IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID")

BROUGHT UNDER THE DOMINICAN REPUBLIC - CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT ("CAFTA") AND THE INVESTMENT LAW OF EL SALVADOR

(ICSID CASE NO. ARB/09/12)

BETWEEN:

PAC RIM CAYMAN LLC

Claimant

v.

THE REPUBLIC OF EL SALVADOR

Respondent

DECISION ON THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

THE TRIBUNAL:

Professor Dr Guido Santiago Tawil;
Professor Brigitte Stern; and
V.V.Veeder Esq (President)

ICSID Tribunal Secretary:
Marco Tulio Montañés-Rumayor

Date: June 1, 2012

TABLE OF CONTENTS

Part 1: The Arbitration 1.01

A: The Parties 1.01

B: The Dispute 1.02

C: The Tribunal's Decision of 2 August 2010 ..... 1.04

D: The Respondent's Jurisdictional Objections 1.04

E: Non-Disputing Party Written Submissions 1.07

F: Amicus Curiae 1.07

G: The Parties' Claims for Relief as regards Jurisdiction 1.10

H: The Jurisdictional Issues 1.14

Part 2: Issue A – "Abuse of Process" 2.01

Introduction 2.01

The Burden and Standard of Proof 2.01

The Respondent's Case 2.05

The Claimant's Case 2.06

The CAFTA Member States 2.11

Amicus Curiae Submission 2.11

The Tribunal's Analysis 2.12

The Relevant Measures or Practices 2.16

Application to this Case 2.23

The Respondent's Submission 2.23

The Claimant's Submission 2.24

One-Time Acts *2.24*

Composite Act *2.28*

Continuous Act *2.29*

Legal Consequences *2.31*

Abuse of Process *2.31*

Ratione Temporis *2.32*

Decisions *2.35*

Part 3: Issue B – "Ratione Temporis"* *3.01

Introduction *3.01*

The Respondent's Case *3.01*

The Claimant's Case *3.06*

The Tribunal's Analysis and Decisions *3.10*

Part 4: Issue C – "Denial of Benefits"* *4.01

Introduction *4.01*

The Respondent's Case *4.02*

(i) Substantial Business Activities *4.03*
(ii) Ownership/Control *4.04*
(iii) Timeliness *4.06*

The Claimant's Case *4.10*

(i) Substantial Business Activities *4.10*
(ii) Ownership/Control *4.11*
(iii) Timeliness *4.11*

Non-Disputing Parties' Submissions *4.15*

Amicus Curiae *4.17*

The Tribunal's Analysis and Decisions *4.18*

(i) Substantial Business Activities *4.18*

(ii) Ownership/Control *4.23*

(iii) Timeliness *4.23*

Part 5: Issue D – "Investment Law" ***5.01***

Introduction *5.01*

The Respondent's Case *5.01*

The Claimant's Case *5.05*

The Tribunal's Analysis and Decisions *5.08*

Part 6: Issue E – "Legal and Arbitration Costs" ***6.01***

Introduction *6.01*

The Claimant's Claim *6.01*

The Respondent's Response *6.10*

The Respondent's Claim *6.12*

The Claimant's Response *6.24*

The Tribunal's Analysis and Decisions *6.25*

Part 7: The Operative Part ***7.01***

Glossary of Defined Terms

"*CAFTA*" means the Dominican Republic - Central America-United States Free Trade Agreement of 2004;

"*DOREX*" means Dorado Exploraciones, Sociedad Anónima de Capital Variable;

"*Enterprises*" means Pacific Rim El Salvador, Sociedad Anónima de Capital Variable (also called "PRES") and Dorado Exploraciones, Sociedad Anónima de Capital Variable (also called "DOREX");

"*Governmental Ethics Law*" means Ley de Ética Gubernamental (The Respondent's Governmental Ethics Law);

"*ICSID Convention"* means the International Convention on the Settlement of Investment Disputes of 1965;

"*ICSID"* means the International Centre for Settlement of Investment Disputes (also "the Centre");

"*Investment Law*" means Ley de Inversiones (The Respondent's Investment Law);

"*MARN*" means Ministerio de Medio Ambiente y Recursos Naturales (The Respondent's Ministry of Environment and Natural Resources);

"*MINEC"* means Ministerio de Economía (The Respondent's Ministry of Economy);

"*Mining Law*" means Ley de Minería (The Respondent's Mining Law of 1995, amended in 2001);

"*ONI"* means Oficina Nacional de Inversiones (The National Office of Investments, a division of MINEC);

"*Pacific Rim*" means Pacific Rim Mining Corporation;

"*PRC"* means the Claimant (Pac Rim Cayman LLC);

"*PRES*" means Pacific Rim El Salvador, Sociedad Anónima de Capital Variable

List of Selected Legal Materials

Treaties:

The Dominican Republic-Central America-United States Free Trade Agreement of 2004 ("CAFTA")

The ICSID Convention on the Settlement of Investment Disputes of 1965 ("ICSID Convention")

The Vienna Convention on the Law of Treaties of 1969 ("Vienna Convention")

Salvadoran Laws:

Investment Law, Legislative Decree No. 732, 14 October 1999

Mining Law, Legislative Decree No. 544, 14 December 1995, amended by Legislative Decree No. 475, 11 July 2001

Regulations of the Mining Law and its Amendments, Legislative Decree No. 47, 20 June 2003

Decisions, Awards and Judgments:

Alex Genin and others v. Republic of Estonia, ICSID Case No. ARB/99/2, Decision on Claimants' Request for Supplementary Decisions and Rectification, 4 April 2002

Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection – Judgment, 22 July 1952, ICJ Reports 1952

Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, 19 December 1978, ICJ Reports 1978

Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001

African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No ARB/05/21, Award, 29 July 2008

Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent"s Objections to Jurisdiction, 21 October 2005

Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela, ICSID Case No ARB/08/3, Decision on Respondent"s Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009

Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010

Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008

Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17, Award, 14 March 2011

Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 12 August 2008

Electricity Company of Sofia v. Bulgaria (Belgium v. Bulgaria), 1939 P.C.I.J. (ser. A/B) No. 77 (Order of Apr. 4)

Fisheries Jurisdiction (Spain v. Canada), Judgment, 4 December 1998, ICJ Reports 1998

Generation Ukraine Inc. v. Ukraine, ICSID Case No ARB/00/9, Award, 16 September 2003

Impregilo S.p.A v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005

Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006

Ioannis Kardassopoulos v. Georgia, ICSID Case ARB/05/18, Decision on Jurisdiction, 6 July 2007

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 11 June 1998, ICJ Reports 1988

Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005 (ECT), Final Award, 26 March 2008

M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, 31 July 2007

Methanex Corp. v. United States of America, UNCITRAL Arbitration Rules, IIC 166 (2002), Partial Award, 7 August 2002

Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010

Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002

Petrobart v. Kyrgyz Republic, SCC 126/2003, Award, 29 March 2005

Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009

Phosphates in Morocco (Italy v. France), 1938 P.C.I.J. (ser. A/B) No. 74 (June 14)

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, 17 November 2008

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No ARB/07/23, Decision on Clarification Request of the Decision on Jurisdiction, 13 January 2009

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010

Rights of Minorities in Upper Silesia (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26)

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004

Société Générale v. Dominican Republic, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008

Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No ARB/84/3, Second Decision on Jurisdiction, 14 April 1988

Tokios Tokelés v.Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004

Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25, Decision on Respondent‟s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008

Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000

Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009

Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1, Award, 24 January 2003

Miscellaneous Materials:

ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission, 2001, Vol II, Part Two

Kinnear (et al), *Investment Disputes under NAFTA, An Annotated Guide to Chapter 11* (2006)

Leathley, *International Dispute Resolution in Latin America: An Institutional Overview* (2007)

Schreuer, et al. *The ICSID Convention: A Commentary* (2nd ed. 2009)

Yearbook of the International Law Commission, 1966, Vol. II

PART 1: THE ARBITRATION

A: The Parties

1.1. *The Claimant*: The named Claimant is Pac Rim Cayman LLC (also called "Pac Rim Cayman" or "PRC"), a legal person organised under the laws of Nevada, USA, with its principal office at 3545 Airway Drive, Suite 105, Reno, Nevada 89511, USA. The Claimant is wholly owned by Pacific Rim Mining Corporation (also called "Pacific Rim"), a legal person organised under the laws of Canada. In these arbitration proceedings, the Claimant advances several claims against the Respondent both on its own behalf and on behalf of its subsidiary companies, collectively described as the "Enterprises."

1.2. *The Enterprises*: The Enterprises are legal persons organised under the laws of the Respondent, namely: (i) Pacific Rim El Salvador, Sociedad Anónima de Capital Variable (also called "PRES"), with its principal office at 5 Avda. Norte, No. 16, Barrio San Antonio, Sensuntepeque, Cabañas, El Salvador; and (ii) Dorado Exploraciones, Sociedad Anónima de Capital Variable (also called "DOREX"), with its principal office at the same address. PRES is the owner of certain rights in the mining areas denominated as "El Dorado Norte," "El Dorado Sur" and "Santa Rita"; and DOREX is the owner of certain rights in the mining areas denominated as "Huacuco", "Pueblos" and "Guaco." These mining areas are located in Las Cabañas and San Vicente, in the northern part of El Salvador.

1.3. *ICSID & CAFTA*: The Claimant is and has been since 13 December 2007 a national of a Contracting State to the Convention on the Settlement of Investment Disputes (the "ICSID Convention") and the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA" or "CAFTA"), in force for the USA as from August 2005. Canada is not a Contracting State to CAFTA or the ICSID Convention; and Pacific Rim, being a Canadian legal person, is not and never has been a national of a Contracting State to CAFTA or the ICSID Convention.

1.4. Prior to 2 March 2012, the Claimant had designated its legal representatives as Messrs Arif H. Ali, Alexandre de Gramont, R. Timothy McCrum, and Theodore Posner Esqs, all of Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington, DC 20004. By letter dated 2 March 2012, the Claimant advised the Secretary of the Tribunal that Messrs Ali, de Gramont, and Posner had changed law firms, and submitted a Power of Attorney providing that Claimant"s legal representatives henceforth be designated as Arif H. Ali, Alexandre de Gramont, and Theodore Posner, Esqs. of Weil, Gotshal & Manges LLP, 1300 Eye Street NW, Suite 900, Washington, DC 20005, and R. Timothy McCrum, Ian A. Laird, Kassi D. Tallent, and Ashley R. Riveira of Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington, DC 20004.

1.5. *The Respondent*: The Respondent is the Republic of El Salvador.

1.6. The Respondent is a Contracting State to the ICSID Convention. It is also a Contracting State to CAFTA, in force for the Respondent as from 1 March 2006.

1.7. The Respondent"s legal representative is Lic. Romeo Benjamín Barahona, Fiscal General de la República, Final 48 Calle Oriente y 19 Avenida Sur, Residencial Primavera, Santa Tecla, La Libertad, EI Salvador. Prior to 10 May 2012, the Respondent had also designated its legal representatives as Messrs Derek C. Smith, Luis Parada, Tomás Solís and Ms Erin Argueta, all of Dewey & LeBoeuf LLP, 1101 New York Avenue NW, Suite 1100, Washington D.C. 20005, USA. By letter dated 10 May 2012, the Respondent submitted a Power of Attorney providing that Messrs Smith, Parada and Solís, and Ms Argueta had moved to Foley Hoag LLP, 1875 K Street NW, Suite 800, Washington, DC 20006, but continued to represent the Respondent in this arbitration.

B: The Dispute

1.8. *The Claims:* As asserted by the Claimant (but denied by the Respondent), the claims pleaded by the Claimant (with the Enterprises) allege: (i) the Respondent"s arbitrary and discriminatory conduct, lack of transparency, unfair and inequitable treatment in failing to act upon the Enterprises' applications for a mining exploitation conces-

sion and environmental permits following the Claimant‟s discovery of valuable deposits of gold and silver under exploration licenses granted by MINEC for the Respondent; (ii) the Respondent's failure to protect the Claimant's investments in accordance with the provisions of its own law and (iii) the Respondent‟s unlawful expropriation of the investments of the Claimant (with the Enterprises) in El Salvador.

1.9. The details of these claims pleaded by the Claimant are set out in the Decision of 2 August 2010 issued by the Tribunal, to which further reference is made below.

1.10. *CAFTA:* In pursuance of these claims, it is alleged by the Claimant that the Respondent breached its obligations under Section A of CAFTA, namely: (i) CAFTA Article 10.3: "National Treatment"; (ii) CAFTA Article 10.4: "Most-Favoured Nation Treatment"; (iii) CAFTA Article 10.5: "Minimum Standard of Treatment"; (iv) CAFTA Article 10.7: "Expropriation and Compensation"; and (v) CAFTA Article 10.16.1(b)(i)(B): as to "investment authorizations."

1.11. *Investment Law*: The Claimant also alleges that the Respondent has breached the Salvadoran Investment Law, which prohibits expropriation without compensation, as well as unjustified or discriminatory measures which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of foreign investments (Article 5 - Equal Protection, Article 6 - Non-Discrimination, and Article 8 - Expropriation).

1.12. *Other Salvadoran Laws:* The Claimant also alleges that the Respondent has breached the Salvadoran Mining Law (Articles 8, 14, 19 and 23), Article 86 of the Salvadoran Constitution, Article 1 of the Salvadoran Civil Code and Article 4(j) of the Salvadoran Governmental Ethics Law.

1.13. During the Hearing (described below), the Claimant significantly clarified, inter alia, the temporal limits to its CAFTA Claims, namely claims for damages only from the period from March 2008 forwards and not for any earlier period. The Tribunal returns to this late clarification of the Claimant‟s pleaded case later in this Decision.

C: The Tribunal's Decision of 2 August 2010

1.14. On 2 August 2010, the Tribunal issued its Decision on the Respondent"s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (for ease of reference, here called "the Decision of 2 August 2010").

1.15. In Part X of the Decision of 2 August 2010 (paragraph 266), the Tribunal decided for the reasons therein set out:

(1) As to the Respondent"s Objections under CAFTA Article 10.20.4, these objections are not granted by the Tribunal;
(2) As to the Respondent"s Objection under CAFTA Article 10.20.5, this objection is not granted by the Tribunal;
(3) As to costs, the Tribunal here makes no order under CAFTA Article 10.20.6, whilst reserving all its powers as to orders for costs at the final stage of these arbitration proceedings; and
(4) As to all other matters, the Tribunal retains its full powers to decide any further matters in these arbitration proceedings, whether by order, decision or award.

1.16. The Decision of 2 August 2010 (with its all recitations and reasons) should be read with this Decision to avoid unnecessary repetition here.

D: The Respondent's Jurisdictional Objections

1.17. The Respondent submitted its Objections to Jurisdiction under ICSID Arbitration Rule 41(1) on 3 August 2010, leading to the further procedure resulting in this Jurisdiction Decision. The Respondent"s Objections comprise four independent grounds to this Tribunal"s jurisdiction: (i) Abuse of Process by the Claimant; (ii) Ratione Temporis; (iii) the Respondent"s Denial of Benefits under CAFTA Article 10.12.2; and (iv) the Investment Law.

1.18. ***Procedural Orders:*** During this further procedure, the Tribunal made a number of procedural orders, all of which were issued or recorded in writing. It is unnecessary to set out their terms here.

1.19. ***Jurisdiction Memorials:*** Pursuant to the Tribunal"s procedural orders, the Respondent submitted its Memorial on its Objections to Jurisdiction dated 15 October 2010 (here described as the Respondent"s "Jurisdiction Memorial"); the Claimant submitted its Counter-Memorial on the Respondent"s Objections to Jurisdiction on 31 December 2010 (here described as the Claimant"s "Jurisdiction Counter-Memorial"); the Respondent submitted its Reply Memorial on the Claimant"s Jurisdiction Counter-Memorial on 31 January 2011 (here described as the Respondent"s "Jurisdiction Reply"); and the Claimant submitted its Rejoinder Memorial on the Respondent"s Jurisdiction Reply on 2 March 2011(here described as the Claimant"s "Jurisdiction Rejoinder").

1.20. ***Written Testimony:*** The Parties adduced the following written testimony in support of their respective cases on jurisdiction: for the Respondent, the witness statement of Mr Luis Alberto Parada dated 14 March 2011; and for the Claimant, the witness statements of Ms Catherine McLeod Seltzer dated 31 December 2010, Mr Tom Shrake dated 31 December 2010, Mr Steven K. Krause dated 31 December 2010 and Mr Charles Pasfield dated 2 March 2011.

1.21. ***The Hearing:*** The Hearing on the Respondent"s jurisdictional objections took place over three days, from 2 to 4 May 2011, at the World Bank, Washington DC, USA, recorded by verbatim transcript (here referred to as "D1", "D2" and "D3"). The Hearing was attended by (inter alios) the following Parties and Non-Participating Parties.

1.22. *The Claimant:* The Claimant was represented by Mr Tom Shrake and Ms Catherine McLeod-Seltzer; and from Messrs Crowell & Moring LLP by Mr Arif H. Ali, Mr Alexandre de Gramont, Mr R. Timothy McCrum, Mr Theodore Posner, Ms Ashley R. Riveira, Ms Marguerite C. Walter, Ms Kassi Tallent, Mr Timothy Hughes, Ms Maria Carolina Crespo, Ms Christina Ferraro, Mr Stephen Duncan and Ms Jessica Ferrante.

1.23. *The Respondent:* The Respondent was represented by Mr Benjamín Pleités (Secretary General of the Attorney General‟s Office), Mr Daniel Ríos (Legal Adviser from the Ministry of the Economy), Mr René Salazar (Director General of Commercial Treaty Administration, Ministry of Economy), Mr Enilson Solano and Ms Claudia Beltrán (of the Respondent‟s Embassy in Washington DC); and from Messrs Dewey & LeBoeuf by Mr Derek Smith, Mr Aldo Badini, Mr Luis Parada, Mr Tomás Solís, Ms Erin Argueta, Ms Mary Lewis, Mr Albert Coto and Ms Jamihlia Johnson.

1.24. *Costa Rica:* The Republic of Costa Rica, as a Non-Disputing Party, was represented by Mr José Carlos Quirce (of the Ministerio de Comercio Exterior) and Ms Laura Dachner (of Costa Rica‟s Embassy in Washington DC).

1.25. *USA:* The USA, as a Non-Disputing Party, was represented by Mr Mark Feldman, Ms Alicia Cate, Mr Patrick Pearsall, Ms Kimberley Claman, Mr David Bigge, Ms Katharine Kelly, Ms Karen Kizer, Mr Lee Caplan, Mr Jeremy Sharpe (all from the US Department of State), Mr Gary Sampliner (of the U.S. Department of Treasury), Ms Kimberley Claman (of the United States Trade Representative) and Mr Chris Herman (of the U.S. Environmental Protection Agency).

1.26. The Hearing was also attended by, as interpreters: Ms Silvia Colla, Ms Judith Letendre and Mr Daniel Giglio; and, as court reporters: Mr Rodolfo Rinaldi and Mr David Kasdan.

1.27. The Parties made respective oral opening submissions at the Hearing: for the Respondent: Mr Smith [D1.6], Mr Badini [D1.71] and Mr Parada [D1.106]; and for the Claimant: Mr Ali [D1.131], Mr de Gramont [D1.152], Mr Posner [D1.212] and Mr Walter [D1.264]. The Non-Disputing Parties present at the Hearing elected not to make oral submissions to the Tribunal.

1.28. The Parties made respective closing oral submissions at the Hearing: for the Respondent: Mr Smith [D3.576 & 756] and Mr Badini [D3.620 & 751]; and for the Claimant: Mr Ali [D3.653 & 739], Mr de Gramont [D3.655] and Mr Posner [D3.698].

1.29. ***Oral Testimony:*** The Parties adduced the following oral testimony at the Hearing: for the Respondent: Mr Parada [D2.284x, D2.298xx, D2.400xxx and D2.515xxxx]; and for the Claimant: Mr Shrake [D2.420x, D2.432xx, D2.510xxx and D2.532xxxx]. (Here and below, "x" denotes direct examination, "xx" cross-examination, "xxx" re-direct examination and "xxxx" re-cross-examination).

1.30. ***Post-Hearing Submissions:*** Pursuant to the Tribunal‟s procedural orders regarding post-hearing written submissions, on 10 June 2011, the Respondent and the Claimant respectively submitted their final submissions (together with submissions on costs); and, on 24 June 2011, the Respondent and the Claimant respectively submitted their reply submissions on costs.

E: Non-Disputing Party Written Submissions

1.31. ***Costa Rica:*** Under cover of a letter dated 13 May 2011 from the Ministry of Foreign Trade ("Comex"), Costa Rica submitted a Non-Party Submission pursuant to CAFTA Article 10.20.2 signed by Mr Federico Valerio de Ford, Ms Mónica C. Fernández Fonseca and Mr Luis Adolfo Fernández, relating to (i) denial of benefits under CAFTA Article 10.12.2 and (ii) the definition in CAFTA of an "investor" and a "national" (For ease of reference, here described as "the Costa Rica Submission").

1.32. ***USA:*** By an email message dated 20 May 2011 from the US Department of State, the United States of America submitted a Non-Party Submission pursuant to CAFTA Article 10.20.2 signed by Mr Jeffrey D. Kovar, Ms Lisa J. Grosh, Mr Mark E. Feldman and Ms Alicia Cate, relating to denial of benefits under CAFTA Article 10.12.2. (For ease of reference, here described as "the USA Submission").

F: Amicus Curiae

1.33. Pursuant to CAFTA Article 10.20.3, Article 37(2) of the ICSID Arbitration Rules and the Tribunal‟s Procedural Order dated 23 March 2011, eight member organizations of La Mesa Frente a la Minería Metálica de El Salvador (The El Salvador National Roundtable on Mining) submitted a written submission dated 20 May 2011

under cover of a letter also dated 20 May 2011 from the Centre for International Environmental Law ("CIEL"), signed by Mr Marcos A. Orellana of CIEL, Mr Aaron Marr Page of Forum Nobis PLLC and Mr Stuart G. Gross of Gross Law. (For ease of reference, here described as "the Amicus Curiae Submission").

1.34. The Tribunal received no application from any other person or body to make submissions as an amicus curiae in these arbitration proceedings (whether timely or otherwise), notwithstanding apparent public statements made by certain persons to the contrary.

1.35. The Tribunal's Procedural Order dated 23 March 2011 as regards submissions from amici curiae was made available to all interested persons; and it provided (inter alia) as follows:[1]

> *~~I~~n accordance with Article 10.20.3 of the Dominican Republic-Central America United States Free Trade Agreement (DR-CAFTA-US) and ICSID Arbitration Rule 37(2), the Tribunal invites any person or entity that is not a Disputing Party in these arbitration proceedings or a Contracting Party to DR-CAFTA-US to make a written application to the Tribunal for permission to file submissions as an amicus curiae.*
>
> *All such written applications should:*
>
> *(1) be emailed to ICSID at icsidsecretariat@worldbank.org by Wednesday, 2 March 2011;*
>
> *(2) in no case exceed 20 pages in all (including the appendix described below);*
>
> *(3) be made in one of the languages of these proceedings, i.e. English or Spanish;*
>
> *(4) be dated and signed by the person or by an authorized signatory for the entity making the application verifying its contents, with address and other contact details;*
>
> *(5) describe the identity and background of the applicant, the nature of any membership if it is an organization and the nature of any relationships to the Disputing Parties and any Contracting Party;*
>
> *(6) disclose whether the applicant has received, directly or indirectly, any financial or other material support from any Disputing Party, Contracting Party or from any person connected with the subject-matter of these arbitration proceedings;*

[1] The full text was and remains published on ICSID's web-site at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement81.

(7) specify the nature of the applicant's interest in these arbitration proceedings prompting its application;

(8) include (as an appendix to the application) a copy of the applicant's written submissions to be filed in these arbitration proceedings, assuming permission is granted by the Tribunal for such filing, such submissions to address only matters within the scope of the subject-matter of these arbitration proceedings; and

(9) explain, insofar as not already answered, the reason(s) why the Tribunal should grant permission to the applicant to file its written submissions in these arbitration proceedings as an amicus curiae …"

1.36. The Amicus Curiae Submission received by this Tribunal addressed the following matters: (i) the factual background to the dispute raised by the Claimant in these arbitration proceedings, (ii) whether there exists any "legal dispute" under Article 25 of the ICSID Convention or any "measure" under CAFTA Article 10.1, as distinct from the Claimant"s dissatisfaction with Salvadoran public policy in recent years and the "independently-organized communities who have risen up against the Claimant"s projects, i.e. [the] amici"; (iii) whether the Claimant"s claim amounts to an abuse of process; and (iv) the Respondent"s denial of benefits under CAFTA Article 10.12.2.

1.37. The Amicus Curiae Submission concludes:

> *"The general political debate concerning sustainability, metals mining and democracy in El Salvador is ongoing. Pac Rim has attempted to influence the political debate, but has been disappointed in its lobbying efforts. Dissatisfied with the direction of the democratic dialogue, Pac Rim has abused the arbitral process by changing its nationality to attract jurisdiction. The Tribunal should not sanction this abuse and, more important, has no jurisdiction to hear a complaint against the course of a political debate."*

1.38. The Tribunal notes that the Amicus Curiae Submission does not address the further jurisdictional issues raised by the Respondent regarding "Ratione Temporis" and the "Investment Law." The Tribunal also notes that the Respondent, unlike the Amicus Curiae Submission, has not impugned this Tribunal"s jurisdiction by reference to Article 25 of the ICSID Convention and CAFTA Article 10.1.

G: The Parties' Claims for Relief as regards Jurisdiction

1.39. ***The Respondent:*** In its Jurisdiction Memorial (paragraph 476), the Respondent requests the Tribunal to:

(i) Issue an award dismissing all claims in this arbitration for lack of jurisdiction resulting from the Claimant"s abuse of process;

(ii) Award the Respondent all arbitration costs and legal fees incurred in this arbitration, plus interest.

1.40. In its Reply Costs Submissions, the Respondent rejected the Claimant"s request for an order for costs.

1.41. ***The Claimant:*** In its Post-Hearing Submissions (paragraph 113), Costs Submission (paragraph 35) and Reply Costs Submission (paragraph 3), the Claimant requests this Tribunal:

(i) to deny all of the jurisdictional objections raised by the Respondent with prejudice;

(ii) to enter a procedural order for concluding the remainder of this case in a single, expeditious phase;

(iii) to issue an order allocating to Respondent all the costs of these proceedings to date; and

(iv) to decline the Respondent"s request for an award of costs.

1.42. ***The Tribunal's Request to the Parties:*** By letter dated 13 September 2011 (communicated to the Parties by the Tribunal"s Secretary), the Tribunal requested the Parties" assistance in clarifying the jurisdictional objections addressed by the Parties in these arbitration proceedings, as follows:

> *—... During its current deliberations (which are not complete), the Tribunal has noted that the unnumbered first sub-paragraph of Paragraph 476 in the —Prayers for Relief" of Part IX (page 152) of the Respondent's Memorial on its Objections to Jurisdiction dated 15 October 2010 may not be wholly consistent with the full list of jurisdictional objections pleaded both earlier in that same document (for example, see Paragraph 457, at pages 145-146) and the Respondent's subsequent written and oral submissions to the Tribunal, as also addressed by the Claimant.*

If there were in fact any inconsistency, the Tribunal requests the Parties to clarify the full list of the jurisdictional objections addressed in these arbitration proceedings.

Accordingly, the Tribunal requests the Respondent (as the Disputing Party raising jurisdictional objections) briefly to clarify in writing the full list of its jurisdictional objections as soon as possible but no later than 26 September 2011; and the Tribunal requests the Claimant (as the Disputing Party responding to such objections) to respond briefly in writing to such clarification, within two weeks of its receipt ..."

1.43. The Respondent responded to the Tribunal's request by letter dated 26 September 2011, confirming (inter alia) the list of its objections as summarised in an attached "outline", as follows (with underlining and other emphasis here omitted):

—I: Primary Objection against all claims in this arbitration: Abuse of Process

If the Tribunal finds that Claimant's actions constitute Abuse of Process, El Salvador requests the Tribunal to dismiss the entire arbitration (Memorial, para. 71) by:

A: Rejecting jurisdiction and dismissing all claims under CAFTA (Memorial, paras. 61-70); and

B: Rejecting jurisdiction and dismissing all claims under the Investment Law of El Salvador (Memorial, paras. 103-105).

II: Alternative Objections:

A: Alternative 1: If the Tribunal decides that there is no Abuse of Process:

(1) With regard to the CAFTA claims, El Salvador requests the Tribunal to dismiss all CAFTA claims for lack of jurisdiction based on any of the following independent objections:

(i) Denial of benefits provisions of CAFTA (Memorial, para. 106; 253-254); or
(ii) Pac-Rim Cayman is not an Investor of a Party (Memorial, paras. 256-259); or
(iii) There is no jurisdiction ratione temporis (Memorial, paras. 305-318); or
(iv) CAFTA's three-year statute of limitations precludes consideration of Claimant's main claims (Memorial, paras. 324-336);and

(2) With regard to the Investment Law claims, El Salvador requests the Tribunal to dismiss all claims under the Investment Law of El Salvador for lack of jurisdiction based on any of the following independent objections:

a. Enforcing the CAFTA waiver (Memorial, paras. 428-454); or
b. Pac-Rim Cayman is not a —Foreign Investor" under the Investment Law (Memorial, paras. 379-380); or

c. Piercing the corporate veil (Memorial, paras. 381-413); or
d. Article 15 of the Investment Law does not constitute consent (Memorial, paras. 337-379); or, in the alternative, the Investment Law claims are inadmissible (Memorial, paras. 424-427); or
e. Indivisibility of the CAFTA claims and the Investment Law claims (Memorial, para. 105).

B: Alternative 2: If the Tribunal finds that Claimant's actions constituted Abuse of Process, but that the Abuse of Process only affects the CAFTA claims and only results in the rejection of jurisdiction under CAFTA,

(1) El Salvador requests the Tribunal to also dismiss all claims under the Investment Law for lack of jurisdiction based on any of the independent objections listed in paragraph II.A.2 above, i.e.,

a. Enforcing the CAFTA waiver (Memorial, paras. 428-454); or
b. Pac-Rim Cayman is not a "Foreign Investor" under the Investment Law (Memorial, paras. 379-380); or
c. Piercing the corporate veil (Memorial, paras. 381-423); or
d. Article 15 of the Investment Law does not constitute consent (Memorial, paras. 337-379); or, in the alternative, the Investment Law claims are inadmissible (Memorial, paras. 424-427); or
e. Indivisibility of the CAFTA claims and the Investment Law claims (Memorial, para. 105)."

1.44. The Claimant responded by letter dated 10 October 2011 to the Tribunal's request, stating (inter alia) as follows:

"... Claimant wishes to observe that Respondent's recitation of its objections in the September letter is not entirely consistent with its previous pleadings, and in some instances is internally contradictory. The primary ambiguity arises from Respondent's seemingly interchangeable use of the terms, "dismiss for lack of jurisdiction" and "reject jurisdiction." For example, in their first paragraph of page 2 of the September letter, Respondent asserts that if the Tribunal finds an abuse of process, it should dismiss all claims "for lack of jurisdiction." In the following paragraph, however it asserts that the consequence of a finding of abuse of process would be for the Tribunal to "reject jurisdiction under CAFTA."

A dismissal for lack of jurisdiction occurs where a claimant has failed to demonstrate that the requirements for jurisdiction are satisfied. On the other hand, the notion of "rejecting" jurisdiction indicates that the requirements for jurisdiction have been proved – i.e., jurisdiction exists – but the tribunal, in the exercise of its discretion, chooses not to accept jurisdiction. Here, this distinction is relevant because Respondent has raised objections to the Tribunal's jurisdiction ratione temporis (under CAFTA) and ratione personae and voluntatis (under the Investment Law), while also raising objections that, in Respondent's own words, "are not strictly tied to the requirements for jurisdiction, like Abuse of Process and Denial of Benefits."

Given the manner in which Respondent has articulated its objections (as opposed to the relief which it may have requested in connection therewith, or the order in which the objections may have been presented), Claimant does not understand the objection dubbed "Abuse of Process" to be an objection based on a "lack of jurisdiction." As Respondent has described it in its Objections, its abuse of process argument is derived from a judicial doctrine of a discretionary nature, whereby an international tribunal may decline to exercise its jurisdiction if it concludes, based on an assessment of the "particular facts and circumstances of the case," that to do so would undermine the tribunal's integrity or otherwise constitute an abuse of the arbitral procedure.

In Claimant's view, it is clear that abuse of process, as an equitable doctrine, is not relevant to the question of whether or not the Tribunal has jurisdiction over the present dispute. Indeed, as it has emphasized on past occasions, Claimant is not aware of any investment arbitration tribunal having dismissed an entire case for lack of jurisdiction on the sole basis of abuse of process. In this regard, Claimant has repeatedly referred to the guidance provided by the Rompetrol tribunal, cautioning that dismissal on the sole basis of abuse of process would require a tribunal to disregard the jurisdiction that it is "bound to exercise" under the terms of the Washington Convention; and that a tribunal certainly is not in a position, "at [a] very preliminary stage, before it has even had the benefit of the Claimant's case laid out in detail in a Memorial, let alone the supporting evidence," to assess a question of abuse of process, including the attendant considerations of the Claimant's motivation in bringing its claims to arbitration.

In conclusion, Claimant submits that Respondent's abuse of process objections is a request for an extraordinary remedy under which the Tribunal may decline to exercise its jurisdiction even where all of the jurisdictional requirements have been met, because it has concluded that the arbitral process has been so severely abused that it would be improper to hear the merits of the dispute. In this case, there is more than enough argument and evidence presently before the Tribunal to demonstrate that such a remedy would be entirely unwarranted and inappropriate. Thus, notwithstanding that the abuse of process objection does not and cannot per se affect the Tribunal's jurisdiction, Claimant submits that the Tribunal should proceed to evaluate and reject the objection and the associated relief requested ..."

1.45. By letter dated 18 October 2011 (communicated by the Tribunal's Secretary), the Tribunal acknowledged receipt of the Parties' two responses, having also noted their respective contents for the purpose of this Decision.

H: The Jurisdictional Issues

1.46. It is convenient for the purpose of this Decision to describe the Respondent"s jurisdictional objections under four separate headings: (A) the "Abuse of Process" issue regarding the Claimant"s claims under CAFTA; (B) the "Ratione Temporis" issue; (C) the "Denial of Benefits" issue regarding the Claimant"s claims under CAFTA; and (D) the "Investment Law" issue regarding the Claimant"s Non-CAFTA claims. The Abuse of Process Issue does not apply to the Claimant"s Non-CAFTA claims, as determined by the Tribunal. In addition, the Tribunal addresses the Parties" respective claims for Legal and Arbitration Costs (E).

1.47. In addressing these Issues A to E, the Tribunal has considered all the written and oral submissions made by the Parties. In order to explain the grounds for this Decision, it is necessary below to cite or summarise a certain number of these submissions at some length, but not all of them. The fact that a submission is not cited or summarised below does not signify that it was not considered by the Tribunal in arriving at this Decision.

ANNEX TO PART 1: THE RELEVANT LEGAL TEXTS

1.1. It is appropriate here, for later ease of reference, to set out the relevant legal texts from (i) the Investment Law, (ii) CAFTA, (iii) the ICSID Convention, (iv) the ICSID Arbitration Rules and (v) the International Law Commission"s Articles on State Responsibility.

(01) The Investment Law

1.2. Article 15(a) of the Investment Law provides (as translated by the Claimant from the original Spanish into English), in relevant part:

> *"In the case of disputes arising among foreign investors and the State, regarding their investments in El Salvador, the investors may submit the controversy to: (a) The International Centre for Settlement of Investment Disputes (lCSID), in order to settle the dispute by ... arbitration, in accordance with the Convention on Settlement of Investment Disputes Between States and Investors of Other States (ICSID Convention) ..."*

1.3. The original Spanish text of Article 15 of the Investment Law provides, in full:

> "*En caso que surgieren controversias ó diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los tribunales de justicia competentes, de acuerdo a los procedimientos legales. En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en EI Salvador, los inversionistas podrán remitir la controversia: (a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI); ...*".

(02) CAFTA

1.4. ***CAFTA Article 10.1: Scope and Coverage***

~~1~~. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) covered investments; and

(c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.

2. A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.

3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."

1.5. ***CAFTA Article 10.12: Denial of Benefits***

~~1~~. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise."

1.6. ***CAFTA Article 10.15: Consultation and Negotiation***

"In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation."

1.7. ***CAFTA Article 10.16: Submission of a Claim to Arbitration***

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this section a claim

(i) that the respondent has breached

(A) an obligation under Section A [of Chapter Ten]

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. *At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (―notice of intent"). The notice shall specify:*

   (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

   (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

   (c) the legal and factual basis for each claim; and

   (d) the relief sought and the approximate amount of damages claimed.

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:*

   (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

   (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or

   (c) under the UNCITRAL Arbitration Rules.

4. *A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration (―notice of arbitration"):*

   (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

   (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General; or

   (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent.

   A claim asserted for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

[...]"

1.8. ***CAFTA Article 10.17: Consent of Each Party to Arbitration***

—1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an —agreement in writing;" and

(c) Article I of the Inter-American Convention for an —agreement."

1.9. ***CAFTA Article 10.18: Conditions and Limitations on Consent of Each Party***

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

2. No claim may be submitted under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any

measure alleged to constitute a breach referred to in Article 10.16.

3. *Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.*

4. *No claim may be submitted to arbitration:*

   (a) *for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or*

   (b) *for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C).*

if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.61.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution."

1.10. ***CAFTA Article 10.20: Conduct of the Arbitration***

—2. *A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement."*

3. *The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party...*

6. *When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment..."*

1.11. ***CAFTA Article 10.22: Governing Law***

—1. *Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*

2. *Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(b) or (C), the tribunal shall apply:*

   (a) the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree; or

   (b) if the rules of law have not been specified or otherwise agreed:

      (i) the law of the respondent, including its rules on the conflict of laws; and

      (ii) such rules of international law as may be applicable.

3. *A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 19.1.3(c) (The Free Trade Commission) shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent with that decision."*

1.12. ***CAFTA Article 10.28: Definitions***

—'enterprise' means an enterprise as defined in Article 2.1 (Definitions of General Application) and a branch of an enterprise; ..."

[Article 2.1 provides:— 'enterprise of a Party' means an enterprise constituted or organised under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there"; ..."]

—national' means a natural person who has the nationality of a Party according to Annex 2.1 (Country-Specific Definitions); ..."

[Annex 2.1(g) provides: —with respect to the United States, national of the United States' as defined in the existing provisions of the Immigration and Nationality Act..."].

(03) The ICSID Convention

1.13. ***ICSID Article 25(1)***

—1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

1.14. ***ICSID Article 27***

—1. No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

2. Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."

(04) The ICSID Arbitration Rules

1.15. ***ICSID Arbitration Rule 27***

—A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object."

1.16. ***ICSID Arbitration Rule 28***

—(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs(as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties…"

1.17. ***ICSID Arbitration Rule 37(2)***

"After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observation on the non-disputing party submission"

1.18. ***ICSID Arbitration Rule 41(1)***

"1. Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time."

(5) ILC Articles on State Responsibility

1.19. ***Article 14 - Extension in time of the breach of an international obligation***

~~1~~. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

1.20. ***Article 15 - Breach consisting of a Composite Act***

~~1~~. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."

PART 2: ISSUE A - ABUSE OF PROCESS

(01) Introduction

2.1. This first issue as to Abuse of Process, as alleged by the Respondent and denied by the Claimant, was the principal issue raised in the Parties‟ written and oral submissions at the Hearing. Although, as later determined by the Tribunal in this Decision, it is not the decisive issue as regards the Respondent‟s jurisdictional objections to the Claimant‟s CAFTA claims, the Tribunal considers it appropriate to begin with it as a matter of courtesy to the Parties.

(02) The Burden and Standard of Proof

2.2. The Tribunal has first to establish its general approach to the question of proof for the purpose of this issue, as with other jurisdictional issues. Two distinct factors are relevant: (i) the burden of proof, i.e. on which party the obligation rests to prove its case; and (ii) the standard of proof required to discharge that burden, i.e. whether it is a "prima facie" standard (as submitted by the Claimant) or a different standard.

2.3. *Standard of Proof:* As far as the standard of proof is concerned, both in its Jurisdiction Counter-Memorial and Rejoinder, the Claimant requested the Tribunal to "accept pro tem the facts as alleged by [the Claimant] to be true and in that light to interpret [the relevant provisions of the treaty] for jurisdictional purposes;"[2] and the Claimant cited a number of decisions that have allegedly applied such an approach, including (in its submission) the *Phoenix* award.

2.4. In contrast, the Respondent submitted that the Claimant‟s factual allegations relevant to the Tribunal‟s decision on jurisdiction cannot enjoy any special status as assumed facts. The Respondent contended that the Claimant must meet its full standard of

[2] Jurisdiction Counter-Memorial, § 37.

proof or the Claimant"s allegations must be considered unproven, with necessarily adverse consequences for the Claimant"s jurisdictional case.[3]

2.5. At an early jurisdictional stage of an arbitration, as regards facts alleged by a claimant in its pleadings but not admitted or even denied by a respondent, the Tribunal acknowledges that it is often said that an arbitration tribunal is required to test the factual basis of a claimant"s claim by reference only to a "prima facie" standard – as regards the merits of such claim. That standard was most clearly expressed by Judge Higgins in the well-known passage from her separate opinion in *Oil Platforms;* and it has been applied, as a general practice, by many tribunals in addressing jurisdictional objections made in many investor-state arbitrations.[4]

2.6. In this case, as regards the Respondent"s several jurisdictional objections, the Tribunal is not minded to accept the Claimant"s submissions, for two reasons.

2.7. First, this Tribunal has already received from both Parties a substantial mass of written and oral evidence, including the cross-examination of certain important witnesses at the Hearing. Accordingly, having received such extensive evidential materials directed at factual issues, the Tribunal thinks it inappropriate to apply to those issues a lesser standard of proof in favour of the Claimant, when the Tribunal can arrive fairly at its decision on a sufficient evidential record to which both Parties have had a full opportunity to contribute and, moreover, have also substantially contributed.

2.8. Second, but more importantly, the Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant"s CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that "prima facie" or other like standard is limited to testing the merits of a claimant"s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal"s jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of

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3 Jurisdiction Reply, § 12.

4 These materials are considered by Schreuer (et al), *The ICSID Convention: A Commentary* (2nd ed), pp. 540-542.

Benefits issues in this case. In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision *pro tempore* by a tribunal.

2.9. The *Phoenix* award makes the point clearly, as follows:

> "*In the Tribunal's view, it cannot take all the facts as alleged by the Claimant as granted facts, as it should do according to the Claimant, but must look into the role these facts play either at the jurisdictional level or at the merits level, as asserted by the Respondent.*
>
> *If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."*[5]

Accordingly, this Tribunal is here required to determine finally whether it has jurisdiction over the Claimant"s CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant"s favour.

2.10. The Tribunal therefore decides, in regard to all disputed facts relevant to the jurisdictional issues under CAFTA not to apply the lesser "prima facie" standard in favour of the Claimant; but, rather, the higher standard of proof applicable to both Parties" cases, whether it be described as the preponderance of the evidence or a standard based on a balance of probabilities. In arriving at this decision, the Tribunal has noted that the Respondent"s jurisdictional objection based on Abuse of Process by the Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal"s jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist. For present purposes, the Tribunal considers this to be a distinction without a difference.

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[5] *Phoenix Action Ltd v. Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009, §§ 60-61. [*Phoenix v. Czech Republic*]

2.11. *Burden of Proof:* As far as the burden of proof is concerned, in the Tribunal‟s view, it cannot here be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, in other words, the Claimant has to prove that the Tribunal has jurisdiction. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.

2.12. This sharing of the burden of proof has been stated in *Chevron v. Ecuador* in the following terms:

> *―As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed."*[6]

2.13. The Tribunal agrees that the burden lies on a claimant who asserts a positive right and on a respondent who asserts a positive answer to the claimant. The Tribunal does not consider the latter to be an exception to the former, both being (in its view) the application from a different perspective of the same general principle that the party which asserts a positive case has to prove that case. In this case, the Claimant is asserting that the Tribunal has jurisdiction over the Parties‟ dispute; and, as regards this first jurisdictional objection, the Respondent is asserting an abuse of process by the Claimant.

2.14. This general approach was analysed by the *Chevron* tribunal in relation to a respondent‟s positive objection asserting abuse of process by a claimant, not dissimilar to the present case:

> *―A claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse of process as a defense."*[7]

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6 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, § 138.

7 *Ibid*., § 139.

2.15. In summary, it is the Tribunal"s opinion that it is not bound to accept the facts necessary to support or deny jurisdiction as alleged by the Claimant and the Respondent respectively; that the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and that the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded. Accordingly, for the purpose of this Decision, the Tribunal adopts a general approach to the Parties" disputed factual allegations whereby all the elements of proof adduced by the Parties are considered by the Tribunal for the purpose of assessing whether the Claimant and the Respondent have discharged their respective burdens to prove their respective cases.

(03) The Respondent's Case

2.16. In summary, the Respondent"s presentation of its jurisdictional objection based on Abuse of Process begins with a statement of facts, which are not contested by the Claimant:

> *"Pacific Rim Mining Corp. is a Canadian company that applied for an environmental permit and a mining exploitation concession in El Salvador through one of its subsidiaries in 2004. The environmental permit and the concession were not granted. Three years later, in December of 2007, Pacific Rim Mining Corp. changed the nationality of another subsidiary, Pac Rim Cayman, from the Cayman Islands to the United States…"*[8]

2.17. The Respondent then makes its legal analysis on these facts, which (as will be seen later in this Decision) is strongly contested by the Claimant. In the Respondent"s submission, the Claimant has "abused the provisions of CAFTA and the international arbitration process by changing Pac Rim Cayman's nationality to a CAFTA Party to bring a pre-existing dispute before this Tribunal under CAFTA."

2.18. This objection is the major part of the Respondent"s jurisdictional objections. As confirmed in its Jurisdiction Reply, "El Salvador's main jurisdictional objection is Claimant's Abuse of Process." This was re-confirmed in the Respondent"s letter dated 26 September 2011 sent to the Tribunal (cited in Part 1 above).

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[8] Jurisdiction Memorial, § 1.

2.19. In presenting this main objection, the Respondent does not object to prospective nationality planning made in good faith before any investment. The Respondent objects to the Claimant's change of nationality because of its timing at a much later date, made in deliberate bad faith:

"*What Claimant and its parent company did in the present case, however, is not prospective nationality planning but a retrospective gaming of the system to gain jurisdiction for an existing dispute based on existing facts over which there would not otherwise be jurisdiction. This is an abuse of the international arbitration system and process.*"[9]

2.20. The Respondent's position was summarised at the outset of its Post-Hearing Submissions:

"*Pacific Rim Mining Corp., a Canadian corporation, through its wholly-owned shell subsidiary, Pac Rim Cayman, has abused the international arbitration process by changing Pac Rim Cayman's nationality from the Cayman Islands to the United States, and then using this nationality to initiate ICSID arbitration proceedings for a pre-existing dispute and assert claims under CAFTA and the Investment Law of El Salvador as a national of the United States. The consequence of this abuse can only be the dismissal of this entire arbitration.*"[10]

(04) The Claimant's Case

2.21. In summary, the Claimant submits that its change of nationality was not an abuse of process because it was part of an overall plan to restructure the Pac Rim group of companies. According to the Claimant, "(i)n 2007, the Companies were looking for ways to save money;"[11] and as a result, changes are alleged to have been envisioned, as follows:

"*This led to an examination of the overall corporate structure of the Companies. There were administrative costs involved in maintaining Pac Rim Cayman as a Cayman Islands entity. At the same time, the Companies were advised that there would be no adverse tax consequences to domesticating Pac Rim Cayman to Nevada – the jurisdiction from which it had been effectively managed by Mr. Shrake since 1997. In other words, the Companies believed that by domesticating Pac Rim Cayman to Nevada, they could eliminate the costs of maintaining Pac Rim Cayman in*

[9] Jurisdiction Memorial, § 18. Emphasis by the Respondent.
[10] The Respondent's Post-Hearing Submissions, § 2.
[11] Jurisdiction Counter-Memorial, § 136.

the Cayman Islands, without losing any tax benefits. It made no sense to manage a Cayman Islands company from Nevada, if that company could be domesticated to Nevada with cost savings and no adverse tax consequences."[12]

2.22. This was an incomplete explanation on the evidential materials adduced by the Claimant itself, particularly from its principal factual witness, Mr Shrake. Even before the Hearing, Mr Shrake candidly acknowledged that the availability of international arbitration (under CAFTA and ICSID) was one of the elements of its decision to change the Claimant's nationality:

> *"The ability of Pac Rim Cayman to bring claims under CAFTA, if a dispute with El Salvador were to arise in the future, was one of the factors I considered, and which – with others – weighed in favour of the reorganization."*[13]

2.23. The Claimant nonetheless submitted that the events giving rise to the Parties' dispute occurred after this change of nationality on 13 December 2007; and, given that timing, the change cannot be characterised as an abuse of process by the Claimant. It was said that a change in nationality can be triggered by many reasons; and if nationality planning for the purpose of international arbitration can be made in good faith as one of several reasons before an investment is made (as the Respondent acknowledges), then why not a change made in like good faith after an investment but before any dispute has arisen?

2.24. In the present case, however, the timing is important. For the Respondent, CAFTA came into force on 1 March 2006; the Claimant changed its nationality in 13 December 2007 whereupon, ostensibly, it acquired substantive and procedural rights under CAFTA; President Saca's speech was publicly reported on 11 March 2008; and the Claimant submitted its Notice of Arbitration on 30 April 2009.

2.25. From the Claimant's Notice of Intent onwards, the Claimant has pleaded "unlawful and politically motivated measures" taken by the Respondent before 13 December 2007, including (as alleged) the arbitrary imposition of unreasonable delays and un-

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12 Jurisdiction Counter-Memorial, § 138.

13 Mr Shrake's Witness Statement, § 113. See also, to the same effect, the Jurisdiction Counter-Memorial, § 139: "*As part of this overall assessment of the Companies' organizational structure, Mr. Shrake also considered the Companies' potential avenues of recourse if a dispute were ever to arise with El Salvador in the future."*

precedented regulatory obstacles designed and implemented with the aim of preventing PRES and DOREX from developing gold mining rights in which the Claimant, through those Enterprises, had made substantial and long-term investments.[14] As pleaded by the Claimant, many of these events necessarily pre-dated the speech of President Saca in March 2008, allegedly confirming the opposition of the Respondent"s Government to granting mining permits. [15]

2.26. In the Notice of Arbitration, the following measures were also alleged by the Claimant against the Respondent, as taking place before December 2007:

> *—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 Gonzalez, through the Ministerio de Medio Ambiente y Recursos Naturales (—MARN") and MINEC, against Claimant's investments."*

2.27. As regards the speech of President Saca, the Claimant alleges first: "in March 2008, President Saca abruptly and without any justification announced that he opposed granting any new mining permits."[16] The Claimant next alleges that the permit had been earlier refused by MARN on the instructions of the Government: "it is now apparent that MARN"s inaction had been directed from above, and specifically from the offices of President Saca."[17] These events cover a period which, at least in part, pre-date December 2007. The Claimant alleges that President Saca"s speech revealed that the permit refusals were made following an existing policy by the Government and were not mere bureaucratic incidents: "In 2008, it became clear that the Government"s delay tactics with respect to the issuance of the Enterprises" various permits had been designed and implemented with the unlawful, discriminatory, and politically motivated aim of preventing the Enterprises" mining."[18]

2.28. In other words, as here alleged by the Claimant, President Saca"s speech (post-December 2007) expressed a "newly announced „policy" of opposing the issuance of

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14 Notice of Intent, Introduction, pp. 1-2.
15 Notice of Intent, § 32.
16 Notice of Arbitration, § 9.
17 Notice of Arbitration, § 64.
18 Notice of Arbitration, § 74.

mining permits;"[19] and the earlier refusal of the Government (pre-December 2007) to act upon the Enterprises' applications for permits therefore constituted "a gross abuse of administrative discretion."[20]

2.29. In the Counter-Memorial, the Claimant again focused on the speech given by President Saca in March 2008:

> *"Even if Respondent contests the existence of a mining ban (despite the public statements of President Saca and his successor, President Funes), its characterization of the measure at issue as a single act or omission completed in December 2004 still is incorrect, because the failure of MARN to act in December 2004, together with subsequent failures to act by MARN and its sister ministry, Ministerio de Economía ("MINEC"), is a situation that continued to exist after the key jurisdictional thresholds were crossed, thus causing it to come within the scope of CAFTA's Investment Chapter."*[21]

2.30. Another citation from the Claimant's earlier pleadings to the same effect, amongst many others, can be reproduced here, because it refers not only to "continuing" acts or omissions alleged against the Respondent, but also to "composite" acts or omissions:

> *"Even if the Tribunal were to accept Respondent's assertion that, despite the public statements of two successive heads of State, the de facto mining ban does not exist, the individual instances of Respondent's failure to grant Claimant's mining-related applications are continuing or composite acts or omissions that breach CAFTA obligations ..."*[22]

2.31. In its Jurisdiction Rejoinder, the Claimant returned to the alleged significance of the de facto ban:

> *"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."*[23]

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19 Notice of Arbitration, § 77.
20 Notice of Arbitration, § 81.
21 Jurisdiction Counter-Memorial, § 19.
22 Jurisdiction Counter-Memorial, § 163.
23 Jurisdiction Rejoinder, § 235.

2.32. In its Post-Hearing Submissions, as at the Hearing, the Claimant presented the relevant measure as a "practice" covering both an earlier period of time when CAFTA did not apply (either pre-December 2007 or even pre-March 2006) and a later period of time when it did apply to the Claimant, namely, as a continuing course of conduct by the Respondent that existed before and after the Claimant's change of nationality on 13 December 2007:

> *"The measure at issue as consistently identified in Claimant's pleadings is El Salvador's practice of withholding permits necessary for metallic mining: This measure is a continuing course of conduct by Respondent which may have begun before CAFTA became applicable to Claimant, but continued thereafter (indeed, to this very day) and which Claimant became aware of at the earliest in March 2008, when El Salvador's President first confirmed the existence of a de facto mining ban."*[24]

2.33. As regards the date when the Parties' dispute arose, the Claimant alleges that it arose only in March 2008 and not before, i.e. it came into existence as a continuing or composite act after the change in the Claimant's nationality in December 2007:

> "*The act supporting Pac Rim Cayman's claims of breach resulting in loss or damage is Respondent's de facto ban on mining as announced by President Saca in March 2008. . . . As relevant to Respondent's abuse of process argument, since the act giving rise to the dispute did not occur until March 2008 or, alternatively, only became recognizable as a continuing or composite act in breach of CAFTA obligations at that time, Pac Rim Cayman's domestication to Nevada in December 2007 could not have been ~~a~~ retrospective gaming of the system to gain jurisdiction for an existing dispute.*"[25]

2.34. The Tribunal considers that the Claimant's pleaded case had developed significantly from its early pleadings by the end of the Hearing, as not infrequently happens during a complicated arbitration. This development has, however, created certain difficulties for the Tribunal, to which it is necessary to return below.

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[24] The Claimant's Post-Hearing Submissions, § 3.

[25] Jurisdiction Counter-Memorial, § 376. Emphasis by the Claimant. *See also* § 11 of the Respondent's Post-Hearing Submissions.

(05) The CAFTA Member States

2.35. The USA Submission addresses Denial of Benefits and does not address the issue of Abuse of Process. The Costa Rica Submission likewise does not address Abuse of Process, concentrating mostly on Denial of Benefits.

(06) Amicus Curiae Submission

2.36. The Amicus Curiae Submission does address the issue of Abuse of Process (in addition to other matters), first in general terms:

> *"The facts underlying Claimant's claim are deeply intertwined with the social and political change that has occurred since the advent of representative democracy in post-civil war El Salvador, and there is little doubt that the Tribunal's decision to accept or reject jurisdiction over a claim of this nature could impact the transition toward democracy in El Salvador. The Tribunal's decision could also impact the communities amici represent - their lands, their livelihoods, and even their well-being and fundamental rights."*

2.37. This Amicus Curiae next contends that the Claimant's claims amount to an abuse of process for two reasons, the first developed by the Respondent (as summarised above) and the second that is specific to its own Amicus Curiae Submission:

> *"1. Pac Rim's last minute re-organization to take advantage of CAFTA benefits after setting itself up to enjoy the benefits of Cayman Islands' zero taxation is abusive in nature.*
> *2. Pac Rim's attempt to take a dispute centered between it and the affected communities to a forum where the communities have only limited discretionary rights is abusive in nature ..."*

2.38. The Amicus Curiae Submission contends, that in relying only on the first of these two reasons, "the Republic has, in fact, underestimated the extent of the abuse of process" (p. 10), because this dispute is, in fact, not a dispute between an investor and a host State but a dispute between an investor and the local communities of which the State is only an intermediary.

2.39. The Amicus Curiae Submission alleges that this is a purely political dispute and therefore that the Parties' dispute is not a "legal dispute" under Article 25 of the IC-

SID Convention, nor relates to a "measure" under CAFTA Article 10.1. The Tribunal will limit itself here to the Amicus' arguments relating to the Abuse of Process issue.

2.40. The Amicus Curiae Submission addresses the motivation for the Claimant's change of nationality, basing itself on Mr Shrake's testimony. It considers that stating that one of the motives for the change was to save a few thousand dollars in annual corporate registration fees is fanciful; but even if it were one element of the decision-making process, the Claimant's access to international arbitration was another factor; and that factor is sufficient for the Tribunal to find here that there has been an abuse of process by the Claimant. As alleged by the Amicus Curiae Submission:

> *"Moreover, regardless of whether the benefit of CAFTA dispute resolution was a primary or secondary motivation, the fact that it is a motivation is all that the relevant prong of the abuse of process inquiry requires." (p. 10)*

(07) The Tribunal's Analysis

2.41. The Tribunal finds as a relevant fact, based on the Claimant's own evidential materials, that one of the principal purposes of the change in the Claimant's nationality was the access thereby gained to the protection of investment rights under CAFTA and its procedure for international arbitration available against the Respondent. Although the Tribunal accepts that another purpose was to save unnecessary expenses for the Pacific Rim group of companies, the Tribunal finds, as a fact, again based on the Claimant's own evidential materials, that such a purpose was not the dominant, still less the only, motive for the change. As rightly emphasized by the Respondent, "… Claimant presents no evidence that the costs of maintaining a limited liability company in Nevada are significantly cheaper than being incorporated in the Cayman Islands."[26]

2.42. Accordingly, the factual situation here is materially similar to the facts found by the tribunal in the *Mobil v. Venezuela* case, that "… the main, if not the sole purpose of

[26] Jurisdiction Reply, § 87.

the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT."[27]

2.43. That, however, is not a sufficient answer to determine the issue of Abuse of Process in this case. The Tribunal does not accept the arguments made to the contrary in the Amicus Curiae Submission. As already described, there is an important issue of timing and other circumstances in this case, to which it is necessary to return below at some length.

2.44. At the outset, the Tribunal subscribes to the general approach set out in the decision made in *Mobil v. Venezuela:*

> *„The Tribunal first observes that in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law. Reference may be made in this respect to „good faith" („bonne foi"), „détournement de pouvoir" (misuse of power) or „abus de droit" (abuse of right)."*[28]

2.45. The Claimant's restructuring consisted of its change of nationality on 13 December 2007. To adopt the tribunal's approach in *Mobil v. Venezuela*, "(s)uch restructuring could be „legitimate corporate planning" as contended by the Claimant or an „abuse of right" as submitted by the Respondent. It depends upon the circumstances in which it happened."[29] As already summarised above, it is not contested between the Parties that the circumstances of this case are decisive as to the time when the relevant measure(s) occurred and the Parties' dispute arose, whether before or after the change in the Claimant's nationality on 13 December 2007.

2.46. This important question of timing was also explained in the *Phoenix* award:

> *„International investors can of course structure upstream their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. ...*

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27 *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, § 190. [*Mobil v. Venezuela*]

28 *Mobil v. Venezuela*, *supra* note 27, § 169.

29 *Ibid,* § 191.

But on the other side, an international investor cannot modify downstream the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed."[30]

2.47. The Tribunal does not dispute (nor did the Respondent) that if a corporate restructuring affecting a claimant's nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process.[31] That is not, however, the issue in the present case, as the Tribunal explains below by reference to other reported cases.

2.48. The Tribunal notes first the approach adopted by the tribunal in *Autopista v. Venezuela*,[32] where a Mexican company restructured its investment in a Venezuelan company, Aucoven, by transferring 75 % of its shares to a US corporation. As in the present case, the respondent alleged that this restructuring was an abuse in order to gain access to ICSID jurisdiction. The tribunal noted that the US entity had been incorporated eight years before the parties had entered into their concession agreement; and that it was not a mere shell corporation. Thus, the tribunal concluded that the restructuring did not constitute "an abuse of the Convention purposes."[33]

2.49. In *Tokios Tokelés v. Ukraine,*[34] the claimant was organised under Lithuanian law but was owned and controlled as to 99 % by Ukrainian nationals. The tribunal noted that this enterprise was formed many years before the BIT between Ukraine and Lithuania entered into force; and it concluded:

"The Claimant manifestly did not create Tokios Tokelés for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT ... entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose."[35]

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30 *Phoenix v. Czech Republic*, *supra,* note 5*,* §§ 94-95. Emphasis in the original.

31 Certain decisions to this effect have been made subject to a dissenting opinion.

32 *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001.

33 *Ibid*., § 126.

34 *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, §§ 53 to 56. This case did not involve a restructuration by a change of nationality to get access to ICSID jurisdiction, but an initial structuration permitting such access.

35 *Ibid*., § 56.

The tribunal therefore concluded that there had been "no abuse of legal personality."[36]

2.50. In *Aguas del Tunari v. Bolivia,*[37] a Bolivian company had entered into a water concession contract with the Bolivian authorities. Bechtel, a US corporation, owned 55% of the shares in the Bolivian company, which were transferred to a Dutch company. The tribunal"s jurisdiction was ostensibly derived from the Dutch-Bolivian BIT. Bolivia argued that the Dutch entity was a mere shell company created solely for the purpose of gaining access to ICSID and that, therefore, the tribunal had no jurisdiction under the BIT. The tribunal considered that the Dutch claimant was "not simply a corporation shell established to obtain ICSID jurisdiction over the case."[38] The tribunal explained the dividing line between abuse of process and legitimate restructuring even after the making of an investment:

> *—... it is not uncommon in practice and – absent a particular limitation – not illegal to locate one's operation 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."*[39]

2.51. A statement to the same effect can be found in the *Mobil* decision, where the tribunal considered legitimate an "upstream" reorganization made in order to protect investments by gaining access to ICSID arbitration before any dispute, in contrast to an illegitimate "downstream" reorganization to the same effect with respect to a pre-existing dispute:

> *—As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.*
>
> *With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT*

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[36] *Idem.* The President, Prosper Weil, strongly dissented, stating: "The ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether pre-existent or created for that purpose. … Given the indisputable and undisputed Ukrainian character of the investment the Tribunal does not, in my view, give effect to the letter and spirit, as well as the object and purpose, of the ICSID institution." *Ibid.,* Dissenting Opinion, § 19 and § 20.

[37] *Aguas del Tunari S.A. v. Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

[38] *Ibid.,* § 321.

[39] *Ibid.,* § 330 (d).

for such disputes would constitute, to take the words of the Phoenix Tribunal, an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs'. The Claimants seem indeed to be conscious of this, when they state that they invoke ICSID jurisdiction on the basis of the consent expressed in the Treaty only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed."[40]

2.52. The Tribunal concludes from these and other legal materials submitted by the Parties that, in order to determine whether the Claimant's change of nationality was or was not an abuse of process, the Tribunal must first ascertain whether the relevant measure(s) or practice, which (as the Claimant allege) caused damage to its investments from March 2008 onwards, took place before or after the change in nationality on 13 December 2007. This approach in turn requires the Tribunal to ascertain the legal nature of the relevant measure(s) or practice alleged by the Claimant.

2.53. ***The Relevant Measure(s) or Practice:*** In order to identify these measures or practice, the Tribunal must necessarily analyse the Claimant's own pleadings. It will be recalled that the Tribunal decided, in its Decision of 2 August 2010, that the Notice of Intent was incorporated by reference into the Notice of Arbitration, and also to "treat the Notice of Arbitration as amended in the manner requested by the Claimant."[41] Accordingly, the Claimant's early pleadings include both the Notice of Intent and the Notice of Arbitration.

2.54. The Notice of Intent pleads several alleged measures; and in the Notice of Arbitration, the same measures are pleaded. Starting with the Jurisdiction Counter-Memorial, the emphasis is increasingly placed by the Claimant on the alleged de facto ban publicly disclosed in President Saca's speech.

2.55. At this early stage, the Claimant based its pleaded case on the allegation that the Respondent had taken precise *measures* (in the plural) that improperly refused to grant to PRES an exploitation concession and to deliver to DOREX environmental permits. In its Jurisdiction Counter-Memorial, the Claimant alleged that the *measure* (in

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40 *Mobil v. Venezuela*, *supra* note 27, §§ 204-205. Emphasis added.

41 Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2009, § 35.

the singular) that had damaged its investments was the de facto ban announced by President Saca in March 2008, inter alia, as follows:

> *"Respondent treats a December 2004 missed deadline by El Salvador's Ministerio de Medio Ambiente y Recursos Naturales ("MARN") as if that were the sole or primary 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."*[42]
>
> *"The act supporting Pac Rim Cayman's claims of breach resulting in loss or damage is Respondent's de facto ban on mining as announced by President Saca in March 2008 ..."*[43]

2.56. At the Hearing, the Claimant's Opening Statement described "the measure at issue" (again in the singular) as follows: "The practice of the Government not to grant any metallic mining application regardless of whether it satisfied all of the regulatory requirements."[44]

2.57. At the end of the Hearing, the Claimant clarified its pleaded case in its Closing Statement, as follows:

> *"... And it is true – and Respondent has really hit on this point over and over again over the course of these proceedings – it is true that we've sometimes referred to the individual acts and omissions that resulted in the denial of permits to PRES and DOREX as measures. We sometime used term "measures" to describe those acts and omissions. And they are, indeed, measures. That is an accurate way to describe those acts and omissions, but they're not the measure at issue, and I think that's a very important distinction to make. The measure at issue – and I really want to emphasize that phrase – "the measure at issue" – that is, the measure that is the basis for Claimant's articulation of breaches by Respondent of obligations on the international law plane is the practice of withholding mining-related permits. It is that measure that forms the basis of our claims ..."*[45]

2.58. The Tribunal considers that the Claimant's case was most clearly pleaded and explained during the Hearing. It therefore does not attach undue significance to its earlier written pleadings which might well be understood differently. The Tribunal understands the Claimant from its later pleadings as alleging that the measures de-

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42 Jurisdiction Counter-Memorial, § 19.

43 Jurisdiction Counter-Memorial, § 376. Cited in § 11 of the Respondent's Post-Hearing Submissions.

44 The Claimant's Opening Statement, Hearing D1.160, with its Opening Power Point, Overview of Facts, p. 4.

45 Hearing D3.708-709.

scribed in its early pleadings formed only a factual pattern which derived from a then unstated practice of the Salvadoran Government, of which (as the Claimant alleges) the Claimant first became aware on 11 March 2008 with the report of President Saca"s speech. Accordingly, the Tribunal treats the Claimant"s pleaded case as alleging a practice by the Respondent which came to the Claimant"s knowledge only with President Saca"s reported speech in March 2008, which practice is alleged to consist of either a continuing or composite act in breach of CAFTA and for which the Claimant claims damages only from March 2008 onwards. The Tribunal accepts that a governmental practice, by definition, has necessarily to comprise a multiplicity of pre- or co-existing acts or omissions. It is necessary to ascertain the legal nature and timing of such a practice where a claimant"s pleaded allegations are directed both at the acts or omissions themselves and to the practice comprising such acts or omissions, which practice only become known to a claimant at a later date.

2.59. What then is the role of President Saca"s speech as now alleged and explained by the Claimant in its pleadings? According to the Claimant, it was not by itself a measure, but it is what made public an alleged pre-existing governmental practice:

> *"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."*[46]

2.60. From this and other explanations from the Claimant, it follows that, although the President"s speech is not alleged to be a measure by itself, it is the point in time when, according to the Claimant, its dispute with the Respondent arose. It would be possible to use other language to describe the emergence of this dispute, as employed by both Parties in this case (e.g. "born", "crystallised" etc); but all these terms convey the same concept; and the Tribunal here prefers substance to semantics.

[46] Jurisdiction Rejoinder, § 238.

2.61. However, in the Tribunal"s view, it is necessary as a matter of international law (being applicable to the Claimant"s CAFTA claims) to distinguish between President"s Saca"s speech as the alleged culminating point of a pre-existing practice and the effective beginning of a practice causing injury to the Claimant and its Enterprises. The Claimant"s pleaded case was ambiguous on this point; particularly as to whether and (if so) when the alleged practice became a continuous act or a composite act by the Respondent.

2.62. During the Hearing, the Tribunal understood the Claimant´s case to include three alternative analyses of its alleged practice: (i) the speech of President Saca publicly launched a new policy, that did not exist before; (ii) the speech of President Saca acknowledged the existence of a practice analysed as a continuous act; and (iii) the speech of President Saca acknowledged the existence of a practice analysed as a composite act.

2.63. At the end of the Hearing, the Tribunal requested both the Claimant and the Respondent to comment on whether and (if so) when the alleged practice constituted a continuing act or a composite act, as those two terms are used in Articles 14 and 15, respectively, of the ILC Articles on State Responsibility of States (cited in the Annex to Part 1 above); and in particular whether the Claimant"s pleaded claims were based on alleged conduct by the Respondent that pre-dated the Claimant"s change of nationality on 13 December 2007.

2.64. According to the Claimant"s answer, the Tribunal did not need to characterise the relevant measure because the only important factor, according to the Claimant, was the existence of an unlawful situation which was applicable to the Claimant in March 2008, after 13 December 2007:

> *"As for whether the ban is better described as a continuing measure or a composite measure, Claimant suggests that, like other tribunals confronted with similar fact patterns, this Tribunal need not choose. If the Tribunal finds that the measure at issue is conduct that did not cease to exist prior to CAFTA's becoming applicable to Claimant, there is no need to label the measure."*[47]

[47] The Claimant"s Post-Hearing Submissions, § 23.

2.65. The Tribunal considers that the Claimant"s response might be more appropriate for the Ratione Temporis issue; but that it is clearly inappropriate to this Abuse of Process issue. For this latter issue, it is important to ascertain whether the alleged measure began before and continued after the change in the Claimant"s nationality. It here is necessary to apply first principles of international law.

2.66. The question of identifying precisely when an internationally wrongful act takes place is often a difficult factual question; it has important consequences on the law of international responsibility; and, as far as it concerns investment arbitration under a treaty, it can directly affect (as here) the exercise of jurisdiction by a tribunal.

2.67. In any particular case, three different situations can arise: (i) a measure is a "one-time act", that is an act completed at a precise moment, such as, for example, a nationalisation decree which is completed at the date of that decree; or (ii) it is a "continuous" act, which is the same act that continues as long as it is in violation of rules in force, such as a national law in violation of an international obligation of the State; or, (iii) it is a "composite" act, that is an act composed of other acts from which it is legally different. These important and well-established distinctions under customary international law are considered in the Commentaries of the ILC Articles on State Responsibility.[48]

2.68. *(i) One-Time Act:* As far as a one-time act is concerned, the ILC Commentaries explain both its instant realisation, at a precise moment in time, and the fact that it can have continuous effects:

> *"The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs 'at the moment when the act is performed', even though its effects or consequences may continue…"*[49]
>
> *"An act does not have a continuing character merely because its consequences extend in time."*[50]

[48] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Yearbook of the International Law Commission, 2001, vol II, Part Two ["ILC Commentaries"].
[49] ILC Commentaries, p. 59.
[50] ILC Commentaries, p. 60.

Based on such a definition, it is relatively easy to determine the moment when a measure takes place as a one-time act.

2.69. *(ii) Continuous Act:* In contrast, a continuous act is the same act extending throughout a period of time, as also explained in the ILC Commentaries:

> *"In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period."*[51]

2.70. *(iii) Composite Act:* Finally, a composite act is not the same, single act extending over a period of time, but is composed of a series of different acts that extend over that period; or, in other words, a composite act results from an aggregation of other acts and acquires a different legal characterisation from those other acts, as described in the ILC Commentaries:

> *"Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.*
>
> *Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is a series of acts or omissions defined in aggregate as wrongful.""*[52]
>
> *"Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful."*[53]

2.71. The fact that a composite act is composed of acts that are legally different from the composite act itself means that the composite act can comprise legal acts and still be unlawful or that it can comprise unlawful acts violating certain norms which are different from the legal norm violated by the composite act. For example, several legal acts (of which each by itself is not unlawful) can become unlawful as the composite aggregation of those legal acts;[54] or a series of unlawful acts interfering with an in-

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51 ILC Commentaries, p. 60.
52 ILC Commentaries, p. 62.
53 ILC Commentaries, p. 63.
54 This type of composite act was referred to by the Claimant in its Post-Hearing Submissions, § 30: "A composite measure is a series of acts and omissions which, in the aggregate, constitute a breach of relevant obligations (even though individual acts or omissions on their own may not constitute such a breach). Such

vestment (which by themselves are not expropriatory) can by their aggregation result in an unlawful expropriation.

2.72. Was the relevant measure in the present case, as alleged by the Claimant, a continuous act or a composite act? This is important, if the continuous or composite act extends over a critical date, here the Claimant"s change of nationality on 13 December 2007.

2.73. As regards a continuing act, the ILC Commentaries state the following:

"*Thus, conduct which has commenced sometime in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present."*[55]

In this situation, the unlawful act only starts when the rule which this act violates is applicable.

2.74. As regards a composite act, the ILC Commentaries state the following:

~~"~~In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the ‚first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.[56]

Paragraph 1 of article 15 defines the time at which a composite act ‚occurs' as the time at which the last action or omission occurs …"[57]

In this situation, the unlawful composite act is composed of aggregated acts and takes place at a time when the last of these acts occurs and violates (in aggregate) the applicable rule.

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an analysis was performed by the tribunal in *Société Générale*, which referred to the concept of composite act and stated clearly that acts that are not illegal can become such by accumulation: "While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation …", *Société Générale v. Dominican Republic,* LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, § 91.

55 ILC Commentaries, p. 61.

56 ILC Commentaries, p. 64.

57 ILC Commentaries, pp. 63-64.

2.75. ***Application to this Case:*** Having here set out the relevant general principles of international law, the Tribunal turns to the present case, as pleaded by the Claimant and disputed by the Respondent.

2.76. ***The Respondent's Submission****:* In summary, the Respondent submits that the relevant acts alleged by the Claimant were completed before the change in the Claimant"s nationality on 13 December 2007:

> "*In the present case, the measure at issue was exhausted when MARN did not respond to Claimant within the 60-day time period prescribed in the law. The presumed denial, denegación presunta, of Claimant's application gave Claimant the opportunity to challenge the denial of the environmental permit. On the date that the 60-day period expired, the measure and its effects were consummated. Therefore the situation at the core of the present dispute, formed by all the acts and events described above, ceased to exist before CAFTA entered into force. The fact that Claimant's environmental permit was not granted is not the result of an omission from an ongoing obligation to act by the Government arising from Claimant's 2004 application.*
>
> *Indeed, Claimant could have resubmitted its application for an environmental permit after CAFTA entered into force. This could have generated another measure by MARN, either granting or denying the permit, which would be covered by the Treaty. But once the Government did not respond within the time period prescribed in the law concerning the 2004 application, and the presumed denial operated by law, the measure of which Claimant here complains, took place for purposes of CAFTA and the law of El Salvador. The fact that Claimant could resubmit its application is evidence that the alleged omission by MARN to respond to Claimant's application did not extend in time past the 60-day adjudication period, much less up to the entry into force of the Treaty.*"[58]

2.77. Accordingly, the Respondent contends that the relevant acts, measure, measures and other essential facts giving rise to the Parties" dispute all took place before 13 December 2007. The Respondent specifically alleges that: (i) with regard to the environmental permit, MARN did not meet the time limit established under Salvadoran law to either issue or deny the environmental permit by December 2004 (i.e. three years before the Claimant"s change of nationality);[59] and (ii) with regard to the exploitation concession filed with the Bureau of Mines, once the Bureau of Mines sent the two warning letters to the Claimant in October and December 2006 triggering the provisions of Article 38 of the Mining Law, that application was effectively ter-

[58] Jurisdiction Memorial, §§ 317-318.
[59] Jurisdiction Memorial, § 287.

minated; nothing more could have been done by the Claimant after the expiration of the 30-day extension to revive it; and, therefore, such application should be treated as having been effectively terminated under the laws of the Respondent by January 2007 (i.e. one year before the Claimant"s change of nationality).[60]

2.78. ***The Claimant's Submission****:* In summary, the Claimant alleges that the relevant measure was the de facto mining ban consisting of a practice[61] of withholding mining-related permits and concessions which only became public and known to the Claimant in March 2008 (with President Saca"s speech); and which then wiped out the value of its mining investments and nullified its legitimate expectations and other protections under CAFTA, thereby giving rise to its present dispute with the Respondent.

2.79. ***One-Time Acts:*** The Tribunal considers first whether the relevant measure or measures constitute one-time acts that were completed before the Claimant"s change of nationality in December 2007. If this were the case, in the Tribunal"s view, it would follow on the particular facts of this case, that the Claimant"s change of nationality would be an abuse of process by the Claimant. However, if the relevant one-time acts all took place after such change of nationality in or after March 2008, in the Tribunal"s view, it would follow on the particular facts of this case, that such change would not be an abuse of process. The Tribunal bears in mind that, in the case of one-time completed acts, the mere fact that earlier conduct has gone un-remedied when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies international law on State responsibility.[62]

2.80. One factor supporting the Respondent"s analysis is the Claimant"s own early pleading of its case in the Notice of Intent, where almost all the references to acts (of which the Claimant there complains) take place before the Claimant"s change of na-

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60 Jurisdiction Reply, §§ 194-196; the Respondent"s Post-Hearing Submissions, §§ 104-105.

61 Meaning: "a repeated or customary action; the usual way of doing something": see the Claimant´s Post-Hearing Submissions, § 14.

62 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, § 70 [*Mondev v. USA*].

tionality. For example, there are references to earlier events "in late 2005" (§ 18), "(i)n March 2004 (§ 19), "in September 2004" (§ 19), "on August 2004" (§ 20), "(i)n December 2004 (§ 20), "(b)etween March 2004 and December 2006" (§ 22), "in December 2006" (§ 22), "in December 2006" (§ 23), "(i)n September 2005" (§ 25), "on November 9, 2006 (§ 27), "(s)ince the end of 2006 (§ 29), "in or about January 2007" (§ 29), "in 2007" (§ 30), "in 2007" (§ 33), and "other industries … have received environmental permits during the same time-frame that the Enterprises' applications have been pending." (§ 35). The factual narrative pleaded in the Claimant's Notice of Arbitration concerning the El Dorado concession[63] also focuses primarily on events before December 2007, whilst also expressing strong criticism of President Saca's speech in 2008. Although the Tribunal accepts the Claimant's subsequent explanation of these events as not being relevant measures, these remain alleged facts pre-dating the Claimant's change of nationality.

2.81. Was the Claimant therefore aware from these facts of an actual or impending dispute with the Respondent before its change of nationality on 13 December 2007, as the Respondent contends? Again, it is necessary to turn to several passages in the Claimant's own pleading in the Notice of Intent:

> *"Since the end of 2006, when indications arose that MARN was intent on delaying the Enterprises' activities, it has become increasingly apparent that these delay tactics were designed and implemented by the Government with the unlawful, discriminatory, and politically motivated aim of preventing their operations altogether.*
>
> *In addition to articulate the foregoing position, MARN also informed the Enterprises in 2007 that, prior to the Ministry granting any environmental permits, MARN would need to conduct a "country-wide strategic environmental study …"*[64]
>
> *"… representatives of the companies participated in both public and private meetings with various members of the Government throughout the year [this is a reference to the year 2007], during which they objected to the Government's newfound positions …"*[65]
>
> *"The Government's nascent opposition to the Enterprises' operations was first manifested by MARN in late 2005, when it began delaying its responses to their applications for environmental permits without explanation. Soon thereafter, it began*

[63] A similar analysis can be made for the Exploration Licenses for Pueblos, Guaco, and Huacuco.
[64] Notice of Intent, § 29.
[65] Notice of Intent, § 31.

to arbitrarily change or add new requirements to the established legal process for obtaining such permits."[66]

2.82. From these early pleadings, the Tribunal concludes that the Claimant was here alleging a known opposition to its interests by the Salvadoran Government by 2005; and it had already objected to the conduct of the Salvadoran authorities as to the non-granting of new mining permits by 2007, before its change of nationality one year later. If the matter rested there, the Tribunal would be minded to accept the submissions of the Respondent; but for the Claimant"s subsequent clarification of its pleaded case.

2.83. The Tribunal has taken particular note of the Claimant"s belief that it received indications from the Salvadoran authorities, to the effect that the different permits and authorisations could yet be granted to its Enterprises. According to the Claimant, even if there were theoretical legal circumstances under which a government agency"s failure to meet a statutory deadline could give rise to a dispute between an investor and the Respondent, the conduct in this particular case of MARN, the Bureau of Mines and other government officials led the Claimant reasonably to understand that even though deadlines had been missed by these authorities, PRES´s applications for a permit and a concession remained under consideration by the Salvadoran authorities.[67] Therefore, so the Claimant contends, having induced it to understand that despite the missed deadlines in 2004 or 2007 there was no dispute between the Parties, the Respondent is now effectively precluded, as a matter of law, from here arguing that the missed deadlines triggered the present dispute between the Claimant and the Respondent before December 2007.[68]

2.84. The Tribunal accepts the Claimant"s submissions. It also notes that, even after March 2008, there were discussions between the Claimant and the Salvadoran authorities. In the Notice of Intent, it was specifically pleaded that: "(i)n 2008, President Elias Antonio Saca was reported as having publicly stated that he opposed the granting of any outstanding mining permits. In light of President Saca"s comments and the Government"s actions and inactions, the Enterprises engaged in several

66 Notice of Intent, § 18.
67 Jurisdiction Counter-Memorial, §§ 93-127.
68 Jurisdiction Rejoinder, §§ 268-276; Hearing Day 1.223-225.

meetings with the Government in 2008 seeking approval of the necessary permits."[69] Accordingly, the Tribunal concludes that the alleged omission to grant a permit and concession was not completely finalised before 13 December 2007, because even at that time there still seemed to be a reasonable possibility, as understood by the Claimant, to receive such permit and concession notwithstanding the passage of time.

2.85. In conclusion, taking stock of all the evidential materials adduced before the Tribunal and the several submissions from both the Claimant and the Respondent, the Tribunal concludes that: (i) before 13 December 2007, the Claimant was aware of difficulties in obtaining the permit and concession; (ii) discussions with Salvadoran authorities to resolve those difficulties extended at least until mid-2008, after President Saca‟s speech; (iii) exchanges between the Claimant and the Salvadoran authorities, involving the latter‟s request for further information after the legal date which (as the Respondent alleges) constituted the legal termination of administrative proceedings,[70] suggest that the door was not closed to the Claimant before 13 December 2007; and (iv) the fact that, differing from other similar requests,[71] no formal decision was taken by the Respondent terminating such proceedings likewise suggests that these proceedings were still live at the beginning of 2008.[72] In addition, as already explained by this Tribunal, the Claimant has unequivocally pleaded later in these proceedings (after the Notice of Arbitration but at least from its Counter-Memorial onwards) that the relevant measure does not comprise one or more of the individual acts taken by MARN and MINEC, but the alleged de facto ban or practice by the Respondent that was not made public before the Claimant‟s change of nationality on 13 December 2007.

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69 Notice of Intent, § 32.

70 See the letter from MINEC to PRES dated 4 December 2006, and the letter from MARN to PRES issued exactly two years after (4 December 2008), evidencing in both cases that at the time of such letters the proceedings were still not terminated.

71 See the Tribunal´s question at the Hearing (D3.559, lines 7/22 and 560, line 1) and the Respondent´s answer (at D3.614, lines 13/22), referring to the fact that besides Pacific Rim Mining Corp there was only one other Exploitation Concession Application (of another company whose name counsel at that time did not know), which was filed in 2005 and rejected by the Ministry of Economy in 2006. See also the references made in §§ 62 and 64 of the *Commerce Group* award indicating that in other cases MARN and the Ministry of Economy terminated environmental permits and denied the extension of licenses applications.

72 See Mr Shrake‟s Witness Statement, §§ 101, 118, 119 and 120. The Tribunal notes that the Respondent did not produce any evidence (by means of witness statements or otherwise) expressly contradicting the existence and content of the conversations and meetings adduced by the Claimant.

2.86. Accordingly, treating the relevant measure pleaded by the Claimant as an alleged practice constituting a one-off act under international law, the Tribunal could consider that the Parties‟ dispute arose in March 2008, at the earliest. On this analysis, therefore, the Tribunal would not consider that the relevant measure alleged by the Claimant comprised one or more one-time acts completed before the Claimant‟s change of nationality on 13 December 2007. However, it is impossible for the Tribunal to characterise this alleged practice, necessarily comprising several acts and omissions, as a one-off act; and the Tribunal here declines to do so.

2.87. ***Composite Act:*** As already described above, the Claimant pleaded its relevant measure as a composite act. The Tribunal considers that the existence of the de facto ban or practice, as alleged by the Claimant, necessarily extends both before and after the Claimant‟s change of nationality in December 2007; and, therefore, the Tribunal is next required to analyse whether the alleged ban could be a composite act under international law. If the Tribunal were to determine that the ban was a composite act, only the component acts which occurred after the Claimant‟s change of nationality on 13 December 2007 could be treated by the Tribunal as possibly engaging the responsibility of the Respondent under CAFTA.

2.88. As no relevant act was pleaded by the Claimant occurring after the change of nationality that could be a component part of the alleged practice only publicly disclosed in March 2008, it is impossible, in the Tribunal‟s view, to characterise the ban as a different legal animal from the several acts that comprise it, i.e. as a composite act. That ban was described by the Claimant as: "(t)he practice of the Government not to grant any metallic mining application" derived from the facts that the Government did not grant environmental permits to DOREX and did not grant a concession exploitation to PRES, which occurred before the Claimant‟s change of nationality in December 2007. These are similar acts the aggregation of which does not produce a different composite act under international law. The Tribunal therefore rejects the de facto ban, as pleaded by the Claimant, as a composite act.

2.89. ***Continuous Act:*** Can the alleged practice be characterised as a continuous act, as also pleaded by the Claimant? If the Tribunal were to determine that there was a

continuous act in this case, only that portion of the continuous act taking place after the change of nationality on 13 December 2007 could be considered by the Tribunal for the purpose of engaging possible responsibility by the Respondent under CAFTA.

2.90. As regards this question, the Claimant explained that:

> *"... (w)hile the ban may have come into existence at some earlier point in time, it continued to exist after Pac Rim Cayman acquired its U.S. nationality in December 2007, which is when CAFTA became applicable to measures relating to Pac Rim Cayman."*[73]

2.91. The Tribunal also bears in mind that the Claimant pleads that the alleged unlawful practice by the Respondent is a negative practice not to grant any mining application, i.e. it allegedly comprises omissions to act and not positive acts; and that, consequently, it is difficult to give a precise date for such omissions (compared to a specific positive act). Once an act takes place, it affects the parties' legal position; but, in contrast, an omission to act does not necessarily affect the parties as long as it is not definitive; and an omission can remain non-definitive throughout a period during which it could be cured by a positive act. As determined above by the Tribunal, although there were deadlines fixed under Salvadoran law for the granting of the permits and the concession, the Claimant understood that the Salvadoran authorities themselves did not treat these deadlines as definitive deadlines after which permits or concessions could no longer be granted to the Claimant at all.

2.92. In the Tribunal's view, on the particular facts of this case as pleaded by the Claimant, an omission that extends over a period of time and which, to the reasonable understanding of the relevant party, did not seem definitive should be considered as a continuous act under international law. The legal nature of the omission did not change over time: the permits and the concession remained non-granted. The controversy began with a problem over the non-granting of the permits and concession; and it remained a controversy over a practice of not granting the mining permits and concession.

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[73] The Claimant's Post-Hearing Submissions, § 4.

2.93. The Tribunal notes that this same general approach was adopted for the omission to pay a debt (which omission lasts as long as the debt remains unpaid) in *SGS v. Philippines*, where the tribunal decided that: "… the failure to pay sums due under a contract is an example of a continuing breach."[74] A similar analysis was made by the tribunal in *African Holding:*

> *"The Tribunal concludes in this regard that the nature of the dispute concerned the fact that the work had been performed under a contract and that their cost had not been paid during a lengthy period of more than fifteen years. That the DRC officially refused to pay or kept silent is unimportant for the nature of the dispute. The fact is that the DRC defaulted in its obligations under the terms of the contract, to which is therefore attached a situation of non-performance envisaged by Article 7.1.1 of the UNIDROIT Principles. Under this same article, non-performance includes defective or late performance. Moreover, the fact that the DRC offered to renegotiate the debts and to pay only a fraction of their value cannot be considered the same as an official refusal. Even if the DRC had agreed to pay, and did not in fact pay, the nature of the dispute would still remain the same: before as well as after the critical date, the amount for the work performed was not paid.*"[75]

2.94. Accordingly, the Tribunal determines that the alleged de facto ban should be considered as a continuing act under international law, which: (i) started at a certain moment of time after the Claimant"s request for environmental permits and an exploitation concession but before the Claimant"s change of nationality in December 2007 and (ii) continued after December 2007, being publicly acknowledged by President"s Saca speech in March 2008; or, in other words, that the alleged practice continued after the Claimant"s change of nationality on 13 December 2007.

2.95. ***Legal Consequences:*** What then are the legal consequences of the existence of an alleged continuous act overlapping the Claimant"s change of nationality? This ques-

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[74] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, § 167.

[75] *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo,* ICSID Case No ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008. French original: "Le Tribunal conclut à cet égard que la nature du différend concerne le fait que des travaux ont été exécutés sous contrat et que leur coût n"a pas été réglé pendant une longue période de plus de quinze ans. Que la RDC ait officiellement refusé de payer ou ait gardé le silence, est sans importance pour la nature du différend. Le fait est que la RDC a manqué à ses obligations aux termes du contrat, ce qui se rattache donc à une situation d"inexécution envisagée à l"article 7.1.1 des Principes d"UNIDROIT. Aux termes de ce même article, l"inexécution comprend l"exécution défectueuse ou tardive. En outre, le fait que la RDC offrait de renégocier les créances et de ne payer qu"une fraction de leur valeur ne peut pas être assimilé à un refus officiel. Même si la RDC avait accepté de payer, et n"a en fait pas payé, la nature du différend serait toujours restée la même: avant comme après la date critique : le montant des travaux exécutés n"a pas été réglé."

tion touches not only upon the Abuse of Process issue, but also the Ratione Temporis issue; and it is here helpful to address these issues together to contrast their differences.

2.96. ***Abuse of Process**:* The Tribunal first considers the point in time when a change of nationality can become an abuse of process. Several different answers were suggested by the Parties as the crucial dividing-line: (i) where facts at the root of a later dispute have already taken place and that future dispute is foreseen or reasonably foreseeable; (ii) where facts have taken place giving rise to an actual dispute; and (iii) where facts have taken place giving rise to an actual dispute referable under the parties" relevant arbitration agreement.

2.97. The Tribunal starts with the last of these three suggested answers, as submitted by the Claimant during the Hearing:

> *"... the temporal determination for abuse of process purposes must be made on the basis of evaluating what concrete acts were taken by the Party asserting jurisdiction to invoke the instrument on which it intends to base its consent and under which it intends to assert its claims."*[76]

2.98. The Respondent contested this dividing-line as far too late and also as an absurd logical impossibility:

> *"As El Salvador indicated at the hearing, under this standard there could never be abuse of process for change of nationality because the jurisdictional instrument relied on by a claimant committing an abuse cannot be invoked until after the putative claimant changes nationality. This guarantees that the moment of the 'temporal determination' would always be after the change of nationality and the change could thus never be abusive."*[77]

2.99. The Tribunal accepts the force of the Respondent"s submission; and it therefore rejects this third suggested answer. As far as the two other suggested answers are concerned, the Tribunal considers that they can be examined together for the purpose of this case. In the Tribunal"s view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high prob-

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[76] Hearing D3.744.
[77] The Respondent"s Post-Hearing Submissions, § 46.

ability and not merely as a possible controversy. In the Tribunal"s view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case. As already indicated above, the Tribunal is here more concerned with substance than semantics; and it recognises that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area.

2.100. To this extent, the Tribunal accepts the Respondent"s general submission that: "... it is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration."[78] In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute, as also submitted by the Respondent:

> *"... In addition, the investor has substantial control over the stages of the development of the dispute [as described in Maffezini]. Because it is the investor who must express disagreement with a government action or omission and the investor who must formulate legal claims, the investor may delay the development of the dispute into these later stages until it has completed the manipulative change of nationality. Relying on this test would permit an investor that is fully aware of a dispute to create access to jurisdiction under a treaty to which it was not entitled at the time of the actions affecting the investment, and at the same time provide no protection to the State from this abusive behaviour."*[79]

2.101. ***Ratione Temporis:*** The Tribunal considers that this approach as regards the Abuse of Process issue is materially different from the approach applicable to the Ratione Temporis issue, where both Parties relied on the general principle of non-retroactivity for the interpretation and application of international treaties.

2.102. The Claimant submitted as follows in its Post-Hearing Submissions: "Whether the Tribunal has jurisdiction ratione temporis depends on whether the measure at issue is an act or fact that took place or a situation that continued to exist after CAFTA be-

[78] The Respondent"s Post-Hearing Submissions, § 49. Emphasis by the Respondent.
[79] The Respondent"s Post-Hearing Submissions, § 50.

came applicable to Claimant."[80] The Respondent shared this analysis, here cited (for example) from its Jurisdiction Reply: "The relevant issue [for jurisdiction ratione temporis] is the date on which the measure, act, or fact that constitutes the alleged breach took place."[81] There is here no reference to a claimant"s knowledge or awareness of an alleged breach or present or future dispute.

2.103. The general principle of non-retroactivity in the law of international treaties, unless there is a specific indication to the contrary, is well established. This principle is embodied in CAFTA"s Article 10.1 (cited in the Annex to Part 1 above). It is codified in Article 28 of the Vienna Convention on the Law of Treaties, which provides: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." In its 1966 Commentaries to the Draft Articles of the Law of Treaties, the International Law Commission stated: "There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effect if they think fit. It is essentially a question of their intention. The general rule however is that a treaty is not to be treated as intended to have retroactive effects unless such an intention is expressed in the treaty or was clearly to be implied from its terms."[82] It would be possible to add to these legal materials; but it is unnecessary to do so given that this general principle is not materially disputed by the Parties.

2.104. Where there is an alleged practice characterised as a continuous act (as determined above by the Tribunal) which began before 13 December 2007 and continued thereafter, this Tribunal would have jurisdiction ratione temporis over that portion of the continuous act that lasted after that date, regardless of events or knowledge by the Claimant before 13 December 2007. The Tribunal concludes that this solution is different from that reached in its analysis of the Abuse of Process issue, as here explained.

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80 The Claimant"s Post-Hearing Submissions, § 8.
81 Jurisdiction Reply, § 191.
82 Yearbook of the International Law Commission, 1966, Vol. II, p. 211.

2.105. Having reached these several conclusions, the Tribunal turns to the question whether, as regards the Ratione Temporis issue, all factual materials before 13 December 2007 are irrelevant to the Claimant's pleaded case in regard to the alleged practice as a continuous act causing injury from March 2008 only? The Tribunal considers that such materials could still be received as evidence of the factual background to the Parties' dispute, as was stated in *Mondev* (when discussing substantive standards under NAFTA Chapter 11):

> *"... events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach."*[83]

As in *Mondev,* the Tribunal determines that it could remain appropriate for the Claimant to point to the conduct of the Respondent before 13 December 2007. This same approach was adopted by the *MCI* tribunal, which did not dismiss acts and omissions completed before the treaty's entry into force as irrelevant. It decided that such acts and omissions may be considered: "for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force."[84]

2.106. Accordingly, the Tribunal decides that for jurisdiction to exist under CAFTA in the present case ratione temporis, there must be a dispute between the Parties after the application of CAFTA to the Claimant consequent upon its change of nationality on 13 December 2007, based on a continuous act or measure that existed after such date.

2.107. In the Tribunal's view, the relevant date for deciding upon the Abuse of Process issue must necessarily be earlier in time than the date for deciding the Ratione Temporis issue. Where the alleged practice is a continuous act (as concluded above by the Tribunal), this means that the practice started before the Claimant's change of nationality and continued after such change. This analysis would found the basis of the

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83 *Mondev v. USA*, *supra* note 62, § 69.

84 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, § 62.

Tribunal"s jurisdiction ratione temporis under CAFTA; but it would preclude the exercise of such jurisdiction on the basis of abuse of process if the Claimant had changed its nationality during that continuous practice knowing of an actual or specific future dispute, thus manipulating the process under CAFTA and the ICSID Convention in bad faith to gain unwarranted access to international arbitration.

2.108. At this point, it is necessary to return again to the Claimant"s pleading at the Hearing, to the effect that it was only claiming compensation for the period from March 2008 onwards, in the words of its counsel:

> *"... let me be very clear: with respect to our claim for damages, we are only asking for damages as a result of the breach that we became aware of and that we only could have become aware of in – as of March 2008 at the earliest ...*
>
> *... let me just emphasize in response to the Tribunal's question as to whether the measure at issue is the same for the CAFTA claims and the Investment Law claims, it is. In both cases the measure at issue is the de facto mining ban. Also, as I said earlier, in both cases, Claimant is alleging damages only from the period from March 2008 forward and not from any earlier period."*[85]

2.109. As unequivocally explained at the Hearing on several occasions, the Claimant"s alleged measure, the de facto ban forming the legal and factual basis pleaded for its CAFTA claims, must be understood by the Tribunal as a continuous act relevant for the Claimant"s claims for compensation from March 2008 onwards (not before); that, as such, it became known to the Claimant only from the public report of President Saca"s speech on 11 March 2008; and that, also as such, it was not known to or foreseen by the Claimant before 13 December 2007 as an actual or specific future dispute with the Respondent under CAFTA.

(08) Decisions

2.110. For these reasons, in the circumstances of the present case, taking into particular consideration the Claimant"s claims as finally pleaded and explained to this Tribunal, the Tribunal determines that the change in the Claimant"s nationality on 13 December 2007, on all the evidential materials adduced by the Parties in these proceedings, is not proven to have been an abuse of process precluding the exercise of the

[85] Hearing D3. 719 & 729 (see also D3.701).

Tribunal‟s jurisdiction to determine such claims under CAFTA and the ICSID Convention; and the Tribunal therefore rejects the Respondent‟s case on the Abuse of Process issue.

2.111. This determination, together with the Tribunal‟s determination of the Denial of Benefits issue later in Part 4 of this Decision, renders it unnecessary for the Tribunal to address other factors raised by the Parties in regard to the Abuse of Process issue. It should not be assumed from its silence here that, if relevant, the Tribunal was minded to decide any of these further factors one way or another. However, the Tribunal considers that the Abuse of Process issue does not apply to the Claimant‟s claims under the Investment Law which are not made under CAFTA and made with an independent right to invoke ICSID Arbitration.

PART 3: ISSUE B - RATIONE TEMPORIS

(01) Introduction

3.1. This Ratione Temporis issue under CAFTA formed a relatively limited part of the jurisdictional debate between the Parties; it has already been addressed in material part by the Tribunal in Part 2 above (in regard to the Abuse of Process issue); and, as appears later in this Decision, it is not decisive of the Tribunal‟s jurisdiction in regard to the Claimant‟s CAFTA claims. In these circumstances, the Tribunal addresses this issue shortly, again as a matter of courtesy to the Parties.

3.2. It is nonetheless necessary to summarise the Parties‟ respective submissions on this issue, which, to a significant extent, mirrors certain of their submissions made on the Abuse of Process issue. The summaries below therefore inevitably duplicate earlier submissions in Part 2 of this Decision, which the Tribunal has there already decided.

(02) The Respondent´s Case

3.3. As an alternative and subsidiary objection to its case on the Abuse of Process and Denial of Benefits issues, the Respondent contended that this Tribunal lacks jurisdiction ratione temporis due to the fact, principally, that the Claimant‟s change of nationality on 13 December 2007 occurred after the relevant measure or measures leading to the Parties‟ present dispute.[86]

3.4. In summary, the Respondent submits that in order to be considered as an investor under CAFTA Article 10.28, an enterprise has first to be a national or an enterprise of a Party, and as such the enterprise has to attempt to make, be making or have made an investment in the territory of another Party. As the Claimant became an enterprise of a Party only on 13 December 2007, all transactions in which it may have been involved before that date were not made as an investor under CAFTA.[87]

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[86] Jurisdiction Memorial, § 8; Hearing D1.107; and the Respondent‟s Post-Hearings Submissions, § 102.
[87] Jurisdiction Memorial, §§ 256-257; Hearing D1.107-111.

3.5. The Respondent also submits that the provisions of CAFTA Chapter 10, including the dispute settlement provisions, can only apply after CAFTA entered into force for the USA and the Respondent on 1 March 2006; and as the Claimant did not become a national of the USA until 13 December 2007, CAFTA protections and benefits could only have been available to the Claimant after 13 December 2007.[88]

3.6. As a result of these undisputed facts, the Respondent concludes that: (i) CAFTA could only cover investments made by the Claimant as a covered investor after 13 December 2007; and that there were no such investments;[89] (ii) the Tribunal lacks jurisdiction over disputes based on any relevant measure that took place before 13 December 2007; and all relevant measures took place before 13 December 2007;[90] and, in any case, (iii) CAFTA imposes a three-year time limit to bring CAFTA claims that should be counted from the time the Claimant knew or should have known of the alleged breach and that damage had occurred caused by such breach; and these CAFTA proceedings began after the expiry of that limitation period: the Respondent submits that, taking 2004 as the commencement date (the expiration of environmental permit statutorily mandated period) or 1 March 2006 (when CAFTA entered into force), the Claimant did not file its Notice of Arbitration within three years of either of those commencement dates.[91]

3.7. The Respondent alleges that, when considering its jurisdiction ratione temporis the Tribunal is not impeded from looking at factual events that took place before the Claimant"s change of nationality, but its jurisdiction must depend upon the existence of a relevant measure that took place after 13 December 2007 and which also constituted a breach of the Respondent"s obligations towards the Claimant under CAFTA. According to the Respondent, if this breach date occurred prior to the acquisition of CAFTA nationality by the Claimant, it necessarily follows that there can be no juris-

88 Jurisdiction Memorial, §§ 264-274 and 297-304, §185; Hearing D1.111-114; Respondent"s Post-Hearings Submissions, § 102.

89 Jurisdiction Memorial, §§ 260-263; Reply Memorial, § 186.

90 Jurisdiction Memorial, §§ 275-279; Reply Memorial, § 187. Respondent"s Post-Hearings Submissions, § 109.

91 Jurisdiction Memorial, §§ 324-336; Reply Memorial, § 188; Respondent"s Post-Hearings Submissions, § 112.

diction for the Tribunal to decide the merits of the Claimant"s claims under CAFTA.[92]

3.8. The Respondent submits that the relevant measure giving rise to the Parties" dispute took place before 13 December 2007. It alleges that: (i) with regard to the environmental permit, MARN did not meet the time-limit established under Salvadoran law to either issue or deny the environmental permit by December 2004,[93] and (ii) with regard to the application for the exploitation concession filed with the Bureau of Mines, once the Bureau of Mines sent the two warning letters to PRES in October and December 2006 triggering the provisions of Article 38 of the Mining Law, the application was effectively terminated; and nothing more could have been done after the expiration of the 30-day extension thereby granted to revive its application. Therefore, according to the Respondent, the application should be treated as having been effectively terminated by January 2007.[94]

3.9. With respect to the requirement to submit evidence of ownership or authorisation to use the surface area of the concession, the Respondent contends that it did not have any legal duty or obligation to change its laws in favour of the Claimant"s application and, therefore, that there was no breach of CAFTA or any other legal obligation towards the Claimant. In any case, all the attempts to change the law in order to accommodate the Claimant"s interests took place in 2005 and 2006, followed by Claimant"s attempt to procure a new law in 2007.[95]

3.10. Concerning the Claimant"s allegation that the relevant measure is a de facto ban occurring in March 2008 with President Saca"s speech or constitutes a continuing or composite act that was only apparent to the Claimant from that speech in March 2008, the Respondent submits that press reports of President Saca"s statements does not constitute a measure[96] and that not issuing the environmental permit and not granting the concession application are not the result of several omissions or a continued omission by the Respondent; nor can these constitute a composite act be-

92 Reply Memorial, § 191; Respondent"s Post-Hearings Submissions, § 103.
93 Jurisdiction Memorial, § 287.
94 Reply Memorial, §§ 194-196; Respondent"s Post-Hearings Submissions, §§ 104-105.
95 Reply Memorial, § 197.
96 Jurisdiction Memorial, §§ 321-323.

cause there was only one application for an environmental permit and only one omission to issue it (which occurred in December 2004) and only one application for an exploitation concession that was effectively terminated by January 2007.[97]

3.11. In addition, the Respondent contends that such statements by the Respondent were not new. Press reports in July 2006 and June 2007 contained similar concerns expressed by the Respondent"s Ministers of Environment Barrera and Guerrero with respect to mining and possible changes to existing legislation for exploitation concessions, respectively.[98]

3.12. Moreover, according to the Respondent, the Claimant has failed to identify the date of the relevant measure at issue. Instead, it has identified only when it allegedly "became aware" of the relevant measure; and this insufficient response cannot assist the Claimant"s argument that there is a relevant measure covered by CAFTA that occurred after the Claimant"s change of nationality, over which CAFTA could apply and by which this Tribunal could assert jurisdiction over the Claimant"s CAFTA claims. The Respondent concludes that there is no such relevant measure.[99]

3.13. The Respondent submits that the loss of value in Pac Rim"s stock was not caused by the press reports regarding President Saca´s statement, but co-incided with the worldwide decline in stock values in 2008 and mirrored the significant drop in the values of other gold stocks.[100] The reason why this Canadian parent company"s stock price never recovered was because it suspended drilling activities and began to make work-force reductions in El Salvador.[101]

3.14. The Respondent submits that the present case should be distinguished from other cases, such as *RDC v. Guatemala,* because in that case there was an executive act affecting the investment after CAFTA entered into force. The Respondent also contends that although a "practice" could be considered a measure, the timing of that measure must depend on the specific acts that are alleged to form part of that "prac-

97 Jurisdiction Memorial, §§ 305-319; Reply Memorial, § 201; Respondent"s Post-Hearing Submissions, § 106.
98 Reply Memorial, §§ 205-206, citing R-120 and R-121.
99 Hearing, D3.709-719; Respondent"s Post-Hearing Submissions, § 105.
100 Reply Memorial, §§ 209-210; Hearing D1.115.
101 Hearing D1.116-117; and the Respondent"s Post-Hearing Submissions, § 20.

tice." In the present case, according to the Respondent, such acts took place in 2004 and were in any event completed by January 2007.[102]

3.15. With respect to the Claimant"s allegation that exchanges before December 2007 between MARN and MINEC and the Claimant evidenced a "mere disagreement" and not a dispute for the purpose of CAFTA, the Respondent submits that the definition of a dispute set forth by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions* (adopted by ICSID tribunals) defines a dispute as a "disagreement on a point of law or fact, a conflict of legal views or interests between two persons." As such a disagreement existed between 2004 and 2006 before the Respondent"s accession to CAFTA, the Claimant"s contrary case should be rejected by the Tribunal.[103]

3.16. As regards CAFTA"s limitation period, CAFTA Article 10.18.1 limits consent to submit a claim to arbitration to three years from the date when the claimant first acquired, or should have first acquired, knowledge of the alleged breach of CAFTA and that the claimant or the enterprise had thereby incurred loss or damage. The Respondent submits that the evidential materials before this Tribunal demonstrate that the Claimant knew in December 2004 that the environmental permit was not issued within the time-limit fixed by Salvadoran law; and that, even on the argument that the three-year term could only count from the date CAFTA entered into force for the Respondent (on 1 March 2006), the Claimant did not file its Notice of Arbitration until 30 April 2009, after CAFTA"s three-year time limit had expired.[104]

3.17. Lastly, the Respondent relies on the award dated 14 March 2011 in *Commerce Group*,[105] whereby, according to the Respondent, that tribunal considered the same factual allegations advanced by the Claimant in this case and decided that the al-

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[102] Reply Memorial, §§ 213-216.
[103] Reply Memorial, § 218.
[104] Jurisdiction Memorial, §§ 324-336; Reply Memorial, §§ 220-223; Hearing D1.117-119; Respondent"s Post-Hearings Submissions, § 112.
[105] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador,* ICSID Case No. ARB/09/17, Award, 14 March 2011 [*Commerce v. El Salvador*].

leged de facto ban on mining was not a relevant measure for the purposes of CAFTA.[106]

(03) The Claimant's Case

3.18. In summary, the Claimant submits that Respondent"s objection to the Tribunal"s jurisdiction ratione temporis under CAFTA should fail on two principal grounds: (i) that 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; and (ii) that the measure at issue is not MARN´s failure to grant an environmental permit to PRES within the required time period in 2004, but the Respondent"s de facto mining ban consisting of the practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments, which was only publicly disclosed in President Saca"s speech in March 2008, after the Claimant´s change of nationality in December 2007.[107]

3.19. As regards the first ground, the Claimant submits that CAFTA Article 10.28 clearly establishes that the order of operations, whether investments were made before acquiring the nationality of a Party or otherwise, is not determinative of whether a person is a covered investor of a Party under CAFTA.[108]

3.20. As regards the second ground with respect to the relevant date, the Claimant submits that the Parties" dispute arose only when the Claimant first became aware of the relevant measure that constituted a breach of the Respondent´s CAFTA obligations towards the Claimant, causing damage to its investments in El Salvador. The Claimant submits that it neither became nor could have become aware of the relevant measure (in the form of the de facto ban on mining) before 13 March 2008 when President Saca publicly disclosed the existence of this ban. In the Claimant"s own words: "it is the ban, as first publicly confirmed by El Salvador´s chief executive in

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106 *Commerce v. El Salvador*, *supra* note 105, § 112. See the Respondent´s letter dated 17 March 2011; and the Respondent"s Post-Hearing Submissions, § 38.

107 Jurisdiction Rejoinder, §§ 226-227; Hearing D1.134-138 and 215; Claimant"s Post-Hearing Submissions, § 20.

108 Jurisdiction Rejoinder, §§ 228-229.

March 2008, that wiped out the prospect of Claimant being able to derive value from its investments, thus rendering those investments worthless."[109]

3.21. In the Claimant´s submission, although the delays and irregularities by the Respondent in the application of Salvadoran law provide valuable historical context for understanding the Respondent"s CAFTA breaches and constitute further evidence and factual bases for the Claimant"s claims under CAFTA, they do not in themselves constitute the relevant measure alleged by the Claimant to have breached the Respondent"s CAFTA obligations.[110]

3.22. For the Claimant, the acts and omissions of the Respondent occurring prior to 2008 are not the measures at issue in this arbitration. Rather, they were only individual instances where MARN or MINEC failed to issue permits or concessions in a timely manner which may have caused delay, but which did not, in contrast to the de facto mining ban, wipe out the value of the Claimant´s mining investments nor nullify its legitimate expectations under CAFTA, giving rise to the present dispute.

3.23. According to the Claimant, "prior to the ban´s coming to light, the frustration of individual acts or 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."[111]

3.24. In the Claimant´s submission, there was in place in El Salvador a practice of withholding mining-related permits and concessions; and that such a practice – already in existence for some indeterminate period of time while the Respondent was to decide what the future of metallic mining in El Salvador was to be - was never revealed in the laws, regulations and representations by the Government on which the Claimant relied in making and expanding its investments in El Salvador. According to the

[109] Jurisdiction Rejoinder, § 231; Jurisdiction Counter-Memorial, § 193; and the Claimant"s Post-Hearing Submissions, § 5.
[110] Jurisdiction Counter-Memorial, §195.
[111] Jurisdiction Rejoinder, § 232.

Claimant, it came to light only in March 2008 when President Saca publicly acknowledged its existence.[112]

3.25. The Claimant contends that the de facto mining ban constitutes the breach of CAFTA pleaded by the Claimant; and, accordingly, the relevant date on which Claimant first knew or should have known that the ban had been implemented by the Respondent, causing loss to the Claimant, was March 2008.[113] According to the Claimant, the significance of President Saca"s revelation in March 2008 is illustrated by the impact on the share price of the Claimant"s parent company (Pacific Rim), which dropped precipitously upon the President"s announcement of the alleged de facto mining ban and has never since recovered, a pattern materially different from other gold stocks.[114]

3.26. The Claimant contends that President Saca´s speech in March 2008 may have marked either the actual imposition of the ban or confirmed a practice that pre-dated his announcement. In any case, that ban, as it relates to the Claimant, is a measure covered by CAFTA. In the first case, it would be a measure that took place both after CAFTA´s entry into force in March 2006 and the Claimant"s change of nationality in December 2007. In the second case, it would be a continuing practice that continued both after CAFTA´s entry into force and the Claimant´s change of nationality. Moreover, in this last case, the Claimant submits that the de facto ban should be considered as a continuing or composite measure,[115] as distinct from a completed act with continuing effects.[116]

3.27. According to the Claimant, acts and omissions that occurred before December 2007 should only be taken into account by this Tribunal "for purposes of understanding the background, the causes or scope of the violations of CAFTA that occurred after entry into force."[117]

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112 Jurisdiction Rejoinder, § 244.
113 Jurisdiction Rejoinder, § 236.
114 Jurisdiction Rejoinder, §§ 249-251.
115 Claimant"s Post-Hearing Submissions, §§ 29-31.
116 Jurisdiction Counter-Memoriall, § 224-244; Hearing D1.221-223.
117 Claimant´s Post-Hearing Submissions § 21, citing *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections on Jurisdiction, 19 September 2008, § 87.

3.28. With respect to the difference between a dispute and a mere disagreement drawn by the Respondent, the Claimant submits that, although every dispute involves a disagreement, it is not true that every disagreement constitutes a dispute. In the Claimant´s submission, the Respondent‟s case is not supported by the decision of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, nor is it the correct interpretation of CAFTA. According to the Claimant, for there to be a dispute under CAFTA, there must be an allegation of a breach of an obligation under CAFTA and an allegation of loss or damage by reason of or arising out of that breach.[118]

3.29. Also according to the Claimant, even if there were some theoretical 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, the conduct of MARN, the Bureau of Mines and other government officials led the Claimant reasonably to understand that even though deadlines had been missed, PRES´s applications for a permit and a concession remained under active consideration by these agencies.[119] Therefore, having induced the Claimant to understand that despite the missed deadlines in 2004 or 2007 there was no dispute, the Respondent is now precluded, as a matter of law, from arguing that the missed deadlines triggered the present dispute between the Claimant and the Respondent.[120]

3.30. With respect to the decision in *Commerce Group*, the Claimant submits that its circumstances differ significantly from this case. Whilst the *Commerce Group* case was about the Respondent‟s revocation of environmental permits previously granted, the present case relates only to a de facto ban.[121] The claim in this other case was dismissed by the tribunal on the basis that the claimant had challenged the revocation before the local courts and had failed to terminate such local court action, even after it had submitted its claims to arbitration under CAFTA, in violation of its waiver obligation under CAFTA Article 10.18. That being that the principal factor for the tribunal‟s decision, the tribunal‟s reference (in paragraph 112 of its award) to a policy

118 Jurisdiction Rejoinder, §§ 260-267.
119 Jurisdiction Counter-Memorial, §§ 93-127.
120 Jurisdiction Rejoinder, §§ 268-276; Hearing D1.223-225.
121 Hearing D1.228-234; and the Claimant‟s Post-Hearing Submissions, §§ 13-15.

that led to the revocation should be considered, according to the Claimant, as mere obiter dicta.[122]

(04) The Tribunal´s Analysis and Decisions

3.31. The Tribunal determines that the relevant questions to be addressed under this issue are: (i) whether, in order to be an investor making an investment under CAFTA Article 10.28, an enterprise has already to be a national or an enterprise of a Party or if such nationality can be acquired after the investment has been made; (ii) what is the relevant measure and which date should be considered as the date of the measure for the purpose of this issue; and (iii) the relevance to be given by the Tribunal, if any, to the recent award in the *Commerce Group* arbitration. It will be noted that the second question, in particular, has already been addressed and decided by the Tribunal in Part 2 above; but it remains necessary to duplicate below the same overall analysis.

3.32. ***The First Question:*** With regard to the first question, the Tribunal does not find in the text, object or purpose of CAFTA any indication that, in order to qualify for protection under the treaty, CAFTA requires an investor to have a Party‟s nationality prior to making its investment.

3.33. Article 10.28 of CAFTA defines "investor of a Party" as: "… a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party[.]…" In the Tribunal‟s opinion, CAFTA Article 10.28 does not require any precise chronological order in the fulfillment of its requirements to quality an "investor of a Party." The Tribunal notes the use of the past tense in regard to the making of an investment; and it also notes that there is no linguistic impediment in an investor otherwise qualified for protection under CAFTA having made its investment prior to such qualification.

3.34. In the Tribunal´s opinion, for the purpose of this Ratione Temporis issue, what CAFTA requires is not that the investor should bear the nationality of one of the Par-

[122] Hearing D1.228-234; and the Claimant‟s Post-Hearing Submissions, § 16.

ties before its investment was made, but that such nationality should exist prior to the alleged breach of CAFTA by the other Party. Therefore, as regards this issue in the present case, the Tribunal is required to determine when the Parties‟ dispute arose in order to establish if the Claimant‟s required nationality under CAFTA nationality was present at the relevant time.

3.35. ***(ii) The Second Question:*** As already noted earlier in this decision, the Parties strongly disagree as to what is the relevant dispute and the time when it arose. Whilst the Respondent submits that the relevant measure giving rise to the dispute was the failure to issue the environmental permit within the statutorily mandated adjudication period by December 2004 or the termination by negative silence of the exploitation concession proceedings under Article 38 of the Mining Law in January 2007, the Claimant alleges that the relevant measure was the de facto mining ban resulting from a practice of withholding mining-related permits and concessions which only came to light, to the Claimant‟s knowledge, in March 2008.[123]

3.36. For the reasons given in Part 2 above, the Tribunal has determined that the relevant dispute as regards the Claimant‟s claims (as now pleaded and clarified in these proceedings) arose on 13 March 2008, at the earliest.

3.37. The Tribunal‟s determination has several consequences for the Ratione Temporis issue. First, as a matter of chronology, there is no doubt that at the time the dispute arose in March 2008, the Claimant was a national of the USA, a CAFTA Party (since 13 December 2007). Second, the relevant measure alleged by the Claimant will necessarily focus on unlawful acts or omissions under CAFTA that allegedly took place not earlier than March 2008.

3.38. Such being the Tribunal‟s analysis, the debate between the Parties concerning: (i) the measures that took place both before the Claimant changed its nationality on 13 December 2007 or before CAFTA entered into force on 1 March 2006; and (ii) the three-year time limit under CAFTA as invoked by the Respondent become irrelevant

[123] The Claimant´s Post-Hearing Submissions, § 14.

for the purpose of deciding the Ratione Temporis issue; and it is not necessary for the Tribunal to address their respective submissions any further here.

3.39. ***(iii) The Third Question:*** The Respondent has much relied upon the passage in the award dated 14 March 2011 in the *Commerce Group* arbitration, where the tribunal considered that: "even if the de facto mining ban policy and the revocation of the permits could be teased apart, the Tribunal is of the view that the policy does not constitute a „measure" within the meaning of CAFTA."[124] The ban was treated by the tribunal as a policy of the Government, as opposed to a measure taken by it. In contrast, the revocation of the environmental permits was treated as a measure taken pursuant to that policy and, as noted, it was the revocation of those permits which put an end to the claimants´ mining and processing activities.

3.40. In the opinion of the Tribunal, this passage must be read in the context of that particular case, where there was at least one specific and identifiable governmental measure that allegedly terminated the rights of the claimants.[125] That particular measure was challenged by the claimants, both before the local courts and before the CAFTA arbitration tribunal. The CAFTA claim was dismissed by the CAFTA tribunal on the ground that the claimants should have discontinued the local proceedings and, by not having done so, the claimants had infringed the waiver provision in CAFTA Article 10.18.[126] Although the tribunal accepted that non-compliance with this waiver provision did not formally dispose of the de facto ban claim (because that particular of action had been not challenged before the local courts),[127] it did do so in substance.

3.41. As it appears to the Tribunal from this award, the tribunal decided that it was not confronted with separate and distinct claims pleaded by the claimants in that arbitra-

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124 *Commerce v. El Salvador*, *supra* note 105, § 112.

125 Id., § 62, citing the Claimants" request ("On September 13, 2006 MARN revoked the environmental permits of the San Sebastian Gold Mine and the San Cristobal Plant and Mine, thereby effectively terminating Claimants´ right to mine and process gold and silver"). In addition, "Commerce/Sanseb applied to MARN for an environmental permit for the New San Sebastian Exploration Licence and the Nueva Esparta exploration license, and then to Respondent´s Ministry of Economy for extension of the exploration licenses. The requested environmental permits were not granted, and on 28 October 2008, El Salvador´s Ministry of Economy denied Commerce/Sanseb´s application citing Commerce/Sanseb´s failure to secure an environment permit", (Id § 65).

126 Id. § 107.

127 Id. § 108.

tion. Accordingly, the tribunal viewed: "the Claimants" claim regarding the de facto mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits."[128] Therefore, having considered that the claim concerning the revocation of the environmental permit was pleaded by the claimants before the local Salvadoran courts and could not be re-pleaded under CAFTA, the tribunal could only conclude that the same approach needed to be taken to preclude the pleading under CAFTA of the de facto mining ban claim.

3.42. Given this Tribunal"s interpretation of the award in its context, the distinction apparently drawn between the Respondent"s policies and measures in paragraph 112 of the award can be seen as being limited to the particular claims pleaded by the claimants in that particular case, as was indeed acknowledged by the tribunal.[129]

3.43. In this Tribunal"s opinion, the present case differs significantly from the *Commerce Group* arbitration. The relevant measure here at issue is not a specific and identifiable governmental measure that effectively terminated the investor´s rights at a particular moment in time (i.e. the termination of a permit or license, denial of an application, etc.), but, rather the alleged continuing practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments.[130] Moreover, no legal action against the Respondent has been filed before the local Salvadoran courts by the Claimant. Whilst it will remain for the Claimant to prove its claims at the merits stage of these proceedings, the way the case has been pleaded and clarified by the Claimant before this Tribunal indicates that the

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128 Id. § 111.

129 Id. §§ 112 ("at least based on the Tribunal´s evaluation of this particular case") and 68 ("…the Tribunal will not address arguments that have not been raised by the Parties, as this Award is a decision only in the dispute as pleaded between them").

130 In answering the Tribunal´s question at the Hearing if "(A)s we stand today, going back in time to March 2008, has any foreign company been given an exploitation permit for underground mining, first of all as regards any foreign company and, separately, as regards any local –that is, national- company. And if no such and if none have been granted, either none to a foreign company or none to a local company or both, what is the reason for that?" (page 559, lines 7/22 and 560, line 1), the Respondent answered "The truth of the matter is that no foreign or national company received a mining exploitation concession in El Salvador since Commerce Group was issued its last concession in August of 2003. The truth of the matter is that since then there have only been two Exploitation Concession Applications. One was by Pacific Mining Corp. of Canada. One was for another company whose name I do not know. That other one was filed in 2005 and was rejected by the Ministry of the Economy in 2006. Since 2005, with the exception of the Pacific Rim Mining Corp. there simply have been no Mining Exploitation Concession Applications". Respondent"s answers at Hearing D3.614-615.

distinction made in the *Commerce Group* award, as invoked by the Respondent, is inapplicable to this Ratione Temporis issue.

3.44. ***Decisions:*** In conclusion, as regards the Claimant"s CAFTA claims, the Tribunal decides to reject the Respondent"s objections to its jurisdiction under this Ratione Temporis issue. As already noted in regard to the Abuse of Process issue, however, this is not the decisive issue in regard to the Respondent"s jurisdictional objections to the Claimant"s CAFTA claims.

PART 4: ISSUE C - DENIAL OF BENEFITS

(01) Introduction

4.1. This third issue regarding denial of benefits arises under CAFTA Article 10.12.2, which permits (but does not require) a CAFTA Party, subject to CAFTA Articles 18.3 and 20.4, to:

> *"... deny the benefits of [Chapter 10 of CAFTA] to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party and persons of a non-Party, or of the denying Party, own or control the enterprise."*

"Enterprise" is a broadly defined term under CAFTA Articles 10.28 and 2.1, meaning "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association" and a branch of such enterprise. (The full texts of these CAFTA provisions are set out in the Annex to Part 1 above).

4.2. The Tribunal was informed by the Parties that this case is the first time that an arbitration tribunal has been required to address the issue of denial of benefits under CAFTA Article 10.12.2.

4.3. In these circumstances, the Tribunal (as invited by the Parties) considered whether it was desirable for the Tribunal to draw on past decisions by tribunals addressing provisions on denial of benefits under other treaties, particularly the Energy Charter Treaty. The Tribunal has chosen not to do so here given their different wording, context and effect. (These decisions include *Plama v. Bulgaria; LLC AMTO v. Ukraine* (under the Energy Charter Treaty) and *Petrobart v. Kyrgyz Republic; Generation Ukraine v. Ukraine* (under the USA-Ukraine BIT); and, as tangentially raised,

EMELEC v. Ecuador (under the USA-Ecuador BIT) and *CCL Oil v. Kazakhstan* (under the USA-Kazakhstan BIT)).

4.4. As expressly worded in CAFTA, it is significant that the "benefits" denied under CAFTA Article 10.12.2 include all the benefits conferred upon the investor under Chapter 10 of CAFTA, including both Section A on "Investment" and Section B on "Investor-State Dispute Settlement." Section B specifically includes CAFTA Article 10.16(3)(a) providing for ICSID arbitration, as here invoked by the Claimant for its claims under CAFTA to establish the Tribunal"s jurisdiction to decide those CAFTA claims against the Respondent. This jurisdictional issue under CAFTA does not therefore resemble the more limited issue under Article 17(1) of the Energy Charter Treaty, although in this respect it resembles the position under Article 1113(1) of NAFTA. The Tribunal is not aware of any decision as to denial of benefits under NAFTA; and none was brought to its attention by the Parties.

4.5. For these reasons, the Tribunal determines that, in the present case, it must interpret the relevant text of CAFTA by itself, in accordance with the relevant principles for treaty interpretation under international law as codified in the Vienna Convention on the Law of Treaties.

(02) The Respondent's Case

4.6. The Respondent contends that it has properly, fully and timeously denied all relevant benefits to the Claimant under CAFTA Article 10.12.2 on 3 August 2010 (the day after the Tribunal"s Decision of 2 August 2010), whereby the Respondent (as a CAFTA Party) may and did deny the benefits of CAFTA (including the provision on dispute resolution here invoked by the Claimant) to an enterprise of another Party, i.e. the Claimant, if "the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party own or control the enterprise."

4.7. In summary,[131] the Respondent contends that the Claimant has never had "substantial business activities" in the USA (as a CAFTA Party) and that it is and has been owned and controlled always by persons of a non-CAFTA Party. Whereas the Respondent submits that the ownership/control part of this test under CAFTA Article 10.12.2 is disjunctive, requiring either ownership or control by "persons of a non-Party", the Respondent asserts in this case that the Claimant is both owned and controlled by Pacific Rim, a Canadian company and a legal person of a non-CAFTA Party, which has at all relevant times wholly owned the Claimant. The Respondent contends that these facts, effectively admitted by the Claimant during these arbitration proceedings, suffice to justify the Respondent"s denial of benefits under CAFTA Article 10.12.2, validly made in a timely manner on 3 August 2010.

4.8. ***(i) Substantial Business Activities:*** The Respondent relies on Mr Shrake"s evidence as factual confirmation that the Claimant had no relevant business activities in the USA: it submits that Mr Shrake testified that the Claimant does nothing other than hold shares; that it has no employees; that it leases no office space; that it has no bank account [D2.445xx]; that it has no board of directors; that it pays no taxes in the USA; that it owns no tangible property or makes anything in the USA; and that it performs by itself no exploration activities from the USA [D2.493xxff]. The Respondent submits that Mr Shrake also testified that all contributions towards the alleged investments in El Salvador were made not by the Claimant but by the Claimant"s parent company and another company related to the Claimant"s parent company [D5.511xx]. The Respondent contends, again based on Mr Shrake"s evidence, that the Claimant had and has no physical existence whatsoever other than its name on certain documentation; and, thus, that it cannot possibly have (or have had) substantial business activities in the USA.

4.9. The Respondent contends that if the mere holding of shares by a claimant acting only as a nominal holding company was a sufficient activity to defeat a denial of benefits under CAFTA (as argued by the Claimant), then the entire purpose of CAFTA Article 10.12.2 would be effectively eviscerated. According to the Respondent, the Claimant"s case would ensure that all enterprises passively holding shares

[131] This summary is largely prepared from the Respondent"s oral submissions at the Hearing and its Post-Hearing Submissions.

would qualify for treaty protections under CAFTA, thereby making CAFTA Article 10.12.2 redundant. The Respondent submits that this absurd result cannot be the correct interpretation of the relevant treaty language in CAFTA under international law.

4.10. In regard to the Claimant"s alleged investments made in El Salvador, the Respondent refers to wire transfers coming not from the Claimant but from its Canadian parent company (either Pacific Rim or its predecessor); Mr Shrake"s confirmation to such effect in a press release of 3 July 2008, as also explained by Mr Shrake during his oral testimony [D2.488xx]; and the Claimant's slender reliance upon a fragmentary page from an unconsolidated and apparently unaudited balance sheet purporting to show the Claimant carrying an investment in El Salvador as an "asset". As to the latter, the Respondent submits that this entry proves nothing as to whether the Claimant itself actually made that investment in the first place (as opposed to its Canadian parent company); and that all it could show, at most, is that at some unidentified time this asset was ostensibly placed on the Claimant"s books. In any event, the Respondent submits that this "thinly documented indication" of apparent ownership of an asset located in El Salvador cannot constitute substantial business activities by the Claimant in the USA for the purposes of CAFTA Article 10.12.2.

4.11. ***(ii) Ownership/Control*:** The Respondent contends that the Claimant was both owned and controlled by persons of a non-CAFTA Party. As to the twin contrary arguments advanced by the Claimant, the Respondent contends that neither can succeed in defeating this straightforward conclusion under CAFTA, as a matter of treaty interpretation and as a matter of undisputed or indisputable fact.

4.12. First, so the Respondent submits, the Claimant wrongly applies the plain language of CAFTA to argue not the ownership of the Claimant, but the different ownership of the Claimant's Canadian parent company (Pacific Rim); and second, the Claimant wrongly asserts that because the majority of the shares in the Canadian parent are allegedly held by persons with postal addresses in the USA, then it must follow that the Canadian parent company is owned by persons of a CAFTA Party (namely the USA) and thus the Claimant, as the Canadian parent"s subsidiary, is indirectly also owned by persons of that same CAFTA Party (the USA).

4.13. As to the issue over CAFTA‟s interpretation, the Respondent submits that it is legally irrelevant that the Canadian company might have US-based shareholders because, regardless of who or what these shareholders might be or of their nationality, the Claimant remains wholly owned by a person of a non-CAFTA Party for the purpose of CAFTA Article 10.12.2, namely the Claimant‟s Canadian parent.

4.14. As to the issue over indirect share ownership, the Respondent submits that the Claimant has not established, as a fact, that the Canadian parent is owned by "nationals" of the USA. Chapter 10 of CAFTA defines "national" as "a natural person who has the nationality of a Party according to Annex 2.1 (Country-Specific Definitions)"; CAFTA Annex 2.1 provides that, for the USA, " … 'a natural person who has the nationality of a Party' means 'national of the United States' as defined in the existing provisions of the Immigration and Nationality Act"; and that the US statute defines a "national of the United States" as either "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." (8 U.S.C. § 1101(a)(22)). CAFTA and the US statute, so submits the Respondent, take no account of postal addresses in the USA.

4.15. The Respondent also contends that a postal address or even residence in the USA is not the same as nationality or permanent allegiance under US law because there are many natural and legal persons with addresses in the USA who are not nationals or do not owe permanent allegiance to the USA.

4.16. The Respondent concludes that it would violate basic principles of treaty interpretation under international law to ignore such a carefully drafted definition in CAFTA and instead to substitute what the Claimant acknowledges to be domestic "rules of thumb" used by different U.S. governmental agencies for different purposes, not involving a definition in a multilateral treaty subject to international law. Moreover, even under these so-called proxies invoked by the Claimant, the Respondent contends that, as an evidential matter, the Claimant has not identified these US-based persons; and it therefore remains impossible for the Respondent (and the Tribunal) even to test the Claimant‟s unfounded factual assertions.

4.17. ***(iii) Timeliness:*** The Respondent contends that it denied timeously benefits under CAFTA on 3 August 2010 as regards the Claimant; that its notification to the USA on 1 March 2010 was also made timeously; that its invocation of CAFTA‟s denial of benefits provision was not required before the commencement of these ICSID arbitration proceedings by the Claimant on 30 April 2009 (with its Notice of Arbitration); and that in any event such invocation could not have been made before 13 December 2007 when the Claimant became an enterprise of the USA (as a CAFTA Party).

4.18. First, the Respondent submits that the plain language of CAFTA sets forth the requirements for the invocation of denial of benefits; and that, notably, nowhere does CAFTA impose any time-limit for such an invocation by a CAFTA Party by notice to a claimant. The Respondent also cites Ms Kinnear‟s NAFTA Guide and Thorn & Doucleff‟s "Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of „Investor‟" (2010) to show that, in practice, the question whether a State has the right to deny benefits to an investor is most unlikely to arise before a dispute with that investor: "Before this, states do not necessarily have either a reason or the opportunity to evaluate the nationality of the investors involved in potentially countless foreign investments within their territory."

4.19. Second, the Respondent submits that a CAFTA Party‟s invocation of denial of benefits remains appropriate after an ICSID arbitration has commenced; and that it does not amount to the unilateral withdrawal of consent prohibited by Article 25(1) of the ICSID Convention. According to the Respondent, the CAFTA Party is not there withdrawing consent because the general consent expressed in CAFTA Article 10.17 to "the submission of a claim to arbitration under this Section in accordance with this Agreement," remains intact; but there was and remains no unconditional consent to arbitrate disputes with an enterprise falling within CAFTA Article 10.12.2. The Respondent submits that an investor of a non-CAFTA Party cannot enjoy the benefits of CAFTA; and that CAFTA‟s provision on denial of benefits simply protects CAFTA Parties and their nationals from "free-riding" non-CAFTA Party investors improperly invoking arbitration and other benefits under CAFTA.

4.20. Accordingly, so the Respondent submits, the timing of the Respondent‟s invocation of denial of benefits was appropriate as a timely jurisdictional objection in these ICSID arbitration proceedings; and that this timing has permitted the Tribunal to consider the denial of benefits issue efficiently under the ICSID Convention and ICSID Arbitration Rules, along with other objections to jurisdiction made by the Respondent. Conversely, the Respondent submits that an implied time-limit requiring that the denial of benefits under CAFTA Article 10.12.2 must be invoked prior to an arbitration‟s commencement would lead to several practical difficulties for CAFTA Parties.

4.21. The Respondent accepts, however, that a CAFTA Party may not wait until after an adverse award to invoke denial of benefits under CAFTA for measures addressed in that arbitration award. It submits, apart from considerations of good faith, that in an ICSID arbitration, a "party which knows or should have known that a provision of ... these [ICSID Arbitration] Rules or of any other rules or agreement applicable to the proceeding . . . has not been complied with and which fails to state promptly its objections thereto, shall be deemed . . . to have waived its right to object" pursuant to ICSID Arbitration Rule 27.

4.22. The Respondent further contends that the present case demonstrates the inappropriateness of requiring a CAFTA Party to invoke denial of benefits prior to the commencement of an arbitration. Here, the Respondent did not have any notice that the Claimant changed its nationality in December 2007 (from the Cayman Islands to the USA) until 16 June 2008; that such notice was not volunteered by the Claimant but given in response to an unrelated query by the Respondent's National Investment Office; and that the Respondent would not even then have had any reason to understand that the Claimant was to become a claimant under CAFTA or whether, in such a dispute, the Respondent could invoke denial of benefits under CAFTA Article 10.12.2.

4.23. Nor, according to the Respondent, is there any requirement under CAFTA for the invocation of denial of benefits in the short ninety-day period between a CAFTA Party‟s receipt of the Notice of Intent from a claimant and that claimant‟s subsequent filing of a Notice of Arbitration under CAFTA. It would be unreasonable, so

the Respondent submits, to require a CAFTA Party to engage professional legal advisers, complete all necessary researches, vet the decision to deny benefits with appropriate government agencies and then promptly invoke its right to deny benefits all within ninety days of receiving each and every Notice of Intent, especially where a Notice of Intent might not even be followed by any Notice of Arbitration at all.

4.24. Moreover, in the present case, the Respondent submits that the Claimant's Notice of Intent was cursory and even misleading: it asserted (wrongly) that the Claimant was an "American investor" which was "predominantly managed and directed from its exploration headquarters in Reno, Nevada" (Introduction and paragraph 6).

4.25. The Respondent contends that by 1 March 2010 it had only partially completed its investigations into the Claimant's ownership and business activities when it provided to the U.S. Trade Representative a notification letter of the Respondent‟s intent to deny benefits to the Claimant under CAFTA Article 10.12.2; that the Respondent necessarily continued its investigations thereafter until its invocation of denial of benefits on 3 August 2010; and that there was therefore no delay, still less any undue delay by the Respondent.

4.26. The Respondent contends further that, in any event, the Claimant has not suffered any prejudice from the timing of the Respondent‟s denial of benefits under CAFTA Article 10.12.2. Indeed, so the Respondent submits, the Claimant was not itself entitled to any notice from the Respondent under CAFTA, as distinct from notification to the USA as the most directly affected CAFTA Party under CAFTA Article 18.3.

4.27. The Respondent particularly dismisses the Claimant's argument that the Claimant has somehow been prejudiced because the timing of the notice of denial of benefits prevented the USA from engaging in the consultation procedure under CAFTA Article 20.4. The Respondent contends that such participation could not be an inappropriate grant of "diplomatic protection" in contravention of Article 27(1) of the ICSID Convention. The Respondent emphasises that if there were any merit to the Claimant‟s argument, it would be the USA (not the Claimant) which would have standing to make such an objection in this case; but the USA not only does not raise

the Claimant‟s argument but clearly rejects that argument in its own Submission to this Tribunal.

4.28. Moreover, the Respondent formally made the following statement at the Hearing, as recorded in the transcript: "[I]f the United States of America wishes to initiate such consultations with El Salvador with respect to the invocation of the denial of benefits, El Salvador would not have any objection to those consultations on the basis that they would amount to diplomatic protection for purposes of Article 27 of the ICSID Convention, and El Salvador expressly waives any right it might have to object to those consultations on that ground." [132]

4.29. Lastly, the Respondent contends that its case is supported by the USA‟s state practice relevant to CAFTA Article 20.4 and ICSID Article 27. The Respondent refers to the US Department of State Foreign Affairs Manual, Volume 7 – Consular Services, Part 671, Assistance to Citizens Involved in Commercial, Investment and Other Business Related Disputes Abroad ("FAM"), as showing that the USA‟s official policy on handling foreign investment disputes of U.S. nationals overseas closely tracks the distinction made in ICSID Article 27(1) and Article 27(2) between (i) diplomatic protection and espousal and (ii) informal communications meant to facilitate dispute resolution; that FAM prohibits consular officers from taking a position on the merits of a foreign investment dispute until the requirements for espousal have been met, including the exhaustion of local and other remedies (which expressly include international arbitration under any applicable international treaty); that, until that time, "the scope of appropriate USG [U.S. Government] assistance is generally confined to consular services aimed at helping the United States citizen/national navigate the host country legal system"; that the USA "may in its discretion decide to make diplomatic representations to the host government in order to encourage expeditious resolution of the dispute"; but that there is a clear limit on such representations, as follows: "In all such cases, however, posts [i.e., embassies and consulates] should be clear both with the host government and with the investor that such representations do not reflect a decision on the part of the USG that the claim is valid, but rather reflect our interest in having the claim amicably and expe-

[132] Hearing D4.649.

ditiously resolved" (paragraph l). The Respondent submits, therefore, that there was and can have been no practical difficulty in this case arising from ICSID Article 27(1).

4.30. In conclusion, for all these reasons, the Respondent contends that it has effectively denied the Claimant and its investments any benefits under CAFTA; and that consequently this Tribunal has no jurisdiction or competence to decide any of the Claimant‟s claims under CAFTA and the ICSID Convention.

(03) The Claimant's Case

4.31. The Claimant contends that the Respondent has failed to establish any of the conditions for invoking its denial of benefits to the Claimant under CAFTA Article 10.12.2.

4.32. In summary,[133] the Claimant contends that it has substantial business activities in the USA; that it is both owned and controlled by persons of the USA as a CAFTA Party; and that the Respondent did not give timely notice of its invocation of CAFTA Article 10.12.2.

4.33. ***(i) Substantial Business Activities:*** The Claimant contends that the Respondent has failed to discharge its burden of proving its positive assertion that the Claimant lacks "substantial business activities" in the USA; that, ignoring evidence to the contrary, the Respondent‟s argument is narrowly focused on a small check-list of activities which must be present (but only according to the Respondent) in order to qualify as substantial business activities; and that the Respondent‟s mechanical approach is inconsistent with the text, object and purpose of CAFTA.

4.34. Taking all the evidence as a whole, the Claimant submits that it has substantial business activities in the USA, whether the Claimant is considered separately as a single holding company (which, along with its holdings, has been continuously managed since 1997 from Nevada, USA) or whether the Claimant is considered as part of a

[133] This summary is largely prepared from the Claimant‟s oral submissions at the Hearing and its Post-Hearing Submissions.

group of Nevada-based companies (which together contributed substantial financial capital, intellectual property, personnel and oversight to the companies‟ Salvadoran operations). Accordingly, so the Claimant submits, its activities fall squarely within the meaning of "substantial business activities" in the USA under CAFTA Article 10.12.2.

4.35. ***(ii) Ownership/Control***: The Claimant contends that the Respondent has equally failed to discharge its burden of rebutting the evidence that the Claimant ultimately is owned and controlled by persons of the USA as a CAFTA Party; and that the Respondent‟s argument that the Claimant is owned and controlled directly by its Canadian parent (Pacific Rim) ignores the fact that the ultimate owners and controllers of the Claimant are those US persons who own a majority of the shares in the Canadian parent.

4.36. As to control, the Claimant submits, taking all the evidence as a whole, that the Claimant is controlled, in the sense of exercise of critical decision-making, by a US national (Mr Shrake); that Mr Shrake serves as one of the managers of the Claimant (the Claimant‟s board of directors having been replaced by three managers consequent upon the change of nationality from the Cayman Islands to the USA in December 2007); and therefore, as both a manager and de facto chief executive officer of the Claimant, Mr Shrake has (and had) the power to direct and control the activities of the Claimant.

4.37. As to ownership, the Claimant also submits that the fact of majority ownership by US nationals (shareholders in the Claimant‟s parent company) and day-to-day management by a US national in the USA precludes the Respondent from denying CAFTA‟s benefits to the Claimant under CAFTA Article 10.12.2.

4.38. ***(iii) Timeliness:*** The Claimant submits that the Respondent‟s attempt to deny CAFTA benefits to the Claimant must also fail because the Respondent did not comply with the procedural requirements of CAFTA Article 10.12.2 requiring the Respondent to provide to the USA timely notice of its intent to deny benefits to the Claimant and an opportunity to engage in State-to-State consultations; that the Respondent deliberately waited until 1 March 2010 (fifteen months after the Claimant

provided the Respondent with its Notice of Intent) for the Respondent‟s notice to the USA, long after the time for any meaningful State-to-State consultation envisaged by CAFTA Article 10.12.2; and that the denial of benefits could not be validly made by the Respondent on 3 August 2010 long after the commencement of this ICSID arbitration.

4.39. The Claimant submits that the Respondent could have notified the USA as early as June 2008 (following the meeting between the Respondent‟s President, the USA‟s Ambassador and Pacific Rim‟s chief executive officer); and that the Respondent has never offered any satisfactory explanation in these proceedings as to why it chose deliberately to wait so long before providing the notice in March 2010 to the USA or the later notice in August 2010 to the Claimant.

4.40. The Claimant contends that CAFTA requires that a Party provide timely notice of its intention to deny benefits before the filing of a request for arbitration by a claimant; that, in contrast to almost every one of the 44 other U.S. investment treaties and free trade agreements concluded since NAFTA entered into force in 1994, CAFTA makes the invocation of denial of benefits "subject to" compliance with two other CAFTA articles: (i) the first on the provision of notice to other CAFTA Parties of measures that may affect CAFTA rights under CAFTA Article 18.3; and (ii) the second on formal State-to-State consultations under CAFTA Article 20.4; that, as denial of an investor‟s CAFTA benefits is made "subject to" these two obligations, compliance with these obligations must precede an actual denial of benefits by a CAFTA Party; and that compliance with these two obligations must necessarily occur before any claims are submitted by a claimant to ICSID arbitration under CAFTA.

4.41. The Claimant denies that its interpretation of CAFTA imposes any undue or impractical burden on CAFTA Parties. In particular, in the present case as already indicated, the Claimant contends that the Respondent could have provided the required notice in June 2008 (see above) or at least in December 2008 (after receiving the Claimant‟s Notice of Intent and before the Claimant submitted its Notice of Arbitration in April 2009); that, contrary to the Respondent‟s argument, it was not necessary for the Respondent to engage in lengthy investigations to determine whether all the criteria for denial of benefits were definitively established before the Respondent

could provide such notice to the USA; and that CAFTA‟s notification and consultation procedures exist so that CAFTA Parties may consult with one another over the merits of a proposed measure, such as a proposed (but not actual) denial of benefits to an investor of another CAFTA Party.

4.42. The Claimant dismisses the Respondent‟s subsidiary reliance upon the notice requirement in CAFTA Article 18.3 applying only "[t]o the maximum extent possible." The Claimant contends that this plain language means only what it says: i.e., that failure to provide notice will not result in a breach of CAFTA in circumstances where it is actually impossible for the CAFTA Party to provide such notice, as opposed to mere inconvenience, impracticality or arbitration strategy; that the former would include an emergency measure adopted by the CAFTA Party to deal urgently with a natural disaster or a situation in which the CAFTA Party‟s legislative branch unexpectedly amended a law without warning the executive branch effectively responsible for providing notice to CAFTA Parties under CAFTA Article 18.3; and that, in contrast, nothing in the circumstances of the Respondent‟s dealings with the Claimant in the present case limited the possibility of the Respondent in providing timely notice to the USA of its proposed denial of benefits to the Claimant.

4.43. The Claimant also dismisses the Respondent‟s subsidiary reliance upon CAFTA Article 18.3 relating to "proposed or actual measures," as if the Respondent could notify the USA of its denial of benefits to the Claimant at the point only when such denial was "proposed" or "actual." The Claimant contends that, consistent with the ordinary meaning of CAFTA Article 18.3, a CAFTA Party‟s obligation requires notice of any measure that might affect another CAFTA Party‟s interests under CAFTA (such as a denial of benefits to one of that Party‟s investors), whether that measure is proposed or actual; that State-to-State consultations would be of little utility (if any) if, as appears to have been the case when the Respondent sent its notice to the USA, the denying Party has already made up its mind and was already firmly committed to its position; and that the Respondent‟s limited interpretation of its obligation under CAFTA Article 18.3 (with CAFTA Article 10.12.2) violates the legal principle of "*effet utile*" under international law.

4.44. The Claimant contends further that a denying CAFTA Party"s notice under CAFTA Article 10.12.2 must be provided in a timely manner for State-to-State consultations to occur before claims are submitted to ICSID arbitration by the Claimant because otherwise ICSID Article 27(1) renders later consultations impermissible.

4.45. The Claimant stresses the fact that the Respondent deliberately waited five months to deny benefits to the Claimant in August 2010 after its notice to the USA in March 2010; that the Respondent"s tendered explanation lacks any substance (namely: " ... because this really is the first denial of benefits that we"re aware of under CAFTA or NAFTA. And because we take seriously the opportunity of the United States Government or any other affected Party to engage in State-to-State consultation");[134] that if the Respondent had truly wished to provide the USA with an opportunity to engage in State-to-State consultations, the Respondent would not have waited until this ICSID arbitration was well under way, at which point the USA was bound by its treaty obligation under ICSID Article 27(1) not to give any diplomatic protection to the Claimant; and that tactical ad hoc waivers made unilaterally by the Respondent at the Hearing (significantly to the Claimant and not the USA) cannot amend the interpretation of two multilateral treaties under international law.

4.46. The Claimant submits that arguments that the investor"s claim is valid are clearly intended to be addressed by the State-to-State consultation procedure under CAFTA Article 20.4; that the very purpose of notice and consultation qualifying CAFTA Article 10.12.2 is to give the CAFTA Parties the opportunity to exchange views on both facts and law relevant to the claim (including any proposed denial of benefits); and that it is not credible that the USA would have agreed to a procedure in CAFTA that would require precisely the kind of intervention into the merits of a dispute in a pending arbitration contrary to ICSID Article 27(1).

4.47. The Claimant submits that, for this reason, if the Respondent"s interpretation were adopted, then for tactical reasons a CAFTA Party could deliberately wait until after an investor had submitted its claim to ICSID arbitration to invoke denial of benefits under CAFTA (just as the Respondent did in the present case); and that by such de-

[134] Hearing D3.647.

liberate delay, the CAFTA Party could thwart any objection from the investor‟s CAFTA Party under CAFTA Articles 18.3 and 20.4, notwithstanding CAFTA Article 10.12.2.

4.48. The Claimant submits that there is no legitimate reason based on the text or context of CAFTA for the Respondent‟s assertion that the proper time to provide notice to a claimant can be delayed to the jurisdictional phase of an arbitration. Indeed, so the Claimant contends, under the Respondent‟s interpretation there is no reason why a respondent could not wait to deny benefits until after an award has been made in favour of such claimant. The Claimant submits that this absurd result cannot be the correct interpretation of CAFTA Article 10.12.2 under international law.

4.49. Lastly, the Claimant contends that ICSID Article 25(1) prevents the Respondent from denying benefits to the Claimant after claims have been submitted to arbitration by the Claimant because once a Contracting State has consented to ICSID arbitration with a claimant, that consent is irrevocable and may not be unilaterally withdrawn; and that the Respondent‟s mistaken interpretation of CAFTA Article 10.12.2 would allow a respondent CAFTA Party to withdraw its consent after claims had been submitted by a claimant to arbitration, in violation of ICSID Article 25(1).

4.50. In conclusion, the Claimant contends that the Respondent has not satisfied any of the conditions for denying benefits to the Claimant under CAFTA Article 10.12.2; and that, accordingly, the Respondent‟s attempt to deprive the Claimant of CAFTA benefits should fail and should have no effect on this Tribunal‟s jurisdiction to address the Claimant‟s CAFTA claims on their merits.

(04) Non-Disputing Parties' Submissions

4.51. ***Costa Rica:*** In its Submission, Costa Rica observes that no provision of CAFTA requires the CAFTA Party to address any communications "to the individual concerned" (paragraph 3), as distinct from addressing the other CAFTA Party under CAFTA Articles 18.3 and 20.4. Costa Rica also observes that the consultation procedure between CAFTA Parties under CAFTA Article 20.4 does not amount to dip-

lomatic protection within the meaning of ICSID Article 27(1), citing the International Law Commission"s Draft Articles on Diplomatic Protection (paragraph 5).

4.52. As to timing, Costa Rica observes that CAFTA Article 10.12.2 is silent on when a CAFTA Party may deny benefits; and it suggests that, consequently, "denial of benefits may occur at any time, regardless even of the existence or not of an investment arbitration" (paragraph 6), particularly when a tribunal is examining its jurisdiction (paragraphs 8 & 9), although such a denial could not be legally effective after an award was made (paragraph 7).

4.53. Costa Rica analyses the object and purpose of CAFTA Article 10.12.2, as follows (paragraphs 12 & 13):

"*12 ... the denial of benefits clause of [CAFTA Article 10.12] aims to correct a situation where investors, who may formally be from a Party to the Treaty but are not such in reality, attempt to benefit from the Treaty. In this regard it is a clause that privileges substance over form ... An interpretation of [CAFTA Article 10.12] that creates formal requirements, including as to the moment of invocation, that are not present in the text of the treaty and that have the effect of denying the provision of any practicality goes against the object and purpose of the Treaty.*

13 A State Party to DR-CAFTA is not necessarily informed at all times of the share make-up and corporate structure of all investors from other Parties to the Treaty in its territory. What is more likely is that the State only becomes aware of who owns or controls a company at the time when there is a dispute, which escalates into an investment arbitration. Failing to allow the invocation of the denial of benefits clause even when an investment arbitration has already commenced deprives this provision of any effectiveness."

4.54. As regards the nationality of a natural person under CAFTA Article 10.12.2, Costa Rica observes that, with respect to the USA, CAFTA expressly provides that such nationality is determined by the US Immigration and Nationality Act, to the exclusion of other domestic law instruments (paragraph 16).

4.55. ***USA:*** In its Submission, the USA observes that CAFTA Article 10.12.2 "is consistent with a long-standing U.S. policy to include a denial of benefits provision in investments to safeguard against the potential problem of "free-rider" investors, i.e. third party entities that may only as a matter of formality be entitled to the benefits

of a particular agreement", citing NAFTA Article 1113 and also testimony before the US House of Representatives by one of CAFTA's US negotiators (paragraph 3).

4.56. The USA observes (in common with Costa Rica) that a CAFTA Party is not required to invoke denial of benefits under CAFTA Article 10.12.2 before an arbitration commences; and that it may do so as part of a jurisdictional defence after a claim has been submitted to arbitration (paragraph 5). The USA likewise observes that this CAFTA provision contains no time-limit for its invocation; and that a contrary interpretation would place an untenable burden on a CAFTA Party, contrary to the purpose of CAFTA Article 10.12.2:

> *—... It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territories of each of the other six CAFTA-DR Parties that attempt to make, are making, or have made investments in the territory of the respondent [citing Ms Kinnear's NAFTA Commentary]. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in those countries. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring CAFTA-DR Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision" (paragraph 6).*

4.57. The USA also observes that neither CAFTA Article 10.12.2 nor CAFTA Article 18.3 require a CAFTA Party to give any notice to a claimant (such as the Claimant in the present case); and the USA notes that CAFTA Article 20.4.1 is only discretionary even as to CAFTA Parties: "Any Party *may* request in writing consultations with any other Party ..." (emphasis supplied).

(05) Amicus Curiae

4.58. The Amicus Curiae observes in its Submission that CAFTA Article 10.12.2 "provides an important safeguard to CAFTA Parties and their citizens" and "cannot be emptied of practical effect" or rendered "a nullity" (page 13).

4.59. The Amicus Curiae also observes that an imposed time-limit for the invocation of denial of benefits by a CAFTA Party "would necessarily be expensive" for that

Party [i.e. as the host State] which may "be facing serious imperatives regarding poverty alleviation and the attainment of the millennium development goals". It also observes that even if, theoretically, a CAFTA Party "could establish and maintain the required system of pre-investment investigation and post-investment monitoring of a foreign investor's ownership structure," such a system would also be "intrusive for the investor, creating more bureaucratic hurdles and as such likely reducing foreign investment, not increasing it." (page 13).

(06) The Tribunal's Analysis and Decisions

4.60. ***Introductory Matters:*** The Tribunal approaches this issue as to denial of benefits on the basis that it is primarily for the Respondent to establish, both as to law and fact, its positive assertion that the Respondent has effectively denied all relevant benefits under CAFTA to the Claimant pursuant to CAFTA Article 10.12.2 and that, conversely, it is not primarily for the Claimant here to establish the opposite as a negative.

4.61. The Tribunal determines that the meaning and application of CAFTA Article 10.12.2, interpreted in accordance with its object and purpose under international law, require the Respondent to establish two conditions in the present case: (i) that the Claimant has no substantial business activities in the territory of the USA (beyond mere form) and (ii) either (a) that the Claimant is owned by persons of a non-CAFTA Party (here Canada) or (b) that the Claimant is controlled by persons of a non-CAFTA Party (here also Canada, or at least persons not of the USA or the Respondent as CAFTA Parties). In addition, the Tribunal considers below whether a third condition is required as to the time by which the Respondent should have elected to deny benefits under CAFTA Article 10.12.2 and, if so, whether that deadline was met by the Respondent in the present case.

4.62. It is convenient for the Tribunal to address in turn each of these three questions.

4.63. ***(i) Substantial Business Activities*:** It is clear to the Tribunal from the factual evidence adduced in these arbitration proceedings that the group of companies of which

the Claimant forms part has and has had since December 2007 substantial business activities in the USA.

4.64. A useful description of such activities was given by Ms McLeod-Selzer, the Chairman of Pacific Rim, a Director of Pacific Rim Exploration Inc, the President and a Director of Dayton Mining (U.S.) Inc. and also one of the Claimant's managers. Significantly, the Respondent chose not to cross-examine this witness at the Jurisdiction Hearing. In the circumstances, for present purposes, the Tribunal accepts her written testimony as regards such activities.

4.65. Ms McLeod-Selzer's description in her written witness statement leaves no doubt as to the existence of such activities in Nevada, USA by "the Companies", defined by this witness to mean collectively Pacific Rim and all its subsidiaries, including the Claimant:

> *"... the Companies have always had a substantial presence in Nevada, USA. Indeed, Mr. Thomas C. Shrake, who has served as the Chief Executive Officer ("CEO") of Pacific Rim Mining Corporation since 1997, has always maintained his offices there, along with the Companies' other senior geologists. Mr. Shrake has largely managed the Companies, including [the Claimant] and its Salvadoran subsidiaries [PRES and DOREX] from Nevada. Pacific Rim Mining has other subsidiaries in Nevada, including Dayton Mining (U.S.) Inc, which provided a substantial portion of the capital invested in El Salvador. [The Claimant] is a legitimate holding company, which for many years has held the Companies' most important assets, namely our Salvadoran subsidiaries ...."*[135]

4.66. However, in the Tribunal's view, this first condition under CAFTA Article 10.12.2 relates not to the collective activities of a group of companies, but to activities attributable to the "enterprise" itself, here the Claimant. If that enterprise's own activities do not reach the level stipulated by CAFTA Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprise's activities for the purpose of applying CAFTA Article 10.12.2.

4.67. Accordingly, the relevant question is whether the Claimant by itself had substantial activities in the USA from 13 December 2007 onwards. The Tribunal accepts that

[135] Ms McLeod-Selzer's witness statement, §5.

there were and are certain activities by the Claimant in the USA; and there can be no criticism of their legitimacy under the laws of the USA; but the question remains whether such activities were "substantial" within the meaning of CAFTA Article 10.12.2. Here Ms McLeod-Selzer"s written testimony provides little assistance to the Tribunal.

4.68. In the Tribunal"s view, the evidence adduced in these proceedings shows only that the Claimant was a passive actor both in the USA and the Cayman Islands both before and after December 2007, with no material change consequent upon its change of nationality. In addition to the written testimony of Ms McLeod-Selzer, Mr Shrake"s oral testimony demonstrates the slender scale of the Claimant"s activities.

4.69. Mr Shrake testified orally as follows at the Hearing:

> "*Q. Now, how many employees did Pac Rim Cayman [the Claimant] have while it was registered in the Cayman Islands? A. It's a holding company. It doesn't have employees.*
> *Q. Okay. Did it lease any office space? A. For no employees? No, it didn't lease office space.*
> *Q. Did it own anything other than the Shares in the company [sic] it held on behalf of Pacific Rim Mining? A. The verb [is] being held, it's a holding company. Its purpose is to hold.*
> *Q. But it did nothing else. It held those shares. It didn't own any? A. That's what a holding company does.*
> *Q. Okay. Did it have annual board meetings? A. Yes, I believe.*
> *Q. Were minutes kept of those board meetings? A. I don't know, actually, for sure.*
> *Q. Okay. Did it have a bank account? A. Oh, no, it did not have a bank--*
> *Q. So, pretty much it just existed on paper? A. No - well, no. It's a holding company. The purpose of the company is to hold assets.*
> *Q. Right. But what physical existence, what existence did it have other than on the documents that exist perhaps in your office and registered with the corporate Registry in the Cayman Islands? A. None ...*[136]

4.70. Later during his oral evidence, Mr Shrake testified:

> *A: ... [The Claimant] is a holding company. It apparently has no Board of Directors [Here the witness was seeking to correct his earlier evidence that the Claimant did have a board of directors: see D2.430 & 491-492] ... It has two — apparently only has two managers [sic]. But again, this is a company designed solely to hold assets. There is [sic] no exploration activities directly through that*

[136] Hearing D2.445-446xx.

holding company. This is, as the name suggests, strictly a company to hold assets.[137]

4.71. Mr. Shrake also explained that the principal activities of the group of companies in Nevada, USA were not the Claimant"s but those of Pacific Rim Exploration Inc. as regards „mine-finding" and „wealth creation", with which company he identified himself (i.e. not the Claimant): "We are the intellectual property of the company" and "it contributed everything to El Salvador."[138] This explanation significantly excluded the Claimant from the scope of such activities (not being involved with such intellectual property, in contrast to Pacific Rim Exploration Inc).

4.72. This Tribunal does not here decide that a traditional holding company could never meet the first condition in CAFTA Article 10.12.2 as to "substantial business activities". Generally, such holding companies are passive, owing all or substantially all of the shares in one or more subsidiary companies which will employ personnel and produce goods or services to third parties. The commercial purpose of a holding company is to own shares in its group of companies, with attendant benefits as to control, taxation and risk-management for the holding company"s group of companies. It will usually have a board of directors, board minutes, a continuous physical presence and a bank account.

4.73. That is clearly not the case here with the Claimant, compounded by its change of nationality. In the Tribunal"s view, the Claimant"s case fails the simple factual test of distinguishing between its geographical activities before and after the change of nationality in December 2007. It is not possible from the evidence of Ms McLeod-Selzer and Mr Shrake (including contemporary documentary exhibits) for the Tribunal to identify any material difference between the Claimant"s activities as a company established in the Cayman Islands and its later activities as a company established in the USA: the location (or non-location) of the Claimant"s activities remained essentially the same notwithstanding the change in nationality; and such activities were equally insubstantial.

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137 Hearing D2.492-493xx.

138 Hearing D2.511-512xx.

4.74. It will be recalled that the first condition in CAFTA Article 10.20.2 addresses "substantial business activities in the territory" of the USA. In the Tribunal"s view, the Claimant cannot here attribute geographical activities to the Claimant "in the territory" of the USA when those same activities (including their location) are not materially different from its earlier insubstantial activities as a company in the Cayman Islands. Moreover, the Claimant"s activities, both in the Cayman Islands and the USA, were principally to hold the shares of its subsidiaries in El Salvador. The position might arguably be different if it was acting as a traditional holding company owning shares in subsidiaries doing business in the USA; but that is not this case. The Claimant"s activities as a holding company were not directed at its subsidiaries" business activities in the USA, but in El Salvador.

4.75. In short, as regards business activities in the territory of the USA, the Tribunal concludes that the Claimant was and is not a traditional holding company actively holding shares in subsidiaries but more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities.

4.76. It is not necessary for the purpose of this first condition for the Tribunal to deal in detail with the source of the capital expended in El Salvador as regards the investments held by the Claimant and its subsidiaries or Enterprises. It is clear to the Tribunal from the evidence adduced in these arbitration proceedings that these activities did not originate as part of the Claimant"s own activities in the USA but were associated with Pacific Rim (its Canadian parent), as Mr Shrake testified.[139] Accordingly, such capital expenditure does not assist the Claimant"s case under CAFTA.

4.77. In the Tribunal"s view, here as elsewhere, Mr Shrake was a candid and honest witness; his oral testimony is consistent with other evidence (including the written testimony of Ms McLeod-Selzer); and the Tribunal unhesitatingly accepts his evidence on all these points.

[139] Hearing D2.488-489xx.

4.78. It follows that the first condition is met by the Respondent under CAFTA Article 10.12.2: the Tribunal finds as a fact that the Claimant did not and does not have substantial activities in the USA after December 2007.

4.79. ***(ii) Ownership/Control:*** As to ownership, it is not disputed between the Parties that the Claimant has been and remains wholly owned by its Canadian parent company, Pacific Rim, a person of a non-CAFTA Party for the purpose of CAFTA Article 10.12.2.

4.80. However, a majority of the shareholders in this Canadian company, both natural and legal persons, reside or at least have postal addresses in the USA. According to the Claimant, as noted above, this factor is said to result in the Claimant being owned, albeit indirectly, by persons of a CAFTA Party (namely the USA).

4.81. In the Tribunal"s view, the Respondent is correct in applying CAFTA"s Annex 2.1 referring for natural persons as USA nationals to the US Immigration and Nationality Act. That statute"s requirements for US citizenship or permanent allegiance to the USA cannot be met by adducing mere US postal addresses for shareholders in the Canadian parent company, even assuming them to be natural persons and however convenient or even appropriate for other domestic purposes (as Mr Pasfield testified). The Tribunal does not here decide, were CAFTA"s definition materially different, the question whether or not indirect ownership of the Claimant could suffice to establish the nationality of the Claimant"s ownership.

4.82. It follows that that the second condition is met by the Respondent under CAFTA Article 10.12.2: the Tribunal finds as a fact that the Claimant is owned by Pacific Rim Corporation, a legal person of a non-CAFTA Party. In these circumstances, it is not necessary for the Tribunal to decide the alternative part of this second question as to "control" under CAFTA Article 10.12.2. It should not be assumed that the Respondent"s case would have failed on this issue, if necessary to the Tribunal"s decisions above.

4.83. ***(iii) Timeliness:*** There is no express time-limit in CAFTA for the election by a CAFTA Party to deny benefits under CAFTA Article 10.12.2. In a different case un-

der different arbitration rules, this third question might have caused this Tribunal certain difficulties given the importance of investor-state arbitration generally and, in particular, the potential unfairness of a State deciding, as a judge in its own interest, to thwart such an arbitration after its commencement. In this case, however, no such difficulties arise for three reasons.

4.84. First, the Tribunal accepts that, given that this was the first denial of benefits by any CAFTA Party under CAFTA Article 10.12.2, denying benefits to the Claimant under CAFTA was a decision requiring particular attention by the Respondent, to be exercised upon sufficient and ascertainable grounds. Inevitably, such a decision requires careful consideration and, inevitably, also time. It is not apparent to the Tribunal that the Respondent thereby deliberately sought or indeed gained any advantage over the Claimant, by waiting until 1 March 2010 (as regards notification to the USA) or 3 August 2010 (for its invocation of denial of benefits to the Claimant).

4.85. Second, this is an arbitration subject to the ICSID Convention and the ICSID Arbitration Rules, as chosen by the Claimant under CAFTA Article 10.16(3)(a). Under ICSID Arbitration Rule 41, any objection by a respondent that the dispute is not within the jurisdiction of the Centre, or, for other reasons, is not within the competence of the tribunal "shall be made as early as possible" and "no later than the expiration of the time limit fixed for the filing of the counter-memorial". In the Tribunal‟s view, that is the time-limit in this case here incorporated by reference into CAFTA Article 10.12.2. Any earlier time-limit could not be justified on the wording of CAFTA Article 10.12.2; and further, it would create considerable practical difficulties for CAFTA Parties inconsistent with this provision‟s object and purpose, as observed by Costa Rica and the USA from their different perspectives as host and home States (as also by the Amicus Curiae more generally). In the Tribunal‟s view, the Respondent has respected the time-limit imposed by ICSID Arbitration Rule 41.

4.86. Third, the Tribunal does not accept the Claimant‟s arguments based on ICSID Articles 25(1) and 27(1).

4.87. As regards ICSID Article 27(1) precluding diplomatic protection in respect of a dispute subject to ICSID arbitration before an award is rendered in such dispute, the

Tribunal does not consider that the procedures envisaged by CAFTA Article 20.4 and still less CAFTA Article 18.3 amount to the exercise of diplomatic protection by a CAFTA Party.

4.88. The Tribunal accepts the reasoning in Costa Rica‟s Submission, based on Article 1 of the ILC Draft Articles on Diplomatic Protection (2006) describing diplomatic protection as "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility". Article 16 of the ILC Draft Articles distinguishes between such diplomatic protection and other actions and procedures; namely: "The rights of States …. to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act." The Tribunal also notes a similar distinction between diplomatic protection under ICSID Article 27(1) and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of a dispute" under ICSID Article 27(2).

4.89. In the Tribunal‟s view, the two CAFTA procedures envisaged by CAFTA Articles 18.3 and 20.4 fall short of diplomatic protection under international law (whatever may be the consular practice of a CAFTA Party, including the USA). Accordingly, the Tribunal rejects the Claimant‟s submission based on ICSID Article 27(1).

4.90. As regards ICSID Article 25(1), the Tribunal accepts the Respondent‟s submission to the effect that the Respondent‟s consent to ICSID Arbitration in CAFTA Article 10.16.3(a) is necessarily qualified from the outset by CAFTA Article 10.12.2. It is not possible for the Tribunal to arrive at any different interpretation without distorting the meaning of Article 10.12.2, contrary to the applicable rules for treaty interpretation under international law. Accordingly, a CAFTA Party‟s denial of benefits invoked after the commencement of an ICSID arbitration cannot be treated as the unilateral withdrawal of that Party‟s consent to ICSID arbitration under ICSID Article 25(1).

4.91. It follows that this third condition is met by the Respondent under CAFTA Article 10.12.2.

4.92. ***Decisions:*** Accordingly, for these several reasons above, the Tribunal decides that as from 3 August 2010 the Respondent has established under CAFTA to the required standard and burden of proof, as a matter of fact and international law, that the Claimant as an investor and its investments in El Salvador can receive no benefits from Part 10 of CAFTA upon which the Claimant‟s CAFTA claims necessarily depend; and accordingly that the Centre (ICSID) and this Tribunal can have no jurisdiction or other competence in respect of any such CAFTA claims. This decision regarding the Denial of Benefits issue, however, does not affect the Claimant‟s other Non-CAFTA claims, as next explained by the Tribunal below, in Part 5 of this Decision.

PART 5: ISSUE D - INVESTMENT LAW

(01) Introduction

5.1. The Tribunal here addresses the Respondent‟s independent and alternative jurisdictional objection to the effect that this Tribunal lacks any jurisdiction under the Investment Law of El Salvador to decide the Claimant‟s pleaded Non-CAFTA claims. The Claimant contests this jurisdictional objection in full.

5.2. In the Tribunal‟s opinion, the Parties‟ debate under this separate issue can be determined largely as a matter of legal interpretation, where issues as to the standard of proof play no material part. It is, however, ultimately for the Claimant to establish the Tribunal‟s jurisdiction over its Non-CAFTA claims as a matter of such interpretation.

(02) The Respondent's Case

5.3. In summary,[140] the Respondent denies jurisdiction under this issue on four principal grounds: (i) that Article 15 of the Investment Law does not constitute consent to ICSID jurisdiction;[141] (ii) even if the Investment Law did constitute such consent and did apply to the Claimant, the Claimant‟s claims are precluded for the Claimant‟s failure to initiate conciliation before ICSID arbitration;[142] (iii) the Claimant is not a foreign investor under the Investment Law;[143] and (iv) the CAFTA waiver precludes jurisdiction under the Investment Law.[144]

5.4. As to the first ground, the Respondent alleges that Article 15 of the Investment Law does not constitute consent to arbitration for the purposes of Article 25 of the ICSID

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140 Jurisdiction Memorial, § 9; Hearing Day1.119-129.
141 Jurisdiction Memorial, §§ 337-378; Jurisdiction Reply, §§ 225-250.
142 Jurisdiction Memorial, §§ 424-427; Jurisdiction Reply, §§ 253-254.
143 Jurisdiction Memorial, §§ 379-380; Jurisdiction Reply, §§ 255-261.
144 Jurisdiction Memorial, §§ 428-454; Jurisdiction Reply, §§ 262-264.

Convention.[145] In the Respondent‟s submission, Article 15 contains no consent by the Respondent to arbitration.[146]

5.5. The Respondent disputes the Claimant‟s submission that the passage in the *Inceysa* award supports the Claimant‟s case that Article 15 constitutes consent under Article 25 of the ICSID Convention: the Respondent contends that this issue was not before the *Inceysa* tribunal and that the short passage cited by the Claimant was mere obiter dicta and should not replace this Tribunal‟s own legal analysis of Article 15.[147] Further, the Respondent submits that the focus in the *Inceysa* case was on the illegality of the investment by a foreign company;[148] therefore, the *Inceysa* case is not relevant to the issue of whether or not Article 15 of the Investment Law constitutes consent; and it is not necessary for the Tribunal to consider that case in order to arrive at its own decision in the present case.[149]

5.6. In the Respondent‟s further submission, the Tribunal‟s duty to interpret Article 15 cannot be substituted, as the Claimant suggests, by the unreasoned reference to Article 15 in the *Inceysa* award, or academic commentaries, or what the Claimant erroneously refers to as the "official position" of the Respondent with respect to Article 15 of its Investment Law.[150]

5.7. The Respondent contends that Article 15 is a unilateral declaration by the Respondent, as opposed to reciprocal or multilateral statements of consent in a BIT or CAFTA; there is no clear statement of consent in its text; and it must be interpreted restrictively.[151] Therefore, so the Respondent contends, by stating that Article 15 should not be interpreted restrictively or by seeking support for its argument in the decisions in *SSP v. Egypt* and *Mobil v. Venezuela*, the Claimant´s arguments are fundamentally mistaken.[152]

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145 Jurisdiction Memorial, § 337; Jurisdiction Reply, § 225.
146 Jurisdiction Memorial, § 373.
147 Jurisdiction Memorial, § 339; Jurisdiction Reply, § 238.
148 Jurisdiction Memorial, § 339; Jurisdiction Reply, § 240; Hearing Day 1.127-129.
149 Jurisdiction Reply, § 241.
150 Jurisdiction Reply, §§ 227-246.
151 Jurisdiction Memorial, §§ 340-373; Jurisdiction Reply, §§ 225-250; Respondent‟s Post-Hearing Submissions § 129.
152 Jurisdiction Reply, § 231; Hearing D1.127.

5.8. In the Respondent"s submission, the tribunal in *SPP v. Egypt* did not actually apply the principles of interpretation for a unilateral declaration; and its decision, therefore, does not stand for the proposition that unilateral declarations are not to be interpreted restrictively.[153] With regard to the decision in *Mobil v. Venezuela*, the Respondent contends that the tribunal there did not specifically reject a restrictive interpretation for unilateral acts of the State, such as national legislation; and that it concluded that the ambiguous arbitration provision in the applicable investment law, together with the lack of evidence of any intention to consent to arbitration, meant that the investment law did not include a statement of unilateral consent to ICSID arbitration.[154]

5.9. As additional evidence that the Respondent did not intend unilaterally to consent to ICSID arbitration by its Investment Law, the Respondent cites Article 146 of the Salvadoran Constitution which only allows the Respondent to agree to arbitration in treaties and contracts; Article 146 simply does not mention legislation (such as the Investment Law); and the Respondent accordingly cites in support of its case the general principle of legal interpretation: "*expressio unius est exclusio alterius*".[155]

5.10. As to the second ground, the Respondent submits that the Claimant"s claims are precluded for the Claimant"s failure to initiate conciliation before ICSID arbitration. According to the Respondent, the text of the Investment Law is clear: if a dispute is to be referred to ICSID under Article 15, such dispute is to be settled "by means of conciliation and arbitration." The express linguistic use of the conjunction "and" connects conciliation with arbitration, so that both methods of dispute resolution must be used by a claimant. As the Claimant did not initiate any conciliation prior to arbitration for its claims under the Investment Law, the Claimant"s request for ICSID arbitration was and remains impermissible.[156]

5.11. As to the third ground, the Respondent contends that there is no indication of any investment made by the Claimant in El Salvador at any time. In the Respondent"s submission, the Claimant qualifies as a foreign legal person; but it does not meet the

153 Jurisdiction Reply, § 232.
154 Jurisdiction Memorial, § 361.
155 Jurisdiction Memorial, §§ 374-378; Jurisdiction Reply, §§ 251-252; Hearing D1.127.
156 Jurisdiction Memorial, §§ 424-427; Jurisdiction Reply, §§ 253-254.

further express requirement of having made an investment in El Salvador. Therefore, the Claimant does not therefore meet the definition of a foreign investor under the Investment Law.[157]

5.12. Further, the Respondent contends that, even if there were consent to arbitrate in the Investment Law and the Claimant were a foreign investor within the meaning of that law, the Tribunal should still decline jurisdiction in this case because the Claimant is not an investor of a Contracting State to the ICSID Convention.[158] In the Respondent"s submission, it is appropriate to pierce the corporate veil to identify the real investor – the Canadian parent company, Pacific Rim - which is not an investor of a Contracting State of the ICSID Convention and, therefore, not entitled to claim jurisdiction under the Investment Law before this Tribunal under the ICSID Convention.[159]

5.13. As to the fourth ground, the Respondent contends that the waiver provision in CAFTA precludes the Claimant from bringing claims under the Investment Law.[160] The Respondent reiterates its request, as in its Preliminary Objections, that the Tribunal enforce the Claimant"s waiver to prevent the Claimant from bringing duplicative claims in these ICSID proceedings.[161]

5.14. In this regard, the Respondent submits that since the Tribunal did not grant its Preliminary Objection in its Decision of 2 August 2010, such impermissible duplication of proceedings survives under this jurisdictional objection and should be addressed here as a jurisdictional objection by the Respondent. The Respondent contends that such duplication of proceedings violated and still violates the Claimant"s written waiver under CAFTA.[162]

5.15. The Respondent further contends that, as the Tribunal"s Decision of 2 August 2010 is not res judicata, the Tribunal may revisit its determination in that Decision on the

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157 Jurisdiction Memorial, §§ 379-380; Jurisdiction Reply §§ 255-257; Respondent"s Post-Hearing Submissions, § 126.
158 Jurisdiction Memorial, §§ 381-423.
159 Jurisdiction Reply, § 261; Hearing D1.129; Respondent"s Post-Hearing Submissions, §§ 116 and 127.
160 Jurisdiction Memorial, §§ 428-454; Jurisdiction Reply, §§ 262-264.
161 Jurisdiction Memorial, § 428; Respondent"s Post-Hearing Submissions, §§ 118-125.
162 Jurisdiction Memorial, § 429; Respondent"s Post-Hearing Submissions, § 124.

indivisibility of the two arbitration proceedings initiated by the Claimant under CAFTA and the Investment Law. In the Respondent‟s submission, the most important reason to revisit that determination and CAFTA‟s waiver provision is that this arbitration‟s jurisdictional phase has clearly demonstrated that there are two proceedings based on the same measures; and that the Claimant is intending to detach those two proceedings and go forward with one of these proceedings independently from the other and under a different legal standard. In the Respondent´s submission, such result is prohibited by the CAFTA waiver.[163]

(03) The Claimant's Case

5.16. The Claimant contends, under this issue, that the Respondent‟s objection should be rejected on the ground that the text of Article 15 of the Investment Law contains the Respondent‟s clear and specific consent to ICSID jurisdiction.[164]

5.17. The Claimant submits that the decisions made in the *Cemex, Mobil* and *Inceysa* arbitrations, as well as by acknowledged legal scholars cited by the Claimant, all agree that the language of Article 15 is an instrument of consent and, as such, not subject to any principle of restrictive interpretation.[165] Indeed, according to the Claimant, all these materials conclude that such language is so clear that under any interpretive standards or principles, the only conclusion that can be drawn is that it contains the Respondent‟s unilateral consent to ICSID jurisdiction.[166]

5.18. Further, the Claimant submits that the legislative history of the Investment Law confirms such an interpretation; and it refers, as an example, to a Power Point presentation made before the *Asamblea Legislativa* at the time of debating the Investment Law bill which expressly referred to "international arbitration administered by ICSID" in the case of foreign investment. In the Claimant‟s submission, it is clear that at the time when the Respondent promulgated the Investment Law, the *Asamblea*

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163 Respondent‟s Post-Hearing Submissions, §§ 120 and 122.

164 Jurisdiction Counter-Memorial, §§ 34 and 426-466; Jurisdiction Rejoinder, §§ 281-306; Hearing D1.148; Claimant‟s Post-Hearings Submissions, § 91.

165 Jurisdiction Counter-Memorial, §§ 440-450; Jurisdiction Rejoinder, § 289; Hearing D1.147-148; Claimant‟s Post-Hearing Submissions, § 98.

166 Jurisdiction Rejoinder, §§ 290-299; Hearing D1.147-148; Claimant‟s Post-Hearings Submissions, § 92.

Legislativa was fully aware that the wording of Article 15 provided consent by the Respondent to ICSID jurisdiction.[167]

5.19. In this regard, the Claimant alleges that the Respondent has not only declined to address the contents of this legislative presentation, but also has failed to provide any evidence contradicting the Claimant"s case. Indeed, according to the Claimant, the Respondent did not provide any evidence (i.e. witness statement, legislative history, academic commentary, etc.) confirming its case that it was never the intention of the Salvadoran legislature to provide for the Respondent"s unilateral consent to ICSID arbitration in the Investment Law.[168]

5.20. With respect to the Respondent"s invocation of Article 146 of the Salvadoran Constitution, the Claimant states that: (i) the Respondent provides no legal authority to support its contention that the Salvadoran Supreme Court has ever applied the maxim "*expressio unius est exclusio alterius*" to interpret the Respondent"s Constitution; and since the Supreme Court has exclusive jurisdiction to interpret the Salvadoran Constitution in El Salvador, this Tribunal should not allow itself to be pressed into doing what the Respondent"s Supreme Court would not itself do; and (ii) 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 legal interpretation in the present case.[169]

5.21. With regard to the Respondent"s attempt to attribute significance to the fact that Article 15 does not contain the exact same language as used in some of the Respondent"s BITs or in CAFTA,[170] the Claimant submits that the facts, that the word "consent" or references to "mandatory" arbitration were included in some BITs, is not sufficient to conclude that the absence of such mandatory language or the use of the word "consent" in the Investment Law established that the Respondent did not intend to consent to ICSID jurisdiction in that legislative instrument.[171]

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167 Jurisdiction Counter-Memorial, § 458; Jurisdiction Rejoinder, § 301; Hearing D1.148; the Claimant"s Post-Hearing Submissions, footnote 172.

168 Jurisdiction Rejoinder, §§ 284 and 303; Hearing D1147; Claimant"s Post-Hearing Submissions, § 96.

169 Jurisdiction Counter-Memorial, §§ 463-466; Jurisdiction Rejoinder, §§ 307-312; Hearing D1.147; the Claimant"s Post-Hearing Submissions, § 95.

170 Claimant"s Post-Hearing Submissions, § 94.

171 Jurisdiction Counter-Memorial, § 462; Jurisdiction Rejoinder, §§ 313-316.

5.22. The Claimant denies that it was required to initiate conciliation before ICSID arbitration. In its view, the conjunction "and" in Article 15 of the Investment Law means only that both dispute settlement mechanisms provided by the ICSID Convention are available to the disputing parties. In the present case, the investor decided to initiate arbitration and not conciliation under the ICSID Convention. Further, the Claimant submits that in the event that the Tribunal considers that conciliation is a procedural requirement under Article 15 of the Investment Law, the Claimant should be released from complying with this requirement because, in the circumstances of this particular case, conciliation was and would remain completely futile.[172]

5.23. With regard to the CAFTA waiver question raised by the Respondent, the Claimant contends that the matter was definitively settled by the Tribunal when deciding on the Preliminary Objection in its Decision of 2 August 2010; and it should therefore not be revisited at this late stage by the Tribunal.[173]

5.24. Moreover, the Claimant submits that, it is the proceedings that are indivisible here, not the Claimant"s claims. There is nothing in the Tribunal"s Decision of 2 August 2010 that should be revisited in evaluating whether to dismiss any of Claimant"s claims under the Respondent"s jurisdictional objections. The Claimant submits that the dismissal of its CAFTA claims on any of the Respondent"s jurisdictional objections cannot be applied to the Claimant"s Non-CAFTA claims under the Investment Law simply because (as the Respondent argues) those latter claims are being addressed as part of the same ICSID arbitration proceedings.[174]

5.25. With respect to the Respondent"s allegations that the Investment Law is not applicable to the Claimant due to the lack of investments made by the Claimant in El Salvador, the Claimant submits that although substantial portions of the financial and intellectual capital invested in El Salvador are of U.S. origin,[175] the nationality of a particular foreign investor is irrelevant for purposes of qualifying as a "foreign investor" under the Investment Law. The Claimant"s investments in El Salvador were

[172] Jurisdiction Rejoinder, §§ 317-325.
[173] Jurisdiction Counter-Memorial, §§ 472-474; Jurisdiction Rejoinder, §§ 326-328.
[174] Claimant"s Post-Hearing Submissions, §§ 105-112.
[175] Jurisdiction Rejoinder, §§ 330.

made before and after the Claimant changed its nationality on 13 December 2007; and its change to US nationality cannot affect its access to ICSID arbitration under the Investment Law. Before its change of nationality, the Claimant was a Cayman Islands company; and as such it could have invoked Article 15 because the United Kingdom"s ratification of the ICSID Convention extended to the Cayman Islands.[176] Such being the case, the change in nationality of the Claimant cannot justify the Respondent"s case under this issue.

5.26. Lastly, the Claimant contends that it is an enterprise organised under the laws of Nevada, USA. Consequently, under the applicable rules of international law, the Claimant is a national of the USA, which is a Party to the ICSID Convention.[177] Moreover, according to the Claimant, if the Claimant"s corporate veil were lifted (contrary to the Claimant"s primary submission), and nationality were then to be assessed by reference to control over the Claimant, the Claimant would have U.S. nationality because the Claimant is (indirectly) controlled by U.S. persons.[178]

(04) The Tribunal´s Analysis and Decisions

5.27. Pursuant to Article 25 of the ICSID Convention, the Centre´s jurisdiction extends to: "any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State which *the parties to the dispute consent in writing* to submit to the Centre" (emphasis supplied).

5.28. Article 15 of the Investment Law, provides, in material part: "In the case of disputes arising between foreign investors and the State, regarding their investment in El Salvador, the investors may submit the dispute to: (a) the International Center for Settlement of Investment Disputes (ICSID), in order to settle the dispute by means of conciliation and arbitration, in accordance with the Convention on Settlement of Investment Disputes Among States and Nationals of other States (ICSID Convention)". The full texts of Article 15 in Spanish and English are set out in the Annex to Part I above.

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176 Jurisdiction Rejoinder §§ 332-333; Claimant"s Post-Hearing Submissions, §§ 100-101.
177 Jurisdiction Rejoinder, §§ 336-337.
178 Jurisdiction Rejoinder, §§ 352-355.

5.29. As summarized above, the Parties disagree on the interpretation of Article 15. Whilst the Claimant submits that the Respondent there consented to ICSID jurisdiction, the Respondent denies that Article 15 provides such consent under Article 25 of the ICSID Convention. In order to determine the meaning of Article 15, the Tribunal considers, as confirmed by other ICSID tribunals, that its jurisdiction is to be assessed by reference to the following general principles.

5.30. First, under Article 41 (1) of the ICSID Convention, it is for the Tribunal, as the judge of its competence and not for State authorities or national courts,[179] to determine the basis of that competence, whether it be derived from a treaty or a unilateral offer made in legislation and subsequently accepted in writing by the investor.[180]

5.31. Second, such an approach is consistent with the solution adopted by international tribunals, such as the Permanent Court of International Justice and the International Court of Justice, when making 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.[181]

5.32. Third, the question arises as to which legal rules of interpretation (here Salvadoran domestic rules or international rules) apply to the State´s consent to arbitration contained not in a treaty but in a unilateral act of a State, i.e. in the present case national legislation such as Article 15 of the Investment Law.

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179 *Mobil v. Venezuela*, *supra* note 27, § 75; *Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 § 70 [*Cemex v. Venezuela*].

180 See the Report of the Executive Directors on the Convention, § 24: "Thus, a host State might in its investment promotion legislation offer to submit disputes…to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing", also, *Mobil v. Venezuela*, *supra* note 27, § 74; *Cemex v. Venezuela*, *supra* note 179, § 69; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Second Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 131 (1995) § 60 [*SPP v. Egypt*]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, RL-30, §§ 212-213 [*Inceysa v. El Salvador*]; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) § 339, *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on jurisdiction (24 December 1996), amongst others.

181 *Electricity Cy of Sofia and Bulgaria*, Preliminary objections, PCIJ. Series A/B No. 77 (1939); *Aegean Sea Continental Shelf (Greece v Turkey)* – 19 December 1978 – ICJ Reports 1978 page 3; *Fisheries Jurisdiction (Spain v. Canada)* – 4 December 1998 – ICJ Reports 1988 page 432.

5.33. As established by the International Court of Justice when interpreting optional declarations of compulsory jurisdiction made by States under Article 36 (2) of the ICJ Statute[182] and as adopted recently by other ICSID tribunals,[183] legislation and unilateral acts by which a State consents to ICSID jurisdiction are to be considered as standing offers to foreign investors under the ICSID Convention and interpreted according to the ICSID Convention and under the rules of international law governing unilateral declarations of States.

5.34. As explained by the *Mobil* and *Cemex* tribunals,[184] whilst the ICJ has decided that a restrictive interpretation should apply when construing acts formulated by States in the exercise of their freedom to act on the international plane, rules of interpretation differ when unilateral acts are formulated in the framework and on the basis of a treaty such as, in the present case, the multilateral ICSID Convention.

5.35. In such cases, declarations must be interpreted as they stand, having regard to the words actually used[185] and taking into consideration "the intention of the government at the time it made the declaration."[186] Such intention can be inferred from the text, but also from the context, the circumstances of its preparation and the purposes intended to be served by the declaration.[187] In doing so, the relevant words should be interpreted in a natural and reasonable way.

5.36. Applying these principles, the Tribunal returns to the wording of Article 15 of the Investment Law, providing that, in the case of disputes arising between foreign investors and the Respondent, regarding their investment in El Salvador, "the investors may submit the dispute to" [ICSID]. As noted above, the Tribunal determines that Article 15 of the Investment Law, formulated in the framework and on the basis of the ICSID Convention to which it explicitly refers, must be interpreted having re-

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182 *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections – ICJ Reports 1998 page 291 § 25; *Fisheries Jurisdiction (Spain v. Canada)* – ICJ Reports 1998 page 453 § 46.

183 *Mobil v. Venezuela*, *supra* note 27, § 85; *Cemex v. Venezuela*, *supra* note 179, § 79.

184 *Mobil v. Venezuela*, *supra* note 27, §§ 86-96; *Cemex v. Venezuela*, *supra* note 179, §§ 80-89.

185 *Anglo-Iranian Oil Co*.- Preliminary objection – Judgement – ICJ Reports 1952 page 105.

186 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No ARB/84/3, Decision on Jurisdiction, 27 November 1985, 3 ICSID Reports 112, § 107; *Anglo Iranian Oil Co*. – ICJ Reports 1952 page 104; *Rights of Minorities in Upper Silesi*a, 1 PCIJ, Series A, No. 15, page 22 (1928); *Phosphates in Morocco*, PCIJ, Series A/B, No. 74, pages 22-24 (1938).

187 *Mobil v. Venezuela*, *supra* note 27, §§ 92-96; *Cemex v. Venezuela*, *supra* note 179, §§ 85-89.

gard to the words actually used, interpreted in a natural and reasonable way.

5.37. The Tribunal decides that the wording of Article 15 is clear and unambiguous. By providing foreign investors with the option ("may"), absent for local investors, of submitting the "disputes arising between foreign investors and the State, regarding their investment in El Salvador" to ICSID, Article 15 of the Investment Law clearly invites foreign investors to decide whether to submit their claims to local courts (Article 15, first paragraph) or to ICSID tribunals (Article 15, second paragraph, (a) and (b)), therefore providing the consent of the Respondent required by Article 25 of the ICSID Convention which the investor can accept.

5.38. In the Tribunal"s opinion, nothing in the ICSID Convention establishes the need for specific wording in national legislation or other unilateral acts by which a State consents to ICSID jurisdiction, still less the identical wording used in other instruments of consent used by that State historically (whether in BITs or CAFTA). Consent must be evident and in writing;[188] and, in the Tribunal´s opinion, both requirements were duly met in the present case by the Respondent, as later accepted in writing by the Claimant in commencing these ICSID arbitration proceedings.

5.39. Accordingly, the Tribunal decides that the wording of Article 15 of the Investment Law contains the Respondent"s consent to submit the resolution of disputes with foreign investors to ICSID jurisdiction; that such intention appears unambiguously from the text of Article 15; and that it is confirmed from the context, the circumstances of its preparation and the purposes intended to be served by Article 15, read with Article 25 of the ICSID Convention.[189] Although the Tribunal has reached this decision based on the language of Article 15 alone, the Tribunal also notes that, confronted with the extraneous evidence adduced by the Claimant to this same effect,[190] the Respondent chose not to provide to the Tribunal any rebuttal evidence indicating that it was not the intention of the Salvadoran legislature to provide for unilateral consent to ICSID arbitration in Article 15 the Investment Law.

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188 Report of the Executive Directors on the Convention, § 23.

189 *Mobil v. Venezuela*, *supra* note 27, §§ 92-96; *Cemex v. Venezuela*, *supra* note 179, §§ 85-89.

190 See the power point presentation made before the Salvadoran Congress when the Investment Law bill was debated, CL-149, an UNCTAD Report alleged to have been made with input from PROESA and other Government officials, CL 147 and the academic opinions of Professors Schreuer and Oliva de la Cotera referred by the Claimant.

5.40. As also summarized above, the Parties also debated the effect to be given to paragraph 332 of the *Inceysa* award.[191] While it is correct that the *Inceysa* tribunal declined jurisdiction and dismissed the claimant‟s claims on the basis that the investment did not meet the conditions for legality, the tribunal also interpreted Article 15 of the Investment Law in a manner which accords with the interpretation separately reached by this Tribunal.

5.41. With respect to Article 146 of the Salvadoran Constitution,[192] the Tribunal does not find such provision incompatible or inconsistent with the consent provided to ICSID jurisdiction in Article 15 of the Investment Law. Article 146 is included in Title VI, Chapter I, Third Section of the Salvadoran Constitution under the heading "Tratados" (Treaties). As the plain reading of Article 146 indicates, the purpose of such provision is to limit what may or may not be negotiated in a treaty or concession. Article 146 allows the Salvadoran State to submit disputes to arbitration or to an international tribunal in treaties or contracts as a qualification to the restrictions made earlier in the Constitution;[193] and it should be read in such context (i.e. what treaties or concession contracts can contain or not). The Respondent‟s interpretation, limiting the instruments by which the Respondent can consent to ICSID arbitration so as to exclude laws and other instruments not referred by in Article 146, does not have, in the Tribunal´s opinion, any rational or other legal support.

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191 See *Inceysa v. El Salvador*, *supra* note 180, § 332 ("The foregoing clearly indicates that the Salvadoran State, by Article 15 of the Investment Law, made to the foreign investors a unilateral offer of consent to submit, if the foreign investor so decides, to the jurisdiction of the Centre, to hear all *´disputes referring to investments´* arising between El Salvador and the investor in question. However, in the case at hand, as indicated in the previous paragraphs, Inceysa cannot enjoy the rights granted by said Investment Law because its *´investment´* does not meet the conditions of legality").

192 Article 146 of the Salvadoran Constitution provides that: "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 con en los contratos, el Estado salvadoreño en caso de controversia, someta la decisión a un arbitraje o a un tribunal internacionales". ("Treaties shall not be entered into or ratified, nor shall any concessions be granted that would in any way alter the form of government or damage or diminish the territorial integrity, sovereignty, or independence of the Republic or the fundamental rights and guarantees of individuals. The provisions of the previous paragraph shall apply to all international treaties or agreements entered into which governments or domestic or international companies in which the Salvadoran State is subject to the jurisdiction of a tribunal of a foreign state. The aforementioned does not prevent the Salvadoran State from submitting, in treaties and contracts, to arbitration or to an international tribunal for a decision in the event of a dispute".)

193 "Lo anterior no impide…" (the aforementioned does not prevent…)

5.42. The Tribunal also finds no merit in the Respondent"s argument that if Article 15 constituted consent, the Claimant"s claims were precluded for failing to initiate conciliation before arbitration. The conjunction "and" in Article 15 of the Investment Law can only mean that both dispute settlement mechanisms provided by the ICSID Convention are available to the Claimant. Once consent has been given by the Respondent (as it is in the form of Article 15), it is for the party instituting the proceedings to choose between conciliation and arbitration under the ICSID Convention.[194]

5.43. With regard to the Respondent"s submission that the Investment Law is not applicable to the Claimant because of its lack of any investments in El Salvador, the Tribunal considers that the Claimant´s nationality (and subsequent change of nationality) is irrelevant for the purpose of it qualifying as a "foreign investor" under the Investment Law.[195] The Claimant was registered as a "foreign investor" for the purposes of the Investment Law from 2005;[196] it was successively a Cayman Island company prior to 13 December 2007 and a US company thereafter; and the Claimant, as such, could have invoked Article 15 of the Investment Law by virtue of the respective ratifications of the ICSID Convention by the United Kingdom and the USA, which (in the case of the United Kingdom) extended to the Cayman Islands.

5.44. The Respondent"s next submission raises the question of the Claimant"s actual investments in El Salvador. The definition of "a foreign investor" contained in the Investment Law is broad; and, as confirmation of this interpretation, the Tribunal notes that register of the Respondent"s Ministry of Economy shows that the Salvadoran

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194 *SPP v. Egypt*, *supra* note 180, § 102, R. Dolzer and C. Schreuer, *Principles of International Investment Law,* at page 221 (2008).

195 Article 2 (d) of the Investment Law provides the following definition "Inversionista Extranjero: Las personas naturales y jurídicas extranjeras y los salvadoreños radicados en el exterior por más de un año ininterrumpido, que realicen inversiones en el país" ("Foreign Investor: The foreign natural and legal persons and the Salvadoran nationals established abroad for more than one ininterrupted year that make investments in the country").

196 To this respect, Article 17 of the Investment Law provides that "Los inversionistas extranjeros deberán registrar sus inversiones en la ONI, quien emitirá una Credencial la cual le otorgará a su titular la calidad de inversionista extranjero, con expresión de la inversión registrada" (Foreign investors shall register their investments before ONI, who will issue a credential that will provide to its bearer the quality of foreign investor, expressing the foreign investment". See MINEC Resolution No. 288-R (21 June 2005), C-36 and MINEC Resolutions No. 368-MR (30 July 2008) and No. 387 MR (13 August 2008), C-12.

Government had always treated the Claimant as a foreign investor.[197] In the Tribunal"s opinion, it is therefore unnecessary here to enter in any factual analysis of the precise origin or timing of funds invested in El Salvador by or on behalf of the Claimant to conclude that the Claimant is a foreign investor for the purpose of Article 15 of the Investment law.

5.45. With regards to the question relating to the CAFTA waiver raised by the Respondent, the Tribunal considers that it fully addressed this same question in its Decision of 2 August 2010;[198] and it here confirms that answer. In particular, the Tribunal finds no juridical difficulty in having an ICSID arbitration based on different claims arising from separate investment protections and separate but identical arbitration provisions, here CAFTA and the Investment Law.[199] To the contrary, when consent to the same tribunal´s jurisdiction is contained in two or more instruments, the Respondent"s suggestion that different ICSID arbitrations must be commenced under each instrument would render nugatory the natural inclinations of both investors and States for fairness, consistency and procedural efficiency in international arbitration.

5.46. As regards indivisibility, the Tribunal repeats paragraph 253 of its Decision of 2 August 2010:

> *"In the Tribunal´s view, these arbitration proceedings are indivisible, being the same single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration registered once by the ICSID Acting Secretary-General under the ICSID Convention. To decide otherwise would require an interpretation of CAFTA Article 10.18 (2) wholly at odds with its object and purpose and potentially resulting in gross unfairness to a claimant. There is no corresponding*

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197 See MINEC Resolution No.368-MR (30 July 2008), C-12, page 10: "That pursuant to the records of foreign capital kept by the 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: …", C-12.

198 Pac Rim Cayman v. The Republic of El Salvador, ICSID Case No. ARB/09/12, 2 August 2010, §§ 252-253.

199 See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, where the tribunal analysed the possibility of intervening in the case both under the Energy Charter Treaty and the Bulgaria-Cyprus BIT. The fact that it finally decided not to do so on the basis that the MFN existing in this BIT did not provide consent to ICSID arbitration under the BIT does not alter such conclusion. Under the reasoning of that tribunal, if consent would have been present, the tribunal would have been acting in the same proceeding on two different legal bases, both of which provided for ICSID arbitration. Id. *Cemex v. Venezuela* and *Mobil v. Venezuela*, where the tribunals admitted the possibility of hearing two sets of claims (under the Venezuelan Investment Law and the Venezuela-Netherlands BIT) in the same proceeding, although they finally declined its jurisdiction under the Investment Law because it did not provide consent to ICSID jurisdiction.

unfairness to the Respondent in maintaining these ICSID proceedings as one single arbitration. In particular, the Respondent does not here face any practical risk of double jeopardy. Lastly, it is hardly a legitimate objection to this Tribunal´s competence that it exercises jurisdiction over these Parties based not upon one consent to such jurisdiction from the Respondent but based upon two cumulative consents from the Respondent. It is an indisputable historical fact that several arbitration tribunals have exercised jurisdiction based on more than one consent from one disputant party, without being thereby deprived of jurisdiction."

5.47. The Tribunal considers that these ICSID arbitration proceedings are indivisible; but it does not consider that the Claimant"s claims are indivisible, given the Tribunal"s decision above to deny any jurisdiction over the Claimant"s CAFTA claims. What now remains in these ICSID proceedings for decision on the merits are the Claimant"s non-CAFTA claims; and the Tribunal"s jurisdiction to decide these claims in this ICSID arbitration cannot be affected by its rejection of the Claimant"s CAFTA Claims under this Decision. To this extent, the Tribunal accepts the Claimant"s submission that: "… Claimant commenced this proceeding by both invoking CAFTA and the Investment Law, and the Tribunal has already held that this dual invocation of consent did not violate Claimant´s waiver provision. Where the *commencement* of the proceeding did not violate the waiver, it can hardly be imagined that its *continuation* would somehow do so, regardless of which claims go forward and which do not …"[200]

5.48. ***Decisions:*** For the reasons set out above, the Tribunal decides to reject the Respondent"s jurisdictional objection based on Article 15 of the Investment Law and to accept jurisdiction to decide on their merits the Non-CAFTA claims pleaded by the Claimant in its Notice of Arbitration (incorporating its Notice of Intent). This decision is strictly limited to the Respondent"s jurisdictional objection: it does not and will not affect any issue, whether legal or factual, as to the merits or demerits of any of the Claimant"s non-CAFTA claims or any of the Respondent"s as yet formally unpleaded defences to such claims.

[200] Claimant"s Post-Hearing Submissions, §111.

PART 6: ISSUE E – LEGAL AND ARBITRATION COSTS

(01) Introduction

6.1. The Parties made submissions on the legal and arbitration costs incurred to date in their respective written submissions on costs of 10 June 2011 and their reply submissions on costs of 24 June 2011.

6.2. In summary, the Claimant claims legal costs US$ 4,338,744; and the Respondent claims legal costs US$ 4,057,719.96, together with arbitration costs of approximately US$ 250,000. These claims are denied in full by the Respondent and the Claimant respectively.

6.3. This issue as to costs arises under ICSID Arbitration Rule 28(1) and CAFTA Article 10.20.4 & 10.20.6 (cited in the Annex to Part 1 above). It also arises under Paragraph 266(3) of the Tribunal‟s Decision of 2 August 2010, whereby the Tribunal reserved its powers to order costs under CAFTA Article 10.20.6 until the final stage of these arbitration proceedings.

6.4. Given the conduct of this arbitration to date and the Parties‟ respective allegations of misconduct made against each other, together with the significant sums involved in this costs issue before these proceedings have even reached the actual merits of the Parties‟ dispute, the Tribunal considers it appropriate to set out the Parties‟ respective submissions on costs at some length in this Decision.

(02) The Claimant's Claim

6.5. In summary,[201] the Claimant requests the Tribunal to order the Respondent to bear all the costs of these arbitration proceedings to date.

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[201] This summary of the Claimant‟s claim and the Claimant‟s response below are based on the Claimant‟s written submissions on costs of 10 and 24 June 2011.

6.6. The Claimant acknowledges that an award or allocation of costs typically accompanies a final award. It submits, however, that ICSID Arbitration Rule 28(1) also allows this Tribunal to make an interim determination of costs at any stage of these proceedings, relying upon Professor Schreuer's commentary on the ICSID Convention:

> *"The apportionment of costs need not relate to the entire proceeding. The Tribunal may charge one party the costs or a major share of the costs of a particular part of the proceeding. Often this will be in reaction to undesirable conduct by a party in the proceedings. ... A party whose conduct has necessitated a particular measure may have to bear the resulting costs."*[202]

6.7. The Claimant submits that the Respondent should now bear all the costs of its objections; and that the Tribunal should proceed to allocate such costs in its decision (not award) on jurisdiction, for the several reasons which follow.

6.8. The Claimant submits that, other than CAFTA Article 10.20.6 which provides that the Tribunal "shall" consider whether a party's positions were "frivolous" in exercising its discretion to award "reasonable costs and attorney's fees" following an objection made under CAFTA Articles 10.20.4 or 10.20.5, the cost provisions of CAFTA, the ICSID Convention and the ICSID Arbitration Rules do not provide any particular standard for tribunals to use in determining how to allocate costs.

6.9. However, so the Claimant submits, both arbitration tribunals and learned commentators recognize that costs may be allocated against a party as a sanction for procedural misconduct, or simply as a response and, hopefully, a deterrent to undesirable conduct by a party in the proceedings. For example, according to the Claimant, tribunals have awarded costs against a respondent which delayed the arbitration and increased the costs of the arbitration by making multiple objections and motions; against a respondent which submitted its objections with considerable delay, leading to an unnecessary escalation in the costs of the claimant; and against a claimant whose characterisation of the evidence was unacceptably slanted and whose submissions had been without adequate foundation.

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[202] Schreuer (et al), *The ICSID Convention: A Commentary* (2nd ed), p. 1231.

6.10. The Claimant submits that, under ICSID Arbitration Rule 28(1)(b), ICSID tribunals have ordered a party to bear the costs of a specific part of the proceedings where that part was requested or caused by that party and where the tribunal concluded that it would be unfair for the other party to bear such costs. For example, in rejecting the claimant's request for supplementary decisions and rectification following the award in *Genin v. Estonia*, the tribunal decided:

> *"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."*[203]

Accordingly, that tribunal ordered the claimant to pay in full the expenses incurred by the parties, as well as the additional costs of the arbitration.

6.11. The Claimant contends that an allocation of costs against the Respondent is more than warranted in the present case: the Respondent has employed its full procedural arsenal to make the dual preliminary objections phases of this arbitration as long and expensive as possible; the Respondent has raised every argument (factual and legal) that it could devise, regardless of its merit or even plausibility; and the Respondent has consistently made highly charged but utterly baseless allegations of "concealment," "deceit," and "bad faith" against the Claimant, including the Claimant"s Counsel.

6.12. The Claimant submits that its request for an allocation of costs against the Respondent is warranted even if the Tribunal were to limit its consideration to the Respondent's conduct during the course of this second jurisdictional phase of these arbitration proceedings. However, the Claimant submits that the Tribunal should consider the Respondent's conduct during both preliminary phases, particularly as its conduct in this second phase has only underscored the improper tactical motivations that have underlain its handling of this case from the outset of these arbitration proceedings.

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[203] *Alex Genin and others v. Republic of Estonia* **,** ICSID Case No. ARB/99/2, Decision on Claimants' Request for Supplementary Decisions and Rectification, 4 April 2002, § 19.

6.13. The Claimant submits that the Respondent decided at the outset that it would "bifurcate" its preliminary objections. Thus, on 4 January 2010, the Respondent launched its Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5. Although objections under Article 10.20.4 must be made "as a matter of law" and assuming the Claimant's factual allegations "to be true," the Respondent made innumerable factual arguments that it plainly knew to be disputed by the Claimant. Indeed, those arguments necessitated the submission of 54 exhibits consisting of nearly 800 pages of material, notwithstanding that the Preliminary Objections were supposed to be based on the facts as alleged by Claimant in the Notice of Arbitration.

6.14. In the meantime, so the Claimant contends, the Respondent was preparing its second set of jurisdictional objections even as its Preliminary Objections were still being prepared. For example, by 1 March 2010, the Respondent had already carried out a full "investigation", which, so the Respondent informed the United States Government, "conclusively" proved that it was entitled to deny the Claimant the benefits of CAFTA; when the Respondent filed its Objections to Jurisdiction on 3 August 2010 (literally within hours of the Tribunal's Decision of 2 August 2010), the Respondent based its arguments largely, if not entirely, on the same grounds that purportedly supported its case in the letter of 1 March 2010 to the USA (although the Respondent failed to provide either the Claimant or the Tribunal with such letter until 3 September 2010).

6.15. Furthermore, so the Claimant contends, given the nature of the two sets of objections, there is no legitimate reason why the Respondent could not have asserted them together. The Claimant submits that the arguments included in the Respondent"s Objections to Jurisdiction are no more fact-intensive than those that the Respondent put forward in its first round of objections under CAFTA Article 10.20.4. Thus, so the Claimant contends, the information on which the Respondent based its letter dated 1 March 2010 to the USA (as well as the Respondent"s subsequent denial of benefits to the Claimant) consists almost entirely of the Claimant"s own public filings or other information that the Claimant had made publicly available. In turn, the Respondent's Objection to Jurisdiction based on Abuse of Process is, according to the Claimant, largely based on the same underlying facts as the Objection based on Denial of Benefits; the facts required to demonstrate that the Tribunal has jurisdic-

tion ratione temporis (i.e. the continued existence of a ban on mining in El Salvador) are not contested by the Respondent; and the issue of the Respondent's consent to ICSID arbitration under the Investment Law is an issue of legal interpretation, without any relevant factual dispute.

6.16. In contrast, the Claimant submits that the Respondent‟s Preliminary Objections were based (inter alia) on numerous internal documents from the Respondent‟s regulatory agencies which had never been provided to the Claimant, numerous alleged communications between the Claimant and the Respondent (often alleged by the Respondent without any evidential support), complex issues involving the application of Salvadoran mining and environmental laws and regulations to the Claimant's applications for an environmental permit and exploitation concession, and various assertions concerning highly technical aspects of the applications and the project itself.

6.17. The Claimant concludes that there is no legitimate reason for the Respondent to have withheld its jurisdictional objections in reserve until after the Tribunal's Decision of 2 August 2010. Moreover, the Claimant contends that none of the Respondent‟s objections submitted under CAFTA Article 10.20 (with the possible exception of the waiver issue under CAFTA Article 10.18.2) should have been raised at the preliminary phase of the proceedings. The Claimant submits that the Respondent's decision to submit such inappropriately fact-intensive Preliminary Objections, even as it was already preparing its Jurisdictional Objections for later submission to the Tribunal, was aimed solely at multiplying the preliminary phases of these arbitration proceedings, thereby deliberately delaying any adjudication on the merits and imposing additional costs on the Claimant.

6.18. The Claimant next contends, putting aside the Respondent's “bifurcation” of its preliminary objections, that the Respondent‟s conduct during this second phase of these proceedings standing alone, more than merits an order for costs in favour of the Claimant: the entire theme of the Respondent' jurisdictional objections is that the Claimant secretly changed its nationality from that of the Cayman Islands to that of the USA; that the Claimant “tried to conceal this abuse through misleading words and actions;” and that the Respondent‟s objections “exposed Claimant's

change of nationality." The Claimant contends that the Respondent persisted in its allegations that the Claimant failed to disclose its change in nationality, even as it was pointed out to the Respondent that the Claimant had duly notified the Respondent‟s Government of the Claimant‟s domestication to Nevada , USA, long before the commencement of this ICSID arbitration; and that the change in nationality from that of the Cayman Islands to that of the USA was again disclosed in the exhibits to the Claimant‟s Notice of Arbitration.

6.19. At the Hearing, so the Claimant submits, the Respondent (having repeatedly accused the Claimant of "bad faith," "concealment," and "deceit") effectively conceded that there was no evidence to support any of these inflammatory allegations. Instead, the Respondent was reduced to arguing that the Respondent did not have to show any bad faith on the part of the Claimant, because bad faith is "inherent in this type of abuse [of process]." That assertion, so the Claimant contends, is without any merit as a matter of international law (given that good faith is always to be presumed); but, more important for present purposes is the fact that the Respondent was forced to make this concession at all. The Claimant submits that the Respondent's attempt to "imply" bad faith into the Claimant's conduct is illustrative of its tendency to make serious allegations against the Claimant that are either contradicted by the record or that turn out to be completely unsupported.

6.20. The Claimant submits that many of the tactics employed by the Respondent throughout this case, for example the tendency to offer unacceptably distorted assertions of fact and law; to make accusations and insinuations that were utterly without support and to hold back various allegations or information until the last minute in an effort to ambush the Claimant, were dramatically on display in the proffered testimony of the Respondent's own counsel, Mr Parada. The Claimant contends that Mr Parada‟s witness statement was offered only after the written phase for the Respondent's jurisdictional objections was closed and even though the Respondent maintained that the "information" contained in his testimony was the basis for the Respondent's documentary and other requests made in September 2010.

6.21. The Claimant submits that, as the Respondent's counsel acknowledged as he began his direct examination of Mr Parada, "it's quite extraordinary for a counsel for a

Party to also put in a witness statement." Indeed, so the Claimant contends, it is not only extraordinary; but it is also strongly discouraged and often prohibited.

6.22. The Claimant cites the American Bar Association's Model Rules on Professional Responsibility which specifically prohibit a lawyer from acting as an advocate in a trial in which the lawyer is also likely to be a witness (absent several limited exceptions inapplicable here):

> *"[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."*

The Claimant also cites the United States Supreme Court's observation that in some cases it may be unseemly, especially where counsel is in a position to comment on his own testimony; and that the practice of being an advocate and witness in the same case should be discouraged, the reasons for such discouragement being numerous, including, the danger of intruding upon attorney-client privilege and the fundamentally different roles played by advocates and witnesses.[204]

6.23. The Claimant contends that Mr Parada's clashing roles of advocate and witness were evident at the Hearing, for example, when he asserted in his opening argument that he could definitively describe the position that the Respondent had taken in *Inceysa* (because he had worked at Arnold & Porter, the firm which represented the Respondent in that case); but he then admitted as a witness in cross-examination that he had left Arnold & Porter before the jurisdictional objections in that case were filed by the Respondent.

6.24. Further, so the Claimant submits, Mr Parada's testimony was marked by other inconsistencies and absurdities: Mr Parada testified that during a recruiting breakfast interview in December 2007, two of the Claimant's counsel (i.e. Messrs. Ali and de Gramont of Crowell & Moring) told him of their client's plans to commence arbitration proceedings against the Respondent; according to Mr Parada, Messrs. Ali

[204] *French v. Hall*, 119 U.S. 152, 154 (1886), citing also *Ferraro v. Taylor*, 197 Minn. 5, 12, 265 N.W. 829, 833 (1936).

and de Gramont divulged this confidential client information even though Mr Parada had told them of his close and long-standing professional ties to the Salvadoran Government; Mr Parada further testified that Mr Ali told him that he (Mr Ali) had met the week before with President Saca to inform the President that Mr Ali's client intended to initiate arbitration against the Respondent under CAFTA; however, as Mr Parada testified, he (Mr Parada) had concluded that the true purpose of the interview was that Crowell & Moring wanted Mr Parada to inform the Respondent of Mr Ali‟s plans; and, notwithstanding Mr Parada's "conclusion" about the real reason for the interview, Mr Parada also testified that Messrs. Ali and de Gramont "invited" him to join Crowell & Moring's international arbitration practice, even as they were planning to commence an ICSID arbitration against the Respondent and even though Mr Parada had told them that he "would be extremely uncomfortable working on an ICSID arbitration against El Salvador".

6.25. The Claimant submits that any counsel appearing before this Tribunal (as counsel or as a witness) has an obligation to make sure that his assertions, especially assertions of such a serious nature, have a basic foundation. According to the Claimant, the modus operandi of the Respondent has been to suggest or insinuate wrongdoing on the part of the Claimant without any regard for whether such suggestions have any foundation at all. The Respondent retained its own counsel (Dewey & LeBoeuf) by April 2009 at the latest, so that the Respondent had more than two years to confirm the foundations for its several allegations; but the Respondent significantly failed to do so.

6.26. The Claimant concludes that, if the Tribunal were again in its jurisdictional decision to decline to allocate costs against the Respondent following this second phase of objections (as it did with its Decision of 2 August 2010 following the first phase), the Respondent will have been well rewarded for its misconduct; and the Respondent will have succeeded (again) in delaying the merits phase of this arbitration and in imposing yet more expense on the Claimant, with its limited resources. Moreover, so the Claimant further concludes, a decision by the Tribunal not to order costs against the Respondent will ensure that the Respondent will continue such misconduct as this arbitration proceeds to the merits; and it would strongly encourage other miscreant parties to engage in the same misconduct in fu-

ture arbitration proceedings. Indeed, so the Claimant submits, the Respondent will have created a "blueprint" as to how all CAFTA respondents can double the length of the period for objections and deplete the resources of all but the best-funded CAFTA claimants.

6.27. The Claimant submits, as to arbitration costs, that according to the interim financial statement as of 3 June 2011 issued by the ICSID Secretariat, the Centre's total disbursements as of that date totalled US $311,025.77 to which the Claimant has contributed US $249,962.00. As to its own legal costs, the Claimant submits the following statement:

I: First Phase of Objections:

C&M Legal Fees	US$ 1,791,297
C&M Disbursements	US$ 72,566
Expert fees of Professor Don Wallace, Jr.	US$ 35,625
Total C&M Fees and Disbursements for First Phase:	US$1,899,488

II: Second Phase of Objections:

C&M Legal Fees	US$2,355,713
C&M Disbursements	US$ 83,543
Total C&M Fees and Disbursements for Second Phase:	US$2,439,256

Total Fees and Disbursements for Both Phases:	*US$4,338,744*

6.28. The Claimant requests that the Tribunal issue an order allocating to the Respondent all the arbitration and legal costs of these proceedings to date.

(03) The Respondent's Response

6.29. In summary,[205] by way of response to the Claimant"s case on costs, the Respondent requests that the Tribunal order the Claimant to bear all the costs incurred by the Respondent in this arbitration because the Claimant initiated this arbitration about a mining exploitation concession which it did not have a right to receive, abusing the international arbitration process, and because it also has made a series of false, misleading and inconsistent statements before this Tribunal to try to keep its claims alive.

6.30. The Respondent submits that the Hearing confirmed that this arbitration is the result of an abuse of process by the Claimant and others: the Canadian company, Pacific Rim, had a dispute with the Respondent about its application for a mining exploitation concession in El Dorado; it spent three years trying to resolve the dispute by lobbying the Respondent"s Government to change its Mining Law; those years of unsuccessful lobbying efforts made resolving that dispute appear increasingly unlikely; the Canadian company engaged international arbitration lawyers and then changed the nationality of its subsidiary (the Claimant) in December 2007 in order to procure arbitral jurisdiction under CAFTA for its pre-existing dispute with the Respondent.

6.31. The Respondent submits that the Claimant, unable to contest the overwhelming evidence that the dispute existed before its change of nationality in December 2007, has instead repeatedly tried to change its definition of the "measure at issue" and its explanation of when the dispute arose between the Parties. This tactical shifting of positions, according to the Respondent, has been the Claimant"s common practice throughout this arbitration.

6.32. The Respondent contends that, unlike the Claimant, the Respondent has pursued its objections honestly and in good faith, seeking the quickest and most efficient resolution possible: the Respondent brought Preliminary Objections in an attempt to end

[205] This summary of the Respondent"s response and the Respondent"s claim below are based on the Respondent"s written submissions on costs of 10 and 24 June 2011.

this arbitration with the least expenditure of time and expense; only after extensive written submissions and denials in the Preliminary Objections phase did the Claimant accept that: (i) it never had a "perfected right" to a concession; and (ii) it had known of problems with its application and chose to try to lobby the Respondent"s Government to change its legal requirements instead of complying with them.

6.33. In this jurisdictional phase, the Respondent submits that the Claimant sought to disregard its own nationality and relevant treaty provisions, wrongly insisting on its right to arbitrate even though it does not qualify to initiate CAFTA claims or to invoke ICSID jurisdiction against the Respondent; and that the Claimant again wasted time and expense before accepting these straightforward facts. The Respondent cites, as one example, the Claimant"s continuous invocation of the activities of the "Pacific Rim Companies" to suggest that the Claimant had activities in the USA, even though it was forced to admit that the Claimant is a passive holding company with no activities beyond holding shares on paper.

6.34. The Respondent contends that these essential facts were not complicated; that these jurisdictional objections could have been argued concisely; but that the Claimant submitted a 256-page Jurisdiction Counter-Memorial and a 186-page Jurisdiction Rejoinder, sticking to the tactic: "if the facts are against you, focus on the law; if the law is against you, focus on the facts; if the law and the facts are against you, create distractions and confusion."

6.35. The Respondent submits that the Claimant cannot hide from the true facts of this case: this dispute relates to the application for an environmental permit that was presumptively denied by the Respondent. By early 2007 at the latest, the Claimant knew that the concession application could not be approved until it either revised and resubmitted the application or succeeded in its efforts to change the Mining Law; but Pacific Rim changed the Claimant"s nationality to the USA in December 2007 and later began these arbitration proceedings.

6.36. The Respondent contends that in all these circumstances, having been unfairly subjected to the Claimant"s abusive process and to its abusive tactics and misconduct in this arbitration, the Respondent should not be required to bear any of the Claimant"s

costs but, rather, that it is entitled to recover its own costs from the Claimant, as submitted (in summary) below.

(04) The Respondent's Claim

6.37. The Respondent notes, as a preliminary matter, that costs only need to be addressed at this stage if the Tribunal decides that it lacks jurisdiction as established by the Respondent; and that, as the Tribunal indicated when instructing the Parties to address costs with their post-hearing submissions, "obviously on one view of what happens with our decision, we may have to address costs, and that's the claim ... which is made by the Respondent."[206] Thus, according to the Respondent, despite the Claimant's efforts to argue the contrary, the Claimant's claim for costs would only be relevant if the Claimant were to prevail at the end of this arbitration.

6.38. The Respondent submits that the Tribunal has already seen enough to conclude without hesitation that this arbitration must end now unfavourably for the Claimant. The Respondent submits that the evidence establishes that this arbitration has been abusive by the Claimant at different levels, beginning with Pacific Rim"s manipulation of the Claimant's nationality to manufacture jurisdiction under CAFTA; followed by the lack of merit in the Claimant"s main claim (an asserted entitlement to a mining exploitation concession which the Claimant in fact did not have any right to receive); and finally the manner in which the Claimant has conducted this arbitration; all leading to the result that this entire arbitration should now be dismissed with an award at this jurisdictional phase; and accordingly that costs could and should be awarded to the Respondent and against the Claimant.

6.39. The Respondent also notes that, even if the Claimant's costs claim were somehow relevant, its claim was filed in contravention of the Tribunal's instructions to include "a brief summary as regards both allocation and quantification of costs that are being sought by both sides" with the Post-Hearing Submissions, which the Tribunal indicated was to have a maximum length of fifty pages. Rather than abide by the Tribunal"s instructions, the Claimant requested flexibility on the page limit and then

[206] Hearing D3.764.

abused the Tribunal's indulgence in granting such flexibility by filing a separate thirteen-page written submission on costs, in addition to its full fifty-page Post-Hearing Submissions. The Claimant thus circumvented the page-limit for the post-hearing submissions, seeking to gain an unfair advantage over the Respondent; whereas the Respondent fully abided by the Tribunal's fifty-page limit. Accordingly, the Respondent contends that the Claimant's separate costs submission should be considered inadmissible by the Tribunal.

6.40. Nevertheless, the Respondent states that, because the Claimant's costs submission has been filed with the Tribunal as a part of the public record and includes many misrepresentations, the Respondent is obliged to respond at length.

6.41. First, the Respondent submits that it did not "bifurcate" its objections to cause delay, but to ensure that the Claimant's unmeritorious claims could be dismissed as efficiently as possible; that the Claimant argued in the Preliminary Objections phase that the Respondent brought too many objections; but that the Claimant now argues that the Respondent, rather than limiting its Preliminary Objections, should have added even more objections. In fact, the Respondent submits that it properly refrained in the first phase from asserting its Abuse of Process, Denial of Benefits, Ratione Temporis Objections (as well as its additional Objection to claims under the Investment Law), because these objections needed to be decided without assuming the Claimant's factual allegations to be true, required consideration of disputed facts, and could not have been properly decided under the strict time-limit for the expedited procedure required by CAFTA Article 10.20.5.

6.42. Second, the Respondent submits that the Preliminary Objections phase served a useful purpose. It raised these Preliminary Objections to present undisputed facts to the Tribunal that exposed fatal weaknesses in the Claimant's claims on the merits that could have resulted in the early dismissal of the primary claims in this arbitration; the Claimant, however, refused to provide additional facts that might have permitted the Tribunal to come to an early decision, merely stating that its claims could not be decided at a preliminary first phase in an expedited proceeding; that whereas the Respondent had hoped to narrow the issues in this arbitration to save time and expense, the Claimant successfully postponed an adverse decision by promising that it would

cure the serious weaknesses and deficiencies in the allegations made in the Notice of Arbitration at a later time.

6.44. The Respondent contends that, even though the Tribunal decided to allow the arbitration to continue with regard to all the Claimant's claims, the Tribunal noted that the Respondent‟s Preliminary Objections had served a useful purpose in the arbitration, as expressed in Paragraph 264 of the Tribunal‟s Decision of 2 August 2010 (“... as regards these particular claims, much of the costs so far incurred by the Parties will not have been wasted. Much of the work required to bring these proceedings forward ... to a conclusion has now been done. In the Tribunal's view, it is unlikely that much time, effort and expenditure will have been lost overall).

6.45. The Respondent submits that the Preliminary Objections phase allowed the Tribunal an early look at the weaknesses in the Claimant's claims; that, in addition, the filing of the Preliminary Objections was helpful for the Tribunal's decision in this second jurisdictional phase; that, by having engaged in an early discussion of what the dispute was about (unaffected by a concurrent consideration of the Respondent‟s abuse of process objection), the Tribunal was able to see during the first phase that the Parties‟ dispute had started well before the Claimant's abusive change of nationality; that had the Respondent not brought its Preliminary Objections before filing its Abuse of Process objection, the Claimant would have without a doubt argued that it was necessary to join the decision on jurisdiction to the merits of the dispute; and that, because the Respondent brought its Preliminary Objections earlier, the Tribunal had the evidence it needed to render an award declining jurisdiction at this stage. Therefore, so the Respondent contends, there is no need to waste more time and resources to reach the same result after a costly phase on the merits, which would have included evidence and arguments on both liability and damages.

6.46. Third, the Respondent submits that the Claimant, not the Respondent, caused significant delay and unnecessary additional expense in this arbitration: the Respondent is the unwilling party in these proceedings; it was the Claimant which chose to initiate this arbitration; the Claimant should have researched and understood the legal and factual bases for its claims before forcing the Respondent into these arbitration proceedings; had the Claimant done so, the costs of this arbitration could have been

avoided; but, instead, the Respondent has had to expend considerable resources to refute claims that should not have been made by the Claimant; and, once these claims were refuted by the Respondent, the Claimant, rather than accepting the consequences, constantly changed its positions on the facts and the law; and it now wrongly accuses the Respondent of "hold[ing] various allegations or information in reserve until the last minute in an effort to ambush Claimant."

6.47. The Respondent notes that the Claimant‟s complaints of "ambush" relate to matters which should not have come as any surprise to the Claimant: (i) the Respondent‟s presentation of undisputed evidence in the Preliminary Objections first phase that its Government had considered and rejected the Claimant's proposals to "interpret" or amend the Mining Law to eliminate requirements that the Claimant's application for an exploitation concession failed to meet (such as the requirement for ownership or authorisation to use the surface land covering the concession area); and (ii) the Respondent‟s early notification to the USA of the Respondent‟s intent to deny benefits under CAFTA.

6.48. The Respondent submits that this evidence was not presented in order to ambush the Claimant; but, rather, it was presented by the Respondent to prove facts that contradicted the Claimant's case, which the Claimant knew or should have known when it commenced this arbitration but which it did not present to the Tribunal. The Respondent cites, as an example, the fact that the Claimant initiated this arbitration based on a claim that it had met all the requirements for a concession application except for the environmental permit; but when it was presented with the Respondent‟s evidence, the Claimant changed its position and admitted that it had been advised of its failure to comply with the surface land ownership requirement in March 2005. The Respondent argues that, after trying at the Preliminary Objections stage to create a complicated dispute regarding the surface land issue, at the jurisdictional stage the Claimant admitted that it had tried to get the Respondent‟s Government to interpret or amend the Mining Law to overcome the fact that the company's concession application did not comply with the existing surface land requirement. As for the Respondent‟s denial of benefits under CAFTA, so the Respondent argues, that should have come as no surprise to the Claimant, being wholly owned and controlled

by a Canadian company, with no substantial business activities of its own in the USA.

6.49. Fourth, the Respondent submits that the Respondent avoided delay by filing its jurisdictional objections immediately, instead of waiting until the due date for the filing of its counter-memorial on the merits (as it was entitled to do under the ICSID Convention and ICSID Arbitration Rules).

6.50. The Respondent notes that it (the Respondent), the Claimant, and the Tribunal all knew well in advance of the Tribunal's Decision of 2 August 2010 that some of the Claimant's claims would not be dismissed during this first phase because such claims were not subject to the Preliminary Objections. In keeping with its goal of ending this arbitration as soon as possible, the Respondent decided to prepare immediately to file objections to jurisdiction with regard to any surviving claims. The Respondent was under no obligation to act so expeditiously; and, if it had actually wanted to delay this arbitration and thereby increase the Claimant‟s costs, it could have waited for the Claimant to file its memorial on the merits, then raised its objections to jurisdiction and requested the suspension of the proceedings on the merits. The Respondent did not do so.

6.51. Fifth, the Respondent contends that, in this case, there is ample evidence of the Claimant's bad faith. The Respondent notes that the Claimant has asserted that the Respondent was "reduced to arguing that [the Respondent] did not have to show any bad faith on the part of Claimant, because bad faith is „inherent in this type of abuse‟." However, the Respondent submits that it presented ample evidence of the Claimant's bad faith, and, in addition, noted that a tribunal need not find subjective bad faith as an additional element once it is shown that a claimant manipulated its corporate form to gain access to arbitral jurisdiction for an existing dispute, because that manipulation (by itself) constitutes bad faith under international law.

6.52. The Respondent submits that the Claimant exhibited bad faith when it decided not to mention to the Tribunal the crucial fact of its change of nationality anywhere in the entire text of its Notice of Intent and Notice of Arbitration. Instead, the Claimant only described itself as "an American investor organized under the laws of Nevada,"

"a U.S. investor organized under the laws of Nevada," and "a limited liability company duly organized under the laws of the state of Nevada, in the United States of America." Nowhere in the 131 paragraphs of the Notice of Arbitration is there any reference to the change of nationality, much less to the date of that change. The Respondent argues that the Claimant's attempts to argue that it provided notice of the change of nationality to the Tribunal by including an exhibit for a different purpose and not translated into English (that happened to include a reference to the change of nationality) are, at best, disingenuous.

6.53. The Respondent also submits that the Claimant exhibited bad faith in asserting that no one at Pacific Rim had any reason even to suspect there was a dispute with the Respondent until reading a newspaper article in March 2008 reporting President Saca‟s speech, after the Claimant‟s change of nationality, in spite of all the evidence introduced during the Preliminary Objections first phase about the prior existence of that dispute. The extremity of the Claimant's bad faith in this regard, so the Respondent argues, was revealed when the Claimant's principal witness, Mr Shrake (as the CEO and President of Pacific Rim), denied that the newspaper article alerted him to the relevant measure invoked by the Claimant, namely the alleged de facto ban on mining, which the Claimant now asserts gave rise to the Parties‟ present dispute.

6.54. The Respondent further submits that the Claimant's bad faith was also demonstrated by admissions and proof that other key factual assertions made by the Claimant were similarly false or misleading: (i) the Claimant and its witnesses in their written witness statements repeatedly asserted that saving costs, rather than creating jurisdiction, was "the primary factor behind" changing the Claimant's nationality; on oral testimony at the Hearing, however, the Claimant's main witness (Mr Shrake) admitted that saving costs was not the primary reason for the change of nationality; and (ii) the Claimant asserted repeatedly that the Claimant was constantly assured "through 2007 and into 2008" that it would receive the environmental permit; the Claimant, however, could not and did not refute the Respondent‟s proof at the Hearing that there were no meetings with officials of the Salvadoran administration between January and December 2007; and therefore that there was no possibility that any assurances were given in 2007, the year leading up to the Claimant's change of nationality.

6.55. Accordingly, the Respondent contends that, whilst it was not required to make any additional showing of bad faith once it had demonstrated the improper manipulation of the Claimant‟s corporate form in order to gain jurisdiction under CAFTA, it has nonetheless proved the Claimant‟s bad faith.

6.56. Sixth, the Respondent submits that Mr Parada's testimony only became necessary as a result of the Claimant's own misconduct. According to the Respondent, Mr Parada never imagined he would be a factual witness in this arbitration until August 2010 when the Claimant, in an effort to survive the Respondent‟s Abuse of Process objection, wrongly alleged that no-one in the Claimant knew or could have known that there was a dispute with the Respondent before reading the newspaper article on 11 March 2008 reporting President Saca‟s speech. The Respondent submits that, in fact, Mr Parada‟s testimony (and all that has been associated with it) would have been completely unnecessary if the Claimant had not raised this absurd allegation, or if the Claimant in September 2010 had simply responded to the Respondent‟s questions and admitted the true facts which it finally admitted much later in April 2011; namely: the Claimant's retention of international arbitration counsel with regard to the Respondent in October 2007 and such counsel's attendance with their client at a lunch for President Saca in November 2007, before the Claimant's change of nationality in December 2007.

6.57. The Respondent notes that the Claimant maintained that there was no dispute with the Respondent before March 2008; that the Claimant asserted, “prior to March 2008, Claimant had no reason to believe that this temporary impasse would not be resolved”; and that the report of President Saca's speech in March 2008 “was the first time that Claimant believed that its legal rights under Salvadoran and international law were being 'positively opposed' by El Salvador.” As a result of these assertions, the Respondent included questions about the Claimant's counsel in its request for documents and information, explaining that because “the August 17, 2010 letter denies that Pac Rim Cayman's change in nationality of December 2007 enabled the company to begin CAFTA arbitration about a dispute that already existed,” the “timing of the relationship between Pac Rim Cayman and its international arbitration counsel” would be “relevant and material” to the Abuse of Process objection.

The Respondent acknowledges, of course, that it knew that the Claimant's statements were false, but the Respondent wanted to do everything possible to get the Claimant itself to admit the true facts without the need for any testimony from Mr Parada.

6.58. The Respondent submits that the Claimant, however, rather than simply admitting at this time the facts that it later admitted, responded by mischaracterising those facts and arguing that the Respondent‟s questions were irrelevant: according to the Claimant, "[t]he issue of when Claimant or any of its affiliates decided to hire lobbyists or lawyers or any other service providers to assist them with the issues they were facing in El Salvador (which, as of December 2007, principally involved the failure of Salvadoran regulators to rule on Claimant's application for a mining concession at the El Dorado site) has nothing to do with any question before the Tribunal". In response, so the Respondent submits, it was required to reiterate its request, explaining again that the questions relating to the Claimant's counsel were directly relevant to establishing when the Parties‟ dispute existed and whether the Claimant's nationality was changed to gain access to CAFTA jurisdiction; specifically, so the Respondent wrote: "it would be important to know if, for example, an attorney for Claimant met with a then-government official from El Salvador before Pac Rim Cayman's change in nationality and mentioned the possibility of initiating arbitration against El Salvador unless El Salvador granted the concession".

6.59. The Respondent contends that the Claimant continued to refuse to provide the information, responding that such information was irrelevant; "the possibility of any such meeting appears to be purely speculative on Respondent's part"; and "[t]his sort of „fishing expedition‟ might be commonplace in U.S.-style litigation", but it is "not permitted under the norms of international arbitration generally or the standards of ICSID arbitration particularly."

6.60. In its Procedural Order No. 2, the Tribunal granted most of the Respondent‟s requests for information but not those relating to the Claimant's counsel, reserving this issue until after the first round of written pleadings. The Respondent renewed its requests for information after the Claimant filed its Jurisdiction Counter-Memorial and witness statements, insisting that, "[i]t was only after President Saca's announcement

of a de facto mining ban in March 2008 that we began to believe that a dispute with the Government was a real possibility."

6.61. As the Respondent then explained: "Claimant's continued allegations in its Counter-Memorial make the information and documents requested in El Salvador's requests numbers 10, 11, 12, and 13 even more relevant than before. As noted in El Salvador's original request, the timing of the relationship between [the Claimant] and its international arbitration counsel, as well as the identity of the client, are material for the Tribunal to make a decision regarding the reason why Pacific Rim decided to change the nationality of the Claimant from the Cayman Islands to the United States in December 2007. The issue is fundamental to the Tribunal's decision on the Objections to Jurisdiction because Claimant and its counsel have emphatically denied El Salvador's abuse of process objection and instead have accused El Salvador of fabricating the reasons for this objection." The Respondent ended its renewed request by noting that, if these questions remained unanswered, the Respondent would seek permission from the Tribunal to introduce evidence contradicting the assertions made by the Claimant; but the Claimant continued to refuse to answer the Respondent"s questions and to insist that such questions were irrelevant.

6.62. By letter dated 22 February 2011, the Claimant requested the Tribunal to order the Respondent to produce any information it had relating to "any Crowell & Moring lawyer having attended any meetings with Salvadoran officials prior to Pac Rim Cayman's domestication to Nevada in December 2007." The Respondent submits that it was only in response to that letter, given also the Claimant's refusal to answer the relevant questions, that Mr Parada was obliged to inform the Tribunal that he knew that the Claimant was not stating the true facts, explaining that he had been told directly by the Claimant's counsel (before the change of the Claimant"s nationality in December 2007) that such counsel represented their client in a dispute with the Respondent and that their client was planning on commencing an arbitration under CAFTA, if this client did not receive its mining concession from the Respondent.

6.63. In response to Mr Parada's letter to the Tribunal, the Respondent submits that it was the Claimant which urged the Tribunal to order Mr Parada to submit a sworn witness statement: "Not only does Claimant *not* oppose Mr Parada's request. To the contrary,

Claimant submits that under the circumstances, the Tribunal should *order* Mr Parada to resubmit his 4 March 2011 letter as a sworn witness statement and to make himself available for cross-examination by Claimant's counsel during the hearing." Acceding to the Claimant's request, the Tribunal then ordered the Respondent to submit Mr Parada's sworn statement and required him to be available for cross-examination at the Hearing, as he was.

6.64. The Respondent contends that it was only after Mr Parada was ordered to submit a sworn statement and to be available for cross-examination that the Claimant finally admitted, ten days before the Hearing, that "[a]n attorney-client relationship between Crowell & Moring and Pacific Rim Mining Corp. and its subsidiaries ... commenced on or around [24 October 2007]" and that Mr Ali and another of Claimant's counsel attended a lunch where President Saca was the keynote speaker on 28 November 2007. According to the Respondent, there is no excuse for the Claimant to have put the Respondent and the Tribunal through seven months of denials and evasions and then force Mr Parada to become a witness in this arbitration before giving these answers to the Respondent‟s questions, when truthful, timely answers could have avoided the entire situation.

6.65. Under these circumstances, the Respondent submits that it is ironic for the Claimant to base its request that the Respondent should pay costs on the assertion that Mr Parada's testimony was somehow improper. The Respondent argues that there is no basis for this assertion: as an international arbitral tribunal, this Tribunal is not bound by the rules of any U.S. jurisdiction; there is no rule preventing the Tribunal from accepting Mr Parada‟s testimony; and there is no rule preventing the Claimant from submitting its own rebuttal testimony, which it chose not to do at the Hearing. According to ICSID Arbitration Rule 34: "(t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value"); and, thus, the Tribunal has full discretion to decide what evidence to admit and to determine the relevance and materiality of any proffered evidence.

6.66. The Respondent submits that even under the American Bar Association Model Rule (cited by the Claimant) as discouraging lawyers from representing parties in trials where the lawyer is likely to be a witness, it was acceptable and appropriate for Mr

Parada to provide his witness statement in this case; and it would have been acceptable and appropriate for Mr Ali and Mr de Gramont to testify as factual witnesses at the Hearing if they believed that anything in Mr Parada's statement was inaccurate. The Respondent repeats that Mr Parada could not have anticipated that he would need to become a factual witness in this arbitration until the Claimant argued, falsely, that it could not have known that there was a dispute until after March 2008. As for Mr Ali and Mr de Gramont, if they did not believe that Mr Parada's testimony was accurate, the model rule would not apply to them because it would not have been in any way foreseeable that they would be necessary factual witnesses when they agreed to represent the Claimant as counsel; and, in addition, they could have testified under the „substantial hardship exception" to protect their client's interests.

6.67. In fact, the Respondent submits that the Claimant never denied the truth of Mr Parada's account, even in correspondence after Mr Parada filed his witness statement with the Tribunal. In its letter of 14 March 2011, the Claimant requested documents relating to Mr Parada's statement, claiming that the documents provided with the original statement were "highly selective"; as the Respondent noted in its response to this letter: "The most important aspect of Claimant's request is that Claimant has not contested the facts in Mr Parada's Witness Statement. Claimant should not be permitted to instead use innuendo to imply that the facts in Mr Parada's Witness Statement are not true. If Claimant and its counsel actually believe that the facts are not as Mr Parada asserts in his Witness Statement, they can submit witness statements from Mr Ali and Mr de Gramont to that effect. They should not be allowed to instead waste the Tribunal's time with a request for irrelevant information."

6.68. The Claimant responded on 23 March 2011, defending its requests for documents, but still not denying the facts stated in Mr Parada's written testimony; and the Respondent again highlighted the lack of denial in its next letter to the Tribunal: "The most significant aspect of Mr Posner's letter [for the Claimant] is not what it says, but what it still fails to say. There is no mention in Mr Posner's letter that he has discussed Mr Parada's Statement with the two partners from Claimant's counsel that have direct knowledge of the conversations recounted by Mr Parada to ask them to confirm or deny the truth of his declaration [i.e. Mr Ali and Mr de Gramont]." According to the Respondent, the Claimant did not deny the facts in Mr Parada's state-

ment in the communications with the Tribunal regarding procedural issues leading up to the hearing originally scheduled to begin on 23 March 2011 or during the procedural meeting held by telephone conference-call preceding that intended hearing.

6.69. The Respondent states that it urged the Claimant directly to respond to Mr Parada's testimony in its letter of 22 April 2011: "El Salvador also notes - again - that Claimant continues to insist on document production from Mr Parada, while failing to tell the Tribunal whether Mr de Gramont and Mr Ali confirm or deny that they were already working for [Pacific Rim] and preparing for this arbitration before [Pacific Rim] changed [the Claimant's] nationality to allow it to become the Claimant in this arbitration. Claimant's answer to this question could save the parties and the Tribunal considerable time and expense in disposing of this case." The Respondent submits that, after refusing to answer the Respondent's questions for seven months, the Claimant finally admitted the truth of most of Mr Parada's testimony by its letter dated 22 April 2011; but that, even then, the Claimant persisted in having the Tribunal call Mr Parada as an oral witness at the Hearing and there conducted an intensive cross-examination aimed at impugning Mr Parada's credibility, without ever indicating that Mr Ali and Mr de Gramont denied any part of Mr Parada's factual testimony.

6.70. The Respondent concludes that, given multiple opportunities, Mr Ali and Mr de Gramont never denied the truth of any of Mr Parada's statements; that Mr Parada's early factual knowledge about the dispute with the Respondent and the potential arbitration could have only come from the Claimant's own counsel; that the Claimant's attacks on Mr Parada's credibility as a factual witness are baseless; and that all this can clearly not entitle the Claimant to costs based on Mr Parada's testimony but, rather, the reverse.

6.71. In conclusion, the Respondent submits that this arbitration concerning a pre-existing dispute between the Parties regarding claims arising from the failure to issue a concession that the Claimant did not have a right to receive should never have been initiated against the Respondent; and that, having been unfairly subjected to this abusive process by the Claimant and to the Claimant's abusive tactics in this arbitration, the Respondent is entitled to recover its costs from the Claimant.

6.72. As to the amount of such costs, the Respondent submits the following figures:

The Respondent's Statement of Costs	
Attorneys‟ fees	US$3,610,651.75
Other Expenses	UD$447,068.21
Amounts paid or due to ICSID	US$250,000.00
TOTAL:	US$4,307,719.96

6.73. The Respondent notes that its own claim for attorneys' fees for this arbitration total US$3,610,651.75 and that the Claimant's attorneys‟ fees total US$4,147,010.00 for the two rounds of objections: a significant difference of US$536,358.25.

6.74. The Respondent submits that, given that the Respondent had to carry the burden of proof for its two sets of objections, there is no reason that the Claimant's legal fees should be higher than the Respondent‟s legal fees. Nevertheless, the Respondent submits that the Claimant's higher legal fees are evidence that the amount of legal fees incurred by the Respondent is a reasonable amount for the Tribunal to include in its award as compensation for the Respondent‟s legal costs.

(05) The Claimant's Response

6.75. The Claimant responds that the Respondent's claim for costs is remarkable in that nowhere does it identify a legal rule for the Tribunal to apply in deciding how to allocate the costs of this arbitration to date; that, rather than argue any relevant legal points of law, the Respondent merely repeats arguments underlying its jurisdictional objections and the baseless accusation that the Claimant has not acted "honestly and in good faith"; that if its objections are well-founded (which they are not), that it should then automatically be entitled to have the Claimant "bear all the costs and expenses incurred by El Salvador in this arbitration." The Claimant argues that the Respondent cites no authority for this proposition, because there is none in CAFTA, the ICSID Convention or in any other source of law applicable to this international arbitration.

6.76. The Claimant submits that the Respondent's repetition of its jurisdictional arguments contrasts adversely with the Claimant's costs submission, which articulates the relevant legal standard; explains why the application of that standard justifies an award of costs against the Respondent in this case; and then quantifies those costs. The Claimant notes that it has already addressed the Respondent's jurisdictional arguments in its written and oral submissions; and as the Respondent has identified no other basis for its costs submission, the Tribunal should decline the Respondent's request for an award of costs.

(06) The Tribunal's Analysis and Decisions

6.77. The Tribunal decides to receive in full all the submissions on costs made by the Parties; and it rejects the application by the Respondent to exclude the Claimant"s separate written submission on costs.

6.78. As regards the first phase of these arbitration proceedings resulting in the Tribunal"s Decision of 2 August 2010, the Tribunal sees at present no reason to depart from its original decision expressed in Paragraph 266(3) of that Decision; namely, that the Tribunal would reserve its powers to order legal and arbitration costs under CAFTA Article 10.20.6 relating to that first phase "until the final stage of these arbitration proceedings." The Tribunal notes, of course, that the Claimant"s CAFTA Claims cannot proceed beyond this Decision on Jurisdiction; but nonetheless the Tribunal thinks that it may be appropriate to weigh in the balance for the purpose of its discretion on such costs the final result of the Claimant"s Non-CAFTA Claims, principally because both Claims relate to the same essential complaint (albeit advanced in different legal terms under separate instruments).

6.79. As regards this second phase of these arbitration proceedings resulting in this Decision on Jurisdiction, the Tribunal considers that neither the Claimant nor the Respondent can be regarded as having either wholly succeeded or wholly lost their respective cases. Whilst the Claimant"s CAFTA Claims can no longer proceed in this arbitration as a result of this Decision, the Claimant"s Non-CAFTA Claims may now proceed to the merits of the Parties" dispute.

6.80. In these circumstances, the Tribunal considers that, in the exercise of its discretion under ICSID Arbitration Rule 28(1), the eventual result of these Non-CAFTA Claims on the merits may provide a highly relevant factor to any decision as to the final allocation of legal and arbitration costs between the Parties. Indeed, the Parties‟ respective cases on costs, as summarised above, closely mirror their different submissions as to those eventual merits. Accordingly, as a matter of discretion, the Tribunal declines to make an order at this stage as regards the allocation of any legal or arbitration costs incurred during this second phase of these arbitration proceedings.

6.81. The Tribunal also notes that its powers as to costs under the ICSID Arbitration Rules are limited to an order in an award; and that this Decision is not an "award" within the meaning of the ICSID Convention and the ICSID Arbitration Rules.

6.82. It remains nevertheless appropriate for the Tribunal to state at this stage certain conclusions regarding the Parties‟ respective arguments on costs. First, the Tribunal does not criticise the conduct of the Respondent or its Counsel (including Mr Parada) for submitting to the Tribunal factual evidence of certain events in November and December 2007 apparently disputed by the Claimant and then potentially relevant to the issues of jurisdiction. It would be possible here to say much more; but, given that this arbitration will continue further, the Tribunal considers it best to state this conclusion succinctly on what must now be regarded as a dead issue for the future of these arbitration proceedings. As regards the Claimant, the Tribunal similarly discounts the Respondent‟s criticism of its conduct during these arbitration proceedings. Again, the less here said, the better in what was inevitably an uncomfortable controversy.

6.83. Lastly, the Tribunal intends that its lengthy summary of the Parties‟ other arguments on costs, as set out above, will provide a written record which it will be unnecessary for the Parties to duplicate later in these arbitration proceedings. In the meantime, until an award or the final stage of these proceedings, the Tribunal reserves in full all its powers and jurisdiction in regards to legal and arbitration costs as regards both Parties‟ existing and future claims.

PART 7: THE OPERATIVE PART

7.1. **For the reasons and on the grounds set out above, the Tribunal finally decides as follows:**

(A) As to the Claimant's CAFTA Claims:

(1) the Tribunal dismisses the Respondent's jurisdictional objections based on the "Abuse of Process" issue;

(2) the Tribunal dismisses the Respondent's jurisdictional objections based on the "Ratione Temporis" issue;

(3) the Tribunal accepts the Respondent's jurisdictional objections based on the "Denial of Benefits" issue; and

(4) the Tribunal accordingly declares that the International Centre for Settlement of Investment Disputes ("the Centre") and this Tribunal have no jurisdiction or competence to decide such CAFTA Claims in these arbitration proceedings pursuant to CAFTA Articles 10.16, 10.17 and ICSID Article 25(1);

(B) As to the Claimant's Claims under the Investment Law, the Tribunal dismisses the Respondent's jurisdictional objections and declares that the Centre and this Tribunal have jurisdiction and competence to decide such Claims in these arbitration proceedings pursuant to ICSID Article 25(1);

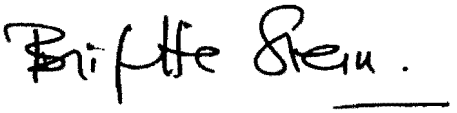
(C) **As to Costs, the Tribunal here makes no order as to any legal or arbitration costs, whilst specifically reserving in full its jurisdiction and powers as to all orders for costs at the final stage of these arbitration proceedings; and**

(D) As to all other matters, the Tribunal retains in full its jurisdiction and powers generally to decide such matters in these arbitration proceedings, whether by order, decision or award.

ICSID, Washington DC, USA.

Professor Dr Guido Santiago Tawil:

Date:

Professor Brigitte Stern: 

Date:

V.V.Veeder Esq (President):

Date: