Appendix A to El Salvador's Reply

Pac Rim Cayman's Assertion	How it is inaccurate
"From the beginning of this arbitration, Respondent and its counsel have repeatedly sought to portray Pac Rim Cayman as the 'sham' creation of a 'large' Canadian corporation, with no ties to the United States of America, set up for the sole purpose of asserting claims under CAFTA at ICSID."[1]	El Salvador did not allege that Pac Rim Cayman is a "sham" creation or that Pacific Rim Mining Corp. is "large" in any of its filings before this Tribunal—not in its Preliminary Objections or the Reply, nor in its letters notifying of its intent to raise jurisdictional objections or the Memorial.
"In addition to misrepresenting the true nature of Pac Rim Cayman from the outset of this case, Respondent has repeatedly tried to misstate Claimant's claims. Respondent's argument that there was already an 'existing dispute' between the parties as of December 2007 . . . once again ignores the basic allegations of the Notice of Arbitration, as well as the larger record now before the Tribunal."[2]	In the Notice of Arbitration, Claimant said, "As previously set out in the Notice of Intent and further summarized herein, PRC's claims arise out of unlawful and politically motivated measures taken by the Government of President Elias Antonio Saca González, through the *Ministerio de Medio Ambiente y Recursos Naturales* ("MARN") and MINEC, against Claimant's investments."[3] The "measures" taken by MARN and MINEC that affected Claimant's investments took place in 2004-2006.
"Respondent's mischaracterization of a mere disagreement as a full-blown investment dispute depends, in turn, on its mistaken view of the measure at issue. . . . In fact, as is clear from Claimant's Notice of Arbitration, the measure at issue is Respondent's *de facto* ban on mining operations, a practice which then-President Saca announced in March 2008."[4]	There is no mention of a "ban" or a "*de facto* ban" in the Notice of Arbitration.
Dismissal for Abuse of Process "might be warranted in a case where the claimant and/or its affiliates set up a shell company in a jurisdiction where they have no other presence, solely to obtain access to arbitration which they would not otherwise have had, well after a dispute . . . was already pending or had clearly crystallized."[5]	The Abuse of Process doctrine has nothing to do with where affiliates of a named Claimant may have a presence, or, in this case, with whether Pac Rim Cayman is a shell company. In this case, it deals only with the change of nationality to bring a pre-existing dispute to arbitration under CAFTA.

[1] Counter-Memorial, para. 12. *See also id.*, para. 42; McLeod Witness Statement, para. 4.
[2] Counter-Memorial, para. 18.
[3] NOA, para. 7.
[4] Counter-Memorial, para. 19.
[5] Counter-Memorial, para. 32.

Pac Rim Cayman's Assertion	How it is inaccurate
"As stated above, from 2002 forward, nearly all of the profits earned by the Companies from the Denton-Rawhide mine in Nevada – approximately US$20 million – were reinvested by the Companies in El Salvador. Typically, the profits from Denton-Rawhide were sent by Dayton Mining (U.S.) to Pacific Rim Corp. in Canada, which then invested them in El Salvador through Pac Rim Cayman."[6]	First, Pac Rim Cayman had no connection to the Salvadoran investment until the end of 2004. Second, there is no evidence of any capital being invested "through Pac Rim Cayman." Pac Rim Cayman does not even have a bank account. All capital registered in El Salvador was transferred from Canada. The Resolution provided by Claimant as evidence of investments made "through Pac Rim Cayman" notes that the money was transferred from Canada. The same is true for the other Resolutions.
"Thus, virtually *all* of the intellectual property contributed by the Companies for investment by the Enterprises in El Salvador was created in the United States, and paid for in the United States with profits generated by mining operations in the United States."[7]	Pacific Rim Mining Corp.'s use of geologists and mining and consulting firms from the United States has nothing to do with any of El Salvador's objections—it does not negate abuse of process, it does not show that Claimant (Pac Rim Cayman) has substantial business activities in the United States, it does not affect whether, how, or when Claimant could qualify as a protected investor under CAFTA, and it does not relate to whether El Salvador intended to provide unilateral consent to ICSID arbitration through its Investment Law.
"In August 2004, Mr. Earnest, the President of PRES, expressed concern to Ms. Navas, the Director of the Bureau of Mines, that MARN appeared to be moving slowly on the application. In response, Ms. Navas wrote Mr. Earnest a letter in which she assured him that PRES's application for an exploitation concession would not be affected by any potential delay in receiving the environmental permit."[8]	This is not what Ms. Navas's letter to PRES says. Ms. Navas only referred to PRES's ability to submit the application, and only if the delay in obtaining the environmental permit did not last too long. Even Claimant's own translation of the letter states, "I hereby refer to your letter dated August 23 of this year, in which you inquire if your rights to seek the concession for El Dorado North and El Dorado South would be affected in the case that an Environmental Permit is not awarded by December 31st. To answer your question, when the company presents documentation showing that the MARN . . . has not awarded the permit, and <u>provided that it doesn't take too long</u>, your rights will not be affected."[9]

[6] Counter-Memorial, para. 82. *See also id.*, paras. 16, 80, 83, 395, and 398.
[7] Counter-Memorial, para. 92.
[8] Counter-Memorial, para. 101. *See* Letter from Ms. Gina Navas de Hernández to Pacific Rim, Aug. 25, 2004 (NOA, Exhibit 6; Claimant provided the translation with its Counter-Memorial as an un-numbered Exhibit titled "English translation to Notice of Arbitration, Exh. 6").
[9] Claimant's translation provided with its Counter-Memorial (emphasis added).

Pac Rim Cayman's Assertion	How it is inaccurate
"MINEC told PRES that it could not approve a concession covering such a large area. Accordingly, PRES worked with MINEC to define an acceptable portion over which PRES could solicit an exploitation concession. PRES agreed to remove certain areas from the original concession area it sought."[10]	It was not MINEC's decision that PRES could not obtain a 75 km^2 concession. PRES should have already known that. Article 20 of the Mining Law says that an exploration area may not exceed 50 km^2 and Article 24 states that the area of an exploitation concession must be defined based on the extent of the deposits and the technical justifications of the applicant. Complying with the law is not a showing of special cooperation with the Government.
"Different Government officials suggested various ways to address the [land surface ownership or authorization] issue, including advising PRES to request an 'authentic interpretation' ('*una interpretación auténtica*') and proposing a legislative amendment to clarify and resolve the issue. The Companies tried both approaches. Ultimately, neither approach moved forward. But it was never clear to the Companies whether the Government reached a consensus view on this point."[11]	Pacific Rim certainly knew the Government's position. It was clear to them in 2007 that the concession could not be granted without a new law. According to the 2007 Annual Report to the Canadian Government: "Pacific Rim's Exploitation Concession application for the El Dorado project remains in process however <u>it is unlikely that a mining permit will be granted prior to the expected reformation of the El Salvadoran mining law</u>."[12]
"It should be observed, that here too, the Companies' efforts were meant to be constructive and helpful. The Companies' proposals for amendments to the Mining Law were hardly limited to the land ownership issue."[13]	The proposed change to the Mining Law was an attempt to make a new law that would change the requirements to fit Pacific Rim's application. As El Salvador explained during the Preliminary Objection phase: "According to the proposed new law, an applicant would be able to obtain a 'Mining Concession', which would include both exploration and exploitation, without submitting any of the documents which were then (and are currently) lacking from Pacific Rim El Salvador's concession application. An applicant therefore could receive a mining concession with no environmental permit, no feasibility study, and very limited land use documentation. Only after completing an extended 16 year exploration phase, the applicant would need to submit an environmental permit, a feasibility study, and ownership or authorization for only the land on which it would locate mining infrastructure."[14]

[10] Counter-Memorial, para. 102.
[11] Counter-Memorial, para. 113.
[12] 2007 Annual Report to Canada, at 10 (emphasis added) (R-37).
[13] Counter-Memorial, para. 114.
[14] Reply (Preliminary Objections), para. 94 (citing Proposed New Mining Law, Arts. 34, 35, 38, 52, and 54 (R-36)).

Pac Rim Cayman's Assertion	How it is inaccurate
"Although DOREX experienced delays elsewhere, the fact that MARN was continuing to communicate and work with the Companies on other sites also reinforced the Companies' belief that overall, their projects were moving forward with the support of the Government in 2008. Indeed, in each of the years 2006, 2007, and 2008, the Companies *increased* the amount of money they were investing in El Salvador."[15]	Claimant is alleging that the Companies increased investment into El Salvador in 2006-2008. The Balance Sheet that supposedly supports this allegation does not show increased investment.[16] Moreover, Claimant refers to fiscal years, so 2008 refers to the period from May 2007 through April 2008, or until only a few months after Pac Rim Cayman's nationality was changed in December 2007. According to the 2008 Annual Report to the Government of El Salvador, the total costs of the El Dorado project in El Salvador, including exploration, public relations, honorary fees, etc. from December 2007 through April 2008 was just $703,173.[17]
"Had there been a dispute with El Salvador prior to the domestication of Pac Rim Cayman to Nevada in December 2007, the majority shareholders in the United States and certain of Pacific Rim Mining Corp.'s U.S. subsidiaries could have asserted claims against El Salvador at ICSID under CAFTA and under the Investment Law. In 2007 (as today), a majority of U.S. shareholders indirectly owned the Salvadoran subsidiaries through their majority shareholding in Pacific Rim Mining Corp. In addition, Pac Rim Exploration and Dayton Mining (U.S.) Inc. – both Nevada corporations – had made substantial investments in El Salvador. Thus, if a dispute had crystallized prior to December 2007, Pac Rim Exploration, Dayton Mining (U.S.) Inc., and/or the U.S. shareholders all could have brought claims against El Salvador at ICSID under CAFTA and the Investment Law."[18]	The fact that U.S. shareholders did not initiate arbitration says nothing of whether or not there was a dispute before 2007. They would have faced several obstacles to establish their ownership and control of the investment, nationality, whether the same shareholders have had an interest in PRMC since 2002 or whether ownership had changed, and the percentage of any alleged loss they were entitled to recover. Besides the consent issue, U.S. shareholders and subsidiaries would not be able to bring Investment Law claims as they are not registered as foreign investors in El Salvador. In any event, the undisputed fact is that the Claimant in this arbitration is Pac Rim Cayman.

[15] Counter-Memorial, paras. 127-128.
[16] C-Protected-1.
[17] 2008 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession, Feb. 2009, Table 1 (R-3).
[18] Counter-Memorial, para. 141.

Pac Rim Cayman's Assertion	How it is inaccurate
"As stated in the Notice of Arbitration, 'PRC and the Enterprises were astonished by President Saca's assertions,' which suddenly put an entirely new light on the administrative delays they had been facing in attempting to get an environmental permit and exploitation concession."[19]	The Companies knew that their application did not comply with the laws that were in existence and were hoping that the law would be changed. According to the 2007 Annual Report, it was "unlikely that a mining permit will be granted prior to the expected reformation of the El Salvadoran mining law."[20] This is reiterated by Mr. Shrake: "We were advised that the proposed amendments to the Mining Law were likely to pass in 2008, meaning (among other things) that we would not have to revise our El Dorado application for a smaller concession area, or try to buy or acquire authorization to use all of the surface area overlaying the concession area included in our pending application."[21]
"[T]he shares of Pacific Rim Mining Corp. had been trading at around US$1.21 prior to President Saca's announcement of the mining ban in March 2008. By 15 April 2009, just prior to the date Claimant filed its Notice of Arbitration, the share price had fallen to just under US$0.17. The market value of Pacific Rim Mining Corp. had fallen from approximately US$140 million to approximately US$20 million – a decline of about US$120 million (or 85%) in little more than a year."[22]	The drop in value of PRMC's shares corresponded to a drop in value for most, if not all, gold mining companies during the exact same period.

[19] Counter-Memorial, para. 145.
[20] 2007 Annual Report to Canada at 10 (R-37).
[21] Shrake Witness Statement, para. 114.
[22] Counter-Memorial, para. 160. *See also* Counter-Memorial, paras. 161 ("It was only when President Saca announced El Salvador's *de facto* ban on mining, in March 2008, that the share price began to fall precipitously – never to recover."), 177 ("Indeed the relevance of the March 2008 announcement as a watershed event distinguishing prior acts and omissions from later acts and omissions is illustrated quite graphically by the dramatic fall in the share price for Pac Rim Cayman's parent, Pacific Rim Mining Corp., following the announcement."), 194 (claiming that the President Saca's announcement "destroyed Claimant's investments in El Salvador, thus effecting an expropriation, a fact recognized by the market, as reflected in the steep drop in value of the shares of Pac Rim Cayman's parent, Pacific Rim Mining Corp., following President Saca's announcement in March 2008 and his subsequent pronouncements concerning the ban"), 413 ("the ban in effect expropriated those investments . . . . [which] was recognized almost immediately by the market, as reflected in the precipitous drop in the share price of Pac Rim Cayman's parent, Pacific Rim Mining Corp.").

Pac Rim Cayman's Assertion	How it is inaccurate
"Without language to the contrary in the treaty at issue – and there is none in CAFTA – such changes do not prevent an enterprise of the United States that 'attempts to make, is making, or has made an investment in the territory of another Party' from being an 'investor of a Party' under the Treaty, simply because it was an entity of the Cayman Islands when it started making its investments. Given CAFTA's plain language, Respondent's contention that Pac Rim Cayman is not an investor of a Party must be rejected."[23]	Pac Rim Cayman has not made any investments. It holds shares for Pacific Rim Mining Corp. The interests in El Salvador were transferred to be held by Pac Rim Cayman in late 2004. Claimant became a U.S. entity in late 2007. Claimant is not attempting to make or making an investment in El Salvador and it has not made an investment.
"In retrospect, the administrative lapses and irregularities put Respondent's subsequent acknowledgment of a *de facto* mining ban into context. But, at the time, it would have been impossible for Claimant to recognize each individual lapse as evidence of an unwritten government practice . . . ."[24]	It was not "impossible" for Claimant to recognize that its exploitation concession was not granted. There was only one application to MARN for an environmental permit and the corresponding single application to MINEC for the El Dorado exploitation concession. Neither application was granted within the 60 days provided for by law. There were not a series of "lapse[s]" that Claimant needed to piece together.
"Respondent suggests that an unwritten practice ordered by a head of State, and implemented by the bureaucracy outside the State's legal framework, cannot constitute a 'measure' under CAFTA. That is an extraordinary proposition . . . . If Respondent were correct in its theory that such conduct does not constitute a 'measure' under CAFTA, a head of State could make a pronouncement identifying a practice that in turn is followed throughout the government; the practice may be blatantly inconsistent with the State's treaty obligations; and the State would avoid all responsibility because, on this theory, the practice is not a measure."[25]	El Salvador never argued that an unwritten practice cannot be a measure. In fact, El Salvador explicitly recognized that a practice can be a measure, but only disputed Claimant's assertion that a statement about the practice changes the date of the measure. El Salvador stated, "Claimant asserts that the 2008 statements only made Claimant aware of the alleged governmental *rationale* behind the measures that occurred many years before. . . . [I]t was the earlier measures—not granting the applications in 60 business days—and not the later statements, that allegedly harmed Claimant."[26]

[23] Counter-Memorial, para. 192.
[24] Counter-Memorial, para. 200.
[25] Counter-Memorial, para. 205.
[26] Memorial on Jurisdiction, para. 48.

Pac Rim Cayman's Assertion	How it is inaccurate
"Like *Mobil*, this situation in *Phoenix Action* is readily distinguishable from the circumstances of this case and provides no basis for focusing on December 2004 as the moment when the dispute arose. The pre-March 2008 delays and 'disagreements' between Claimant and Respondent bear no resemblance to the litigation, investigations, and frozen bank accounts that preceded the claimant's acquisition of its investment in *Phoenix Action*. Indeed, contrary to Respondent's apparent intent in citing *Mobil* and *Phoenix Action*, these cases actually serve to underscore the point that in this case a 'dispute' as that term is used in CAFTA (and similarly in the instruments at issue in *Mobil* and *Phoenix Action*) had not arisen prior to March 2008."[27]	Claimant's case is about its failure to receive the El Dorado exploitation concession, which happened well before 2008. PRES applied for an environmental permit and an exploitation concession in 2004. Neither of those applications was granted. PRES wrote to the Government in December 2004 complaining about the delay and stating that it was being harmed. The Companies then tried to change the Government's application of the law and in 2007 tried to change the Mining Law so that the concession application could be granted without meeting particular requirements of the law. After all of these attempts to negotiate a solution or change the law failed, Claimant initiated this arbitration for the same dispute.
"Nor does *Société Générale v. Dominican Republic* support Respondent's position. As relevant here, that award confirms that a breach must have occurred after an investor became covered by the applicable treaty in order for a tribunal to have jurisdiction *ratione temporis* over the investor's claims. However, Respondent neglects to mention that the *Société Générale* tribunal expressly recognized that it 'may take into account ***prior acts and events*** resulting in such Treaty breaches.' Unlike Respondent in this case, that tribunal acknowledged the relevance of such 'prior acts and events,' whether as context, as evidence of conduct that came into existence before jurisdictional conditions were met and continued in existence thereafter, or as 'composite acts' (*i.e.*, acts which in the aggregate result in a treaty breach).[28]	El Salvador does not disagree that prior acts and events may be relevant to treaty breaches, *i.e.* violations of treaty obligations that affect an investor of a Party after the treaty has entered into force. The important point from *Société Générale v. Dominican Republic* to this case is that there must be a violation of the treaty after the treaty is in force and applicable to the claimant. Claimant is not using prior events as context, but rather is trying to say that prior acts and events were "recognized" as a treaty breach after Pac Rim Cayman became a U.S. national. That is impermissible.

[27] Counter-Memorial, para. 217.
[28] Counter-Memorial, para. 218.

Pac Rim Cayman's Assertion	How it is inaccurate
"The denial of benefits provision (Article 10.12.2), like all CAFTA provisions, must be interpreted consistently with the ordinary meaning of its text, in context and in light of CAFTA's object and purpose. Text, context, and object and purpose support the proposition that a host Party (also referred to in this discussion as 'the denying Party') may deny the treaty's benefits where a person with no economic ties whatsoever to any Party other than the host Party sets up a 'shell' company in the territory of another Party, uses the shell to make an investment in the territory of the host Party, and on that basis seeks to be covered by CAFTA's protections."[29]	Claimant misinterprets the CAFTA provision. The provision has nothing to do with whether a non-Party investor trying to gain treaty access has "no economic ties whatsoever to any Party." It simply says that benefits can be denied to an enterprise incorporated in the territory of a Party if that enterprise has no "substantial business activities" in any Party other than the denying Party. Under Claimant's rewriting of the Treaty, it becomes much more difficult, if not impossible, to deny benefits.
"There has never been any dispute that Pac Rim Cayman is a holding company. Claimant has explicitly acknowledged that Pac Rim Cayman is a holding company."[30]	Claimant only explicitly acknowledged that Pac Rim Cayman is a holding company, and not "an environmentally and socially responsible mining company" after El Salvador exposed the lie.
"Respondent . . . opportunistically elevates form over substance as a means of gaining an advantage . . . . [T]he determination as to whether an entity has substantial business activities in its home State necessitates a detailed factual inquiry that cannot be satisfied by merely checking the box marked 'holding company' and listing all the facts that demonstrate Pac Rim Cayman's status as such a company. . . . Respondent's position reflects what has become a standard argument by respondent states seeking to avoid the jurisdiction of international tribunals such as this one by insinuating that 'the use of a holding company to channel investment is . . . illegitimate or an abuse of the corporate form.'"[31]	El Salvador did not argue that benefits should be denied because Pac Rim Cayman is a holding company, but because Pac Rim Cayman is a shell company—in this case, a holding company with no substantial business activities.[32] Pac Rim Cayman's focus on the fact that some holding companies have activities does nothing to rebut all the evidence that it is a holding company with no business activities.
"Much like Pac Rim Cayman, AMTO was a holding company with two full-time employees."[33]	Pac Rim Cayman has no employees. In addition, unlike Pac Rim Cayman, AMTO had a bank account and leased office space.

[29] Counter-Memorial, para. 251.
[30] Counter-Memorial, para. 255.
[31] Counter-Memorial, paras. 258-259.
[32] Memorial on Jurisdiction, para. 130 ("Claimant provided the Nevada Business Registration for Pac Rim Cayman filed January 15, 2008. . . . None of the boxes for activity, such as 'Mining,' 'Service,' or 'Leasing,' are checked. Instead, the company checked the box 'Other' and, at item 15, where asked to '*Describe in Detail the Nature of Your Business in Nevada*,' the company simply filled in '*Holding Company*.' This document alone proves beyond doubt that Pac Rim Cayman is a shell subsidiary conducting no business activities in the United States.").
[33] Counter-Memorial, para. 283.

Pac Rim Cayman's Assertion	How it is inaccurate
"Similarly, the *Petrobart* tribunal found that Kyrgystan could not deny benefits pursuant to Article 17(1) of the ECT because the claimant had substantial business activities, not in the State in which it was incorporated, but in another Contracting Party through the company that managed it . . . . This decision is instructive for two reasons. First, it shows that the 'handling' of 'strategic and administrative matters' is sufficient to qualify for substantial business activities. Second, it shows that the activities of an affiliate can serve to confirm that the claimant has substantial business activities."[34]	The *Petrobart* case said nothing of counting "the activities of an affiliate." The cited quote is specifically providing the claimant's argument. The tribunal simply stated that it "attache[d] weight to the information about Petrobart provided by Petrobart itself which . . . contradicts the view that Petrobart is a company owned or controlled by citizens or nationals of a state other than the United Kingdom and that Petrobart has no substantial business in the United Kingdom."[35]
"The denial of benefits provision recognizes that an enterprise that has made an investment in the territory of the host Party is itself, in turn, an investment of the persons who own and control it, and the provision requires a determination of the nationality of those persons . . . . Because the denial of benefits provision recognizes that an enterprise of a Party that owns or controls an investment in the territory of another Party is itself an investment owned or controlled by investors, the definition of the investor-investment relationship in Article 10.28 applies here as well. In determining whether the denial of benefits provision may apply to an enterprise, the context provided by the definition of 'investment' requires an analysis that looks not only to the enterprise's immediate owner, if that owner happens to be a person of a non-Party, but to persons further up the ownership chain that ultimately may own or control the enterprise. If those latter persons are persons of a Party other than the host Party, then the host Party may not deny benefits under Article 10.12.2."[36]	There is nothing in the text of CAFTA Article 10.12.2 that supports looking for indirect ownership. The plain text says "owns or controls." Where CAFTA drafters wanted to include indirect control, they added "directly or indirectly."[37]

[34] Counter-Memorial, para. 286.
[35] *Petrobart Ltd. v. Kyrgystan*, SCC Case No. 126/2003, Award, Mar. 29, 2005, para. 348 (CL-115).
[36] Counter-Memorial, paras. 310, 313.
[37] *See* CAFTA Article 10.28, definition of investment (RL-1).

Pac Rim Cayman's Assertion	How it is inaccurate
Claimant states, "Respondent asserts that the question is whether Pac Rim Cayman had substantial business activities in the United States 'at the time of the decision to make the investment [in El Salvador].'" A few paragraphs later, Claimant alleges, "in Respondent's view, nothing can erase the original sin of having lacked substantial business activities in the home State at the time the investment in the host State was first made, and therefore nothing can save the investor from being punished for that sin."[38]	In fact El Salvador argued, "[t]he dual purposes of denial of benefits clauses, to protect legitimate investors of State-Parties to a treaty while preventing nationality-shopping, are best achieved by looking to substantial business activities at the time of the decision to make the investment," but also noted, "[i]n the alternative, the denial of benefits clause could require one to look for 'substantial business activities' during the period when the facts that give rise to the dispute take place. This timing would not have the advantage of considering each party's expectations, but would contribute to preventing nationality-shopping *after* the facts that give rise to the dispute take place."[39]
"A CAFTA Party's right to deny benefits to an investor of another CAFTA Party is a conditional right. . . . [T]he right is '[s]ubject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations).' This procedural condition is extremely rare among free trade agreements and bilateral investment treaties negotiated by the United States since the conclusion of NAFTA in 1993. All of those later agreements contain denial of benefits clauses, but most of them do not contain the procedural condition at issue here. . . . The denial of benefits clause in the U.S.-Korea Free Trade Agreement contains an advance notice provision, but it applies only if the denying Party has actual knowledge of particular facts warranting the denial of benefits and only 'to the extent practicable.' The discretion allowed to the denying Party in that Agreement serves to highlight the mandatory nature of the advance notice requirement in CAFTA."[40]	The notice requirement of CAFTA, like that of the U.S.-Korea BIT mentioned by Claimant, includes the proviso, "[t]o the maximum extent possible . . ."[41]

[38] Counter-Memorial, paras. 298, 301.
[39] Memorial on Jurisdiction, paras. 185, 190.
[40] Counter-Memorial, para. 341.
[41] CAFTA Article 18.3 (RL-111).

Pac Rim Cayman's Assertion	How it is inaccurate
Claimant states that El Salvador's assertion that it believed it was dealing with a Canadian investor is "remarkably disingenuous" because it was clear from Pacific Rim Mining Corp.'s reports to the U.S. Government that it had a U.S. presence.[42]	Whatever Pacific Rim Mining Corp. reported to the U.S. Government does not change the fact that it was and remains a Canadian company. In addition, El Salvador had no reason to look at reports to the U.S. Government; the Annual Reports to the Salvadoran Government and the investment registrations mentioned a Canadian company and a Canadian investment.
"[T]he *Plama* tribunal went on, 'a putative covered investor has legitimate expectations of [the advantages of the treaty] until that right's exercise. *A putative investor therefore requires reasonable notice* before making any investment in the host State whether or not that host State has exercised its right' to deny benefits."[43]	Pac Rim Cayman's argument that it should have had more notice of application of the denial of benefits provision before it made its investment in El Salvador is frivolous. Pacific Rim Mining Corp. began the investment in El Salvador before CAFTA entered into force and before associating Pac Rim Cayman with the project. In 2004, when the Salvadoran interests were transferred to Pac Rim Cayman, and in 2006, when CAFTA entered into force, Pac Rim Cayman could not have had legitimate expectations of treaty protection because it was not a U.S. company.
"To adopt Respondent's reading of the Agreement would permit a State to make its own, necessarily self-interested determination as to whether it could deny benefits to an investor after a dispute had already arisen, and would further permit it to deny benefits to that investor without notice *and without providing access to international dispute settlement*."[44]	This is dramatic and incorrect. The denying State does not get to make its own determination—the Tribunal decides whether or not the conditions are met for an enterprise to be denied treaty benefits. The State's "self-interest[]" and the result—lack of access to arbitration—are not any different depending on when notice is given.
"For the reasons discussed in Sections IV and V, above, demonstrating that Respondent's jurisdictional objections and invocation of denial of benefits are unfounded, its abuse of process argument is equally unfounded."[45]	The abuse of process doctrine is based on completely different factors and standards than the CAFTA denial of benefits or *ratione temporis* provisions. First, abuse of process simply requires a change in nationality to gain treaty protection—there is no need to show that the investor does not have substantial business activities in the new State. Second, abuse of process does not depend on there being a dispute as defined by CAFTA. Moreover, abuse of process only requires the mere knowledge of a dispute, and has nothing to do whether a dispute has ceased to exist or is continuing.

[42] Counter-Memorial, para. 354. *See also* Counter-Memorial, para. 383.
[43] Counter-Memorial, para. 360.
[44] Counter-Memorial, para. 367.
[45] Counter-Memorial, para. 375.

Pac Rim Cayman's Assertion	How it is inaccurate
"As noted above, Respondent's abuse of process argument essentially restates its objection to jurisdiction *ratione temporis* and its argument on denial of benefits."[46]	Abuse of process is El Salvador's principal and first objection to jurisdiction, with all other objections listed as alternatives. As a result, El Salvador could not have been "restat[ing]" arguments it had not yet made regarding the second and third objections.
"Respondent inexplicably asserts that Claimant failed to 'mention anywhere in the 55 pages of its Notice of Arbitration' that Pac Rim Cayman was originally incorporated in the Cayman Islands. That assertion is intended to mislead the Tribunal. In fact, Exhibit 3 to the Notice of Arbitration is a July 2008 Resolution by El Salvador's Ministry of the Economy" which modifies the records kept for Pac Rim Cayman to change its domicile to Nevada.[47]	The change in nationality is not mentioned anywhere in the text of the Notice of Arbitration. After the fact, Claimant has found a reference to the change in nationality in an Exhibit that was only provided in Spanish and was not cited to be transparent about the change in nationality. The only reference to Exhibit 3 in the Notice of Arbitration is in a footnote to paragraph 51, which mentions that the ONI acknowledged PRC's status as owner of PRES in August 2005. The footnote cites Resolution 383-R from August 2005 and adds, "PRC's last updates of its registered investment in the Enterprises are here attached as composite Exhibit 3."[48]
"Respondent equates the undefined and pejorative term 'shell company' with the well-defined and entirely legitimate concept of a holding company. Thus it attributes great significance to statements it characterizes as Pac Rim Cayman 'admit[ting] that it was merely 'a holding company,' as if that status were something that needed to be hidden for fear of losing CAFTA protections, while 'admit[ting]' it is somehow self-incriminating."[49]	El Salvador focused on Pac Rim Cayman's status as a holding company as an example of how Claimant has tried to hide its abuse of process and conflate and confuse facts before this Tribunal. Claimant is a holding company <u>with no substantial business activities</u>, making it a shell company.

[46] Counter-Memorial, para. 380.
[47] Counter-Memorial, para. 388.
[48] NOA, para. 51, n.40.
[49] Counter-Memorial, para. 391.

Pac Rim Cayman's Assertion	How it is inaccurate
"[T]he domestication of Pac Rim Cayman to Nevada was done for entirely legitimate business reasons. . . . The impetus for the reorganization was originally to deactivate several subsidiaries where the Companies had not conducted business for some time, but still paid various fees and costs, and devoted administrative time, to maintain the subsidiaries in good standing. . . . There were administrative costs involved in maintaining Pac Rim Cayman as a Cayman Islands entity." [50]	Claimant provides no evidence that the costs and fees of maintaining Pac Rim Cayman as a Nevada company are significantly less expensive than maintaining Pac Rim Cayman in the Cayman Islands. According to the Cayman Islands Chamber of Commerce, a non-resident company currently pays as little as U.S. $488 to register and as an annual fee, and up to $2400 to be an exempt company with maximum shareholder capital.[51] Comparatively, Claimant paid at least $350 filing fee with its Articles of Domestication in Nevada, $125 filing fee with its Initial List of Managers (and each list thereafter), and a $100 annual business license fee.[52]
"The assertion that Pac Rim Cayman does not have its 'own' offices, phone number, office equipment, *etc*., also misses the point: Pac Rim Cayman is not a manufacturing or sales company; it does not need office equipment or employees. It simply needed a person or persons to decide what it would hold and how those holdings would be managed. Those decisions were made, for the most part, by Mr. Shrake, assisted by his geologic team, in Nevada."[53]	The people allegedly making decisions in Nevada were not and are not employed by Pac Rim Cayman.
"Pac Rim Cayman has maintained consistently that the measure at issue is El Salvador's *de facto* ban on mining, which President Saca first announced in March 2008."[54]	In the Notice of Intent, Claimant asserted that the measures at issue were: "*inter alia*, the arbitrary imposition of unreasonable delays and unprecedented regulatory obstacles designed and implemented with the aim of preventing PRES and DOREX from developing gold mining rights."[55] In the Notice of Arbitration, Claimant said, "As previously set out in the Notice of Intent and further summarized herein, PRC's claims arise out of unlawful and politically motivated measures taken by the Government of President Elías Antonio Saca González, through the *Ministerio de Medio Ambiente y Recursos Naturales* ("MARN") and MINEC, against Claimant's investments."[56]

[50] Counter-Memorial, para. 393.
[51] Cayman Islands Chamber of Commerce: Investing in Cayman (R-123).
[52] Pac Rim Cayman Articles of Domestication (R-69), Initial and Annual List of Managers for Pac Rim Cayman (R-82), Nevada Department of Taxation, Supplemental Registration (R-72).
[53] Counter-Memorial, para. 397.
[54] Counter-Memorial, para. 402.

Pac Rim Cayman's Assertion	How it is inaccurate
"Respondent attempts to avoid the undeniable consequences of the *Inceysa* award for its position in this arbitration by arguing that the tribunal denied jurisdiction under the Investment Law on the grounds of Claimant's fraud and illegal investment in El Salvador, rather than on a critical analysis of whether the Investment Law contains a consent to ICSID arbitration. Indeed, Respondent argues that it did not even have an opportunity to present its arguments on whether the text of Article 15 provides consent to ICSID jurisdiction."[57]	El Salvador did not say that it did not have "an opportunity to present its arguments" about Article 15 in the *Inceysa* arbitration. Rather, El Salvador stated that that dispute was decided on other grounds, so it was not necessary for El Salvador to invest resources in briefing and arguing the issue of unilateral consent.

[55] NOI, Introduction.
[56] NOA, para. 7.
[57] Counter-Memorial, para. 431.