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 REPLY OBJECTIONS TO JURISDICTION

Lic. Romeo Benjamín Barahona
Fiscal General de la República
de El Salvador

Derek Smith
Aldo A. Badini
Luis Parada
Tomás Solís
Erin Argueta
Dewey & LeBoeuf LLP

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I. INTRODUCTION

1. El Salvador's principal objection to jurisdiction, Abuse of Process, exposed Claimant's change of nationality and Claimant's abuse of its new nationality to start this arbitration regarding a pre-existing dispute.

2. Although this first objection is sufficient to end the entire case, El Salvador included three alternative objections. El Salvador's second objection demonstrated that Claimant is a shell company without substantial business activities in the United States, owned and controlled by a Canadian company. In its third objection, El Salvador established that the main dispute in this case, which took place before Claimant's change of nationality, is beyond CAFTA's temporal application and therefore beyond the Tribunal's jurisdiction. Finally, in its fourth objection, El Salvador demonstrated that there is no jurisdiction under the Investment Law of El Salvador.

3. Claimant, finding its abuse exposed and with the facts and the law against it, has abandoned many of its original assertions and resorted to a strategy of distracting attention with volumes of irrelevant information and attempting to confuse a clear factual record and distort what are in reality straightforward legal principles.

4. In an effort to avoid the consequences of its abuse of process, Claimant seeks to redefine the dispute and hide the reasons for its change of nationality.

5. In its effort to survive El Salvador's invocation of the Denial of Benefits clause, Claimant attempts to obscure its identity as a shell company by focusing its discussion on a "group of companies." In addition, without submitting a single supporting document, and contrary to specific evidence presented by El Salvador, Claimant wants the Tribunal to accept without question that unknown and unidentified United States shareholders of its Canadian parent company are the ones who really own and control Claimant. Claimant is also attempting to apply the substantially different denial of benefits clause of the Energy Charter Treaty to

CAFTA, and to have the Tribunal read an obligation to notify Claimant before denying benefits into CAFTA even though such a requirement is nowhere in the text of the Treaty.

6. Finally, Claimant is attempting to confuse the issues and the legal principles with regard to El Salvador's two other objections, which confirms that Claimant's position has no real basis in international law.

7. El Salvador is confident that this Tribunal, comprised of experienced arbitrators, will recognize and reject Claimant's strategy of misdirection. Once the distractions are removed, the case is simple, as is the conclusion that this arbitration must be dismissed for lack of jurisdiction.

8. El Salvador will refute Claimant's most relevant misrepresentations and flawed arguments below, but the misrepresentations and arguments are too numerous to be addressed in the text of any reasonable Reply. El Salvador therefore informs the Tribunal that the lack of a specific reference to any allegation or argument does not imply acceptance of such allegation or argument and El Salvador reserves all of its rights in this regard. El Salvador has included a non-exhaustive list of examples of Claimant's numerous inaccuracies in its Counter-Memorial.[1] Finally, El Salvador incorporates by reference the arguments in its Memorial on Jurisdiction dated October 15, 2010, which has the complete formulation of El Salvador's legal arguments.

II. PRELIMINARY ISSUES

A. El Salvador's principal jurisdictional objection is Abuse of Process

9. El Salvador's main jurisdictional objection is Claimant's Abuse of Process. As El Salvador stated in its Memorial, the Tribunal should dismiss the entire case if it finds that Pac Rim Cayman has abused the international arbitration system by initiating CAFTA arbitration for a dispute that had already begun before Pac Rim Cayman's change of nationality. If the Tribunal

[1] This non-exhaustive list of Claimant's inaccuracies is included in Appendix A, which is attached to and considered part of this Reply.

finds that Claimant has engaged in Abuse of Process, the Tribunal would not need to consider any of the remaining jurisdictional objections. This is why El Salvador placed Abuse of Process first in its Memorial and made all other objections secondary and subsidiary to Abuse of Process.

10. Pac Rim Cayman, however, is seeking to change the order of El Salvador's jurisdictional objections. This was no accident. Pac Rim Cayman is trying to confuse the issues before the Tribunal by including arguments that might be relevant for other objections, but are completely irrelevant for Abuse of Process, in its section responding to what it calls El Salvador's third objection.

11. In this Reply, El Salvador again makes Abuse of Process its first objection to jurisdiction, and requests that the Tribunal decide it first, before considering any other objection.

B. Burden of proof

12. Claimant has the burden to prove the facts necessary to establish jurisdiction, and the Tribunal is not bound to accept the facts alleged by Claimant necessary to support jurisdiction. Pac Rim Cayman quotes paragraph 62 of the Award in *Phoenix Action* for the proposition that "the facts as pled by the claimant 'have to be accepted *pro tem* at the jurisdiction phase.'"[2] But Claimant cites only a fragment of the tribunal's statement, which when read in its entirety contradicts Claimant's position. The rest of that paragraph cited by Claimant clarifies that the presumptive acceptance of a claimant's factual allegations applies to "facts capable of being analyzed as a breach of the BIT, and not to facts whose existence is necessary to support jurisdiction."[3] The *Phoenix Action* tribunal continued that, "[i]f, on the contrary, the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant."[4] Therefore, Claimant's factual allegations relevant to the decision on

[2] Claimant Pac Rim Cayman LLC's Counter-Memorial in Response to Respondent's Objections to Jurisdiction, Dec. 31, 2010, para. 37, n.25 ("Counter-Memorial").
[3] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, para. 62 (RL-50).
[4] *Phoenix Action*, para. 63.

jurisdiction do not enjoy any special status. Claimant must meet its standard burden of proof or the allegations must be considered unproven and therefore ignored.

13. Indeed Claimant has the burden of proving that the requirements for jurisdiction are fulfilled.[5] Claimant alleges: "Claimant has made a *prima facie* case establishing the Tribunal's jurisdiction. That caused the burden to shift to Respondent. It is now Respondent's burden to disprove our *prima facie* case by demonstrating a lack of jurisdiction."[6] But the authority on burden of proof cited by Claimant rejects this argument. According to Kazazi:

> "it is not accurate to say that establishing *prima facie* evidence shifts the burden of proof, since it would mean that the duty of the claimant to discharge the burden of proof would be fulfilled by a mere showing of a *prima facie* case, and that from that stage it would be the duty of the respondent to disprove the claimant's allegation. . . . The burden of proof stays with the proponent until such time as the claim is proved. . . . If the respondent is able to cast doubt on the value of the *prima facie* evidence provided by the claimant, then the claimant has to carry its burden of proof further to the satisfaction of the tribunal."[7]

14. Beyond this point that Claimant maintains the burden of proving that the jurisdictional requirements are met, El Salvador agrees that the rule that "the party making an assertion bears the burden of proving it (*actori incumbit probatio*)" applies.[8] El Salvador accepts that it has the burden of proof with respect to the factual and legal basis of its objections that are not strictly tied to the requirements for jurisdiction, like Abuse of Process and Denial of Benefits. El Salvador has met this burden in its Memorial.

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[5] *Canfor Corp. v. United States*, UNCITRAL Arbitration Rules, Decision on Preliminary Question, June 6, 2006, para. 176 (CL-76) ("with respect to the burden of proof, a claimant must satisfy the Tribunal that the requirements of [NAFTA] Article 1101 are fulfilled, that a claim has been brought by a claimant investor in accordance with Article 1116 or 1117, and that all preconditions and formalities under Articles 1118–1121 are fulfilled").

[6] Counter-Memorial, para. 180, n.212.

[7] Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals 338-339 (1996) (CL-74; additional excerpt submitted as **Authority RL-108**).

[8] Counter-Memorial, para. 180.

15. Nevertheless, when Claimant, instead of "responding" to El Salvador's objections, introduces a new set of unsubstantiated factual allegations that make for an entirely different argument, Claimant has the burden to prove those facts.

16. In its Memorial, El Salvador provided abundant evidence to establish the factual premise of its objection that Claimant is a shell company owned and controlled by Pacific Rim Mining Corp., a Canadian company. As a matter of law, and for purposes of the Denial of Benefits provision in CAFTA, El Salvador has established that Claimant is owned and controlled by a national of a non-CAFTA Party with no substantial business activities in any CAFTA Party other than the denying Party.

17. In *response* to El Salvador's objection, Claimant brings a *new* set of unsupported factual assertions. One of these new assertions is, for example, that Pacific Rim Mining Corp. is owned and controlled by a majority of unidentified U.S. shareholders. Claimant, however, has provided no evidence in support of its new factual assertion that Pacific Rim Mining Corp. is owned and controlled by U.S. nationals. In fact, Claimant has not even identified these individuals, let alone established their alleged nationality or that they exercise control over Pacific Rim Mining Corp. and, more importantly, over Pac Rim Cayman, which as the Claimant in this case should be the real subject of the inquiry.

18. Similarly, Claimant makes an entirely new set of allegations trying to establish that Pac Rim Cayman is more than a shell company and has activities in the United States because of its association with a group of companies, some of which have activities in the United States. In the Notice of Arbitration, however, there is no indication that the Claimant in this proceeding is a group of companies or that it is in that capacity that Claimant qualifies as a U.S. national. Claimant's allegations in this regard are both irrelevant and unsubstantiated.

19. In these circumstances, the Tribunal is not bound to accept the new factual assertions alleged by Claimant in response to El Salvador's Objections.

20. As mentioned above, the *Phoenix Action* tribunal noted that, "[i]f . . . the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has

to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant."[9]

21. It follows that the *prima facie* presumption invoked by Claimant operates exclusively in favor of Claimant's factual allegations as they pertain to the merits, *i.e.*, that if the Tribunal has jurisdiction, the facts as pleaded by Claimant may constitute a violation of the Treaty.[10] This approach protects the integrity of the proceeding and keeps the jurisdictional and merits phases separate.[11] However, Claimant's own authority is emphatic that this presumption does not apply to what Claimant is attempting to do in this case:

> This presumption, however, is not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT. As the tribunal in *Pan American Energy v. Argentina* stated, 'if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them.'[12]

22. Claimant's new allegations are frivolous insofar as it has provided no evidence in support of its new contentions. Therefore, the Tribunal should reject Claimant's new factual assertions for purposes of jurisdiction on that basis. Moreover, El Salvador requests that the Tribunal reject *in limine* all of Claimant's new assertions as El Salvador and the Tribunal have had no opportunity to examine any evidence in support of these contentions. Claimant is simply

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[9] *Phoenix Action*, para. 63.
[10] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, UNCITRAL, Interim Award, Dec. 1, 2008, para. 103 (CL-75) ("The Tribunal accepts the *prima facie* approach as the correct standard to apply to the question of whether the claimed breach would be covered by the jurisdictional scope of the BIT.") (emphasis added).
[11] *Chevron v. Ecuador*, paras. 107-108 ("As stated by Judge Higgins later in her opinion, this approach is concerned with 'protect[ing] the integrity of the proceedings on the merits' and 'the obligation . . . to keep separate the jurisdictional and merits phases' in a bifurcated proceeding. . . . To require the Claimants to prove facts or interpretation regarding their substantive claims at this stage would also prejudge the merits of the dispute and deny the Tribunal's jurisdiction to decide these matters at the appropriate phase of the proceedings.").
[12] *Chevron v. Ecuador*, para. 109 (emphasis added).

attempting to make "enough frivolous allegations to bring its claim within the jurisdiction of" CAFTA and the Investment Law.

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

23. Pac Rim Cayman has engaged in Abuse of Process by changing its nationality to a CAFTA Party to invoke CAFTA jurisdiction with regard to a dispute that clearly existed and was cognizable before the nationality change.

24. In its Counter-Memorial, Claimant has gone to great lengths to argue that either the dispute did not begin, or in the alternative, that the dispute was not cognizable or foreseeable, until after the change of nationality; and thus no improper motivation could possibly be ascribed to the nationality change.

25. However, the constant metamorphosis of Claimant's position and its efforts to distract and confuse cannot change the fact that Claimant initiated this arbitration because El Salvador had not granted the application for a mining exploitation concession for El Dorado submitted by Pacific Rim El Salvador ("PRES") and had not granted applications for mining exploration licenses in the areas known as Guaco, Huacuco, and Pueblos submitted by Dorado Exploraciones ("DOREX"). The facts before the Tribunal clearly show that this dispute originated before the change of nationality, and that Claimant knew about it and manipulated its nationality to initiate this arbitration about this pre-existing dispute.

A. Claimant changed its nationality and then initiated an arbitration regarding a pre-existing dispute it could not have initiated but for the change of nationality

1. Without the change of nationality, Pac Rim Cayman could not have initiated this arbitration

26. The Claimant in this arbitration is Pac Rim Cayman, as a United States national invoking jurisdiction and the protections of CAFTA. It is undisputed that, prior to the change of

its nationality from the Cayman Islands to the United States in December 2007, Pac Rim Cayman could not have initiated this arbitration under CAFTA. Claimant tries to obfuscate this fact by indicating that Mr. Shrake and some unidentified U.S. shareholders *could have* brought a case against El Salvador under CAFTA. This unproven allegation is entirely irrelevant to whether there is jurisdiction in this arbitration. Mr. Shrake and the unidentified U.S. shareholders do not appear as claimants in the Notice of Arbitration. As indicated, the Claimant in this arbitration is Pac Rim Cayman, and jurisdictional determinations must be made with regard to Claimant alone.

2. Claimant has initiated a CAFTA arbitration with respect to a dispute that existed before the change of nationality

27. As shown in El Salvador's Memorial and explained further below, Claimant has initiated this arbitration under CAFTA over a dispute that had already started and was cognizable before the change of nationality. This is sufficient cause for the Tribunal to conclude that Claimant has abused CAFTA and the international arbitration system and process by changing its nationality and initiating arbitration about a dispute that already existed and was known to Claimant before the change of nationality.

B. For the initiation of proceedings to constitute Abuse of Process, it is only necessary that the dispute has begun before the corporate restructuring used to invoke jurisdiction

1. Abuse of Process does not require looking to the treaty definition of a dispute or finding that all the facts related to the dispute are completed

28. As Claimant points out, structuring an investment ahead of time in order to gain treaty protection may be acceptable, but changing nationality after a dispute has arisen in order to qualify for treaty protection is Abuse of Process. Contrary to what Claimant implies, however, one need not look to the temporal limitations of the treaty or the treaty's definition of an investment to determine whether or not there has been an abuse of process. Rather, one must look at the facts and circumstances of the case to see whether the measures complained of—*i.e.*,

the acts and omissions of the government that allegedly affected the investment—had occurred or begun to occur when the investor decided to change its nationality.

29. It is abuse of process for a claimant to try to gain access to treaty protection after the acts affecting its investment have already occurred. As the *Phoenix Action* tribunal clearly stated, "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."[13]

30. As explained in El Salvador's Memorial, the acts causing the alleged damages to Claimant's investment occurred in 2004-2006 when PRES was not granted the right to extract and process gold from El Dorado.[14] According to Claimant, even accepting its view of the 2008 press article quoting comments attributed to President Saca, the alleged comments were an acknowledgment or explanation of acts that had already been committed.[15]

31. Ignoring this, Claimant tries to say that there was no abuse of process because there was no CAFTA dispute before it became a national of a CAFTA Party. Claimant argues that "[i]ndividual omissions by MARN and MINEC in the period from 2004 through 2006 did not give rise to a 'dispute' as that term is used in CAFTA."[16] Further, Claimant insists, "since the act giving rise to the dispute did not occur until March 2008 or, alternatively, only became recognizable as a continuing or composite act in breach of CAFTA obligations at that time, Pac Rim Cayman's domestication to Nevada in December 2007 could not have been 'a *retrospective* gaming of the system to gain jurisdiction for an *existing* dispute.'"[17]

32. Leaving aside for the moment that this is a *post hoc* rewriting of the facts as asserted by Claimant in the Notice of Arbitration, it must be noted that any allegation of abuse of

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[13] *Phoenix Action*, para. 95 (emphasis added) (RL-50).
[14] *See* Counter-Memorial, para. 168, n.201 ("That repeated and consistent inaction in response to applications by PRES and DOREX, which began before CAFTA became applicable to Claimant and has continued since, is what we mean when we refer to the '*de facto* mining ban.'") (emphasis added).
[15] *See, e.g.*, Counter-Memorial, para. 193.
[16] Counter-Memorial, para. 376.
[17] Counter-Memorial, para. 376.

process involves manipulating the system to gain access to treaty protection for a dispute that already exists. By definition, there will never be a recognizable breach of the treaty before the abuse of process, because without the abuse of process, there is no applicable treaty.

33. As a result, abuse of process does not depend on whether or not there was an identifiable breach of a treaty or whether or not the dispute is continuing. Abuse of process depends on restructuring the investment to seek treaty protection for a dispute that already exists. The dispute is not defined by the treaty requirements but by the facts of the case—there is a dispute for purposes of abuse of process if the investor is aware of the actions and omissions affecting its investment. If the dispute exists before the change to manufacture treaty protection, there is abuse of process.

34. As Claimant acknowledges, dismissal for abuse of process "might be warranted in a case where the claimant and/or its affiliates set up a shell company in a jurisdiction where they have no other presence, solely to obtain access to arbitration which they would not otherwise have had, well after a dispute . . . was already pending or had clearly crystallized."[18] While Claimant attempts to distinguish its actions from this description, the factual record shows that there is no meaningful distinction with respect to determining abuse of process. The abuse of process consists of the claimant's actions to gain access to international arbitration for a dispute with respect to which it would not otherwise be entitled to treaty protection.

2. Tribunals have confirmed that it is Abuse of Process to change nationality or restructure an investment to gain treaty protection after a dispute is "born" or "foreseeable"

35. The *Phoenix Action* tribunal explained that the abuse of process in that case "could be called a '*détournement de procédure*', consisting in the Claimant's creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not

[18] Counter-Memorial, para. 32 (emphasis added). Of course, Claimant has added "and/or its affiliates" when the actions of affiliates have nothing to do with an abuse of process claim. That a claimant can identify affiliates that have connections in a claimed home State does not change the fact that Claimant changed its nationality to gain access to international arbitration for a dispute that was otherwise not entitled to treaty protection.

entitled."[19] Although the facts of this case are different from *Phoenix Action*, the same concept of abuse of process applies. Pacific Rim is also trying to create a legal fiction—that of a Cayman Islands holding company of a Canadian parent being "managed" out of the United States. But just as it was impermissible for the *Phoenix Action* claimants to try to make their domestic dispute international, it is impermissible for the Canadian company to try to make its dispute subject to CAFTA and ICSID.[20]

36. Just like in *Phoenix Action*, where "all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies, when the alleged investment was made,"[21] in this case all the damages claimed by Pac Rim Cayman had occurred and the alleged government actions and omissions had already taken place when Pacific Rim Mining Corp. decided to change Pac Rim Cayman to a U.S. entity.

37. The *Mobil v. Venezuela* tribunal confirmed that a claimant can only bring international claims for a dispute that is born, *i.e.*, that arises or begins, after any restructuring that gains access to treaty protection. In that case, the claimants tried to bring claims based on measures that had occurred before the restructuring of their investment and measures that occurred after the restructuring of their investment. The tribunal noted that the claimants had written to the government complaining about increases in royalties and taxes before the restructuring, and concluded based on those letters that disputes about the royalties and income taxes existed before the change of nationality.[22]

38. For abuse of process, it did not matter at all whether those disputes were continuing or the facts related to the dispute had ceased. All that mattered was that they had

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[19] *Phoenix Action*, para. 143.
[20] *See Phoenix Action*, para. 144 ("The conclusion of the Tribunal is therefore that the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration. If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT.").
[21] *Phoenix Action*, para. 136.
[22] *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, para. 202 (RL-51).

already begun—"[w]ith respect to pre-existing disputes, . . . 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.'"[23] As a result, and only after giving the claimants the benefit of the doubt regarding their intention to bring claims for the pre-existing dispute, the tribunal declined to make a finding of abuse of process and instead only determined that it had "no jurisdiction under the ICSID Convention and the BIT with respect to any dispute born before [the] dates [of restructuring]."[24] It did not matter that the dispute born before the restructuring continued thereafter.

39. The majority of the *Aguas del Tunari* tribunal imposed an even stricter standard, indicating that there would be an abuse of process if the corporate restructuring occurred after the dispute became foreseeable. There, the majority tribunal decided that the claimant had not transferred ownership "in anticipation of the events" underlying the dispute and that those events were not "foreseeable" when the transfer occurred.[25]

40. In sum, for a finding of Abuse of Process, the only requirement is that the dispute submitted to arbitration was either "born"[26] or "foreseeable,"[27] and that it was cognizable, before Pac Rim Cayman changed nationality to permit the submission of the dispute to arbitration. In other words, it would be sufficient for a finding of Abuse of Process that the Government's alleged interference with the investment had already started and was cognizable before the change of nationality and initiation of arbitration about that dispute, regardless of whether the alleged Government interference or its effects continued after the change of nationality.

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[23] *Mobil v. Venezuela*, para. 205.
[24] *Mobil v. Venezuela*, para. 206.
[25] *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. 329 (emphasis added) (RL-60).
[26] *Mobil v. Venezuela*, para. 206; The Republic of El Salvador's Memorial, Objections to Jurisdiction, Oct. 15, 2010, para. 100 ("Memorial on Jurisdiction").
[27] *Aguas del Tunari*, paras. 329-331.

41. All the evidence already before the Tribunal clearly indicates that the dispute existed and was cognizable before Pac Rim Cayman's change of nationality.

C. This dispute had begun and was cognizable before Pacific Rim Mining Corp. changed Claimant's nationality

42. Despite acknowledging the clear evidence that the problems with the approval of the application for the concession started in December 2004, Claimant has focused on a single press report in 2008 to describe the dispute in a way that brushes over the fact that the core of its allegations against the Government arise from events between 2004 and 2006. In contradiction with its own earlier submission in this arbitration, Claimant is now equating the dispute exclusively with an alleged measure identified as a *de facto* policy or practice that may or may not have begun with the press report of President Saca's statement in March 2008 (only three months after the change of nationality), or that may have begun as early as 2004, but that was not foreseeable or cognizable until President Saca's statement in March 2008.[28]

43. There is no way for Claimant to resolve the inherent contradiction in insisting that the dispute is an alleged *de facto* ban which came into existence in 2008 and, at the same time, acknowledging that the Government's actions and omissions that allegedly affected Claimant's investment occurred in 2004-2006. Claimant's attempt to do so relies on unsubstantiated factual allegations regarding events in 2008 and attempts to distort the factual record before the Tribunal regarding events from 2004 to 2006:

> the measure constituting the breach under Pac Rim Cayman's claim is the *de facto* ban on mining of which Pac Rim Cayman did not become aware – and, indeed, could not have become aware – until March 2008, when El Salvador's President either imposed the practice or first acknowledged its existence as a practice. It was the President's announcement that either put the ban in place or definitively established that Respondent's prior omissions – *i.e.*, its repeated failures to provide PRES and DOREX the mining permits and concessions to which they were entitled – were the product not of ordinary bureaucratic delay, but of a deliberate policy

[28] Counter-Memorial, para. 413.

decision.[29]

44. In spite of Claimant's recent attempt to confuse the issues regarding the dispute, as Claimant explained in its Notice of Arbitration, the claims in this arbitration are based on El Salvador's alleged failure to act on PRES's application for the El Dorado mining exploitation concession, and DOREX's applications for exploration licenses in the areas known as Guaco, Huacuco, and Pueblos.[30] The alleged *de facto* practice is the explanation Claimant gives for the lack of action on its applications. But an alleged *de facto* practice by itself is not the same thing as the dispute; it is only the explanation offered by Claimant.[31]

1. The core of the dispute as presented in the Notice of Arbitration is the alleged failure to issue the environmental permit necessary to obtain the mining exploitation concession in El Dorado

45. Claimant's application for the El Dorado exploitation concession was the first in time and the most significant of the applications involved in this dispute. Thus, Claimant's application for the mining exploitation concession in El Dorado is the most appropriate reference to determine when the government conduct that allegedly interfered with Claimant's investment first took place and was cognizable as a dispute. In addition to being first in time, the application for El Dorado was Claimant's only application for an exploitation concession (as opposed to applications for exploration licenses), included the two gold deposits on which the only pre-

[29] Counter-Memorial, para. 193 (emphasis added). *See also* Counter-Memorial, para. 195 ("To the extent the *de facto* ban . . . took shape as a practice at an earlier date and simply continued through and beyond March 2008, those earlier measures may well have been manifestations of the ban's existence. However, they did not become recognizable as individual instances of a common practice until President Saca made his March 2008 announcement, at which point any rational observer would have concluded that they were part of a continuing practice that had come into existence at some point prior to the date.").

[30] NOA, para. 108 ("El Salvador's unjustified failure to grant either the concession or the various permits constituted a breach of its obligations under CAFTA.").

[31] El Salvador rejects Claimant's allegation of the existence of a *de facto* policy or practice to ban metallic mining in El Salvador. A *de facto* ban would refer to a permanent prohibition on metallic mining. As Claimant notes, El Salvador is currently engaged in the process of deciding what the future of metallic mining in El Salvador will be, a decision that will be based to a significant extent on a strategic national environmental study currently underway. None of the facts alleged by Claimant support an allegation that El Salvador has made a decision to ban metallic mining. It has not.

feasibility study submitted to El Salvador was based, and was related to the project where Claimant allegedly spent the most resources.

2. The primary dispute in this arbitration had already begun and was cognizable before Claimant's change of nationality

46. After identifying the alleged interference with the investment, the key question is whether the alleged interference existed or was foreseeable, and was known—or should have been known—by Claimant before the nationality change that enabled Claimant to initiate this arbitration under CAFTA as a national of the United States.

47. In its Memorial on Jurisdiction, El Salvador established that all the facts relevant for this dispute to arise with regard to the environmental permit had been completed by December 2004.[32] As a matter of law, the application for an environmental permit was presumptively denied in December 2004. Acknowledging that there were communications between MARN and PRES even after the environmental permit application was effectively denied, continuing through 2006, El Salvador submitted that even under the most generous approach to Claimant's statement of the facts, this dispute was born by December 2006, when according to the Notice of Arbitration, all official communications between the Ministry of the Environment and Pacific Rim about the permit application ceased.[33]

48. The record clearly indicates, as El Salvador maintains, that this dispute began in December 2004, when the environmental permit was not granted, and became even clearer in December 2006, when official communications from the Ministry ceased.[34] Nevertheless, given Claimant's disingenuous insistence that there was no sign of a dispute before 2008, El Salvador will discuss additional evidence, related to the alleged failure to grant the concession application, also already in the record during the Preliminary Objections phase, to reinforce the same point—this dispute existed and was known to Claimant well before its change of nationality. The

[32] Memorial on Jurisdiction, paras. 25-48.
[33] Memorial on Jurisdiction, para. 31 (citing NOA, para. 64).
[34] Memorial on Jurisdiction, paras. 25-31.

undisputed facts regarding the application for the concession filed by PRES before the Bureau of Mines in December 2004 reaffirm the conclusion that the dispute had already arisen before Claimant's change of nationality in December 2007.

a. Undisputed facts regarding the application for the concession

49. The following set of undisputed facts are relevant to identify when the dispute arose and when Claimant had notice that a dispute existed:

- Claimant submitted one application for a mining exploitation concession in El Dorado, in December 2004.[35]
- By December 2004 Claimant had notice that MARN had missed the time limit allowed under Salvadoran law to approve or reject the Environmental Impact Study and grant or deny the environmental permit that was required to apply for the concession. PRES notified MARN of this fact in writing, and informed MARN that the delay was causing it harm.[36]
- The Director of the Bureau of Mines wrote a letter to PRES indicating that the lack of the environmental permit would not be an impediment for PRES to apply for the concession, provided that the delay in submitting the permit did not last too long.[37]
- Almost two years later, in October 2006, the Director of the Bureau of Mines wrote a warning letter to PRES formally triggering a maximum 30-day deadline provided by the Mining Law to submit the missing environmental permit and other missing information and documents.[38]
- Regardless of the sufficiency of PRES's compliance with the other requirements, PRES did not submit the required environmental permit by the 30-day time limit, because MARN had not issued it. PRES alleged just impediment and requested that the time limit be extended indefinitely, even though the Mining Law clearly indicated that the time limit could not exceed 30 days.[39]

[35] NOA, para. 57.
[36] Memorial on Jurisdiction, para. 291; Counter-Memorial, para. 103.
[37] Letter from Ms. Gina Navas de Hernández to Pacific Rim, Aug. 25, 2004 (NOA, Exhibit 6; Claimant provided the translation with its Counter-Memorial as an un-numbered Exhibit titled "English translation to Notice of Arbitration, Exh. 6").
[38] Preliminary Objections, para. 62 (citing Letter from Bureau of Mines to Pacific Rim El Salvador, Oct. 2, 2006 (R-4)).
[39] Letter from Pacific Rim El Salvador to Bureau of Mines, Nov. 11, 2006 (R-5; C-11).

- The Director of the Bureau of Mines responded to PRES's invocation of just impediment by granting PRES one additional 30-day period to submit the environmental permit.[40] This period ended in January 2007, without Claimant having submitted the environmental permit or the other documentation required for the adjudication of the application. As a result, the concession was not admitted, evaluated, or granted.[41]

b. Legal implications of the warning letters

50. Article 38 of the Mining Law only allows a maximum 30-day time limit to cure a defect in an application for a mining exploitation concession after the official warning letter is received by the applicant.[42] Having triggered the 30-day period in the first warning letter of October 2, 2006, which made specific reference to Article 38 of the Mining Law, and an additional 30-day extension granted to PRES in light of its arguments on just cause, the Bureau of Mines could not have legally admitted, much less evaluated or granted, the concession without the environmental permit (even assuming that the application complied with all the other requirements, which it did not).

51. Therefore, under Article 38 of the Mining Law of El Salvador, the application for a mining exploitation concession submitted by PRES to the Bureau of Mines was effectively terminated by January 2007. Nothing Claimant could have done after that date, and nothing the Bureau of Mines, the Minister of Economy, or even the President of El Salvador could have done or said after that date, could lawfully revive that application. Thus, the application for the El

[40] Letter from Bureau of Mines to Pacific Rim El Salvador, Dec. 4, 2006 (R-6).
[41] NOA, para. 65.
[42] Mining Law of El Salvador, Art. 38 (RL-7) ("Presentada en legal forma una solicitud se practicará inspección por Delegados de la Dirección, y de ser favorable se admitirá. En caso de no presentarse con los requisitos de ley, se otorgará al interesado un plazo que no excederá de 30 días para que subsane las omisiones; si transcurrido dicho plazo no las subsanare se declarará sin lugar la solicitud y se ordenará el Archivo de la misma.") ["After an application is legally submitted, it shall be reviewed by agents from the Bureau and shall be admitted if the results are favorable. If not submitted with the legal requirements, the interested party shall be granted a term of no more than 30 days to correct the omissions. If said period elapses and the omissions are not corrected the application shall be rejected and the order issued to archive it."].

Dorado mining exploitation concession submitted in December 2004 could no longer be lawfully admitted, reviewed, or adjudicated after January 2007.[43]

52. El Salvador submits that the facts related to the application for the concession, added to the facts previously discussed in the Memorial regarding the lack of a decision on the environmental permit by MARN in the two-year period that ended in December 2006, provide further evidence that the dispute had already been born and was cognizable long before Claimant's nationality was changed.

c. The warning letters are further evidence that the dispute between the parties was already cognizable and known to Claimant by December 2006, well before the change of nationality

53. Claimant has admitted that it received the second warning letter from the Bureau of Mines, dated December 4, 2006, informing PRES that it only had one additional 30-day period to submit the missing environmental permit.[44] And as Claimant well knows, the environmental permit was not issued.[45] Therefore, having received the two warning letters from the Director of the Bureau of Mines in October 2006 and December 2006, the first of which made reference to Article 38 of the Mining Law, Claimant clearly had notice that its application for the El Dorado exploitation concession was no longer viable after the second 30-day time limit expired in January 2007. It therefore knew or should have known at that moment that it had a dispute with El Salvador, the same dispute it has submitted for decision in this arbitration.

54. Without the need to go into the merits of the case, it is clear from these facts that the alleged government actions with regard to the application for the El Dorado mining

[43] It appears that PRES's application was not formally rejected, and that the file was not formally declared closed and sent to the archives as mandated by Article 38 of the Mining Law. This is a mere formality that does not change the legal implications of the fact that PRES did not submit the documents required by the warning letter within the specific time period. As a matter of Salvadoran law, the application for the El Dorado exploitation concession was effectively terminated at the end of the 30-day time limit, regardless of whether the formalities of issuing a resolution, closing the file, and sending it to the archives were performed. El Salvador will be prepared to address this issue at the hearing or in post-hearing briefs if Claimant decides to contest it.

[44] Claimant's Response to Preliminary Objections, para. 154; Counter-Memorial, para. 116.

[45] NOA, para. 65.

exploitation concession began in December 2004 when MARN failed to issue or deny the environmental permit in the 60 days allowed under Salvadoran law, and ended in January 2007, when the extra 30-day time limit granted by the Bureau of Mines ended without PRES submitting the environmental permit for its exploitation concession application.

55. The application for the El Dorado mining exploitation concession submitted by PRES to the Bureau of Mines in December 2004 was effectively terminated in January 2007, at the end of the second 30-day time limit to submit the environmental permit, and it could not have been lawfully reactivated even if MARN had issued the environmental permit shortly thereafter (and assuming PRES had met the other conditions, which it did not).

56. The application for the concession could not have been lawfully reactivated then as it cannot be lawfully reactivated now. However, as already stated in El Salvador's Memorial, nothing prevented PRES from submitting a new application (assuming it met all the legal requirements, which it did not).

57. Thus, December 2006, when Claimant received the second warning letter from the Bureau of Mines, and January 2007, the date when the application could no longer be lawfully granted, mark an additional point prior to its change of nationality by which the legal dispute had arisen and was known to Claimant.

58. Any change of nationality after that date used to submit a dispute about the application for the El Dorado mining exploitation concession constitutes an abuse of CAFTA and the international arbitration system.

D. Events that took place after the time to grant the exploitation concession had definitively expired do not change the date the dispute began or was cognizable

59. In attempting to displace the date of the dispute, Claimant alleges that President Saca assured Pacific Rim Mining Corp. that the concession would be granted.[46] But whatever

[46] Counter-Memorial, paras. 23, 118, 149.

President Saca may have said at a meeting cannot change the date this dispute was foreseeable or began.

60. First, even assuming as true Claimant's allegations about any alleged assurances by President Saca, these statements could only have been understood as saying that the application for the concession would be granted *if it complied with the law*. Claimant cannot possibly be arguing that a head of State was offering to violate the law to grant the application. As Claimant has recognized in its Counter-Memorial, and as Mr. Shrake has also admitted, Claimant's legitimate expectations after meeting with President Saca were only that the application for a mining exploitation concession would be granted *if the application met the legal requirements to obtain the concession*.[47] Claimant could not have had a legitimate expectation, much less an expectation that this Tribunal can enforce, that its application would be granted even if it did not meet the legal requirements to obtain a concession in the Mining Law.

61. The record presented to the Tribunal during the Preliminary Objections reflects that the Ministry of Economy of El Salvador went to great lengths to try to help Claimant overcome the other legal impediments that existed in the Mining Law of El Salvador to the granting of the application for a mining exploitation concession in El Dorado.

62. As the Tribunal will recall, one of these other legal requirements—equally necessary to obtain the concession as the environmental permit—was Claimant's ability to prove that it had ownership or authorization to use the surface area above the concession for which it was applying. During the Preliminary Objection phase, El Salvador demonstrated that PRES only had ownership or authorization to use a small fraction of the area of the concession, and that it did not even have ownership or authorization over the majority of the surface area above the proposed mine and the two deposits that formed the basis for its Pre-Feasibility Study.

[47] *See, e.g.,* Counter-Memorial, paras. 236 ("As explained by Mr. Shrake in his witness statement, Claimant had a continuous expectation, based on repeated and explicit encouragement and assurances by Respondent from the first days of the investment through 2008, that if all of the Salvadoran legal requirements were met and the necessary information provided, the licenses and applications would be granted."); 240 ("Claimant reasonably expected that the exploitation license would be granted if the requirements of Salvadoran law necessary for the approval of the license were followed.").

63. Claimant now acknowledges that the Minister of Economy of El Salvador attempted to assist Claimant meet the legal requirements for the concession. This assistance was in the form of requesting a favorable opinion from the legal advisor to the President in accordance with Claimant's interpretation. When that failed, Claimant requested an authentic interpretation of the law in accordance with Claimant's interests, followed by an attempt to amend the law. When these attempts to interpret or amend the law did not succeed, Claimant attempted to replace the existing Mining Law with a new law that would remove the legal obstacles for Claimant's application.

64. Of course, *the Government of El Salvador was under no legal obligation to change its mining law to fit Pacific Rim's application for a mining exploitation concession for El Dorado*. Therefore, the fact that the law was not amended as Claimant wanted, or that the new law advocated by Claimant had not been approved, does not create a new dispute and certainly does not change the point when the existing dispute began.

65. Second, nothing President Saca could have said to Claimant in these meetings could have changed the fact that the application filed in December 2004 by PRES for the El Dorado mining exploitation concession could not be reactivated or granted under the existing Mining Law. Nor could any public statements by President Saca in 2008 change the fact that the dispute already existed and was known to Claimant since 2004, and without doubt by January 2007, well before the change of nationality.

E. Claimant's lack of candor with regard to its change of nationality and the existence of the dispute before the change of nationality

1. Claimant did not inform the Tribunal about its change of nationality

66. Claimant did not bring the facts regarding its change of nationality to the Tribunal's attention, even though Claimant identified itself as a United States company to initiate arbitration under CAFTA. Claimant did not refer to the change of nationality in the text of the 131 paragraphs in the 55 pages of its Notice of Arbitration, or in the two extensive written

submissions filed during the Preliminary Objection phase, even though Claimant repeated its claims that it is "an environmentally and socially responsible mining company" "under the laws of Nevada, United States of America."[48] The only two documents that included a reference to the change of nationality were located in one of the exhibits to the Notice of Arbitration. They were copies of investment registrations issued by El Salvador, which Claimant submitted for a different purpose and without an English translation. This is hardly a model for disclosure.

67. The fact that Claimant's name includes the word "Cayman" was not proper notice either. Claimant may not have been able to hide that it had previously been a Cayman Islands company, as suggested by its name. Rather, Claimant had a reason not to say anything about the change of nationality to avoid bringing attention to the date on which it changed nationality, as it is this date that makes the change of nationality and the submission of this dispute to arbitration abusive.

2. Claimant has been less than candid in denying that the dispute was even foreseeable before the change of nationality

68. In response to El Salvador's objections to jurisdiction, Claimant alleges that there was no dispute with El Salvador until after the press reported President Saca's alleged comments about not granting mining permits until certain requirements were met in March 2008. Mr. Shrake states, "I was stunned when, in March 2008, the press reported President Saca as announcing that he opposed granting any pending mining permits."[49] Claimant tries to reinforce the idea that there were no signs of a dispute before that newspaper article with other comments in its Counter-Memorial and the attached witness statements.[50] But, in fact, it is abundantly clear from Claimant's presentation of its claims in its Notice of Arbitration, as well as Pacific Rim's

[48] NOA, paras. 14, 12. *See also* Claimant's Response to Preliminary Objections, para. 21.
[49] Shrake Witness Statement, para. 116.
[50] *See* McLeod Witness Statement, para. 37 ("By 2008, there is no question that many members of Pacific Rim Mining Corp.'s Board of Directors were beginning to feel uncomfortable about delays in the issuance of permits for the El Dorado project."); Shrake Witness Statement, para. 11 ("It was only after President Saca's announcement of a *de facto* mining ban in March 2008 that we began to believe that a dispute with the Government was a real possibility.").

contemporaneous reports and actions, that Mr. Shrake and Ms. McLeod knew there was a dispute with El Salvador before the newspaper article about President Saca, and before the decision was made to change Pac Rim Cayman's nationality to the United States.

a. Claimant's own words and actions show Claimant was aware there was a dispute before the change of nationality

69. First, although Claimant now says that "Pac Rim Cayman has maintained consistently that the measure at issue is El Salvador's *de facto* ban on mining, which President Saca first announced in March 2008,"[51] there was no mention of any alleged ban in its Notice of Arbitration. Even elsewhere in its Counter-Memorial, Claimant recognizes that the dispute is about the specific acts and omissions of the government in not granting the requested environmental permits and exploitation concession, which occurred in 2004-2006.[52]

70. In its Notice of Arbitration, Claimant said, "[a]s previously set out in the Notice of Intent and further summarized herein, 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."[53] Thus, Claimant initiated this arbitration complaining of the acts and omissions of MARN and MINEC in 2004-2006, and only now has redefined the measure at issue as the alleged *de facto* ban which it claims, conveniently, came into existence or was only cognizable in 2008.

71. Second, before March 2008, Pacific Rim Mining Corp. acknowledged that there was a dispute, *i.e.*, that its application for an exploitation concession would not be granted by the Salvadoran Government unless the law was changed.[54] This casts doubt on Claimant's insistence in its Counter-Memorial that it was positive it would be granted the concession until March 2008.

[51] Counter-Memorial, para. 402.
[52] Counter-Memorial, paras. 177, 193, 412.
[53] NOA, para. 7.
[54] Pacific Rim Mining Corp., 2007 Annual Report (Canada) at 10 (R-37).

72. Indeed, in December 2004, PRES wrote to the Minister of the Environment, complaining that 60 days had passed without a decision from MARN and that the delay was harming the company.[55]

73. Now, instead of acknowledging that a dispute already existed, Claimant tries to rewrite what happened: "Early in the application process, it became apparent that the Government was not going to adhere strictly to many of the time periods which, under the laws and regulations, the Government was supposed to follow. Having previously worked in countries with relatively new regulatory regimes, we were not particularly surprised."[56]

74. But Claimant knew that the problem was not about "adher[ing] strictly" to the time limits imposed by law. As Claimant has acknowledged, Claimant knew in 2005 that the Bureau of Mines considered Claimant's application for the exploitation concession to be incomplete or insufficient to meet the legal requirements and in 2006 it received specific written notice to that effect.[57] If it was just a bureaucratic delay, then there would have been no need to change either the law or the application for an exploitation concession. But Claimant has consistently acknowledged, earlier than 2008 and now, that either the law or the application would have to change before the concession could be granted.

75. For example, Pacific Rim Mining Corp. reported to the Canadian Government and its shareholders in 2007: "Pacific Rim's Exploitation Concession application for the El Dorado project remains in process however it is unlikely that a mining permit will be granted prior to the expected reformation of the El Salvadoran mining law."[58] As the Tribunal will recall from the evidence submitted in the Preliminary Objection phase, adoption of the Mining Law proposed by Pacific Rim would have removed the legal obstacles PRES had in its application for the El Dorado exploitation concession. The proposed mining law would have allowed an applicant to obtain a mining concession, which included both exploration and exploitation,

[55] Letter from PRES to Minister of the Environment, Dec. 15, 2004 (R-55).
[56] Shrake Witness Statement, para. 75.
[57] Letter from Bureau of Mines to Pacific Rim El Salvador, Oct. 2, 2006 (R-4).
[58] Pacific Rim Mining Corp., 2007 Annual Report (Canada) at 10 (emphasis added) (R-37).

without the need to submit an environmental permit, with no feasibility study, and only submitting very limited land use documentation.[59]

76. Mr. Shrake confirms this in his Witness Statement, noting that "the proposed amendments to the Mining Law were likely to pass in 2008, meaning (among other things) that we would not have to revise our El Dorado application for a smaller concession area, or try to buy or acquire authorization to use all of the surface area overlaying the concession area included in our pending application."[60] In other words, in 2007, Claimant knew that the Government took the position that its application did not meet the legal requirements under the Mining Law, and, as the record indicates, Pacific Rim advocated the opposite legal position before the Government. Claimant thus knew there was a dispute with the Government and made concerted efforts to solve the dispute by seeking a change in the law.

77. In fact, Claimant has been forced to admit that CAFTA was at least a consideration in the decision to change the nationality of Pac Rim Cayman from the Cayman Islands to the United States. Mr. Shrake states, "[a]s part of this overall assessment of the Companies' organizational structure, I also considered the Companies' potential avenues of recourse if a dispute with El Salvador were ever to arise in the future."[61]

78. Mr. Shrake's statement is clearly worded with care and is only partially true. Without a doubt he considered the dispute resolution options when deciding to change Pac Rim Cayman's nationality, but it is more than doubtful that this was merely a secondary consideration. Of course, the record shows that the dispute was foreseeable and in fact had

[59] Reply (Preliminary Objections), paras. 94-95 and Proposed New Mining Law, Arts. 34, 35, 38, 52 and 54 (R-36).
[60] Shrake Witness Statement, para. 114 (emphasis added). *See also* Shrake Witness Statement, paras. 86 ("It seemed to us that . . . the legislative approach might be successful (and certainly preferable to reducing the concession size or trying to buy up all the land overlaying the proposed concession size), or that the Government might ultimately resolve the land ownership issue in our favor without legislation, and in any event, we were still waiting for MARN to issue our environmental permit for El Dorado."); 101 ("During my visit in January 2008, Mr. Gallegos told me he was confident that MARN would issue the permits, and, moreover, that the proposed amendments to the Mining Law (which included clarification of any outstanding issue concerning the surface property issue) would be approved in February of 2008.").
[61] Shrake Witness Statement, para. 112.

already arisen in 2007. It is very hard to believe that the existing dispute was unknown to Mr. Shrake when the nationality change decision was made. This is clear, not only from Claimant's acknowledgment that it was trying to change the law in order to allow its application that did not comply with the existing law to be granted, but also from Claimant's actions.

79. To justify part of its request for information from Pac Rim Cayman, El Salvador provided evidence that Pacific Rim Mining Corp. hired the lobbying arm of Crowell & Moring LLP, Claimant's counsel in this arbitration, in October 2007, two months before the change of nationality, to lobby the United States' Legislative and Executive branches and agencies about its investment in El Salvador.[62] Moreover, on January 17, 2008—just one month after the "reorganization" and two months before the newspaper article which "stunned" Claimant, Pacific Rim Mining Corp. issued a press release, which it then filed with the U.S. Securities and Exchange Commission, stating:

> Pacific Rim will continue to aggressively advance its assets in El Salvador through its ongoing exploration drilling, to further expand the resource base and enhance the economics of the proposed El Dorado Mine . . . . Pacific Rim continues to work within the existing laws of El Salvador and operate under their protection as well as the foreign investment laws of El Salvador and international trade agreements, including the Central American Free Trade Agreement ("CAFTA").[63]

It is inconceivable that Pacific Rim Mining Corp. hired a Crowell & Moring affiliate two months before the change of nationality and that Pacific Rim Mining Corp. would be making references to investment protections under CAFTA for its investments in El Salvador less than a month after the change if a dispute was not already existing or foreseeable.

[62] C & M Capitolink, Lobbying Registration, Oct. 24, 2007 (**Exhibit R-118**).
[63] Pacific Rim Mining Corp., "El Dorado Gold Project M&I Resources Top 1.4 Million Gold Equivalent Ounces with an Additional 0.3 Million Gold Equivalent Ounces Inferred," PMU News Release #08-01, Jan. 17, 2008, at 3 (**Exhibit R-119**).

b. Claimant's reliance on the March 2008 press report is only an excuse to postdate the dispute

80. Claimant's focus on the March 2008 newspaper article is merely convenient. Claimant could just as easily have dated the dispute in 2006 or 2007 based on similar newspaper articles. Given the newspaper reports and legislative debate from 2005-2007, the March 2008 newspaper article could not have "stunned" anyone.

81. As Mr. Shrake himself acknowledges, "[i]n July 2006, the press reported that Mr. Hugo Barrera, the Minister of the Environment, was reported as stating that he 'personally' found mining to be 'inconvenient' ('*no conveniente*') for El Salvador."[64] This is an understatement. In fact, on July 9, 2006, the Salvadoran newspaper, *La Prensa Gráfica*, published a spread titled "Farewell to Mining" which included an interview with Minister of the Environment Barrera under the banner, "Pacific Rim will not obtain the exploitation permit for the El Dorado mine in San Isidro, Cabañas, assured the Minister of the Environment."[65] In the interview, Mr. Barrera explained that the Ministry would not authorize any project that would harm the environment and that he could not imagine any mining project with no negative effect on the environment.

82. Moreover, in June 2007, another article in *La Prensa Gráfica* quoted the new Minister of the Environment, Carlos Guerrero, explicitly ruling out any changes to the existing legislation for exploitation concessions.[66] He insisted that the law would not be changed until the Government completed its study of how mining would impact the country. Minister Guerrero was thus confirming, in June 2007, that the Government of El Salvador would not support adopting the proposed new mining law Pacific Rim had admitted it needed to obtain a mining exploitation concession in El Dorado.

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[64] Shrake Witness Statement, para. 93.
[65] *La Prensa Gráfica*, *Enfoques*, "Adiós a Las Minas", July 9, 2006 (Interview with Minister of the Environment) (**Exhibit R-120**).
[66] *La Prensa Gráfica*, "Reforma de ley en espera", June 14, 2007 (**Exhibit R-121**) ("Carlos Guerrero, ministro de Medio Ambiente, confirmó que realizar cambios en la actual legislación que rige la concesión de permisos de explotación de minas está descartado.") ["Carlos Guerrero, Minister of the Environment, confirmed that changes to the current legislation regulating approval of mining exploitation permits have been ruled out."].

83. Later that same month, on June 24, 2007, an article in the *Diario de Hoy* about a march of citizens protesting the Canadian mining company mentioned Minister Guerrero as confirming that the Ministry would not be granting concessions until a mining study was completed. According to the article, Minister Guerrero confirmed that the mining companies would not receive exploitation concessions, even those already applied for, until the country concluded a study of the effects of mining, which would not be completed for at least a year.[67]

84. These pre-2008 press reports confirm that the newspaper article reporting on President Saca's statements about the need for caution and requiring a study of the environmental impacts of mining in El Salvador before granting any exploitation concessions was not a new, or stunning, announcement in 2008. In both 2006 and 2007, the Minister of the Environment of El Salvador openly and publicly stated that Pacific Rim would not get its exploitation concession and the changes to the mining law for which Pacific Rim was advocating were not going to occur until a study of the impacts of mining was completed at least one year later.

85. Beyond showing that the dispute already existed, these press articles show that by June 2007, Pacific Rim Mining Corp. knew that the dispute about the El Dorado exploitation concession would not be resolved by the new mining law Pacific Rim had proposed and for which it had intensively lobbied. It is no surprise that Pacific Rim Mining Corp. hired a Crowell & Moring affiliate four months later, in October 2007, and began to look at international arbitration as a serious option.

3. Claimant is trying to conceal that it moved Pac Rim Cayman to gain treaty protection

86. On the record there can be no doubt that the main reason to move Pac Rim Cayman to the United States in December 2007 was to gain treaty protection for the existing dispute related to the El Dorado mine. In its Counter-Memorial, Claimant does not dispute the

[67] *El Diario de Hoy*, "Protesta contra explotación minera", June 24, 2007 (**Exhibit R-122**). The Spanish text reads: "sostiene que no se concederán licencias de explotación, algunas ya solicitadas por las empresas, hasta que el país cuente con un diagnóstico sobre los efectos de la minería, mismo que podría tardar por lo menos un año."

facts: Pac Rim Cayman was not "repatriated" as Claimant asserted in its August 17, 2010 letter to the Tribunal;[68] it has no office or assets in the United States; the capital invested in El Salvador was transferred from Canada;[69] and there were no other changes to Pac Rim Cayman as a Nevada company.

87. Nevertheless, Claimant now alleges that the change of nationality was to save money. But, despite Claimant's suggestion that 2007 differed from other years because Pacific Rim Mining Corp. recorded a big loss,[70] the truth is that Pacific Rim Mining Corp. has a history of losses, including $4.6 million for fiscal year 2005, $6.9 million for fiscal year 2004, and $2.8 million for fiscal year 2003.[71] Moreover, although Claimant claims that the move saved it "the costs of maintaining Pac Rim Cayman in the Cayman Islands," Claimant presents no evidence that the costs of maintaining a limited liability company in Nevada are significantly cheaper than being incorporated in the Cayman Islands.[72]

88. In fact, given the actual costs involved, the assertion that cost savings was the primary reason and access to CAFTA just a convenient afterthought, is hardly credible. According to the Cayman Islands Chamber of Commerce, a non-resident company currently pays between U.S. $488 and $689 to register and as an annual fee in the Cayman Islands, while an exempt company pays between $573 and up to $2400 for companies with maximum shareholder capital.[73] Cost could not have been a major concern. Moreover, Claimant spent at least $575 to register, submit an initial list of managers, and acquire a business license in Nevada.[74]

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[68] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 2, 3, 4 (R-56).
[69] Counter-Memorial, paras. 396-398.
[70] Counter-Memorial, para. 136.
[71] Pacific Rim Mining Corp., 2005 Annual Report (Canada) at 13 (C-30).
[72] Counter-Memorial, para. 138.
[73] Cayman Islands Chamber of Commerce: Investing in Cayman, http://www.caymanchamber.ky/investing/business.htm (last visited Jan. 23, 2011) (**Exhibit R-123**).
[74] Pac Rim Cayman Articles of Domestication (R-69), Initial and Annual List of Managers for Pac Rim Cayman (R-82), Nevada Department of Taxation, Supplemental Registration (R-72).

89. The only significant result of Pac Rim Cayman's change of nationality was gaining access to CAFTA. In addition to the fact that the dispute for which Claimant then initiated arbitration already existed and was known to Claimant, there is no evidence that the change to U.S. nationality served any other purpose.

F. This whole arbitration must be dismissed as a result of Claimant's Abuse of Process

90. Pac Rim Cayman's abuse of process through its change of nationality has implications beyond CAFTA. The change to U.S. nationality also facilitated Pac Rim Cayman's efforts to gain ICSID jurisdiction to bring its claims under the Investment Law under the ICSID Convention.

91. As the Tribunal noted in its decision of August 2, 2010 on El Salvador's Preliminary Objections, "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."[75] 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.

IV. ALTERNATIVE JURISDICTIONAL OBJECTIONS

A. Denial of Benefits

92. CAFTA includes a denial of benefits clause to prevent non-CAFTA Party investors from using a company incorporated in the territory of a CAFTA Party but without substantial business activities there, to benefit from the Treaty to the detriment of another CAFTA Party. Specifically, a CAFTA Party may deny the benefits of the entire investment

[75] Decision of the Tribunal on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, Aug. 2, 2010, para. 253.

chapter, including the section on dispute resolution, to an enterprise of another Party "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."[76]

93. El Salvador has invoked 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 company of a non-Party, Canada.

1. Claimant has no "substantial business activities" in the United States

94. After starting this arbitration describing itself as "an environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas,"[77] Claimant now admits that it is merely a holding company, asserting, "[t]here has never been any dispute that Pac Rim Cayman is a holding company."[78]

95. El Salvador presented detailed evidence in its Memorial on Jurisdiction that Pac Rim Cayman is not only a holding company, but is in fact a shell company with no substantial business activities whatsoever, much less substantial business activities in the United States. Perhaps because it has no real response to that evidence, Claimant, in its Counter-Memorial, creates a straw man, arguing that El Salvador spent more than 30 paragraphs of its Memorial "reciting a litany of facts dedicated to establishing that Pac Rim Cayman is none other than a holding company."[79] As is clear from El Salvador's Memorial, the facts establish that Claimant, in addition to being set up as a holding company, is nothing more than a shell company. Without disputing those facts, Claimant tries to dismiss El Salvador's argument by knocking down the straw man it invented—asserting that a holding company is not always a shell company. But, be

[76] CAFTA Article 10.12.2 (emphasis added) (RL-1).
[77] NOA, para. 14.
[78] Counter-Memorial, para. 255.
[79] Counter-Memorial, para. 257.

that as it may, the Counter-Memorial does not rebut El Salvador's evidence that Pac Rim Cayman is a shell company with no substantial business activities.

a. The meaning of "substantial business activities"

96. Claimant has agreed with El Salvador that the CAFTA drafters purposefully left "substantial business activities" undefined to allow for a case-specific factual inquiry. Claimant quotes Acting U.S. Trade Representative Peter Allgeier: "It would be difficult, if not impossible, to come up with a generic definition suitable for all business arrangements in all sectors."[80]

97. Although Claimant insists that any flexibility is designed to favor investors in structuring their investments, Acting U.S. Trade Representative Allgeier further commented, "[t]he fact that 'substantial business activities' is not explicitly defined in our free trade agreements likely discourages potentially costly efforts to circumvent the intended scope of the benefits afforded under those agreements."[81] The intent was to avoid creative lawyering used to come up with structures so that a non-Party company would comply with a specific definition of substantial business activities merely to improperly gain access to the Treaty's benefits. As one of Claimant's authorities explains, "there was a belief that by avoiding an express delineation of what would constitute substantial business activities, the possibility of treaty shopping and abuse would be reduced" and that "[b]y leaving the requisite level of activity undefined, states therefore retain the latitude to make an evaluation on a case-by-case basis."[82] Clearly, the Treaty is intended to benefit investors of a Party and the denial of benefits provision should be interpreted to prevent manipulation by non-Party investors seeking to improperly take advantage of the Treaty, not to encourage such manipulation, as Claimant insists.

[80] Counter-Memorial, para. 268 (quoting Testimony of Peter F. Allgeier).
[81] 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 Peter F. Allgeier) (R-95; CL-91).
[82] Rachel Thorn & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor", in* The Backlash Against Investment Arbitration 10 (Michael Waibe et al. eds., 2010) (CL-89).

98. The latitude built in to the concept of substantial business activities in the denial of benefits clause should be used to protect States from the abusive use of shell subsidiaries. Tribunals should look at the facts related to a particular enterprise owned or controlled by persons of a non-Party to see if that enterprise has substantial, *i.e.*, sufficient or important, business activities in the territory of a Party to qualify for Treaty protection.

b. Pac Rim Cayman is and has always been a "shell" company

99. El Salvador agrees that in some circumstances holding companies can be legitimate corporate entities with business activities, but in this case the named claimant holding company is also a shell company with no business activities.

100. The heading of the section of El Salvador's Memorial that Claimant cites and incorrectly dismisses as devoted to establishing that Pac Rim Cayman is a holding company is "Pac Rim Cayman does not have substantial business activities in the United States." Paragraph 123 provides: "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."[83]

101. In the paragraphs that follow that statement, El Salvador showed that Pac Rim Cayman has no substantial business activities anywhere, *i.e.*, that it is a shell company. First, El Salvador discussed the documents provided in response to its request for documents which showed that Pac Rim Cayman has no employees, has no office leases, does not pay taxes, and holds no bank accounts.[84] Moreover, the documents suggested that Pac Rim Cayman's managers held no meetings and kept no corporate records, and that Pac Rim Cayman is not named in any contracts or on any payment records.[85] Second, El Salvador presented additional evidence of lack of substantial business activities, including that Pac Rim Cayman does not have a phone

[83] Memorial on Jurisdiction, para. 123 (emphasis added).
[84] Memorial on Jurisdiction, para. 134.
[85] Memorial on Jurisdiction, para. 134.

number, website, or e-mail address, and that Pac Rim Cayman was not mentioned in any press releases or news articles prior to the filing of the Notice of Intent for this arbitration.[86]

102. El Salvador, of course, was not presenting all of this evidence to show that Pac Rim Cayman is a holding company, but rather to show that Pac Rim Cayman should be denied benefits because it has no substantial business activities in the United States or any other CAFTA Party other than the denying Party. Paragraph 156 of El Salvador's Memorial concluded this subsection:

> 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.

103. In fact, setting aside Claimant's attempt to misrepresent El Salvador's argument, Claimant and El Salvador actually agree on one instance when the denial of benefits clause should apply. Both parties agree that the denial of benefits clause should be used to deny the treaty's benefits when an investor sets up a shell company in the territory of a State Party and on that basis seeks to be covered by the treaty's protections.[87] There is abundant, specific, and uncontested evidence in the record showing that Claimant fits squarely within this understanding, and Claimant has made no showing to the contrary.

104. Accordingly, in this case, El Salvador may deny the benefits of CAFTA to Claimant because Pacific Rim Mining Corp. moved its shell company, Pac Rim Cayman, "previously incorporated in a jurisdiction having no connection to the business *(i.e.*, the Cayman

[86] Memorial on Jurisdiction, paras. 135-156.
[87] Counter-Memorial, para. 251 (explaining that a host State "may deny the treaty's benefits where a person with no economic ties whatsoever to any Party other than the host Party sets up a 'shell' company in the territory of another Party, uses the shell to make an investment in the territory of the host Party, and on that basis seeks to be covered by CAFTA's protections").

Islands)"[88] to the United States and, just as it had no business activities in the Cayman Islands, Pac Rim Cayman does not have substantial business activities in the United States.

i. Comparisons to other cases confirm that Pac Rim Cayman, unlike some other holding companies, is merely a shell company

105. Instead of responding directly to the overwhelming evidence that Pac Rim Cayman has no substantial business activities, Claimant further misconstrues El Salvador's objection to claim, "[o]n Respondent's case, no holding company could ever qualify as having 'substantial business activities' for purposes of Article 10.12.2."[89] This is false. El Salvador recognizes that some holding companies may have business activities, but Pac Rim Cayman does not.

106. As discussed above and in El Salvador's Memorial, there is no evidence of Pac Rim Cayman having any business activities whatsoever. It is a shell moved around for the purposes of Pacific Rim Mining Corp. This is hardly disputed. All that Claimant argues is: "Pac Rim Cayman is . . . engaged in the substantial business activities of holding and managing investments in El Salvador from its headquarters in Nevada."[90] Even this statement is misleading. The evidence produced by El Salvador clearly demonstrates that Pac Rim Cayman—a company with no employees, no office space leased under its name, no telephone, no office equipment, and no bank account—has no capacity to manage anything. Moreover, while there is no doubt that it is a holding company, Pac Rim Cayman does not even hold "investments" in El Salvador. It holds shares in Salvadoran companies used as investment vehicles by the common parent company Pacific Rim Mining Corp. Pac Rim Cayman's only "activity" is the purely passive holding of shares in two other companies under its name.

107. As El Salvador stated in its Memorial, holding shares in its name cannot be substantial business activity: "every shell company set up by a non-Party national to try to gain

[88] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 7 (R-56).
[89] Counter-Memorial, para. 257.
[90] Counter-Memorial, para. 252.

CAFTA jurisdiction will have 'holding' activities related to the investments of the non-Party parent company."[91] The denial of benefits provision would be rendered meaningless if merely holding shares or investments qualified as "substantial business activities in the territory of any Party."

108. Moreover, the fact that an officer of the Canadian parent company was located in the United States when he made decisions about what other subsidiaries the Cayman Islands subsidiary, Pac Rim Cayman, would hold, does not amount to business activities for a U.S. enterprise. Like Claimant's other arguments, this would defeat the purpose of a denial of benefits clause. The alleged substantial activities must be connected to the enterprise when it is a national of the Party.

109. Of course, some holding companies may be able to establish that they are legitimate entities functioning within the territory of a Party. Pac Rim Cayman is not such a holding company. This is clear from Claimant's misleading attempt to align itself with the *AMTO* claimant: "[m]uch like Pac Rim Cayman, AMTO was a holding company with two full-time employees."[92] In fact, unlike AMTO, Pac Rim Cayman has no employees. In response to El Salvador's request for information ordered by the Tribunal, Pac Rim Cayman was not able to produce any evidence that it pays the salaries of any employees, or even a portion of the salaries of its two managers, who are also officers of the Canadian parent company and paid by the Canadian company and other subsidiaries. In addition, unlike Pac Rim Cayman, AMTO paid income tax and social insurance payments for its two employees, had a bank account, and leased an office for several years during which the investment was made and the dispute arose.[93] The only thing that Pac Rim Cayman and AMTO have in common is that they are holding

[91] Memorial on Jurisdiction, para. 181.
[92] Counter-Memorial, para. 283.
[93] *AMTO LLC v. Ukraine*, SCC Case No. 080/2005, Final Award, Mar. 26, 2008, § 68 (RL-69).

companies. Pac Rim Cayman has none of the characteristics that led the *AMTO* tribunal to conclude that AMTO had substantial business activities.[94]

110. Claimant is a shell company, with no employees, no office, and no revenue. Pac Rim Cayman's subsidiaries, PRES and DOREX, are investment vehicles in El Salvador that do not contribute to Pac Rim Cayman having any activities in the United States. The activities of Pacific Rim Exploration, minimal as they are, should not be counted as activities of Pac Rim Cayman, because Pacific Rim Exploration was only moved to be held through Pac Rim Cayman as part of the abusive scheme to gain jurisdiction, at the same time Pac Rim Cayman's nationality was changed from the Cayman Islands to the United States. The only business activity Pac Rim Cayman can claim—"holding" the shares in the investment vehicles in El Salvador—is clearly insufficient.

ii. Claimant has tried to confuse and hide its identity as a shell company with no substantial business activities

111. The Tribunal will recall that Claimant referred to Pac Rim Cayman as an "environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas," in the Notice of Intent, in the Notice of Arbitration, and at the hearing on the Preliminary Objections.[95] In its first letter referring to the jurisdictional objections, Claimant was still masking Pac Rim Cayman's nature as a holding company, asserting, "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."[96]

112. Rather than show that it does have business activities, Claimant uses misleading statements, confusingly swaps references to the Canadian parent with references to Pac Rim

[94] El Salvador does not suggest that AMTO's activities would qualify as "substantial business activities" for purposes of the denial of benefits provision of CAFTA. El Salvador is merely showing that Pac Rim Cayman does not even have the minimal business activities AMTO had.
[95] Notice of Intent, para. 6; NOA, para. 14; Transcript of Hearing Day 1, May 31, 2010, at 205-207.
[96] Letter from Claimant to the Tribunal, Aug. 17, 2010, at 6 (R-56).

Cayman, and neglects to mention key dates. Claimant has dedicated many pages to describing the activities of Pacific Rim Mining Corp's other subsidiaries in the United States since 1997. But all of these references are irrelevant because they do not pertain to Claimant, which was a Cayman Islands company for nearly this entire period. The Tribunal cannot, as Claimant expects, simply disregard that the activities Claimant describes in the United States are of separate and distinct affiliates, nor ignore that Pac Rim Cayman was not even a U.S. entity until December 2007.

113. Although Claimant has avoided repeating many of its earlier misrepresentations, the multiple references in the Counter-Memorial to investments being made "through" Pac Rim Cayman are false or misleading.[97] As El Salvador showed in its Memorial, all the money entering El Salvador has been transferred from Canada from accounts held by companies other than Pac Rim Cayman.[98] Claimant provides no evidence to the contrary, but only repeats the unsubstantiated assertion that the investment was made "through Pac Rim Cayman" throughout its Counter-Memorial.

114. Repetition does not make the assertion true. As explained in the Memorial, the investments registered by the ONI were all based on money transferred from Canada to El Salvador by Pacific Rim Mining Corp. and its Canadian predecessors. Pac Rim Cayman does not even have a bank account to facilitate transferring funds "through" Pac Rim Cayman. Aside from empty rhetoric, Claimant has provided no evidence of Pac Rim Cayman sending, transferring, or making <u>any</u> investment in El Salvador.

115. Faced with El Salvador's objections and a table showing some of the ways it has misrepresented the facts, Claimant can hardly continue to argue that it, itself, has substantial business activities. Instead Claimant offers its newest twist: that the activities of the parent and sister companies can count to make Pac Rim Cayman's use of U.S. nationality legitimate.

[97] Counter-Memorial, paras. 16, 17, 32, 80, 82, 83, 84, and 395.
[98] Memorial on Jurisdiction, paras. 170-172.

c. Claimant's attempt to pierce its own corporate veil to hide behind a "Group of Companies" must be rejected

116. The denial of benefits inquiry focuses on the named claimant: a Party may deny benefits to an enterprise of another Party "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 . . . own or control the enterprise."[99]

117. Nevertheless, Claimant argues that "[e]ven assuming, *arguendo*, that Pac Rim Cayman's business activities were not themselves 'substantial' for purposes of Article 10.12.2, Respondent's invocation of the provision would be unavailing, because the Pacific Rim Companies as a group carry out substantial business activities in the United States."[100] Claimant rejects as "formalistic" El Salvador's reliance on the text of the Treaty which directs the Tribunal to look only at the activities of the enterprise being denied benefits.

118. There is no legal authority to support Claimant's rewriting of the denial of benefits clause. The tribunal in *Plama v. Bulgaria* expressly rejected the argument that it consider the activities of the entire group of companies for purposes of the denial of benefits clause in the Energy Charter Treaty.[101] The authorities Claimant does cite, related to foreign control for purposes of the Netherlands-Bolivia BIT and whether or not an enterprise could be considered an "investment" of a particular investor for purposes of NAFTA,[102] are irrelevant to the question of whether or not other companies' activities can be counted for a named claimant's "substantial business activities" for purposes of the denial of benefits clause of CAFTA.

119. Claimant inadvertently provided support for rejecting its own argument. In a misguided attempt to redefine substantial business activities as "principal place of business"

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[99] CAFTA Article 10.12.2 (emphasis added).
[100] Counter-Memorial, para. 289.
[101] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, para. 169 (RL-66) (noting that the claimant had no substantial business activities in Cyprus and stating, "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.") (emphasis added).
[102] Counter-Memorial, paras. 292, 294.

based on the test used by U.S. federal courts for purposes of diversity jurisdiction, Claimant provided several U.S. court cases as authorities.[103] Although these cases are irrelevant to defining substantial business activities for a denial of benefits clause in an international treaty,[104] they do make the point that the test must only take the named claimant's activity into account. For example, in *Topp v. CompAir, Inc*., the defendant was a holding company that held bank accounts, filed taxes, paid social security contributions, paid three employees, and purchased insurance, loans, and car rental services for itself and its subsidiaries.[105] The United States Court of Appeals for the First Circuit found that the district court erred "by failing to confine itself to locating the nerve center of CompAir Inc.'s own activities" and "inappropriately look[ing] outside the limits of CompAir Inc.'s own corporate operations to those of its parent corporations, CompAir Ltd. and Siebe plc."[106]

120. Likewise, looking beyond Pac Rim Cayman for substantial business activities would be inappropriate here given the clear text of the Treaty: benefits may be denied where an enterprise (not a group of companies) does not have substantial business activities in the territory of a Party. The text of the Treaty does not support Claimant's argument that this Tribunal should ignore the fact that Claimant is a shell company and should look instead to the activities of its parent or sister companies.

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[103] Counter-Memorial, paras. 276-277.

[104] The U.S. courts sought to widen the definition of principal place of business in order to prevent fraud and abuse. Finding principal place of business in a U.S. state denies the corporation the right to remove its case from state court and "shop" for better treatment in federal court. Defining "substantial business activities" for denial of benefits clauses in international treaties must also be done with the intent of preventing fraud and abuse, but in the opposite direction. Unlike for U.S. federal jurisdiction, where a broad definition cuts down on a corporation's ability to forum shop, with denial of benefits clauses, a broad definition would invite treaty shopping by allowing corporations from one country to qualify for benefits extended to investors of other countries.

[105] *Topp v. CompAir, Inc*., 814 F.2d 830, 833 (1st Cir. 1987) (CL-110).

[106] *Topp v. CompAir, Inc*., at 834. *See also Lugo-Vina v. Pueblo Int'l*, 574 F.2d 41, 43 (1st Cir. 1978) (finding that the district court erred in holding that the claimant's principal place of business was New York based on viewing the claimant and its wholly owned subsidiary as a single entity; the district court "erred in ignoring the separate corporate identities" of the claimant and its subsidiary because it is "error to look to the subsidiary's operations for purposes of determining where Pueblo's 'principal place of business' was located") (CL-109).

121. Indeed, in this case, Claimant has taken the improper attribution even farther. Claimant not only asks the Tribunal to count the activities of other companies as its own, but also to count the activities of those other companies from before Claimant became an enterprise of a Party. Nearly all of the activities of Pacific Rim Mining Corp. and its other subsidiaries referred to by Claimant took place between 1997 and 2007, before Pac Rim Cayman was reincorporated in the United States. It would defy reason and contravene the text of CAFTA to allow a holding company to move to a new nationality and to then claim all the prior activities of the parent company in that territory as its own even though such activities are attributable, at best, to other, unrelated subsidiaries of the parent company.

122. Under Claimant's interpretation every subsidiary in the world of every company doing business in the United States (or any CAFTA country) could claim to have substantial business activities in the United States simply by attributing to itself the past activities of the other subsidiaries of their common parent. This would open the CAFTA dispute resolution procedures to endless abuse. For example, if a Chinese company had a subsidiary in El Salvador with substantial business activities, a subsidiary in the United States, and a subsidiary in the Cayman Islands, it could create jurisdiction for an existing dispute regarding its investments in the United States between the Chinese company and the United States Government by following Claimant's example and shuffling its organization chart. It would simply have to move the United States company to become a subsidiary of the Cayman Islands company and then move the Cayman Islands company to El Salvador and attribute to it the business activities of its other subsidiary already doing business in El Salvador. It is this sort of forum creation by non-CAFTA Parties that the denial of benefits clause was intended to avoid.

d. The time to measure "substantial business activities"

123. Under the facts of this case, it is unnecessary for the Tribunal to decide the appropriate temporal frame of reference for the "substantial business activities" standard because

Pac Rim Cayman has lacked substantial business activities in the United States at any and all times.

124. Nonetheless, a proper reading of the denial of benefits clause would require substantial business activities at the time of the investment or alternatively, at the times of the measures complained of, and not after nationalities are changed and arbitration is initiated. Otherwise, the denial of benefits provision would have no effect on preventing nationality shopping.

125. As El Salvador noted in its Memorial, the tribunals that have measured "substantial business activities" have looked for activities at the time of the investment.[107]

126. Claimant's interpretation that an enterprise only needs to have substantial business activities when the State seeks to deny it benefits deprives the provision of any meaning by allowing any savvy (or abusive) company to establish minimal activities after the fact to deny a State its right to deny benefits, particularly on the facts of this case that involves a change of nationality.

127. As Acting U.S. Trade Representative Allgeier explained in the U.S. Congressional Hearing on CAFTA:

> [i]t is possible for a U.S. enterprise to establish an affiliate in the territory of another CAFTA–DR Party and for the affiliate to engage/in substantial business activity there. If that affiliate <u>in turn</u> establishes an investment in the United States, the United States may not deny the benefits of the CAFTA–DR Agreement to it.[108]

[107] *AMTO*, §§ 19-21, 68 (noting that the investment began in 1999 and continued into 2003 and that bankruptcy proceedings affecting the claimant's investment commenced in 2002-2003, and finding substantial business activities based on taxes paid from 2000-2007, a bank account held from 1998-2007, and an office lease held from 2000-2007) (RL-69); *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) (RL-70).

[108] 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 Peter F. Allgeier) (emphasis added) (R-95; CL-91).

This supports El Salvador's view that the enterprise must be established in the home State and have substantial business activity there before it invests in the other Party in order to avoid application of the denial of benefits clause.

128. In this case, Pacific Rim Mining Corp. began its investment in 2002 and applied for the environmental permit and exploitation concession at issue in 2004. The Salvadoran projects were moved to be held by Pac Rim Cayman at the end of 2004. Pac Rim Cayman just became a U.S.-registered entity in December 2007, years after PRES did not receive the mining exploitation concession it wanted from El Salvador.

129. Even though El Salvador maintains that Pac Rim Cayman lacks substantial business activities in the United States at any time, allowing Pac Rim Cayman to come up with activities after this date, which is after the investment was made and the measures in dispute occurred, 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 State Party after a dispute arises, manufacture business activities, and then file arbitration. 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.

130. In any event, this Tribunal does not need to decide this question on the facts of this case. Pac Rim Cayman, being a shell company, has never had and still does not have substantial business activities in the United States. Not only must Pac Rim Cayman have substantial business activities of its own, but the Tribunal also cannot allow the artificial creation of business activities through the abusive transfer of another subsidiary of the Canadian company to become a subsidiary of Pac Rim Cayman that took place at the same time as the change of nationality.

2. Claimant is owned by non-CAFTA persons

a. It is undisputed that Claimant is owned by Pacific Rim Mining Corp., a Canadian company

131. Benefits may be denied under CAFTA Article 10.12.2 if the entity being denied benefits is either owned or controlled by persons of a non-Party. Thus if an entity is owned by persons of a non-Party, benefits may be denied even if the entity is controlled by persons of a Party. The reverse is also true.

132. Claimant does not dispute, nor could it, that it is owned by Pacific Rim Mining Corp.—a Canadian company.[109]

133. Even if Claimant's unsupported allegations that 60% of Pacific Rim Mining Corp.'s voting shares are held by U.S. residents is true, Claimant is still owned by Pacific Rim Mining Corp., a Canadian company, its sole member.[110] Thus, because Claimant is 100% owned by a Canadian company, it is "owned . . . by persons of a non-Party" and subject to the denial of benefits provision of the Treaty.

b. The text of Article 10.12.2 does not support looking past direct ownership to identify any number of indirect owners

134. There is no support or authority for Claimant's novel assertion that: "[t]he denial of benefits provision recognizes that an enterprise that has made an investment in the territory of the host Party is itself, in turn, an investment of the persons who own and control it, and the provision requires a determination of the nationality of those persons (who are, by definition, investors)."[111] There is nothing in the text of Article 10.12 "recogniz[ing]" that the claimant enterprise is an "investment" or "requir[ing]" a complex determination of the ultimate nationality of all possible "investors" in the claimant. Claimant cites no CAFTA language and no authority to support this self-serving proposition.

[109] Counter-Memorial, para. 326 ("It is not disputed that Pac Rim Cayman's parent is Pacific Rim Mining Corp., a company incorporated under the laws of Canada.").
[110] Letter from Claimant to ICSID, June 4, 2009 (R-58).
[111] Counter-Memorial, para. 310.

135. Claimant takes this novel idea and leaps to further unfounded conclusions:

> Because the denial of benefits provision recognizes that an enterprise of a Party that owns or controls an investment in the territory of another Party is itself an investment owned or controlled by investors, the definition of the investor-investment relationship in Article 10.28 applies here as well. In determining whether the denial of benefits provision may apply to an enterprise, the context provided by the definition of 'investment' requires an analysis that looks not only to the enterprise's immediate owner, if that owner happens to be a person of a non-Party, but to persons further up the ownership chain that ultimately may own or control the enterprise. If those latter persons are persons of a Party other than the host Party, then the host Party may not deny benefits under Article 10.12.2.[112]

136. The lack of textual support for Claimant's argument is abundantly clear from Claimant's footnote 379, in which Claimant declares that not only does the tribunal have to look for any owner of a Party in the chain of ownership, but it also has to stop at that level, and not reach an ultimate non-Party owner.[113] This argument contradicts Claimant's later argument at paragraph 319 of its Counter-Memorial that not looking for indirect owners would prevent the United States from being able to deny benefits under the provisions of CAFTA Article 10.12.1 to a Salvadoran company owned by a Canadian company in turn owned by a Cuban company. First, the claimant in such unlikely case would always argue, like Claimant does here, that the inquiry must stop at the level necessary to defeat the invocation of the Denial of Benefits clause. Second, both Denial of Benefits provisions in CAFTA Article 10.12 include a finding of control, which if it resides in the Cuban company in Claimant's example would allow the denial of benefits on that basis, regardless of who the direct owner is. Lastly, and more importantly, the fears about not being able to apply the provision of CAFTA Article 10.12.1 to a Cuban company are misplaced because that clause specifically provides that a Party can deny benefits if an

[112] Counter-Memorial, para. 313.
[113] Counter-Memorial, para. 312, n.379 ("By the same token, where the immediate owner or controller of an investment is an investor of a Party, the fact that persons further up the ownership chain may be persons of non-Parties does not preclude attribution of the investment to the immediate owner or controller.").

investor is owned or controlled by persons of a non-Party and the denying Party "adopts or maintains measures with respect to the non-Party . . . that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments."[114] This additional provision would allow the United States to deny benefits to the company in Claimant's hypothetical example.

137. Finally, Claimant also states that, "[a]s was recognized by a tribunal interpreting a definition of 'investment' similar to the definition now at issue, 'The phrase, 'directly or indirectly,' in modifying the term 'controlled' creates the possibility of there simultaneously being a direct controller and one or more indirect controllers."[115] There is nothing "similar" to compare. The denial of benefits provision does not include the words "directly or indirectly." Adding those words would, as Claimant highlights, create situations of there being several indirect owners/controllers. This would make application of the denial of benefits clause costly and time consuming, if not impossible, as States and tribunals would not know which enterprises could be denied benefits.[116]

138. Fortunately, the CAFTA drafters did not weaken the denial of benefits provision by allowing for non-Party owners to defeat its application by alleging indirect ownership by international shareholders. The denial of benefits provision is designed to find the persons that "own or control *the* enterprise." In the present case, Pac Rim Cayman, the enterprise, is owned and controlled by Pacific Rim Mining Corp. The provision expressly requires a finding of who owns or controls *the* enterprise. The provision does not provide for an examination of who owns or controls the owner or controller of *the* enterprise, as Claimant suggests. Claimant is effectively asking the Tribunal to rewrite the Treaty rather than interpret it.

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[114] CAFTA Article 10.12.1.
[115] Counter-Memorial, para. 312, n.379 (quoting *Aguas del Tunari*, para. 237) (emphasis added).
[116] El Salvador strongly rejects Claimant's comparisons to ICSID Article 25(2)(b). It is uncontroversial that Article 25(2)(b) is designed to expand jurisdiction by providing for parties to agree to treat a locally incorporated company as a national of another contracting State based on foreign control. The denial of benefits clause is designed for the opposite purpose—to allow States to deny the benefits of arbitration to particular claimants. Therefore, Claimant's suggestion that analysis of Article 25(2)(b) "is instructive given the similarity of the terms at issue" (Counter-Memorial, para. 315) must be rejected.

c. Even if indirect ownership by unidentified shareholders were to be considered, Claimant has failed to prove that Pacific Rim Mining Corp. is owned by a majority of U.S. shareholders

139. Thus, for the denial of benefits provision, all that matters, according to the words of the Treaty, is ownership or control of the claimant—not ownership or control of the claimant's parent. Nonetheless, even if Claimant's assertion that ownership of Claimant's *parent* were relevant, the Tribunal should disregard Claimant's repeated assertion that "[s]ince 2002, a majority of the outstanding shares in Pacific Rim Mining Corp. have been owned by U.S. shareholders"[117] because Claimant has provided no proof of this statement.

140. The only support for the claims about U.S. shareholders is Mr. Shrake's witness statement. Claimant provides no evidence of who the shareholders are or how their nationalities have been determined. Claimant has the burden to prove the factual allegation on which its argument relies. Given Claimant's failure to provide any concrete evidence of the alleged indirect ownership, this Tribunal cannot make any determinations based on this allegation.

141. While El Salvador recalls that the burden is on Claimant to make this showing, El Salvador notes that the limited information available appears to contradict Claimant's allegation about ownership. According to the reports submitted to the U.S. Securities and Exchange Commission, the percentage of U.S. ownership of shares of Pacific Rim Mining Corp. is much lower than Claimant indicates. According to the report for 2005, less than 14% of the company's shares were registered to U.S. holders.[118] Likewise, in 2009, Pacific Rim Mining Corp. reported: "at June 30, 2009, there were 184 U.S. registered holders owning 15,688,097 (13.29%) of the Company's outstanding shares. The Company is a publicly owned Canadian corporation, the

[117] Counter-Memorial, para. 83. The claim about majority ownership is repeated at paragraphs 13, 30, 141, 252, 259, 325, 327, 330, 334, 338, and 471.

[118] Pacific Rim Mining Corp., Annual and Transitional Report (foreign private issuer) (Form 20-F) at 49 (July 28, 2005) ("As of June 30, 2005, Computershare reported that there were 81,239,494 common shares issued and outstanding. Of those common shares issued, 11,050,916 shares were registered to United States residents to 157 holders of record.") (R-67).

shares of which are owned by Canadian residents, US residents, and residents of other countries."[119]

142. Moreover, Pac Rim Cayman has failed to show that ownership "by residents of the United States" would qualify as ownership by persons of the United States for purposes of CAFTA.

143. As Claimant notes, CAFTA defines "person of a party" as a "national or an enterprise of a Party." Claimant quotes the definition of "national" from Chapter 2 of CAFTA, but Chapter 2 definitions only apply "unless otherwise specified."[120] In this instance, Chapter 10 of CAFTA provides the applicable definition of "national" and the Chapter 10 definition makes no reference to residence.

144. According to CAFTA Chapter 10, "**national** means a natural person who has the nationality of a Party according to Annex 2.1 (Country-Specific Definitions)."[121] CAFTA Annex 2.1 provides that "for the United States, 'a natural person who has the nationality of a Party' means 'national of the United States' as defined in the existing provisions of the *Immigration and Nationality Act*."[122] Claimant recognizes that "the manner in which U.S. law (in particular, the Immigration and Nationality Act) defines and uses the concepts of nationality and residence is determinative for purposes of construing the meaning of these terms with respect to U.S. nationals and permanent residents."[123] Claimant then goes on to simply ignore provisions of the *Immigration and Nationality Act* (the "INA") related to nationality and quotes only its definition of residence in an attempt to support its claim that residence should be a proxy for nationality. Any student of immigration and nationality law would quickly see the irony in this effort. One of the primary distinctions that underpins the INA and all of United States law on immigration and nationality is the distinction between "nationals," on the one hand, and people who merely

[119] Pacific Rim Mining Corp., Annual and Transitional Report (foreign private issuer) (Form 20-F) at 58 (July 29, 2009) (R-83).
[120] CAFTA Article 2.1 (CL-73).
[121] CAFTA Article 10.28.
[122] Counter-Memorial, para. 328.
[123] Counter-Memorial, para. 328.

have a "residence" in the United States, on the other. Extremely important legal rights and obligations depend on this distinction. Nationality has nothing to do with residence. Nationals of the United States are specifically defined in the INA: "'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[124] There are millions of U.S. nationals who do not have their residence in the United States and millions of people with residence in the United States who are not U.S. nationals. Under the INA, and therefore under CAFTA Chapter 10 which incorporates the INA by reference, residence could never be a proxy for nationality.

145. In an attempt to overcome the fact that U.S. residents are not the same as nationals of the United States for purposes of CAFTA, Claimant alleges, "when U.S. laws and regulations require that a majority of the shareholders of a corporate entity be of a specified nationality in order for certain benefits to be available to the entity, residence typically is used as a proxy for nationality" and cites 22 USC § 2198(c)(2).[125] This law, of course, is irrelevant to determining the meaning of ownership by U.S. persons under CAFTA Chapter 10. Moreover, the cited law actually requires eligible investors to be U.S. citizens, corporations incorporated in the United States and substantially beneficially owned by U.S. citizens, or foreign corporations wholly owned by U.S. citizens (subject to other conditions). There is no provision in the cited law for residence to be used as a proxy for U.S. citizenship.[126]

146. Consequently, Claimant has not only failed to identify the alleged U.S. owners and failed to provide any evidence of their ownership, but Claimant's unsupported statements related to the shareholders of its Canadian parent, Pacific Rim Mining Corp., do not even refer to ownership by persons of the United States—*i.e.* U.S. citizens, persons owing permanent allegiance to the United States, and enterprises constituted and organized under U.S. law.

[124] 8 U.S.C. § 1101 (a)(22) (**Authority RL-109**).
[125] Counter-Memorial, para. 329.
[126] 22 U.S.C. § 2198 (CL-126).

Claimant only refers to unidentified persons with residence in the United States, whose citizenship and nationality are wholly unknown.

3. Independent of ownership, Pac Rim Cayman is controlled by Pacific Rim Mining Corp., a Canadian company

147. For purposes of denial of benefits, it is sufficient that Pac Rim Cayman is owned by persons of a non-Party. But El Salvador has also shown that Pac Rim Cayman is controlled by persons of a non-Party, which independently justifies denial of benefits.

a. Pacific Rim Mining Corp., not its shareholders, controls Pac Rim Cayman

148. The Canadian company, Pacific Rim Mining Corp., through its Board of Directors, controls Pac Rim Cayman. Pac Rim Cayman was specifically created by Pacific Rim Mining Corp. for tax reasons and has only been used to hold Pacific Rim Mining Corp.'s subsidiaries for its purposes.

149. *The best evidence to demonstrate that Pacific Rim Mining Corp., through its Board of Directors, controls Pac Rim Cayman, is that the decision to move Pac Rim Cayman from the Cayman Islands to the United States was made, approved, and authorized by the Board of Directors of Pacific Rim Mining Corp., not by any alleged U.S. shareholders or by Pac Rim Cayman's manager, in December 2007.*[127]

150. In addition, according to its Articles of Organization, Pac Rim Cayman is "managed" by Managers.[128] The Managers are appointed by Pacific Rim Mining Corp. and all four people who have served as Managers were or are officers or employees of Pacific Rim Mining Corp.[129] For both 2008 and 2009, Pacific Rim Mining Corp., as Pac Rim Cayman's sole

[127] Consent Resolution of the Directors of Pacific Rim Mining Corp., Dec. 4, 2007 (C-58).
[128] Articles of Organization, Pac Rim Cayman LLC, Doc. 20070846285-12, filed Dec. 13, 2007 (R-81).
[129] *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) (R-82).

member, waived notice of the annual meeting of Pac Rim Cayman and notice of the purpose thereof.[130] The Articles of Organization make no reference to the shareholders of Pacific Rim Mining Corp. having any input into decisions regarding Pac Rim Cayman. They do not.

b. Even if Pacific Rim Mining Corp.'s voting shareholders control Pacific Rim Mining Corp., they do not control Pac Rim Cayman

151. Claimant asserts that "[w]ith majority ownership comes control" and goes on to describe the powers that the shareholders of Pacific Rim Mining Corp. have over Pacific Rim Mining Corp.[131] Without citing any authority or providing any evidence from its corporate documents, Claimant leaps from this assertion to claiming that the majority shareholders of Pacific Rim Mining Corp. indirectly control Pac Rim Cayman.

152. The authorities do not support Claimant's unfounded conclusion. Both cases cited by Claimant to support its argument that "[w]ith majority ownership comes control" are about direct ownership.[132] Claimant quotes the *Aucoven* tribunal: "Direct shareholding confers voting right, and therefore, the possibility to participate in the decision-making of the company. Hence, even if it does not constitute the sole criterion to define 'foreign control', ***direct shareholding is certainly a reasonable test for control***."[133] This, of course, does not support Claimant's argument that alleged indirect partial ownership of Pac Rim Cayman by shareholders of Pacific Rim Mining Corp. means that those shareholders control Pac Rim Cayman. Instead, this supports El Salvador's position that Claimant's direct ownership by a Canadian corporation demonstrates control by that non-Party corporation.

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[130] "Written Consent in Lieu of 2008 Annual Meeting of the Sole Member of Pac Rim Cayman LLC," Dec. 18, 2008 (R-74); "Unanimous Consent in Lieu of 2009 Annual Meeting of the Sole Member of Pac Rim Cayman LLC," Dec. 1, 2009 (R-75).
[131] Counter-Memorial, para. 331.
[132] *Aguas del Tunari*, para. 245 ("An entity that owns 100% of the shares of another entity necessarily possesses the power to control the second entity.") (RL-60); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, Sept. 27, 2001, para. 121 (RL-59).
[133] Counter-Memorial, para. 333 (emphasis in original) (citing *Aucoven*, Decision on Jurisdiction, para. 121).

153. Claimant provided neither authority nor evidence to suggest that, even if U.S. residents hold approximately 60% of voting rights in Pacific Rim Mining Corp., those individuals would exercise control over Pac Rim Cayman. The potential that hundreds of scattered U.S. residents have shares in Pacific Rim Mining Corp. does not automatically suggest that those individuals come together and exercise control over Pacific Rim Mining Corp., much less its subsidiaries, like Pac Rim Cayman, which must be the focus of the analysis for purposes of the denial of benefits clause.

154. Moreover, whereas Claimant cites Pacific Rim Mining Corp.'s Articles of Incorporation to detail the rights given to shareholders, such as the rights to vote, to elect directors, and to give or withhold consent to proposals that alter the company's capital structure,[134] that information is relevant only for Pacific Rim Mining Corp. Claimant provides no similar evidence related to Pac Rim Cayman.

155. Thus, although shareholders may exercise some control over Pacific Rim Mining Corp., there is no basis for finding that those shareholders exercise any control over Pac Rim Cayman. As El Salvador stated in its Memorial, Pacific Rim Mining Corp., the Canadian company, owns and controls Pac Rim Cayman.

156. Finally, everything set forth above in the section on ownership with respect to failure to provide evidence that the shareholders of the Canadian parent Pacific Rim Mining Corp. are persons of the United States, rather than mere residents with no identified nationality, applies equally in the context of Claimant's allegations that such shareholders indirectly control it. Therefore, not only are Claimant's legal arguments with regard to indirect control flawed, but they also lack a basis in fact.

[134] Counter-Memorial, para. 331.

4. El Salvador's Notice to the United States Government was sufficient and timely to deny all CAFTA Chapter 10 benefits to Pac Rim Cayman, including the benefit of initiating this arbitration

a. Sufficient

157. As Claimant notes, the CAFTA denial of benefits provision specifically provides the requirements for its use: notification to and consultations (if requested) with other State Parties. CAFTA does not require State Parties to provide advance notice to investors.

158. Nonetheless, Claimant argues that the express notice requirement with respect to State Parties also includes a notification requirement in favor of investors. Claimant is incorrect.

159. First, the Treaty must be interpreted in good faith in accordance with the ordinary meaning given to its terms in the light of the Treaty's object and purpose.[135] Claimant's interpretation would ignore the Treaty text and require the Tribunal to add terms as follows: Article 18.3.1: "To the maximum extent possible, each Party shall notify any other Party [and investors] with an interest in the matter of any proposed or actual measure . . . ." Faithful treaty interpretation under the Vienna Convention on the Law of Treaties does not allow adding language to impose an additional requirement not found in the text of the treaty.

160. Second, requiring notification to investors is in direct contradiction with the maxim *expressio unius est exclusio alterius*. Whereas the text provides for notice to State Parties, there is no notice requirement in favor of investors anywhere in the text.

161. Third, Claimant wrongly laments that not adding the additional requirement of earlier notification to investors "would permit a State to make its own, necessarily self-interested determination as to whether it could deny benefits to an investor after a dispute had already arisen . . . ."[136] In fact, no matter when notice is given, the denying State plays the same role in deciding to deny benefits. The decision is no more or less "self-interested" depending on notice requirements. Plus, the claimed home State has the right to request consultations and can use that mechanism to show the denying State that the investor actually does have substantial

[135] Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969, 1155 U.N.T.S. 331 (RL-81).
[136] Counter-Memorial, para. 367.

business activities in its territory. Finally, and most importantly, whether or not there are consultations, the denying State's choice is subject to the ultimate determination of the arbitral tribunal.

b. Timely

162. El Salvador's invocation of its right to deny benefits was timely.

163. The alternative, *i.e.*, requiring the denying State to foresee that an investor may incorporate a shell company in another Party and try to benefit from the Treaty, is not only not found in the text, but would also impose an unreasonable burden on State Parties. Beyond this, Claimant goes so far as to imply that El Salvador was obliged to deny benefits to Pac Rim Cayman before it ever became a national of a CAFTA party.[137] Thus El Salvador would have to have a crystal ball to know which companies incorporated worldwide will someday reincorporate in the United States and improperly start a CAFTA arbitration against El Salvador and somehow deny them benefits before they even become CAFTA nationals.

164. As explained by Claimant's authority:

> the practical implications of *Plama* have the potential to render denial of benefits provisions virtually meaningless. Most states have no occasion or means to track all of foreign investment within their borders . . . . In addition, giving prompt notice of denial of benefits is likely to be a daunting task even for those states that closely track foreign investment given the complex investment structuring many investors employ.
>
> These very considerations have lead some commentators to conclude that the notification provision of NAFTA's denial of benefits clause could not be understood to require notice before an investor brought a claim under the treaty. Rather, the state seeking to invoke the clause is expected to provide notice and initiate

[137] Counter-Memorial, para. 371 ("These objectives cannot be met if a denial of benefits has retroactive effect, depriving an investor of protections under CAFTA long after the investment is made and the events giving rise to the dispute have occurred."). Pac Rim Cayman did not even become a national of a CAFTA Party until "long after the investment [was] made."

> consultation prior to raising it as a defense before the arbitral tribunal.[138]

165. The *EMELEC* tribunal confirmed that the jurisdiction phase is the proper time to announce the intent to deny benefits. The tribunal commented, "Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e., upon raising its objections on jurisdiction."[139]

c. State-to-State consultations are not equivalent to diplomatic protection

166. Claimant's last-ditch effort to impose a requirement of earlier notification based on Article 27(1) of the ICSID Convention is plainly absurd. Article 27(1) states that "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention . . . ."

167. Claimant presents the novel argument that this provision would prevent CAFTA Parties from engaging in consultations as provided for in the State-to-State Dispute Settlement Chapter of CAFTA at Article 20.4. Claimant does not explain how or why consultations conducted within the framework of the State-to-State Dispute Settlement Chapter of CAFTA could constitute impermissible diplomatic protection under Article 27 of the ICSID Convention.

168. As explained by Schreuer, "[d]iplomatic protection is a concept of customary international law whereby a State espouses the claim of its national against another State and pursues it in its own name."[140] Article 27 is intended to prevent a State from having to face

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[138] Thorn & Doucleff, at 25 (CL-89).

[139] *Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, June 2, 2009, para. 71 (RL-73). Claimant's argument that this is irrelevant because the U.S.-Ecuador BIT does not condition the denial of benefits on notification and consultations with State Parties is unavailing. CAFTA, just like the U.S.-Ecuador BIT, does not state that investors must be given prospective notice. According to Claimant's other argument, since the U.S.-Ecuador BIT uses the language, "reserves the right to deny," the U.S.-Ecuador BIT should nonetheless require advance notice to investors. Counter-Memorial, para. 358. Therefore, it is indeed relevant that the tribunal expressly stated that the proper time to raise the denial of benefits objection was when raising objections to jurisdiction.

[140] Christoph H. Schreuer et al., The ICSID Convention: A Commentary 415 (2d. ed., 2009) (**Authority RL-110**).

arbitration by an investor as well as a claim brought by the investor's State. This is confirmed by the view of the *Aucoven v. Venezuela* tribunal: "Article 27 prohibits a Contracting State from espousing the claim of one of its nationals in respect of a dispute that one of its nationals and another Contracting State consented to submit to ICSID arbitration."[141]

169. Article 27 is written and intended to prevent States from pursuing the claims of investors who are already pursuing those claims through international arbitration. It is not intended to prevent State Parties to a treaty from consulting.[142] The drafters of the ICSID Convention recognized that contact between Parties is helpful to dispute settlement. Thus, they included Article 27(2): "Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."

170. Schreuer explains that Article 27(2) "does not establish an exception" to the first paragraph, "but is merely designed to avoid an overly strict interpretation of the basic rule."[143] He highlights, "[t]he espousal of a national's claim and the presentation of a formal international claim are not permitted under the conditions of Art. 27" but "[l]ess formal international contacts are allowed."[144] The Convention drafters also considered adding a separate paragraph to make clear that Article 27 would not prevent a State from bringing international claims against another State where the facts of a dispute between an investor and a State also gave rise to a separate dispute concerning an agreement between the States. The drafters decided such a paragraph was unnecessary because "the continued availability of inter-State dispute settlement should be regarded as self-evident."[145]

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[141] *Aucoven*, para. 135 (RL-59). *See also* Report of the Executive Directors on the Convention, para. 33 ("When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so.") (emphasis added).
[142] *See Aucoven*, para. 138 ("attempts to settle a dispute do not constitute prohibited diplomatic protection in the sense of Article 27").
[143] Schreuer, at 428 (emphasis added).
[144] Schreuer, at 428.
[145] Schreuer, at 421.

171. Consultations to resolve an issue of treaty interpretation or application are undoubtedly permissible. State-to-state consultations would not be about the same dispute that was before the ICSID tribunal, *i.e.*, whether the relevant State had breached its obligations to the investor.[146] In this case, the U.S. Government could have consulted with El Salvador about its interpretation and application of the denial of benefits provision; doing so would not have been the same as pursuing a claim on behalf of Claimant.

172. Indeed, Claimant's argument that the U.S. Government cannot "present its own views on the matter" after arbitration has been initiated is disingenuous.[147] As Claimant knows, aside from the consultations provision, CAFTA contemplates the involvement of home States through non-disputing Party submissions[148] and participation in the Free Trade Commission, which supervises implementation of the Treaty, seeks to resolve disputes over application of the Treaty, and can issue interpretations of Treaty provisions.[149] In fact, Pacific Rim Mining Corp. has sought the intervention of the U.S. Government in this dispute. Pacific Rim Mining Corp. hired lobbyists in October 2007 (before Pac Rim Cayman's change of nationality) to meet with members of the U.S. Congress and the U.S. Department of State about Pacific Rim's mining project in El Salvador.[150] Pacific Rim Mining Corp. did not stop lobbying after filing its Notice of Arbitration through Pac Rim Cayman.[151]

173. Article 27 of the ICSID Convention has nothing to do with when a CAFTA Party must notify another State Party of its intent to use the denial of benefits provision. According to the Treaty, a State must simply provide notice before benefits are denied, which El Salvador did.

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[146] *See* Schreuer, at 420 ("the words 'No Contracting State shall give diplomatic protection' must not be read in isolation but apply only in respect of a dispute that the parties have consented to submit or have submitted to ICSID arbitration.") (emphasis added).
[147] Counter-Memorial, para. 348.
[148] CAFTA Article 10.20.2.
[149] CAFTA Article 19.1. Given that some CAFTA provisions outside of Chapter 10 are relevant, El Salvador is submitting the Preamble to CAFTA as well as Chapters 1 and 17-20 as **Authority RL-111**.
[150] C & M Capitolink, Lobbying Registration, Oct. 24, 2007 (R-118).
[151] Crowell & Moring LLP Lobbying Report for Pacific Rim Mining, Jan. 20, 2010 (reporting advocacy on trade issues during the fourth quarter of 2009) (**Exhibit R-124**).

d. Claimant's arguments about prospective application must be rejected

i. The findings based on the ECT are inapplicable

174. The findings of tribunals that the denial of advantages clause in the ECT requires prospective application are not applicable to the CAFTA provision.

175. 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. The ECT provision only applies to Part III, "Investment Promotion and Protection," which contains the substantive protections of investments, and not to Part V, which has the dispute settlement provisions. By contrast, CAFTA Article 10.12.2 applies to all of Chapter 10, which includes both substantive protections and dispute settlement. This difference is crucial. The tribunals interpreting the ECT determined that the denial of advantages provision did not affect jurisdiction precisely because its application is limited to Part III, which does not include the dispute settlement provisions.[152]

176. In contrast, because the CAFTA denial of benefits provision encompasses the dispute settlement provisions, it clearly affects jurisdiction. The dispute resolution mechanism, including the consent offered to investors of other CAFTA Parties, is among the benefits denied under Article 10.12.2. If the conditions are met for a Party to deny benefits, then there is no consent, no right to initiate claims, no obligations on which to base claims, and therefore, no jurisdiction. Thus, denial of benefits does not take rights away from an investor because the rights never existed for that investor.

177. Claimant argues that notice cannot "be provided to the investor *after* the parties have consented to arbitrate a dispute before ICSID, because a State may not unilaterally

[152] *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 (RL-72) ("Since 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."); *Plama v. Bulgaria*, para. 148 (RL-66).

withdraw its consent to arbitration once that consent has been perfected."[153] But the State is not withdrawing consent. Any consent, and the conditions on it, remain intact. There simply is no consent to arbitrate disputes with an enterprise that meets the conditions of Article 10.12.

178. 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.

ii. Pac Rim Cayman could not possibly have had any legitimate expectation of CAFTA protection

179. In direct contradiction of its attempt to show that it did not abuse the international arbitration process by arguing that the dispute did not exist until 2008, Claimant complains that it should not be denied benefits "long after the investment is made and the events giving rise to the dispute have occurred."[154] Claimant's argument that denying it benefits would prevent a "predictable commercial framework" is flawed. When Pacific Rim Mining Corp. decided to invest in El Salvador, it had no expectations of CAFTA protection.

180. First, CAFTA did not exist when Pacific Rim Mining Corp., which is not the Claimant in this case, invested in El Salvador in 2002. Second, Pac Rim Cayman only became a U.S. national, and thus an investor of a CAFTA Party, in December 2007. El Salvador could not have denied benefits to Pac Rim Cayman before 2007, as there were simply no benefits to deny.

5. El Salvador's invocation of the Denial of Benefits clause should be upheld

181. El Salvador has shown that Claimant has no substantial business activities in the territory of any Party other than El Salvador and that persons of a non-Party own or control Claimant. El Salvador notified the U.S. Government of its intention to deny benefits to Pac Rim Cayman and thereby fulfilled the notice requirement to invoke CAFTA Article 10.12.2.

[153] Counter-Memorial, para. 372.
[154] Counter-Memorial, para. 371.

182. Denying benefits in this case fulfills the CAFTA objectives of diversifying trade "between the Parties" and facilitating cross-border movement of goods and services "between the territories of the Parties," as well as that of providing "effective procedures for the implementation and application of this Agreement . . . and for the resolution of disputes."[155] Allowing non-Party investors to abuse CAFTA by reregistering subsidiaries after having invested would run counter to the purpose of encouraging trade and opportunities between CAFTA Parties. Moreover, imposing additional requirements not found in the text of the Treaty on State Parties seeking to invoke the denial of benefits clause would frustrate the Parties' intent and prevent effective implementation of the Agreement.

183. Consequently, El Salvador may rightfully deny benefits to Pac Rim Cayman. Although Claimant would like to add language and requirements to Article 10.12.2 so that it could never be invoked to protect a State, the CAFTA Parties included a clear and specific statement of when and how benefits could be denied in Article 10.12. El Salvador has shown that those requirements are met in this case.

B. Jurisdiction Ratione Temporis

184. If the Tribunal wishes to continue examining jurisdiction beyond the first two objections, the fact that Pac Rim Cayman was not a national of the United States until December 2007 has jurisdictional implications beyond the abuse of process objection.

185. As stated in the Memorial[156] and accepted by Claimant,[157] the provisions of CAFTA Chapter 10, including the dispute settlement provisions, only apply after CAFTA entered into force for the United States and El Salvador on March 1, 2006. In addition, because Pac Rim Cayman did not become a national of the United States until December 2007, CAFTA protections and benefits could have only been available to Pac Rim Cayman after December 2007. Three important jurisdictional implications follow from these facts.

[155] CAFTA Article 1.2 (RL-111).
[156] Memorial on Jurisdiction, para. 302.
[157] Counter-Memorial, para. 220.

186. First, having only acquired United States nationality in December 2007, CAFTA would only recognize Pac Rim Cayman as an investor and would cover investments made by Pac Rim Cayman after December 2007. There are no such investments by Pac Rim Cayman.

187. Second, the Tribunal does not have jurisdiction over disputes based on any measure, act, or fact that took place before Pac Rim Cayman acquired United States nationality on December 13, 2007. In this case, all relevant measures, acts, and facts affecting the application for the El Dorado mining exploitation concession took place before December 2007 and the dispute had definitively crystallized by that date.

188. Third, setting aside for a moment that the measures, acts, and facts that caused the dispute predate Pac Rim Cayman's change of nationality, CAFTA also imposes a three-year time limit to bring CAFTA claims. The three-year time limit starts counting from the time Claimant knew or should have known of the alleged breach and that damages had occurred. It is undisputed that by December 2004, Claimant had notice that MARN did not issue the environmental permit within the statutorily mandated adjudication period and it is this failure to issue the permit that constitutes the alleged breach of El Salvador's obligations under CAFTA. Claimant also had notice that it had suffered damages as a result. Even if the three-year time limit to bring claims in arbitration about the El Dorado dispute did not start until CAFTA entered into force on March 1, 2006, Pac Rim Cayman did not file its Notice of Arbitration within three years of that date.

1. Pac Rim Cayman does not qualify as a United States investor under the facts of this case

189. Claimant's point that a covered investment can exist before the treaty comes into force[158] does not alter the fact that Pac Rim Cayman never made or attempted to make an investment as a national of a Party. The covered investment in a Party's territory must be "*of an investor of another Party in existence as of the date of entry into force of this Agreement or*

[158] Counter-Memorial, para. 187.

established, acquired, or expanded thereafter."[159] Pac Rim Cayman's alleged investment was not of an investor of another Party when the treaty entered into force and was not established, acquired, or expanded thereafter.

2. There is no jurisdiction over a dispute based on any measures, acts, or facts that occurred before Claimant became a national of a CAFTA Party in December 2007

a. Clarification of El Salvador's arguments

190. El Salvador is not arguing, as Claimant alleges,[160] that the Tribunal cannot look at events that took place before the change of nationality to understand and determine whether a measure, act, or fact that took place after December 2007 was a breach of CAFTA. Nor is El Salvador arguing that only because the factual pattern that eventually gives rise to a particular dispute began before Claimant acquired United States nationality, a dispute that arises from measures, acts, or facts that take place after December 2007 cannot be decided by the Tribunal.

191. What El Salvador is arguing is that the Tribunal does not have jurisdiction under CAFTA to decide whether any measure, act, or fact that took place before December 13, 2007 constituted a breach of El Salvador's obligations under CAFTA, or award any damages related to such measures, acts, or facts. The relevant issue is the date on which the measure, act, or fact that constitutes the alleged breach took place. If this date is prior to the acquisition of a CAFTA nationality, there is no jurisdiction.

192. According to Claimant, "*Railroad Dev. Corp. v. Guatemala* . . . simply stands for the proposition that for an act to be considered a continuing act, conduct must occur both before and after the treaty enters into force."[161] El Salvador need not dispute Claimant's understanding of that case. Here, Claimant points to no conduct by El Salvador affecting its investment after its change of nationality.

[159] Counter-Memorial, para. 187 (quoting CAFTA Article 2.1) (emphasis added).
[160] Counter-Memorial, para. 218.
[161] Counter-Memorial, para. 229.

193. Without needing to consider the merits of the case, it is clear from the facts already placed on the record during the Preliminary Objection phase that the conduct that resulted in the principal dispute in this case, related to PRES's application for a mining exploitation concession, started and was completed before December 13, 2007 and is thus beyond the temporal scope of CAFTA and beyond the Tribunal's jurisdiction.

b. The measure, acts, and facts giving rise to the dispute about El Dorado were completed before Claimant's nationality was changed in December 2007

194. The evidence before the Tribunal clearly shows that the measure, acts, and facts that were necessary to establish the existence of a dispute about Claimant's application for the El Dorado exploitation concession took place before December 2007.

195. With regard to the environmental permit, MARN did not meet the time limit established in Salvadoran law to either issue or deny the environmental permit by December 2004.[162] Although there were further communications between MARN and Pacific Rim, Claimant admits that official communications about the application ceased in December 2006.

196. Additionally, with regard to the application for the exploitation concession filed with the Bureau of Mines, once the Bureau of Mines sent the two warning letters to PRES in October and December 2006, triggering the provisions of Article 38 of the Mining Law, the application was effectively terminated and nothing PRES could do after the 30-day extension to submit the environmental permit could revive it. Therefore, PRES's application for the El Dorado mining exploitation concession was in effect legally terminated by January 2007.

197. With regard to the independent legal requirement to submit evidence of ownership or authorization to use the surface area of the concession, El Salvador did not have any legal duty or obligation to change its laws in favor of Pacific Rim's application and thus regardless of when El Salvador decided not to amend its national legislation, conduct related to this was not a breach of CAFTA or any other legal obligation. In any event, it is also undisputed

[162] Letter from PRES to Minister of the Environment, Dec. 15, 2004 (R-55).

that the disagreement about the interpretation of the law, and the attempts to have the provision of the law reinterpreted, amended, or to have a new law passed, all took place before the change of nationality. As demonstrated during the Preliminary Objections phase and now accepted by Claimant, all these attempts to change the law to accommodate Claimant took place in 2005 and 2006, followed by Claimant's attempt to pass a new law in 2007.

198. Therefore, any alleged measure (including by omission), acts, and facts that gave rise to the dispute about the El Dorado exploitation concession had clearly taken place before the change of nationality in December 2007, making the dispute about El Dorado outside the jurisdiction of the Centre and the competence of the Tribunal.

c. Claimant's attempts to disguise the existence of a dispute before the change of nationality must be rejected

199. In a futile attempt to expand the temporal scope of the dispute, Claimant alleges that there is only one measure at issue in this arbitration, which according to Claimant, is an alleged *de facto* ban on mining, which either occurred in March 2008 with a press report about President Saca's statements, or constitutes a continuing or composite act that was only apparent as a dispute starting on the date of the press report about President Saca's statements in March 2008—conveniently three months after the change of nationality.[163]

200. Claimant argues that "[i]ndividual omissions by MARN and MINEC in the period from 2004 through 2006 did not give rise to a 'dispute' as that term is used in CAFTA."[164] However, as Claimant itself must admit, press reports of President Saca's statements do not constitute a measure.[165]

201. Likewise, not issuing the environmental permit and not granting the concession application is not the result of "several omissions" or a "continued" omission nor do they constitute "composite acts" for purposes of Articles 14 and 15 of the ILC Articles on the

[163] Counter-Memorial, paras. 163, 168, 288.
[164] Counter-Memorial, para. 376.
[165] Counter-Memorial, para. 204.

Responsibility of States for Internationally Wrongful Acts. Even on the facts asserted by Claimant, there was only **one** application for an environmental permit and only **one** omission to issue the environmental permit. That omission occurred in December 2004. There was also only **one** application for the El Dorado exploitation concession, and that one application terminated in January 2007. As El Salvador noted in its Memorial, Claimant could have submitted another application for an environmental permit, but it has not.[166] This is clear evidence that there are not "several omissions," but rather there was **one** omission regarding the environmental permit and **one** alleged omission regarding the concession application (which was inextricably related to the lack of the environmental permit), that were fully consummated before Pacific Rim Mining Corp. decided to change Claimant's nationality.

202. Claimant then asserts that "the Companies believed they were moving the project forward (albeit slowly) – with the overall support of the Salvadoran government – through at least early 2008."[167] But Claimant admits that "in 2007 the Companies were unable to get MARN to engage on the issue of an environmental permit for exploitation concessions at El Dorado."[168] Claimant alleges that, even so, a dispute did not exist because the Companies were continuing their exploration activities at El Dorado and elsewhere and "were repeatedly assured by high-level Government officials that exploitation permits for El Dorado were forthcoming."[169]

203. Claimant's alleged belief was clearly misplaced and contrary to what it always knew—that an exploitation concession could not be granted without an environmental permit. Thus, as El Salvador argued, once the environmental permit was not granted and presumptively denied, there was a dispute.

204. Claimant admits: "PRES could have filed an administrative action in El Salvador in 2007, but it was under no obligation to do so."[170] Claimant had the right to go to Salvadoran

[166] Memorial, para. 318.
[167] Counter-Memorial, para. 96.
[168] Counter-Memorial, para. 97.
[169] Counter-Memorial, para. 97.
[170] Counter-Memorial, para. 119.

courts in 2004. It did not take advantage of that right, but tried lobbying instead. Having finally admitted that that lobbying was unsuccessful, Claimant cannot now say its lobbying stretched a finite occurrence into a continuing act.

205. Finally, according to Claimant, "[t]he only time prior to 2008 that any senior Salvadoran official was reported as expressing any opposition to mining came in July 2006, when Mr. Hugo Barrera, the Minister of the Environment, was reported as stating that he 'personally' found mining to be 'inconvenient' ('*no conveniente*') for El Salvador."[171] As noted above, this is an understatement. In fact, on July 9, 2006, the Salvadoran newspaper, *La Prensa Gráfica*, published a spread titled "Farewell to Mining" which included an interview with Minister of the Environment Barrera under the banner, "Pacific Rim will not obtain the exploitation permit for the El Dorado mine in San Isidro, Cabañas, assured the Minister of the Environment."[172] In the interview, Mr. Barrera explained that the Ministry would not authorize any project that would harm the environment and that he could not imagine any mining project with no negative effect on the environment.

206. Likewise, a June 2007 *La Prensa Gráfica* article quoted the new Minister of the Environment, Carlos Guerrero, explicitly ruling out any changes to the existing legislation for exploitation concessions.[173] In addition, an article in the *Diario de Hoy* confirmed that the Ministry would not be granting concessions until the country concluded a study of the effects of mining, which would not be completed for at least a year.[174]

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[171] Counter-Memorial, para. 122.
[172] *La Prensa Gráfica*, *Enfoques*, "Adiós a Las Minas", July 9, 2006 (Interview with Minister of the Environment) (R-120).
[173] *La Prensa Gráfica*, "Reforma de ley en espera", June 14, 2007 (R-121) ("Carlos Guerrero, ministro de Medio Ambiente, confirmó que realizar cambios en la actual legislación que rige la concesión de permisos de explotación de minas está descartado.") ["Carlos Guerrero, Minister of the Environment, confirmed that changes to the current legislation regulating approval of mining exploitation permits have been ruled out."].
[174] *El Diario de Hoy*, "Protesta contra explotación minera", June 24, 2007 (R-122). The Spanish text reads: "sostiene que no se concederán licencias de explotación, algunas ya solicitadas por las empresas, hasta que el país cuente con un diagnóstico sobre los efectos de la minería, mismo que podría tardar por lo menos un año."

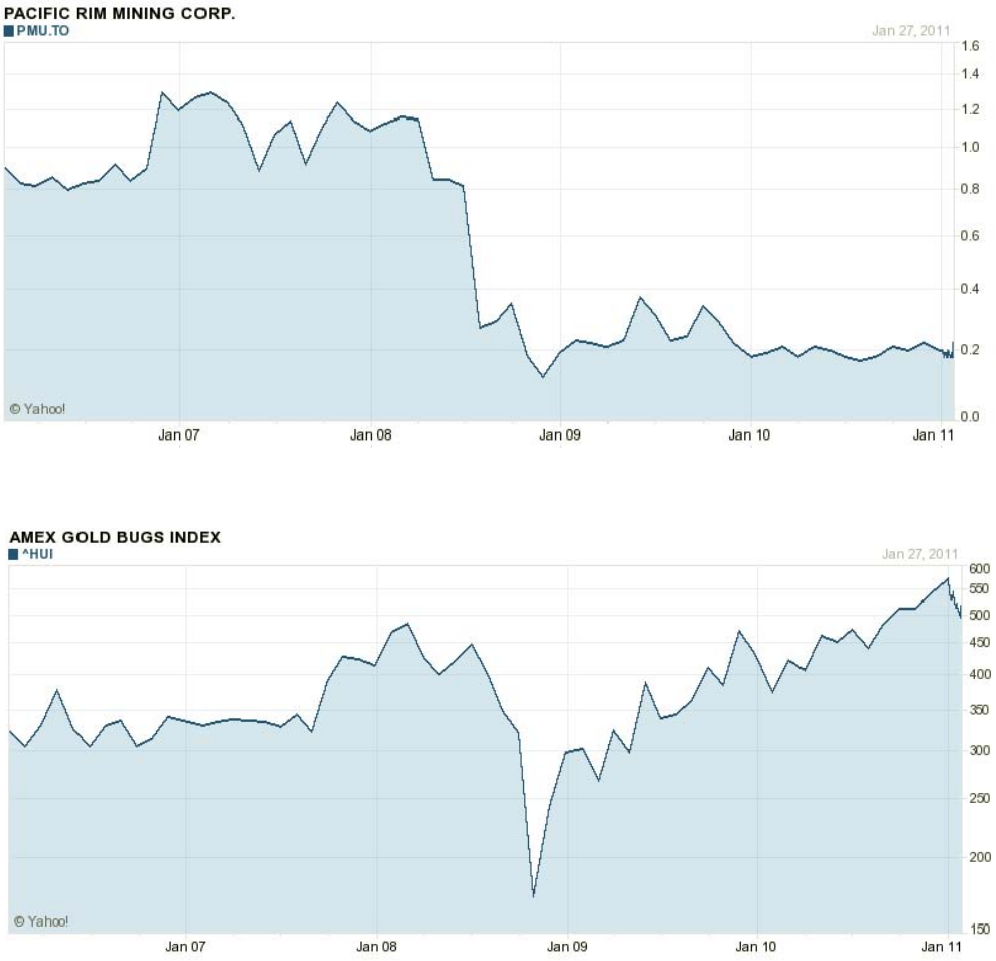
207. These pre-2008 newspaper articles confirm that the announcement about the need for caution and requiring a study of the environmental impacts of mining in El Salvador before granting any exploitation concessions was not a new announcement in 2008, and thus a newspaper article reporting President Saca's statements cannot be relevant to determine when the dispute about El Dorado was known to Claimant, much less defining when the dispute was crystallized as a dispute.

208. In sum, Claimant's self-serving version of events simply does not square with the facts. Claimant knows that to assert jurisdiction, it must allege that the Government took some measure that affected its investment after December 2007. The facts show that there was no such measure. The only alleged conduct that affected any investment took place between 2004 and January 2007. Everything that Claimant describes as taking place thereafter was lobbying efforts to resolve the dispute that arose from such measures. Claimant even had ample evidence that the lobbying efforts were failing prior to its change of nationality, as indicated by the 2006 and 2007 press reports cited above. It seems likely that it was the perceived failure of these lobbying efforts in El Salvador that led Pacific Rim Mining Corp. to hire Claimant's counsel's lobbying affiliate in the United States in October of 2007 and soon thereafter to change Claimant's nationality to create CAFTA jurisdiction. The 2008 press reports to which Claimant attaches such importance were at most a further signal to Claimant that its lobbying efforts were not going to succeed. They did not constitute a new measure or the continuation of any past measure or conduct giving rise to a breach of CAFTA.

d. <u>The drop in the value of Pacific Rim Mining Corp.'s shares is irrelevant to the determination of when the dispute crystallized</u>

209. The press reports regarding President Saca's statement about the need for caution before issuing mining permits, no different than the reports of the Minister's statements in 2006, did not cause Pacific Rim Mining Corp.'s stock to lose value.

210. Without the need to discuss damages and causation, El Salvador notes that the drop in the price of Pacific Rim Mining Corp.'s shares coincided with worldwide decline in stock values in 2008, and mirrors the drop in other gold stock values, as shown graphically below.



211. The first graph is a five-year chart showing the price for Pacific Rim Mining Corp.'s shares, similar to the graph submitted by Claimant with its Counter-Memorial. The second graph is the Amex HUI index, showing how 15 major gold mining companies performed during the same period. As is clear from the graphs, the drop in Pacific Rim Mining Corp.'s share value, falling most steeply between June and October 2008, corresponds with a steep fall for the gold company index at the exact same time. The fact that the value for Pacific Rim's

shares did not recover after the general fall in share values would require additional analysis, but the relevant point is that the drop in Pacific Rim's share value coincided with a general drop in share value in the gold industry.

212. Surely Claimant does not expect the Tribunal to believe that a newspaper article reporting that the President of El Salvador said that he would not support granting mining permits until the environmental concerns regarding mining in El Salvador were resolved caused the entire international gold market to fall.

e. Claimant's other attempts to create confusion about the dispute must be rejected

213. This case is not at all similar to *RDC v. Guatemala*, where there was an executive act affecting the investment after CAFTA entered into force. A newspaper report about a statement by President Saca that Claimant now claims explains why Claimant had not received a concession for more than three years is not a "measure." Even Claimant states, "Pac Rim Cayman's contention is not that the statements themselves are measures."[175] According to Claimant, the measure is the "unwritten practice" of implementing the alleged ban. However it is defined by Claimant, the relevant acts and omissions preventing Claimant from obtaining a concession occurred and were completed between 2004 and January of 2007.

214. El Salvador never argued that a practice cannot be a measure. But the timing of the "measure" depends on the specific actions that are part of the alleged practice. Those actions took place in 2004, and in any event were definitively completed by January 2007 when the final 30-day time limit to submit the environmental permit expired.

215. Claimant incorrectly asserts, "[b]ecause the ban, unlike a law or regulation, is not a written measure, and because it consists largely of failures to act, its existence could only be eventually inferred from the course of conduct of government agents over time."[176] But, of course, the fact that the permit was not issued within the statutory period in 2004 and the

[175] Counter-Memorial, para. 204.
[176] Counter-Memorial, para. 226.

cessation of official communication from MARN in 2006, as well as the Government's refusal to reinterpret the law, to amend the law, and then to replace the law would have led any reasonable applicant to "infer" well before the end of 2007 that it was not going to receive the concession it wanted within the existing Mining Law.

216. Indeed, the only true disagreement between the parties on this point regards what the measure is and thus the date of the measure. Claimant asserts that regardless of the facts that constitute the measure having a definitive impact on an investment and the date on which those facts took place, the date of a measure can be advanced several years by a head of State's comments reported in a newspaper years after the facts that constitute the measure occurred. El Salvador remains firm that the dates of the alleged acts or omissions affecting Claimant's investment are the relevant dates, particularly because they were all known to Claimant at the time.

217. In a final attempt to move the date of the dispute, Claimant argues that all the exchanges between MARN and MINEC and Claimant are evidence that there was a "mere disagreement" between the parties, and that a mere disagreement is not a dispute "for purposes of CAFTA."[177]

218. First, Claimant argues that there is a difference between a "disagreement" and a dispute. However, the definition of dispute set forth by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions*, which has been invariably adopted by ICSID tribunals, defines dispute as a "*disagreement* on a point of law or fact, a conflict of legal views or of interests between two persons."[178] Therefore, Claimant is trying to make a distinction without a difference. A dispute is defined as a disagreement between the parties and Claimant admits that such a disagreement existed between 2004 and 2006.

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[177] Counter-Memorial, paras. 208, 211.

[178] *Case of the Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (Series A) No. 2, Judgment No. 2, at 11 (Aug. 30) (emphasis added) (**Authority RL-112**). For a list of ICSID cases where the definition of dispute elaborated by the P.C.I.J. in the *Mavrommatis Palestine Concessions* Judgment has been adopted see Schreuer, at 93-94, n.45 (RL-110).

219. Second, Claimant argues that "[w]hile the investor may feel aggrieved, the act or omission of which it complains will not necessarily constitute a breach of a CAFTA obligation; nor will it necessarily cause loss or damage even if it does constitute a breach of a CAFTA obligation."[179] While Claimant's case certainly fits this description, whether a breach of CAFTA and any damages arising thereon can be established has nothing to do with the relevant question for this objection: whether a dispute existed between the parties before Claimant acquired U.S. nationality in 2007.

3. In any event, CAFTA's three-year statute of limitations would preclude consideration of the main dispute in this arbitration

220. 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 enterprise had incurred loss or damage.[180] 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 purposes of 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.

221. In this case, the evidence already before the Tribunal clearly shows that Claimant first knew in December 2004 that the environmental permit was not issued within the time limit fixed by law.[181] The same evidence also shows that PRES told El Salvador's Minister of the Environment that the failure to issues the environmental permit was causing economic harm to the company.

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[179] Counter-Memorial, para. 211.

[180] 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 (RL-87).

[181] Letter from PRES to Minister of the Environment, Dec. 15, 2004 (R-55).

222. Even if it may be understandable that Pacific Rim did not want to initiate arbitration or litigation in December 2004, three years is ample time to realize that the environmental permit was not being issued and that a dispute existed about the environmental permit and the concession application that could not be admitted, evaluated, or granted without the permit. This is why CAFTA gives a claimant three years to initiate arbitration or lose that possibility.

223. Even on the argument that the three years could not start counting from the date of the omission that could allegedly constitute a breach of CAFTA (December 2004), but rather could only count from the date CAFTA entered into force (March 1, 2006), Claimant did not initiate arbitration within the three-year time limit. The Notice of Arbitration was not filed until April 30, 2009, almost two months after the three-year time limit had ended. As a result, if the Tribunal wants to look beyond the fact that the dispute about El Dorado predates the date of Claimant's change of nationality, the three-year time limit under CAFTA does not allow Claimant to bring the claims about the application for the El Dorado exploitation concession.

224. Any way the Tribunal wants to look at this dispute—as a dispute that predates CAFTA or, in the alternative, as a dispute that is too old to be submitted to arbitration—the result is the same: there is no jurisdiction over the main dispute in this arbitration related to PRES's application for a mining exploitation concession in El Dorado.

C. There is no jurisdiction under the Investment Law of El Salvador

1. <u>There is no consent to ICSID jurisdiction in the Investment Law</u>

225. Pursuant to Article 25 of the ICSID Convention, ICSID jurisdiction 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."[182] Article 15 of the Investment Law of El Salvador does not constitute consent to arbitration for purposes of Article 25 of the ICSID Convention.

226. Consent of the parties "is the cornerstone of the jurisdiction of the Centre."[183] Therefore, the determination whether Article 15 of the Investment Law constitutes consent is of the utmost importance and is a determination the Tribunal must make as the judge of its own competence.[184]

227. The Tribunal's duty to interpret Article 15 cannot be replaced, as Claimant suggests, by the unreasoned reference to Article 15 in the *Inceysa* award, commentary, and what Claimant erroneously refers to as the "official position" of El Salvador with respect to Article 15 of its Investment Law. The Tribunal is the judge of the probative value of these documents and the Tribunal must, as the judge of its own competence, engage in a conscious interpretation of Article 15 to decide whether Article 15 constitutes consent for purposes of Article 25 of the ICSID Convention.[185] As El Salvador set forth in its Memorial, such an independent analysis leads to the conclusion that Article 15 does not constitute consent.

a. <u>The Tribunal has the duty to reach its own determination</u>

228. The Tribunal is the judge of its own competence. El Salvador asks the Tribunal to determine its own jurisdiction with respect to Article 15 in light of four principles applicable to the interpretation of unilateral acts of States. As El Salvador noted in its Memorial, these principles have been invoked by previous investment arbitration tribunals when interpreting national legislation as the source of consent to ICSID arbitration.[186]

229. The applicable principles for interpreting El Salvador's Investment Law are as follows. First, when the scope of a unilateral declaration is unclear, such declaration must be *interpreted restrictively*. Second, unilateral declarations may only create legal obligations *if*

[182] ICSID Convention, Art. 25(1) (emphasis added).
[183] Report of the Executive Directors on the Convention, para. 23.
[184] ICSID Convention, Art. 41(1).
[185] ICSID Arbitration Rule 34(1).
[186] Memorial on Jurisdiction, para. 345.

stated in clear and specific terms. Third, *emphasis on the intention of the depositing State is required*. Consideration must be given to the intention of the Government *at the time it made the declaration*. Fourth, given that unilateral declarations are made *erga omnes*, the interpreter must proceed *with great caution in determining the legal effects of such declarations*.[187]

230. Claimant regards these principles as a "complicated interpretative exercise"[188] and advocates for adopting references to Article 15 contained in a single unreasoned ICSID Award, commentary, and certain UNCTAD material instead of engaging in an interpretative analysis.[189]

231. Further, Claimant argues that Article 15 of the Investment Law should not be interpreted restrictively. Claimant seeks support for this conclusion in the *SPP v. Egypt* tribunal's determinations on Article 8 of Egypt's Law No. 43 and Claimant's own flawed reading of the *Mobil v. Venezuela* decision on jurisdiction.

232. Claimant's reliance on the *SPP v. Egypt* tribunal's comment that "jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith"[190] is misplaced. This statement by the tribunal was related to its inquiry, as a "second preliminary matter," of "whether jurisdictional instruments must be interpreted restrictively."[191] El Salvador is not arguing that the Investment Law is to be interpreted restrictively because it is a jurisdictional instrument. A restrictive interpretation of the Investment Law is appropriate <u>not</u> because it is a jurisdictional instrument, which it is not, but because it is a unilateral declaration under international law and as such is subject to a specific interpretive regime. A unilateral declaration requires a restrictive interpretation if the nature or scope of the obligation allegedly created is unclear. The *SPP v. Egypt* tribunal did not actually apply the principles of interpretation of unilateral declaration and its decision, therefore, does not stand for the proposition that unilateral declarations are *not* to be interpreted restrictively.

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[187] Memorial on Jurisdiction, para. 343.
[188] Counter-Memorial, para. 427.
[189] Counter-Memorial, para. 427.
[190] Counter-Memorial, para. 445, n.538.
[191] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, Apr. 14, 1988, para. 62 (RL-89).

233. At the same time, Claimant wrongly states that the tribunal in *Mobil v. Venezuela* "specifically rejected a restrictive interpretation for unilateral acts of the State, such as national legislation . . . because they are formulated in the framework and on the basis of a treaty."[192] In support of this conclusion, Claimant cites paragraph 90 of the *Mobil v. Venezuela* decision, where the tribunal merely stated:

> Rules of interpretation are however somewhat different when, as in the present case, unilateral acts are formulated in the framework and on the basis of a treaty, such as the ICSID Convention.[193]

234. It is clear from the text of the passage above that the tribunal is not "specifically rejecting" the applicability of the principle of restrictive interpretation of unilateral acts of States to national legislation, as Claimant wrongly suggests.[194] It is equally clear from the rest of the decision of the tribunal, as discussed in detail in El Salvador's Memorial, that the tribunal applied the interpretive rules for unilateral declarations when interpreting the Venezuelan investment law. The tribunal in the passage quoted by Claimant is referring to the simple and uncontroversial point that in the context of ICSID, the determination of whether an instrument contains consent to arbitration must be made with reference to Article 25 of the ICSID Convention, the instrument where consent is defined. Indeed, the tribunal is merely indicating that the rules of interpretation of unilateral declarations have to be applied in a way that reflects the interplay between the unilateral declaration and the ICSID Convention. El Salvador's position is perfectly in line with the reasoning of the tribunal. El Salvador has clearly indicated that Article 15 of the Investment Law of El Salvador does not constitute consent to arbitration *for purposes of Article 25 of the ICSID Convention*.

235. In any event, despite its strained interpretation of the *Mobil v. Venezuela* decision, Claimant recognizes that if there is doubt regarding the scope of the obligations resulting from a

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[192] Counter-Memorial, para. 447.
[193] *Mobil v. Venezuela*, para. 90 (RL-51).
[194] *See Mobil v. Venezuela*, para. 95 (indicating that the tribunal will apply the "rules of international law governing the interpretation of unilateral acts formulated within the framework and on the basis of a treaty" to interpret the Investment Law of Venezuela).

unilateral declaration, that unilateral declaration must be interpreted restrictively.[195] Claimant attempts to avoid the application of this rule by asserting simply that Article 15 is clear and thus should not be interpreted restrictively.[196] However, El Salvador presented clear and cogent arguments in its Memorial demonstrating that the scope of Article 15 does not extend to consent to arbitration under the ICSID convention. Claimant's Counter-Memorial indicates that it might also make arguments that the scope is broader. Therefore, at most, Claimant has shown that there may be doubt as to the scope of any obligation created by Article 15. If there is such doubt, Article 15, as a unilateral declaration, must be interpreted restrictively.

236. In addition, El Salvador demonstrated that the application of *three* additional principles applicable to the interpretation of unilateral declarations results in the conclusion that Article 15 of the Investment Law cannot be interpreted as constituting consent to arbitration under Article 25 of the ICSID Convention.

237. In conclusion, El Salvador respectfully requests that this Tribunal engage in a conscious interpretation of Article 15 of the Investment Law in light of the international law principles applicable to the interpretation of unilateral declarations. As demonstrated in El Salvador's Memorial, El Salvador is confident that the proper application of these principles will lead the Tribunal to the conclusion that Article 15 does not constitute consent to arbitration under Article 25 of the ICSID Convention.

i. <u>The reference to Article 15 in the *Inceysa* award is not a reasoned determination on its scope</u>

238. Claimant maintains that the *Inceysa* award "determined" that Article 15 of the Investment Law provides for ICSID jurisdiction. However, the *Inceysa* tribunal declared in four lines that El Salvador had clearly made a unilateral offer to foreign investors to submit disputes to ICSID by Article 15 of the Investment Law. This four-line statement in the Award cannot replace this Tribunal's own analysis of Article 15.

[195] Counter-Memorial, para. 449.
[196] Counter-Memorial, para. 449.

239. As El Salvador explained in its Memorial, the nature of El Salvador's objection in the *Inceysa* arbitration made it unnecessary for El Salvador to argue, and for the tribunal to decide, that the Investment Law of El Salvador does not constitute consent to ICSID arbitration.

240. The focus in the *Inceysa* case was on the illegality of the investment by a foreign company that manipulated a shell company and manufactured false evidence of business activity and experience that were attributed to the shell company. El Salvador's strategic decision in that case was to argue, successfully, that the investment was not covered by the relevant BIT and the Investment Law because it had been illegally procured by fraud. Having already established the facts to prove that Inceysa's alleged investment was made through fraud to show that there was no jurisdiction under the BIT, El Salvador chose to simply use the same factual basis to establish that the investment did not fall under the protection of the Investment Law either, rather than starting new arguments concerning lack of consent.

241. Therefore, the *Inceysa* case is not relevant on the issue of whether Article 15 of the Investment Law constitutes consent, and it is not necessary for the Tribunal to consider that case in order to make its own decision in the present case.

ii. Commentary cannot replace the Tribunal's analysis

242. Claimant's search for support that Article 15 of the Investment Law provides a unilateral offer of consent has produced nothing persuasive.

243. First, Claimant cites Professor Schreuer's Commentary, but the reference in the Commentary simply notes that the *Inceysa* tribunal concluded that Article 15 constituted unilateral consent. The commentators do not endorse the *Inceysa* decision or otherwise comment on the text of Article 15. Therefore, Professor Schreuer's reference to the case adds no support to Claimant's position and what has been established above with regard to the *Inceysa* decision applies to the Commentary.

244. Second, Claimant relies on Dr. Oliva de la Cotera's article entitled *Sistema de Protección de Inversiones Extranjeras y el Arbitraje del CIADI en la República de El*

Salvador.[197] Dr. de la Cotera severely criticizes the Investment Law as "excessively permissive" and the State as having been "extremely generous in its laws and in the negotiations of its free trade agreements mistakenly thinking that they would be to its benefit."[198] El Salvador has demonstrated in its Memorial that Dr. de la Cotera's concerns are unwarranted. Contrary to his fears, El Salvador was not "extremely generous" in the Investment Law. El Salvador never intended for Article 15 of the Investment Law to constitute consent to arbitration for purposes of Article 25 of the ICSID Convention.

245. Finally, Claimant wrongly suggests that the UNCTAD Report, "Investment Policy Review, El Salvador," is somehow El Salvador's official position on Article 15 of the Investment Law.[199] El Salvador's official position can only come from El Salvador's duly authorized representatives. In any event, Claimant certainly could not have relied on this UNCTAD document when it invested in El Salvador for the proposition that Article 15 of the Investment Law constitutes consent to arbitration. The document was issued in April 2010, after this arbitration had commenced.[200]

246. Thus, this Tribunal should not rely on any of these documents in reaching its determination about Article 15 of the Investment Law. The Tribunal must look at the text of the law and relevant evidence of El Salvador's intent in order to interpret Article 15 in accordance with the principles of interpretation of unilateral acts of States. Despite Claimant's arguments to the contrary, prior to this arbitration, El Salvador has not taken "an official position" on whether or not Article 15 provides unilateral consent to ICSID. El Salvador has now presented its position that Article 15 does not provide consent, and this Tribunal must make a determination on this issue.

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[197] Claimant includes Dr. de la Cotera's article as Claimant's Legal Authority CL-148.
[198] Oliva de la Cotera, at 12. The original Spanish text provides: "El Estado salvadoreño ha sido extremamente obsequioso en sus leyes y en la negociación de los tratados de libre comercio, partiendo del mal entendido que siempre le beneficiarán."
[199] Counter-Memorial, paras. 435-439.
[200] Investment Policy Review (El Salvador) United Nations Conference on Trade and Development, New York and Geneva (2010) (CL-147).

b. The BITs signed in 1999 are the most relevant for determining the State's intent when the Investment Law was discussed

247. Claimant argues that the BITs ultimately signed in 1999 and one in early 2000 are not contemporaneous with the Investment Law of 1999, and thus should not be considered by the Tribunal. Instead, and in an effort to avoid commenting on the BITs relied upon by El Salvador in its Memorial, Clamant asks the Tribunal to consider the BITs signed between 1994 and 1998.

248. In support of its conclusion that the 1994-1998 BITs are relevant, Claimant notes that the proposal for the Investment Law was submitted by the Executive to the Legislative Assembly in 1998.[201] Claimant clearly misses that the 1998 document was a *proposal* from the Executive to the Legislature to begin discussions over the text of what would ultimately become the Investment Law.

249. Laws come from the Legislature and the *Exposición de Motivos* that accompanies a law is a legislative document. The "drafters" of laws in El Salvador, and the Investment Law is no exception, are the members of the Legislative Assembly and not the Ministers of the Executive that may submit proposals of laws to the Legislature. The relevant intent with regard to legislation is the intent of the Legislature. The draft Investment Law was discussed in Congress from when the proposal was submitted in 1998 until it was promulgated as law in October of 1999. The BITs ultimately signed in 1999 were being contemporaneously negotiated when the Investment Law was being discussed within Congress throughout 1999. El Salvador respectfully asks the Tribunal to refer to its Memorial on Jurisdiction concerning the relevance of the 1999 BITs.

250. The 1994-1998 BITs cited by Claimant, on the other hand, are clearly not relevant. Claimant makes reference to BITs signed with Ecuador, the Swiss Confederation, Argentina, Chile, and Paraguay, all signed before the proposal of the Investment Law was submitted by the Executive to the Legislature in June 1998. Thus, these BITs are not relevant for the interpretation of the Investment Law.

[201] Counter-Memorial, para. 460.

2. Article 146 of the Salvadoran Constitution *only* allows the State to agree to arbitration *in treaties and contracts*

251. Claimant correctly notes that the text of Article 146 of the Salvadoran Constitution does not contain an express restriction on the State's authority to promulgate laws that contain offers to arbitrate.[202] Instead, Article 146 of the Constitution makes clear that the State is *only* authorized to submit to arbitration "in treaties and contracts." Article 146 simply does not mention legislation, *expressio unius est exclusio alterius*.

252. El Salvador explained the reasons for limiting the State's ability to submit to arbitration to treaties and contracts in its Memorial. It is sufficient to say for present purposes that the reason behind this provision is to allow the State to negotiate at arms length with its counter-parties in treaties and/or contracts so that mutual benefits can be derived from the State's submission to international arbitration.

3. Even if, for the sake of argument, Article 15 constituted consent, Claimant's claims would be inadmissible for failing to initiate conciliation before arbitration

253. 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."[203] 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.

254. 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.

[202] Counter-Memorial, para. 464.
[203] Investment Law of El Salvador, Art. 15 (RL-9; CL-4) (emphasis added).

4. Pac Rim Cayman is not a foreign investor under the Investment Law

a. Claimant attempts to rely on CAFTA for a determination of jurisdiction under the Investment Law

255. In its Memorial, El Salvador established that Claimant, Pac Rim Cayman, has not made any investments in El Salvador. The Investment Law considers as investors only those "who make investments in the country."[204] In its Counter-Memorial, Claimant utterly fails to respond to El Salvador's objection, and simply asserts that: (i) this argument is wrong for the same reasons that El Salvador's argument under CAFTA is wrong (despite the fact that El Salvador's arguments under CAFTA are actually different from the argument made with respect to the Investment Law); (ii) Pac Rim Cayman as a Cayman Islands company would have had access to ICSID arbitration through its ratification by the United Kingdom; and (iii) rather than repeating what has been said with respect to the other objections, it will rely on its submissions thereon for this objection.[205]

256. As the Tribunal will no doubt appreciate, Claimant has not addressed El Salvador's actual arguments that Claimant is not a foreign investor within the meaning of the Investment Law, and El Salvador cannot reply to Claimant's total lack of response. El Salvador will point out, however, that this is a clear example of the complications that come with dual invocation of jurisdiction and that this is precisely what the waiver requirement intends to avoid. Claimant is relying on its arguments based on CAFTA to respond to El Salvador's objection under the Investment Law, and CAFTA-related arguments are clearly not relevant to issues of jurisdiction under the Investment Law.

257. In any event, the fact remains that Pac Rim Cayman is not a "foreign investor" in El Salvador because it does not "make investments in the country." As a result, the Investment Law, whatever its scope, does not apply to Claimant.

[204] Memorial on Jurisdiction, paras. 379-380.
[205] Counter-Memorial, paras 467-469.

b. The Tribunal should pierce Pac Rim Cayman's corporate veil and deny jurisdiction under the Investment Law

258. Claimant purports to respond to El Salvador's arguments establishing the possibility of piercing the corporate veil under the Investment Law, and the factual reasons that justify piercing the veil, in two paragraphs of its Memorial.[206] Claimant argues that because El Salvador's objections based on the denial of benefits provision of CAFTA and abuse of process are unfounded, Claimant's place of incorporation should not be disregarded under the Investment Law. Again, CAFTA and the Investment Law are different legal instruments and El Salvador made very different arguments with respect to each. Claimant thus did not address or counter El Salvador's arguments under the Investment Law. In addition, Claimant argues that if the Tribunal considers it appropriate to pierce the corporate veil under the Investment Law, then it should pierce the veil(s) until it finds the persons who ultimately own Pacific Rim Mining Corp.

259. Claimant's limited response has no merit. First, whether piercing the corporate veil is possible under the Investment Law has to be determined in accordance with the text of the Investment Law, not CAFTA. Second, the Investment Law must be applied to the facts of this case—that Claimant is a shell company owned and controlled by a national of Canada which is not a party to the ICSID Convention. Third, Claimant asks the Tribunal to pierce the corporate veil of Pac Rim Cayman *and* Pacific Rim Mining Corp. to reach the shareholders of the latter in order to find jurisdiction under the ICSID Convention, but, as demonstrated above, Claimant has not produced a single piece of evidence in support of Claimant's contention that Pacific Rim Mining Corp. is owned by U.S. nationals and that those U.S. nationals control Pac Rim Cayman. Therefore, piercing the corporate veil of Pacific Rim Mining Corp., a Canadian company that has no right to initiate ICSID arbitration, would not result in a finding that the company is a national of a Contracting State to the ICSID Convention. Pacific Rim Mining Corp. cannot avoid the fact that it is Canadian and that Canada is not a Contracting State to the ICSID Convention.

[206] Counter-Memorial, paras. 470-471.

260. With respect to the first point concerning the interpretation of the Investment Law, El Salvador notes that this is a further example of the complexities of a case with dual invocation of jurisdiction and what the CAFTA waiver requirement is intended to prevent. The fact that the same facts trigger the denial of benefits provision in CAFTA and provide clear evidence of an abuse of the arbitration system has nothing to do with whether piercing the corporate veil is possible under the Investment Law, a question of statutory interpretation which has nothing to do with CAFTA's denial of benefits provision.

261. The investment subject of this dispute was made by a Canadian company entering El Salvador in 2002. The named Claimant, on the other hand, was incorporated by the Canadian company in the United States in December 2007, just weeks before it began hinting that it could resort to international arbitration. Under the Investment Law of El Salvador, the Tribunal is not restricted to a place of incorporation test to identify the real party in interest. It is thus appropriate to pierce the corporate veil to identify the real investor—the Canadian company Pacific Rim Mining Corp. Pacific Rim Mining Corp. is not an investor of a Contracting State of the ICSID Convention and it therefore is not entitled to even make a claim of jurisdiction under the Investment Law.

5. CAFTA waiver prohibits Pac Rim Cayman from bringing claims under the Investment Law

262. As noted in the Memorial on Objections to Jurisdiction, the CAFTA waiver requirement prohibits Claimant from bringing claims under the Investment Law in this CAFTA proceeding and simultaneously invoking jurisdiction under both instruments for alleged breaches arising out of the same measures. Claimant asks the Tribunal not to "re-visit" an issue already briefed and decided, but Claimant at least does not go so far as to say that the Tribunal's decision on El Salvador's Preliminary Objections using CAFTA's expedited procedure is *res judicata*, acknowledging that El Salvador can present its objection under this jurisdictional phase.[207]

[207] Counter-Memorial, paras. 472-473.

263. As noted above, Claimant's repeated attempts to respond to El Salvador's objection under the Investment Law with the same arguments used for the CAFTA objections is evidence of the complications intrinsic to proceedings with dual invocation of jurisdiction. The identity of facts in this case must not negate the differences between CAFTA and the Investment Law as two independent legal instruments. The complications of a case with dual invocation of jurisdiction have begun to surface and this is precisely what the waiver requirement in CAFTA is there to prevent. It may be that such complications are tolerated when there are dual invocations of jurisdiction under instruments that do not contain a waiver like the CAFTA waiver, but the CAFTA Parties made a clear determination that such complications are not permitted in arbitration initiated under CAFTA.[208]

264. El Salvador requests the Tribunal to refer to El Salvador's Memorial on Jurisdiction concerning this objection.

V. CONCLUSION

265. The initiation of this arbitration was a textbook example of Abuse of Process. As of 2004, a Canadian mining company with no possible avenue of recourse to international arbitration had a dispute with the Government of El Salvador about an application for a mining exploitation concession in El Dorado. The Canadian company spent three years trying to resolve the dispute by persuading the Government of El Salvador to change its Mining Law to remove the legal obstacles its overly-ambitious application had encountered. The Canadian company even explained to its shareholders that it could not expect to receive the concession in El Dorado without the proposed new law.

266. The Canadian company indicated that it was "concerned" by comments in 2006 by the Salvadoran Minister of the Environment that the Ministry would not grant the permit

[208] The problem that would be generated for CAFTA Parties under Claimant's proposed misinterpretation of the waiver requirement would not be limited to the Investment Law of El Salvador, as there are several BITs with surviving arbitration clauses between CAFTA Parties that could also lead to double invocation of jurisdiction in a CAFTA arbitration.

necessary for exploitation to Pacific Rim. But the Canadian company remained hopeful that it would convince the Salvadoran Government to change the law in its favor. The Canadian company finally lost hope for a quick resolution of the dispute when the new Minister of the Environment announced in June 2007 that the Government would not change the law and would not issue any new concessions until a strategic environmental study was done at least one year later. At this point, the Canadian company decided to put pressure on the Government by engaging lobbyists in the United States and considering its options for initiating international arbitration. The Canadian company must have been advised that it had no means of initiating arbitration against El Salvador. At the end of 2007 it made the decision to abuse the international arbitration process by changing the nationality of a shell company from the Cayman Islands to the United States so that the shell company could use its newly-created U.S. nationality to initiate a CAFTA arbitration regarding the pre-existing dispute.

267. The abuse of process undertaken by manipulating a shell company's nationality to initiate arbitration under CAFTA for a pre-existing dispute has been compounded by the abusive manner in which Claimant has conducted this arbitration. When its actions were exposed, first during the Preliminary Objections and now in the Jurisdictional Objections, Claimant resorted to multiple misrepresentations and denials of key facts that Claimant already knew or should have known to be true. At both stages, Claimant has gone to great lengths to try to hide the reasons for its change of nationality and distort the nature of the dispute and has made other serious misrepresentations. But the facts are clear, and so is the conclusion that this case must be dismissed as a result of Claimant's abuse of process.

268. As further confirmation that dismissal of the entire case is the correct result in this arbitration, El Salvador has also demonstrated that El Salvador is entitled to deny whatever benefits this late and inactive U.S. enterprise may be able to claim under CAFTA, including the benefit of submitting this dispute to arbitration, in accordance with CAFTA Article 10.12.2. In addition, El Salvador has demonstrated that the main dispute in this arbitration, regarding the application for the mining exploitation concession in El Dorado, is beyond the temporal reach of

CAFTA and the jurisdiction of the Tribunal, having taken place before Claimant became a national of a CAFTA Party, and additionally being subject to the three-year time limit on initiating arbitration. Finally, El Salvador has demonstrated that there is no independent jurisdiction to hear this dispute under the Investment Law of El Salvador.

269. This arbitration started and has gotten this far only because the Canadian company decided to abuse the international arbitration system to coerce El Salvador to grant a concession its subsidiary does not have a legal right to obtain.[209] For the sake of economy of resources in an arbitration that already has become too expensive, El Salvador requests the Tribunal to consider and decide the objection regarding Abuse of Process first. If the Tribunal is convinced, as El Salvador believes it must be by now, that this entire arbitration must be dismissed as a result of Claimant's Abuse of Process, El Salvador requests that the Tribunal consider ending the case at that point, without the need to decide the other objections.

VI. COSTS

270. El Salvador incorporates its request from its Memorial that the Tribunal order Claimant to bear all of the costs of this proceeding.

271. In its Counter-Memorial, Claimant complains that El Salvador's objections to jurisdiction threaten the "equality of arms" in this arbitration. Claimant submits an essay by the late Professor Wälde listing a variety of potential abuses by respondent States, including illegal surveillance, deploying the powers of the State in internal disputes (with a reference to Josef

[209] That the Canadian mining company is only seeking to intimidate and coerce El Salvador to grant the concession even as it argues that it has suffered an expropriation is evident from Claimant's statement in the Notice of Arbitration that "unless the Government reverses its conduct immediately, PRC will have lost the entire US$77 million that it has directly expensed to date . . . ." NOA, para. 103. Even now, Mr. Shrake states: "we have no desire to be engaged in a dispute with El Salvador. We would much prefer to return to a project that we believe would be of great benefit not only to our Companies and their shareholders, but also to the people and economy of El Salvador." Shrake Witness Statement, para. 12.

Stalin), intimidating the arbitral tribunal, and assassinations.[210] It is surprisingly absurd that Claimant submits that article to disparage El Salvador.

272. What does Claimant allege El Salvador has done to threaten the "equality of arms" in this arbitration? El Salvador has simply invoked its right to raise objections under the instruments that Claimant itself chose to initiate this arbitration against El Salvador. Claimant is merely frustrated that this arbitration has not intimidated El Salvador into granting Pacific Rim Mining Corp. the exploitation concession it has no right to receive.

273. Claimant knows full well that El Salvador is a democracy with a developing economy and a population of only seven million. It is disingenuous for Claimant to attempt to portray El Salvador as a wealthy authoritarian country abusing a position of power. Of course, El Salvador is also not a "better funded government" that could afford to manipulate procedures to increase the costs of these proceedings.[211] Indeed, the cost of this international arbitration is a great burden for El Salvador at a time of substantial economic stress for governments worldwide.

274. El Salvador has pursued its objections honestly and in good faith, and its only goal has been to seek the quickest and most efficient resolution possible.

275. El Salvador brought Preliminary Objections, not as a "game,"[212] but to end this case without the time and expense of arguing over jurisdiction, perhaps then the merits, and perhaps then damages, because there are fatal deficiencies in Claimant's claims—the alleged acts of the Government, even taken as alleged, did not "cause" Claimant's losses. As El Salvador explained in the Preliminary Objections phase, Claimant never submitted the documentation required by the Mining Law and therefore never could have received an exploitation concession, even if MARN had issued the environmental permit.

276. El Salvador knew, as the Tribunal noted, that even if all of its Preliminary Objections were granted this arbitration would continue for at least some secondary claims.

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[210] Thomas W. Wälde, *"Equality of Arms" in Investment Arbitration: Procedural Challenges*, *in* Arbitration Under International Investment Agreements 161 (Katia Yannaca-Small ed., 2010) (CL-139).
[211] Wälde, at 173; Counter-Memorial, para. 481.
[212] Counter-Memorial, para. 477.

Thus, although Claimant seeks to ascribe evil intent to El Salvador, it is not surprising that El Salvador was prepared for the next stage when the Tribunal issued its Decision on the Preliminary Objections. It is worth noting, however, that Claimant at once faults El Salvador for moving quickly and, at the same time, accuses El Salvador of trying to delay these proceedings.

277. El Salvador has raised serious objections to jurisdiction because Pacific Rim Mining Corp. changed the nationality of its holding company, Pac Rim Cayman, to initiate this arbitration as a United States entity, years after the dispute arose.

278. This is not a complicated objection and it could be argued concisely, but Claimant responded with a 256-page Counter-Memorial, sticking to the tactic: "if the facts are against you, focus on the law; if the law is against you, focus on the facts; if the law and the facts are against you, create distractions and confusion."

279. Claimant, however, cannot hide from the key facts: PRES applied for an environmental permit and exploitation concession for El Dorado in 2004; PRES never received the environmental permit, without which it could not receive the exploitation concession; Pacific Rim Mining Corp. changed the nationality of Pac Rim Cayman to the United States in December 2007; and within weeks Pacific Rim Mining Corp. was mentioning CAFTA protection related to the proposed El Dorado mine.

280. El Salvador has shown that there is no jurisdiction for this arbitration for multiple reasons. Claimant, a shell company relocated to the United States after the dispute arose, was never entitled to pursue this arbitration. Instead of accepting its fate, Claimant has filed a massive Counter-Memorial full of irrelevant and misleading facts and arguments, gaining nothing but to unnecessarily increase the costs of this arbitration that Claimant should not have started in the first place.

281. El Salvador, having been unfairly subjected to this abusive process and to Claimant's abusive tactics, should be entitled to recover from Claimant the costs for its defense.

Dated: January 31, 2011

Respectfully submitted,

Derek C. Smith
Aldo A. Badini
Luis Parada
Tomás Solís
Erin Argueta

Dewey & LeBoeuf LLP

ATTORNEYS FOR THE REPUBLIC OF EL SALVADOR