminary Objections, paras. 252, 253.

paragraphs did the Tribunal undergo an analysis of the proper interpretation and application of the text of Article 10.18.2(b).

438. The Tribunal's Decision on the preliminary objection related to the waiver was based on the object and purpose of CAFTA for "effective procedures" of dispute resolution; the perception that these duplicative proceedings cause no unfairness or extra risk to El Salvador; and the "historical fact" that several arbitration tribunals have exercised jurisdiction based on more than one instrument of consent.[360]

439. There are several elements of the waiver issue that can be more fully developed at this stage. First, the Tribunal's Decision in the preliminary objection phase did not deal with interpretation of the text of CAFTA Article 10.18.2(b). The interpretation of Article 10.18.2(b) will certainly be addressed in this full fledged jurisdictional phase free from the restrictions related to the expedited nature of the preliminary objection phase.

440. Moreover, in noting the "historical fact" of past cases where tribunals have exercised jurisdiction based on more than one instrument of consent, the Tribunal did not discuss that El Salvador had already stated its position that in all those past cases the treaties at issue *did not contain any waiver provision*, such as the one in CAFTA.[361] Such cases are thus inapposite to the present case.

441. In addition, CAFTA Article 1.2(f) uses the words "*effective* procedures." The Contracting Parties to CAFTA did not employ the adjectives "expeditious" or "efficient" to describe its procedures. Indeed, "effective" means "having an intended or expected effect."[362] Therefore, the Contracting Parties expect that arbitral tribunals will give the provisions and procedures of CAFTA their intended and expected effect.

442. Finally, El Salvador wants to note that El Salvador never argued that the proceeding under CAFTA and the proceeding under the Investment Law were two separate

[360] Decision on Preliminary Objections, para. 253.
[361] El Salvador's Reply (Preliminary Objections), para. 222.
[362] The American Heritage College Dictionary 446 (4th ed. 2002) (RL-86).

dispute settlement *procedures*. What El Salvador argued was that the two were separate dispute settlement *proceedings*, within the meaning of CAFTA Article 10.18.2.

443. These observations counsel the need to make a more careful analysis of the CAFTA waiver requirement that will result in a decision that states the reasons taking into account the arguments of the parties.

444. This is an important issue for El Salvador and other State Parties that still have bilateral investment treaties with other CAFTA Parties in addition to CAFTA, which could be invoked by foreign investors in a double invocation of jurisdiction and claims similar to the two proceedings brought by this Claimant before this Tribunal.

445. El Salvador considers that this issue merits the careful analysis and a reasoned decision.

2. Claimant waived its right to initiate a proceeding under the Investment Law regarding the same measures

446. In order to take advantage of El Salvador's consent to CAFTA arbitration, Claimant submitted a waiver of any right to initiate or continue any proceeding with respect to any measure alleged to constitute a CAFTA breach. The waiver should have prevented Claimant from bringing its Investment Law proceeding before this Tribunal and the waiver prohibits Claimant from continuing the Investment Law proceeding.

447. CAFTA requires exclusivity of the CAFTA dispute settlement provisions with respect to any claims related to the same measures alleged to constitute CAFTA violations. The CAFTA State Parties agreed to voluntarily submit specific types of claims to arbitration conditioned on an investor's compliance with the waiver requirement. Of course, other legal instruments providing for arbitration, that do not contain a waiver requirement, permit claimants to invoke jurisdiction based on multiple instruments and simultaneously pursue multiple sets of claims related to the same measures. But those situations are not relevant here; Claimant chose to initiate its claims pursuant to CAFTA and must abide by the CAFTA requirements.

448. Among the CAFTA requirements for perfecting the consent of the respondent State is the submission of a valid waiver under Article 10.18.2, which reads as follows:

> **Article 10.18: Conditions and Limitations on Consent of Each Party**
>
> . . . .
>
> 2. No claim may be submitted to arbitration under this Section unless: . . .
>
> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

449. The waiver applies to proceedings related to the same measures as the CAFTA claims in any dispute settlement procedure. The text of Article 10.18.2 prohibits any proceeding with respect to any measure alleged to constitute a CAFTA breach before any court or tribunal of a Party or other dispute settlement procedures. Initiating Investment Law claims before this Tribunal is initiating a proceeding via a dispute settlement procedure.

450. The CAFTA proceeding is different from the Investment Law proceeding. As explained in the preliminary objections phase, each has its own jurisdictional requirements, procedural rules, and substantive provisions. Even before the same tribunal, the two proceedings have already increased costs for El Salvador and could easily result in inconsistent outcomes. The fact that this Memorial has to deal with objections to CAFTA claims and objections to Investment Law claims is additional proof that there are two proceedings before this Tribunal.

451. There is no dispute that the waiver applies to the Investment Law claims—even Claimant admitted that it could not bring its Investment Law claims before another tribunal pursuant to the waiver.[363] Therefore the only question is whether the waiver's effect on the Investment Law proceeding can be circumvented by forcing El Salvador to face those claims before this Tribunal. International arbitration is a "dispute settlement procedure." The word "other" in Article 10.18.2(b) reflects that "dispute settlement procedures" means any other dispute settlement procedures other than the administrative tribunals and courts under the law of any Party. In the context of this case, it does not equate "dispute settlement procedures" to this Tribunal but to international arbitration. Claimant cannot bring proceedings based on the same measures as the CAFTA proceedings to any Party's courts or tribunals or to "other dispute settlement procedures," including this international arbitration. In addition, the Investment Law claims are not "arbitration under this Section" because they cannot be submitted pursuant to Article 10.16.1.

452. To be clear, El Salvador is not arguing that the Investment Law claims result in this Tribunal being another dispute settlement procedure from itself. What El Salvador is arguing is that Claimant's dual invocation of jurisdiction in this case amounts to two proceedings using one "dispute settlement procedure" (international arbitration). The right to bring multiple proceedings to international arbitration, separately or before the same tribunal, was waived by Claimant as a condition to the consent of El Salvador to this arbitration

453. Claimant, knowing that it waived its rights to bring the Investment Law proceeding elsewhere, is trying to force it in before this Tribunal. Under CAFTA Article 10.16.1, Claimant had no right to submit claims under the Investment Law to arbitration under CAFTA and, under Article 10.18.2, Claimant waived any right to initiate or continue the Investment Law proceeding through another procedure.

[363] Claimant's Rejoinder on Respondent's Preliminary Objection, para. 250; Transcript of Hearing on Preliminary Objections, Day 1, May 31, 2010, at 255.

454. Claimant chose to invoke jurisdiction under CAFTA, and the consent of the CAFTA Parties to international arbitration is conditioned on the CAFTA claimant's effective waiver of any right to initiate or continue other proceedings for claims related to the same measures. Having chosen to initiate this arbitration under CAFTA, and having executed a valid waiver of any right to bring other claims related to the same measures alleged as CAFTA violations, Claimant cannot escape the legal consequences of its choice. This Tribunal, having both proceedings before it, has the power to make the waiver, a condition to El Salvador's consent to CAFTA, effective by dismissing the Investment Law proceeding.

VI. CONCLUSION

455. For the reasons set forth above, the Tribunal should dismiss all of the claims brought in this arbitration.

456. Most fundamentally, the indisputable facts demonstrate that Claimant has abused the international arbitration process and has abused CAFTA. All of the facts and alleged measures for which Claimant seeks to hold the Government liable took place years before Claimant ever even existed as a United States company. Claimant has now admitted facts that disprove the justification it originally alleged for the change of nationality, and there is clearly no legitimate business justification for the corporate restructuring that was necessary for the invocation of CAFTA. Accordingly, the principle of abuse of process requires the dismissal of this arbitration as a whole, as it is all tainted by this abuse.

457. In addition to Claimant's abuse of process, all CAFTA claims should be dismissed on jurisdictional grounds for two independent reasons. As shown in Section III above, El Salvador has properly invoked the CAFTA denial of benefits provision based on the facts—shown by Claimant's own documents (and failure to provide documents)—that demonstrate that Claimant does not have, and has never had, any substantial business activities in the United States. Indeed, Claimant began by alleging that it was a "socially responsible mining company"

and has now been forced to concede that it is a mere shell holding company with no employees of its own, engaged in no business activities whatsoever other than holding shares for a Canadian company. Additionally, as shown in Section IV above, there is no jurisdiction because Claimant does not qualify as an investor of a Party under CAFTA, given the fact that any investments in El Salvador or measures taken against those investments occurred well before Claimant changed its nationality to become a national of a CAFTA Party.

458. Finally, there is no jurisdiction for this dispute under the Investment Law of El Salvador. Most fundamentally, Article 15 of the Investment Law does not constitute consent to ICSID arbitration. For consent to be found in a unilateral act of a sovereign State, the statement of consent must be clear and unambiguous and the intention of the State to provide consent must be established. Neither is true with respect to Article 15 of the Investment Law. Additionally, and independently: i) Claimant is not a foreign investor under the Investment Law; ii) the dispute brought by Claimant is not a dispute between El Salvador and a national of another Contracting State of ICSID; iii) even if Article 15 of the Investment Law did constitute consent and did apply to Claimant, Claimant's request for arbitration is inadmissible; and iv) Claimant's waiver of its right to initiate or continue any proceeding with respect to the measure alleged to breach CAFTA precludes its claims under the Investment Law.

459. In sum, what Claimant has tried to do here should not be tolerated. In addition to rewarding actions taken without good faith, if Claimant is allowed to succeed, there will be no effective jurisdictional limits to CAFTA arbitrations. Investors from non-Party States will be free to take advantage of the benefits of CAFTA on essentially the same basis as CAFTA State nationals. The only requirement for non-Party nationals to access the very powerful CAFTA protections for all <u>past</u> investments in any CAFTA country would be the simple filing of articles of incorporation to create a shell company in any CAFTA country. Surely the signatories to CAFTA did not create such a regime when they granted each others' nationals an extraordinary remedy through consent to international arbitration and specifically provided for the denial of

benefits to corporations that try to gain access to arbitration through a shell company, as Claimant and Pacific Rim Mining Corp. have done.

VII. COSTS

460. El Salvador requests that the Tribunal order Claimant to bear all the costs and expenses of these objections to jurisdiction, including the Tribunal's expenses, the Republic's costs for legal representation, and interest.

461. El Salvador submits that its costs should be reimbursed because not only is this arbitration the result of an abuse of process, but Pac Rim Cayman has also made a series of false and misleading statements to keep its claims alive. Claimant's tactics, far from facilitating effective dispute resolution based on the facts, are intended to intimidate the country of El Salvador into granting a concession to which neither the Canadian parent company nor the shell subsidiary have a right.

462. First, El Salvador is entitled to costs because Pacific Rim Mining Corp. moved its subsidiary to the United States in order to gain access to CAFTA and facilitate access to ICSID after the measures and damages underlying this dispute had occurred. Claimant was registered in the United States in December 2007 and then, as soon as early 2008, Claimant began threatening CAFTA arbitration related to earlier events.

463. Second, El Salvador is entitled to costs because Claimant has hidden the truth and tried to manipulate the Treaty provisions at every turn. El Salvador expended resources in the Preliminary Objections phase to show that Claimant had wrongly presented its claims as based on a "perfected right" and to show that Claimant had been aware of problems with its concession application since early 2005. Only after extensive written submissions and denials did Claimant accept that 1) it never had a "perfected right," and 2) it had chosen to try to change the Government's interpretation of the legal requirements instead of complying with them.[364]

[364] Claimant's Rejoinder on Respondent's Preliminary Objection, paras. 81, 49. Claimant abandoned the argument that it had a perfected right and instead argued that it should have been given the opportunity to

464. At the start of this jurisdictional phase, Claimant again wasted time and expense before accepting the straightforward facts. In its August 17 letter to the Tribunal, Claimant pretended to be amazed at the allegations of abuse of process and the right to deny benefits, invoking the activities of the "Pacific Rim Companies" to suggest that Claimant had activities in the United States and claiming that Pac Rim Cayman had been "repatriated" to the United States. Finally, after another round of letters, Claimant admitted: "Pac Rim Cayman was a holding company before December 2007 and remains a holding company today."[365] Thus, only when confronted with evidence to the contrary did Claimant abandon its suggestions that it had been "repatriated" and that the activities of an unrelated subsidiary could count as the activities of Pac Rim Cayman.

465. Pacific Rim Mining Corp. wants an exploitation concession to extract gold from under 12.75 square kilometers of *other people's land* in El Salvador. This arbitration is the company's attempt to get that concession even though it ignored the requirements of the Salvadoran Mining Law and requested an area larger than it could explore or justify. Now, Pacific Rim Mining Corp. seeks to disregard its own nationality and pertinent CAFTA provisions, insisting on its right to arbitrate even though it does not qualify to initiate CAFTA claims or to invoke ICSID jurisdiction.

466. Indeed, as described in this Memorial, there is no jurisdiction for this arbitration for multiple reasons. Moreover, the claims should never have been brought because the true factual background demonstrates that Claimant would not be able to show cause and damages on the merits and initiating this arbitration as a CAFTA claimant after changing nationality in December 2007 was an abuse of the international investment protection regime under CAFTA

"cure" the defects in its application. Claimant also admitted that the Bureau of Mines Director raised the land surface problem in March 2005, that "Claimant could have revised the application," and that Claimant instead "chose" to proceed without making changes, "hoping that the Bureau of Mines would ultimately resolve" the issue in Claimant's favor.

[365] Letter from Claimant to the Tribunal, Sept. 13, 2010, at 5.

and of the ICSID Convention. El Salvador has been unfairly subjected to this process and should not be penalized by having to pay for its defense.

VIII. RESERVATION OF RIGHTS

467. El Salvador has already submitted a comprehensive and multilayered set of objections, and does not wish to overwhelm the Tribunal with redundant objections. However, to the extent the Tribunal decides to continue with the case, El Salvador reserves the right to raise additional objections at the appropriate time.

468. In addition, El Salvador has used throughout this Memorial the date when Pac Rim Cayman became an enterprise of the United States, December 13, 2007, as the relevant date for when Pac Rim Cayman became an investor of a Party for purposes of CAFTA. Although this date is adequate for purposes of the present objections to jurisdiction, El Salvador reserves the right to argue, if it becomes necessary, that the relevant date for the potential start of CAFTA protection and benefits in this case is in fact after December 13, 2007. The relevant date may be June or July 2008.

469. Even though Pac Rim Cayman became a national of the United States on December 13, 2007, it may not have qualified as an investor of a Party until it had notified the *Oficina Nacional de Inversiones* ("ONI") of the nationality change and ONI had registered the nationality change, in accordance with the law of El Salvador and in a manner consistent with CAFTA.

470. Article 17 of the Investment Law of El Salvador requires foreign investors to register their investments in El Salvador with ONI, and provides that ONI will issue the foreign investor a credential granting the company the status of foreign investor. One of the required items in the registration of the foreign investor, and of its investments, is the nationality of the foreign investor.

471. Pac Rim Cayman did not notify El Salvador of its change of nationality until June 2008. This happened after Pacific Rim El Salvador's April 2008 request to register over $12 million sent from Canada by Pacific Rim Mining Corp. to Pacific Rim El Salvador. Because the registration request did not specify the name of the foreign investor to whom the investment should be registered,[366] ONI sent a letter to Pacific Rim El Salvador, requesting clarification of the name of the foreign investor under which this investment should be registered.[367]

472. In the context of responding to ONI's request for clarification on the identity of the foreign investor, Pacific Rim El Salvador requested the registration of Pac Rim Cayman's change of nationality in ONI's records on June 16, 2008.[368] With this request, Pacific Rim El Salvador submitted a duly notarized and authenticated copy of Pac Rim Cayman's Articles of Domestication, making it a corporation registered in Nevada, United States, as of December 13, 2007.

473. But it was not until August 2008 that ONI registered Pac Rim Cayman's change of nationality through Resolutions 368-MR (for Pacific Rim El Salvador on July 30, 2008) and 387-MR (for Dorado Exploraciones on August 13, 2008), thus recognizing Pac Rim Cayman as a foreign investor national of the United States.[369]

474. El Salvador therefore reserves the right to assert that it was not until the registration of the change of nationality on July 30, 2008 (in accordance with the laws of El Salvador), or in the alternative at the earliest, until the company notified ONI about the change of nationality on June 16, 2008 (in accordance with basic requirements of good faith), that Pac Rim Cayman was recognized by El Salvador as an investor of a CAFTA Party, subject of course to the invocation of the denial of benefits provision.

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[366] Letter from PRES to ONI, received Apr. 2, 2008 (requesting registration of $12,075,422.77 as foreign investment) (**Exhibit R-115**).
[367] Letter from ONI to PRES, Apr. 9, 2008 (**Exhibit R-116**).
[368] Letter from PRES to ONI, received June 16, 2008 (R-113).
[369] *See* ONI Resolutions numbers 387-MR and 368-MR, attached to the NOA as Exhibit 3, and provided with partial translations as **Exhibit R-117** and R-105.

475. Although CAFTA does not include any specific registration requirements, nothing in CAFTA prohibits CAFTA Parties from imposing registration requirements before a company of a Party can be legally recognized as a foreign investor with a given nationality, and have its investments recognized as protected investments. In fact, CAFTA Article 10.14.1 specifically recognizes the CAFTA Parties' right to adopt or maintain special formalities with regard to investments covered under CAFTA. El Salvador's registration requirement under Article 17 of the Investment Law is such a formality, and this formality is not inconsistent with CAFTA.

IX. PRAYER FOR RELIEF

476. The Republic of El Salvador respectfully requests the Tribunal to:

- Issue an award dismissing all claims in this arbitration for lack of jurisdiction resulting from Claimant's abuse of process.
- In the alternative, dismiss all CAFTA claims and all claims under the Investment Law of El Salvador for the reasons stated as separate objections in Sections III and IV (for CAFTA claims), and Section V (for claims under the Investment Law) of this Memorial.
- Award the Republic all arbitration costs and legal fees incurred in this arbitration, plus interest, as the proper sanction for Claimant's abuse of the international arbitration process.
- Grant the Republic any other remedy that the Tribunal considers proper.

Dated: October 15, 2010

Respectfully submitted,

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