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August 3, 2010

By e-mail

Members of the Tribunal
Mr. V.V. Veeder
Dr. Guido Santiago Tawil
Prof. Brigitte Stern

c/o Mr. Marco Tulio Montañés-Rumayor
Secretary of the Tribunal
ICSID
1818 H Street, N.W.
MSN U3-301
Washington, D.C. 20433

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

Dear Members of the Tribunal,

I am writing to inform you that the Republic of El Salvador is hereby raising preliminary objections to jurisdiction, competence, and admissibility under ICSID Arbitration Rule 41(1). In addition, El Salvador respectfully requests the suspension of the proceeding on the merits while the Tribunal decides these objections as preliminary questions.

The filing of these preliminary objections is consistent with CAFTA Article 10.20.4 and 10.20.4(d), and is being made as early as possible after the Tribunal's decision of August 2, 2010.

The Republic includes the following summary of its objections to allow the Tribunal an early opportunity to examine the reasons to suspend the proceeding on the merits. The Republic will present the arguments in support of its objections on a date to be fixed by the Tribunal and reserves the right to raise additional objections at that time.

Summary of El Salvador's objections

1. Claimant's abuse of process

Pac Rim Cayman's claims are inadmissible because Pac Rim Cayman has engaged in abuse of process by changing its nationality years after the legal dispute arose and using its new nationality to bring CAFTA claims regarding the pre-existing dispute.

As acknowledged in paragraphs 41, 57, and 64 of the Notice of Arbitration, the legal dispute in this case had arisen by December 2004, when the Ministry of the Environment and Natural Resources of El Salvador ("MARN") did not grant or deny the environmental permit requested by Pacific Rim El Salvador in the time limit provided by law. As acknowledged in paragraph 64 of the Notice of Arbitration, communications between MARN and Claimant regarding the application for the environmental permit had ceased by December 2006.

Pac Rim Cayman comes before this Tribunal as a national of the United States. But Pac Rim Cayman did not disclose to the Tribunal in the Notice of Arbitration that it was not a national of the United States (or of any other CAFTA Party) on the critical date when the dispute arose (December 2004), when CAFTA entered into force (March 2006), or even when communications between MARN and Claimant regarding the application for the environmental permit ceased in December 2006.

In fact, it was not until December 2007, *three years after the dispute arose and one year after communications regarding the environmental permit had ceased*, that Pac Rim Cayman's nationality was changed from the Cayman Islands to the United States.

Pac Rim Cayman invoked its newly-acquired United States nationality in December 2008 to send a Notice of Intent and in April 2009 to initiate arbitration under CAFTA, regarding a dispute that arose and was fully developed *before* Pac Rim Cayman changed its nationality.

The consequence of Claimant's blatant abuse of process must be the dismissal of all claims in this arbitration. Not only are all CAFTA claims tainted by this abuse of process, but because of the close relationship between the CAFTA proceeding and the proceeding under the Investment Law of El Salvador, both having been brought by the same Claimant against the Republic before a single Tribunal under the same Notice of Arbitration registered once by the ICSID Secretariat, all claims included in the Notice of Arbitration should be dismissed.

Even though this objection resulting from Claimant's abuse of process is sufficient to dismiss all claims in this arbitration, the Republic includes a summary of additional objections for the sake of completeness.

2. Denial of benefits under CAFTA Article 10.12.2

El Salvador's second objection relates to the character of the Claimant itself.

Although the formal claimant in this arbitration is Pac Rim Cayman, the true party in interest is its parent company Pacific Rim Mining Corp. of Canada. As a Canadian company, Pacific Rim Mining Corp. is neither a national of a CAFTA Party nor a national of a Contracting State to the ICSID Convention. In addition, as already indicated, the United States nationality of Pacific Rim's wholly-owned subsidiary Pac Rim Cayman is a nationality of convenience, acquired to improperly access the benefits of CAFTA arbitration.

Under these circumstances, El Salvador is invoking the denial of benefits provision in CAFTA Article 10.12.2, to deny all benefits of CAFTA Chapter 10 to Pac Rim Cayman, including the substantive provisions of Section A and the ability to submit claims to arbitration under Section B.

El Salvador will show at the appropriate time that Pac Rim Cayman is owned and controlled by Pacific Rim Mining Corp., a Canadian company, and that Pac Rim Cayman has no substantial business activities in the United States or in the territory of any CAFTA Party other than El Salvador. As required by CAFTA Article 10.12.2, El Salvador notified the United States Government on March 5, 2010, that El Salvador would invoke the denial of benefits provision of CAFTA to deny CAFTA benefits to Pac Rim Cayman before this Tribunal.

El Salvador reserves the right to raise a jurisdictional objection regarding the nationality requirement of Article 25 of the ICSID Convention.

3. Objections to jurisdiction *ratione temporis*

Although unnecessary in light of the first two objections, El Salvador includes as a third objection several issues related to jurisdiction *ratione temporis*.

Setting aside for a moment that all claims must be dismissed due to Claimant's abuse of process or, alternatively, all CAFTA claims must be dismissed as a result of applying the denial of benefits provision, it is clear that Claimant cannot make any claims or attempt to recover any damages with regard to any measure, act, or fact that took place before Claimant became a national of a CAFTA Party on December 13, 2007. This objection alone should dispose of substantially all of Claimant's CAFTA claims.

In addition, El Salvador objects to the admissibility of the CAFTA claims due to lack of jurisdiction *ratione temporis* pursuant to CAFTA Article 10.1.3 for any acts or facts that took place before CAFTA's entry into force. In the alternative, the Republic objects to the

admissibility of the CAFTA claims due to lack of jurisdiction *ratione temporis* related to the expiration of the three-year time limit to bring claims included in CAFTA Article 10.18.1.

Like the first two objections, the *ratione temporis* objections would independently dispose of all of Claimant's CAFTA claims.

4. Additional objections to jurisdiction under the Investment Law of El Salvador

In addition to the general objection related to Claimant's abuse of process, El Salvador objects to Claimant's invocation of jurisdiction under the Investment Law of El Salvador on the grounds that the text of Article 15 of the Investment Law does not constitute the required consent to arbitration under Article 25 of the ICSID Convention.

El Salvador reserves the right to raise the objection that the present dispute is not a dispute with a national of another Contracting State for purposes of Article 25 of the ICSID Convention. El Salvador also reserves the right under CAFTA Article 10.20.4(d) to submit objections regarding the effects of Claimant's waivers under CAFTA and to object that the Tribunal was not properly constituted to decide non-CAFTA claims.

Suspension of the proceeding on the merits

El Salvador's preliminary objections relate to questions that are entirely independent of the merits. Sustaining these objections would dispose of Pac Rim Cayman's claims in their entirety. Therefore, El Salvador respectfully requests that the Tribunal address these objections as preliminary questions and suspend the proceedings on the merits as authorized by ICSID Arbitration Rule 41(3) and CAFTA Article 10.20.4.

ICSID arbitration practice supports suspending the proceedings on the merits while objections to jurisdiction are addressed as preliminary questions.¹ The practice of suspending the proceedings on the merits has continued unchanged after the 2006 amendments to ICSID Arbitration Rule 41.² The Rule previously provided for mandatory suspension, but with the

¹ See Christoph Schreuer, *The ICSID Convention: A Commentary* 534 (2d ed., 2009) ("ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.").

² See, e.g., *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, para. 13; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, March 8, 2010, para. 15; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, May 29, 2009, para. 38; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, para. 16; and *Occidental Petroleum Corporation and*

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addition of Rule 41(5), Rule 41(3) was amended to allow tribunals the flexibility to decide whether to suspend the proceeding on the merits in different circumstances.³

Suspension of the proceeding on the merits while objections related to jurisdiction are pending is the most efficient way to proceed when the determination of jurisdiction is not inextricably tied to the merits of the dispute. If jurisdiction is lacking, disposing of the claims without litigating the merits will save significant time and expense. As Mr. Schreuer observed, "[i]t does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively."⁴ This is especially important in ICSID arbitration where a sovereign State has consented to arbitration only within the limits defined in the ICSID Convention and in the instrument including the State's consent to arbitration.

In this particular case, where the preliminary objections rely on facts and questions of law capable of being examined and decided independently of the merits, suspension of the proceedings on the merits is warranted. El Salvador's objections are based on clear provisions related to abuse of process, the investor's nationality, temporal issues, and consent. Thus, there is no basis for deviating from the practice of suspending the proceedings on the merits and instead forcing El Salvador to bear the heavy costs of a proceeding on the merits prior to the adjudication of its compelling jurisdictional objections. El Salvador accordingly requests that the Tribunal suspend the proceedings on the merits and hear the Republic's objections to jurisdiction, competence, and admissibility as preliminary questions.

Respectfully submitted,



Luis Parada

Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Jurisdiction, Sept. 9, 2008, paras. 6-7.

³ See Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review – Foreign Investment Law Journal 427, 441 (2006).

⁴ Schreuer at 537.