

**IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF ARBITRATION OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE
DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES – FREE TRADE
AGREEMENT AND THE FOREIGN INVESTMENT LAW OF EL SALVADOR**

PAC RIM CAYMAN LLC,)	
)	
Claimant,)	
)	
v.)	ICSID Case No. ARB/09/12
)	
REPUBLIC OF EL SALVADOR,)	
)	
Respondent.)	
)	

**CLAIMANT PAC RIM CAYMAN LLC'S
REJOINDER ON RESPONDENT'S OBJECTIONS TO JURISDICTION**

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I. INTRODUCTION AND OVERVIEW OF THE REJOINDER

A. Introduction

1. Claimant¹ hereby respectfully submits this Rejoinder in response to the Reply – Objections to Jurisdiction filed by Respondent, the Republic of El Salvador (“Respondent,” “El Salvador,” or the “Government”).

2. In its Reply as in its opening Memorial in support of its Objections to Jurisdiction, Respondent asks the Tribunal to ignore the substance and reality of the investment at issue and to disregard substantial portions of the record. Instead, Respondent urges the Tribunal to apply a rigid and formulaic analysis – and, moreover, to do so based on particular “slices” of the record chosen by Respondent, which Respondent has moreover often distorted or misrepresented.

3. Thus, for example, Respondent asks the Tribunal to limit its inquiry on “substantial business activities” to ticking off the boxes of Respondent’s would-be checklist of required business activities, such as leases and equipment owned solely in the name of Pac Rim Cayman in Nevada – and to ignore the fact that at all relevant times, Pac Rim Cayman was established in Nevada, where it was co-located with the other main operating entities of the Pacific Rim family. The person primarily managing Pac Rim Cayman and its investments in El Salvador was a U.S. national located in Nevada, and substantial portions of the financial and

¹ As defined in Claimant’s Counter-Memorial para. 1, Claimant means Pac Rim Cayman LLC (“Pac Rim Cayman”) and its subsidiaries in El Salvador, Pacific Rim El Salvador, S.A. de C.V. (“PRES”) and Dorado Exploraciones, S.A. de C.V. (“DOREX”). Claimant and its parent company, Pacific Rim Mining Corp. – along with the other subsidiaries of Pacific Rim Mining Corp. (including Dayton Mining (U.S.) Inc. and Pacific Rim Exploration, Inc.) – are collectively referred to herein as the “Pacific Rim Companies.”

intellectual capital invested by Pac Rim Cayman in El Salvador originated in Nevada. To demonstrate that Pac Rim Cayman is owned and controlled by a person of a non-Party, Respondent asks the Tribunal to “pierce the corporate veil” – but only between Pac Rim Cayman and its Canadian parent corporation. When it comes to the actual U.S. shareholders of the Canadian parent, who are the persons ultimately entitled to the value created by Pac Rim Cayman and its investments, and the U.S. affiliates of Pac Rim Cayman that substantially contributed the financial and intellectual capital that allowed the investment in El Salvador to be made, Respondent wants to maintain the veil and pretend those persons do not exist.

4. Respondent’s presentation of its legal and factual assertions in this case is rife with material distortions of the applicable law and facts. Respondent consistently provides vitriol in lieu of substance, candor, and accuracy, such as when it claims that its objections have “exposed Claimant’s change of nationality.”² Respondent seeks to maintain the ludicrous fiction that its “investigation” has “uncovered” Claimant’s efforts to “conceal” the fact that Pac Rim Cayman was an entity of the Cayman Islands prior to 4 December 2007 – even as that fact was set forth in Exhibit 3 to the Notice of Arbitration.³

5. Claimant will respond in detail below to the various arguments made by Respondent in its Reply, and will demonstrate that: (i) there has been no abuse of process in these proceedings; (ii) Respondent is not entitled to deny CAFTA benefits to Claimant; (iii) this

² The Republic of El Salvador’s Reply Objections to Jurisdiction (31 Jan. 2011) (“Reply”), para. 1.

³ It will be recalled that Exhibit 3 to the Notice of Arbitration is a resolution by the Government of El Salvador acknowledging Pac Rim Cayman’s notification of its change in nationality from that of the Cayman Islands to that of the United States.

Tribunal has jurisdiction *ratione temporis*; and (iv) this Tribunal has jurisdiction under El Salvador's Investment Law. Claimant will demonstrate that based on the record now before the Tribunal, and on basic principles governing the interpretation of the treaty and statutory provisions at issue, the Tribunal should easily and expeditiously dispose of Respondent's objections and proceed to an examination of the merits of this dispute.

6. But before providing a detailed refutation of Respondent's arguments, it is helpful to take a step back and observe the several false premises on which Respondent's objections rest.

B. The Objections' False Premises

7. Respondent's first three objections – that this claim represents an abuse of process; that Respondent is entitled to deny benefits to Claimant; and that the Tribunal does not have jurisdiction over this dispute *ratione temporis* – rest on two false premises. The first is that this case involves a Canadian investor – with no ties to the United States – which transported a “shell” company from the Cayman Islands to Nevada for the sole purpose of being able to assert CAFTA claims against El Salvador concerning a pre-existing dispute.⁴ The second is that the only “measures at issue” in this case involve failures to act by deadlines prescribed by Salvadoran law in issuing an environmental permit and exploitation concession to PRES for the El Dorado site. According to Respondent, the failure of its regulatory agencies to rule on

⁴ See *e.g.* Reply, paras. 16-19, 93-122, 131-33, 148-56.

Claimant's permit applications meant that those applications were "presumptively" denied in either 2004 or 2006, before Claimant acquired U.S. nationality.⁵

8. With respect to the first premise, Claimant has now produced voluminous evidence – uncontested by Respondent – demonstrating that Pac Rim Cayman has always been managed from the Reno, Nevada offices of the Pacific Rim Companies. Mr. Thomas Shrake, the President and CEO of Pacific Rim Mining Corp., along with other key officers and senior geologists of the Pacific Rim Companies, have also maintained their offices in Reno, Nevada over much of the past decade. Pac Rim Cayman's financial investments in El Salvador were substantially funded by the U.S. mining operations of Dayton Mining (U.S.) Corp., a Nevada corporation that is Pac Rim Cayman's sister company. Pac Rim Cayman's mining operations in El Salvador were substantially planned and managed from Nevada by geologists employed and compensated by Pacific Rim Exploration Inc. ("Pac Rim Exploration"), a Nevada corporation that was Pac Rim Cayman's sister company before 4 December 2007, and has been its wholly owned subsidiary since that date. Furthermore, Pac Rim Cayman and its investments in El Salvador are substantially owned and controlled by individual U.S. shareholders of Pac Rim Cayman's parent, who are the persons ultimately entitled to the economic value Pac Rim Cayman generates. To deny jurisdiction without regard to these facts would ignore economic reality.

9. With respect to the second premise concerning the "presumptive" denial of Claimant's applications – that the only measures at issue in this case are two missed deadlines –

⁵ See *e.g., id.*, paras. 69-70, 184-98.

Claimant has also produced abundant evidence that the premise is quite simply false. If Respondent in fact considered the applications “presumptively denied” in either 2004 or 2006 (and there is no evidence of this whatsoever), then Respondent engaged in an elaborate fraud to induce Claimant to continue its investments in El Salvador. Respondent does not even try to contest the evidence establishing that well into 2008, Respondent’s most senior officials repeatedly assured Claimant that the El Dorado permits would be forthcoming. Nor does Respondent try to explain all of its other conduct that is completely inconsistent with its “presumptive denial” theory. For example, if the applications were “presumptively” denied in 2004, then why did MARN⁶ embark on an extended notice and comment period concerning PRES’s application for an environmental permit throughout 2005 and 2006, providing PRES with observations and requesting revisions to the Environmental Impact Assessment (“EIA”)? If they were “presumptively” denied in 2006, then why did MARN send PRES a letter dated 4 December 2008, asking PRES to submit information so that MARN could “resolve PRES’s application for the environmental permit for your mineral exploitation project ‘El Dorado’”?⁷

10. Throughout both its first and second sets of objections, Respondent has repeatedly tried to avoid even acknowledging, much less assuming responsibility for, the main measure at issue in this case – *i.e.*, the *de facto* ban on mining activities announced in March 2008 by then-President Saca (and embraced by his successor, President Funes). Indeed, up until its Reply,

⁶ El Salvador’s Ministerio de Medio Ambiente y Recursos Naturales.

⁷ Letter from MARN to PRES (4 Dec. 2008) (C-76). The original Spanish text states, “Una vez satisfechos estos requerimientos, se estará en la capacidad de resolver su solicitud de permiso ambiental para su proyecto de explotación minera “El Dorado”, antes mencionado, dentro de los 30 días siguientes a la fecha en que se haya finalizado todo el procedimiento de Evaluación de Impacto Ambiental.” *See also* Notice of Arbitration, paras. 78-81.

Respondent had “emphatically denied” the existence of this ban – or any other measure directed at generally preventing metallic mining activities from proceeding.⁸

11. Only in its Reply has Respondent finally acknowledged that, at some point in the Saca Administration, it was decided that MINEC “would not be granting [any] mining concessions until the country concluded a study of the effects of mining”⁹ – even though no such ban of mining activities and no such “study” is contemplated under current Salvadoran law. Whether such a measure is characterized as a “ban” or a “suspension” or some other type of practice, it unquestionably falls within the definition of a “measure” under CAFTA.¹⁰

12. The Tribunal will no doubt appreciate the difficulty in Claimant’s ascertaining that such a measure had been implemented, given that Respondent has consistently denied its existence until filing its Reply in its second round of objections.¹¹ The Tribunal will also be able to distinguish between (a) delays by the Salvadoran regulatory agencies in ruling on PRES’s El Dorado applications (especially when accompanied by repeated assurances that the applications would be granted) and (b) a declaration by El Salvador’s Head of State in March 2008 that no mining permits would be granted (followed by numerous similar statements by President Saca and his successor, President Funes). In sum, there is no basis to conclude that Claimant knew or

⁸ The Republic of El Salvador’s Memorial on Objections to Jurisdiction (15 Oct. 2010) (“Objections to Jurisdiction”), para. 47.

⁹ Reply, para. 206.

¹⁰ See CAFTA, Art. 2.1 at 2-2 (providing that “**measure** includes any law, regulation, procedure, requirement, or practice”); see also discussion *infra* Section IV.B; Counter-Memorial, paras. 406-13.

¹¹ As discussed *infra* Section V.B.5, Respondent should be estopped from arguing that Claimant knew or had reason to know of a measure whose existence Respondent has consistently denied.

should have known that Respondent had implemented the measure at issue until, at the earliest, March 2008. Even then, Respondent did its best to prevent a dispute concerning this measure from crystallizing, by privately denying to Claimant that any such measure existed.

13. While Respondent's first three objections rest on a misapplication of the law to facts that are misstated or misrepresented by Respondent, the fourth rests entirely on the false premise that El Salvador's Investment Law cannot be easily interpreted based on its plain language. The Investment Law plainly provides that "[e]n el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia . . . [a]l Centro Internacional de Diferencias Relativas a Inversiones" ("[i]n the cases of disputes arising among foreign investors and the State, regarding their investments in El Salvador, the investors may submit the controversy to . . . [t]he International Centre for the Settlement of Investment Disputes").¹²

14. The language of this provision – *i.e.*, that the investor “may submit the controversy” (“podrán remitir la controversia”) to ICSID – is used in numerous investment laws and treaties, including, for example, bilateral investment treaties concluded by El Salvador.¹³ There is simply no way to read El Salvador's consent to the jurisdiction of ICSID out of this provision. As several other tribunals have observed, the consent to ICSID jurisdiction provided through the language of this provision is “clear” and “obvious” – so much so that no party or

¹² Investment Law of El Salvador, Art. 15 (RL-9).

¹³ See Claimant Pac Rim Cayman LLC's Counter Memorial in Response to Respondent's Objections to Jurisdiction (31 Dec. 2010) (“Counter-Memorial”), paras. 451-53; see also discussion *infra* Section VI.B.

tribunal would reasonably question whether it required means of interpretation beyond its plain text.¹⁴ That Respondent has chosen to assert the contrary here is indicative of its effort to offer any and every argument that it can think of – regardless of its basis in the laws or facts at issue – in order to make these “preliminary” proceedings as long and expensive for Claimant as possible.

C. Overview of the Rejoinder

15. Because Respondent’s Reply both misstates and misapplies the proper standards concerning the burden of proof at the jurisdictional phase, and otherwise jumbles the facts and objections at issue, Section II of the Rejoinder will set forth the proper standards.

16. In Sections III, IV, V, and VI, we will address Respondent’s objections in the order Respondent has chosen to make them, *i.e.*, alleged abuse of process, denial of benefits, lack of jurisdiction *ratione temporis*, and lack of jurisdiction under the Investment Law.¹⁵

¹⁴ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 Aug. 2006), para. 332 (RL-30); *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), para. 77 (“*Mobil*” (RL-51); *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (30 Dec. 2010), para. 72 (“*Cemex*”) (CL-151).

¹⁵ Respondent asserts that its objections based on the Tribunal’s alleged lack of jurisdiction *ratione temporis* and denial of benefits are separate from and not subsumed by its objection based on alleged abuse of process. *See* Reply, para. 10. For the reasons discussed in Claimant’s Counter-Memorial, we disagree with Respondent’s characterization of its objections. *See* Counter-Memorial, paras. 374-77. Nevertheless, in this Rejoinder we will treat each of Respondent’s objections as distinct from the others. In fact, regardless of whether they are viewed as distinct from one another or overlapping, they remain unfounded and must be rejected.

17. In Section VII, we will explain that Respondent's Reply makes it even more evident that the Tribunal should order Respondent to bear the costs of this part of the proceeding under ICSID Arbitration Rule 28(1)(b).

18. In addition to the authorities and exhibits in support of this Rejoinder, Claimant submits the Witness Statement of Mr. Charles Pasfield, the Vice President of Client Services for Broadridge Investor Communication Solutions, Inc., an affiliate of Broadridge Financial Solutions, Inc. (referred to collectively as "Broadridge"). Among other services, Broadridge transmits communications from publicly traded companies to the holders of shares in those companies. Pacific Rim Mining Corp. is among the publicly traded companies whose communications Broadridge has transmitted to shareholders. Incidental to the provision of its investor communication service, Broadridge becomes aware of the geographic distribution of a company's shareholders. At an issuer's request, Broadridge provides reports describing that geographic distribution, as it has done from time to time for Pacific Rim Mining Corp. Attached to Mr. Pasfield's Statement are geographic summary reports provided by Broadridge in 2007, 2008, and 2009. As Mr. Pasfield explains, these reports establish that throughout that period a majority of the shareholders of Pacific Rim Mining Corp. were persons with addresses in the United States.

II. THE BURDEN OF PROOF AT THE JURISDICTIONAL STAGE

19. In this section, we first explain how Respondent's Reply has misstated the applicable standard governing burden of proof at the jurisdictional phase. We then set forth the actual standard.

A. Respondent Misstates the Applicable Standard

20. Respondent begins with the assertion that with respect to “Claimant’s factual allegations relevant to the decision on jurisdiction . . . Claimant must meet its standard burden of proof or the allegations must be considered unproved and therefore ignored.”¹⁶ El Salvador seems to suggest that a respondent has no evidentiary obligation at all in challenging a claimant’s factual allegations relevant to jurisdiction, and that a claimant must meet its “standard burden of proof” at the outset of the case with respect to each such allegation – or else the tribunal will deny jurisdiction. As discussed below, that is a serious mischaracterization of the burden of proof at the jurisdictional phase.

21. Respondent at first appears to acknowledge that there are at least certain objections for which it carries the burden from the outset. According to Respondent:

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.¹⁷

22. Having acknowledged that principle, however, Respondent quickly abandons it, complaining that Claimant has presented “an entirely new set of allegations” in its Counter-Memorial.¹⁸ Of course, these “new” allegations (many of which are not, in fact, new) have been offered to rebut (and indeed have rebutted) the numerous assertions made by Respondent in

¹⁶ Reply, para. 12.

¹⁷ *Id.*, para. 14.

¹⁸ *Id.*, para. 18.

support of its objections, in particular, Respondent’s objections for alleged abuse of process and denial of benefits. El Salvador would have the Tribunal believe that a respondent can offer any and every assertion it can devise in challenging jurisdiction, but that the claimant in responding is strictly bound by the specific factual allegations contained in its Notice of Arbitration – and may not venture beyond those allegations in contesting jurisdictional objections. This, too, is a fundamental misrepresentation of the allocation of the burden of proof.

23. To begin with, many of the “new” allegations that Respondent complains about are not new allegations at all. For example, Respondent asserts that “[o]ne of [Claimant’s] new assertions is . . . that Pacific Rim Mining Corp. is owned and controlled by a majority of unidentified U.S. shareholders.”¹⁹ This is not a new allegation. Paragraph 2 of the Notice of Arbitration states that Pac Rim Cayman is

owned by Pacific Rim Mining Corp. (“Pacific Rim”), a publicly traded company organized under the laws of Canada, which is traded primarily on the U.S. stock exchange *and owned primarily by U.S. investors.*²⁰

24. Along similar lines, Respondent complains that Claimant has made “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

¹⁹ *Id.*, para. 17.

²⁰ Notice of Arbitration, para. 2 (emphasis added); *see also id.*, para. 14 (Pac Rim Cayman “is ultimately owned by a majority of individual U.S. investors . . .”). Respondent has made a practice throughout this arbitration of repeatedly misrepresenting the allegations in Claimant’s Notice of Arbitration.

which have activities in the United States.”²¹ Respondent argues further that “[i]n 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.”²²

25. Respondent misstates Claimant’s argument and also misses the fundamental point. In its Notice of Arbitration, Claimant was required only to set forth the basic elements of its jurisdictional case and its substantive claims. As this Tribunal stated during the first round of objections, where Respondent raised similar arguments demanding that Claimant discharge every conceivable evidentiary burden for the case in its initial pleading (including in anticipation of arguments that Respondent might or might not assert):

[T]he Claimant’s pleading in its Notice of Arbitration must here meet the requirements of the ICSID Convention and the ICSID Institution and Arbitration Rules. Article 36(2) of the ICSID Convention and Rule 2(e) of the Institutional Rules impose like obligations to plead liability, causation and damages. (Although differently worded from the equivalent provisions in CAFTA, these differences are not material in the present case).

There is however an essential difference between the initial pleading by a claimant, such as the notice of arbitration, and a claimant’s full presentation of its case at a hearing on the merits under the ICSID Convention. The initial pleading cannot and is not required to be a complete documentary record of the claimant’s factual evidence and legal argument. Indeed, a notice may contain few factual exhibits and still fewer legal materials.

* * * *

²¹ Reply, para. 18.

²² *Id.*

Whilst the request of arbitration must be adequately pleaded, with relevant factual allegations under the ICSID Conventions and Rules, it cannot therefore be equated to the fine-tuned instrument which emerges at the later stages of ICSID arbitration proceedings; for example: a party's main pleadings, closing oral submissions or comprehensive post-hearing brief.²³

26. Claimant in its Notice of Arbitration pleaded more than adequate allegations to state the elements of jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*.²⁴ Contrary to Respondent's suggestion, Claimant does not contend that it "qualifies as a U.S. national" because it is a part of a "group of companies" "some of which have activities in the United States."²⁵ Claimant maintains that Pac Rim Cayman qualifies as a U.S. national because it is a legal person that has been duly established under the laws of Nevada, U.S.A., with its principal place of business at 3542 Airway Drive, Suite 105, Reno, Nevada.²⁶ Pac Rim Cayman was a U.S. national in 2008, when then-President Saca announced a *de facto* ban on metallic mining activities – the existence of which measure was confirmed by President Saca on several occasions prior to Claimant's filing its Notice of Arbitration.²⁷ That measure – which only became known to Claimant in 2008 – is what destroyed its substantial investments in El Salvador.²⁸

²³ Decision on Respondent's Preliminary Objection (2 Aug. 2010), paras. 95-96, 99 ("Decision on Preliminary Objection").

²⁴ See Counter-Memorial, Sections IV-VII.

²⁵ Reply, para. 18.

²⁶ See, e.g., Notice of Arbitration, paras. 2, 12, 100.

²⁷ *Id.*, paras. 74-78.

²⁸ *Id.*, paras. 79-81.

27. In response to Claimant’s Notice of Arbitration, Respondent has now brought its second series of objections. The instant set of objections makes various assertions – primarily under the rubric of “abuse of process” and “denial of benefits” – that the case involves a Canadian investor with no ties to the United States, which moved a “shell” company to Nevada solely for the purpose of establishing ICSID jurisdiction over a pre-existing dispute, for which the original investor would have had no recourse to ICSID prior to moving the “shell” company to the United States.

28. In response to these objections, Claimant has produced abundant evidence – both testimonial and documentary – establishing, *inter alia*, that Claimant has significant ties to the United States (including substantial business activities and a majority of the ultimate shareholders as U.S. residents); that the investment activities of Pac Rim Cayman – along with the rest of its affiliates – have always been substantially managed out of Nevada, where the President and CEO of the ultimate parent company in this group of companies has always maintained his offices; that Pac Rim Cayman’s investments in El Salvador were primarily planned and managed from Nevada; that Pac Rim Cayman’s investments were substantially funded by the Pacific Rim Companies’ mining operations in Nevada; and that virtually all of the intellectual property invested in El Salvador is of U.S. origin.²⁹

29. With respect to Respondent’s argument that there was a “pre-existing” dispute at the time of Pac Rim Cayman’s domestication to Nevada – because PRES and DOREX were

²⁹ See Counter-Memorial, paras. 39-42, 50-65, 72-92, 131-43 (and the Witness Statements and Exhibits cited therein).

facing delays in obtaining permits, and because certain regulators had expressed the view that PRES was required to acquire ownership or authorization to use the entire surface overlaying its proposed concession area for the El Dorado site – Claimant has produced abundant and unrefuted evidence that El Salvador’s highest officials were repeatedly assuring Claimant that the permits would be forthcoming, and that Claimant in fact continued to communicate with these regulators concerning permits, well into 2008. Claimant did not know and had no reason to know that El Salvador had taken the measure of stopping all metallic mining extraction activities in the county until President Saca announced it in March 2008 (even as President Saca continued to deny its existence to Claimant privately, and even as Respondent in this case has denied it until submitting the Reply for its instant objections).

30. Respondent does not even attempt to provide any substantive analysis of the extensive evidence that Claimant has offered to rebut the jurisdictional objections. Instead, Respondent merely offers unsupported, empty, and vituperative rhetoric (*e.g.*, that Claimant has resorted to “a strategy of distracting attention with volumes of irrelevant information and attempting to confuse a clear factual record;”³⁰ or “[i]n 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;”³¹ or “instead of ‘responding’ to El Salvador’s objections, [Claimant] introduces a

³⁰ Reply, para. 3.

³¹ *Id.*, para. 4.

new set of unsubstantiated factual allegations that make for an entirely different argument;”³² among many other instances).

31. Instead of addressing the substance of Claimant’s evidence, Respondent complains that it is “new” and – without addressing any specific evidence – baldly asserts that it is “irrelevant” and “unsupported.”³³ Respondent complains that Claimant has submitted “volumes” of information, and yet also complains that “Claimant’s new allegations are frivolous insofar as it has provided no evidence in support of its new contentions.”³⁴ Indeed, Respondent goes so far as to “request[] that the Tribunal reject *in limine* all of Claimant’s new assertions as El Salvador have had no opportunity to examine any evidence in support of these contentions.”³⁵

32. We will put aside for the moment the fact that virtually all of the evidence provided in the Counter-Memorial may be found in the public record (of which Respondent’s counsel supposedly conducted an investigation), including the Companies’ numerous public filings. As a procedural matter, Claimant was not required to produce such evidence prior to Respondent’s raising these objections.³⁶ Moreover, Respondent will have an opportunity to

³² *Id.*, para. 15.

³³ *Id.*, paras. 17-18.

³⁴ *Id.*, paras. 3, 22.

³⁵ *Id.*, para. 22.

³⁶ Although Respondent is vague in the extreme about the specific assertions it would have the Tribunal “reject *in limine*,” Respondent does not appear to assert that any of this evidence should have been produced in response to its Request for Documents. In fact, in response to the Document Requests, Claimant produced numerous documents pertaining to its affiliated companies in Nevada, only to have Respondent complain in its opening memorial that they were all “irrelevant.” Objections to Jurisdiction, para. 158.

“examine” all of this evidence in the four-day hearing that the Tribunal has scheduled on Respondent’s instant objections.

33. A review of the applicable standard governing burden of proof demonstrates that Respondent’s arguments here are, at best, without merit.

B. The Proper Standard for Burden of Proof at the Jurisdictional Phase

34. As stated in the Counter-Memorial, in determining the burden of proof at the jurisdictional phase, the majority of investor-State arbitration tribunals have followed the test set forth by Judge Higgins in her separate International Court of Justice (“ICJ”) opinion in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*.³⁷ We did not think that proposition to be controversial. But given Respondent’s attempt to set forth a very different standard, it is worth discussing the Higgins test – and its acceptance in investor-State decisions – at somewhat greater length.

35. In the *Oil Platforms* case, Judge Higgins set forth the test as follows:

The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the . . . [t]reaty is to accept *pro tem* the facts as alleged by [Claimant] to be true and in that light to interpret [the relevant articles of the treaty] for jurisdictional purposes—that is to say, to

³⁷ *Case Concerning Oil Platforms (Iran v. U.S.)* 1996 I.C.J. 803, 856 paras. 32-34 (Dec. 12) (separate opinion of Judge Higgins) (CL-152).

see if on the basis of [Claimant’s] claims of fact there could occur a violation of one or more of them.³⁸

Further, Judge Higgins explained:

The Court should . . . see if, on the facts as alleged by [Claimant], the [Respondent’s] actions complained of might violate the Treaty articles. . . . Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases . . . and to protect the integrity of the proceedings on the merits What is for the merits—and which remains pristine and untouched by this approach to the jurisdictional issue—is to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the treaty] and if so, whether there is a defense to that violation In short, it is at the merits that one sees “whether there really has been a breach.”³⁹

36. The majority of tribunals in investor-State arbitration cases have repeatedly and consistently adopted Judge Higgins’s test. For example, in *Plama Consortium Ltd. v. Republic of Bulgaria*, the claimant asserted claims under the Energy Charter Treaty (“ECT”), the bilateral investment treaty between Cyprus and Bulgaria, and the ICSID Convention. The tribunal in *Plama* followed the Higgins test to determine who had the burden of proof concerning respondent’s objections to jurisdiction on various grounds.⁴⁰ The *Plama* tribunal also cited other ICSID tribunals employing the Higgins test in holding that it “was up to claimant to present its own case as it saw fit; that, in doing so, the claimant must show” that the facts alleged are capable of falling under the relevant portions of the appropriate treaty.⁴¹

³⁸ *Id.*, para 32.

³⁹ *Id.*, paras. 33-34.

⁴⁰ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), para. 118 (“*Plama*”) (RL-66).

⁴¹ *Id.*, para. 119.

37. Observing that the Higgins test was not “in any sense controversial,” the *Plama* tribunal applied it and held that the claimant had established prima facie that (1) it was an investor under Article 1(7) of the ECT that had legal identity in Cyprus despite the respondent’s argument that it was a mere “mail box company”; (2) the dispute related to an “investment,” and (3) the respondent’s actions might have violated certain obligations imposed on it by the ECT.⁴²

38. As the tribunal in *Plama* observed, numerous other tribunals had followed the Higgins test before *Plama*.⁴³ Numerous tribunals have followed it since.⁴⁴

39. Once the claimant has established a *prima facie* case of jurisdiction, the burden of proof then shifts to the respondent. As stated by the tribunal in *Chevron v. Ecuador*, because of the well-established rule that a claimant’s allegations are accepted *pro tem* for the purposes of establishing jurisdiction,

the Respondent bears the burden of proof to disprove the Claimant’s allegations. This means that, if the evidence submitted [by a respondent] does not conclusively contradict the Claimant’s

⁴² *Id.*, paras. 31, 126, 128, 131-32, 151.

⁴³ *Id.*, para. 119.

⁴⁴ See, e.g., *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, (22 Apr. 2005), para. 239, n.103 (CL-153); *Pan American Energy, LLC, et al. v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006), para. 50 (RL-77); *Bayindir Insaat Turizm Ticaret ve Sanayi A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005), paras. 195-96 (RL-61); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 Sept. 2006), para. 68 (CL-154); *Jan de Nul NV, et al. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), paras. 69-71 (stating that claimant must present a *prima facie* case on the merits) (CL-155).

allegations, [the Claimant's allegations] are assumed to be true for the purposes of the prima facie test.⁴⁵

40. Respondent relies exclusively on the tribunal's decision in *Phoenix v. Czech Republic* in asserting that for "Claimant's factual allegations relevant to the decision on jurisdiction . . . Claimant must meet its standard burden of proof or the allegations must be considered unproved and therefore ignored."⁴⁶ Again, Respondent appears to suggest that a claimant must on its own accord prove all of the factual allegations necessary to establish jurisdiction – in the same manner that it would prove its factual allegations at the merits phase (*i.e.*, it "must meet its standard of proof") – and do even more where the respondent has raised any jurisdictional objections. Otherwise, according to Respondent, the tribunal must "ignore" the allegations. According to the Reply, a respondent has no evidentiary or other burden in contesting a claimant's *prima facie* case of jurisdiction.

41. That is not what the tribunal in *Phoenix* held. To the contrary, *Phoenix* expressly embraced the Higgins test, stating that "[t]he alleged facts complained of have to be accepted pro tem at the jurisdictional phase."⁴⁷ The exception is where the respondent sets forth credible evidence of "facts" to contradict the claimant's allegations with respect to jurisdiction. At that point, the tribunal will have to resolve the factual dispute concerning the jurisdictional issue – or else join the issue to the merits. Thus, the *Phoenix* tribunal stated:

⁴⁵ See *Chevron Corp. & Texaco Petroleum Corp. v. Ecuador*, Interim Award, Ad hoc – UNCITRAL Arbitration Rules; IIC 355, para. 112 (1 Dec. 2008) (CL-75).

⁴⁶ Reply, para. 12 (citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009), para. 62 ("*Phoenix*") (RL-50)).

⁴⁷ *Phoenix*, para. 62.

If . . . 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. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation.⁴⁸

Phoenix stated further that, if a tribunal is unable to ascertain whether “there exists a protected investment” at the jurisdictional phase, then the question “should be joined to the merits.”⁴⁹

42. Similarly, Respondent cites Judge Mojtaba Kazazi’s text on *Burden of Proof and Related Issues* for the proposition that “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 further to the satisfaction of the tribunal.”⁵⁰ But in the text omitted by Respondent, Judge Kazazi explained:

[I]t is the established practice of international tribunals not to require the proponent of the burden of proof to provide more than *prima facie* evidence at the beginning of the proceedings and before the respondent has put forward any reasonable doubt. . . . If the respondent is unable to rebut the *prima facie* evidence provided by the claimant, then the tribunal accepts the *prima facie* evidence provided by the claimant as conclusive. However, again it should be emphasized that while international tribunals usually accept that the proponent satisfies its burden of proof by providing un rebutted

⁴⁸ *Id.*, para. 63.

⁴⁹ *Id.*, para. 61; *see also* ICSID Convention, Article 41(2) (stating that tribunals have the discretion to determine a jurisdictional issue “as a preliminary question or to join it to the merits of the dispute.”); CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, para 80, at 538-39 (stating that the “need for a joinder to the merits is apparent where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case.”) (CL-156).

⁵⁰ Reply, para. 13 (quoting MOJTABA KAZAZI, *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* at 338-339 (1996) (“Kazazi”) (RL-108)).

evidence, it is within their discretion to determine what constitutes prima facie evidence in a given case.⁵¹

43. In the context of jurisdictional objections in an investor-State arbitration, then, the claimant is required to set forth a *prima facie* case of jurisdiction under the relevant treaty or treaties, including jurisdiction *ratione materiae*, *ratione personae*, and *ratione temporis*. Once the claimant has established this *prima facie* case, then the burden shifts to the respondent to establish that there is not jurisdiction *ratione materiae*, *ratione personae*, or *ratione temporis*. If the respondent carries that burden, then the objections may be granted. If the respondent fails to carry that burden, then the objections are denied. If the tribunal is unable to make the determination on the evidence before it, then the issue should be joined to the merits.⁵² With respect to Respondent's objections on abuse of process and denial of benefits, Respondent carries the burden from the outset⁵³ – *i.e.*, Claimant does not have to plead a *prima facie* case in anticipation of such objections.

44. Here, Claimant has produced ample evidence not only establishing a *prima facie* case, but also proving under any reasonable standard that the Tribunal has jurisdiction *ratione materiae*, *ratione personae*, and *ratione temporis*. Similarly, Claimant has produced abundant evidence to rebut the objections for which Respondent has concededly carried the burden from the moment that Respondent raised them in this arbitration, *i.e.*, abuse of process and denial of benefits.

⁵¹ Kazazi, at 339 (RL-108).

⁵² *Phoenix*, para. 61 (RL-50) (if a tribunal is unable to ascertain whether “there exists a protected investment” at the jurisdictional phase, then the question “should be joined to the merits”).

⁵³ Reply, para. 14.

45. In the following Sections in which we respond to Respondent’s various arguments raised in the Reply, we will direct the Tribunal’s attention to the parts of the record that are relevant to Respondent’s various arguments – as well as to Claimant’s rebuttal of those arguments. As we will demonstrate, under any reasonable standard concerning the burden of proof, Respondent’s objections must be rejected based on the evidence now before the Tribunal.

III. THERE HAS BEEN NO ABUSE OF PROCESS IN THIS CASE

46. Respondent states that “abuse of process” is its “principal objection to jurisdiction” – so much so that it relegates all of its other objections to the category of “alternative jurisdictional objections” and asks the Tribunal to decide its objection “without the need to decide the other objections.”⁵⁴

47. Respondent’s heavy reliance on abuse of process betrays its awareness of the profound weakness of its other purported objections to jurisdiction (even as it substantially overlaps with most of the other objections). By focusing on abuse of process, Respondent apparently hopes to avoid the outcome of any reasoned analysis of the plain provisions of the ICSID Convention, CAFTA, and the Investment Law, under which all of Respondent’s objections must be rejected.⁵⁵ Respondent thus asserts that “one need not look to the temporal

⁵⁴ Reply, paras. 1, 92-264, and 269. Respondent’s assertion that it placed its “abuse of process” objection first because, if granted, the Tribunal would not have to consider any of the remaining jurisdictional objections (Reply, para. 9), makes no sense. Respondent’s abuse of process objection is addressed only to the claims concerning the El Dorado site, and, moreover, has no bearing on the claims under the Investment Law.

⁵⁵ See Counter-Memorial, paras. 374-425.

limitations of the treaty or the treaty’s definition of an investment to determine whether or not there has been an abuse of process.”⁵⁶

48. In any event, Respondent appears fundamentally to misunderstand the abuse of process doctrine. It does not serve to obviate the need to examine the relevant instrument or instruments of consent to arbitration. Rather, in the context of investor-State arbitration, it enables a tribunal carefully to consider all of the circumstances surrounding the investment at issue, in order to ensure that the “basic objectives” underlying the applicable treaties or laws are not undermined.⁵⁷

49. Respondent’s failure to understand the abuse of process doctrine is indicated, for example, by its effort to emphasize a handful of decontextualized facts over the full factual context that gave rise to Claimant’s claims, ignoring inconvenient facts concerning the economic and administrative substance of Pac Rim Cayman’s investment in El Salvador (*e.g.*, the location of the decision-makers for Pac Rim Cayman and its investments, the place of origin of the financial and intellectual capital invested, the nationality of its ultimate shareholders, *etc.*) as if they were irrelevant to the Tribunal’s determination as to whether there has been an abuse of process. It is further confirmed by Respondent’s refusal to distinguish between missed deadlines on the one hand, and a measure that prevents all metallic mining activities on the other. However, the abuse of process doctrine requires a holistic analysis.⁵⁸ Respondent’s request that

⁵⁶ Reply, para. 28.

⁵⁷ *See Phoenix*, para. 144 (RL-50).

⁵⁸ *Id.*, paras. 117-38 (considering “the whole file” and a number of broad factors in analyzing the abuse of process doctrine) (RL-50).

the Tribunal ignore substantial portions of the record, and blur critical distinctions, is antithetical to the principles underlying the doctrine.

50. Given the importance that Respondent has ascribed to this particular objection in its Reply (and elsewhere), this Section of the Rejoinder begins with a brief overview of the doctrine generally, and the recognition that it is an extraordinary remedy, to be used following an analysis of *all* of the circumstances of the case. We will then review the standard for applying the abuse of process doctrine in the context of investor-State arbitration, drawing those standards from the several cases that have actually considered the doctrine. We will then demonstrate why the doctrine has no application to this case.

A. The Origins of the Abuse of Process Doctrine Demonstrate That It Is Reserved for Extraordinary Cases

51. Respondent does not dispute that dismissing a claim on grounds of abuse of process is an extraordinary remedy, seldom invoked and even more rarely granted. The abuse of process doctrine arises from the abuse of rights (*abus de droit*) doctrine,⁵⁹ which in turn stems from the general principle of good faith and which some have characterized as a general principle of international law in its own right.⁶⁰ As Professor Bin Cheng has stated, the abuse of rights doctrine “is merely an application of this [good faith] principle to the exercise of rights.”⁶¹

⁵⁹ *Mobil*, paras. 169-77 (RL-51).

⁶⁰ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121-136 (1953) (CL-157).

⁶¹ *Id.*, at 121.

An exercise of rights does not constitute an abuse of rights so long as it is carried out reasonably and in good faith.

52. The application of the doctrine therefore requires a showing of bad faith in the exercise of a right. Abuse of rights has been described “as an omnibus term to describe certain ways of exercising a power which are legally reprehensible.”⁶² As stated by Professor J.F. O’Connor, “the expression ‘abuse of rights’ may be taken to include cases where a legal right – whether arising from a treaty or by virtue of customary rules – is exercised arbitrarily, maliciously or unreasonably, or fictitiously to evade a legal obligation.”⁶³

53. Clearly, allegations of the arbitrary, malicious, or fictitious exercise of a right are quite serious. It is no surprise, then, that such allegations are rarely offered, let alone confirmed. The International Court of Justice, which has done much to develop the doctrine, has rarely found conduct rising to the level of an abuse of right or abuse of process.⁶⁴ Indeed, the late Professor Brownlie, observed that the doctrine is based on “limited support from the dicta of

⁶² G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 Brit. Y.B. Int’l Law 323, 325 (1972-1973) (CL-158).

⁶³ J.F. O’CONNOR, GOOD FAITH IN INTERNATIONAL LAW 35 (1991) (noting that “[t]he principle of good faith probably receives more unqualified acceptance than any other in international law.”) (CL-159).

⁶⁴ Georg Schwarzenberger, *International Law and Order* (1971), at 89-90 and 99-100 (CL-160). See, e.g., Anglo-Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 142 (18 Dec. 1951) (finding Norway had committed no “manifest abuse” in part because its maritime decisions were “moderate and reasonable”) (CL-162); Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 63 (28 May 1948) (rejecting claim relating to decision on whether to admit new State to United Nations because “Article 4 [of the U.N. Charter] does not forbid the taking of account of any factor which it is possible *reasonably and in good faith* to connect to the conditions laid down in that Article”) (emphasis added) (CL-163); Rights of Nationals of United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 212 (27 Aug. 1952) (holding that exercise of right or power does not constitute abuse of right if “exercised reasonably and in good faith”) (CL-164). Some commentators have concluded that the doctrine should be limited to “the arbitrary or unreasonable exercise of rights or powers within the exclusive jurisdiction of States.” Schwarzenberger, at 100.

international tribunals,” which have occasionally mentioned the possibility of an abuse of rights but have rarely found its occurrence.⁶⁵ Similarly, Sir Hersch Lauterpacht described the abuse of right doctrine as “full of potentialities” but noted that it

places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which . . . must be wielded with studied restraint.⁶⁶

54. Reflecting the necessity of such “studied restraint,” an abuse of right can only be established through careful analysis of the facts. Thus, as stated by Respondent’s own authority Professor Chester Brown, the abuse of right doctrine “is not limited to fixed categories – what constitutes an abuse of process will depend on *all the circumstances of the case.*”⁶⁷

B. The Abuse of Process Objection in Investor-State Arbitration Cases

55. Tribunals hearing investor-State claims have followed the same standards in applying the abuse of process doctrine – applying it with considerable care and only in extraordinary or obvious cases. Such tribunals have, for instance, found that the inquiry into allegations of abuse of right or abuse of process requires the close examination of the “whole

⁶⁵ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 444 (7th ed. 2008) (“Brownlie”) (CL-161).

⁶⁶ SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 164 (1958) (CL-165); *see also* Brownlie at 444 (observing that “while it is easy to sympathize with exponents of the doctrine, the delimitation of its function is a matter of delicacy”) (CL-161).

⁶⁷ Chester Brown, The Relevance of the Doctrine of Abuse of Process in International Adjudication, Transnational Dispute Management (2 July 2009), at 7 (emphasis added) (RL-52).

series of factors surrounding the alleged investment.”⁶⁸ Furthermore, nearly all of those tribunals that have considered requests to dismiss claims based on alleged abuse of process have rejected such requests.⁶⁹

56. Indeed, Respondent cites only three investor-State decisions – *Phoenix v. Czech Republic*, *Mobil v. Venezuela*, and *Aguas del Tunari v. Bolivia* – in support of its abuse of process objection, of which the latter award is not, strictly speaking, an abuse of process case at all. *Phoenix* involved an extraordinary set of circumstances, in which the patriarch of a Czech family (Mr. Beňo): escaped from the custody of the Czech police; fled to Israel; established an Israeli company to acquire the shares of two Czech companies owned or controlled by other Beňo family members; and then used the Israeli company to bring claims under the Czech Republic under the Czech Republic-Israel BIT, concerning civil and criminal proceedings involving the Czech companies, which had been pending before Mr. Beňo’s arrest by the Czech

⁶⁸ *Phoenix*, para. 135.

⁶⁹ See *Mobil*, paras. 203-206 (RL-51); *Chevron Corp. & Texaco Petroleum Corp. v. Ecuador*, Ad hoc—UNCITRAL Arbitration Rules, Interim Award (1 Dec. 2008), paras. 137-147 (CL-75); *Rompotrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Decision on Preliminary Objections (18 Apr. 2008), para. 115 (RL-106); *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures (21 Mar. 2007), paras. 154-58 (CL-166); *Saluka Investments BV v. Czech Republic*, PCA—UNCITRAL Arbitration Rules, Partial Award (17 Mar. 2006), paras. 231-32 (RL-74); *Bayindir Insaat Turizm Ticaret ve Sanayi A. Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005), para. 173 (RL-61); *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 Dec. 2003), para. 96 (CL-167); *Waste Management, Inc v. Mexico*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings (26 June 2002), para. 50 (“[T]he Tribunal does not consider that, on the evidence available to it, there is any basis for saying that the present claim was brought in bad faith or that it is not a *bona fide* claim...”) (RL-58); *Lauder v. Czech Republic*, Ad hoc—UNCITRAL Arbitration Rules, Final Award (3 Sept. 2001), para. 180 (CL-168).

As discussed below, the tribunal in *Cementownia v. Turkey* applied the doctrine in the context of the respondent’s request for a declaration that the claimant had acted in bad faith, and found an abuse of process in that case.

police and his subsequent flight to Israel.⁷⁰ In *Mobil*, the tribunal declined to exercise jurisdiction over a relatively small portion of the claims – which portion of the claims had been specifically and formally asserted by the claimant against the respondent *before* acquiring the citizenship that enabled it later to bring claims under a BIT.⁷¹ In *Aguas del Tunari*, of course, none of the claims were dismissed by the tribunal (and as discussed below, the case does not support the proposition for which Respondent cites it).⁷²

57. In fact, *Phoenix* and *Mobil* are the only two investor-State cases Respondent has managed to find in which claims were dismissed based on abuse of process. Respondent’s Reply devotes only a few sentences to describing the particular facts of these cases. But the facts are critical, given that the objection turns on a tribunal’s examination of all of the circumstances of the case in question. A more thorough examination of the facts and holdings of *Phoenix* and *Mobil*, as well as of *Aguas del Tunari* – and the principles to be derived from these cases – demonstrate why the doctrine is inapplicable here.

1. *Phoenix v. Czech Republic*

58. In *Phoenix*, the tribunal concluded that the true investors in the case were Czech citizens, Mr. Vladimir Beño and members of his family, who had established an Israeli company (Phoenix) to acquire all of the interests of two Czech companies – also owned or controlled by

⁷⁰ *Phoenix*, paras. 22, 32-33 (RL-50).

⁷¹ *Mobil*, para. 205-07 (RL-51).

⁷² *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 Oct. 2005), para. 320-21, 330 (“*Aguas del Tunari*”) (RL-60).

members of the Beňo family – to assert claims against the Czech Republic arising from disputes that were formally pending in the Czech Republic.⁷³

59. Specifically, Mr. Beňo had been arrested by the Czech police on charges of tax fraud and custom duty violations, but had escaped to Israel, where he established Phoenix. Phoenix then purchased all of the shares of the two Czech companies from other members of the Beňo family. Two months later, Phoenix notified the Czech Republic that it intended to bring claims under the Israel-Czech Republic BIT. Phoenix’s claims were that (1) the courts of the Czech Republic had failed to “promptly resolve” civil claims between one of the Czech companies and another Czech citizen; and (2) the Czech Government had wrongfully frozen the funds and seized the business records of the other Czech company, in connection with its criminal investigation of Mr. Beňo. Both the civil litigation, and the freezing of the funds and seizure of business records, had commenced before Mr. Beňo’s arrest and flight to Israel, before his establishment of Phoenix, and before Phoenix’s acquisition of its interests in the two Czech companies that had been owned by Mr. Beňo’s family. In originally submitting its Request for Arbitration to ICSID, Phoenix had informed the ICSID Secretariat (in response to questions raised by the Secretariat) that its theory was that the Czech companies had “assigned” their claims against the Czech Republic to Phoenix. Phoenix subsequently abandoned that theory, claiming that its damages arose from the continuing harm caused to its “investments,” which arose from the Czech Republic’s earlier actions.⁷⁴

⁷³ *Phoenix*, paras. 137, 139, 145-47.

⁷⁴ *Id.*, paras. 44-48, 135-44.

60. After reciting these facts, the *Phoenix* tribunal undertook to “examine closely a whole series of factors surrounding the alleged investment of Phoenix.”⁷⁵ The tribunal considered, *inter alia*, the “substance of the transaction,” “the true nature of the operation,” “the timing of the investment,” and the “initial request to ICSID,” in concluding that there was no economic substance to the investment.⁷⁶ Phoenix’s acquisition of shares in the Czech companies had been made *not* as an investment, within the meaning of “investment” under the applicable treaties, but rather had been solely to enable Czech citizens to assert BIT claims against their own State, for preexisting domestic claims.⁷⁷ It must be emphasized that one of the principal concerns of the *Phoenix* tribunal was that the claims at issue were fundamentally *domestic* claims:

If it were accepted that the Tribunal has jurisdiction to decide Phoenix’s case, then any *pre-existing national* dispute could be brought to an ICSID tribunal by the transfer of *national* economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer *from the domestic arena* to the international scene would *ipso facto* constitute a “protected investment” – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited.⁷⁸

⁷⁵ *Id.*, para. 135.

⁷⁶ *Id.*, paras. 135-41.

⁷⁷ *Id.*

⁷⁸ *Id.*, para. 135-44 (RL-50). In *Cementownia v. Turkey*, the tribunal concluded that it did not have jurisdiction over the case because, *inter alia*, the claimant had “not produced any persuasive evidence that could prove either its shareholding . . . at the relevant time or that it was an investor within the meaning of the ECT.” *Cementownia “Nowa Huta” SA v. Turkey*, ICSID Case No. ARB(AF)/06/2, Award, para. 149 (17 Sept. 2009) (CL-169). However, the tribunal addressed the abuse-of-rights doctrine in the context of granting respondent’s request for a declaration that the claim had been brought in bad faith. Similar to *Phoenix* (and citing that case), the tribunal focused largely on the fact that the true investor in that case was a national of Turkey bringing a claim against his own State. According to the tribunal: “Had Cementownia actually proven that on May 30, 2003, it legally acquired the shares [at issue], there would still be the question of whether this was treaty shopping of the wrong kind, in the words of *Phoenix*

(continued...)

61. As discussed in detail below, none of the factors in *Phoenix* are present in this case. This is not a “domestic” dispute. This is a dispute between a U.S. company – whose investment in El Salvador was planned, managed, and financed primarily from the United States – and the Republic of El Salvador. Pac Rim Cayman is a Nevada entity. Long before its domestication to Nevada in December 2007, it was managed from the Reno offices of the Pacific Rim Companies, principally by the President and CEO of Pac Rim Cayman’s parent corporation, who always maintained his offices in Reno (along with the other senior geologists of the Company). Similarly, Pac Rim Cayman’s subsidiaries – including its Salvadoran subsidiaries – were substantially managed from Reno. The financial capital for the investment in El Salvador came substantially from Nevada mining operations owned by Pac Rim Cayman’s Nevada affiliates, as well as from the capital investments of the shareholders of Pacific Rim Mining Corp., a majority of whom are U.S. investors.⁷⁹ The intellectual property for the investment came entirely from the U.S. geologists who were employed and compensated by Pac Rim Cayman’s affiliates. This is not a case involving the establishment of a shell company in a jurisdiction to which the true investor has no connection. The investment at issue in the case is substantially a U.S. investment. The domestication of Pac Rim Cayman in December 2007 reflected the company’s actual economic and administrative substance.

(continued...)

Action, “a transfer of national economic interests to a foreign company in an attempt to seek protections under a BIT.” *Id.*, para. 156 (quoting *Phoenix*, para. 149).

⁷⁹ *Infra* Sections IV.A & IV.B.

62. Nor is this case based on a pre-existing dispute. In December 2007, Pac Rim Cayman and its Salvadoran enterprises faced delays in connection with its permit applications at the El Dorado site, and a potential disagreement with regulators over whether it needed to obtain ownership or authority to use the entire surface overlaying the proposed El Dorado concession area. This dispute arises from El Salvador's measure – first made public by President Saca's announcement in March 2008 – to place a ban on all metallic mining activities in the country. That is what destroyed Pac Rim Cayman's investment in El Salvador.

63. The facts of this case bear no resemblance to those in *Phoenix*. The elements of an abuse of process are not present here.

2. *Mobil v. Venezuela*

64. In *Mobil*, as in *Phoenix*, the tribunal emphasized that “[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case.”⁸⁰

65. In *Mobil*, various entities in the same corporate family (the “Mobil Companies”) had brought claims at ICSID against Venezuela under the Netherlands-Venezuela BIT, arising from their investments in the Venezuelan petroleum industry. At the time these companies

⁸⁰ *Mobil*, para. 177 (RL-51).

commenced their investments in Venezuela – 1996-97 – there were no Netherlands companies in the corporate ownership chain.⁸¹

66. Prior to the insertion of a Netherlands entity into the ownership chain, Venezuela had increased royalty rates and income taxes and had created a new extraction tax. In a series of letters written to the Government in, respectively, February 2005, May 2005, and June 2005 (which was still prior to the corporate restructuring), the Mobil Companies had complained of the royalty rates and tax increases – and specifically threatened to bring ICSID arbitration against Venezuela under Venezuela’s Investment Law.⁸² In October 2005, following its dispatch of these letters to the Government, the Mobil Companies created a new Netherlands entity. It then undertook several transactions to insert the Netherlands entity into the ownership chain for all of their Venezuelan investments, completing those transactions in November 2006.⁸³ Venezuela subsequently undertook nationalization measures in January 2007. The Mobil Companies filed their Request for Arbitration at ICSID in September 2007, alleging violations of the Netherlands-Venezuela BIT and Venezuela’s Investment Law.⁸⁴

67. After the tribunal dismissed the Mobil Companies’ claims under Venezuela’s Investment Law, concluding that the law did not provide consent on behalf of the State to ICSID

⁸¹ *Id.*, paras. 18, 20, 203.

⁸² *Id.*, paras. 200-01.

⁸³ *Id.*, paras. 20-22, 203.

⁸⁴ *Id.*, paras. 1, 19.

jurisdiction,⁸⁵ the tribunal turned to whether it had jurisdiction over the claims under the Netherlands-Venezuela BIT. The Mobil Companies acknowledged that the “aim of the restructuring of their investments through a Dutch holding [company] was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT.”⁸⁶ The respondent argued that the Netherlands entity was “a ‘corporation of convenience’ inserted into the corporate chain solely for the purpose of securing access to ICSID arbitration” and that “[s]uch an ‘abuse’ of right should not be permitted.”⁸⁷

68. The tribunal held that with respect to the royalty and tax increases for which the Mobil Companies had specifically threatened to bring ICSID arbitration *prior* to adding the Netherlands entity to the ownership chain, there was no jurisdiction under the Netherlands-Venezuela BIT, because these were “pre-existing disputes” at the time of the restructuring.⁸⁸ However, with respect to the nationalization measures that began two months after the restructuring had been completed, the tribunal found no abuse of process. It concluded that restructuring the investment to protect it against breaches of the BIT “was a perfectly legitimate goal as far as it concerned future disputes.”⁸⁹

69. In this case, there are no claims comparable to those dismissed by the tribunal in *Mobil*. The primary measure at issue in this case – the *de facto* ban on mining – was not

⁸⁵ *Id.*, at paras. 140, 205-07. As discussed in our Counter-Memorial, paras. 454-55 and *infra* paras. 73-74, Venezuela’s Investment Law is easily distinguished from El Salvador’s.

⁸⁶ *Mobil*, para. 204 (RL-51).

⁸⁷ *Id.*, para. 144.

⁸⁸ *Id.*, para. 205-06.

⁸⁹ *Id.*, para. 204.

cognizable as such in December 2007. Given Respondent’s efforts to deny that the measure existed until it filed its Reply in the instant set of objections, there is no reason for Claimant to have known about it in December 2007. At most, in December 2007, Claimant faced regulatory delays and a possible disagreement about the land surface ownership requirement in the Mining Law. There is no evidence in this case – as there was in *Mobil* – that the Pacific Rim Companies ever considered the delay and/or the disagreement as “measures” that would independently support claims under CAFTA, or that the Pacific Rim Companies ever asserted such claims against El Salvador prior to the domestication of Pac Rim Cayman to Nevada.⁹⁰ It is further worth observing, in the context of an abuse of process objection, that there was no evidence in *Mobil* that either the particular claimants or their investment in Venezuela had any connection to the Netherlands prior to the reorganization. The only purpose served by the Netherlands entity in *Mobil* was to create jurisdiction under the Netherlands-Venezuela BIT. Again, in this case, the domestication of Pac Rim Cayman to Nevada in December 2007 reflected the economic and administrative reality of the investment that had existed for many years.⁹¹

⁹⁰ Moreover, even assuming *arguendo* that Claimant had threatened to assert claims against El Salvador arising from these facts prior to December 2007 – and, again, there is no evidence that it did – that would not have precluded Claimant from bringing claims under CAFTA for the subsequently announced mining ban. In *Mobil*, the claimants had threatened to assert claims against Venezuela arising from royalty and tax increases before they had inserted a Netherlands holding company into the ownership structure. While holding that those claims were barred, the tribunal also held that the claimants were entitled to assert claims under the Netherlands-Venezuela BIT for a nationalization process that began shortly *after* the restructuring was completed. *See Mobil*, para. 206 (RL-51).

⁹¹ Moreover, as discussed in our Counter-Memorial and further below, unlike the claimants in *Mobil*, the Pacific Rim Companies had numerous avenues they could have pursued to international arbitration – including at ICSID under CAFTA – prior to Pac Rim Cayman’s domestication to Nevada. *See* Counter-Memorial, para. 141; discussion *infra* Section III.C.4.

70. In sum, the *Mobil* case serves further to demonstrate that the doctrine of abuse of process is entirely inapplicable to the present case.

3. *Aguas del Tunari v. Bolivia*

71. The Reply grossly mischaracterizes the majority decision in *Aguas del Tunari v. Bolivia*, asserting that it “imposed an even stricter standard” for precluding corporate restructuring under the abuse of process doctrine than the tribunal in *Mobil*. According to Respondent, the majority decision in *Aguas del Tunari* “indicat[ed] that there would be an abuse of process if the corporate restructuring occurred after the dispute became foreseeable.”⁹² There is no such holding (or even such “indication”) in *Aguas del Tunari*.

72. The facts of *Aguas del Tunari* are complex but can be briefly summarized. *Aguas del Tunari, S.A.* (“AdT”), a Bolivian company with predominantly foreign ownership, entered into a Water and Sewage Concession Agreement with the Bolivian Government for the city of Cochabamba on 2 September 1999. At the time the Concession Agreement was entered, there was no foreign ownership in AdT’s upstream structure that would have allowed for arbitration under an investment treaty. In the months immediately following the entry of the Agreement, from September through December 1999, AdT faced increasing criticism from the public and calls for the Agreement’s annulment. As described by the tribunal,

A news article dated November 29, 1999 described how various labor organizations from Cochabamba were expected to present claims of unconstitutionality against the Portable Water

⁹² Reply, para. 39 (emphasis in original) (citing *Aguas del Tunari*, para. 329 (RL-60)).

and Sewage Service Law and to demand recession of the Concession. As new rates took effect on December 1, 1999, a news story emphasized how politicians, unionists, and neighborhood leaders of Cochabamba raised their voices against the rate increases.⁹³

In the midst of these protests, AdT's corporate ownership was restructured, so that Netherlands holding companies were inserted into the ownership chain effective 22 December 1999. After the protests erupted in riots and nationwide violence in the spring of 2000, and Bolivia cancelled the Concession, AdT brought claims against Bolivia at ICSID.

73. In denying Bolivia's various objections to jurisdiction, the tribunal did not remotely suggest that a dismissal on abuse of process would have been appropriate if the events leading to the Concession's cancellation had been "foreseeable" at the time of the corporate reorganization. Rather, in a "Concluding Observation" at the end of the decision, the tribunal merely stated that

[t]o the extent that Bolivia questions the timing of the transfer of ownership in Claimant in November-December 1999 suggesting that it was done in anticipation of the events to follow in the Spring of 2000, the Tribunal notes that . . . the present record does not establish that the severity of the particular events that would erupt in the Spring of 2000 were foreseeable in November or December of 1999.⁹⁴

There is no suggestion that the reorganization would have been inappropriate even if those events had been foreseeable. In finding insufficient evidence that "the December 1999 transfer

⁹³ *Agua del Tunari*, paras. 64-66 (RL-60).

⁹⁴ *Id.*, para. 329(c) (RL-60).

of ownership was a fraudulent or abusive device to assert jurisdiction,” the tribunal observed, *inter alia*, that:

b. the present record does not establish why the joint venture was headquartered in the Netherlands as opposed to some other jurisdiction, although Claimant indicated that the Netherlands was chosen for reasons of taxation,

c. a decision as to where to locate a joint venture is often driven by taxation considerations, although other factors such as the availability of BITs can be important to such a decision, and

d. it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.⁹⁵

74. Here, as in *Aguas del Tunari*, there is no evidence that the domestication of Pac Rim Cayman to Nevada – the jurisdiction from which it had been managed since its inception in 1997, and from which its Salvadoran investments had been largely planned, managed, and financed – was “a fraudulent or abusive device to assert jurisdiction.” To the contrary, the uncontroverted evidence is that the Pacific Rim Companies decided to domesticate Pac Rim Cayman to Nevada as part of an overall corporate structuring that dissolved several other subsidiaries, saved costs and administrative burden, and had no adverse tax consequences. As Mr. Shrake acknowledges in his Witness Statement, he also considered the Companies’ potential avenues of recourse if a dispute with El Salvador were ever to arise in the future.⁹⁶ But there is no indication that the Companies knew or should have known that a ban on metallic mining activities had been or was soon to be implemented. And even if the Companies had somehow been able to predict the ban – despite the private assurances of Salvadoran officials that there

⁹⁵ *Id.*, para. 330 (RL-60).

⁹⁶ Witness Statement of Thomas C. Shrake (“Shrake Statement”), paras. 112-13.

was no such ban, and the denial by El Salvador of the ban's existence up until its Reply in the current objections – there would be no basis to conclude that any reorganization undertaken (in whole or in part) to prospectively protect the Companies' investments in El Salvador would constitute an abuse of process.

C. The Record in this Case Does Not Support Any of the Elements of an Abuse of Process Objection

75. Based on principles above, and on the manner in which Respondent has framed its abuse of process objection, Respondent concededly has the burden of proving the following elements: (1) An investor with no ties to the United States (2) set up a shell company with no substance in the United States (3) for the sole purpose of obtaining jurisdiction over a pre-existing dispute, (4) which jurisdiction the investor would not have otherwise been able to obtain, (5) and did so in bad faith. Respondent has not satisfied its burden of establishing any of these elements, let alone all of them. We offer only a brief summary of the abundant evidence that is now before the Tribunal, which refutes each of these elements.

1. The Substantial Presence in the United States

76. Dating back to 1997, the Pacific Rim Companies have always had a substantial presence in and connection to the United States.⁹⁷ Indeed, the investment in El Salvador was largely planned, managed, and financed from the United States. Thus, for example:

⁹⁷ Respondent has argued that Pac Rim Cayman is the only “investor” in the arbitration and that the Tribunal should not consider the presence or activities of its affiliates in the United States. Particularly in

(continued...)

- The CEO of Pacific Rim Mining Corp., Mr. Thomas Shrake, a U.S. citizen, has maintained his offices in Reno, Nevada since 1997;⁹⁸
- Since 1997, when Mr. Shrake directed Pac Rim Cayman to be established to hold the Companies' non-U.S. subsidiaries, he has always managed Pac Rim Cayman and its subsidiaries from his offices in Reno;⁹⁹
- Since 1997, when Mr. Shrake directed Pac Rim Exploration to be established as a Nevada corporation, Pac Rim Exploration has always had its offices in Reno;¹⁰⁰
- Pac Rim Exploration employed and compensated nearly all of the Companies' senior geologists, including Mr. Shrake and the other U.S. geologists who worked on the El Salvador project (such as Mr. Frederick Earnest and Mr. William Gehlen, both U.S. citizens who were employed by Pac Rim Exploration and each of whom served, at different times, as the President of PRES);¹⁰¹
- Pac Rim Exploration developed virtually all of the intellectual property invested in the El Salvador project, and supervised and paid many of the outside firms and consultants that helped to plan and develop the El Salvador project;¹⁰²
- Since 2002, a substantial amount of the financial capital invested in El Salvador was provided by Pac Rim Cayman's sister company, Dayton Mining (U.S.) Inc., a Nevada corporation, which earned the revenues from mining operations in Nevada.¹⁰³

77. None of these facts is or can be disputed by Respondent. We will observe here that Respondent disputes that Pacific Rim Mining Corp. (and in turn Pac Rim Cayman) is owned

(continued...)

the context of an abuse of process objection, however, the Tribunal can and must look at "all the circumstances of the case" (*Mobil*, para. 177 (RL-51)) and at the "whole series of factors surrounding the alleged investment" (*Phoenix*, para. 135 (RL-50)).

⁹⁸ Counter-Memorial, paras. 15, 39-40, 50, 63 (and the Witness Statements and Exhibits cited therein).

⁹⁹ Counter-Memorial, paras. 29, 39-40, 50-55, 74 (and the Witness Statements and Exhibits cited therein).

¹⁰⁰ Counter-Memorial, paras. 53-54, 74 (and the Witness Statements and Exhibits cited therein).

¹⁰¹ Counter-Memorial, paras. 53-57, 82 (and the Witness Statements and Exhibits cited therein).

¹⁰² Counter-Memorial, paras. 82, 85-92 (and the Witness Statements and Exhibits cited therein).

¹⁰³ Counter-Memorial, paras. 72-80 (and the Witness Statements and Exhibits cited therein).

and controlled by a majority of U.S. investors (a point relevant to the “own or control” prong of CAFTA’s denial of benefits provision). We address and rebut Respondent’s arguments below in our Section addressing denial of benefits. But in the context of abuse of rights, even Respondent cannot contest that a substantial portion of Pacific Rim Mining Corp.’s outstanding shares have been owned by persons resident in the United States during the relevant time frame – another factor establishing the investor’s and the investment’s substantial ties to the United States, and demonstrating that the abuse of process doctrine is entirely inapplicable to this case.

2. Pac Rim Cayman Is Neither a Shell Company nor Without Substance in the United States

78. Unlike *Phoenix*, *Mobil*, or *Aguas del Tunari*, this case does not involve the creation of a holding company, and its insertion into the corporate ownership structure, shortly before the commencement of an investor-State case. Mr. Shrake directed the establishment of Pac Rim Cayman from his Nevada offices in 1997. Since then, Pac Rim Cayman has always been one of the principal companies through which the Companies have held their non-U.S. subsidiaries.¹⁰⁴ From 1997, Mr. Shrake managed Pac Rim Cayman – deciding which holdings it would acquire, which it would divest, and how they would be managed, from his Nevada offices.

79. Thus, for example, in 1997, Mr. Shrake decided that the Companies’ investment in the Diablillos mine in Argentina would be held through Pac Rim Cayman. Mr. Shrake later decided that the Companies would sell the Diablillos mine to help finance the El Salvador project, and, accordingly, Pac Rim Cayman divested itself of its ownership in the Diablillos

¹⁰⁴ See Counter-Memorial, paras. 51-52, 64, 80-84 (and the Witness Statements and Exhibits cited therein).

mine. Similarly, Mr. Shrake determined that Pac Rim Cayman would hold the Companies' Salvadoran assets, and Mr. Shrake was principally responsible for the Companies' acquisition and management of those assets. It was also on Mr. Shrake's recommendation that the Companies domesticated Pac Rim Cayman to Nevada in December 2007, where it became the direct and 100% owner of Pac Rim Exploration. Mr. Shrake and Ms. McLeod-Seltzer both officially hold the title of "Manager" of Pac Rim Cayman. But as acknowledged by Ms. McLeod-Seltzer in her witness statement, it has always been Mr. Shrake who has managed Pac Rim Cayman, along with its direct and indirect subsidiaries, from his offices in Reno.¹⁰⁵

80. The substance of a holding company is not to be measured based on the number of employees it has or the physical assets that it owns. As stated in one of the authorities submitted by Respondent, "A holding company is a corporate body with a concentrated ownership of shares of stock in another company, by which it exercises control, supervision or influence over the policies and management of the company whose shares it holds."¹⁰⁶ The business activities of a holding company, therefore, are the control, supervision, or management of its holdings. Even before Pac Rim Cayman's domestication to Nevada in December 2007, all of those activities were conducted from Nevada.¹⁰⁷

81. Pac Rim Cayman is not a "shell" company. It is a legitimate holding company, duly incorporated under the laws of Nevada. Its business activities – *i.e.*, its management and the

¹⁰⁵ See Counter-Memorial, para. 52 (and the Witness Statements and Exhibits cited therein).

¹⁰⁶ William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations*, § 2821 (2010) (RL-64).

¹⁰⁷ See Counter-Memorial, para. 52 (and the Witness Statements and Exhibits cited therein).

management of its subsidiaries – have always been conducted primarily from the United States.¹⁰⁸ And again, most of the financial capital investment in El Salvador (nearly all of which was accounted for through Pac Rim Cayman) originated from the Companies’ operations in Nevada.

82. Unlike the holding companies in *Mobil* and *Aguas del Tunari* (where the tribunals rejected abuse of process arguments for the claims at issue), or the holding company in *Phoenix*, Pac Rim Cayman has substantial ties to the jurisdiction from which the investment at issue was substantially planned, managed, and financed, and to the jurisdiction where a substantial number of the actual investors reside. This is not a case that is appropriate for the application of the abuse of process doctrine.

3. Pac Rim Cayman Was Not Domesticated To Nevada To Obtain Jurisdiction Over a Pre-existing Dispute

83. Respondent has consistently tried to obscure or ignore the primary measure at issue in the case – the *de facto* ban on metallic mining activities that was first announced by President Saca in March 2008. It is that measure that gave rise to this dispute. It is a measure that is readily distinguished, both substantively and in terms of when Claimant knew or had reason to know about it, from the missed deadlines that Claimant had encountered in the period running into early 2008.

¹⁰⁸ See Counter-Memorial, para. 52 (and the Witness Statements and Exhibits cited therein); see also Counter-Memorial, paras. 255-307 and discussion *infra* Section IV.A (addressing the “substantial business activities” prong of CAFTA’s denial of benefits provision).

84. Respondent’s argument that the only “measures” at issue in this case are the “presumptive” denials of Claimant’s applications for the El Dorado site in 2004 (or, alternatively, 2006) does not withstand even the most modest scrutiny. The evidence is overwhelming that no one believed that the applications had been “presumptively” denied. Indeed, if Respondent believed that the applications had been presumptively denied, then it engaged in a prolonged and elaborate scheme to conceal that belief and to induce Claimant to continue its investments in El Salvador. Such conclusions are obvious based on a review of the record of key events prior to and after March 2008.

a. Key Events Prior to March 2008

85. In connection with its application to MARN for an environmental permit at El Dorado – which was necessary to obtain a exploitation concession for El Dorado from MINEC – PRES submitted its El Dorado EIA to MARN in September 2004. By December 2004, the 60-day statutory period for MARN to rule on it had passed. El Salvador now claims that PRES’s application for an El Dorado environmental permit – as well as its application for an El Dorado exploitation concession – were “presumptively” denied.¹⁰⁹

86. Notwithstanding this supposed “presumptive” denial in 2004, MARN and PRES undertook an extensive exchange of comments and information concerning the El Dorado EIA, which continued over the next several years. Thus, in February 2005, MARN provided PRES with a series of observations concerning the El Dorado EIA in February 2005. In April 2005,

¹⁰⁹ Objections to Jurisdiction, paras. 27-32; Reply, paras. 47-48.

PRES submitted a supplemental volume responding to those observations. In October 2005, MARN published information related to the El Dorado EIA in local newspapers to provide comments on the assessment. In March 2006, MARN provided PRES with observations that had been submitted during the public comment period. In July 2006, MARN provided PRES with 13 additional comments concerning the El Dorado EIA. In September 2006, PRES filed a response to the public comments on the El Dorado EIA. In October 2006, PRES filed a response to MARN's additional 13 comments on the El Dorado EIA. And in December 2006, PRES submitted to MARN its plan for a state-of-the-art water treatment facility for El Dorado.¹¹⁰

87. In October 2006, Ms. Navas of the Bureau of Mines within MINEC had sent a letter to PRES, requesting various documentation in connection with PRES's application for the El Dorado exploitation concession. In November 2006, PRES provided a written submission in response to Ms. Navas's October 2006 letter, providing all of the requested information – with the exception of the environmental permit – and asking MINEC to excuse the absence of the environmental permit on the grounds that there was an "*Impedimento con Justa Causa*."¹¹¹ In connection with its first set of objections, Respondent submitted a letter from Ms. Navas to PRES dated 4 December 2006, stating that PRES's submission "partially" responded to her October 2006 letter, and providing PRES with additional time to submit the environmental

¹¹⁰ See Counter-Memorial, paras. 101-10 (and Witness Statements and Exhibits cited therein); see also, Claimant's Response to Respondent's Preliminary Objection, paras. 47-48.

¹¹¹ Letter from Pacific Rim El Salvador to Bureau of Mines (11 Nov. 2006) (R-5); see Counter-Memorial, para. 116 (and Witness Statements and Exhibits cited therein).

permit. However, Respondent also asserted that the 4 December 2006 letter was officially “withdrawn.”¹¹²

88. After the submission of the plan for the water treatment facility for El Dorado, official communication from MARN concerning the El Dorado EIA stopped for a period of two years, leading Respondent to assert, in the alternative, that the application for the El Dorado environmental permit, as well as the application for the El Dorado exploitation concession, were at this point “presumptively” denied. However, Respondent cannot explain why – if there was a presumptive denial of these applications in 2006 (or even 2007) – MARN sent PRES a letter in December 2008 (discussed further below), in which it asked PRES for information concerning the El Dorado EIA (which in fact PRES had submitted long ago), and stating that “[o]nce these requirements are satisfied, it will be possible to resolve your application for the environmental permit for your mineral exploitation project ‘El Dorado,’ previously mentioned, within the thirty days following the date where you have finalized all the procedures of the EIA.”¹¹³ Nor does Respondent contest (or even mention) the evidence submitted by Claimant, that through 2007 and into 2008, Respondent’s officials repeatedly assured Claimant that the El Dorado permits would be forthcoming.¹¹⁴

¹¹² Reply, para. 63 n. 38 (31 Jan. 2011). Whether the letter was withdrawn, and if so, what significance such withdrawal might have, are not relevant to the issues before the Tribunal at this jurisdictional phase. The point is that up until March 2008, Claimant was dealing with administrative and procedural issues – not an outright prohibition of all metallic mining activities.

¹¹³ Letter from MARN to PRES (4 Dec. 2008) (C-76); *see also* Notice of Arbitration, para. 64 (citing letter).

¹¹⁴ *See* Counter-Memorial, paras. 111-30 (and the Witness Statements and Exhibits cited therein).

89. In the meantime, through 2007 and into March 2008, MARN continued to exchange information with Pac Rim Cayman's other Salvadoran subsidiary, DOREX, concerning its licenses. Thus, in October 2006, DOREX submitted applications to MARN for environmental permits at both Guaco and Pueblos.¹¹⁵ That same month, MARN asked DOREX to submit an EIA for each license area. In August 2007, DOREX submitted the EIAs for the Guaco and Pueblos sites, as requested by MARN. In November 2007, MARN acknowledged receiving the Guaco EIA and requested DOREX to respond to observations on it. In January 2008, MARN acknowledged receipt of the Pueblos EIA, and requested DOREX to respond to observations on it. In February 2008, DOREX responded to MARN regarding its observations on the Guaco application. In March 2008, DOREX responded to MARN regarding its observations on the Pueblos application.¹¹⁶

90. Also through 2007 and into 2008, the Companies continued to increase their exploration activities (and their investment) in El Salvador. In March 2007, the Companies reported significant new discoveries of gold from their exploration drilling in El Dorado Sur at the so-called "Balsamo deposit." In April 2007, the Companies reported that they were using four exploration drills at the Balsamo deposit and planned to add another. In August 2007, the Companies reported that on-going delineation drilling at the Balsamo deposit was nearing completion. And in January 2008, the Companies reported updated estimates of gold and silver

¹¹⁵ Notice of Arbitration, para. 70. As the Tribunal will recall, when PRES was originally preparing the application for the El Dorado exploitation concession, MINEC advised PRES that the original concession area was too large. Working with MINEC, PRES removed the Guaco, Pueblos, and Huacuco sites from the El Dorado application, and established DOREX to hold exploration licenses for those sites separately. *Id.*, paras. 66-67.

¹¹⁶ See Counter-Memorial, para. 127 (and Witness Statements and Exhibits cited therein).

deposits at El Dorado, which at that time included “measured and indicated resources of 1,430,000 gold equivalent ounces.”¹¹⁷

91. As explained in detail in the Counter-Memorial, in late 2007, the Pacific Rim Companies undertook a restructuring of the Companies that was meant, in the first instance, to save costs and administrative burden. Revenues from the Companies’ Nevada mining operations were drying up, and at the same time the Companies had been consistently increasing their investment in El Salvador. Accordingly, on 4 December 2007, the Board of Pacific Rim Mining Corp. resolved to dissolve several inactive subsidiaries and to domesticate Pac Rim Cayman from the Cayman Islands to Nevada, from which it had always been managed. The Companies believed that the domestication of Pac Rim Cayman to Nevada would result in cost savings and would not cause any adverse tax consequences (it had originally been for tax reasons that Pac Rim Cayman was set up in the Cayman Islands).

92. As stated by Mr. Shrake in his Witness Statement, he also considered the Companies’ potential avenues of recourse if a dispute with El Salvador were ever to arise in the future. As of December 2007, the Companies were frustrated with the delays encountered by the El Dorado applications. They had hired lobbyists both in El Salvador and the United States to help move the process forward. They also hoped that mining legislation pending in El Salvador’s Congress would resolve the surface land ownership issue, which would obviate any need to reduce the El Dorado concession area, or to challenge any ruling by MINEC that PRES’s original application had not satisfied the land surface requirement. But no one at the Companies

¹¹⁷ See *id.*, paras. 128-29 (and Witness Statements and Exhibits cited therein).

believed that any of these issues gave rise to a dispute at that time. (As discussed below, if they had believed that such a dispute had arisen, the Companies had other recourse to investor-State arbitration, including under CAFTA and at ICSID, besides Pac Rim Cayman.) At the same time, Mr. Shrake thought it was possible – though unlikely – that a dispute with El Salvador could arise in the future, and the ability of Pac Rim Cayman to bring claims under CAFTA in such a scenario was one of several factors he considered in recommending that the Board undertake the reorganization.¹¹⁸

93. In January 2008, Mr. Shrake traveled to El Salvador, where he again met with senior officials of the Government, including Mr. Guillermo Gallegos. Mr. Gallegos was, at the time, the Majority Leader of Congress, who had been part of a Salvadoran delegation that had visited Mr. Shrake in Nevada in November 2006 to tour a Nevada mining site. During the January 2008 meeting, Mr. Gallegos said he was confident that MARN would soon issue the El Dorado 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 2008.

b. Key Events in March 2008 and Afterward

94. As set forth in the Notice of Arbitration, as discussed at length in connection with Respondent's first set of objections, and as discussed again in our Counter-Memorial in this

¹¹⁸ Shrake Statement, para. 112; *see* Counter-Memorial, paras. 131-42 (and Witness Statements and Exhibits cited therein).

second set of objections, then-President Saca was quoted in the Salvadoran press as stating in March 2008, among other things:

What I am saying is that, in principle, I do not agree with granting [pending mining] permits.¹¹⁹

95. Especially given the repeated representations to Claimant by the Saca Administration that its official policy was one of enthusiastic support for Claimant's mining projects in El Salvador, this press report came as a shock to Claimant. It followed repeated representations by Salvadoran officials that the permits would be issued soon, and increasingly large investments of capital made by Claimant in El Salvador, but also came at a time when the Companies were beginning to run out of money. It cast an entirely new light on the delays Claimant had been facing. It led Claimant to understand that they were more than just delays, and were in fact part of a previously undeclared practice to stop metallic mining activities in the country – undertaken in complete disregard for the laws under which Claimant had invested many millions of dollars in El Salvador.

96. According to Respondent in its Reply, because of the alleged “deficiencies” in Claimant's application, “the application for the concessions could not have been lawfully reactivated However, *nothing prevented PRES from submitting a new application.*”¹²⁰ To the contrary, the ban announced by President Saca in March 2008 prevented Claimant from

¹¹⁹ See Notice of Arbitration, para. 25; Decision on Preliminary Objection, para. 77 (providing English translation of Exhibit 7 to Claimant's Notice of Arbitration); Counter-Memorial, paras. 144-45.

¹²⁰ Reply, para. 56.

submitting any new applications and expecting that they would be granted – even if they met the criteria set forth under Salvadoran law.

97. On 14 April 2008, Mr. Shrake wrote to President Saca:

Through the press, we have noticed that you have stated that you are opposed to awarding us our operating permits. In these public statements, you have stated that, “In principle I do not agree with granting these permits. . . .”

* * * *

I would like to explain to you that the situation of Pacific Rim in El Salvador is extremely critical and precarious. Should we not receive a response on behalf of your government that addresses our rights as investors, our company would be in unavoidable situation of having to initiate the resolution of controversies procedure established in [CAFTA].¹²¹

98. Referring to the March 2008 reports concerning President Saca’s announcement, Respondent asserts that “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.”¹²² But evidence cited in the Notice of Arbitration goes beyond the March 2008 report, and indeed has continued to accumulate through the present.

99. Thus, as stated in the Notice Arbitration, President Saca was asked in a press interview reported on 15 July 2008 about Claimant’s pending applications. He responded:

¹²¹ Notice of Arbitration, Exh. 8.

¹²² Reply, para. 207.

[F]or now, I will not grant mining permits, until two requirements are satisfied.¹²³

The first requirement, according to President Saca, was that new mining legislation had to be passed – notwithstanding the existing Mining Law under which Claimant had made its investment. The second requirement, he said, was for MINEC and MARN to complete a vague “study” on the possible effects of mining on the entire country. President Saca acknowledged, however, that he did not know what the study would entail, or even when it would start.¹²⁴ Indeed, there is no record of any such study being announced by El Salvador until September 2010 – a year and a half after Claimant filed its Notice of Arbitration in this case.¹²⁵

100. In February 2009 (after Claimant had sent its Notice of Intent but before its filed its Notice of Arbitration), President Saca was quoted in the press as stating:

As long as Elías Antonio Saca holds the office of president, he will not grant a single permit [for mining exploitation] not even environmental permits, which are prior to the permits given by the Ministry of Economy.

* * * *

¹²³ See *Saca afirma que no concederá permisos de extracción minera*, CADENAGLOBAL.COM, <http://www.cadenaglobal.com/noticias/default.asp?not=182976&sec=8%20-%2056k> (15 July 2008) (C-61). The original Spanish text of the article reads: “Al ser consultado sobre declaraciones de la empresa canadiense Pacific Rim, que podría iniciar un proceso de arbitraje internacional contra el Estado, Saca dijo que ‘hoy por hoy no daré ningún permiso para la minería, mientras no se cumplan’ dos requisitos.” See Notice of Arbitration, para. 77.

¹²⁴ *Id.*; see Notice of Arbitration, para. 77.

¹²⁵ MINEC, Adjudication Notice, Winning Bid for the Environmental Assessment of the Mining Sector of El Salvador (1 Sept. 2010) (C-62).

[Pac Rim Cayman and the Enterprises] are about to file an international claim and I want to make this clear, I'd rather pay \$90 million than grant them a permit.¹²⁶

101. The Government's public statements concerning the ban continued after Claimant filed its Notice of Arbitration on 30 April 2009 (even as Respondent has denied the existence of the ban throughout most of this arbitration). Thus, as stated in Claimant's Response to Respondent's first set of objections, on 27 December 2009, President Funes was quoted as stating:

The Government is not approving any mining exploration or exploitation project . . .¹²⁷

102. President Funes was quoted again on 13 January 2010 as saying that "no mining exploitation projects will be authorized."¹²⁸ The President reportedly explained:

I do not need to pass a decree for such authorization not to be given, since that would mean questioning the president's word. The authorization of mining exploitation projects is not included either in the governmental programs or in the Five Year Plan¹²⁹

¹²⁶ *No to Mining, Saca closes the door*, LA PRENSA GRAFICA (26 Feb. 2009) (C-4).

¹²⁷ *Funes rules out authorization of mining explorations and exploitations in El Salvador*, EFE AGENCY (27 Dec. 2009) (C-2). The original Spanish text states: "El Gobierno no está aprobando ningún proyecto de exploración ni explotación minera." As stated in this article, the ban apparently applies only to metallic – as opposed to non-metallic – mining, the latter of which is carried out primarily by Salvadoran companies and non-parties to CAFTA. Thus, unless otherwise specified, the term "mining" as used herein refers to metallic mining.

¹²⁸ *No to Mining: Presidential Commitment*, PRENSA GRAFICA (13 Jan. 2010) (C-3).

¹²⁹ *Id.*, The original Spanish text states: "No necesito emitir un decreto para que esa autorización no se dé, eso sería dudar de la palabra del presidente. No existe en los programas del gobierno, no está en el Plan Quinquenal la autorización de proyectos de explotación minera."

103. Since Claimant filed its Counter-Memorial on 31 December 2010, there has been further evidence to support the existence of the ban. On 10 January 2011, Mr. Héctor Dada, the Minister of the Economy was reported as saying “that what the government has done is to provide continuity to the *decision to not issue mining permits which was made during the administration of Antonio Saca.*”¹³⁰ He was quoted as stating:

I want to clarify that we are engaged in an arbitration proceeding due to *a decision made by the previous government*, although the people, the officials, are different, we share the responsibility.¹³¹

104. Indeed, on 28 February 2011 – *i.e.*, two days before the due date of this Rejoinder – the Ministry of the Economy published a Public Notice (“*Convocatoria*”) announcing that:

The Ministry of Economy (MINEC) is performing an Environmental Strategic Assessment . . . of the Metallic Mining Sector in El Salvador with the purpose of defining the strategic environmental reference framework, which could significantly contribute to the debate the country needs to hold regarding an issue as sensitive as mining.¹³²

¹³⁰ Keny López, *26 mining projects in the country on hold*, LA PRENSA GRAFICA (10 Jan. 2011) (C-77). The original Spanish text states: “Hector Dada, ministro de Economía, sostiene que el Gobierno lo que ha hecho es dar continuidad a la negativa de dar permisos a la minería que se tomó en la administración de Antonio Saca.”

¹³¹ *Id.* The original Spanish text states: “Aclaro que ciertamente estamos metidos en un proceso de arbitraje por una decisión del Gobierno anterior, aunque las personas, los funcionarios, como distintos, se comparten las responsabilidades.”

¹³² Public Notice, Ministry of Economy of El Salvador (28 Feb. 2011) (C-78). The original Spanish text states:

El Ministerio de Economía (MINEC), con la intención de definir el marco ambiental estratégico de referencia, que podría contribuir significativamente con el debate, que el país necesita tener en torno a un tema tan sensible como la minería, está realizando la Evaluación de

(continued...)

105. There is no question, therefore, that El Salvador has imposed a “measure” to prevent metallic mining activities in the country, despite Respondent’s “emphatic[]” denial of any such “policy” or “ban” in its opening Memorial in support of its instant objections.¹³³ The time frame in which El Salvador actually decided to implement that measure is difficult to ascertain, particularly given Respondent’s repeated denial of the measure in private conversations with Claimant and in this arbitration.

106. Thus, in uncontested evidence provided with our Counter-Memorial, Mr. Shrake explained that following the March 2008 reports of President Saca’s stated opposition to mining, Mr. Shrake met in person with President Saca, who assured Mr. Shrake that his Administration was not opposed to mining, and “would issue PRES both the environmental permit and exploitation concession for El Dorado in April 2009, after the national elections scheduled for the end of March 2009.”¹³⁴

107. Other Salvadoran officials tried to convince Claimant that there was no ban or other measure in place that would prevent Claimant from obtaining its El Dorado permits. As mentioned above (and in the Notice of Arbitration), in a letter dated 4 December 2008, Mr. Ernesto Javier Figueroa Ruiz of MINEC sent a letter to PRES setting forth the “[r]equirements

(continued...)

Impacto Ambiental Estrategica (EAE) del Sector Minero Metalico de El Salvador.

¹³³ Objections to Jurisdiction, para. 47.

¹³⁴ Shrake Statement, para. 119.

for the water treatment plan for the ‘El Dorado’ mining project.”¹³⁵ The letter set forth a list of requirements that PRES needed “to continue with the process of environmental evaluation of the project”¹³⁶ The letter concludes by stating:

Once these requirements are satisfied, it will be possible to resolve your application for the environmental permit for your mineral exploitation project “El Dorado”, previously mentioned, within the thirty days following the date where you have finalized all the procedures of the Assessment of the Environmental Impact.¹³⁷

108. By this time, however, Claimant had lost trust in the Government. Claimant submitted its Notice of Intent on 9 December 2008. After unsuccessful efforts by Claimant to reach an amicable resolution, it filed its Notice of Arbitration on 30 April 2009.

109. In a dramatic change of course from its previous denials that any such measure had been put in place, Respondent now points to a newspaper article dated 24 June 2007, which, according to Respondent, “confirmed that [MARN] 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.”¹³⁸ The relevant quote, attributed to Mr. Guerrero, the Minister of the Environment, comes at the very end of an article reporting on a “march against mining.” According to the article, the marchers “denounce[d] the neoliberal economic system, driven by the Government, which views natural resources as a source of enrichment.” The marchers also “demand[ed] that

¹³⁵ Letter from MARN to PRES (4 Dec. 2008) (C-76).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Reply, para. 83.

the Government refrain from granting exploitation permits because such activity ‘damages natural resources [and] creates poverty and death in the country.’”¹³⁹ In the last paragraph of the article, the reporter states that Minister Guerrero “maintains that exploitation licenses will not be granted, some of which have already been requested by the companies, until the country completes a study of the effects of mining, which could take at least a year.”¹⁴⁰

110. Respondent’s citation to this article represents the first time in this arbitration that Respondent has acknowledged any measure by the Government designed to stop the granting of mining concessions. Until now, Respondent has always maintained that Claimant’s applications failed because of “deficiencies,” and that the only “measures” at issue in this case were the failure of MINEC and MARN to rule on them in a timely fashion.¹⁴¹

111. As discussed below, Respondent should be estopped from now arguing that Claimant was or should have been aware of a measure that Respondent has consistently denied. In fact, the cited article does not establish that Claimant had or should have had that knowledge in June 2007. It is worth observing that the marchers described in the article did not appear to have any awareness of any Government decision to stop granting exploitation concessions. Particularly given Respondent’s repeated subsequent denials of any such measure, Claimant did not know and could not have known of the measure at issue prior to the March 2008 announcement of President Saca that he opposed granting mining permits – followed by

¹³⁹ El Diario de Hoy, “Protesta contra explotación minera” (24 June 2007) (R-122).

¹⁴⁰ *Id.*

¹⁴¹ *See, e.g.*, Claimant’s Response to Respondent’s Preliminary Objection, paras. 46, 62, 90; Objections to Jurisdiction, paras. 27-30.

numerous similar public statements by President Saca and by his successor, President Funes.¹⁴² Especially given actions taken by Government officials to conceal the measure subsequent to President's Saca's announcement, March 2008 is the *earliest* date on which Claimant knew or had reason to know of the measure.

112. In sum, there is no credible basis for the Tribunal to believe that Claimant has committed an abuse of process by domesticating Pac Rim Cayman to Nevada in December 2007 for the sole purpose of filing an arbitration concerning a pre-existing dispute.

4. Access To Investor-State Arbitration, including under CAFTA and ICSID, Before December 2007

113. Another key aspect to Respondent's abuse of process objection is the notion that Pac Rim Cayman was domesticated for the purpose of gaining access to investor-State arbitration that would not have existed but for Pac Rim Cayman's having acquired U.S. nationality in December 2007.

114. As pointed out in the Counter-Memorial, however, if the Pacific Rim Companies and its U.S. shareholders had believed prior to December 2007 that a dispute with El Salvador had existed under either CAFTA or El Salvador's Investment Law, then they would have had a

¹⁴² It should be further observed that when Minister Guerrero's predecessor, Mr. Hugo Barrera, was quoted in the press in June 2006 as stating opposition to mining, Mr. Shrake immediately flew to San Salvador to meet with Minister Barrera as well as the Minister of Finance, Ms. Yolanda de Gavidia. Both assured him that Mr. Barrera's views did not reflect the Administration's policy, and, indeed, Mr. Barrera had left the Ministry by the end of the year. Shrake Statement, para. 93. The consistent public statements by El Salvador's Heads of State that no further permits would be issued – which commenced with President Saca's statement in March 2008 – must be distinguished from the reported comment by Minister Guerrero, mentioned at the end of a newspaper article concerning public protests against mining.

number of avenues to investor-State arbitration. The U.S. shareholders and/or Dayton Mining (U.S.) Inc. and Pac Rim Exploration (both of which had made substantial investments in PRES and DOREX) could have commenced arbitration under CAFTA at ICSID. Pac Rim Cayman, which was then a national of the Cayman Islands (which is covered by the ICSID Convention) could have commenced arbitration under the Investment Law at ICSID. And Pacific Rim Mining Corporation could have commenced arbitration under the Investment Law at the ICSID Additional Facility.¹⁴³

115. It is true that the domestication of Pac Rim Cayman to Nevada put the Companies in a position where, if a dispute with Respondent were to arise in the future, a single proceeding could be brought by Pac Rim Cayman under CAFTA and the Investment Law. Pac Rim Cayman is and was the direct and 100% owner of PRES and DOREX, and was the corporate entity through which predominantly U.S. nationals (*i.e.*, the U.S. entities of the Companies and the U.S. shareholders in Pacific Rim Mining Corp.) made their investments in El Salvador. But again, prospective nationality planning is not a concern of the abuse of process doctrine. Moreover, abuse of process concerns are not implicated where, as here, Pac Rim Cayman's domestication to Nevada reflected the substantial economic and managerial reality of the investment that had existed for many years.

116. Indeed, there is little question that – if the individual companies and shareholders of the Pacific Rim Companies had brought multiple proceedings as described in the paragraph above – Respondent would have lodged an objection based on abuse of process. One of the

¹⁴³ See Counter-Memorial, para. 141 (and the Witness Statements and Exhibits cited therein).

authorities submitted by Respondent suggests that the abuse of process doctrine may be most appropriately used in such a context. In his article “The Relevance of the Doctrine of Abuse of Process in International Adjudication,” Professor Brown specifically provides a hypothetical involving an international mining company bringing claims that arise from “the host State’s cancellation of the investor’s mining license.”¹⁴⁴ Depending on the structure of the company at the time the dispute arises and various other factors – including “how many of the shareholders take it upon themselves to present a claim” – Professor Brown observes that the investor(s) could commence multiple different proceedings against the host State.¹⁴⁵ He further suggests that “international courts and tribunals should be regarded as having the power summarily to dismiss proceedings as an abuse of process if they arise out of the same facts, and if they seek the same remedies as another international claim (but which do not satisfy the triple identity test).”¹⁴⁶ It would be ironic if the domestication of Pac Rim Cayman to Nevada – which has obviated the need for the Companies and its shareholders to bring multiple claims based on the *de facto* mining ban announced by President Saca in 2008 – were deemed to constitute an “abuse of process” under the facts of this case.

117. In short, the concern that Pac Rim Cayman was domesticated for the purpose of gaining access to investor-State arbitration that would not otherwise have existed is not a factor in this case. This is yet another element of Respondent’s abuse of process objection that has not been met.

¹⁴⁴ Chester Brown, *The Relevance of the Doctrine of Abuse of Process in International Adjudication*, *Transnational Dispute Management*, at 1 (2 July 2009) (RL-52).

¹⁴⁵ *Id.*, at 2.

¹⁴⁶ *Id.*, at 6

5. Respondent's Allegations of Fraud and Concealment Are Frivolous

118. Again, it is well recognized that the abuse of process objection requires a showing of bad faith. As stated by the tribunal in *Rompetrol v. Romania*, “the abuse of process argument is one that seeks essentially to impugn the motives behind the Claimant’s Request for Arbitration.”¹⁴⁷

119. One would hope that a party and its counsel would lodge an accusation of bad faith against its adversary only on a solid foundation. Unfortunately, Respondent and its counsel in this case have made their allegations of “concealment” based on grounds that are entirely frivolous.

120. Thus, in connection with the instant objections, Respondent has repeatedly accused Claimant and its counsel of having “concealed” the fact that Pac Rim Cayman was an entity of the Cayman Islands before being domesticated to Nevada in December 2007. Its Reply begins with the self-congratulatory (but ludicrous) proclamation that Respondent’s abuse of process objection has “exposed Claimant’s change of nationality.”¹⁴⁸

121. Respondent has been making its charges of concealment since the initiation of the instant objections. In a letter to the Tribunal dated 16 September 2010, for example, Respondent asserted that “Claimant . . . initiated this arbitration and went through a year of proceedings

¹⁴⁷ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility (18 Apr. 2008), para. 115 (RL-106) (emphasis in original).

¹⁴⁸ Reply, para. 1.

without disclosing the change in its nationality.”¹⁴⁹ In its opening Memorial for the instant set of objections, Respondent asserted:

Pac Rim Cayman did not mention anywhere in the 55 pages of its Notice of Arbitration that *it was originally a Cayman Islands holding company that did not change its nationality to the United States until December 2007*.¹⁵⁰

122. Respondent and its counsel persisted in making these false charges even after Claimant pointed out that Pac Rim Cayman had duly informed the Salvadoran Government of its domestication to Nevada in the first half of 2008 (at least six months before serving its Notice of Intent), and that the Government’s Resolution specifically recognizing the change in nationality from that of the Cayman Islands to that of Nevada is included as Exhibit 3 to the Notice of Arbitration (filed approximately a year and a half before Respondent raised its abuse of process objection with the Tribunal).

123. In its Reply, Respondent finally acknowledges at one point that Exhibit 3 to the Notice of Arbitration contains MINEC’s July 2008 resolution granting Claimant’s requests (made earlier in the year) to change Pac Rim Cayman’s registered nationality from that of the Cayman Islands to that of Nevada.¹⁵¹ Respondent appears momentarily to retreat from its allegations of concealment, and instead merely offers that “[t]his is hardly a model for disclosure.”¹⁵² Specifically, Respondent complains that the “only two documents that included a

¹⁴⁹ Letter from Respondent to the Tribunal (16 Sept. 2010) at 3.

¹⁵⁰ Objections to Jurisdiction, para. 13 (emphasis in original).

¹⁵¹ Reply, para. 66; *see* Notice of Arbitration, Exh. 3.

¹⁵² Reply, para. 66.

reference to the change of nationality were located in one of the exhibits to the Notice of Arbitration”; and that they were submitted “without an English translation.”¹⁵³ Respondent does not dispute that the documents in this Exhibit demonstrate that Pac Rim Cayman disclosed its domestication to Nevada to the Government of El Salvador at least six months before Claimant served its Notice of Intent, and at least ten months before Claimant served its Notice of Arbitration. Pac Rim Cayman again disclosed this fact to Respondent and the Tribunal when Claimant filed its Notice of Arbitration on 30 April 2009.

124. Even assuming *arguendo* that Claimant had any obligation of “disclosure” in its Notice of Arbitration beyond stating a *prima facie* case of jurisdiction, the reality is that there has been no effort of concealment – none whatsoever – on Claimant’s part. To the extent Respondent’s counsel failed to read the exhibits to the Notice of Arbitration, then they were negligent. To the extent that they read the exhibits but made these allegations anyway, then they have acted in bad faith.

125. Respondent’s assertions that Pac Rim Cayman has tried to conceal its “true” nature by “misleading[ly]” describing itself as an “environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals”¹⁵⁴ – because Pac Rim Cayman is a holding company rather than an operating company – is similarly frivolous. Respondent cites no authority for the proposition that a holding company cannot share the attributes of its subsidiary or parent companies – or, for that matter, of the

¹⁵³ *Id.*, para. 66. Spanish is of course one of the three official languages of ICSID and, the last time we checked, was also the official language of El Salvador.

¹⁵⁴ Objections to Jurisdiction, paras. 53-54 (quoting Notice of Arbitration, para. 14).

people who manage them. As described in detail in the Counter-Memorial, Mr. Shrake's decisions concerning Pac Rim Cayman's holdings – what they would be, where they would be, and how they would operate and be managed – were based on these specific criteria.

126. The reality is that all of the information on which Respondent bases its abuse of process objection – and virtually all of the information presented by Claimant in responding to it – have long existed in the public record. Respondent has simply tried to distort certain portions of that record, while asking the Tribunal to ignore the rest.

127. In sum, the remedy of dismissing a case for an abuse of process is an extraordinary remedy. Respondent has not remotely met its burden of proving the elements of an abuse of process objection, and even putting aside that burden, those elements are simply not present in the record of this case. The Tribunal should dismiss the objection.

IV. RESPONDENT HAS NOT ESTABLISHED ANY OF THE CONDITIONS FOR INVOKING DENIAL OF BENEFITS UNDER CAFTA ARTICLE 10.12.2

128. CAFTA Article 10.12.2 permits a Party to deny CAFTA's protections to an enterprise that is an investor of another Party – and, as a result of that status, presumptively entitled to those protections – if three conditions are met. First, the denying Party must prove that the investor has “no substantial business activities” in the territory of the Party where it is established (or any other Party). Second, the denying Party must prove that the investor is owned or controlled by persons of a non-Party (or of the denying Party). Third, the denying Party must provide advance notification, in accordance with Article 18.3, of its intent to withdraw CAFTA's protections from an investor of a Party and must afford the investor's home

Party an opportunity to engage in State-to-State consultations, in accordance with Article 20.4, on the proposed withdrawal of protections.

129. In the case of Respondent's attempted denial of CAFTA benefits to Pac Rim Cayman, none of these conditions is met. Respondent has failed to establish that Pac Rim Cayman has no substantial business activities in the United States. Indeed, it has failed to rebut Claimant's affirmative evidence demonstrating that it does have substantial business activities in the United States, whether considered from the point of view of its integral role as part of the Pac Rim corporate family or on its own.

130. Respondent also has failed to rebut Claimant's evidence that the ultimate owners and controllers of Pac Rim Cayman are persons of the United States. Claimant insists, incorrectly, on confining the "own or control" analysis to Pac Rim Cayman's direct corporate parent, ignoring the economic reality that the persons entitled to the value Pac Rim Cayman generates, including through its investments in El Salvador, are, in the majority, persons of the United States. To ignore that reality is to ignore the purpose of Article 10.12.2, which is to allow a Party to deny benefits to an enterprise that lacks a real and continuous link with the territory of another Party. Through ultimate ownership and control by the U.S. shareholders of its publicly traded parent, as well as through substantial business activities in the United States, Pac Rim Cayman plainly has that link with the territory of the United States.

131. Finally, Respondent failed to provide timely notice of its intent to deny benefits. Its provision of notice to the United States (but not to Claimant or the Tribunal) on 1 March 2010, more than nine months after commencement of the arbitration (and more than 15 months

after Claimant notified Respondent of its intent to submit claims to arbitration) is not sufficient to deprive the Tribunal of jurisdiction or to deprive Claimant, retroactively, of protections Respondent was obligated to afford Claimant as an investor of a Party. Notification under CAFTA Article 10.12.2 must be provided to the investor's home Party before an arbitration is initiated. The provision of notice during an arbitration curtails the ability of the investor's home Party to engage in advocacy on the investor's behalf (as a result of the limitation in Article 27 of the ICSID Convention on giving diplomatic protection). If provision of notice of intent to deny benefits during an arbitration were allowed, it would negate the possibility of State-to-State consultations envisaged by CAFTA Article 10.12.2.

132. Respondent's failure to give advance notice to Claimant is an additional reason to reject its attempt to deny benefits. And, in any event, any denial of benefits would have prospective effect only. It would not affect Respondent's consent to submit the present dispute to arbitration, because that consent cannot be unilaterally withdrawn.

A. Claimant Has Substantial Business Activities In The United States

133. Although it is Respondent's burden to prove otherwise, Claimant has demonstrated that it has substantial business activities in the United States within the meaning of Article 10.12.2 of CAFTA, both through its own activities as a holding company and through its role as an integral component of the activities of the Pacific Rim group of companies. Rather than engage Claimant's evidence, Respondent simply repeats much of what it previously asserted in its Memorial.

1. Respondent has not met its burden of proving that Claimant has “no substantial business activities” in the United States

134. As the Party seeking to deny CAFTA’s protections to an enterprise that is an investor of another Party and, therefore, presumptively entitled to those protections, it is Respondent’s burden to establish that “the enterprise has *no* substantial business activities in the territory of any Party, other than the denying Party.”¹⁵⁵ It is not Claimant’s burden to show that it has some quantum of substantial business activities in the United States. Rather, Article 10.12.2 requires that Respondent bear the burden of showing a complete absence of substantial business activities of Claimant in the United States.¹⁵⁶ This is not a trivial requirement, and Respondent has failed to meet it.

135. Evidently recognizing the difficulty in meeting its burden, Respondent has resorted to making its case by reference to Claimant’s corporate form (*i.e.*, a holding company) and a checklist of activities that, in Respondent’s view, are the only activities that qualify as substantial business activities.¹⁵⁷ Respondent professes not to be making a generalization about all holding companies, and it acknowledges that “in some circumstances holding companies can be legitimate corporate entities with business activities.”¹⁵⁸ However, it then proceeds to argue

¹⁵⁵ CAFTA, Art. 10.12.2 (emphasis added) (RL-1).

¹⁵⁶ Indeed, Respondent has conceded 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.” Reply, para. 14. *See Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, para. 15.7 (16 Sep. 2003) (CL-193).

¹⁵⁷ *See* Objections to Jurisdiction, paras. 106-254; Reply, paras. 92-183.

¹⁵⁸ Reply, para. 99.

that even though Pac Rim Cayman does the very thing holding companies do – it holds investments – it is not engaged in substantial business activities.

136. The error in Respondent’s reasoning is evident from how it responds (or fails to respond) to the similarity between the facts here and the facts in other cases in which tribunals have rejected States’ attempts to deny treaty benefits to foreign investors. For example, in our Counter-Memorial, we discussed the *AMTO* case, in which Ukraine sought to deny benefits under the ECT to a holding company investor based on an alleged absence of substantial business activities in the investor’s home country of Latvia.¹⁵⁹ In its Reply, Respondent asserts that “the only thing” Pac Rim Cayman and the claimant in *AMTO* have in common is the fact that they are holding companies.¹⁶⁰ In particular, Respondent places great emphasis on the fact that AMTO had two employees, a bank account, and leased its own office space, unlike Pac Rim Cayman.¹⁶¹ Yet there is nothing about the *AMTO* tribunal’s analysis that suggests that these factors played a critical role in its conclusion that AMTO had substantial business activities. In finding that the respondent had not shown that AMTO did not have substantial business activities, the tribunal explained that “substantial business activities” should be understood as pertaining to substance rather than form; the “decisive question” is “the materiality not the magnitude of the business activity.”¹⁶² Thus it concluded that AMTO’s “investment related activities” were substantial business activities that prevented the respondent’s invocation of the

¹⁵⁹ See Counter-Memorial, paras. 282-85.

¹⁶⁰ Reply, para. 109.

¹⁶¹ *Id.*

¹⁶² *Id.* para. 284 (quoting *AMTO* § 69 (RL-69)).

ECT's denial of benefits provision.¹⁶³ This Tribunal should have no difficulty reaching a similar conclusion with respect to Pac Rim Cayman.

137. Tellingly, Respondent ignores altogether the tribunal's denial of benefits analysis in *Petrobart*, another case under the ECT discussed in Claimant's Counter-Memorial.¹⁶⁴ That analysis squarely contradicts Respondent's insistence that shareholding (which Respondent characterizes as a "passive" activity) is incapable of constituting "substantial business activities."¹⁶⁵ *Petrobart* was a Gibraltar holding company that had made an investment in Kyrgyzstan. It was managed by two Serbian nationals from a management company in the United Kingdom (an ECT contracting state).¹⁶⁶ It never alleged that it had business activities of any sort in Gibraltar.¹⁶⁷ The *Petrobart* tribunal rejected Kyrgyzstan's attempt to deny ECT benefits to *Petrobart* because, it said, *Petrobart* had substantial business activities in the United Kingdom. In other words, being the (passive) object of the activities of another company was sufficient to demonstrate that *Petrobart* had substantial business activities in the territory of an ECT contracting state. This is consistent with the understanding that "substantial business activities" is a means of ensuring that the company in question has a "real and continuous link"¹⁶⁸ with a treaty Party. As long as there is a real and continuous link with a treaty Party through business activities that are of substance and not mere formalities, the denying Party

¹⁶³ *Id.*, paras. 284-85 (quoting *AMTO* § 69 (RL-69)).

¹⁶⁴ *Id.*, para. 286 (citing *Petrobart*, para. 346 (CL-115)).

¹⁶⁵ *See Reply*, para. 106.

¹⁶⁶ *See Petrobart*, paras. 207-08 (CL-115).

¹⁶⁷ *Id.*, paras. 207.

¹⁶⁸ *See Counter-Memorial*, paras. 263-307.

cannot meet its burden of proving that the claimant has *no* substantial business activities in its home territory.

138. It is for this reason that, despite repeated references to Claimant as a “shell company” that does not have employees, a separate office, or other material attributes of a corporation that is not a holding company, Respondent has not met its burden of proving that Claimant has no substantial business activities in the United States. On the contrary, and as discussed in more detail below and in Claimant’s Counter-Memorial, Claimant has provided ample evidence that its business activities are substantial, and Respondent’s belated effort to deny it CAFTA benefits should, therefore, be rejected.

2. Pac Rim Cayman has substantial business activities in the United States and therefore is not a “shell company”

139. Respondent’s inability to prove that Claimant has no substantial business activities in the United States no doubt explains its focus on rhetoric instead of facts. Repeatedly calling Pac Rim Cayman a “shell company,” however, does nothing to establish that it *is* a shell company, much less that it has no substantial business activities in the United States. Respondent now admits that this nakedly pejorative term is not synonymous with the term “holding company,”¹⁶⁹ but Respondent’s arguments nevertheless beg the question of what it means when it alleges that Claimant is a shell company.

¹⁶⁹ Reply, para. 99 (conceding that “holding companies can be legitimate corporate entities with business activities”).

140. A shell corporation is generally understood to be a company formed for dubious if not illegal reasons, including tax evasion schemes.¹⁷⁰ Pac Rim Cayman clearly does not meet this definition, notwithstanding Respondent's assertion that it became a U.S. company as part of a non-existent "abusive scheme to gain jurisdiction" under CAFTA.¹⁷¹ On the contrary, Pac Rim Cayman is, and has always been, a legitimate corporation established primarily with a view to possible tax savings in the event of the sale of a mining project.¹⁷² Pac Rim Cayman at all times has been an integral part of a genuine and significant investment enterprise directed by Mr. Shrake from Nevada.

141. In its Counter-Memorial, Claimant described in detail the facts demonstrating that Nevada has been the central locus of Pac Rim Cayman's activities from the time of its original incorporation in the Cayman Islands in 1997.¹⁷³ Mr. Shrake, simultaneously a Manager and the functional chief executive of Pac Rim Cayman and the President and CEO of Pacific Rim Mining Corp., was responsible for the creation of Pac Rim Cayman and was and is still the prime decision maker for the company.¹⁷⁴ Respondent makes the conclusory assertion that Mr. Shrake's work on behalf of Pac Rim Cayman before it domesticated to Nevada does not count as business activities for purposes of Article 10.12.2, because Pac Rim Cayman was not an

¹⁷⁰ BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS (6th ed.) at 640 (2003) (CL-170); *see also* DICTIONARY OF BUSINESS TERMS (3d ed.) at 628 (2000) (RL-65).

¹⁷¹ Reply, para. 110. Respondent has not adduced a *single* piece of evidence to substantiate the existence of such a scheme; Claimant's witness testimony describing and explaining the business reasons for Pac Rim Cayman's migration to the U.S. thus stands un rebutted.

¹⁷² Witness Statement of Stephen K. Krause ("Krause Statement"), para. 13.

¹⁷³ Counter-Memorial, paras. 39-63, 72-92, 131-43.

¹⁷⁴ Shrake Statement, paras. 1, 2-3, 40.

enterprise of the United States during that period.¹⁷⁵ But Respondent offers no authority for this proposition, which in any event is irrelevant. Pac Rim Cayman has continued to be managed primarily from the United States since domesticating to Nevada in 2007. Indeed, the domestication itself was undertaken in large part because it reflected Pac Rim Cayman's actual center of business activity in Nevada.¹⁷⁶

142. Moreover, unlike a shell company, Claimant has significant assets.¹⁷⁷ Specifically, it holds both PRES and DOREX, the two local companies that are the vehicles for the investment in El Salvador, and has held them continuously since, respectively, 2004 and 2005 – *i.e.*, both before and since Pac Rim Cayman became a Nevada company.¹⁷⁸ Respondent's dismissal of Pac Rim Cayman's ownership of these two companies as irrelevant to its activities in the United States again ignores the facts of this case.¹⁷⁹ As already explained, all decisions relating to Pac Rim Cayman, including decisions pertaining to its ownership of PRES and DOREX, were primarily made in the United States by Mr. Shrake.¹⁸⁰ Mr. Shrake is one of the Managers and the *de facto* CEO of Pac Rim Cayman. His decisions as to what assets Pac Rim

¹⁷⁵ Reply, para. 108.

¹⁷⁶ Witness Statement of Catherine McLeod-Seltzer ("McLeod-Seltzer Statement"), para. 36 ("It made no sense to pay fees to maintain Pac Rim Cayman in the Cayman Islands when there were no tax benefits to be derived from that jurisdiction and when Pac Rim Cayman was in fact being managed from Nevada."). Mr. Krause also testifies that the domestication of Pac Rim Cayman would not have been a taxable event in *either* the U.S. *or* Canada. Krause Statement, para. 32. Nevada, however, was clearly the more logical choice in light of the facts and circumstances of Pac Rim Cayman's management by Mr. Shrake.

¹⁷⁷ *Cf.* BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS (6th ed.) at 640 (CL-170), definition of shell corporation (describing shell company as one with "no significant assets or operations").

¹⁷⁸ Krause Statement, paras. 26-27. DOREX was created in 2005. *Id.*, para. 27.

¹⁷⁹ Reply, para. 110.

¹⁸⁰ Shrake Statement, para. 3.

Cayman will hold, and what liabilities it will incur, constitute Pac Rim Cayman’s activities, and were (and still are) carried out in Nevada. Pac Rim Cayman’s activities as the owner of these two companies therefore qualify as business activities centered in the United States both before and since Pac Rim Cayman became a Nevada company.

143. In addition, Pac Rim Cayman has been the parent corporation of Pacific Rim Exploration since its December 2007 domestication to Nevada.¹⁸¹ The exploration arm of the group of companies, Pacific Rim Exploration played a key role in the investment in El Salvador.¹⁸² As with the other facts that undermine its untimely effort to deny CAFTA benefits to Claimant, Respondent attempts to brush aside this aspect of Pac Rim Cayman’s U.S. activities by branding it part of an alleged “scheme” to abusively obtain CAFTA jurisdiction.¹⁸³ Yet Respondent has not offered a shred of evidence to support the existence of such a scheme. Indeed, it has provided *nothing* to rebut the testimony of three witnesses who describe the legitimate business reasons for Pac Rim Cayman’s domestication to Nevada in 2007.¹⁸⁴ Instead, it repeatedly seeks to re-cast this case as a dispute that arose in 2004 (or, alternatively, 2006).¹⁸⁵ Respondent cannot wish away the facts of this case, however. In reality, as Claimant has already

¹⁸¹ Krause Statement, para. 32.

¹⁸² Counter-Memorial, paras. 136-43; Shrake Statement, paras. 3, 34-35.

¹⁸³ Reply, para. 110.

¹⁸⁴ See Shrake Statement, paras. 109-14; McLeod-Seltzer Statement, para. 36; Krause Statement paras. 29-32. Respondent’s belated renewal of its request for documents relating to counsel for Claimant – which it speculates may show that Claimant retained international arbitration counsel before the domestication of Pac Rim Cayman – obviously does not qualify as evidence. See Letter from Respondent to Tribunal at 3 (17 Feb. 2011). Nor does the date of Claimant’s retention of counsel have any bearing on the date when the dispute arose. See also Letter from Claimant to Tribunal at 2-3 (22 Feb. 2011).

¹⁸⁵ Reply, paras. 30, 42-58, 65, 70, 214-15, 218.

demonstrated and re-iterates here, the dispute arose, at the earliest, in March 2008.¹⁸⁶ Accordingly, Claimant’s business planning prior to that date cannot simply be disregarded as a manipulation of corporate form to manufacture jurisdiction.

144. Furthermore, as the parent of the Salvadoran companies, Pac Rim Cayman has been the conduit for the majority of the actual investment flowing into El Salvador – funds that derived in large part from the activities of Pac Rim Cayman’s U.S. affiliate, Dayton Mining (U.S.).¹⁸⁷ Respondent’s objection that no investment could have been made through Pac Rim Cayman because it does not have a U.S. bank account is based on a concept of international business and investment that is at best outdated – and once again ignores Claimant’s evidence. Pac Rim Cayman did not have to make the investment in a cash transaction from a bank account in its name, but obviously could – and did – carry the investment on its books as a liability to its parent, Pacific Rim Mining Corp.¹⁸⁸ In other words, the investment was made, not by means of cash that Pac Rim Cayman already had on hand, but via a loan. This is hardly an unusual way for an investor to finance its investment activities, and does not mean that Pac Rim Cayman did not make an investment.¹⁸⁹

¹⁸⁶ See Counter-Memorial, para. 19, 23-24, 117-19, 144-61; see also *supra* Section III.C.3. Even as late as June 2008, Respondent continued to represent to Claimant that an environmental permit and exploitation concession would be issued at a specific time in the relatively near future. See Shrake Statement para. 119 (describing 25 June 2008 meeting in which “President Saca stated that his Administration would issue PRES both the environmental permit and exploitation concession for El Dorado in April 2009, after the national elections scheduled for the end of March 2009.”).

¹⁸⁷ Krause Statement, para. 22.

¹⁸⁸ See Pac Rim Cayman Unconsolidated Financial Statements 2004-2010 (C-PROTECTED-1).

¹⁸⁹ See, e.g., MAURICE D. LEVI, *INTERNATIONAL FINANCE* at 488 (5th ed. 2009) (CL-171) (describing loans from parent to subsidiary as common method of financing international investment).

145. Nor is there any basis for Respondent's suggestion that the investment in El Salvador had to have been made after Pac Rim Cayman had become a U.S. company in order to qualify for the protections afforded by CAFTA.¹⁹⁰ If that were true, any investor acquiring an existing investment from another company would also be deprived of CAFTA protections, an absurd result that has been rejected by other tribunals in the context of other treaties for reasons that are equally applicable here.¹⁹¹

146. In sum, the evidence Claimant has adduced refutes Respondent's assertion that Pac Rim Cayman has no substantial business activities in the United States. For this reason, El Salvador cannot deny the benefits of CAFTA to Claimant; its untimely effort to do so should be rejected.

3. Claimant's essential role as part of a U.S.-based group of companies confirms that it has substantial business activities in the United States

147. Not only do Claimant's U.S. activities taken on their own, separate from the activities of Claimant's U.S.-based corporate family, constitute substantial business activities, but the U.S. business activities of the corporate family unquestionably are substantial. Indeed, rather than question that the U.S. business activities of the corporate family are substantial, Respondent questions only whether it is appropriate to consider those activities as part of a denial of benefits analysis.¹⁹² Taking account of the activities of the corporate family as a whole is consistent with an economically realistic view of Claimant's activities, and it is consistent with

¹⁹⁰ Reply, para. 186.

¹⁹¹ See Counter-Memorial, paras. 188-92.

¹⁹² Reply, paras. 116-22.

the goal of determining whether Claimant's links to the United States are real and continuous. Claimant does not operate in isolation from its sister entities. It is an integral part of a major mining investment endeavor that operates through several distinct but affiliated components that work closely together to make the endeavor a success. The center of that endeavor's operations is the United States.¹⁹³

148. In our Counter-Memorial, we cited various authorities for the proposition that it is appropriate to consider the economic reality of an enterprise's role within its corporate family in determining whether the enterprise has links with an investment (*Aguas del Tunari; S.D. Myers*) or with the territory of a treaty Party (*Petrobart*) that are sufficiently strong to overcome a challenge to jurisdiction.¹⁹⁴ Respondent's complaint that these authorities did not deal with the "substantial business activities" dimension of denial of benefits,¹⁹⁵ (although, *Petrobart* in fact did), misses the point. Like CAFTA Article 10.12.2, the treaty provisions at issue in these other cases referred to characteristics of a particular enterprise. They did not refer to the larger corporate family of which the enterprise may be a part. And yet, in analyzing those characteristics, tribunals consistently declined the suggestion that they should ignore the economic reality of the enterprise's role in its corporate family. They found the enterprise's role

¹⁹³ See Counter-Memorial, paras. 291-96.

¹⁹⁴ See *id.*, paras. 292-95.

¹⁹⁵ Reply, para. 118.

within its corporate family relevant to determining whether the enterprise had the applicable attribute.¹⁹⁶ This Tribunal should do the same.

149. Moreover, Respondent’s claim to have found a contradiction between the rationale for taking account of an enterprise’s role within its corporate family, on the one hand, and Claimant’s reference to U.S. jurisprudence on a company’s “principal place of business,” on the other,¹⁹⁷ is mistaken. It should be recalled why Claimant referred to U.S. jurisprudence in the first place. In its opening Memorial, Respondent quoted testimony of then Acting United States Trade Representative Peter Allgeier that “[t]he fact-dependent nature of an inquiry into the existence of substantial business activity is well recognized in U.S. corporate and tax law.”¹⁹⁸ Respondent then asserted that it was “worth noting” what it referred to as “*the* test for ‘substantial business activity’ used by the United States Government,” which it claimed to be articulated in temporary tax regulations that were not promulgated until years *after* CAFTA entered into force.¹⁹⁹

150. In our Counter-Memorial, we noted the implausibility of Respondent’s suggestion that in 2005 Ambassador Allgeier was referring to regulations not promulgated until after 2005. We argued it was more likely he was referring to tests U.S. courts have applied for decades to

¹⁹⁶ Respondent cites *Plama v. Bulgaria* as contrary authority. See Reply, para. 118. But, that case is distinguishable on its facts, which included claimant’s concession that it lacked substantial business activities in Cyprus. *Plama*, para. 168 (RL-66).

¹⁹⁷ See Reply, para. 119.

¹⁹⁸ Objections to Jurisdiction, para. 177 (quoting Implementation of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA): Hearing Before the House Committee on Ways and Means, 109th Cong. (2005), Testimony of Peter F. Allgeier at 193 (CL-91)).

¹⁹⁹ Objections to Jurisdiction, para. 177 (emphasis added).

determine a company's "principal place of business."²⁰⁰ Far from "a misguided attempt to redefine substantial business activities,"²⁰¹ Claimant's argument simply corrected a demonstrably mistaken assertion by Respondent of U.S. law "worth noting." Moreover, as we pointed out, the link between substantial business activities of a company and its principal place of business is one that has long been recognized in the context of treaty text on which CAFTA Article 10.12.2 is based. Thus, in explaining how the denial of benefits provision in various investment treaties is meant to operate, the United States consistently has recognized that it would not be able to deny benefits to a company of a treaty Party "that maintains its central administration or *principal place of business* in the territory of, or has a real and continuous link with" that Party.²⁰²

151. Respondent now asserts that the U.S. authorities we cited to illustrate a logical approach to determining a company's principal place of business (thereby establishing the existence of substantial business activities at that place) would preclude an examination of the company's role within its corporate family.²⁰³ Respondent misconstrues those authorities. The argument U.S. courts have rejected is the argument that in identifying a company's principal place of business one may *substitute* the "nerve center" of the company's parent or other affiliate

²⁰⁰ See Counter-Memorial, paras. 272-77.

²⁰¹ Reply, para. 119.

²⁰² Counter-Memorial, para. 273 n.325 (quoting Message From the President Transmitting Treaty Between the Government of the United States of America and the Government of the Republic of Honduras concerning the Encouragement and Reciprocal Protection of Investment, Art. XII (b) (emphasis added) (CL-97)); see also *id.*, para. 274 (quoting North American Free Trade Agreement, U.S.-Can.-Mex., The United States Statement of Administrative Action at 145 (Nov. 1993) (CL-92)).

²⁰³ Reply, para. 119.

for the company's own nerve center. In *Topp v. CompAir, Inc.*, on which Respondent principally relies, the court explained the distinction as follows:

The test, in other words, does not search out the home of the economic tsar who ultimately dominates, through other corporations or otherwise, the entity in question. Rather, so long as the entity's corporate form is entitled to credibility, the nerve center test looks for the localized nerve center from which the corporation in issue is directly run.²⁰⁴

152. Put differently, the court in *Topp* was focused on which nerve center to examine. It was not focused on whether, having identified the correct nerve center, it is appropriate to consider an enterprise's activities within the context of its broader corporate family.

153. There is no contradiction between the authorities Claimant cited to illustrate an approach to identifying a company's principal place of business and the proposition that it is appropriate to analyze a company's substantial business activities in the context of the corporate family of which it is a part. The statements Respondent cites are addressed to a different issue. In demonstrating that its principal place of business is (and always has been) in Nevada, Claimant has not sought to claim the nerve center of an affiliate or parent as its own. Rather, consistent with *Topp* and other authorities, Claimant has shown that its own nerve center is in Nevada and that, accordingly, it has substantial business activities there.

²⁰⁴ *Topp v. Compare*, 814 F.2d 830, 835 (1st Cir. 1987) (CL-110). The court's decision in *Lugo-Vina v. Pueblo International*, which Respondent also cites, is fully consistent with the later decision in *Topp*. In *Lugo-Vina*, the First Circuit found that the lower court had erred because it had found the plaintiff was controlled from New York (as its subsidiary was), whereas the record showed the plaintiff was more likely controlled from Puerto Rico. *Lugo-Vina v. Pueblo Int'l*, 574 F.2s 41, 43 (1st Cir. 1978) (CL-109).

154. Furthermore, international jurisprudence supports the kind of pragmatic analysis that the “nerve center” test exemplifies. As Claimant has already explained, investor-State arbitration tribunals consistently have found it appropriate to consider the economic reality of an enterprise’s role within its corporate family in determining whether the enterprise has links with an investment or with the territory of a treaty Party that are sufficiently strong to overcome a challenge to jurisdiction.²⁰⁵ There is perhaps no better illustration of this flexibility than the *Petrobart* decision, cited above, where the tribunal apparently looked *only* to the activities of a management company – not even a parent or a subsidiary – in order to determine that the claimant in that case had substantial business activities in the territory of a treaty Party sufficient to defeat an effort to deny benefits under the ECT.

155. Similarly in this case, even if Claimant did not have substantial business activities of its own – which it does – its role as the holder of the assets which are the object of the investment in El Salvador is a substantial business activity when considered in the context of the activities of the group of Pacific Rim companies as a whole. This is not to ignore Pac Rim Cayman’s separate and independent corporate existence. It simply recognizes the economic reality of the investment in El Salvador, which was carried out by a set of closely linked companies run by the same handful of individuals.

156. Among those individuals, the person who made most of the strategic and day-to-day decisions was Mr. Shrake. Mr. Shrake’s decisions, and the management of the companies and the Salvadoran investment from Nevada, unquestionably constitute substantial business

²⁰⁵ See Counter-Memorial, paras. 292-95 (discussing *Aguas del Tunari*, *Petrobart*, and *S.D. Myers*).

activities from which the activities attributable exclusively to Pac Rim Cayman cannot be isolated as a matter of economic reality. The activities of the other companies cannot substitute for those of Pac Rim Cayman in a denial of benefits analysis, but when considered in context, there can be no question that Pac Rim Cayman's shareholding activities were a significant element of the Pacific Rim companies' interconnected substantial business activities in the United States.

4. The relevant inquiry under Article 10.12.2 is whether an investor has substantial benefits in the territory of a Party when another Party seeks to deny benefits

157. We agree with Respondent that “[u]nder the facts of this case, it is unnecessary for the Tribunal to decide the appropriate temporal frame of reference for the ‘substantial activities standard.’”²⁰⁶ But the reason this is so is the very opposite of the one Respondent articulates. Pac Rim Cayman has had substantial business activities in the United States since its domestication to Nevada in December 2007 (and, indeed, even before). Nevertheless, in the interest of completeness we demonstrate why Respondent is wrong in asserting that Article 10.12.2 “require[s] substantial business activities at the time of the investment or alternatively, at the times of the measures complained of.”²⁰⁷

158. In our Counter-Memorial, we showed that the text and context of Article 10.12.2, as well as CAFTA's object and purpose, support the conclusion that “substantial business activities” are to be analyzed from the moment the denying Party purports to invoke denial of

²⁰⁶ Reply, para. 123.

²⁰⁷ *Id.*, para. 124.

benefits. This is evident from use of the present tense in Article 10.12.2, which refers to an enterprise that “*has* no substantial business activities in the territory of any Party.”²⁰⁸ It is evident from the context provided by other CAFTA provisions, such as Article 10.18.4, which contrast with Article 10.12.2 by stating conditions in terms of events that occurred in the past. And, it is evident from CAFTA’s object and purpose, which seeks to “substantially increase investment opportunities,”²⁰⁹ an objective that would be severely impaired under Respondent’s understanding that an investor that developed substantial activities in its home Party only after making an investment in a host Party can never hope to enjoy CAFTA’s protections.²¹⁰

159. Respondent’s Reply is notable for making no reference whatsoever to the text or context of Article 10.12.2 or to CAFTA’s object and purpose. Instead, Respondent relies on its subjective view of what “a proper reading of the denial of benefits clause would require” and an excerpt from U.S. congressional testimony in which then Acting U.S. Trade Representative Peter Allgeier described a hypothetical in which a host Party would be precluded from denying benefits to an investor, but did not purport to opine on when an enterprise must have substantial business activities in its home Party in order to defeat an invocation of denial of benefits.²¹¹ This

²⁰⁸ CAFTA, Art. 10.12.2 (emphasis added) (RL-1).

²⁰⁹ CAFTA, Art. 1.2.1(d) (CL-8).

²¹⁰ See Counter-Memorial, paras. 299-306.

²¹¹ See Reply, paras. 124, 127.

approach cannot substitute for an interpretation based on CAFTA's text, context, and object and purpose.²¹²

160. In fact, Respondent's view that to defeat a denial of benefits an enterprise must have substantial business activities in the territory of its home Party before it makes its investment in the territory of a host Party is a repackaging of its flawed argument regarding the requirements for an investor to meet the definition of "investor of a Party."²¹³ Just as there is no requirement that an investor first attain the status of "person of a Party" and only then make its investment in the territory of another Party,²¹⁴ there is no requirement that an investor first establish substantial business activities in its home territory and only then make its investment in the territory of another Party. In both cases, Respondent's sequencing argument lacks support in CAFTA's text, context, and object and purpose and would lead to absurd results. As we pointed out in our Counter-Memorial, it would mean that even years or perhaps decades after making an investment in the territory of a CAFTA Party an enterprise of another CAFTA Party that unquestionably has substantial business activities in its home Party could be denied CAFTA's benefits simply because the investment preceded the establishment of substantial business

²¹² Respondent also misrepresents the jurisprudence relating to denial of benefits provisions in other treaties, repeating its erroneous assertion that other tribunals have measured substantial business activities at the time of the investment. Reply, para. 125. In fact, as Claimant explained in its Counter-Memorial, those tribunals did not consider the question of timing at all. They simply looked at the claimants' business activities as a whole and over time, without either asking or deciding if the inquiry should be limited to the moment at which the investment was made. See Counter-Memorial, paras. 282-88.

²¹³ See Objections to Jurisdiction, paras. 256-59.

²¹⁴ See Counter-Memorial, paras. 184-92; see also *infra* Section V.A.

activities.²¹⁵ Far from encouraging investment, as CAFTA seeks to do, such a non-text-based interpretation of Article 10.12.2 would sow uncertainty and discourage investment.

161. Finally, in addition to repackaging its argument regarding the requirements for an investor to meet the definition of “investor of a Party,” Respondent repackages its argument as to when the present dispute arose. Because Respondent believes, incorrectly, that the dispute arose in 2004 (or, alternatively, 2006), it alleges that Claimant’s argument would allow an investor to defeat an invocation of denial of benefits even if the investor established substantial business activities in the territory of its home Party after a dispute arose.²¹⁶ But that argument is premised on Respondent being correct about when the dispute arose which, for reasons discussed elsewhere, it is not.²¹⁷

162. Respondent’s mischaracterization of Claimant’s argument also assumes (again, incorrectly) that Respondent’s invocation of denial of benefits nearly 16 months after Claimant filed its notice of intent and nine months after Claimant filed its notice of arbitration was timely. In fact, if Respondent had invoked denial of benefits in a timely manner, before the commencement of arbitration, then analyzing substantial business activities at the time of the purported denial of benefits would not necessarily amount to analyzing those activities after a dispute had arisen.

²¹⁵ See Counter-Memorial, para. 301.

²¹⁶ See Reply, paras. 128-29.

²¹⁷ See Counter-Memorial, part IV.D; see also *infra* Section V.B.

163. In conclusion, Respondent has not met its burden of proving that Claimant has no substantial business activities in the United States. It has failed to rebut Claimant's evidence demonstrating that it is engaged in the business of holding its various investments from its home-base in Nevada, and that its activities are substantial whether viewed in isolation or as part of the broader corporate group of which Claimant forms a part. Through its substantial business activities, Claimant has a real and continuous link with the United States. For this reason alone, Respondent's purported invocation of denial of benefits is unfounded.

B. Claimant Is Owned And Controlled By U.S. Persons

164. For a Party to deny CAFTA's benefits to an investor of another Party under Article 10.12.2, not only must the investor lack substantial business activities in its home Party (or in the territory of another CAFTA Party), it also must be owned or controlled by persons of a non-Party (or of the denying Party). Respondent claims the "own or control" prong of Article 10.12.2 is met in this case, because Claimant is owned and controlled directly by its Canadian parent, Pacific Rim Mining Corp. In response, we demonstrated that the ultimate owners and controllers of Claimant are the U.S. persons who own a majority of the shares of the parent company. It is these persons who are the recipients of the economic value Claimant generates, including through its investment activity in El Salvador. The Canadian entity is simply the conduit through which that value is transmitted to the shareholders. Moreover, we demonstrated that it is a U.S. citizen working in the United States, Mr. Shrake, who makes and implements key

decisions for Claimant in his capacity as Manager, thereby steering Claimant's fortunes and exercising control over Claimant.²¹⁸

165. The fact of majority ownership by U.S. persons and day-to-day management by a U.S. person in the United States (together with Claimant's substantial business activities in the United States, as previously discussed) establish a "real and continuous link" between Claimant and the United States. The existence of that real and continuous link precludes Respondent from denying CAFTA's benefits to Claimant. The obvious objective of CAFTA Article 10.12.2 is to limit entitlement to CAFTA benefits to persons with such a link to the Party in which they are established.²¹⁹ But, Respondent ignores that objective. In its Reply, Respondent seeks to disparage the significance of majority ownership by U.S. persons, and it completely ignores the fact that the key decisions for Claimant (*e.g.*, where it will invest; how it will manage those investments) are made and implemented by a U.S. person working in the United States. In urging the Tribunal not to credit these facts, Respondent would deny CAFTA's benefits to an investor with a real and continuous link to the United States, and thus expand the scope of Article 10.12.2 in a way the CAFTA Parties plainly did not intend.

166. In this section, we will demonstrate why Respondent fails in its attempt to discredit the evidence of a real and continuous link between Claimant and the United States by

²¹⁸ See Counter-Memorial, paras. 335-37.

²¹⁹ North American Free Trade Agreement, U.S.-Can.-Mex., The United States Statement of Administrative Action at 145 (Nov. 1993) (explaining that benefits should not be denied to a company with a "real and continuous link" with the Party in which it is established) (CL-92). As explained in our Counter-Memorial, the CAFTA denial of benefits provision is based on the corresponding NAFTA provision. Counter-Memorial, paras. 272-77.

virtue of ownership and control, in addition to failing in its attempt to discredit the evidence of a real and continuous link by virtue of Claimant's substantial business activities in the United States.

1. Indirect ownership and control of an enterprise of a Party by persons of a Party precludes the denial of CAFTA benefits to that enterprise

167. The "own or control" prong of Article 10.12.2 requires as one condition for denial of benefits to an enterprise that "persons of a non-Party, or of the denying Party, own or control the enterprise." Conversely, if persons of a Party (other than the denying Party) own and control the enterprise, denial of benefits is precluded. Respondent argues that to determine whether the "own or control" condition is met, the Tribunal must look only to the direct owner or controller of the enterprise and ignore the persons who ultimately own and control the enterprise, even if those persons are persons of a Party. That argument finds no support in the text or context of Article 10.12.2, or in CAFTA's object and purpose.

168. The focus of Article 10.12.2 is on the persons that "own or control" the enterprise. The phrase "own or control" is not qualified in any way. It is not Claimant that would modify the text of that provision, as Respondent argues.²²⁰ Rather, it is Respondent that would do so by inserting the word "directly" before "own or control," so that direct ownership or control by

²²⁰ Reply, paras. 137-38.

persons of a non-Party would satisfy the condition, notwithstanding indirect ownership and control by persons of a Party.²²¹

169. Not only does the text of Article 10.12.2 lack the modifier Respondent seeks to insert, but context undermines its argument. As discussed in our Counter-Memorial, interpretation of Article 10.12.2 is informed by the definition of “investment” in Article 10.28, because the relationship between the enterprise to which a Party would deny benefits and the persons who own or control the enterprise is that of an investment to its investors. The definition of “investment” makes clear that the ownership or control relationship that links an investment to an investor may be direct or indirect. This context supports an examination of indirect as well as direct ownership and control in determining whether denial of benefits is appropriate.²²²

170. This is not a “novel assertion,” as Respondent contends;²²³ it is an assertion firmly grounded in the text of CAFTA. In particular, Article 10.12.2 contemplates the possible denial of benefits to “an enterprise” based in part on the nationality of the persons who “own or control the enterprise.” Article 10.28, in turn, identifies “an enterprise” as a kind of “investment,” and provides that a person who “owns or controls” an investment is an “investor.” Accordingly, there is nothing at all “novel” about describing the relationship between an enterprise and its owners and controllers as an investment-investor relationship.

²²¹ See *SOABI v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction (1 Aug. 1984), para. 35 (tribunal declining to interpret the unqualified term “control” in Article 25(2)(b) of the ICSID Convention as being limited to only direct control) (CL-122).

²²² See Counter-Memorial, paras. 310-13.

²²³ Reply, para. 134.

171. What is novel is Respondent's suggestion that in analyzing the relationship between an enterprise and its owners and controllers to determine whether it is appropriate to deny CAFTA benefits to the enterprise, one should exclude indirect owners and controllers, even though the definition of "investment" includes them as investors of an enterprise. Respondent offers no logical explanation why CAFTA should be interpreted as recognizing indirect owners and controllers as investors of an enterprise, but ignoring them for purposes of a denial of benefits analysis.

172. In fact, even though Respondent would ignore an indirect *owner*, Respondent acknowledges that it is appropriate to consider an indirect *controller* as part of a denial of benefits analysis. It makes that acknowledgment in addressing Claimant's argument that a disregard for indirect owners and controllers would lead to implausible results under paragraph 1 of Article 10.12, which contemplates denial of benefits to an enterprise owned or controlled by a person of a country subject to certain diplomatic or economic sanctions. We posited a scenario in which an enterprise of El Salvador is owned and controlled indirectly by a Cuban person, and argued that the United States intended to be able to deny benefits to such an enterprise.²²⁴ Respondent replies, "[B]oth 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."²²⁵ However, the text does not support a different approach to control than to ownership. If it is appropriate to

²²⁴ See Counter-Memorial, paras. 319-20.

²²⁵ Reply, para. 136.

consider indirect control, as Respondent concedes, then it is appropriate to consider indirect ownership.²²⁶

173. Finally, as discussed in our Counter-Memorial, a denial of benefits analysis that takes into account indirect ownership and control by persons of a Party is consistent with CAFTA's object and purpose. CAFTA's stated objectives include, among others, "substantially increas[ing] investment opportunities" in the CAFTA Parties and "ensur[ing] a predictable commercial framework for business planning and investment."²²⁷ A denial of benefits analysis that would result in an enterprise losing CAFTA benefits despite its real and continuous link with its home Party as established through indirect ownership and control by persons of that Party is hardly consistent with these objectives.²²⁸

174. Respondent fails to address this point. Instead, it asserts that taking account of persons of a Party that own and control an enterprise indirectly "would make application of the denial of benefits clause costly and time consuming, if not impossible, as States and tribunals

²²⁶ Respondent incorrectly asserts that there is a contradiction between the argument that the presence of a person of a Party in the ownership chain defeats denial of benefits and ends the analysis under Article 10.12.2, while it does not do so under Article 10.12.1. Reply, para. 136. Respondent fails to consider the distinct objectives of these two provisions. Article 10.12.2 is concerned with the strength of the connection between an enterprise and the Party in which it is established (the home Party). Article 10.12.1 is concerned with the status of an owner or controller of the enterprise as a person of a disfavored country, regardless of the strength of the connection between the enterprise and the home Party. If a person of a Party owns and controls an enterprise, whether directly or indirectly, that ordinarily will establish a link between the enterprise and the home Party precluding denial of benefits under Article 10.12.2, regardless of the presence of persons of a non-Party in the ownership chain. On the other hand, the presence of a person of a Party in the ownership chain does not end the inquiry entailed by Article 10.12.1, which is not concerned with the degree of connection between the enterprise and its home Party.

²²⁷ CAFTA, Art. 1.2.1(d) & Preamble (CL-8).

²²⁸ See Counter-Memorial, paras. 321-24.

would not know which enterprises could be denied benefits.”²²⁹ Putting aside the speculative nature of this assertion, Respondent cites no authority for its suggestion that invocation of denial of benefits was meant to be easy. In fact, it was not meant to be easy.

175. The enterprise whose benefits a Party would seek to deny is, by definition, an investor of a Party and, therefore, presumptively entitled to the protections afforded by CAFTA. By invoking denial of benefits, a Party would take away those protections, disrupting the rules on which the investor reasonably relied in planning its investment. The severity of this sanction presumably is one reason why the CAFTA Parties made the invocation of denial of benefits subject to compliance with CAFTA’s notice and consultation provisions. When done in a timely way (*i.e.*, when done *before* the submission of claims to arbitration, unlike what Respondent did here, as discussed below), the provision of notice and a meaningful opportunity to consult affords Parties the chance to confer on factors that should be considered in deciding whether the denial of benefits is appropriate, including the very issues that make determinations of ownership and control complex. In short, the possibility that consideration of indirect owners and controllers may make a denial of benefits analysis more complex is not a reason to exclude such persons from the analysis.

²²⁹ Reply, para. 137.

2. The evidence shows that U.S. shareholders own a majority of the shares of Pacific Rim Mining Corp.

176. Respondent also asserts that, as an evidentiary matter, Claimant has not shown that U.S. persons own a majority of the shares of Claimant's parent, Pacific Rim Mining Corp., thus making them the indirect owners of Claimant itself.²³⁰ Respondent is incorrect.

177. In connection with its Counter-Memorial, Claimant submitted the testimony of Mr. Shrake, the President and CEO of Pacific Rim Mining Corp. (as well as a Manager of Pacific Rim Cayman). Mr. Shrake explained that in the interest of maintaining its "foreign private issuer" status under U.S. securities laws, Pacific Rim Mining Corp. closely monitors the ownership of its voting securities.²³¹ In particular, it receives periodic reports from proxy processing firm Broadridge Investor Communication Solutions, Inc. ("Broadridge") and from Computershare Ltd., a firm that helps corporate issuers distribute material to shareholders. Mr. Shrake testified in his Witness Statement that based on Pacific Rim Mining Corp.'s monitoring of share ownership, a majority of the shares of Pacific Rim Mining Corp. have been held by U.S. residents from 2002 forward.²³²

178. As further support for this fact, we provide with this Rejoinder the actual reports provided to Pacific Rim Mining Corp. by Broadridge for each year from 2007 to 2009. We also

²³⁰ Reply, paras. 139-40.

²³¹ Under U.S. law, an issuer of securities that is incorporated outside the United States may be treated as a "foreign private issuer," which entails somewhat less burdensome reporting requirements than ordinarily would be the case, if it meets certain conditions. Which conditions it must meet depends on whether "[m]ore than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States." 17 C.F.R. § 240.3b-4 (CL-172).

²³² Shrake Statement, paras. 58-59.

provide the witness statement of Mr. Charles Pasfield, who is the Vice President for Client Services of Broadridge. Mr. Pasfield's statement explains how the reports were prepared and what they show.

179. Respondent alleges that there is a contradiction between the evidence demonstrating majority ownership of Pacific Rim Mining Corp. by U.S. residents and information the company has provided to the U.S. Securities and Exchange Commission ("SEC").²³³ Respondent misinterprets the evidence. In particular, Respondent confuses the distinction between beneficial shareholders and registered shareholders. The SEC filings Respondent cites refer to U.S. persons who are registered shareholders of Pacific Rim Mining Corp. These are persons whose names are actually recorded on the share certificates of Pacific Rim Mining Corp. In fact, the vast majority of Pacific Rim's shareholders are beneficial shareholders, rather than registered shareholders.²³⁴ That is, they hold their shares through intermediaries (*i.e.*, banks or brokers), and their names do not actually appear on the share certificates. Their names and places of residence are provided to Broadridge and Computershare by the intermediaries in whose names the shares are issued. As explained in Mr. Pasfield's statement, when the holdings of these beneficial shareholders are taken into account, U.S. residents do hold a majority of the shares of Pacific Rim Mining Corp., and have done so consistently since 2007.²³⁵

²³³ Reply, para. 141.

²³⁴ See Witness Statement of Charles Pasfield ("Pasfield Statement"), paras. 14-16.

²³⁵ *Id.*

3. U.S. practice is relevant to determining the nationality of the persons who are the ultimate owners and controllers of Pac Rim Cayman

180. Having established that a majority of the shares of Pacific Rim Mining Corp. are owned by U.S. residents, we demonstrated in our Counter-Memorial that the company should be considered to be majority-owned by U.S. citizens. While recognizing that a U.S. resident is not necessarily a U.S. citizen, we referred to the practice of U.S. Government agencies in determining whether a corporation whose shares are publicly traded should be treated as majority-owned by U.S. citizens for purposes of statutes that condition eligibility for certain benefits on majority ownership by U.S. citizens. We observed that these agencies apply a rule of thumb whereby majority beneficial ownership by persons with addresses in the United States is considered to be majority beneficial ownership by U.S. citizens. We argued that it would be appropriate for the Tribunal to use that same rule of thumb in determining the nationality of the owners of Pacific Rim Mining Corp. – who are the ultimate beneficial owners of Claimant, Pac Rim Cayman.²³⁶

181. Respondent objects to this argument on the grounds that the foregoing rule of thumb is not actually set forth in one of the U.S. laws cited by Claimant (even though Respondent does not contest that the rule is in fact applied by the relevant agency) and that, in Respondent’s view, the law is “irrelevant.”²³⁷ Respondent misses the point, which we will seek to clarify here.

²³⁶ See Counter-Memorial, para. 329.

²³⁷ Reply, para. 145.

182. The indirect owners of Claimant, Pac Rim Cayman, are the shareholders of Claimant's parent, Pacific Rim Mining Corp., which is a publicly traded company. If those owners are persons of the United States (defined for this purpose to mean, primarily, citizens of the United States), that fact would tend to preclude the denial of benefits to Claimant, for the reasons discussed in Section IV.B above. The question for the Tribunal is how to determine the citizenship of the owners of a publicly traded company.

183. U.S. Government agencies have had to answer that same question in administering U.S. laws that make certain benefits available to corporate entities, provided that they are majority owned by U.S. citizens. For example, the U.S. law establishing the Overseas Private Investment Corporation ("OPIC") limits eligibility for political risk insurance to (as relevant here) corporate entities that are "substantially beneficially owned by United States citizens."²³⁸ Similarly, regulations of the U.S. Agency for International Development ("USAID") limit eligibility for financing for the supply of certain services to corporations (or partnerships) that are "more than 50 percent beneficially owned by individuals who are citizens of [the United States or certain other authorized countries] or non-U.S. citizens lawfully admitted for permanent residence in the United States."²³⁹

184. OPIC and USAID recognize the practical difficulty in determining the citizenship of the beneficial owners of publicly traded corporations. Accordingly, in administering the above-referenced laws, they apply reasonable rules of thumb to determine whether the

²³⁸ 22 U.S.C. § 2198(c)(2) (CL-126).

²³⁹ 22 C.F.R. § 228.31(a)(2)(i) (CL-128).

citizenship-based eligibility criteria are met. Thus, OPIC states in its official Handbook: “Where shares of stock of a corporation with widely dispersed public ownership are held in the names of trustees or nominees (including stock brokerage firms) with addresses in the United States, *such shares may be deemed to be owned by U.S. citizens* unless the investor has knowledge to the contrary.”²⁴⁰ Similarly, the USAID regulations provide that the corporate officer certifying that the citizenship-based eligibility criteria for USAID financing are met ordinarily “*may presume citizenship on the basis of the stockholders’ record address.*”²⁴¹

185. Our contention is that the same rule of thumb OPIC and USAID use to determine whether publicly traded companies meet citizenship-based eligibility criteria should be used in this case to determine whether Pac Rim Cayman is ultimately beneficially owned by citizens of the United States. The citizenship provisions in the U.S. law programs and in CAFTA’s denial of benefits article serve a similar purpose. They serve to limit eligibility for specified benefits to a corporate entity with a link to a particular country defined in part by the nationality of the entity’s owners. U.S. Government agencies have determined that such a link can be presumed to exist where a majority of the owners have a U.S. address. CAFTA expressly refers to the laws of a Party to determine who qualifies as a “national” of that Party.²⁴² It is relevant, therefore, to refer to that Party’s administration of its laws in determining whether a corporation whose shares

²⁴⁰ OPIC Handbook at 17 n.* (emphasis added) (CL-127). Respondent complains that “[t]here is no provision in the cited law for residence to be used as a proxy for U.S. citizenship.” Reply, para. 145. That is true, but beside the point. What is relevant here is how in practice the U.S. Government administers a law that conditions a benefit on a company’s majority ownership by U.S. citizens when the shares of the company are publicly traded.

²⁴¹ 22 C.F.R. § 228.31(b) (CL-128).

²⁴² CAFTA, Art. 10.28 (defining “national”) (RL-1) & Annex 2.1 (defining “natural person who has the nationality of a Party”) (CL-73).

are publicly traded should be considered majority-owned by nationals of that Party. There is no logical reason the presumption applied by U.S. Government agencies for that purpose should not apply in the CAFTA denial of benefits context.

4. The U.S. persons who own a majority of the shares of Pacific Rim Mining Corp. control Claimant, Pac Rim Cayman

186. Finally, Respondent argues that even if U.S. persons indirectly own Pac Rim Cayman, they do not control it by virtue of their ownership. This argument, too, is incorrect.

187. The U.S. persons who own a majority of the shares of Pacific Rim Mining Corp. control that company directly by virtue of their majority ownership.²⁴³ They control Claimant, Pac Rim Cayman, indirectly by virtue of that company's status as a wholly-owned subsidiary of Pacific Rim Mining Corp.

188. Respondent does not dispute that the owners of Pacific Rim Mining Corp. control that company by virtue of their share ownership. Instead, Respondent contests the proposition that majority ownership of the parent results in control of its wholly-owned subsidiary. Respondent argues that the authorities finding control to be inherent in majority ownership are limited to direct ownership.²⁴⁴ That is incorrect.

²⁴³ See Counter-Memorial, para. 331 (discussing powers of shareholders under Company Act Articles of Pacific Rim Mining Corp.); *id.*, para. 332 (discussing finding of tribunal in *Aguas del Tunari* that control is inherent in majority ownership).

²⁴⁴ The *Aucoven* case concerned direct ownership as the source of control, and did not discuss indirect ownership. But, that was a result of how the disputing parties had defined control in the

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189. In *Aguas del Tunari*, the question was whether the claimant (Aguas del Tunari, S.A.), which was established under the laws of Bolivia, should be treated as a national of the Netherlands for purposes of the Netherlands-Bolivia BIT by virtue of indirect control by a Dutch entity.²⁴⁵ A majority of the shares of Aguas del Tunari, S.A. was held directly by a Luxembourg entity (International Water (Tunari) SARL). The first Dutch entity to appear in the ownership chain was the parent of the Luxembourg entity.²⁴⁶ Thus, the Dutch company did not have direct ownership of the claimant; it had only indirect ownership as a result of owning the entity that owned a majority of the claimant's shares. Nevertheless, the tribunal held that through its indirect ownership the Dutch company had control of the claimant, thus establishing jurisdiction under the BIT.²⁴⁷

190. Similarly, in *SOABI v. Senegal*, the tribunal found control of an enterprise to exist as a result of indirect ownership. The claimant in that case (SOABI) was established under the laws of Senegal. The question was whether it should be treated as a national of another ICSID Contracting State for purposes of Article 25(2)(b) of the ICSID Convention. All of the shares of

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concession agreement at issue. As the tribunal in that case explained, “Aucoven and Venezuela *chose* to define the term ‘foreign control’ only by reference to Aucoven’s direct shareholding.” *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 Sept. 2001), para. 117 (emphasis added) (RL-59). This does not mean that the control that comes from majority ownership exists only where the ownership relationship is direct. In particular, where a subsidiary is wholly-owned by its parent, it would be illogical to conclude that control through ownership of the parent does not also imply control through ownership of the wholly-owned subsidiary.

²⁴⁵ See *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objection to Jurisdiction (21 Oct. 2005), para. 215 (RL-60).

²⁴⁶ See *id.*, para. 71 (diagram of ownership structure).

²⁴⁷ *Id.*, para. 323.

SOABI were owned by Flexa, a company established under the laws of Panama, which (at the time) was not an ICSID Contracting State. However, the shares of Flexa were owned, in turn, by a national of Belgium, which was an ICSID Contracting State. As the result of indirect ownership, the tribunal found that the Belgian national controlled SOABI and that, accordingly, the tribunal had jurisdiction within the meaning of Article 25 of the ICSID Convention.²⁴⁸

191. Respondent’s argument that majority ownership of Pacific Rim Mining Corp. by U.S. shareholders does not result in control of its wholly-owned subsidiary, Pac Rim Cayman, by those same shareholders appears to be based on its view that there can be only one person that controls Pac Rim Cayman. As Respondent sees it, only the parent controls the subsidiary.²⁴⁹ But that position reflects an oversimplified understanding of “control.” As the *Aguas del Tunari* tribunal explained, “[T]he ordinary meaning of ‘control’ would seemingly encompass **both** actual exercise of powers or direction **and** the rights arising from the ownership of shares.”²⁵⁰ The fact that the board of directors of a parent may exercise powers exhibiting control over a subsidiary does not preclude the fact of shareholders with rights that are exercisable also possessing control.²⁵¹

²⁴⁸ *SOABI v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction (1 Aug. 1984), paras. 35-38 (CL-122).

²⁴⁹ *See Reply*, paras. 148-50.

²⁵⁰ *Aguas del Tunari*, para. 227 (emphasis added) (RL-60).

²⁵¹ *See id.*, para. 237 (acknowledging “possibility of there simultaneously being a direct controller and one or more indirect controllers”); *Aucoven*, para. 113 (stating in the context of Article 25 of the ICSID Convention, “The concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights, etc.”) (RL-59).

192. Ultimately, the board of directors is accountable to the shareholders. It is the shareholders who elect the board members, and they have the power to remove them.²⁵² If a majority of the shareholders disapprove of the way Pac Rim Cayman is being run, they have the power to change the board of the parent company and in so doing put in place a board that is more sympathetic with their vision of how Pac Rim Cayman should be run.

193. Likewise, the shareholders have the power to approve or disapprove of certain proposals to alter the capital structure of Pacific Rim Mining Corp. That is another means at their disposal to exercise control over Pac Rim Cayman. If they disagree with the way Pac Rim Cayman is being run, they can reject proposed changes to the capital structure of the parent company that are put to them for a vote or impose conditions on their approval.”²⁵³

194. In sum, Respondent’s assertion that “[t]he Articles of Organization [of Pac Rim Cayman] make no reference to the shareholders of Pacific Rim Mining Corp. having any input into decisions regarding Pac Rim Cayman”²⁵⁴ ignores the ultimate control that the shareholders have over Pac Rim Cayman as a result of their control of the parent company. The absence of an express reference in the Articles of Organization to shareholder input into decisions regarding Pac Rim Cayman does not affect this essential relationship. It is through their rights as shareholders of the parent that the U.S. persons who own a majority of the shares of the parent have control of the wholly-owned subsidiary, Pac Rim Cayman.

²⁵² Pacific Rim Mining Corp., Articles of Incorporation, filed as part of Form 6-K on 1 Feb. 2005, Arts. 14.1 (election of directors at annual general meeting) & 14.10 (removal of directors by special resolution of shareholders) (C-68).

²⁵³ *Id.*, Art. 9.1 (Alteration of Authorized Share Structure).

²⁵⁴ Reply, para. 150.

195. For the reasons set forth in this section, Claimant has shown that through ownership and control by U.S. persons, as well as through substantial business activities in the United States, it has (and at all relevant times has had) a real and continuous link with the United States. Because of that link, the “own or control” condition for applying CAFTA’s denial of benefits article has not been met. For this additional reason, Respondent’s attempt to invoke denial of benefits must be rejected.

C. Respondent’s Failure To Provide Timely Notice As Required By Article 10.12.2 Precludes It From Denying Benefits To Claimant

196. Not only are the substantive conditions for denying CAFTA’s benefits to Claimant not met, but Respondent failed to meet the procedural condition of providing timely notice to the United States and a meaningful opportunity for State-to-State consultations as required by Article 10.12.2. Nor did Respondent provide notice to Claimant, or the Tribunal, of its intention to invoke denial of benefits until nearly 16 months after this arbitration had been initiated. For these reasons, too, Respondent’s attempt to deny benefits must be rejected.

1. Respondent failed to provide timely notice to the United States as required by Article 10.12.2

197. Respondent had ample opportunity to provide the United States notice of its intent to deny benefits to Pac Rim Cayman well before Pac Rim Cayman filed its notice of arbitration on 30 April 2009. For example, Respondent could have provided notice following the 25 June 2008 meeting attended by President Saca, U.S. Ambassador Charles Glazer, and Mr. Shrake, from which it would have been abundantly clear that Pac Rim Cayman considered itself to be a

U.S. investor entitled to CAFTA's protections.²⁵⁵ Alternatively, Respondent could have provided notice during the period of more than four months between Pac Rim Cayman's 9 December 2008 submission of its notice of intent to request arbitration and its 30 April 2009 filing of its notice of arbitration. Instead, Respondent provided its notice of intent to deny CAFTA benefits to Claimant to the United States (though not to Claimant or the Tribunal) in March 2010 – nearly 16 months after Claimant had provided Respondent its notice of intent to initiate arbitration, and nine months after it actually initiated arbitration. That notice came too late to deprive the Tribunal of jurisdiction or to deny Claimant's entitlement to CAFTA's protections as of a date prior to the provision of notice.

a. Respondent's argument fails to address CAFTA's text, context, or object and purpose

198. In explaining why this is so, Claimant set forth a thorough analysis of the text and context of Article 10.12.2 in light of CAFTA's object and purpose. We recalled that CAFTA is practically unique among U.S. free trade agreements and investment treaties of its era in making the invocation of denial of benefits "subject to" the Agreement's articles on "Notification and Provision of Information" (Article 18.3) and "Consultations" (Article 20.4). We argued that the Parties' conscious decision to depart from the prevailing trend and make the denial of benefits subject to these provisions must be given effect. Otherwise, CAFTA's denial of benefits provision would be no different from the denial of benefits provisions in treaties that lack the transparency and consultations proviso. We further demonstrated that if it were permissible for a respondent to provide notice to an investor's home Party of its intent to deny benefits in the

²⁵⁵ See Shrake Statement, para. 119.

midst of an arbitration, the proviso would be negated, because the investor's home Party would be prevented by Article 27 of the ICSID Convention from engaging in the advocacy on behalf of its investor envisaged by CAFTA Article 20.4.²⁵⁶

199. In its Reply, although Respondent reminds us that “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,”²⁵⁷ its discussion of the timing of its provision of notice to the United States is devoid of any reference to the text or context of Article 10.12.2 or of CAFTA’s object and purpose.²⁵⁸ Respondent’s disregard for text, context, or object and purpose is illustrated by its continued reliance on the award in *EMELEC* for the proposition that “the jurisdiction phase is the proper time to announce the intent to deny benefits.”²⁵⁹ As we pointed out in our Counter-Memorial, unlike CAFTA Article 10.12.2, the U.S.-Ecuador BIT at issue in *EMELEC* did not make the denial of benefits “subject to” preconditions related to transparency

²⁵⁶ See Counter-Memorial, paras. 341-54.

²⁵⁷ Reply, para. 159.

²⁵⁸ See *id.*, paras. 162-73. The Tribunal should note Respondent’s selectivity in allegedly hewing to the ordinary rules of treaty interpretation as set forth in Article 31 of the Vienna Convention on the Law of Treaties. For example, compare *id.*, paras. 158-60 (professing to interpret the transparency and consultation proviso of CAFTA Article 10.12.2 in accordance with ordinary rules of treaty interpretation), with *id.*, paras. 123-30 (discussing timing for analyzing an investor’s “substantial business activities” without regard to CAFTA’s text, context, or object and purpose) and *id.*, paras. 162-73 (discussing timing for provision of notice without regard to CAFTA’s text, context, or object and purpose).

²⁵⁹ *Id.*, para. 165.

and State-to-State consultations.²⁶⁰ Rather than address this critical distinction, Respondent merely asserts without explanation that it is “unavailing.”²⁶¹

200. Instead of engaging in an analysis of CAFTA’s text, context, and object and purpose, Respondent resorts to arguments based on mischaracterization of Claimant’s position. Thus it accuses Claimant of “imply[ing] that El Salvador was obliged to deny benefits to Pac Rim Cayman before it ever became a national of a CAFTA party.”²⁶² Of course, that is not Claimant’s position at all. The point of the passage from which Respondent draws this supposed implication was that allowing a Party to deny CAFTA’s benefits to an investor of another Party as of a date prior to providing notice of its intent to deny benefits would undermine CAFTA’s objectives, including the creation of a predictable investment framework, the promotion of transparency, and the establishment of effective procedures for resolving disputes.²⁶³ Nothing about that statement supports the implication Respondent asserts.²⁶⁴

²⁶⁰ See Counter-Memorial, para. 368 n.452.

²⁶¹ Reply, para. 165 n.139. Respondent asserts that “CAFTA, just like the U.S.-Ecuador BIT, does not state that investors must be given prospective notice.” *Id.* Even if true, that assertion has absolutely nothing to do with the issue at hand, which is the timing of a would-be denying Party’s notice to the investor’s home Party.

²⁶² *Id.*, para. 163.

²⁶³ See Counter-Memorial, para. 371.

²⁶⁴ Respondent quotes from an academic article that it claims supports its position that notice of proposed denial of benefits provided to the investor’s home State in the midst of a dispute is timely. See Reply, para. 164. However, the quoted passage does not support this position with reference to text, context, or object and purpose. In any event, the suggestion that it would be impractical for a respondent to provide notice to an investor’s home State before the investor initiated arbitration is demonstrably incorrect. For example, plainly a respondent would be able to provide such notice in the period between an investor’s filing of a notice of intent and its filing of a notice of arbitration, which is at least 90 days long, and possibly longer. See CAFTA, Art. 10.16.2. As noted above, Respondent in this case could

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b. Engaging in advocacy in consultations under CAFTA Article 20.4 after arbitration has begun would risk giving diplomatic protection in breach of ICSID Convention Article 27

201. Respondent also tries unsuccessfully to counter the argument that allowing a respondent to provide notice of denial of benefits to the investor's home State in the midst of arbitration would negate the provision making denial of benefits subject to CAFTA Article 20.4, because the home State would be precluded by Article 27 of the ICSID Convention from engaging in the consultations contemplated by CAFTA Article 20.4.

202. Respondent's reply to this argument is that for an investor's home State (in this case, the United States) to engage in consultations under Article 20.4 would not amount to giving diplomatic protection, which is the act prohibited by ICSID Convention Article 27(1) once a dispute has been submitted to arbitration. In Respondent's view, "diplomatic protection" as that term is used in Article 27(1) is confined to espousal by a State of its investor's claim.²⁶⁵

203. As discussed in our Counter-Memorial, however, that understanding of Article 27(1) is too limited. A State may be considered to be giving diplomatic protection to its investor through measures that fall short of espousal.²⁶⁶ As the tribunal in *Banro American Resources*

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have provided the United States notice of its intent to deny benefits during that period or even earlier, following the 25 June 2008 meeting among President Saca, U.S. Ambassador Glazer, and Mr. Shrake.

²⁶⁵ See Reply, para. 168 ("Article 27 is intended to prevent a State from having to face arbitration by an investor as well as a claim brought by the investor's State.").

²⁶⁶ See Counter-Memorial, paras. 349-52.

found, for example, diplomatic protection may be given through the bringing of “diplomatic pressure” on another State.²⁶⁷

204. Quoting from Article 27(2) of the ICSID Convention, Respondent states that diplomatic protection does not include “informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”²⁶⁸ But, the proceeding envisaged by CAFTA Article 20.4 is hardly an “informal diplomatic exchange[.]” It is a formal proceeding under a Chapter entitled “Dispute Settlement” that is initiated by a formal “request in writing,” the contents of which are prescribed by Article 20.4.2 and include, among other things, “an indication of the legal basis for the complaint.” The Party requesting consultations is required to provide its request to all of the other CAFTA Parties, and any of those other Parties that considers it has “a substantial trade interest in the matter” is entitled to participate in the ensuing consultations.²⁶⁹ Moreover, Article 20.4 requires consulting Parties to share information with one another and to make available personnel with relevant expertise from their respective governments.²⁷⁰ In short, formal consultations under CAFTA Article 20.4 go well beyond the “informal diplomatic exchanges” referred to in ICSID Article 27(2).

205. Furthermore, the role played by an investor’s home State in consultations under CAFTA Article 20.4 is not necessarily that of “facilitating a settlement of the dispute,” as

²⁶⁷ *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award (1 Sep. 2000), paras. 19-21 (CL-136) (quoted in Counter-Memorial, para. 350).

²⁶⁸ Reply, para. 169.

²⁶⁹ CAFTA, Arts. 20.4.2 & 20.4.3 (RL-111).

²⁷⁰ *Id.*, Arts. 20.4.5 & 20.4.6.

contemplated by ICSID Convention Article 27(2). The home State may wish to engage in advocacy on behalf of its investor. For example, it may seek to persuade the Party that would deny CAFTA benefits that the investor actually has substantial business activities in the home State's territory and/or that the investor is owned and controlled by persons of the home State. Of course, such efforts are almost certain to be futile if denial of benefits is invoked after a dispute has been submitted to arbitration.

206. But, more to the point, such efforts would constitute more than facilitating dispute settlement through informal diplomatic exchanges. They would constitute the sort of advocacy encompassed by the giving of diplomatic protection. By cross-referencing Article 20.4, Article 10.12.2 envisages the possibility of a home State engaging in such advocacy prior to a host State's denying benefits. But ICSID Convention Article 27 would preclude the home State's engaging in such advocacy after an arbitration has begun. To avoid ICSID Convention Article 27 negating the consultation proviso in CAFTA Article 10.12.2, the latter provision must be construed as requiring the denying Party to provide notice to the investor's home State *before* the submission of claims to arbitration.

207. In a vain attempt to support its position to the contrary, Respondent refers to two circumstances in which an investor's home State may present its views on questions of treaty interpretation after an arbitration has been initiated. Respondent cites the home State's opportunity to make non-disputing Party submissions under Article 10.20.2, and its opportunity to participate in the work of the Free Trade Commission under Article 19.1.²⁷¹ But these

²⁷¹ See Reply, para. 172.

examples undermine Respondent’s position rather than support it. In both examples, the home State intervention contemplated is an intervention regarding treaty interpretation, as opposed to an intervention regarding the merits of a dispute.²⁷² As discussed in our Counter-Memorial, that distinction is one the tribunal in *Aguas del Tunari* recognized and diligently sought to respect when it sought clarification from the Netherlands (the investor’s home Party under the Netherlands-Bolivia BIT) on a point of treaty interpretation. Thus, in its request to the Dutch Government, the tribunal said that it

wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal’s jurisdiction in this matter, rather it seeks only to secure comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions.²⁷³

208. By contrast, the consultations provided for under CAFTA Article 20.4 are not limited to consultations over treaty interpretation. The only predicate for consultations under Article 20.4 is that one Party considers that an actual or proposed measure of another Party (in this case, the proposed denial of benefits) “might affect the operation of [CAFTA].”²⁷⁴ Consultations may go well beyond issues of treaty interpretation and delve into the merits of the proposed measure, as Respondent itself admits when it states, “plus, the claimed home State has the right to request consultations and can use that mechanism to show the denying State that the

²⁷² See CAFTA, Art. 10.20.2 (“A non-disputing Party may make oral and written submissions to the tribunal regarding the *interpretation* of this Agreement.” (emphasis added)) (RL-1) & Art. 19.1.3(c) (“The [Free Trade] Commission may . . . issue *interpretations* of the provisions of this Agreement.” (emphasis added)) (RL-111).

²⁷³ *Aguas del Tunari*, para. 258 (RL-60) (quoted in Counter-Memorial, para. 351).

²⁷⁴ CAFTA, Art. 20.4.1 (RL-111).

investor actually does have substantial business activities in its territory.”²⁷⁵ The very fact that the CAFTA Parties limited a home State’s intervention after a dispute has commenced to questions of treaty interpretation corroborates the point that for the consultation proviso in Article 10.12.2 to be meaningful, notice and the opportunity for State-to-State consultations must be provided *before* arbitration is initiated.²⁷⁶

209. In sum, in order to give effect to the notice and consultation requirement of Article 10.12.2, notice to the investor’s home Party must be provided before a dispute has been submitted to arbitration. Respondent in this case did not do that, even after Claimant filed its notice of intent in December 2008. Instead, Respondent waited until nearly a year *after* Claimant had filed its notice of arbitration, and nearly 16 months after it filed its notice of intent, to notify the United States (but not Claimant or the Tribunal) of its intent to deny benefits under Article 10.12.2. By then, the United States could not engage in advocacy with respect to the measure Respondent proposed to take without risking a violation of Article 27(1) of the ICSID Convention. For this reason, Respondent’s notice to the United States came too late to be effective, and Respondent cannot exercise the right to deny benefits that it would have had if other conditions had been met, which in this case they were not.

²⁷⁵ Reply, para. 161.

²⁷⁶ Respondent also seeks to support its argument by alleging that Pacific Rim Mining Corp. continued to meet with Members of the U.S. Congress and the U.S. Department of State after Claimant filed its notice of arbitration. Reply, para. 172. But that fact, even if true, is probative of nothing at all. Certainly it does not show that engaging in consultations under CAFTA Article 20.4 after this investment dispute was initiated would not breach the obligation of the United States under Article 27 of the ICSID Convention to refrain from giving diplomatic protection to Claimant.

2. Respondent failed to provide notice to Claimant of its intent to deny benefits to it

210. In addition to failing to provide timely notice to the United States of its intent to deny CAFTA's benefits to Claimant, Respondent failed to provide timely notice to Claimant itself. Respondent disavows any obligation to provide an investor notice of a Party's intent to deny benefits.²⁷⁷ That understanding of CAFTA is mistaken.

211. Chapter 10 of CAFTA prescribes protections a Party must afford to an investor of another Party and to investments of such an investor in the Party's territory (defined as "covered investments"). An investor of another Party is entitled to rely on those protections and to operate its covered investments and plan for the future accordingly. If it could not do so, there would not be "a predictable commercial framework for business planning and investment."²⁷⁸ The absence of such a framework would work against CAFTA's objective of "substantially increas[ing] investment opportunities in the territories of the Parties."²⁷⁹

212. CAFTA provides that under certain circumstances a Party may deny CAFTA's protections to an investor even though that investor is an investor of another Party and is entitled to rely on CAFTA's protections. But denial of benefits is not automatic. An investor of a Party is not presumed to know that it will be denied CAFTA benefits in the territory of another Party. Rather, the denying Party must take an affirmative act to effectuate the denial of benefits. Thus, Article 10.12.2 states that a Party "may" deny CAFTA benefits under specified circumstances.

²⁷⁷ Reply, para. 160.

²⁷⁸ CAFTA, Preamble (CL-8).

²⁷⁹ *Id.*, Art. 1.2.1(d).

Denial of benefits is a possibility, not a certainty. It remains inchoate until the denying Party does something to bring about the denial.

213. By invoking denial of benefits, a host Party removes the presumption on which an investor ordinarily is entitled to rely that as an investor of another Party it enjoys CAFTA's protections in the territory of the host Party. Absent notice from the host Party, an investor of another Party has no reason to know that its entitlement to rely on that presumption has been removed. Accordingly, the host Party must provide notice to the investor before exercising the denial of benefits.²⁸⁰

214. It is based on similar reasoning that tribunals have found invocation of denial of benefits under Article 17(1) of the ECT to require advance notice to the investor.²⁸¹ The reasons articulated by ECT tribunals are relevant here, given the similarity between the conditions for denial of benefits under ECT Article 17(1) and the conditions under CAFTA Article 10.12.2. Accordingly, Respondent's failure to provide advance notice to Pac Rim Cayman of its intent to deny benefits is a further reason to reject its attempt to invoke Article 10.12.2 in the middle of this arbitration.

3. Any denial of benefits to Claimant would have prospective effect only

215. Finally, as discussed in Claimant's Counter-Memorial, even if the substantive conditions for applying denial of benefits are met (which Claimant maintains they are not), the

²⁸⁰ See Counter-Memorial, paras. 355-68.

²⁸¹ See *id.*, paras. 360-63 (discussing decisions of tribunals under ECT).

effect of Respondent’s exercise of its right to deny benefits would be prospective only. It would not deprive the Tribunal of jurisdiction to consider the merits of claims submitted to arbitration before the right was exercised. Again, this conclusion is consistent with the reasoning of tribunals interpreting the ECT’s denial of benefits provision, which is similar to CAFTA Article 10.12.2.²⁸²

216. Respondent’s disagreement on this point is based on what it calls a “crucial” difference between ECT Article 17(1) and CAFTA Article 10.12.2 – in particular, the fact that the ECT’s denial of benefits provision applies only to substantive protections whereas, in Respondent’s view, CAFTA’s denial of benefits provision applies to dispute settlement as well as substantive protections.²⁸³ Even if Respondent is correct in characterizing the difference between ECT Article 17(1) and CAFTA Article 10.12.2 (a point Claimant does not concede), Respondent fails to explain why that difference would mean that a denial of benefits under the former applies prospectively only, but a denial of benefits under the latter applies retrospectively.

217. Respondent asserts that if the conditions of Article 10.12.2 are met, “denial of benefits does not take rights away from an investor because the rights never existed for that investor.”²⁸⁴ But even assuming *arguendo* that proposition to be true, the same could equally be said of Article 17(1) of the ECT. Following Respondent’s logic, if the conditions for denial of benefits under the ECT are met, the investor was never entitled to substantive ECT protections in any case, and so would suffer no actual loss if benefits were denied retrospectively.

²⁸² See *id.*, paras. 369-72.

²⁸³ Reply, paras. 175-76.

²⁸⁴ *Id.*, para. 176.

218. However, every tribunal to consider the application of ECT Article 17(1) has rejected that reasoning. On the contrary, each has confirmed that investors' reasonable expectations of receiving treaty protections must be preserved by requiring advance notice of an intent to deny benefits, and accordingly, that a well-founded right of denial can only be effective on a prospective basis.²⁸⁵ This is because the right to deny benefits remains inchoate until exercised – and may never actually be exercised. Allowing a State to deny benefits at any time, and to effectively take away treaty protections that previously existed, would fundamentally undermine the goal of fostering and protecting foreign investment, since investors could never be sure – until it was too late – whether their investments actually were protected by the treaty or not. This is true whether or not the treaty in question permits denial of substantive benefits alone, as does the ECT, or whether the treaty permits denial of both substantive and procedural benefits, as Respondent argues is the case with CAFTA.

219. Furthermore, where a dispute has already been submitted to a tribunal, Article 10.12.2 cannot operate to deprive that tribunal of its inherent power to determine its own jurisdiction. Yet this is precisely the position Respondent would have this Tribunal adopt when it insists that it can wait for months or years after the initiation of arbitration to deny both the procedural and substantive benefits of CAFTA to the claimant in the arbitration on a retrospective basis.

²⁸⁵ See Counter-Memorial, paras. 369-70.

220. In our Counter-Memorial, we recalled that a State may not unilaterally withdraw its consent to arbitration once that consent has been perfected.²⁸⁶ Respondent replies that its purported retrospective application of denial of benefits is not a withdrawal of consent, because “[t]here simply is no consent to arbitrate disputes with an enterprise that meets the conditions of Article 10.12.”²⁸⁷ Respondent states that because, in its view, Article 10.12.2 pertains to both consent and jurisdiction, “[t]he provision applies when the issue is raised and determined,” like any other objection to jurisdiction.²⁸⁸ It is unclear precisely what Respondent means, since consent is always a condition precedent to jurisdiction, and most objections to jurisdiction are premised on the notion that there is no consent.

221. However, even accepting *arguendo* Respondent’s assertion as to the scope of Article 10.12.2, there is no basis for the conclusion it draws. Unlike other limitations on consent to jurisdiction, the right to deny benefits pursuant to Article 10.12.2 must be exercised in order to become effective.²⁸⁹ In this regard it is fundamentally different from such other limitations, because it has no effect absent a subsequent action taken by the host State to give it effect – an action, furthermore, that the State is under no obligation to take and may choose never to take. In contrast, other limitations on consent – for example, limitations on the types of investments covered by the instrument of consent – are effective immediately and without further action by the State granting such limited consent to arbitrate. That State may later, in the context of a

²⁸⁶ *Id.*, para. 372 (citing ICSID Convention, Art. 25(1)).

²⁸⁷ Reply, para. 177.

²⁸⁸ *Id.*, para. 178.

²⁸⁹ *See* Counter-Memorial, para. 357.

specific case, argue that the previously identified limitations apply, and it is up to the tribunal to determine if there is merit to that argument.

222. It is quite another matter, however, for a State to *affirmatively create* the conditions necessary to place limitations on its consent to arbitrate only after an investor has already accepted its offer to arbitrate. Permitting a State to do so would violate the most fundamental principles governing State conduct on the international plane, including the basic principle of *pacta sunt servanda*. It is this principle that prevents a party from unilaterally withdrawing its consent to arbitrate once it has been given.²⁹⁰ For this reason as well, a purported invocation of denial of benefits under Article 10.12.2 must precede the investor's acceptance of the denying Party's offer to arbitrate, *i.e.*, the submission of the notice of arbitration. An attempt to invoke denial of benefits in the middle of the arbitration has no effect on the arbitration or the rights that accrued earlier and are at issue in the arbitration. Its effect, if any at all, is prospective only.

D. Conclusion On Denial Of Benefits

223. For the reasons set forth in this Part, Respondent has failed to establish any of the substantive or procedural conditions necessary to deny benefits to Claimant under CAFTA Article 10.12.2, and its attempt to deny those benefits must be rejected. Respondent has not met its burden of proving that Claimant has no substantial business activities in its home Party, the United States. To the contrary, the evidence adduced by Claimant affirmatively establishes that

²⁹⁰ See *id.*, para. 372.

it has, and at all relevant times has had, substantial business activities in the United States. That is so whether Claimant's business activities are examined in isolation or, consistent with economic reality, in the context of the Nevada-based corporate family in which Claimant plays an integral role.

224. Moreover, because Claimant ultimately is owned and controlled by U.S. persons – *i.e.*, the shareholders who own a majority of the shares of Claimant's parent and who are the beneficiaries of the economic value Claimant generates – the second substantive condition for denial of benefits is not met. The ultimate majority ownership of Claimant by U.S. persons establishes a real and continuous link with the United States. The CAFTA Parties had no intent to allow a Party to deny CAFTA protections to an investor with such a real and continuous link with its home Party.

225. Finally, Respondent failed to meet the procedural condition of providing timely notice of its intent to deny CAFTA benefits to an investor of another Party. Such notice must be provided to the investor's home Party prior to the submission of a dispute to arbitration in order to give that Party a meaningful opportunity to engage in consultations with the denying Party under CAFTA Article 20.4. That opportunity would be severely curtailed if the denying Party could refrain from providing notice until after arbitration is commenced, given the limitation under ICSID Convention Article 27 on the home Party giving diplomatic protection to its investor once an arbitration has commenced. Respondent also failed to provide timely notice to Claimant of its intent to deny benefits. In any event, to the extent Respondent's purported denial of benefits may have any effect at all, that effect would be prospective only; it would not deprive this Tribunal of jurisdiction over the claims already submitted to arbitration.

V. THERE IS NO BASIS FOR RESPONDENT’S OBJECTION TO THE TRIBUNAL’S JURISDICTION RATIONE TEMPORIS

226. Respondent’s argument that the Tribunal lacks jurisdiction *ratione temporis* is based on two propositions, each of which is incorrect. First, Respondent asserts Claimant is not an investor of a Party because it became an enterprise of the United States only after it made its investment in El Salvador. However, nothing in CAFTA requires an investor first to attain the status of “person of a Party” and only afterwards make its investment in the territory of another Party. A person that makes an investment and then becomes a person of a Party qualifies as an investor of a Party.

227. Second, Respondent asserts that the measure at issue is MARN’s failure to grant an environmental permit to PRES within the statutorily required time period in 2004, even though that plainly is not the measure alleged by Claimant to constitute a breach of CAFTA. The actual measure at issue is the practice of the Government of El Salvador to withhold permits and concessions in furtherance of the exploitation of metallic mining investments – that is, El Salvador’s *de facto* mining ban, which was publicly confirmed for the first time by President Saca in 2008 (after Claimant’s December 2007 incorporation in the United States). Respondent does not deny the existence of the measure, but nevertheless refuses to accept that it is the measure at issue, because it believes that the dispute arose from an act or omission of the Government of El Salvador that occurred before the ban’s existence came to light. In this section, we further demonstrate why each of Respondent’s propositions is incorrect and why the Tribunal, therefore, should reject Respondent’s objection to jurisdiction *ratione temporis*.

A. Pac Rim Cayman Is An Investor Of A Party

228. In its Reply, Respondent barely attempts to defend its argument that Pac Rim Cayman is not an investor of a Party. It devotes a mere three sentences to this argument, entirely ignoring most of Claimant’s response.²⁹¹ Respondent fails to respond to our arguments concerning the text of CAFTA Article 10.28 (defining the term “investor of a Party”), the context for that provision, and case law addressing the very circumstance at issue here – *i.e.*, an investment being made in the territory of a Party to a treaty by a person of a non-Party and only later coming into the possession of a person of another Party to the treaty.²⁹²

229. In its Counter-Memorial, Claimant pointed out that context shows that the order in which a person (a) attains the status of “person of a Party,” and (b) makes an investment in the territory of another Party does not matter. That context includes the definition of “covered investment,” which encompasses investments persons acquired before CAFTA entered into force and, therefore, before those persons were persons of a Party. Respondent’s reply, that the investment at issue here was not an investment of an investor of a Party other than El Salvador when CAFTA entered into force,²⁹³ misses the point. What this context shows is that the order of operations is not determinative of whether a person is an investor of a Party. As Respondent

²⁹¹ See Reply, para. 189.

²⁹² See Counter-Memorial, paras. 185-92. Respondent’s utter failure to address these arguments is not excused by its specious, catch-all assertion that Claimant’s “arguments are too numerous to be addressed in the text of any reasonable Reply.” Reply, para. 8. This assertion does not discharge its duties under the ICSID Rules, which state that responsive written submission “*shall* contain an admission or denial of the facts stated in the last previous pleading . . . observations concerning the statement of law in the last previous pleading . . . [and] a statement of law in answer thereto.” ICSID Rules of Procedure for Arbitration Proceedings, Rule 31(3) (emphasis added).

²⁹³ Reply, para. 189.

has failed to rebut this point, Respondent's contention that Pac Rim Cayman is not an investor of a Party must be rejected.

B. The Dispute Arose When The Measure At Issue – El Salvador's *De Facto* Mining Ban – Came To Light, Which Occurred No Earlier Than March 2008

230. Respondent's second argument, that this dispute arose before December 2007, when Pac Rim Cayman domesticated to Nevada and thus became an investor of a Party, is also incorrect.²⁹⁴

231. This dispute arose when Claimant first became aware of the measure that constitutes a breach of Respondent's CAFTA obligations and has caused loss and damage to Claimant and to its investments in El Salvador. That measure is Respondent's practice of withholding the permits necessary to carry out metallic mining – that is, its *de facto* ban on mining. Respondent did not acknowledge the existence of that measure as such, and Claimant did not become aware of it (nor *could* Claimant have become aware of it) until March 2008 at the earliest, which is when then-President Saca publicly confirmed the ban's existence. It is the ban, as first publicly confirmed by El Salvador's chief executive in March 2008, that wiped out the prospect of Claimant being able to derive value from its investments, thus rendering those investments worthless.

232. Conversely, acts and omissions of Respondent that occurred prior to 2008 did not give rise to this dispute. They are not the measures at issue. Individual instances in which

²⁹⁴ Because this argument is incorrect, Respondent's related assertion that the claims in dispute were submitted to arbitration after expiration of the limitations period in CAFTA Article 10.18.1 also fails.

Respondent's Environmental Ministry or Mining Bureau failed to issue permits or concessions in a timely manner may have caused delay. But, unlike the public confirmation by President Saca of what, in retrospect, appears to have been a long-standing *de facto* mining ban, they did not wipe out the value of Claimant's mining investments. Nor did they undermine the legitimate expectations that had induced Claimant to make those investments in the first place. In fact, prior to the ban's coming to light, the frustration of individual acts and omissions causing delay was dissipated by statements and acts of Government officials consistent with steady (albeit slow) progress towards the goal of being able to extract the minerals PRES and DOREX had discovered during the exploration phase of the investment. In view of Respondent's own conduct supporting and encouraging Claimant's investments well into 2008, Respondent cannot now argue that a measure constituting a breach had occurred and a dispute therefore had arisen prior to 2008.

1. The measure that constitutes the alleged breach is the *de facto* mining ban, the existence of which came to light no earlier than March 2008

233. Respondent states that “[t]he relevant issue is the date on which the measure, act, or fact that constitutes the alleged breach took place.”²⁹⁵ Since it is the Claimant that alleges breaches of CAFTA obligations, “the measure, act, or fact that constitutes the alleged breach” is the measure, act, or fact identified by Claimant as the basis for its claims. The measure identified by Claimant as the basis for its claims is set forth in the Notice of Arbitration. In its Notice, Claimant made quite clear that the measure that constitutes the alleged breach of CAFTA

²⁹⁵ Reply, para. 191.

obligations is the practice of withholding permits and concessions necessary to operate a mining investment – in other words, the *de facto* mining ban. Thus, Claimant explained:

[I]n March 2008, President Saca abruptly and without any justification announced that he opposed granting any new mining permits. This pronouncement followed an extended period during which the Government had simply ceased to communicate with the Enterprises or to act upon their regulatory filings. Without Government action, the Enterprises could not exercise their vested rights – earned through the costly and time-consuming mineral exploration process – to proceed to extraction. And although the Enterprises pressed hard for an explanation of why they had been effectively shut off from communication with the Government, ***only after President Saca’s announcement in March 2008 did they understand that they had become the target of something other than bureaucratic delay or incompetence.*** Rather, President Saca, without any legal or other valid reason, had simply decided to shut the Enterprises down and deprive them of their substantial and long-term investments. As a result of the Government’s actions and inactions, the rights held by the Enterprises have been rendered virtually valueless and PRC’s investments in El Salvador have been effectively destroyed.²⁹⁶

234. Similarly, later in the Notice, Claimant stated:

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

²⁹⁶ Notice of Arbitration, para. 9 (emphasis added).

El Salvador's unjustified failure to grant either the concession or the various permits constituted a breach of its obligations under CAFTA.²⁹⁷

235. As explained in the Notice of Arbitration, it is the *de facto* mining ban confirmed by President Saca – as opposed to any individual missed deadlines under the Mining Law or the Environmental Law – that rendered Claimant's investments valueless. Likewise, it is the ban, rather than any single act or omission in furtherance of the ban, that undermined Claimant's legitimate investment-backed expectations, thus denying it the fair and equitable treatment to which it was entitled under CAFTA. And, it is the ban that constitutes Respondent's failure to accord national treatment and most-favored-nation treatment.

236. Since it is the *de facto* mining ban that constitutes the alleged breach, the relevant issue is the date on which Claimant first knew or should have known that the ban had been implemented by El Salvador.²⁹⁸ The Tribunal need not determine the precise date on which the ban came into existence. It is enough to conclude, as Claimant demonstrated in its Counter-Memorial, that the existence of the ban was not known to Claimant prior to its becoming an enterprise of the United States, in December 2007, nor could it have been known. To the extent this Tribunal determines that it is required to determine a date when the ban came into existence, the only objective date it can use is the date of the ban's formal announcement by President Saca.

237. To settle on an earlier date would be patently unfair to Claimant. This is because Respondent's own conduct concealed the ban's existence by leading Claimant to believe that the

²⁹⁷ *Id.*, paras. 107-08 (emphasis added).

²⁹⁸ Reply, para. 191.

applications of PRES and DOREX were being actively reviewed and that the Government supported their mining enterprises. The Government conduct inducing that belief was described in detail in Claimant's Counter-Memorial and the accompanying witness statement of Mr. Shrake.²⁹⁹ Claimant will revisit that conduct below in explaining why Respondent is in fact estopped from arguing that a dispute arose from acts or omissions that occurred before December 2007. For now, it suffices to observe that when coupled with the inherent difficulty in discerning the existence of an unstated, *de facto* practice, Respondent's acts and statements in ostensible support of Claimant's mining investments made it even more difficult for Claimant to become aware of the mining ban.

238. This is why President Saca's March 2008 public acknowledgment of the ban is so important. Claimant does not contend that the President's statement is by itself the measure at issue. But the President's statement did provide critical information, given the inherent difficulty in discerning the measure at issue, and as such may be seen as the consummation point of the administration's action and inaction constituting the offending measure at issue in this arbitration.

239. Accordingly, it was no earlier than President Saca's acknowledgment of the ban in March 2008 that Claimant acquired knowledge (or could have acquired knowledge) of the measure constituting the breach. Because that moment post-dates Pac Rim Cayman becoming an enterprise of a Party entitled to CAFTA's benefits, Respondent's objection to the Tribunal's jurisdiction *ratione temporis* is meritless.

²⁹⁹ Shrake Statement, paras. 52, 68-106.

2. Respondent admits existence of the measure at issue

240. Despite its prior “emphatic” denials, Respondent now acknowledges the existence of the practice of withholding mining-related permits and concessions for the indefinite future, despite the requirements of the Environmental Law and the Mining Law. In fact, in its Reply, Respondent admits that this measure exists, citing a newspaper article that, in its view, “confirmed that the Ministry [of the Environment] would not be granting concessions until the country concluded a study of the effects of mining.”³⁰⁰ What Respondent neglects to mention is that neither the Environmental Law nor the Mining Law contemplates the conclusion of such a study as a precondition for the granting of concessions. Respondent also neglects to mention that, as of the filing of the Notice of Arbitration, no such study had even begun.

241. Instead of denying the existence of the measure that constitutes the alleged breach, Respondent attacks Claimant’s characterization of that measure as a “ban,” and it suggests that Claimant should have been aware of the measure’s existence prior to December 2007.

a. Prohibition on metallic mining need not be permanent to constitute a “ban”

242. Respondent’s denial that the measure is a “ban” is semantic sleight of hand. Respondent states that in its view “[a] *de facto* ban would refer to a permanent prohibition on metallic mining.”³⁰¹ Since it is unknowable whether the current practice of withholding mining-

³⁰⁰ Reply, para. 206.

³⁰¹ *Id.*, para. 44 n.31.

related permits and concessions will be permanent, Respondent denies the existence of a “ban” even while admitting the existence of the measure at issue.

243. In fact, a prohibition need not be permanent to constitute a “ban.”³⁰² It simply must be a prohibition, which is precisely what the measure at issue is. By consistently refraining from issuing permits or concessions necessary to conduct mining operations, El Salvador effectively has prohibited mining. It may not have adopted a law or regulation establishing a *de jure* prohibition, but through its acts and omissions it has established a *de facto* prohibition, which is equally susceptible to challenge as a measure at issue.³⁰³ Whether the prohibition is permanent or not is irrelevant to determining Respondent’s liability, and it certainly is irrelevant to determining whether the Tribunal has jurisdiction *ratione temporis*.

244. What matters is that as of the filing of Claimant’s Notice of Arbitration, by Respondent’s own belated admission, there was in place in El Salvador a practice of withholding mining-related permits and concessions; this practice will be in place for some indeterminate period of time while Respondent decides “what the future of metallic mining in El Salvador will be;”³⁰⁴ the laws, regulations, and representations by the Government on which Claimant relied in making and expanding its investment never revealed the existence of this practice; the practice came to light only in March 2008, when President Saca acknowledged its existence; and, by enjoining the very activity in which Pac Rim Cayman’s investment is engaged, the practice has

³⁰² As relevant here, a “ban” is a “legal or formal prohibition.” Merriam-Webster Dictionary Online, definition of “ban” (CL-173).

³⁰³ See Reply, para. 214 (“El Salvador never argued that a practice cannot be a measure.”).

³⁰⁴ *Id.*, para. 44 n.31.

rendered the investment worthless and destroyed Pac Rim Cayman's legitimate, investment-backed expectations.

b. Claimant could not have known of ban's existence before President Saca's public announcement in March 2008

245. As for Respondent's suggestion that the practice of withholding mining-related permits and licenses was known prior to 2008, Respondent ignores the distinction between the public announcement by El Salvador's Head of State in March 2008 and earlier comments by subordinates. Respondent relies on three newspaper articles. One quotes an Environmental Minister whom, as discussed in Claimant's Counter-Memorial, confirmed that the statements at issue reflected his personal views, rather than those of the Government, and resigned from his post within months of making the statement.³⁰⁵

246. A second article actually contradicts Respondent's assertion that the existence of the mining prohibition was well-known before 2008. It is a June 2007 article describing protesters as "denounc[ing]" the Government because they understood the Government to "view[] natural resources as a source of enrichment,"³⁰⁶ which is consistent with statements Government officials were making to Claimant at the time.

³⁰⁵ See Counter-Memorial, para. 122; Shrake Statement, para. 93.

³⁰⁶ *El Diario de Hoy*, "Protesta contra explotación minera," 24 June 2007 (R-122).

247. The third article (also from June 2007), states that the then Minister of the Environment “ruled out” changes to current mining legislation, but says nothing about mining practices under the existing legislation.³⁰⁷

248. None of these articles comes even close to the express acknowledgment of a mining ban in President Saca’s March 2008 announcement. Accordingly, Respondent is incorrect to assert that President Saca’s statement “was not a new announcement in 2008.”³⁰⁸

249. In its Counter-Memorial, Claimant illustrated the significance of President Saca’s revelation of the metallic mining ban by showing its impact on the share price of Claimant’s parent, Pacific Rim Mining Corp. Claimant showed that the share price was US\$1.21 just before President Saca’s announcement; dropped precipitously upon the President’s announcement of the *de facto* mining ban; and has hovered at between US\$0.20 and US\$0.30 ever since the President confirmed the ban’s existence in July 2008.³⁰⁹

³⁰⁷ *La Prensa Gráfica*, “Reforma de ley en espera,” 14 June 2007 (R-121).

³⁰⁸ Reply, para. 207.

³⁰⁹ See Counter-Memorial, paras. 160-61.



250. The chart above illustrates the declines and increases of the stock price of Pacific Rim Mining Corp. compared to the Amex Gold Bugs Index (the index used by Respondent in its Reply) from February 2008 through December 2009. As shown, the steep drop in the value of Pacific Rim Mining Corp. began in March 2008, upon President Saca’s announcement of the mining ban. By contrast, other gold stock values did not fall nearly as fast or as far as that of Pacific Rim Mining Corp. – and, moreover, had begun their recovery by November 2008. The stock price of Pacific Rim Mining Corp. never recovered. Respondent dismisses this contrast by asserting that it “would require additional analysis.”³¹⁰

251. However, the explanation is clear. Pac Rim Cayman’s Salvadoran investments were the most valuable assets in the Pacific Rim portfolio. Pacific Rim’s fortunes would rise or

³¹⁰ *Id.*, para. 211.

fall based on the likelihood of those assets generating value. President Saca's March 2008 confirmation of a metallic mining ban made clear that there was no foreseeable prospect of the assets generating any value, because the necessary permits and concessions would not be granted. Accordingly, Pacific Rim shares lost more than 75 percent of their pre-announcement value. Respondent offers no other plausible explanation.

252. In sum, the drop in Pacific Rim share value confirms that President Saca's March 2008 public announcement of the mining ban represented a fundamental shift in the relationship between Claimant and the Government of El Salvador. The distinction between delays on the one hand, and an announcement by the Head of State in opposition to granting mining permits on the other, is readily apparent. With President Saca's statement, it became clear that despite the prior assurances of support, the Government had implemented a deliberate practice of withholding mining-related permits. Accordingly, it was with that statement that Claimant first became aware of the measure at issue. And, indeed, in light of the Government's failure to acknowledge the measure sooner, it would have been impossible for Claimant to have become aware of the measure at an earlier date. Because Claimant became aware of the measure at issue several months after Claimant became a U.S. enterprise entitled to the benefits of CAFTA, Respondent's objections to the Tribunal's jurisdiction *ratione temporis* must be rejected.

3. Measures alleged by Respondent as giving rise to a "dispute" did not constitute breaches of CAFTA obligations

253. Unable to deny the existence of the metallic mining ban, and evidently recognizing that the existence of this ban did not come to light until March 2008 (a fact that would defeat its jurisdictional objection), Respondent seeks to divert attention to other acts or

omissions. In particular, it urges the Tribunal to treat the failure of MARN to grant PRES an environmental permit by a statutory deadline in December 2004 as the measure at issue.³¹¹ Alternatively, it suggests that the failure of the Bureau of Mines to grant PRES an exploitation concession by January 2007 is the measure at issue.³¹²

254. However, neither of these alleged omissions is “the measure, act, or fact that constitutes the alleged breach.”³¹³ Following the test articulated by Respondent itself, the date on which these alleged failures to act occurred, therefore, is not “[t]he relevant issue.”

255. Respondent’s attempt to treat a missed deadline in December 2004 or January 2007 as the measure at issue ignores the difference between a missed deadline and a practice of withholding altogether permits necessary to conduct mining operations. The difference is enormous. While the missed deadlines were disappointing, they did not by themselves wipe out the value of Pac Rim Cayman’s investments, thus effectuating an expropriation. Nor did they undermine Pac Rim Cayman’s legitimate, investment-backed expectations so as to constitute a denial of fair and equitable treatment, in other words, breaches of duties owed by El Salvador under CAFTA.

256. The failure of a government agency to meet deadlines, even deadlines prescribed by statute, is not especially unusual. An investor might even expect such lapses as an ordinary cost of doing business. Such lapses are especially unremarkable where, as here, the responsible

³¹¹ See *id.*, paras. 201-03.

³¹² See *id.*, para. 196.

³¹³ *Id.*, para. 191.

agencies are administering a relatively new law in a sector that has seen no activity for years.³¹⁴ The fact that PRES had presented MARN with an extremely detailed EIA was further reason for PRES not to be surprised by delay in MARN's acting on its application for an environmental permit.³¹⁵

257. Moreover, it is not as if the missed deadlines that Respondent characterizes as the measures at issue were accompanied by complete inactivity on the part of MARN and the Bureau of Mines. To the contrary, even though these agencies acted less swiftly than the law suggested should have been the case, they continued to engage with PRES and DOREX in a manner that indicated cooperation and forward movement towards the shared goal of being able to move from exploration to exploitation.³¹⁶

258. This ordinary conduct must be contrasted with the extraordinary measure of banning all mining-related activity for an indefinite period of time, which is the practice President Saca first openly acknowledged in March 2008. Unlike the missed deadlines on which Respondent focuses, the mining ban actually did render Claimant's investments valueless and undermine the Government-formed expectations on which Claimant had relied in making its investments. The ban eliminated the possibility of deriving value from Claimant's investments, whereas individual delays did not.

³¹⁴ Counter-Memorial, para. 94; Shrake Statement, para. 75 ("Having previously worked in countries with relatively new regulatory regimes, we were not particularly surprised" by El Salvador's lack of strict adherence to statutory time periods).

³¹⁵ Notice of Arbitration, paras. 55, 63; *see* Environmental Impact Assessment ("EIA") (Sep. 2005) (C-8).

³¹⁶ *See infra*, Section V.G.

259. Accordingly, the two missed deadlines on which Respondent focuses did not constitute breaches of CAFTA obligations. They are not the measures at issue, and the dates on which they occurred are not relevant to determining whether the Tribunal has jurisdiction *ratione temporis*.

4. Respondent confuses the difference between a dispute and a mere disagreement

260. Even though the two missed deadlines that Respondent wrongly alleges to be the measures at issue do not constitute breaches of CAFTA obligations, Respondent maintains that they gave rise to a dispute between Claimant and Respondent, and that the existence of that dispute before December 2007 deprives the Tribunal of jurisdiction. As previously discussed, this argument fails, because Respondent confuses the distinction between a dispute and a mere disagreement.³¹⁷ Even if Claimant believed that PRES was entitled to a permit or a concession by a date prior to December 2007, that belief did not give rise to a dispute as that term is used in CAFTA.

261. Respondent argues that “Claimant is trying to make a distinction without a difference.”³¹⁸ It points to the statement of the Permanent Court of International Justice in *Mavrommatis Palestine Concessions* that a dispute is “a ‘disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’”³¹⁹ But this argument represents a

³¹⁷ See Counter-Memorial, paras. 206-23.

³¹⁸ Reply, para. 218.

³¹⁹ *Id.* (quoting *Case of the Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, Judgment No. 2, at 11 (Aug. 30)).

flaw of basic logic. In essence, Respondent is arguing that because every dispute involves a disagreement, every disagreement constitutes a dispute. Of course, that is not the case. Nor did the Court in *Mavrommatis Palestine Concessions* suggest that it was. The only issue there was whether the suit between Great Britain and Greece was, in fact, a “dispute,” which the Court found it was. The Court did not find, however, that every disagreement between two parties is necessarily a “dispute.”

262. As was pointed out in Claimant’s Counter-Memorial, for there to be a “dispute” within the meaning of CAFTA, there must be an allegation of breach of an obligation under CAFTA and an allegation of loss or damage by reason of or arising out of the breach. This stems from the way the term “dispute” is used in CAFTA, and in particular the recognition that for there to be a dispute there must be a “claim,” the elements of which are an allegation of breach, an allegation of loss or damage, and an allegation of a causal link between the two.³²⁰

263. Without any basis in the text, Respondent simply asserts that the existence of a dispute “has nothing to do” with the existence of “a breach of CAFTA and any damages arising thereon.”³²¹ Ironically, in the very next paragraph, Respondent asserts that Claimant’s knowledge of breach and damages has everything to do with the running of the three-year limitations period provided for in Article 10.18.1.³²² Respondent fails to reconcile its assertion that the existence of a breach and damages has nothing to do with when a dispute arose with its assertion that the existence of a breach and damages has everything to do with when the

³²⁰ Counter-Memorial, paras. 209-11.

³²¹ Reply, para. 219.

³²² *Id.*, para. 220.

limitations period begins to run. Nor does Respondent reconcile its assertion that the existence of a breach (and damages) has nothing to do with the existence of a dispute, with its earlier assertion that “[t]he relevant issue is the date on which the measure, act, or fact that constitutes the alleged *breach* took place.”³²³

264. Respondent’s theory seems to be that as long as there was some disagreement between Claimant and Respondent at some point in time over some point of fact or law (including municipal law), then there was a dispute between them, regardless of whether that “dispute” would have been cognizable under CAFTA. If that “dispute” arose before CAFTA entered into force or became applicable to Claimant, then the Tribunal lacks jurisdiction *ratione temporis*, according to Respondent. But, in addition to defying logic and finding no support in the text or context of CAFTA, this understanding of a “dispute” finds no support in the applicable case law.

265. In its Counter-Memorial, Claimant called attention to several authorities (including those relied upon by Respondent) that explored the distinction between a dispute and a mere disagreement. We recalled, for example, *Maffezini v. Spain*, in which Spain objected to jurisdiction on the very same grounds El Salvador now advances. Quoting Professor Schreuer, the tribunal explained that a “dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”³²⁴ The tribunal acknowledged that

³²³ Compare Reply, para. 219 with *id.*, para. 191 (emphasis added).

³²⁴ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 Jan. 2000), para. 94 (CL-81) (quoting C. Schreuer, “Commentary on the ICSID Convention. Article 25,” *Foreign Investment Law Journal—ICSID Review*, Vol. 11, 1996, 318, at 337)).

before the treaties at issue there had entered into force, “[i]ssues such as budget estimates, requirements of environmental impact assessment, disinvestment, and other [sic] were indeed discussed.”³²⁵ But, in rejecting Spain’s contention that a “dispute” predated the treaties’ entry into force, the tribunal stated that

there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.³²⁶

266. We also recalled *Mobil v. Venezuela*, a case cited by Respondent. There, the tribunal found it lacked jurisdiction over certain claims due to a dispute having arisen before the treaty at issue became applicable to the claimant. It based that finding on two letters from the claimant to the respondent State making specific legal complaints, requesting the State to appoint representatives for settlement talks, and recalling the State’s consent to ICSID arbitration while at the same time confirming its own consent to ICSID arbitration.³²⁷ The facts in *Mobil*, which contrast sharply with the facts alleged by Respondent to constitute the “dispute” in this case, represented the “latter stage” of the progression from disagreement to dispute described in *Maffezini*.

³²⁵ *Id.*, para. 95.

³²⁶ *Id.*, para. 96 (quoted in Counter-Memorial, para. 211 n.251).

³²⁷ See Counter-Memorial, para. 214 (discussing *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), paras. 205-06 (RL-51)).

267. In its Reply, Respondent addresses none of the case law discussed in Claimant's Counter-Memorial. Instead, Respondent rests on its unsupported assertion that the distinction between a disagreement and a dispute is "a distinction without a difference."³²⁸ The Tribunal should reject that argument and, like the *Maffezini* tribunal, it should reject Respondent's suggestion that any disagreements that may have existed before CAFTA became applicable to Claimant constituted a dispute.

5. Respondent is estopped from arguing that disagreements over missed deadlines in 2004 or 2007 gave rise to a dispute between Claimant and Respondent

268. Finally, not only does Respondent ignore the distinction between a mere disagreement and a dispute, it also ignores its own conduct at the time of the missed deadlines, which misled Claimant into believing that there was no disagreement and that its applications for an environmental permit and an exploitation concession were under active consideration and had the Government's support. Even if there were some theoretical set of circumstances under which a government agency's failure to meet a statutory deadline might automatically give rise to a treaty dispute between an investor and the government (which is what Respondent alleges here), the actions of Respondent in this case preclude that result. Having induced Claimant to understand that despite the missed deadlines there was no dispute, Respondent cannot now argue that the missed deadlines triggered the "birth" of the dispute between Claimant and Respondent. Indeed, as a matter of law, it is estopped from taking that position.

³²⁸ Reply, para. 218.

269. Under CAFTA, the issues in dispute are to be decided “in accordance with [CAFTA] and applicable rules of international law.”³²⁹ Applicable rules of international law include the well-established doctrine of estoppel. As Judge Alfaro put it succinctly in his opinion in the *Preah Vihear* case, “[I]nconsistency between claims or allegations put forward by a state, and its previous conduct in connection therewith, is not admissible.”³³⁰ Tribunals considering estoppel in the context of investor-State arbitration have found that in addition to an inconsistency between a party’s claims or allegations and its previous conduct, the other party must have relied justifiably to its detriment on the first party’s previous conduct.³³¹

270. Applying the foregoing factors – (1) inconsistency between the State’s claims or allegations and its previous conduct; (2) investor’s justifiable reliance on the previous conduct; and (3) detriment to the investor from its reliance – Respondent is estopped from alleging that a dispute between Claimant and Respondent existed from as early as December 2004 (or, alternatively, January 2007), as we now will show.

271. Respondent’s view that the measure giving rise to the dispute is MARN’s failure to meet a deadline in December 2004 (or, alternatively, the Bureau of Mines’ failure to meet a deadline in January 2007) is based on the premise that if a law requires an act to occur by a

³²⁹ CAFTA, Art. 10.22.1 (RL-1).

³³⁰ *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thai.), 1962 I.C.J. 6, 37 (June 15) (Sep. Op. Vice-President Alfaro) (CL-174); *see also AMCO Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction (25 Sept. 1983), 25 I.L.M. 351, 380 (“*AMCO Asia*”) (CL-175) (“State must not be permitted to benefit by its own inconsistency to the prejudice of another State”) (citing *id.*).

³³¹ *See, e.g., Chevron v. Ecuador*, Partial Award on the Merits Ad Hoc—UNCITRAL Arbitration Rules (30 Mar. 2010), IIC 421, at paras. 350-351 (2010) (CL-176); *AMCO Asia* at 380-381 (CL-175).

certain deadline and the act does not occur by that deadline, then there is a dispute between the party seeking the action and the State that failed to act. Respondent thus puts substantial weight on what is required by the letter of Salvadoran law,³³² and a very heavy burden on itself.³³³

272. However, that view ignores the conduct of MARN, the Bureau of Mines and other officials of the Salvadoran Government, which led Claimant to understand that even though deadlines had been missed, PRES's applications for a permit and a concession remained under active consideration. That conduct showed that although the Salvadoran agencies were not adhering strictly to the deadlines prescribed by law, they were working with Claimant to navigate the process required by the law. Moreover, the Government's conduct led Claimant to believe that the Government shared its objective of making the PRES and DOREX mining operations a success and induced Claimant to increase its investment in El Salvador.

273. The details of the interaction between PRES and DOREX, on the one hand, and the Salvadoran Government, on the other, from 2004 through 2008 have been described extensively in our Counter-Memorial.³³⁴ Key points may be summarized as follows:

³³² See, e.g., Reply, para. 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"), *id.* at para. 196 ("[O]nce 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."), *id.*, para. 203 ("[O]nce the environmental permit was not granted and presumptively denied, there was a dispute."); see also Objections to Jurisdiction, para. 47 ("In this case, the measure at issue took place in December 2004, when MARN did not grant or deny the environmental permit within the 60 business days provided for under the law of El Salvador."); *id.*, para. 294 ("Thus, when the Bureau of Mines did not admit the application within 60 business days, the application for the El Dorado mining exploitation concession was presumed to have been denied by March 2005.").

³³³ Taken to its logical conclusion, accepting Respondent's position would essentially mean that any party whose application for a permit has been delayed could claim that there has been a breach of El Salvador's CAFTA obligations. Clearly, this cannot be the case.

- February 2005: MARN issued a series of observations in response to the environmental impact assessment (“EIA”) PRES had submitted in September 2004.³³⁵
- April 2005: PRES submitted a supplemental volume to MARN responding to the observations.³³⁶
- September 2005: PRES submitted revised and updated EIA to MARN, based on dialogue with MARN from May to August 2005.³³⁷
- October 2005: On MARN’s instructions, PRES published information on EIA in local newspapers and held public meetings. At a meeting, El Salvador’s Vice President and Minister of Economy assured Mr. Shrake and Mr. Earnest that Saca Administration “strongly supported the El Dorado project.”³³⁸
- March 2006: MARN provided PRES observations made during public comment period.³³⁹
- May 2006: At meeting, El Salvador’s Vice President and Minister of Economy assured Mr. Shrake and Ms. McLeod-Seltzer that Government is “supportive and enthusiastic” about their work.³⁴⁰
- July 2006: MARN provided additional comments.³⁴¹
- September-October 2006: PRES provided MARN responses to observations and additional comments.³⁴²

(continued...)

³³⁴ Counter-Memorial, paras. 93-130; *see also* Shrake Statement, paras. 71-104.

³³⁵ *See* Counter-Memorial para. 105; Shrake Statement, para. 76.

³³⁶ *See* Counter-Memorial para. 105; Shrake Statement, para. 76.

³³⁷ Shrake Statement, para. 77; *see also* Counter-Memorial para. 105.

³³⁸ *See* Counter-Memorial paras. 106, 120; Shrake Statement, paras. 78, 91.

³³⁹ Shrake Statement, para. 79; *see also* Counter-Memorial para. 107.

³⁴⁰ *See* Counter-Memorial para. 121; Shrake Statement, para. 92.

³⁴¹ *See* Counter-Memorial para. 107; Shrake Statement, para. 79.

³⁴² *See* Counter-Memorial para. 107; Shrake Statement, para. 79.

- November 2006: Mr. Shrake gave Salvadoran Government delegation tour of Midas Mine in Nevada, as illustration of what El Dorado mine would look like.³⁴³
- December 2006: PRES presented MARN design for state-of-the-art water treatment facility.³⁴⁴
- January 2007: Minister of Environment assured Pacific Rim’s Chief Operating Officer, Peter Neilans, that he would “move the bureaucratic process forward.”³⁴⁵
- August 2007: DOREX submitted EIAs for Guaco and Pueblos exploration areas.³⁴⁶
- November 2007 – March 2008: MARN made observations on Guaco and Pueblos EIAs, and DOREX responded.³⁴⁷
- January 2008: Mr. Guillermo Gallegos, Majority Leader of the Congress, said he was “confident that MARN would issue the permits.”³⁴⁸

274. In view of the constant, positive interaction between Claimant and Respondent, from the submission of PRES’s original EIA in September 2004 through early 2008, Claimant had absolutely no reason to suspect that Respondent was, in fact, engaged in a practice that would make it impossible to ever operate its investments and thus deprive the investments of any value. All communications indicated that the very opposite was true; that while the process was moving more slowly than Claimant had anticipated, it actually was moving, and that it was headed towards a result that eventually would allow Claimant to operate its investments. Indeed,

³⁴³ See Counter-Memorial para. 123; Shrake Statement, para. 94.

³⁴⁴ See Counter-Memorial paras. 108-09; Shrake Statement, para. 80.

³⁴⁵ Shrake Statement, para. 96; *see also* Counter-Memorial para. 125.

³⁴⁶ See Counter-Memorial para. 127; Shrake Statement, para. 99.

³⁴⁷ See Counter-Memorial para. 127; Shrake Statement, para. 99.

³⁴⁸ See Counter-Memorial para. 129; Shrake Statement, para. 101.

far from discouraging Claimant, Respondent's conduct encouraged Claimant to maintain and expand its investment, which it did by investing US\$5.8 million in fiscal year 2006, US\$10.3 million in fiscal year 2007, and US\$11.5 million in fiscal year 2008 (which fiscal years ended on 30 April of each calendar year).³⁴⁹

275. It was only in March 2008, with publication of President Saca's statement that he was "not in favor of granting those [mining] permits" that it became apparent that the process was not moving forward. As stated in the Notice of Arbitration, it was that announcement that revealed that there had been "a radical change in the Government's position with respect to mining" and "a radical departure from controlling Salvadoran law."³⁵⁰

276. Through its previous conduct, Respondent caused Claimant to understand that there was no dispute as of the December 2004 deadline for MARN to act on PRES's application for an environmental permit (or as of the January 2007 deadline for the Bureau of Mines to act on its application for an exploitation concession). Respondent induced Claimant to cooperate with Respondent's agents in the processes of reaching final determinations on PRES's applications. Claimant did, in fact, cooperate and refrained from taking the steps it otherwise might have taken to protect its interests if it had understood that a dispute existed between it and Respondent. Claimant also continued to spend resources on maintaining and expanding its investment in view of Respondent's conduct. Because Claimant acted to its detriment in justifiable reliance on Respondent's conduct indicating that there was no dispute between

³⁴⁹ See Counter-Memorial, para. 128 & n.150 (citing sources).

³⁵⁰ Notice of Arbitration, para. 107.

Claimant and Respondent in December 2004 or in January 2007, Respondent cannot now maintain that there was a dispute at those times. For this additional reason, therefore, Respondent's allegation that a dispute arose before CAFTA became applicable to Claimant in December 2007 thus depriving the Tribunal of jurisdiction *ratione temporis* must be rejected.

277. Thus, by the time MARN requested PRES to submit additional information concerning the El Dorado EIA in December 2008 – so that it could “resolve [the] application for the environmental permit for your mineral exploitation project ‘El Dorado’”³⁵¹ – Claimant had realized that MARN was simply engaged in further delay tactics, rather than trying to move the process forward.

C. Conclusion On Jurisdiction *Ratione Temporis*

278. For the reasons set forth in this section, neither of Respondent's bases for objecting to the Tribunal's jurisdiction *ratione temporis* is well-founded. Its contention that Claimant does not qualify as an investor of a Party because it made its investment in El Salvador before it became incorporated in the United States lacks any basis in the text or context of CAFTA, and Respondent's recognition of the argument's weakness is evident from the fact that it barely tries to defend the argument in its Reply.

279. Respondent's contention that the Tribunal lacks jurisdiction because the dispute arose before CAFTA became applicable to Claimant is equally specious. That argument ignores the measure alleged to constitute a breach of CAFTA obligations – Respondent's practice of

³⁵¹ Letter from MARN to PRES (4 Dec. 2008) (C-76).

withholding metallic mining-related permits and concessions (*i.e.*, its metallic mining ban), which only came to light in March 2008 – and pretends that the real measure at issue is a different act or omission – a missed deadline in December 2004. Not only is the latter measure not alleged to constitute a breach of CAFTA, but it did not give rise to a dispute as that term is used in CAFTA, and Respondent’s own conduct contradicts its allegation that the missed deadline gave rise to a dispute.

280. Accordingly, Respondent’s objection to the Tribunal’s jurisdiction must be rejected.

VI. THE TEXT OF ARTICLE 15 OF THE INVESTMENT LAW CONTAINS EL SALVADOR’S CONSENT TO ICSID JURISDICTION

281. Respondent has not put forward a single new argument or any evidence with its Reply memorial to address the submissions and evidence presented in our Counter-Memorial regarding the scope and effect that the Tribunal should accord to Article 15 of the Investment Law. Respondent, therefore, has failed to discharge its burden of persuasion. Accordingly, the Tribunal must find that it has jurisdiction pursuant to the plain terms of Article 15.

282. Respondent’s position with respect to Article 15 would appear to be as follows:³⁵²

(1) As “consent is the cornerstone of the jurisdiction of the Centre,” it is imperative that the Tribunal be the judge of its own competence. Claimant does not disagree;

³⁵² Respondent’s argument is summarized in italics; Claimant’s brief response is provided in plain text.

(2) In judging its own competence, the Tribunal must “engage in a conscious interpretation of Article 15 to decide whether Article 15 constitutes consent for purposes of Article 25 of the ICSID Convention.” In our view, as also confirmed by at least three other ICSID tribunals, the terms of Article 15 are clear and unambiguous and therefore the Tribunal need not go beyond the language of Article 15 in an effort to discern what might have been El Salvador’s intent at the time the Investment Law was drafted and promulgated, but even if it chooses to do so, the evidence demonstrates that Respondent has always intended Article 15 to constitute a unilateral consent to ICSID arbitration;

(3) *The Tribunal should disregard the Inceysa decision completely* (notwithstanding the fact that the Tribunal in that case addressed the jurisdictional import of Article 15);

(4) Article 15 is not a jurisdictional instrument for purposes of Article 25 of the ICSID Convention and therefore the rules of interpretation applicable to the unilateral acts of states that are formulated in the framework and on the basis of a treaty, such as the ICSID Convention, are not applicable. However, at least three ICSID tribunals, including the *Inceysa* tribunal, have confirmed that Article 15 is an instrument of consent;

(5) *When the scope of a unilateral declaration is unclear, such declaration must be interpreted restrictively.* In the present case, the unilateral declaration at issue is not unclear, and moreover, as recently recognized by the tribunals in *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (“Cemex”) and *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*

(“Mobil”), the principle of restrictive interpretation is not applicable where the unilateral declaration at issue is one that was formulated in the framework of a treaty and on the basis of such a treaty;

(6) *Unilateral declarations may only create legal obligations if stated in clear and specific terms.* Claimant agrees, and has provided ample evidence that El Salvador’s consent in Article 15 has been stated in clear and specific terms;

(7) *Emphasis on the intention of the depositing State is required at the time it made the declaration.* As a general proposition, Claimant does not disagree, however, background and circumstantial evidence of the state’s intention cannot override the clear terms of its declarations and such evidence must be substantial and compelling. Here, Respondent has presented no direct evidence whatsoever of the State’s intention with respect to Article 15.

283. In Claimant’s respectful submission, the available evidence regarding the jurisdictional import of Article 15, including Respondent’s own statements in the *Inceysa* case, the views expressed about Article 15 of the Investment Law by other ICSID tribunals, and the statements made by Salvadoran Government officials is overwhelming. As such, one could have perhaps expected Respondent, in the discharge of its obligations to the Tribunal, the ICSID system and to the foreign investment community, to have conceded on its objections with respect to the Investment Law. By not doing so, Respondent has failed to act in good faith.

284. What is perhaps most remarkable about Respondent’s position is the complete absence of any direct evidence in support of its stance *in this arbitration* that Article 15 does not

contain El Salvador's unilateral consent to ICSID arbitration. Respondent has not been able to produce a witness statement from anyone involved in drafting the law; or any legislative history supporting its *current* reading of the law; or any academic commentary supporting its view on the law; or any materials from PROESA (the Salvadoran investment authority), contemporaneous with the law's promulgation or at any time since then, explaining the dispute resolution provisions of the Investment Law. This is because there is no direct evidence, testimonial or documentary, in support of Respondent's position. One might even have expected Respondent to have submitted the relevant sections of its memorials, expert reports and other evidence relating to the debate over Article 15 in the *Inceysa* case; if only to show that Article 15 was not, as Respondent now contends, of any relevance in that case and was not even the subject of party argument. Respondent's failure to do even this much should give rise to serious skepticism regarding the validity and *bona fides* of its objections to Article 15 as a basis for this Tribunal's jurisdiction.

285. Below Claimant responds to the submissions El Salvador has put forward in order to avoid any doubt that Article 15 of the Investment Law does in fact "clearly" (to use the *Inceysa*, *Mobil* and *Cemex* tribunals' description) set forth Respondent's unilateral consent to ICSID jurisdiction; which consent has been accepted by Claimant.

A. The Investment Law Should Not Be Interpreted Restrictively

286. Respondent argues that Article 15 of the Investment Law should be interpreted restrictively because it is not an instrument of consent but a unilateral declaration of the State

having no bearing on arbitral jurisdiction.³⁵³ However, several ICSID tribunals have confirmed that unilateral jurisdictional instruments should not be interpreted restrictively.³⁵⁴ And at least three tribunals have confirmed that Article 15 of the Investment Law is an instrument of consent. This latter point is addressed in the next Section (B).

287. In *Cemex* and *Mobil* the tribunals recently explained that under customary rules governing unilateral declarations of states a distinction should be made between the rules of interpretation applicable to declarations formulated in the framework and on the basis of a treaty, and other declarations made in the exercise of a state's freedom to act on the international plane.³⁵⁵ Both tribunals concluded that a restrictive interpretation would be applicable only to unilateral declarations that are not made in the context of a treaty framework.³⁵⁶

288. Respondent misinterprets the *Mobil* decision. In paragraphs 88 and 89, the tribunal set forth the rule of restrictive interpretation as formulated by the International Court of Justice in cases in which the unilateral declaration to be interpreted was not formulated in the framework or on the basis of a treaty. Immediately following this explanation, the tribunal determined that rules of interpretation are different for unilateral acts formulated in the context of

³⁵³ Reply, para. 229.

³⁵⁴ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 Apr. 1988) (“*SPP v. Egypt*”) (RL-89); *Mobil* (RL-51); *Cemex* (CL-151).

³⁵⁵ *Cemex*, paras. 81-82 (30 Dec. 2010) (CL-151). *See also Mobil*, paras. 87-90 (RL-51).

³⁵⁶ *Cemex*, paras. 80-89 (30 Dec. 2010). *See also Mobil*, paras. 86-96 (RL-51).

a treaty, such as jurisdictional instruments under the ICSID Convention.³⁵⁷ Even from a quick reading of the award, there can be little doubt that the tribunal rejected the application of the principle of restrictive interpretation in that case, in which the tribunal was called upon to evaluate whether Article 22 of the Venezuelan Investment Law contains Venezuela’s unilateral consent to ICSID arbitration. The same is true for the *Cemex* decision.

289. As discussed below, both tribunals, like the *Inceysa* tribunal and academic commentators, have also recognized that Article 15 is an instrument of consent and, as such, not subject to the principle of restrictive interpretation. Instead, the standard applied by the *Mobil* and *Cemex* tribunals is that the relevant words of a declaration should be interpreted in a natural and reasonable way, having due regard to the intention of the State concerned.³⁵⁸ Consideration may be given to the context and examining the evidence of the circumstances of the declaration’s preparation, but only if a determination is first made that the text of the declaration is not clear. This is not necessary here. As discussed below, the text of Article 15 is clear and unequivocal.

B. The Text of Article 15 Is Clear and, Under Any Rule of Interpretation, Contains El Salvador’s Consent To ICSID Jurisdiction

1. Three ICISD tribunals have accepted that Article 15 contains a “clear” consent to ICSID jurisdiction

290. In its Reply, Respondent continues to insist – without invoking any new authorities or even argument – that the Tribunal must seek to ascertain what El Salvador

³⁵⁷ “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.” *Mobil*, para. 90 (RL-51).

³⁵⁸ *Cemex*, para. 87 (CL-151); *see also Mobil*, para. 94 (RL-51).

intended when it promulgated the Investment Law and that the text of Article 15 must be interpreted restrictively.³⁵⁹ As explained in the Counter-Memorial and further explained below, there is no support for Respondent’s position. Whatever jurisprudence or soft law principles Respondent has cited do not in any way support Respondent’s contentions. In any event, the text of Article 15 of the Investment Law is so clear that under any interpretive standards or principles, the only conclusion that can be drawn is that it contains El Salvador’s unilateral consent to ICSID jurisdiction.

291. Aside from the determination of the scope and effect of Article 15 of the Investment Law by the *Inceysa* tribunal, two other ICSID tribunals have also recognized that Article 15 of the Investment Law is a paradigm example of an investment law-based consent to ICSID arbitration. For example, in *Cemex*, in the context of deciding what interpretive standards to apply to examining whether Article 22 of Venezuela’s foreign investment law contains that country’s unilateral consent to ICSID arbitration, the tribunal described the text of the Salvadoran Investment Law as “so clear” that neither the parties nor the tribunal in the *Inceysa* case “felt it necessary to expressly take a position on the rules of interpretation to be applied.”³⁶⁰ The *Cemex* tribunal understood that under any applicable interpretation, Article 15 contains a

³⁵⁹ Reply, para. 229.

³⁶⁰ *Cemex*, para. 72 (CL-151) (“In a number of cases, ICSID tribunals have had to *apply national laws that were so clear* that neither the parties nor the tribunal felt it necessary to take a position on the rules of interpretation to be applied. This was the case for ... various Salvadorian laws in *Inceysa v. El Salvador*” (emphasis added)).

unilateral offer of consent to investors by El Salvador. The tribunal in *Mobil* reached the same conclusion.³⁶¹

292. As discussed in further detail in our Counter-Memorial, Article 15 of the Investment Law uses the term “may” (“*podrán*”), thereby granting the investor the possibility to accept the offer of consent issued by El Salvador and submit disputes to ICSID arbitration. The use of the permissive term “may” does not in any way diminish the obligation of the State to be bound by an arbitration procedure when the investor exercises the option granted by the law. The term “may” (or the Spanish equivalent verb “*poder*”) is often used to indicate that one party has an option or choice; indicating at the same time that the other party is bound by such choice.³⁶²

293. The ICSID Convention does not require that consent be expressed using any particular language. The only requirement established by Article 25 of the Convention is that such consent be “in writing.”³⁶³ Respondent appears to struggle to accept this self-evident proposition, but provides no evidence to support its view that Article 25 requires something more. Muchlinski, Ortino and Schreuer have opined that host states can express their consent to international arbitration in different forms, including formulations that use the term “may.” In particular, they consider that formulations such as “any of the parties to the dispute ‘**may** transfer

³⁶¹ *Mobil*, para. 77 (citing *Inceysa v. El Salvador* as an example of a national legislation containing an offer to arbitrate that was “so clear” that there was no need for the tribunal nor the parties to engage in an interpretive exercise.) (RL-51).

³⁶² The meaning in Spanish of the verb “*poder*” (“*podrán*” is the simple future tense of this verb) is “*tener expedita la facultad o potencia de hacer algo*” (to have readily available the ability or capacity to do something). *Diccionario de la Lengua Española*. Real Academia Española. (22d ed. 2001) (CL-177).

³⁶³ ICSID Convention, Art. 25.

the dispute’ to, (...), international arbitration” contained in host State legislation explicitly sets forth the state’s consent to international arbitration.³⁶⁴

294. States have also used the term “may” when consenting to arbitration under investment treaties. In the Counter-Memorial reference was made to several BITs signed by El Salvador using the formulation “may” (or the Spanish verb “*poder*”).³⁶⁵ This has also been a common practice for other states. Professor Schreuer cites the Lebanon-Switzerland BIT which uses the verb “may” in order to express that the State has provided its consent in advance and the investor has the option to choose among several procedures available to resolve the dispute.³⁶⁶ Other states, such as the United States, have used models with a similar “may” formulation to express consent to international arbitration in their BITs.³⁶⁷

295. In sum, there is no ambiguity contained in Article 15 of the Salvadoran Investment Law. Other ICSID tribunals that have considered Article 15 have found its import to be unambiguous. So should this Tribunal; particularly given the absence of any evidence

³⁶⁴ PETER MUCHLINSKI, ET AL., THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 833 (2008) (CL-178) (emphasis added).

³⁶⁵ See Counter-Memorial, para. 461, n. 553. Muchlinski, Ortino and Schreuer agree that the Albanian law contains the State’s consent. See PETER MUCHLINSKI, ET AL., THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 833 (2008) (CL-178).

³⁶⁶ “2. If these consultations do not result in a solution within six months from the date of the written request for consultations, the investor **may** submit the dispute, at his choice, for settlement to: (...)” (emphasis added) CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 209-210, paras. 441-442 (2d ed. 2009, excerpts) (CL-156).

³⁶⁷ “3. Provided that six months have elapsed since the events giving rise to the claim, a claimant **may** submit a claim referred to in paragraph 1: (...)” (emphasis added), CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 210-211, paras. 444-445 (2d ed. 2009, excerpts) (CL-156).

presented by Respondent in support of its position that the terms of Article 15 are not “clear and specific.” Just because Respondent says they are, does not make it so.³⁶⁸

2. The Inceysa Award cannot be disregarded by the Tribunal

296. Respondent has provided no justification as to why this Tribunal should disregard wholesale the findings of a sister ICSID tribunal on an issue that is squarely before this Tribunal. Respondent’s sole reasoning for this is that the *Inceysa* tribunal did not analyze the text of Article 15. But, Respondent cannot on the one hand argue that the *Inceysa* tribunal did not consider the question of whether Article 15 contains El Salvador’s unilateral consent to ICSID arbitration and at the same time refuse to produce the materials Claimant has requested. Based on the text of the *Inceysa* award, as demonstrated in our Counter-Memorial, the tribunal did consider the text of Article 15, and determined that it was a clear consent to ICSID arbitration.

297. Respondent attempts to minimize the importance of the *Inceysa* tribunal’s finding by referring to the length of that tribunal’s discussion of the Article 15 issue: 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.”³⁶⁹ The fact that the issue was not discussed in any great length is explained by the clarity of the text of Article 15³⁷⁰ and because El Salvador had acknowledged in the course of the proceedings that such text contained

³⁶⁸ As has been recognized by the *Mobil* tribunal the Permanent Court of International Justice and the International Court of Justice “made clear that a sovereign State’s interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues.” *Mobil*, para. 75 (RL-51); *see also Cemex*, para. 70 (CL-151).

³⁶⁹ Reply, para. 238.

³⁷⁰ *Cemex*, para. 72 (CL-151); *see also Mobil*, para. 77 (RL-51).

its consent. Therefore, the lack of an extended discussion on the matter should not be an obstacle for the Tribunal to give the *Inceysa* award its due weight in these proceedings. In fact, quite the opposite. It should give the Tribunal ample comfort that Claimant's reading of the Investment Law is in fact the correct reading.

3. Academic commentary confirms that Article 15 is a paradigm example of a consent to ICSID jurisdiction

298. Respondent urges the Tribunal to give no weight to the academic commentaries cited by Claimant. With respect to Professor Schreuer's (*et al.*) reference to the *Inceysa* tribunal and its views as a paradigmatic example of a clear and unambiguous example of a unilateral consent contained in an investment law, Respondent argues that the Tribunal should pay Schreuer (*et al.*) no heed, as all the authors intended by citing to *Inceysa* was to mention a case where the tribunal had ruled that the investment law contained a consent, while offering no opinion on that ruling.³⁷¹ Respondent's attempt to minimize the significance of Professor Schreuer's commentary is unavailing. As the Tribunal will quickly conclude from reviewing the relevant section of the Schreuer (*et al.*) commentary, the authors' clear purpose in citing the *Inceysa* award was to confirm that the Salvadoran Investment Law constitutes an *unequivocal* unilateral consent to ICSID arbitration:

a) *Binding Offer of Consent by the Host State*

Some national investment laws provide *unequivocally* for dispute settlement by ICSID....

³⁷¹ Reply, para. 243.

In *Inceysa v. El Salvador* the Claimant relied, *inter alia*, on Article 15 of the El Salvador Investment Law.... The Tribunal concluded that this provision constituted a unilateral offer of consent to submit to the jurisdiction of the Centre to hear disputes regarding investments arising between El Salvador and an investor. (Emphasis added)³⁷²

299. El Salvador also criticizes Claimant's reference to Oliva de la Cotera, a Salvadoran lawyer and academic, mostly because Respondent disagrees with his conclusion that the Investment Law contains El Salvador's unilateral consent to ICSID arbitration.³⁷³ The best that Respondent can do is to note that Dr. de la Cotera is critical of the fact that the State decided to include its unilateral consent in the Investment Law. But Respondent can neither identify any language in Dr. de la Cotera's paper, nor cite to any other Salvadoran (or international) authority contradicting the conclusion that Article 15 of the Investment Law contains El Salvador's clear and unambiguous consent to ICSID arbitration. Indeed, what is of note is not Respondent's perfunctory attempts to discredit the views of third-party commentators, but rather Respondent's complete failure to cite a single authority or source that has addressed the Salvadoran Investment Law in support of its interpretation of Article 15. This, by itself, should be sufficient for the Tribunal to find in favor of Claimant's position.

³⁷² CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 463 (2d ed. 2009) (relevant excerpts), paras. 395-397, at 197 (CL-41).

³⁷³ Reply, para. 244.

C. There is Ample Evidence That El Salvador Intended Article 15 To Contain a Unilateral Consent To ICSID Arbitration

300. Respondent states that the Tribunal should take into consideration “relevant evidence of El Salvador’s intent.”³⁷⁴ As Claimant has previously argued, given the clear and unequivocal text of Article 15, there is no need for the Tribunal to engage in an interpretive exercise calling for an examination of El Salvador’s intent. However, to the extent that the Tribunal determines otherwise, it should take note of Respondent’s perfunctory and unsubstantiated response to evidence presented by Claimant of “El Salvador’s intent” at the time that the Investment Law was being adopted. Specifically, Respondent fails to address the presentation made before the *Asamblea Legislativa* on the country’s proposed investment law and the comments by El Salvador’s representative before the WTO on that law in November 1996.

301. The Power Point presentation made before the *Asamblea Legislativa* when the proposal of the Investment Law was being debated contained a slide on dispute resolution that expressly referred to “international arbitration administered by ICSID” for the case of foreign investment.³⁷⁵ In the Counter-Memorial Claimant argued that this evidenced that the *Asamblea Legislativa* that promulgated the Investment Law was fully cognizant of the fact that the wording of Article 15 provided consent to ICSID jurisdiction.³⁷⁶ Respondent has not only failed to address the contents of this presentation, but also has failed to provide any evidence contradicting Claimant’s position.

³⁷⁴ *Id.*, para. 246.

³⁷⁵ Presentation Titled “*Proyecto de Ley de Inversiones*” (CL-149).

³⁷⁶ Counter-Memorial, para. 458.

302. Respondent also failed in its Reply to address the comments made by El Salvador's representative before the WTO Trade Policy Review Body, when he stated that the new investment law would guarantee foreign investors access to international arbitration.³⁷⁷

303. Especially in the absence of any positive evidence from Respondent confirming that it was never the intention of the Salvadoran legislature to provide for a unilateral consent to ICSID arbitration in the Investment Law, the Tribunal must accept Claimant's evidence in support of a plain reading of the text of Article 15.

304. In the Counter-Memorial, Claimant also cited to an UNCTAD Report entitled "Investment Policy Review, El Salvador"³⁷⁸ clarifying that Article 15 sets forth El Salvador's consent to ICSID arbitration. The report was prepared on the basis of input provided by the Salvadoran Government, including its investment agency (PROESA), and then subsequently publicly endorsed by the Government at the report's official presentation in April, 2010.³⁷⁹

305. In Claimant's respectful submission, the UNCTAD Report by itself eviscerates Respondent's submissions on the scope and effect of Article 15 of the Investment Law, perhaps providing an explanation for Respondent's perfunctory and evasive response to this evidence:

³⁷⁷ WTO Trade Policy Review Body: Review of El Salvador. Press Release PRESS/TPRB/52 (27 Nov. 1996) (CL-150); WTO Trade Policy Review Body: Review of El Salvador, Minutes of Meeting 25-26 November 1996, WT/TPR/M/23 (27 Jan. 1997) paras. 72, 81 (C-79). *See* Counter-Memorial, para. 459.

³⁷⁸ U.N. Conf. on Trade and Development, Investment Policy Review, El Salvador 2010, at 35-36, U.N. Sales No. E.10.II.D.15 ("The Law on Investment allows foreign investors to submit disputes with the State to international conciliation or arbitration under the International Centre for Settlement of Investment Disputes.") (CL-147).

³⁷⁹ *See* Counter-Memorial, para. 437.

“El Salvador’s official position can only come from El Salvador’s duly authorized representatives.”³⁸⁰ Claimant does not disagree. As noted, the Report was prepared with official input by PROESA and other Government ministries, and was endorsed by El Salvador’s Ambassador to the United Nations and the Director of PROESA, both acting in their official capacity. Once given, consent to ICSID jurisdiction may not be unilaterally withdrawn.³⁸¹ (That is, Respondent’s “duly authorized representatives” cannot withdraw El Salvador’s consent now.)

306. Respondent’s contention that the UNCTAD Report was not available when Claimant made its investments and therefore Claimant could not have “relied” on it at that time misses the mark.³⁸² Claimant need not have relied on the Report’s contents regarding Article 15 of the Investment Law, in order for the Report to be given its due evidentiary weight in evaluating Respondent’s true position and intentions regarding the jurisdictional import of Article 15 – to the extent that the Tribunal determines that it must in fact engage in an interpretive exercise regarding the meaning of Article 15. As Claimant has argued, given the clear language of Article 15, this is not required.

³⁸⁰ Reply, para. 245.

³⁸¹ ICSID Convention Article 25(1).

³⁸² Reply, para. 245.

D. Respondent Has Presented No Direct Evidence That It Never Intended Article 15 To Constitute a Unilateral Consent To ICSID Arbitration

1. Article 146 of the Constitution does not contain a restriction on El Salvador's Unilateral Consent to ICSID jurisdiction

307. Respondent's attempted invocation of Article 146 of the Salvadoran Constitution to escape the legal effects of Article 15 of the Investment Law provides perhaps the best example of the desperate lengths to which Respondent is willing to go to deny this Tribunal's jurisdiction. Respondent relies on the maxim "*expressio unius est exclusio alterius*" to argue that because Article 146 of the Salvadoran Constitution does not mention legislation, the State is only authorized to submit to arbitration "in treaties and contracts".³⁸³ The reason behind this, Respondent submits, was to allow the State to negotiate at arms length so that mutual benefits could be derived from the State's submission to international arbitration.³⁸⁴ As demonstrated in Claimant's Counter-Memorial, Respondent's interpretation of Article 146 is flawed.

308. First, Respondent provides no authority to support its contention that the Salvadoran Supreme Court has ever applied the maxim "*expressio unius est exclusio alterius*" to interpret El Salvador's Constitution. This is perhaps because Latin maxims, including the one cited by Respondent, while still applied by courts in certain common law jurisdictions for the purposes of statutory interpretation, have long been subject to severe criticism in the civil law tradition.³⁸⁵ The Tribunal should not allow itself to be pressed into doing what the El Salvadoran Supreme Court would not do; nor should it seek to step into the shoes of the

³⁸³ *Id.*, para. 251.

³⁸⁴ *Id.*, para. 252.

³⁸⁵ *See* NICOLAS COVIELLO, DOCTRINA GENERAL DEL DERECHO CIVIL, 84-85, 89 (CL-179).

Salvadoran Supreme Court, which has the exclusive jurisdiction to interpret the Salvadoran Constitution.

309. Second, even if the Tribunal were to decide that it could properly apply the maxim “*expressio unius est exclusio alterius*,” it should appreciate its limited value as a tool for statutory interpretation. Even in the common law tradition, this principle of interpretation has been the object of severe criticism. For example, Karl Llewellyn, in his noted treatise on the common law tradition, has contended that Latin maxims, as a general proposition, provide no guidance in the construction of statutes, stating that “there are two opposing canons on almost every point.”³⁸⁶ He maintains that in order for an interpretation to be upheld it has to be supported by other means that derive from the statutory language.³⁸⁷

310. Finally, irrespective of what the Tribunal’s final views are on the applicability of “*expressio unius est exclusio alterius*,” there is a fundamental threshold question which the Tribunal must first address: whether Article 146 of the Salvadoran Constitution is even relevant at all to the analysis of Article 15 of the Investment Law. Article 146 states as follows:

Treaties shall not be signed or ratified or concessions granted if they in any way alter the governmental form, or harm or infringe the integrity of the territory, the Republic’s sovereignty or independence or the fundamental rights and guarantees of the human person.

³⁸⁶ KARL N. LLEWELLYN. THE COMMON LAW TRADITION – DECIDING APPEALS 521 (1960) (CL-180). He cites a canon directly contradicting the *expressio unius* maxim: “The language may fairly comprehend many different cases where some only are expressly mentioned by way of example.” *Id.*, at 526.

³⁸⁷ *Id.*, at 521.

The provisions contained in the previous paragraph are applicable to international treaties and contracts with national governments or national or international companies in which the Salvadoran State accepts the jurisdiction of the courts of a foreign state.

The aforementioned does not prevent the Salvadoran State from submitting, in treaties and contracts, to arbitration or to an international tribunal for a decision in the event of a dispute.³⁸⁸

311. From a plain reading of the text, it is hard to see how Article 146 even applies to the question of whether or not Article 15 of the Investment Law contains Respondent's unilateral consent to ICSID arbitration. Based on a plain reading of the entirety of Article 146, the provision's specific purpose would appear to be limited to addressing what the State may or may not do in connection with negotiating a treaty or a concession contract, including its authority to submit to arbitration in connection with those instruments. The fact that Article 146 says nothing about whether or not the State may also adopt legislation containing a submission to international

³⁸⁸ Constitution of the Republic of El Salvador, Art. 146 (emphasis added) (CL-181). The original Spanish text of the article reads:

No podrán celebrarse o ratificarse tratados u otorgarse concesiones en que de alguna manera se altere la forma de gobierno o se lesionen o menoscaben la integridad del territorio, la soberanía e independencia de la República o los derechos y garantías fundamentales de la persona humana.

Lo dispuesto en el inciso anterior se aplica a los tratados internacionales o contratos con gobiernos o empresas nacionales o internacionales en los cuales se someta el Estado salvadoreño, a la jurisdicción de un tribunal de un estado extranjero.

Lo anterior no impide que, tanto en los tratados como en los contratos, el Estado salvadoreño en caso de controversia, someta la decisión a un arbitraje o a un tribunal internacionales.

arbitration does not mean that for the State to do so would be unconstitutional. At least, certainly not on the basis of anything permitted or prohibited by Article 146.³⁸⁹

312. In short, Respondent's attempted reliance on Article 146 is inapposite, and should be disregarded by the Tribunal.

2. Relevance of the BITS signed by El Salvador

313. In its Memorial, Respondent invoked the BITS that El Salvador signed in 1999 and 2000 as evidence of what its intent must have been when the Investment Law was being drafted and eventually promulgated. In its Counter-Memorial, Claimant demonstrated that El Salvador's attempted invocation of its 1999 and 2000 BITS was off by a few years, but provided no support for Respondent's position. In reply to Claimant's rebuttal, Respondent has done nothing more than reiterate its position that the BITS El Salvador signed in 1999 are the most relevant for determining the state's intent when the Investment Law was discussed. It argues that the relevant intent with regard to legislation is the intent of the Legislature, and therefore the only relevant time is the time when the law was promulgated, not the time when the actual text was being drafted. This cannot be correct, and in any event cannot constitute the type of definitive evidence of state intent that Respondent must put forward to overcome the conclusions that necessarily follow from a plain reading of the text of Article 15.

³⁸⁹ Nor is there any principled basis to conclude that the language "in treaties and contracts" provides an exclusive list of the means by which El Salvador may submit to international arbitration, particularly when read in the context of the overall Article.

314. To the extent the Tribunal feels it necessary to look behind the plain text, Claimant submits that the time during which the proposal was being prepared by the Executive is the most relevant timeframe. Respondent has accepted that the proposal was made in 1998. However, it mentions that the draft “was discussed in Congress from when the proposal was submitted in 1998 until it was promulgated as law in October of 1999” and refers to discussions in the Legislature “over the text of what would ultimately become the Investment Law.”³⁹⁰ Although the proposal of the Investment Law was submitted to the Legislature, and sessions were held to address it, no changes were ever introduced to the text of Article 15.

315. Considering that the text of Article 15 was approved by the Legislature as drafted by the Executive, the period in which such text was drafted should be considered relevant. Notably, the “*exposición de motivos*” which refers to the BITs signed by El Salvador was included in the 1998 proposal, and was therefore also drafted by the Executive and not by the Legislature.

316. In light of the foregoing, and Claimant’s arguments and evidence set out in paragraphs 460 to 462 of its Counter-Memorial, even assuming that the Tribunal were to decide that the text of Article 15 is ambiguous and that it must therefore engage in an interpretive exercise, it would be inappropriate for the Tribunal to rely on Respondent’s submissions regarding what should be deduced from the text of its BITs from 1999. The best that these BITs do for Respondent’s position, in light of the BITs that Claimant has invoked (*i.e.*, those adopted between 1994 and 1998), is confirm that the textual parsing of all of these various treaties sheds

³⁹⁰ Reply, paras. 248-49.

no clarity on the matter. Ambiguous evidence cannot serve as a basis to disregard the plain reading of a legislative text.

E. Claimant Was Not Required To Initiate Conciliation Before Arbitration

317. As indicated in the Counter-Memorial, Respondent’s contention that Article 15 provides for mandatory conciliation is at the same time meritless. Respondent argues that in the event Article 15 is understood to contain El Salvador’s consent to ICSID jurisdiction, Claimant’s claims under the Investment Law are inadmissible because Claimant did not seek conciliation before instituting these arbitration proceedings. Neither did Respondent – a minor detail that Respondent conveniently overlooks. This, however, does not change the conclusion that Claimant submits must be reached on this issue: there is no requirement that Claimant have attempted conciliation before initiating arbitration.

318. According to Respondent, the use of the conjunction “and” in Article 15 indicates that “both methods of dispute resolution need to be used, conciliation followed by arbitration”³⁹¹. Therefore, in Respondent’s view, the initiation of conciliation constitutes a prerequisite to arbitration. This is nonsense and Respondent knows it. The conjunction “and” in Article 15 of the Investment Law means that both dispute settlement mechanisms provided for under the ICSID Convention (conciliation “and” arbitration) are available to the disputing parties. They may choose whichever mechanism they consider to be the more appropriate to resolve the

³⁹¹ Reply, para. 253.

dispute at hand. This interpretation is consistent with the meaning of the word “y” (“and” in English):

conj[unción] copulat[iva] para unir palabras o cláusulas en concepto afirmativo.³⁹² (conjunction that binds words or clauses in the affirmative)

319. Claimant’s position is also consistent with the decision of the tribunal in *SPP* which found that:

Once consent has been given ‘to the jurisdiction of the Centre’, the Convention and its implementing regulations afford the means for making the choice between the two methods of dispute settlement. The Convention leaves that choice to the party instituting the proceedings.³⁹³

320. Commentators also share this view. For example, Dolzer and Schreuer explain that “[s]ome dispute settlement clauses offer both arbitration and conciliation by either mentioning both or by referring to the ICSID Convention without further specification. In a situation of this kind, the choice between the two methods is with the party initiating proceedings.”³⁹⁴ In this case, Article 15 leaves that choice to the investor, and Claimant elected to initiate arbitration, not a conciliation proceeding.

³⁹² Diccionario de la Lengua Española. Real Academia Española. (22nd ed. 2001) (CL-182).

³⁹³ *SPP v. Egypt*, para. 102 (RL-89).

³⁹⁴ RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 221 (2008) (CL-183) (emphasis added).

321. Respondent argues that the conjunction “or” would be required to make both methods available to the investor. However, the use of “or” would imply that the choice of one excludes the other. Under such language once the investor opts for conciliation, arbitration would then no longer be an option for the investor in the event the conciliation fails (*i.e.*, the investor may choose conciliation *or* arbitration, but cannot pursue both). The Investment Law as drafted, using the term “and” allows the investor to choose either of them alternatively, or choose them both consecutively (in case conciliation fails for example), or even concurrently.

322. As Respondent has acknowledged, this objection is not related to the jurisdiction of the Tribunal, but to the admissibility of the claims presented by Claimant.³⁹⁵ As Paulsson has explained, matters of admissibility are “alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such.”³⁹⁶ With this objection, Respondent attempts to prevent the Tribunal from hearing the merits of the case; however, the objection is not related to any of the jurisdictional requirements contained in Article 25 of the ICSID Convention.

323. The requirement to commence a conciliation procedure before arbitration would only constitute a procedural requirement, which may be dispensed by the Tribunal if appropriate:

³⁹⁵ “Claimant’s Investment Law claims would in any event be **inadmissible**” Objections to Jurisdiction, para. 424. (emphasis added) and “its request for arbitration would be **inadmissible** in any case.” *Id.*, para. 254. (emphasis added).

³⁹⁶ JAN PAULSSON, JURISDICTION AND ADMISSIBILITY, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION LIBER AMICORUM IN HONOUR OF ROBERT BRINER 617 (Nov. 2005) (CL-184).

In general, national courts and arbitral tribunals have been reluctant to conclude that compliance with contractual procedural requirements is a jurisdictional condition for commencing an arbitration.³⁹⁷

324. ICSID tribunals have found that failure to comply with procedural requirements does not preclude jurisdiction and that requiring compliance with formalistic requirements “would not serve to protect any legitimate interests of the Parties”³⁹⁸ and would not be “consistent with the need for an orderly and cost-effective procedure”.³⁹⁹ Professor Schreuer agrees that “[t]here is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile.”⁴⁰⁰

325. It is clear from the conduct of Respondent in the present case, which has never requested negotiation or conciliation, that such proceedings would not be successful to settle the claims filed by Claimant in this proceeding. As a result, if the Tribunal orders that a conciliation procedure be initiated by Claimant before arbitration, the only practical consequence would be unnecessary delay in the resolution of this dispute. Therefore, the Claimant respectfully submits that in the event the Tribunal considers that conciliation was a procedural requirement under Article 15 of the Investment Law, Claimant should be dispensed from complying with such requirement because, in the circumstances, conciliation would be futile.

³⁹⁷ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 842 (CL-185).

³⁹⁸ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision of Jurisdiction, para. 102 (14 Nov. 2005) (RL-61).

³⁹⁹ *SGS Société Générales de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, para. 184 (6 Aug. 2003) (CL-186).

⁴⁰⁰ CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, para. 547 at 239 (CL-156).

F. CAFTA Waiver Does Not Preclude Jurisdiction Under the Investment Law

326. In yet another throw-away argument, Respondent suggests that Claimant has acknowledged that El Salvador may resubmit its earlier objection to the effect that Claimant's CAFTA waiver precludes it from asserting ICSID jurisdiction on the basis of Article 15 of the Investment Law. Respondent's argument is premised on the absence of Claimant's specific use of the term "*res judicata*" in its Counter-Memorial.⁴⁰¹ Yet again, Respondent has mischaracterized the arguments contained in the Counter-Memorial.

327. Claimant emphatically rejected Respondent's attempt of revisiting an issue that had already been "finally determined."⁴⁰² By referring to that fact that a final decision had been reached on the scope and effect of the CAFTA waiver, Claimant made it clear that the issue was *res judicata*. According to Black's legal dictionary "*res judicata*" means "an issue that has been definitively settled by judicial decision."⁴⁰³

328. Nothing in Claimant's arguments implied an acknowledgement or acceptance that Respondent may re-visit this issue. Respondent has not referred to any section of the Counter-Memorial in which this alleged acknowledgement could, even at a stretch, be construed; it relies entirely on the absence of the term "*res judicata*". The use of Latin terminology or lack thereof in presenting arguments is entirely a matter of style, and parties may choose to present their arguments in many different ways. Claimant's arguments were clear. The CAFTA waiver issue

⁴⁰¹ Reply, para. 262.

⁴⁰² Counter-Memorial, para. 473.

⁴⁰³ BLACK'S Law Dictionary 1425 (9th ed. 2009) (CL-187).

was “definitively settled” by the Tribunal when it rejected all of the grounds upon which Respondent based its Preliminary Objection, and this issue cannot now be relitigated. For the avoidance of doubt and further debate on the matter, the issue is *res judicata*.

G. Claimant Is a “Foreign Investor” Under the Investment Law

329. Respondent’s Reply insists that Pac Rim Cayman is not a “foreign investor” under the Investment Law because it did not “make investments in the country,” and as a result the Investment Law is not applicable to Claimant.⁴⁰⁴

330. As stated in the Counter-Memorial, substantial portions of the financial and intellectual capital invested by the Companies in El Salvador are of U.S. origin. In particular, based on filings since 2005, Respondent has been well aware that the investments of financial capital have been made primarily through Pac Rim Cayman.⁴⁰⁵ Respondent is wrong in stating that Claimant has not complied with the requirement of having made investments in the country.

331. The Salvadoran Investment Law contains a very broad definition of what constitutes a foreign investor. Article 2 of the Investment Law defines “Foreign Investor” as “[t]he foreign natural and juridical persons and those Salvadoran persons who reside abroad for more than a consecutive year, who make investments in the country.” Also, the Investment Law

⁴⁰⁴ Reply, paras. 255-57. Respondent seeks to make much of the fact that Claimant relied “on its arguments based on CAFTA to respond to El Salvador’s objection under the Investment Law.” Claimant’s reference to other Sections in the Counter-Memorial (which addressed CAFTA issues) was for reasons of brevity. Rather than repeating all the facts set out earlier in the same document, Claimant chose to refer back to the Sections that described how the investments were made in El Salvador, thereby addressing the objection under the Investment Law.

⁴⁰⁵ Counter-Memorial, paras. 80, 84-92, 169.

does not make distinctions among foreign investors of different nationalities. Even in its dispute resolution provision, the Investment Law intended to afford the same protections to all foreign investors, without regard to their nationality, by providing access to ICSID arbitration under both the ICSID Convention and the ICSID Additional Facility Rules.

332. The nationality of a particular foreign investor is irrelevant for purposes of qualifying as a “foreign investor” under the Investment Law. Therefore the change in nationality of the Claimant is not relevant. Notwithstanding, Claimant’s investments in El Salvador were made before and after Claimant was domesticated in the United States.

333. In addition, Claimant’s change of nationality did not affect access to ICSID arbitration under the Investment Law. Before its change of nationality, Claimant was a Cayman Islands company and could have invoked Article 15 because the U.K. ratification of the ICSID Convention extends to the Cayman Islands.⁴⁰⁶

334. Respondent now attempts to deny that Claimant is a foreign investor; however, before this arbitration was initiated the Salvadoran Government had always treated Claimant as a foreign investor. El Salvador has expressly acknowledged Claimant is a foreign investor and has registered its investments in the foreign capital registry kept by the Ministry of Economy. On 5 September 2008, for example, the Ministry of Economy issued a certificate that states:

⁴⁰⁶ ICSID Convention, U.K. Designation of Cayman Islands (7 May 1968) (CL-188). The U.K. has expressly designated to ICSID the Cayman Islands and other territories such as Bermuda, British Virgin Islands, Gibraltar, Anguilla, St. Helena as “constituent subdivisions” under Article 25(1).

That pursuant to the records of foreign capital kept by this Ministry, the company PAC RIM CAYMAN LLC., domiciled in the State of Nevada, United States of America, has registered and invested in national companies, as follows: (...) ⁴⁰⁷

335. This certificate lists the amounts invested by Claimant in two local Salvadoran companies: Dorado Exploraciones, S.A. de C.V. and Pacific Rim El Salvador, S.A. de C.V. This certificate, along with the other resolutions issued by the Ministry of Economy and that are part of the record, ⁴⁰⁸ clearly establish that the Ministry of Economy considers Pac Rim Cayman a foreign investor that has made investments in two local companies under the Investment Law.

H. Claimant Is a National of a Contracting State of the ICSID Convention

336. Respondent has argued that Claimant is not the “national of another Contracting State” under Article 25 of the ICSID Convention, by proposing that Claimant’s “corporate veil” should be “lifted” or “pierced”, because in its opinion Pac Rim Cayman is a shell company that has abused its corporate personality. Respondent submits that the real party in interest in this dispute, which would be reached once Claimant’s corporate veil is lifted, is a Canadian company.

337. As has been established, Pac Rim Cayman is an enterprise organized under the laws of the U.S. State of Nevada. Therefore, under the applicable rules of international law, the Claimant is a national of the United States, a Contracting State of the ICSID Convention. There has been no abuse of the corporate form in this case, and therefore the exceptional remedy of

⁴⁰⁷ MINEC, Resolution No. 368-MR, at 10 (30 July 2008) (C-12).

⁴⁰⁸ See Notice of Arbitration, Exh. 2; MINEC, Resolution No. 368-MR (30 Jul. 2008) and Resolution No. 387-MR (13 Aug. 2008) (C-12); MINEC, Resolution No. 288-R (21 June 2005) (C-36).

lifting the corporate veil is not appropriate in this case. Finally, if the Claimant's corporate veil is lifted, and nationality is assessed taking control into consideration, Claimant would also have U.S. nationality because Pac Rim Cayman is indirectly controlled by U.S. persons.

1. Pac Rim Cayman is a national of the United States under international law

338. Article 25 of the ICSID Convention expressly defines what "National of another Contracting State" means. Such definition contains two sections, section (a) refers to natural persons, and section (b) refers to juridical persons. The relevant section referring to juridical persons states:

any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.⁴⁰⁹

339. This section covers two different situations: (i) that of a juridical person that has the "nationality" of a Contracting State other than the respondent to the dispute, and (ii) that of a juridical person that has the nationality of the respondent State, but which the parties have agreed to treat as a foreign national because it is under foreign control. In the first scenario, "nationality" is the only criteria taken into consideration by the ICSID Convention. The second scenario is not relevant in the present case because Claimant is not a national of El Salvador. However, notably this provision takes into consideration "foreign control" to expand and not to

⁴⁰⁹ ICSID Convention, Art. 25(b).

restrict the Centre’s jurisdiction, and applies only by agreement of the parties. Such foreign control justifies extending jurisdiction to cases that involve juridical persons that have the nationality of the respondent State, which would ordinarily mean the dispute would not have an international element.

340. The first provision in Article 25(2)(b) of the ICSID Convention refers only to “nationality,” without establishing how to determine such nationality. As a result, the States parties to the ICSID Convention have “wide latitude to agree on the criteria by which nationality would be determined”.⁴¹⁰ This first part of Article 25(2)(b) contains no reference to control, and therefore, tribunals have found that it does not require an inquiry regarding control exercised over the claimant entity.⁴¹¹ On the contrary, experts agree that the text of Article 25 implies that nationality should be determined with reference to the traditional criteria applicable to the nationality of juridical persons: place of incorporation and headquarters. According to Schreuer:

[t]he overwhelming weight of the authority, outlined above, points towards the traditional criteria of incorporation or seat for the determination of corporate nationality of claimants under Art. 25(2)(b).⁴¹²

⁴¹⁰ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/03, Decision on Respondents Preliminary Objections on Jurisdiction and Admissibility, para. 80 (18 Apr. 2008) (RL-106); *see also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, para. 97 (27 Sept. 2001) (RL-59).

⁴¹¹ *CMS Gas Transmission Company v. The Republic of Argentina*, Case No. ARB/01/8, Decision on Objections to Jurisdiction, (17 July 2003) paras. 51, 58 (CL-189); *see also Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, paras. 28, 36 (29 Apr. 2004) (RL-70); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, para. 359 (2 Oct. 2006) (RL-104).

⁴¹² CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2nd ed. 2009, excerpts), para. 707, at 283 (CL-156). Broches agrees with this conclusion: “...this text [Article 25(2)(b)]

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341. As noted, the ICSID convention leaves room for party autonomy on this issue, and many BITs set forth specific criteria for determining a juridical entity's nationality for purposes of applying the protections granted thereby. National laws granting protections to foreign investors may also contain definitions that establish requirements when making nationality determinations. However, in the absence of a definition containing additional requirements, the only relevant criteria to determine nationality of an investor under Article 25(2)(b) of the ICSID Convention are those set forth by customary international law (place of incorporation and seat).

342. Professor Schreuer supports this conclusion:

ICSID practice repeatedly confirms that in the absence of a definition of nationality in a treaty or law imposing further, more substantial connections than the mere incorporation or seat, it is both permissible and to be expected that investors will structure their investments in order to avail themselves of treaty protection and, thus, the right to submit the disputes to ICSID.⁴¹³

343. The Salvadoran Investment Law includes no such further requirements. The Salvadoran Investment Law contains a very broad definition of what constitutes a foreign investor. Article 2 of the Investment Law defines "Foreign Investor" as "[t]he foreign natural and juridical persons and those Salvadoran persons who reside abroad for more than a

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implicitly assumes that incorporation is a criterion of nationality." ARON BROCHES, THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES. RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 360 (1973) (CL-190).

⁴¹³ CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2nd ed. 2009, excerpts), para. 740, at 292 (CL-156).

consecutive year, who make investments in the country”. Under this definition, even some Salvadoran nationals qualify as “foreign investors” for the Investment Law, depending on their place of residence.

344. In addition, the Investment Law does not make any distinction among foreign investors of different nationalities, with the exception of Central American investors who are treated as national investors for certain purposes.⁴¹⁴ Even in its dispute resolution provision, the Investment Law intended to afford the same protections to all foreign investors, without regard to their nationality, by providing access to ICSID arbitration under both the ICSID Convention and the ICSID Additional Facility Rules.

345. In the absence of any indication in the Investment Law on how to determine a corporation’s nationality, the general rules of international law regarding determination of nationality remain applicable. There is nothing in the Investment Law that suggests the Tribunal should look beyond a foreign investor’s country of incorporation and/or headquarters to determine its nationality for purposes of Article 25 of the ICSID Convention.

346. As established by *Barcelona Traction*, under the customary rules of international law a corporate entity has the nationality of the State in which it is incorporated and has its registered office.⁴¹⁵ The commentators cited by Respondent also recognize that place of

⁴¹⁴ See El Salvador Investment Law, Art. 7(a) (RL-9).

⁴¹⁵ “The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.” *Barcelona Traction*, para 70 (RL-102). In the *Barcelona Traction* case the ICJ determined the nationality of the

(continued...)

incorporation and the location of its offices are the primary methods to determine a juridical person's nationality.⁴¹⁶ Other commentators share this view.⁴¹⁷ Finally, these two criteria have been consistently recognized by ICSID tribunals as the traditional criteria that determine the nationality of a corporate entity.⁴¹⁸

347. In this case, it is not disputed that Pac Rim Cayman is an enterprise legally organized under the laws of the U. S. State of Nevada. Therefore, under the rules of customary

(continued...)

corporate entity in the absence of any specific treaty between the parties, and therefore applied customary rules of international law.

⁴¹⁶ “It is usual to attribute a corporation to the state under the law of which it had been incorporated and to which consequently it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siège social* to be in the same state.” OPPENHEIM'S INTERNATIONAL LAW 859-860 (RL-103).

⁴¹⁷ CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2nd ed. 2009, excerpts), para. 694, at 279 (CL-156)

⁴¹⁸ “In either case [under customary law principles of nationality and under the applicable BIT and the ICSID Convention] **inquiry stops upon establishment of the State of incorporation...**” *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16 Award, para. 357 (2 Oct. 2006) (RL-104). In *TSA* the tribunal found that the nationality of legal persons “is determined by one of the two generally accepted criteria of the place of incorporation or the seat (*siège social*) of the corporation.” *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, para. 144 (19 Dec. 2008) (RL-105). In *AMCO Asia* the tribunal held that “the concept of nationality is there [in Article 25 of the ICSID Convention] a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat.” *AMCO Asia Corp and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, para. 14 at 396 (25 Sep. 1983) (CL-175). The *Tokios* tribunal followed the *Amco Asia* decision and held that “the generally accepted (albeit implicit) rule is that the nationality of a corporation is determined on the basis of its *siège social* or place of incorporation”. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, paras. 38, 40, 42 (29 Apr. 2004) (RL-70). According to the *Rompétrol* tribunal “[i]ncorporation in a given jurisdiction is a widely used criterion internationally for determining the nationality of corporate bodies...” *The Rompétrol Group N.V. v. Romania*, ICSID Case No. ARB/06/03, Decision on Respondents Preliminary Objections on Jurisdiction and Admissibility, para. 83 (18 Apr. 2008) (RL-106). According to Professor Schreuer: “ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of claimants that are juridical persons.” CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2nd ed. 2009, excerpts), para. 699, at 281 (CL-156).

international law, Pac Rim Cayman is a corporate entity with U.S. nationality for purposes of Article 25 of the ICSID Convention.

2. Claimant has not abused its corporate form

348. Contrary to what Respondent maintains, the doctrine of piercing the corporate veil is not applicable in the present case. As the cases cited by Respondent clearly establish, this doctrine is considered to apply only in exceptional circumstances.⁴¹⁹ According to the *ADC* tribunal, this principle is “rarely and always cautiously applied”.⁴²⁰ All of the cases, including those cited by Respondent, are consistent in establishing that there must be a showing of fraud in the use of the corporate structure in order to justify the piercing of the corporate veil.

349. For example, the *ADC* tribunal stated that the principle only applies when the beneficiary “misused corporate formalities in order to **disguise its true identity** and therefore avoid liability.”⁴²¹ In *Tokios* the tribunal found that piercing of a corporate veil could only be supported if there is a showing of “fraud” or “malfeasance”.⁴²² The ICJ has also stated that the “special circumstances” that may justify the lifting of the corporate veil are those such as: “the misuse of the privileges of legal personality,” “fraud or malfeasances” and the “evasion of legal

⁴¹⁹ *Barcelona Traction*, para. 58 (RL-102); *See Reply*, para. 398.

⁴²⁰ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, para. 358 (2 Oct. 2006) (RL-104).

⁴²¹ *Id.*

⁴²² *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, para. 55 (29 Apr. 2004) (RL-70). The tribunal in *Saluka* coincided with this view. *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, para. 230 (17 Mar. 2006) (RL-74).

requirements or of obligations.”⁴²³ In fact, in none of these cases was the corporate veil of the claimants actually “lifted.”⁴²⁴

350. Respondent argues that veil piercing would be justified in the present case because, “the Canadian company is using a shell company to access ICSID, having transferred shares after the project started and having led El Salvador to believe at all times that it was dealing with a Canadian mining company and a Canadian investor.”⁴²⁵ However, as established in Claimant’s Counter Memorial, all Respondent’s allegations of abuse are based on mischaracterizations of the facts and allegations set out in Claimant’s Notice of Arbitration, as well as the record now before the Tribunal.

351. Claimant never made any misrepresentations regarding its nationality, on the contrary its corporate structure was always transparent. There was abundant publicly available information demonstrating the Companies’ substantial presence and ties to the United States.⁴²⁶ Representatives of the Salvadoran Government even visited Mr. Shrake, the President and CEO of Pacific Rim Mining Corp., in Nevada in 2006.⁴²⁷ In addition, shortly after President Saca’s public remarks on March 2008, Mr. Shrake approached high-level Salvadoran Government officials including the Salvadoran Ambassador to the United States, and U.S. diplomatic officers

⁴²³ *Barcelona Traction*, paras. 56, 58 (RL-102).

⁴²⁴ It shall be noted that in *TSA* the tribunal distinguished between the two sections of Article 25(2)(b), and found only that veil piercing was applicable for the second part of such provision, which refers to domestic companies under foreign control. *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, paras. 144, 147, 160 (19 Dec. 2008) (RL- 105).

⁴²⁵ Objections to Jurisdiction, para. 400 (15 Oct. 2010).

⁴²⁶ Counter-Memorial, para. 80.

⁴²⁷ *Id.*, para. 123.

in El Salvador were also involved in these meetings.⁴²⁸ Finally, since the acts giving rise to the dispute did not occur until 2008 or alternatively, only became recognizable at that time, Pac Rim Cayman's domestication to Nevada to 2007 could not be regarded as an abuse of process, or any other type of abuse of the corporate form.⁴²⁹ In conclusion, since there has been no abuse of the corporate form in the present case, the doctrine of lifting the corporate veil is not applicable.

3. In any event, Claimant is ultimately controlled by U.S. nationals

352. If the Tribunal decides to lift the corporate veil, and determine nationality according to actual control for purposes of Article 25(2)(b) of the ICSID Convention, it should reach the ultimate controllers and not restrict the inquiry to intermediary persons in the chain of ownership. As was established in Section V.B. of the Counter-Memorial, and in this Rejoinder in Section IV.B, U.S. persons own and control Pac Rim Cayman.⁴³⁰ Therefore, in the event the Tribunal decides to lift the Claimant's corporate veil, it would reach the U.S. persons that ultimately own and, by virtue of their rights as shareholders, control Pac Rim Cayman.

353. Section V.B.1.b. of the Counter-Memorial explained how investor-State arbitral awards and decisions have determined what it means for persons to "own or control" an enterprise. Thus, as was explained, in order to be consistent, the *TSA* tribunal found it was required to trace control "to its real source" and therefore consider the ultimate owner or

⁴²⁸ *Id.*, paras. 148-49; *see also*, Shrake Statement, paras. 118-19.

⁴²⁹ Counter-Memorial, paras. 400-23.

⁴³⁰ *Id.*, paras. 308-37.

controller of the enterprise.⁴³¹ In other cases, tribunals disregarded the intermediate entities and focused on the ultimate beneficial owners.⁴³²

354. As was described in the Counter-Memorial, and further evidenced with this filing, at all relevant times a majority of the ownership of Pacific Rim Mining Corp. has been in hands of U.S. persons, and consequently majority ownership of Pac Rim Cayman is held indirectly by U.S. persons.⁴³³ Through share ownership, U.S. persons have the right to exercise various corporate powers, and thereby have indirect control over Pac Rim Cayman.⁴³⁴

355. Respondent argues that “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.”⁴³⁵ However, as stated in the Counter-Memorial, the shareholding in Pacific Rim is described in detail in the witness statement of Mr. Shrake, where he explains how Pacific Rim Mining Corp. monitored shareholding. Such monitoring included reports generated by Broadridge Financial Solutions, Inc., (“Broadridge”), Computershare, Ltd., and reports on trading on the U.S. and Canadian stock exchanges on which

⁴³¹ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, paras. 147, 154 (19 Dec. 2008) (RL- 105).

⁴³² *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/03, Award, para. 85 (30 Apr. 2004) (RL-76); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 170 (8 Feb. 2005) (RL-66); *Siag and Vecchi v. Egypt*, para. 207 (CL-121); *SOABI v. Senegal*, paras. 35-38 (CL-122); *African Holding Company of America, Inc. and Société Africaine de Construction S.A.R.L. v. Democratic Republic of Congo*, paras. 99-104 (CL-78).

⁴³³ See Counter-Memorial, paras. 326-30 (31 Dec. 2010); see also Shrake Statement, para. 59; Pasfield Statement, paras. 12-16.

⁴³⁴ See Counter-Memorial, paras. 331-34.

⁴³⁵ Reply, para. 259.

Pacific Rim Mining Corp. is traded.⁴³⁶ Although we submit that this unrebutted testimony is sufficient, given Respondent's complaints that it is not, we are submitting with this Rejoinder the Broadridge reports and a Witness Statement from a Broadridge Vice-President.

356. In sum, Respondent has failed to provide any valid arguments as to why the plain text of Article 15 does not provide El Salvador's consent to the jurisdiction of this Tribunal to decide Claimant's claims against El Salvador under the Investment Law. The Tribunal should reject this objection.

VII. THE TRIBUNAL SHOULD ORDER RESPONDENT TO BEAR THE COSTS OF THIS PART OF THE PROCEEDINGS UNDER ICSID ARBITRATION
RULE 28(1)(b)

357. As demonstrated in our Counter-Memorial and the present Rejoinder, all of the arguments set forth in Respondent's second set of objections are without merit. Respondent's decision to bifurcate its objections – when all of the objections asserted in the second set could easily have been brought with the first – has obviously been made to prolong the objections phase of the case, impose burden and expense on a small claimant with limited resources, and delay reaching the merits of the case. Incredibly, even in opposing our request that the Tribunal order it to pay the costs of this phase of the proceeding, Respondent hints that it will next seek to separate the merits and damages phases of the case, thus threatening to divide this arbitration into *no fewer than four separate phases*, each with its own briefing schedule and oral hearing.⁴³⁷

⁴³⁶ Shrake Statement, para. 59.

⁴³⁷ Reply, para. 275 (“El Salvador brought Preliminary Objections...to end this case without the time and expense of arguing over jurisdiction, perhaps then the merits, and perhaps then damages”). Lest there

(continued...)

Respondent could hardly have made it clearer that its strategy is indeed to wage a war of attrition against Claimant in hopes of forcing it to abandon its claims due to lack of resources. In light of these circumstances, an order obligating Respondent alone to bear the costs of this phase of the proceeding is all the more justified.⁴³⁸

358. Respondent denigrates Claimant’s reference to the late Thomas Wälde’s article on the need for paying particular attention to equality of arms in investor-State arbitration, dismissing it as “surprisingly absurd.”⁴³⁹ Yet Respondent’s own actions in this arbitration demonstrate the pertinence of Professor Wälde’s observations to this proceeding. As Professor Wälde explained, the “equality of arms” principle can be threatened if one party employs the “[f]ull use (or abuse) of the arbitrable procedure.”⁴⁴⁰ In this regard, he noted, parties at times may misuse procedural tools “for delay and for depleting the opponent’s ‘war chest.’”⁴⁴¹ This is precisely the strategy Respondent has employed, and apparently intends to continue to employ, in order to overcome Pac Rim Cayman’s claims arising from Respondent’s ban on mining.

359. Respondent is correct that Professor Wälde also wrote of far more extraordinary abuses, “including illegal surveillance, deploying the powers of the State in internal disputes

(continued...)

be any doubt, Claimant will vigorously oppose the quadrification of this case, or any further division of this case into further separate phases.

⁴³⁸ See Counter-Memorial Section VIII (requesting order for costs pursuant to ICSID Arbitration Rule 28(1)(b)).

⁴³⁹ Reply para. 271.

⁴⁴⁰ Thomas W. Wälde, “*Equality of Arms*” in *Investment Arbitration: Procedural Challenges*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 161, 173 (Katia Yannaca-Small, ed. 2010) (footnote omitted) (CL-139).

⁴⁴¹ *Id.*

(with a reference to Josef Stalin), intimidating the arbitral tribunal, and assassinations.”⁴⁴² But this is beside the point: Claimant never alleged this type of abuse or invoked these particular portions of the article in its request for an order under Rule 28(1)(b), or for that matter, to “disparage” El Salvador with portions of the article that it did not cite.

360. Of course, a party need not intimidate the arbitral tribunal or carry out assassinations to merit an order requiring it to bear the costs of a particular part of the proceedings under Rule 28(1)(b). As Professor Schreuer has stated in another authority cited on this point in our Counter-Memorial, “the Tribunal may charge one party the costs or a major share of the costs of a particular part of the proceedings. Often this will be in reaction to *undesirable conduct* by a party in the proceeding.”⁴⁴³

361. A party’s decision fully to deploy each and every procedural tool available to it (including seeking to bifurcate, trifurcate, or even quadrificate a case), raising every objection and making every argument that its counsel can exercise its considerable (and unrestrained) creativity to devise, and reasserting factual and legal arguments at every opportunity (even those that have been already explicitly rejected by the tribunal) may not violate the letter of any particular rule or procedure. But it means that that party has engaged in “undesirable conduct” aimed at harassing the other party or even depriving it of meaningful access to arbitration. The party on the receiving end of such conduct should not have to share in the additional costs that it adds to the proceedings.

⁴⁴² Reply, para. 271 (citing Wälde, at 173).

⁴⁴³ CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (relevant excerpts), 1231 at para.61:27 (2nd ed. 2009) (CL-41) (emphasis added).

362. Other tribunals have recognized that such conduct merits an award of costs against the party engaging in it. Thus, for example, in rejecting Claimant's Request for Supplementary Decisions and Rectification following the award in *Genin v. Estonia*, the tribunal observed:

The Claimants had their "day in court." In fact, they had their week before the Tribunal. Not content with the result, they initiated further proceedings, as was their right, making the Request which the Tribunal hereby denies.⁴⁴⁴

Accordingly, the tribunal in *Genin* ordered Claimants to pay in full the expenses incurred by the parties as well as the fees and expenses of the members of the tribunal associated with the Request.⁴⁴⁵

363. Here, Respondent had its opportunity to present preliminary objections. Respondent chose to do so under the expedited procedures of CAFTA Articles 10.20.4 and 10.20.5, providing for an accelerated proceeding but also requiring that Respondent limit itself to questions to be decided "as a matter of law" based on the facts as alleged by Claimant in its Notice of Arbitration. Instead, Respondent made numerous fact-based arguments that went far beyond the scope of the Notice of Arbitration and submitted hundreds of pages of documentary exhibits dealing with issues of fact that were obviously disputed. The Tribunal held a two-day

⁴⁴⁴ *Genin and ors. v. Estonia*, ICSID Case No. ARB/99/2, Decision on Request for Supplementary Decisions and Rectification (4 Apr. 2002), para. 19 (CL-191). *See also* *Compañía de Aguas del Aconquija AS and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/97/3, Decision on Request for Supplementation and Rectification of Decision Concerning Annulment of the Award (28 May 2003), paras. 20, 21, 43 (CL-192) (ordering the respondent to pay the entirety of the fees and costs of the Annulment Committee where the Request consisted largely of attempts to reargue the substantive elements of the Committee's original Decision).

⁴⁴⁵ *Id.*

hearing and issued a 91-page decision dismissing all of Respondent's objections. The end result was a very expensive "preliminary" proceeding that did nothing other than delay reaching the merits of this dispute and imposed significant cost on Claimant. We doubt Respondent had any other goal.

364. Now Respondent has chosen to take a "second bite of the apple" and bifurcate its objections. While Respondent is perhaps within its procedural rights to do so, that does not mean that Claimant should have to share in the fees and costs of the Tribunal for this additional round when the objections Respondent raises turn on many of the very same factual issues that Respondent already (abusively) raised in the preliminary proceeding.

365. That Respondent has a "developing economy and a population of only seven million" is irrelevant to Claimant's request under Rule 28(b)(1). The fact remains that, unlike Claimant, Respondent is a sovereign State that has plainly chosen to put its resources toward pursuing "scorched earth" tactics in an effort to wear down Claimant and exhaust Claimant's considerably less ample resources before the merits phase is ever reached.

366. Furthermore, an order requiring Respondent to pay the costs of this part of the proceeding is a comparatively modest remedy. Rule 28(1)(b) does not appear to encompass the attorneys' fees and related expenses incurred by the parties in connection with this part of the proceedings, but only the "related costs" as "determined by the Secretary-General." Nevertheless, such an order would be extremely meaningful to Claimant, would hopefully deter Respondent from deploying its blunderbuss tactics in every part of this case, and would certainly discourage other respondents from following the same course in other CAFTA cases.

VIII. CONCLUSION

367. For the reasons stated above, and in Claimant's Counter-Memorial, the Tribunal should deny all of the objections asserted by Respondent with prejudice; order Respondent to bear the costs of this part of the proceeding; enter a procedural order for concluding the remainder of this case in a single, expeditious phase; and grant such other relief as counsel may advise and that the Tribunal may deem appropriate.



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2 March 2011