



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

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VIA EMAIL

Members of the Tribunal
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ICSID
1800 G Street NW, 3rd Floor
Washington, D.C.

Re: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12
SUBMISSION OF AMICUS CURIAE BRIEF

Dear Members of the Tribunal:

Amici respectfully submit an *amicus curiae* brief in the above-captioned matter, pursuant to Article 37(2) of the ICSID Arbitration Rules, United-States Central American Free Trade Agreement (CAFTA) Article 10.20.3, the Tribunal's Procedural Order 8 dated March 23, 2011, and the Tribunal Secretary's e-mail communication dated May 5, 2011. Specifically, *amici* request the Tribunal to consider the written submission attached as Appendix.

In accordance with the Tribunal's Procedural Order 8, *amici*'s submission has been edited to assist the Tribunal's determination of its jurisdiction. It is a generally accepted principle of international arbitration that the Tribunal has the authority, and indeed the duty, to satisfy itself that it has jurisdiction over the matter, including raising "of its own motion *ex officio*" any jurisdictional problem the parties may fail to raise.¹ Accordingly, while *amici*'s submission does closely track the arguments raised by the parties, *amici* recognize that their role is to assist the Tribunal to fulfill this broader, independent duty.

As set forth in the earlier submission, *amici* are member organizations of the ***Mesa Nacional Frente a la Minería Metálica de El Salvador*** (the El Salvador National Roundtable on Mining) ("La Mesa"), a coalition of community organizations, research institutes, and environmental, human rights, and faith-based nonprofit organizations who collectively aim to improve public policy dialogue concerning metals mining in El Salvador.¹

Claimant has put this matter before the Tribunal by asserting that it has a legal dispute with the Republic of El Salvador relating to an investment in El Salvador, namely the Claimant's efforts made with respect to the proposed El Dorado mine and certain other mining projects that it wished to pursue in

¹ International Commercial Arbitration: Important Contemporary Questions 239 (Albert Jan van den Berg, gen. ed., Kluwer Law International 2003); *see also* *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, November 15, 2004, (a tribunal "***must satisfy itself*** that it has jurisdiction over the dispute") (emphasis added); *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005 (same); *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, (1952) I.C.J. Reports 93 ("An international tribunal cannot regard a question of jurisdiction as a question *inter partes*.").

El Salvador. 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. As the Respondent correctly noted in its letter to the Tribunal of March 18, 2011, *amici* and their constituent communities are unavoidably at “the core of this arbitration,” and it is critically important that their voices be heard and their perspective be appreciated.

Amici have particular knowledge of the complex political debate over metals mining and sustainability in El Salvador that also lies at the core of this arbitration. As active participants in this social dialogue, *amici* are uniquely placed to provide the Tribunal with a perspective different from that of the disputing Parties. The people of El Salvador are grappling with fundamental questions such as whether metals mining is appropriate in a country with the highest population density in the Americas and a profound shortage of water; whether affected communities are sufficiently informed to understand the choices they face; whether they are sufficiently organized to defend their right to participate in the public policy dialogue affecting such choices; and whether they are sufficiently empowered that their informed choices will be respected.

In this submission, *amici* argue that Claimant's claim does not present any “legal dispute” or cognizable “measure” sufficient to confer jurisdiction under Article 25 of the ICSID Convention and Article 10.14 of CAFTA, but rather appears to reflect Claimant's dissatisfaction with the general direction that Salvadoran public policy has taken in recent years. Moreover, Claimant appears to be using this proceeding to gain an unfair advantage in what is fundamentally not a dispute between it and the Republic, but rather between it and the independently-organized communities who have risen up against Claimant's projects, *i.e.*, *amici*.

The momentous gains that *amici* and their allies have achieved in the last decade are at stake in this arbitration. These gains concern not just the mining debate but also much broader areas of civic participation, respect for human and environmental rights, and representative democracy. If Claimant is allowed to leverage international investment law to essentially hang a price tag on its opponents' successes in domestic public policy debates (even if that price tag is just the not-insignificant cost of litigating a claim to the merits), the democratic gains *amici* and their constituent communities have earned, for literally the first time in El Salvador's history, could be drastically undermined.

Amici are juridical citizens of El Salvador. No organization has received any financial or other support connected to this submission or any future involvement in these proceedings.

Very truly yours,

A handwritten signature in black ink, reading "Marcos A. Orellana", with a horizontal line underneath.

Marcos A. Orellana
Center for International Environmental Law (CIEL)

On behalf of amici

ⁱ *Amici* are as follows.

Comité Ambiental de Cabañas (The Cabañas Environmental Committee, “CAC”) is a community-based organization formed in 2005 to address environmental issues in Cabañas, El Salvador, including municipal waste and mining;

La Asociación Amigos de San Isidro Cabañas (The Association of Friends of San Isidro, Cabañas) (“ASIC”) is a community development organization founded in 1992 in San Isidro, the community closest to the proposed El Dorado gold mine, that promotes wider participation in public policy dialogue through education and community-building.

La Asociación de Comunidades para el Desarrollo de Chalatenango (The Association of Communities for the Development of Chalatenango) (“CCR”) is a nonprofit founded in 1988 that works in areas of community health, education, and human rights.

La Asociación de Desarrollo Económico y Social (The Association for Economic and Social Development) (“ADES”) is a nonprofit founded in 1993 in Sensuntepeque, the nearest substantial city to the proposed El Dorado mine, that works with affected communities in the Cantón of Santa Marta.

La Asociación para El Desarrollo de El Salvador (The Association for the Development of El Salvador) (“CRIPDES”) is a San Salvador-based development organization founded in 1984, at the height of the civil war, that now works more than 270 local women’s committees and 250 local youth committees in seven of the El Salvador’s 14 departments, including Cabañas.

La Fundación de Estudios para la Aplicación del Derecho (The Foundation for the Study of the Application of the Law, “FESPAD”) is a social, legal, and political action center dedicated to protecting human rights and using the law as an instrument to help the neediest in society.

Unidad Ecológica Salvadoreña (The Salvadoran Ecological Union, “UNES”) is an NGO whose mission includes the defense of nature, improvement in quality of life, strengthening of communities, and the equal participation of men and women in the policy dialogue at the regional, national, and international levels.

Movimiento Unificado Francisco Sánchez (The Unified Movement Francisco Sánchez, “MUFRAS”) is an organization founded in 2001 that focuses on increasing citizen participation to solve social, political, and environmental challenges.

AMICUS CURIAE SUBMISSION

**By Member Organizations of
La Mesa Nacional Frente a la Minería Metálica de El Salvador
(The El Salvador National Roundtable on Mining)**

***Pac Rim Cayman LLC v. Republic of El Salvador*
ICSID Case No. ARB/09/12**

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I. INTRODUCTION

This Tribunal has the inherent authority to recognize that Claimant does not have a “legal dispute” as understood by Article 25 of the ICSID Convention, but rather finds itself in disagreement with general, universally applicable shifts in Salvadoran public policy, as that policy begins to recognize the deeply destructive environmental and social effects that metals mining poses to local communities and the emptiness of mining’s promise as path to sustainable development in El Salvador. The *Commerce Group v. El Salvador* recently considered another mining investor’s similar generalized grievances about the same alleged “de facto mining ban” in El Salvador on which Claimant (after a reverse course) now bases its claims. That distinguished tribunal quickly recognized that even if the existence of such a de facto ban could be accepted and “teased apart”:

the Tribunal is of the view that the policy does not constitute a “measure” within the meaning of CAFTA. At most . . . the ban is a policy of the Government as opposed to a “measure” taken by it.²

Amici submit that the *Commerce Group* tribunal’s conclusion is equally applicable to the grievances raised by Claimant. After all, Claimant makes no secret of the fact that it spent years vigorously engaging in the political process to secure approval for its controversial mining plans. Only now that it perceives it has lost that *political* debate does it pretend that the political process is somehow illegitimate and instead grounds for a “legal dispute” over a “measure.” For years, Claimant asserts, it sought to engage the potentially affected local communities, to hear their views and bring them meaningfully into the process.³ Only now that it perceives that the communities will not give it the answer it wants does it pretend that this is really a dispute against *the Republic*, and that communities somehow do not matter.

The potentially affected local communities do matter. It is their land, their livelihoods, their well-being and fundamental rights that are at stake here. As NGOs constituted out of local communities, and actively engaged in empowering those local communities, and assisting them in leveraging their democratic rights and opinions within the national political process, *amici* are uniquely poised to offer a critical perspective different from those of the formal parties to the dispute.

Amici appreciate the streaming video access to the recent jurisdictional hearing, as well as the Tribunal’s graciousness in providing access to the transcripts. The hearing, however, has left *amici* more concerned than ever about this proceeding and its possible impacts. From *amici*’s perspective, nearly

² *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award ¶ 112 (Mar. 14, 2011).

³ See Witness Statement of Thomas C. Shrake, Dec. 3, 2010 (“Shrake Stmt”), at ¶ 69 (expressing allegiance to “[o]ne of the cardinal rules of Corporate Social Responsibility . . . [which] is to maintain an open dialogue with the local communities where the corporation intends to work, recognizing that those communities are going to be significantly affected by the corporation’s presence”).

every aspect of Claimant's case reflects an instinct to manipulate the system. Claimant's 11th-hour move from the Cayman Islands to the United States just weeks before it began threatening and then prosecuting this arbitration is the keynote example. But at the hearing the Claimant put many more examples on display. After initially basing its dispute on alleged "measures" dating back to 2004, Claimant now pretends the relevant measure only arose or "crystallized" after its move to the United States. Claimant further urges this Tribunal to disregard those corporate rules that don't suit it, seeking to enjoy the tax and place-of-business benefits of, respectively, the Caymans and Canada while still being allowed to gain CAFTA benefits that those countries don't offer. And Claimant advances an interpretation of CAFTA's denial of benefits provision that, as the ICSID Secretary-General has noted in her scholarship, would be entirely unworkable, thus allowing Claimant to breeze past this important treaty limitation as well.⁴ *Amici* respectfully submit that, in multiple ways, Claimant seeks to game the system; and, accordingly, on multiple grounds, the Tribunal should dismiss its Claims at this juncture.

II. FACTUAL BACKGROUND

The submission accompanying *amici*'s application of March 2 presented facts that *amici* considered useful to assist the Tribunal's determination of jurisdiction in this matter. Specifically, the non-legal nature of the underlying dispute and the abusive nature of Claimant's use of this process are key jurisdictional issues. The facts presented in *amici*'s first submission were included specifically to provide context for the Tribunal's decision-making on these issues; in short, they were *jurisdictional* facts, describing the largely uncontroverted context of how Claimant engaged in years of political activity to advance its inherently political agenda in El Salvador,⁵ and of how the underlying dispute is inherently between Claimant and the potentially affected communities, *not* the government. The facts also addressed certain non-jurisdictional issues that had been raised by the parties. For example, Claimant has sought to gain the Tribunal's sympathy by promoting its so-called "green" mining practices.⁶ In the first submission, *amici* presented just a fraction of the wide body of analysis which suggests that "green" mining of gold metal is simply a contradiction in terms, and that Claimant's conduct so far in the areas of the proposed mine belie these claims.

Despite the importance of such jurisdictional and quasi-jurisdictional facts, *amici*, in consideration of the terms of the Tribunal's Procedural Order No. 8, have significantly reduced the presentation of facts as follows.

A. *Opposition to the El Dorado Mine Grew Organically from the Direct Experiences of Local Communities, and its Success is a Success for Civic Participation and Representative Democracy in Post-Civil War El Salvador*

The Republic has raised abuse of process and denial of benefits as jurisdictional issues in this arbitration. The Republic has also raised the fact that there is no ban on mining and that the various measures the investor complained of in its notice of arbitration pre-date its change of nationality. Critical to ascertaining these jurisdictional issues is an understanding that the real opposition to Pac Rim's mining plans was *not* generated at the level of government ministries, but rather at the level of the local, potentially affected communities. Local communities and NGOs, including *amici*, in reflection of their hard-fought empowerment and awareness of their own rights, and in a legitimate exercise of the

⁴ See, e.g., Transcript of Hearing on Jurisdiction, May 2-4, 2011, at 643, 646 ("May 2011 Hearing Tr.").

⁵ See e.g. May 2011 Hearing Tr. at 461 (MR. SHRAKE: "I was lobbying. I was lobbying in the United States to pressur[e] El Salvador. I was doing numerous--numerous things at that point, so yeah.").

⁶ See May 2011 Hearing Tr. at 526-534 (President Veeder inviting Mr. Shrake to present his perspective on Pac Rim's "green mining" plans).

democratic process in the post-Civil War political environment, refused to accept Pac Rim's plans to dig mines under their own lawfully owned land, build dangerous waste ponds, and otherwise threaten the continuity of their environment, livelihoods, and way of life.

It is uncontroverted that opposition to Pac Rim's plans for El Salvador arose organically from the first-hand experiences of affected local communities and their commendable efforts to organize and protect themselves. Indeed, the first stirrings of opposition were engendered by Pac Rim itself when in 2003 and 2004, as it ramped up exploratory drilling work, its technicians and engineers trespassed on the private property of local residents, drilling exploratory wells without permission and in a manner that was both "suspicious and arrogant."⁷ Yet more critically, as reported by the International Union for the Conservation of Nature (IUCN) in a detailed examination of the context and consequences of the proposed El Dorado mine by Professor Richard Steiner, as early as 2004 "people living near mining exploration activities began to notice environmental impacts from the mining exploration--reduced access to water, polluted water, impacts to agriculture, and health issues."⁸

Clearly, the negative effects felt by the people at the exploratory stage were only a preview of what they could expect if the El Dorado mine were to be developed. At the individual level, people who owned land in Pac Rim's concession area simply refused to sell Pac Rim their land or allow it to operate there. As Oxfam America has noted, this refusal to sell is a tool of opposition that has emerged as one of the key building blocks by which local communities in Central America have been able to prevent the establishment of mines in their communities.⁹ At the local community level, in 2005 community members formed the Environmental Committee of Cabañas (*Comité Ambiental de Cabañas*), which in turn joined with other civil society organizations to form La Mesa as a national umbrella organization.

Comité Ambiental de Cabañas and La Mesa focused their energy on highlighting the problems with Pac Rim's proposed mine and conveying their views to a national audience, including representatives in government who typically confined their presence and attention to San Salvador, the capital city. La Mesa engaged the broader question of whether metals mining offered an appropriate development path for El Salvador, in light of mining's deleterious environmental and social impacts, as documented by scholars and discussed briefly below. Using a combination of locally-based organizing and small-scale protesting, *Comité Ambiental de Cabañas* and La Mesa were able to not just bring the issue of metals mining to the nation's attention but make it a "central issue of Salvadoran politics."¹⁰

Opposition to mining was by no means confined to community organizations or individual landowners. In 2007, the Catholic Bishops Conference of El Salvador issued a statement in opposition to metals mining in El Salvador, noting the danger of water pollution, particularly related to use of cyanide. The Catholic Church emphasized the inappropriateness of mining in El Salvador, given its small size and

⁷ Nester Martinez, *A Compelling History of Mining in El Salvador*, U.S.-El Salvador Sister Cities Network (Jan. 2010), courtesy link at <http://bit.ly/eaNvyf> (www.elsalvadorsolidarity.org).

⁸ Richard G. Steiner, *Gold, Guns, and Choice: The El Dorado gold mine, violence in Cabañas, CAFTA claims, and the national effort to ban mining*, International Union for the Conservation of Nature (Feb. 2010), at 15, courtesy link at <http://bit.ly/f42Ken> (<http://www.miningwatch.ca/>) ("IUCN Report").

⁹ See *Metals mining and sustainable development in Central America*, Oxfam America (2009), at 25, courtesy link at <http://bit.ly/hFCKH1> (www.oxfamamerica.org); *id.* at 13 (discussing the use by Guatemalan local communities of laws requiring the purchase of surface rights of land over a mineral deposit before the deposit can be mined to become "gatekeepers" of proposed mining developments in their regions).

¹⁰ Michael Busch, *El Salvador's Gold Fight*, Foreign Policy in Focus, Institute for Policy Studies (2009), courtesy link at <http://bit.ly/9msWaY> (www.fpif.org).

high population density.¹¹ A year later, the Archbishop of San Salvador Fernando Sáenz Lacalle gave a series of statements in which he reiterated the church's opposition to metals mining in El Salvador, emphasizing the "irreversible damage [mining] will cause to humans and the environment."¹² The church specifically "castigated Pacific Rim's economic justification for gold mining operations. 'No material advantage,' the bishops warned, 'can be compared with the value of human life.'"¹³

These swells of resistance—each peaceful and organic—led to a situation where by late 2007, 62.5% of Salvadorans were against allowing metals mining in El Salvador, despite the lobbying campaign deployed by Pac Rim as discussed briefly below. The resistance was so broad, effective, and deeply-felt that in 2008, then-President Elías Antonio Saca of the right-wing ARENA party announced his own view that metals mining should not proceed in El Salvador without significant further study of possible environmental impacts and codification of more robust mining laws.¹⁴ Then in January 2010, President Carlos Mauricio Funes of the left-wing FMLN party set up a "Strategic Environmental Evaluation of the Metallic Mining Sector of El Salvador."¹⁵ The Ministry of Economy's Department of Hydrocarbons and Mines reported to the Legislative Assembly that the Strategic Environmental Evaluation is to be finalized in 2011. A Blue Ribbon Commission of prominent international scientists and experts was set up by the Ministry of Environment and Natural Resources (MARN) to assure that the Strategic Environmental Evaluation is carried out in an objective and scientific manner.

The fact that La Mesa could form and help achieve such results is a step to be celebrated in El Salvador's long climb out of war-torn chaos toward a representative democracy—a democracy where representatives not only are elected according to the will of the people, but also act during their terms according to the public interest as expressed in myriad forms, including popular expression and demonstrations and the work of civil society. The Mesa's work, however, is far from over. Contrary to Claimant's assertions, in El Salvador there is no ban on mining, de facto, de jure, or otherwise. La Mesa will continue its peaceful advocacy work through the democratic channels of El Salvador's institutions and to achieve a ban on metals mining in El Salvador, in order to safeguard human rights and the environment.

III. ARGUMENT

A. *The Dispute Pac Rim Would Place Before this Tribunal Is Not a "Legal Dispute" under Article 25 of the ICSID Convention Nor a "Measure" Under Article 10.1 of CAFTA*

Under Article 25 of the ICSID Convention, an ICSID tribunal's jurisdiction only extends to a "legal dispute arising directly out of an investment." CAFTA 10.1 states that the chapter on investment disputes only "applies to measures adopted or maintained by a Party." As set forth below, each of these limitations independently excludes Pac Rim's claim from this Tribunal's jurisdiction.

¹¹ See Michelle Petrotta, *Congressional Brief: Mineral Mining In El Salvador*, SHARE Foundation (2009) courtesy link at <http://bit.ly/eG0X3B> (www.elsalvadorsolidarity.org).

¹² *Id.*

¹³ *Busch*, *supra* note 10.

¹⁴ Public Citizen, *CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case* (May 25, 2010), p. 3, courtesy link at <http://bit.ly/aZZ16V> (www.citizen.org).

¹⁵ The Spanish Agency for International Cooperation and Development is funding this process, and the contract for the assessment has been awarded to Tau Consultora Ambiental of Spain. See *Update on El Salvador*, Press Release, Condor Resources, PLC, Sept. 16, 2010, at <http://www.infomine.com/index/pr/Pa928579.PDF>.

1. This dispute is not a “legal dispute” under Article 25 but rather Pac Rim’s disagreement with general (and universally applicable) shifts in Salvadoran public policy.

The Tribunal has the inherent authority to recognize this dispute in its fundamental character, as Pac Rim’s dissatisfaction with the fact that El Salvador’s public policy has begun to turn against metals mining, in recognition and reflection of the deeply destructive environmental and social effects that metals mining can pose to local communities. In short, this is clearly a political dispute—one that Claimant engaged in vigorously over the years. *Amici* know this because they, too, were closely involved in this political battle over a number of years, and remain so today. *Amici*’s political tactics include educating community members through town hall events and public speakers, building coalitions with like-minded individuals and organizations, organizing mass rallies and other public assemblies. Such rallies not only have a community empowerment function, they also have a democratic accountability function: they demonstrate for elected officials the views of the people, and suggest in no uncertain terms that the officials’ terms in office will be limited if they choose to ignore those views.

Pac Rim’s political tactics were different: as Mr. Shrake has testified, he met regularly and privately with top officials,¹⁶ flew them on trips to United States,¹⁷ and engaged in substantial “lobbying in the United States to pressur[e] El Salvador.”¹⁸ Only when Pac Rim began to perceive that its lobbying efforts were not prevailing over efforts by *amici* and others did it begin to cast this dispute not as a normal, legitimate political dispute but rather as a “legal dispute” allegedly sufficient for jurisdiction under Article 25.

This “political” character of the public policy dialogue, particularly over issues of such importance as the use of natural resources, is neither wrong, dirty, nor in breach of international law, as the investor would like to present it. The investor in the recently-decided *AES Summit* case tried a similar tactic, seeking to characterize Hungary’s move to lower electricity prices for its citizens as an inherently illegitimate “political” response to the public’s outrage over the perception that power generators were enjoying “luxury profits.”¹⁹ The *AES Summit* tribunal did not dispute the “political” nature of Hungary’s acts—in fact, it noted that the investor had become “something of a political lightning rod,” and that the politics of which the investor complained were driven in part by “upcoming elections”—but found the “political” label to be of little consequence.²⁰ Indeed, the tribunal noted that while the reality of democratic politics “may not be seen as desirable in certain quarters,”²¹ nonetheless “it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public.”²² This understanding is correct: the term “political” should be properly understood in the Aristotelian tradition as the high art of governance of the polis, underscoring democratic decision-making, in contrast with dictatorial, autocratic or corrupt regimes. When Pac Rim attacks the

¹⁶ Shrake Stmt. ¶¶ 89-92.

¹⁷ Shrake Stmt. ¶ 94.

¹⁸ May 2011 Hearing Tr. at 461.

¹⁹ *AES Summit Generation Ltd. et al. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010, at ¶ 9.1.5.

²⁰ *Id.* at ¶ 10.3.22., ¶ 10.3.31-34 (“Having concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits, the Tribunal nevertheless is of the view that [the government pursued] a perfectly valid and rational policy objective.”).

²¹ *Id.* at ¶ 10.3.34.

²² *Id.* at ¶ 10.3.24.

“political” nature of the policy shifts it dislikes, it reveals that its complaints are not a legal dispute over a particular measure, but rather a disagreement with broader changes in political dynamics in El Salvador.

Public policy is “political”; it also carries consequences, and the reality is that commercial mining interests, Salvadoran and non-Salvadoran alike, may well feel some of those consequences. Broad historical shifts are part of the life and history of a nation and its people; they are also part of the fundamental underlying risk that any enterprise embraces when it decides to enter commerce. CAFTA was not designed as a strict liability insurance policy guaranteeing foreign investors 100% protection against all risk,²³ nor was it designed to stand in the way of history, or freeze public policy developments.²⁴ It is the attempt by foreign investors to transform investment treaties into such fantasies that has increasingly mired ICSID arbitration in controversy over the last decade.²⁵

In an effort to avoid such results, an ICSID tribunal’s jurisdiction under Article 25 only extends to “legal disputes,” and under CAFTA 10.1 only applies to disputes over “measures.”²⁶ These limitations play a critical jurisdictional role, recognizing that the whole area populated by disagreements over general public policy is outside the limits of the judicial function and not a source of “legal disputes.”

It has been widely recognized that this limit is inherent in the very nature of the ICSID forum as a *judicial* remedy. As Professor Abi-Saab has recognized, the judicial function itself incorporates limits which “may be difficult to catalogue . . . [but] are nonetheless imperative as a conclusive bar to adjudication in a concrete case.”²⁷ “[I]ncompatibility of the claim with its judicial function” must be recognized at the outset, as a “delimit[ation of] the borders of judicial function” and policed as a jurisdictional (or admissibility) matter by the Tribunal pursuant to its “residual discretionary power.”²⁸

²³ See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID CASE NO. ARB/05/22, Award, Jul. 24, 2008, at ¶ 376 (“the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations as to its profitability and to be on notice of both the prospects and pitfalls of an investment undertaken in a high risk - high return location”) (quoting Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 55 ICLQ 527, 530 (2006)).

²⁴ Reference can be made to “stabilization” or “freezing” clauses in investment contracts, which have increasingly come under fire in recent years. See, e.g., Andrea Shemberg, *Stabilization Clauses and Human Rights*, Joint Research Project for the International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights, at 10, ¶ 36, (March 2008), *courtesy link at* <http://bit.ly/gNIGIG> (www.ifc.org) (noting vocal concerns that stabilization clauses are “wrong in principle, because [they] den[y] the state its proper role as legislator . . . [and] create[] a financial disincentive for the host state, thus chilling or hindering the application of dynamic social and environmental standards”); *id.* (noting that such concerns are “exacerbated in developing countries, where rapid legislative development and implementation is needed, rather than obstacles to the application of new laws.”). CAFTA contains no such freezing clause, nor does any instrument entered into between Pac Rim and the Republic.

²⁵ See, e.g., Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vand. J. Trans’l L. 775, 779-82 (2008) (describing the evolution of investment law from “shield” to “sword”); Gus van Harten, *Investment Treaty Arbitration and Public Law* (2007).

²⁶ Article 10.14 of CAFTA also limits the scope of a tribunal’s jurisdiction to “investment disputes.”

²⁷ Georges Abi-Saab, *Les Exceptions Préliminaires dans la Procédure de la Cour Internationale* 147 (1967).

²⁸ *Id.* at 97. See also *id.* at 146-147 (“In the same way as one distinguishes . . . between special jurisdiction and general jurisdiction, it is possible to distinguish, in the context of material admissibility, between the specific conditions of admissibility representing the conditions for the existence or exercise of the right of action and the

The same principle may also be described in terms of justiciability and non-justiciability. As Professors Collier and Lowe have written:

Justiciability is an aspect of the focusing of a disagreement or clash of interests into a concrete dispute, capable of resolution by a judicial process on the basis of law. Disputes that do not have those characteristics ought not to be submitted to judicial procedures; and if they are so submitted, a preliminary objection by one of the parties ought to result in the dismissal of the case by the tribunal.²⁹

As many tribunals have now agreed, the limits of Article 25 mean that an ICSID tribunal “does not have jurisdiction over measures of general economic policy . . . and cannot pass judgment on whether they are right or wrong.”³⁰ Rather, tribunals must limit their review to “specific *measures* affecting the Claimant’s investment or measures of general economic policy having a direct bearing on such investment that have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.”³¹

While this formulation could involve a difficult line-drawing process between “measures of general economic policy” and “specific measures affecting the Claimant’s investment,”³² in the instant arbitration its application is relatively straightforward. Pac Rim’s own description of its claim is exceptionally broad and is not linked to any discrete action or measure by El Salvador. The best Pac Rim can do is describe El Salvador’s so-called “de facto ban on mining operations” as a measure. But the description is unpersuasive. The alleged, informal, unwritten “de facto ban”—which the Respondent has stated does not even exist,³³ and from which *amici*, who continue to be vigilant in their efforts to protect

conditions of general admissibility which delimit the borders of judicial function”); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-54: Questions of Jurisdiction, Competence and Procedure*, 34 British Y.B. Int’l L. 1, 21-22 (1958) (“The fact that an international tribunal has jurisdiction in a given case, does not mean that it will necessarily be bound to, or will, exercise it. The question of propriety of its doing so in particular circumstances may enter in, and the tribunal may in certain cases feel that it ought to decline to exercise its jurisdiction.”).

²⁹ John Collier & Vaughan Lowe, *The Settlement of Disputes in International Law* 16 (1999); *see also Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 220-36 (June 27) (Oda, J., dissenting); *id.* at 285 (Schwebel, J., dissenting).

³⁰ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8 Decision on Objections to Jurisdiction, Jul. 17, 2003, at ¶ 33; *Pan American Energy LLC et al. v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, Jul. 27, 2006, at ¶ 65 (quoting *CMS*).

³¹ *Id.* (emphasis added); *see also id.* ¶ 27 (“What is brought under the jurisdiction of the Centre [are] not the general measures in themselves but the extent to which they may violate [] specific commitments”); *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Aug. 2, 2004, at ¶ 12; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, May 11, 2005, ¶ 59.

³² It is worth noting that the Tribunal clearly has the power, at this stage, to conduct such inquiry and analysis as may be necessary to make this distinction. *See, e.g., Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award of Aug. 2, 2006, at ¶ 155 (“When deciding on its own competence [a Tribunal]... has the power to analyze all of those issues that may have legal relevance to [the scope of its competence], regardless of whether these are issues that may be qualified as substantive or of ‘merits’ or procedural issues.”).

³³ May 2011 Hearing Tr. at 614 (Respondent’s counsel noting that real reason that the Salvadoran government has not granted any exploitation concessions to date is that “there have only been *two* Exploitation Concession Applications” even made, and both were deemed inadequate on their merits.) (emphasis added).

their environment, take no comfort—is at best, as the *Commerce Group* tribunal recognized, “a policy of the Government as opposed to a ‘measure’ taken by it.”³⁴ It might be a policy that “may not be seen as desirable in certain quarters,”³⁵ but that does not make it illegitimate or transform it in a basis for a “legal dispute” under ICSID Article 25.³⁶

2. The only “legal” dispute Pac Rim may have had against the government expired when it failed to appeal MARN’s denial of its EIA in 2004—the breakdown of subsequent negotiations does not amount to a “legal dispute.”

To the degree that Pac Rim might have had a legal dispute with El Salvador, it is only MARN’s denial of the requested environmental permit by not granting it within the statutorily prescribed sixty days (ending in December 2004).³⁷ Pac Rim, however, deliberately failed to properly appeal that denial per procedures “explicitly provided in the Environmental Law for the environmental permit,”³⁸ choosing, instead, to pursue an extralegal and unofficial solution to the issue through discussions with various “high-ranking” Salvadoran government officials.³⁹

Pac Rim’s Mr. Shrake clearly believed, based on his experience “work[ing] in countries with relatively new regulatory regimes,” that Pac Rim had a greater chance of success using high-level informal channels as opposed to the formal legal mechanisms of El Salvador’s regulatory framework (new or otherwise). As noted above, Pac Rim executives regularly engaged senior individuals in the Salvadoran government directly and privately in efforts to gain the results it wanted.⁴⁰ Its methods were not subtle: for example, Pac Rim describes how, instead of simply following the mining laws and purchasing ownership or authorization to use the surface land over the proposed mine, it vigorously lobbied the highest officials in the Salvadoran Ministry of Mines to convince MINEC to shift its interpretation of the law—and when this strategy failed, it sought to change Salvadoran law to meet its own needs.⁴¹ It describes how government officials outwardly and publicly “ceased all official communication,” but nonetheless met privately with Pac Rim and allegedly gave it “personal” “assurances” and the like.⁴²

As an initial matter, the record suggests that what Pac Rim was receiving at this time was more akin to “feedback” than “assurances.” As Respondent’s counsel put it at the hearing, “back in 2005, the Ministry of the Economy was trying to assist Pacific Rim Mining Corp. in getting its application right.

³⁴ *Commerce Group Award* at ¶ 112.

³⁵ *AES Summit* at ¶ 10.3.34.

³⁶ By asserting a claim with no concrete link to any actual government measure, Claimant asserts complete control over it temporally, so that it can decide when the claim is “born,” when it “ripens,” and when it “crystallizes” all to suit its interests. *See, e.g.*, May 2011 Hearing Tr. at 466. It is disturbing to think that an investor could create international jurisdiction by asserting when it subjectively realized or “crystallized” its own thinking.

³⁷ Mem. at ¶¶ 26-29.

³⁸ Mem. at ¶ 27.

³⁹ Countermem. at ¶¶ 120-21, 123; Shrake Stmt. at ¶¶ 78, 85-96, 101-103, 118-121.

⁴⁰ *See supra* notes 16-18.

⁴¹ Shrake Stmt. at ¶¶ 84-86.

⁴² Countermem. at ¶¶ 117-18.

They were getting the application wrong, and the Government was bending over backwards and including doing things that, in fact, were not permitted strictly by law that the bureaucrats did on their own in order to give them continuing opportunities to correct.”⁴³

But even if the Tribunal were to credit Pac Rim characterization of “assurances,” such informal, extralegal processes (and any informal extralegal promises purportedly made therein) do not give rise to a “legal dispute” as required under Article 25 of the ICSID Convention and do not amount to a Party “measure” under CAFTA 10.1. Indeed, it would be unwise for this Tribunal to sanction a claim of this sort. Even if nothing more untoward occurred than what Pac Rim has described of its back-channel communications, what did occur set a stage ripe for corruption and the very opposite of transparent government.

International investment law and its institutions should encourage the development of robust, transparent regulatory regimes, especially in developing countries. This is particularly important for El Salvador where the development of new regulatory regimes is part of a broader shift towards democratic and representative government. While the regulatory framework in El Salvador may be weaker than in other States, El Salvador is a sovereign country that has adopted a system of governance based on laws. Pac Rim knowingly took the risk to continue its work because it thought that its political clout, largely exercised through backroom deals and arm-twisting, could circumvent the practice of good governance and the government’s accountability to the law and to the people.⁴⁴ Though not illegal, this is certainly not the sort of investor conduct that the investor-State arbitration regime was meant to encourage.⁴⁵

La Mesa has been active in legislative debates in El Salvador, advocating for a general law that will ban metals mining in the country, and has rejected the intervention of foreign investors in the domestic environmental and social affairs of El Salvador. The fact that Pac Rim preferred to engage in a political debate (substantially conducted in the rear corridors of power) rather than pursue legal means to address its dispute with MARN also underscores that there is no legal dispute in this arbitration. It further underscores that the real political controversy is between the investor and La Mesa, and that it has been taken to a forum where La Mesa cannot participate in equal footing, as elaborated below.

B. Pac Rim’s Claim Amounts to an Abuse of Process

The Republic has demonstrated how Pac Rim’s decision to reincorporate itself in the United States in anticipation of its CAFTA claim amounts to an abuse of process. When Mr. Shrake was simply asked at the hearing whether he “considered the possibility of arbitration under CAFTA as you were deciding to change the nationality of Pac Rim Cayman,” the answer was “Yes.”⁴⁶ When further questioning tried to elicit when he was told that he could obtain CAFTA arbitration by changing nationality, he prevaricated, protesting that “it was a while ago, and I got a lot of other—I got a lot of

⁴³ May 2011 Hearing Tr. at 608.

⁴⁴ Interestingly, all the alleged unofficial communications Pac Rim relies (except for the “troubling” communications with Minister Barrera) on are attributed to government officials *outside of MARN*. See Countermem. at ¶¶ 117-130. Salvadoran administrative law, like any administrative law, understands that different government agencies not only have different competencies but might also have different perspectives, guiding principles, and the like, and allocates decision-making authority amongst agencies accordingly. The law explicitly requires MARN’s approval for the proposed mining project—for Pac Rim to try to construct a dispute over MARN’s (in)actions by referencing “assurances” from other agencies is simply disingenuous.

⁴⁵ Cf. *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008, at ¶ 139 (“the fundamental aim [of investment law is] to strengthen the rule of law”).

⁴⁶ May 2011 Hearing Tr. at 460.

things that I have to remember.”⁴⁷ The facts are not hard to discern: Mr. Shrake appears to have been advised he could obtain CAFTA benefits (either for an arbitration or even just to threaten one) by changing nationality and he promptly did so. The only other possible explanation that was floated was that the change was to save a few thousand dollars in annual corporate registration fees. The idea that such minor savings were the primary motivating factor—and just happened to end up conferring beneficial access to a forum for Claimant to seek tens if not hundreds of millions of dollars—is fanciful.⁴⁸ 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.⁴⁹

Nonetheless, *amici* submit that the Republic has, in fact, underestimated the extent of the abuse of process evident here. Not only has Claimant engaged in abuse by strategically relocating to seek CAFTA jurisdiction well after the genesis of the dispute, it has also, even assuming CAFTA rights are available to it, abused those rights by trying to invoke those rights with respect to a dispute that was never intended to be subject to CAFTA jurisdiction. As discussed below, CAFTA gives investors a right to seek relief against specific “measures” implemented by a respondent State. The issue here concerns opposition raised and maintained by the potentially affected communities—at most, the State acted only as an intermediary between the Claimant and the communities.

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.

Amici agrees with the Republic’s analysis concerning Pac Rim’s ill-concealed attempt to transform itself into a CAFTA-covered investor at the last minute before filing its claim and how that amounts to an abuse of process under applicable general principles of international law.

Amici would only add a few points. Pac Rim admits at several places that it was incorporated in the Cayman Islands to obtain unspecified “tax savings” and “tax benefits.”⁵⁰ *Amici* would simply like make sure that in its overall appreciation of the jurisdictional faults in Pac Rim’s claim, the Tribunal’s view is not overly clouded by such euphemisms: Pac Rim incorporated in the Cayman Islands in order to avoid paying U.S. and/or Salvadoran taxes.⁵¹ The Cayman Islands, of course, has a corporate tax rate of **zero** and a capital gains tax rate of zero,⁵² and has been denounced by President Obama as housing “the

⁴⁷ May 2011 Hearing Tr. at 462.

⁴⁸ This is especially obvious given that by moving to the United States, Pac Rim Cayman, unless it were to entirely refrain from trade or business in the United States, lost the key purpose of its existence as a holding company able to dispose of assets without tax consequences. See May 2011 Hearing Tr. at 444, 457.

⁴⁹ May 2011 Hearing Tr. at 17 (counsel making the argument that “where at the change of nationality had at least as one purpose access to jurisdiction, . . . the first prong for the test of abuse of process is met.”).

⁵⁰ Countermem. at ¶ 51, 84.

⁵¹ See May 2011 Hearing Tr. at 444 (“A. Yeah, it’s for tax reasons. It’s in case we want to slice off assets in the company, then you sell them at the holding company level. Q. Without any tax consequences, in your home State? A. Correct.”).

⁵² See Cayman Islands Tax Guide 2010, PKF Worldwide Tax Guides 2010, courtesy link at <http://bit.ly/e2Xxcb> (www.pkf.com).

biggest tax scam in the world.”⁵³ Although the Pac Rim companies did not end up taking in any revenue in El Salvador, it was neatly set up to escape taxation in the event that it did.

Pac Rim cites another arbitral award noting such arrangements are “not uncommon in practice,”⁵⁴ but that does not mean that this Tribunal cannot consider the tax-avoidance character of Pac Rim’s initial arrangement in assessing the overall abusive character of its sudden move to the United States in December of 2007, long after MARN had rejected its EIA.⁵⁵ Interestingly, Pac Rim defends its 2007 move to Nevada having been motivated by “the desire to take into account changing regulations and regulatory regimes in the places where our Companies were located.”⁵⁶ This may refer to the fact that the Cayman Islands was at that time coming under extreme pressure by OECD countries as a tax haven and was promising to implement tax and regulatory reforms.⁵⁷

Pac Rim established its business arrangements to enjoy the benefits of light taxation (and more regulatory freedom), at the expense of *not* enjoying the treaty protections accorded to CAFTA Party investors—and effectively paid for by CAFTA Party citizens through the taxes that Pac Rim sought to avoid by incorporating in the Cayman Islands. Pac Rim’s attempt to “free ride” on CAFTA’s benefits through this proceeding represents a clear attempt to obtain an illegitimate advantage, and thus contributes to the abusive character of Pac Rim’s claim.

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.

It is well-established that “even a well-founded claim will be rejected by the tribunal if it is found to be abusive.”⁵⁸ This principle, as an expression of the larger principle of good faith, has long been recognized as a fundamental, stabilizing element of international law and the adjudication of international legal rights.⁵⁹ More specifically, as formulated by one leading publicist, the “abuse of right” or “abuse of

⁵³ See Landon Thomas, “Offshore Haven Considers a Heresy: Taxation,” NY Times, Oct. 3, 2009, *courtesy link at* <http://nytimes.com/dGtuUJ> (www.nytimes.com). By contrast to the Caymans’ zero rate of corporate and capital gains taxation, El Salvador applies a corporate tax rate of 25% and the United States applies a corporate rate up to 39.3%; El Salvador applies a capital gains tax rates of 10%, the United States applies a rate up to 15%. See El Salvador Tax Guide 2010, *supra* at 1; *Topic 409—Capital Gains and Losses*, U.S. Internal Revenue Service, at <http://www.irs.gov/taxtopics/tc409.html>.

⁵⁴ Countermem. at ¶ 302.

⁵⁵ NOA at ¶ 64; Countermem. at ¶ 117.

⁵⁶ Shrake Stmt. at ¶ 10.

⁵⁷ See, e.g., Natasha Lance Rogoff, “Haven or Havoc?,” PBS Frontline, *courtesy link at* <http://to.pbs.org/982JUQ> (www.pbs.org).

⁵⁸ *Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador*, Interim Award, Dec. 1, 2008, at ¶ 139. See also *Phoenix v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, at ¶ 106 (“The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law”).

⁵⁹ See *Phoenix*, Award at ¶ 107 (“Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused”); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 131-34 (1958) (“The principle of good faith thus requires every right to be exercised honestly and loyally.”); H.C. Gutteridge, *Abuse of Rights*, 5 Camb. L.J. 22, 24 (1935) (“an act ceases to be the exercise of a right as soon as it acquires an abusive character”).

process” doctrine is used to prevent parties from using conferred rights of available procedures of law: (1) “for purposes that are alien to those for which the procedural rights were established;” (2) “for fraudulent, procrastinatory or frivolous purpose;” (3) “for the purpose of causing harm or obtaining an illegitimate advantage;” (4) for the purpose of reducing or removing the effectiveness of some other available process;” or (5) “for purposes of pure agenda.”⁶⁰

Although Pac Rim names the Republic as the Respondent, as it must in order to invoke this proceeding under CAFTA and the ICSID Convention, Pac Rim’s own pleadings show that the real locus of the dispute is not between Pac Rim and the Republic, but rather between Pac Rim and the independently organized communities that would be affected by its proposed mine, including *amici*. Indeed, Pac Rim emphasizes how Salvadoran government officials were supportive of its proposed mine. Moreover, as discussed above, it does not base its claim on any specific regulatory action or “measure” (not even on MARN’s administrative denial of its EIA in December 2004), but rather on comments to the media made by President Saca in 2008.⁶¹ The context of the heated debate and political campaign in which President Saca was engaged at the time make clear that the government was not the original source of opposition to Pac Rim’s plans; rather, Saca’s comments reflect his attempt to catch up with public opinion, which was trending against allowing metals mining because of general, legitimate policy concerns.

The important fact is that the genuine “political” opposition of which Pac Rim complains is centered between Pac Rim and the communities. Pac Rim is now trying to have this dispute resolved in this forum, a notable feature of which is that the communities, Pac Rim’s genuine opponent on the issue, have no right to appear to defend their position, but rather appear pursuant to this Tribunal’s good graces by way of this limited *amicus curiae* submission.

The tactical use of the international arbitration forum in this manner is, in *amici*’s view, “alien” to the purposes for which CAFTA treaty rights were originally conceived. These rights were conceived to provide a forum for disputes genuinely arising out of actions by governments abusing their unique sovereign powers. Instances of expropriation, denial of justice, or targeted animus define the core nature of disputes the investment arbitration regime was designed to address. What Pac Rim’s own facts reveal is a government that is pointedly *not* abusing its sovereign powers as would implicate the concerns and purpose of investor-State arbitration, but rather a government doing its best to remain neutral and mediate the underlying dispute between Pac Rim and the affected communities.⁶²

⁶⁰ Robert Kolb, *General Principles of Procedural Law*, in *The Statute of the International Court of Justice: A Commentary* 831 ¶ 65 (Andreas Zimmermann et al. eds., 2006).

⁶¹ See Countermem. at ¶ 23 (“It was only in 2008, after then-President Saca appeared to announce a de facto ban on metallic mining that a dispute began to crystallize”).

⁶² It is additionally worth considering that accepting jurisdiction over Pac Rim’s claim would essentially punish the Republic for fulfilling its own international law obligations to be responsive to its citizens and to secure their rights, including their economic, social, and cultural rights. Cf. Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights, “Human rights and the extractive industry” at 4, U.N. Doc. E/CN.4/2006/92 (Dec. 19, 2005) (noting that power and resource imbalances between extractive industries companies and affected communities in developing countries have already had a deleterious effect on a wide range of those communities’ rights); The Reports of Special Representative to the Secretary-General on Business and Human Rights, Prof. John Ruggie. UN Docs E/CN.4/2006/97 (2006), A/HRC/4/035 (Feb. 9, 2007), and A/HRC/8/5 (2008); see also John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am. J. of Int’l L. 819, 821 (2007); OECD Guidelines for Multinational Enterprises, at <http://bit.ly/eZmyim>; ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, at <http://bit.ly/f9Fb5E>; the UN Global Compact, at <http://bit.ly/Ko1kf>.

Amici further submit that Pac Rim's use of this arbitration proceeding is abusive because it invokes rights in order to obtain "an illegitimate advantage" over the potentially affected communities by taking its differences with them to a forum where they cannot properly appear. It is a core principle of international adjudication that where the rights of a third party "would not only be affected by a decision, but would form the very subject-matter of the decision," exercise of jurisdiction otherwise granted is inappropriate.⁶³ As the *Phoenix Action* tribunal noted, tribunals must be vigilant "to prevent an abuse of the system of international investment protection . . . [by] ensuring that only investments that . . . do not attempt to misuse the system are protected."⁶⁴

Finally, Pac Rim's misuse of this arbitration also threatens to undermine the effectiveness of the political process through which the communities have asserted their rights. El Salvador has recently emerged from many decades during which political disputes were commonly resolved in violent non-democratic ways. The political process regarding the future of metals mining in El Salvador has, in contrast, been conducted in a peaceful and democratic manner (with some disturbing exceptions, namely the attacks on environmental defenders discussed in *amici*'s March 2 submission). It would send a disturbing message to the people of El Salvador if this Tribunal were to allow Pac Rim to effectively reverse of the results of that process in this forum.

C. The Denial Of Benefits Provision Of CAFTA Article 10.12 Provides An Important Safeguard To CAFTA Parties And Their Citizens, And El Salvador's Invocation Of It Should Be Upheld

The arguments that Pac Rim has raised in opposition to upholding the Republic's invocation of Article 10.12 here are without merit, and *amici* join in the arguments by the Republic. *Amici* would simply emphasize the untenable nature of the argument Pac Rim has crafted to escape the denial of benefits situation, and the important reasons why the denial of benefits position cannot be emptied of practical effect by the Tribunal.

First, Pac Rim's suggestion that a CAFTA party should be required to give notice of its decision to deny benefits to an investor at some time before such an investor brings a claim would create an unreasonable institutional burden on CAFTA parties—a burden that, as a practical matter, would render Article 10.12's safeguards a nullity. Pac Rim's argument that "the denying Party's compliance with Article 10.12.2's notice and consultation provisions must occur before a dispute is submitted to arbitration,"⁶⁵ is, as Respondent's counsel noted at the hearing, entirely "unworkable," as it would require "a Party to keep up with [every foreign investor in its country, in order] to know when they have to provide notice of denial of benefits."⁶⁶ 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 necessarily be expensive for the party (which may, like El Salvador, be facing serious imperatives regarding poverty alleviation and the attainment of the millennium development goals), and intrusive for the investor, creating more bureaucratic hurdles and as such likely reducing foreign investment, not increasing it. In reality, Claimant would not like to see such a system. Rather, it would like to see what is the most likely result if this Tribunal were to effectively

⁶³ *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 I.C.J. 19 (Judgment of June 15, 1943) (emphasis added).

⁶⁴ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009 at ¶ 113.

⁶⁵ Countertermem. at ¶ 344.

⁶⁶ May 2011 Hearing Tr. at 643.


impose such a burden: namely, States simply giving up on the impossible task of employing Article 10.12, rendering the provision a nullity as a practical matter.

Amici would find such a result deeply disturbing. Concern among the people of El Salvador towards CAFTA is growing in light of widespread perceptions that (1) CAFTA has improperly infringed upon the sovereignty of El Salvador; and (2) the ultimate extent of that infringement will grow over time as the rights and obligations under CAFTA are interpreted with an increasing expansiveness.⁶⁷ CAFTA parties specifically included the denial of benefits provision of Article 10.12 as a safeguard against the phenomenon of “obligation creep” and the effective globalization of CAFTA parties’ obligations to all foreign investors. After lengthy negotiations, El Salvador only agreed to give CAFTA protections to investors of the United States and four other countries in Central America and the Caribbean. Interpreting the denial of benefits provision in an unworkable manner could moot these carefully articulated limitations.

IV. CONCLUSION

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.

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⁶⁷ Given the experience of El Salvador with U.S. intervention during the twentieth century, these concerns are acutely felt by many Salvadorans and have led to at least one constitutional challenge to the treaty, currently pending before El Salvador’s Constitutional Chamber of the Court. See Leonard Morin, *Nearly 5 Years of DR-CAFTA and Its Constitutional Challenge: EL SALVADOR - Free Trade’s Dubious Blessings*, Alterinfos America Latina (Jan. 31, 2011), courtesy link at <http://bit.ly/g2UuBB>.