



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

March 2, 2011

The Honorable V.V. Veeder, Esq.
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

VIA EMAIL IcsidSecretariat@worldbank.org

Re: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12
APPLICATION FOR PERMISSION TO PROCEED AS AMICI CURIAE

Dear President Veeder:

Prospective *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.ⁱ *Amici* respectfully apply for permission to proceed as *amicus curiae* 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, and the Tribunal's Procedural Order dated February 2, 2011. Specifically, prospective *amici* seek permission to file the written submission attached as Appendix and the opportunity to make an oral presentation at the upcoming jurisdictional hearing.

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 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. In this respect, the Tribunal's decision, including a decision to accept or reject jurisdiction over a claim of this nature, would impact the transition toward democracy in El Salvador.

An encouragingly democratic nationwide debate over metals mining and sustainability has arisen in El Salvador. Particular knowledge of this political debate is directly relevant to the subject-matter of this arbitration. As active participants in this social dialogue, prospective *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.

As civil society organizations who are constituted by, and work daily with, affected communities and individuals to help them understand and mobilize to face these challenges, prospective *amici* have a unique understanding of, and a significant interest in, these proceedings. As *amici* will argue if given the opportunity, 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. Prospective *amici* are uniquely qualified to offer the Tribunal a broad contextual understanding—and defense—of the substance and historical significance of the government's response to the democratic debate over metals mining and sustainable development in El Salvador.

The interest of prospective *amici* in this proceeding is also unique because that interest is uniquely vulnerable. As *amici* will argue if given the opportunity, Claimant is using this proceeding to gain an 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.

Prospective *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.

For these reasons, prospective *amici* request that the Tribunal: (1) grant this request for permission to file an *amicus curiae* brief in this case; (2) consider the submission included in the Appendix; and (3) allow the undersigned to make an oral presentation at the upcoming hearing on jurisdiction.

Very truly yours,

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

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

On behalf of prospective amici

ⁱ Prospective *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.

APPENDIX:
SUBMISSION OF MEMBER ORGANIZATIONS OF LA MESA AS AMICUS CURIAE

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

TABLE OF CONTENTS

APPLICATION FOR PERMISSION TO PROCEED AS AMICI CURIAE.....	1
APPENDIX: SUBMISSION OF MEMBER ORGANIZATIONS OF LA MESA AS AMICUS CURIAE	4
TABLE OF CONTENTS	4
I. INTRODUCTION	5
II. FACTUAL BACKGROUND.....	5
A. <i>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</i>	5
B. <i>The Environmental Concerns Behind Pac Rim’s Proposed Mine Are Real and Not Addressed By Pac Rim’s EIA</i>	7
1. Potentially Devastating Environmental Impact of the Proposed Mines	7
2. Pac Rim’s EIA Utterly Failed to Adequately Assess the Mine’s Environmental Impacts and Provide Assurance to Local Communities.....	9
C. <i>Pac Rim’s Involvement in Salvadoran Politics and Its Strategy for Dealing with Local Opposition Are Deeply Problematic and Have Already Caused Violent Fissures in Local Communities</i>	10
III. ARGUMENT	13
A. <i>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</i>	13
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.	13
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.”.....	16
B. <i>Pac Rim’s Claim Amounts to an Abuse of Process</i>	18
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.	18
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.....	19
IV. CONCLUSION	20

I. INTRODUCTION

This dispute is not a “legal dispute” under Article 25 of the ICSID Convention but rather is an expression of Pac Rim Cayman’s (or Pacific Rim Mining Corp.; for simplicity, *amici* will refer to the Claimant as “Pac Rim”) disagreement with general (and universally applicable) shifts in Salvadoran public policy. In essence, this so-called “dispute” concerns Pac Rim’s dissatisfaction with the fact that El Salvador’s public policy has begun to recognize the destructive environmental and social effects that metals mining poses to local communities, as well as the emptiness of mining’s promise as a path to sustainable development in El Salvador. Furthermore, there are no “measures” in this case that relate to Pac Rim, but rather a general political debate concerning sustainability, metals mining and democracy in El Salvador.

CAFTA does not purport to allow foreign investors to dictate the environmental and social policy over natural resources of Central American States. Yet this is what lies at the heart of this arbitration: the attempt by Pac Rim to extract compensation as a result of its dissatisfaction with the government’s legitimate exercise in political democracy. Plainly, this is not a legal issue, but a political debate over the meaning of sustainable development at this point in time in El Salvador’s history.

II. FACTUAL BACKGROUND

In its 50-page retelling of the “facts” in its Counter Memorial, Pac Rim presents itself as the victim of two-faced politicians who alternate between scheming against Pac Rim and caving into feverish mobs of agitators who apparently are too ignorant or irrational to recognize all the alleged opportunities that Pac Rim’s promise of “green mining” has to offer.

Amici will endeavor to use this submission to make sure that the Tribunal understands that: (A) the grassroots, peaceful opposition to Pac Rim’s proposed mine—and the government’s response to it—were and are entirely legitimate and should be celebrated as a new dawn for representative democracy in El Salvador, not saddled with a hundred-million-dollar price tag; (B) the environmental concerns underlying that opposition were, and are, well-founded, but were not adequately addressed in Pac Rim’s Environmental Impact Assessment (the “El Dorado EIA”); and (C) Pac Rim’s involvement in Salvadoran and regional politics in support of its proposed mine has been deeply problematic, and the proposed mine itself has already generated disturbing levels of intra-community conflict and violence.

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

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.”¹ 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

¹ 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> (<http://elsalvadorsolidarity.org>).

notice environmental impacts from the mining exploration--reduced access to water, polluted water, impacts to agriculture, and health issues.”²

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.³ 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.”⁴

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 high population density.⁵ 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.”⁶ 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.’”⁷

These swells of resistance—each peaceful, organic, and unrelated to government action—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

² 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”).

³ 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).

⁴ Michael Busch, *El Salvador’s Gold Fight*, Foreign Policy in Focus, Institute for Policy Studies (2009), courtesy link at <http://bit.ly/9msWaY> (www.fpi.org/).

⁵ See Michelle Petrotta, *Congressional Brief: Mineral Mining In El Salvador*, SHARE Foundation (2009) courtesy link at <http://bit.ly/eG0X3B> (elsalvadorsolidarity.org/).

⁶ *Id.*

⁷ Busch, *supra* note 4.

significant further study of possible environmental impacts and codification of more robust mining laws.⁸ 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."⁹ 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 May 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.

B. The Environmental Concerns Behind Pac Rim's Proposed Mine Are Real and Not Addressed By Pac Rim's EIA

1. Potentially Devastating Environmental Impact of the Proposed Mines

Pac Rim's proposed El Dorado mine alone would encompass 144 square kilometers, located just 3 km from the community of San Isidro, where over 10,000 people live, just 12 km from the town Sensuntepeque, where almost 50,000 people live, and just 65 km from the capital of San Salvador.¹⁰ The Department of Cabañas, in which the El Dorado mine and Pac Rim's other proposed mines would be located, has a high population density of approximately 194 persons per square km, roughly the same as Luxemburg. The majority of these persons are subsistence farmers who live in rural villages, work the land for less than \$2 a day, and rely on clean surface water and groundwater for drinking, bathing and sustaining their crops and animals.¹¹

One of the major socio-environmental issues facing El Salvador generally, and the area of the proposed mining project specifically, is access to clean water for human consumption and agriculture. According to the Joint Monitoring Programme for Water Supply and Sanitation of the World Health Organization ("WHO") and UNICEF, as of 2008 only 42% of El Salvador's rural population had access to on-premises piped drinking water, and 24% had no access to drinking water sources in any way monitored for quality and safety.¹² At the same time, the World Bank estimates that a staggering 90% of El Salvador's surface water bodies are contaminated, with 98% of municipal wastewater and 90% of industrial wastewater discharged into El Salvador's rivers and creeks without treatment.¹³ The World

⁸ Public Citizen, *CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case* (May 25, 2010), p. 3 available at www.citizen.org/documents/Pacific_Rim_Backgrounder1.pdf.

⁹ 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>.

¹⁰ See <http://www.pacrim-mining.com/s/Eldorado.asp>.

¹¹ See IUCN Report at 5.

¹² See *A Snapshot of Drinking-water and Sanitation in the MDG region Latin-America & Caribbean – 2010 Update*, WHO / UNICEF Joint Monitoring Programme for Water Supply and Sanitation (2010), courtesy link at <http://bit.ly/et4slu>.

¹³ *El Salvador, Recent Economic Developments in Infrastructure - Strategy Report (REDI-SR)*, Report No. 37689-SV, ¶ 6.16, World Bank (Oct. 20, 2006).

Bank further reports that in the twenty years ending in 2006, yields from El Salvador's springs declined by 30% due to deforestation, causing water tables in some areas to decline by one meter per year.¹⁴

The areas in which Pac Rim proposes to mine are among those in which such dramatic annual declines in water tables have been observed.¹⁵ Moreover, the proposed mining areas are all within the basin of Rio Lempa, El Salvador's largest and most important river and the source of drinking water for approximately half of El Salvador's 6 million people, including the population of San Salvador.¹⁶ The area affected by the proposed El Dorado mine includes an aquifer that provides critical water supply for local communities and which is located between, and linked to, the Copinolapa and Tilahuapa rivers, which flow into the Rio Lempa.¹⁷

As noted above, residents of Cabañas have already reported negative environmental impacts from the approximately 660 exploratory wells that Pac Rim has drilled in the region, ranging from reduced access to fresh water, polluted water, impacts to livestock, and adverse health impacts.¹⁸ The potential adverse environmental consequences of full exploitation of El Dorado project would be far more dramatic. As affirmed by El Salvador's Ombudsman for the Defense of Human Rights, an independent monitoring body established as part of the Peace Accords that ended El Salvador's civil war,¹⁹ the environmental and social risks of the proposed mine include:

- the planned use of *2 tons of cyanide per day* in the mine's operation which, combined with other factors including "higher levels of acidity and heavy metals from [released] hydrocarbons" could lead to contamination not only of surrounding surface waters but also local aquifers;
- unpredictable realignment of the flow of local aquifers caused by the excavation of the mine by explosives, which could open up existing fissures;
- contamination of local aquifers from released mine water, which contains nitrates and heavy metals, as well as cyanide and acid from contaminated materials used to refill mine galleries;
- air pollution which could cause respiratory problems for nearby local populations and lead to additional contamination of surface waters;
- contamination of groundwater caused by leaching from "tailings" (drilling wastes) ponds, including acid rock drainage;
- the danger of catastrophic failure of the dams of such ponds; and
- severe modifications of local landscape caused by necessary deposits of large quantities of overburden materials and related de-vegetation, and other impacts.²⁰

Given these severe threats to local communities in Cabañas, a heavy burden lay on Pac Rim to convince community members that their lives and livelihoods would not be wholly destroyed. Merely invoking the words "green mining" and describing sunny "best case" scenarios would not suffice. But as

¹⁴ *Id.* at ¶ 6.18.

¹⁵ IUCN Report at 5.

¹⁶ *Water Resource Assessment of El Salvador*, United States Southern Command (Oct. 2008), at 4, *courtesy link at* <http://bit.ly/hN0Qji> (noting that San Salvador withdraws about 1.5 cubic meters per second from the Rio Lempa); *Mining in El Salvador*, USESSC Fact Sheet (2010), *courtesy link at* <http://bit.ly/dGXiOk>.

¹⁷ *Statement concerning situation surrounding the "El Dorado" mining extraction project and assassinations in Cabañas*, El Salvador National Ombudsman for the Defense of Human Rights (Procuraduría para la Defensa de los Derechos Humanos or "PDDH Report") (2009), at 27, *attached as* Appendix I to the IUCN Report.

¹⁸ IUCN Report at 19.

¹⁹ See Michael Dodson & Donald Jackson, *Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala*, 46:4 *Latin Am. Pol. and Soc'y* 1, 1-27 (Winter, 2004).

²⁰ IUCN Report at 27-28 (PDDH Report).

shown below, the only concrete assurance Pac Rim was able to provide, its EIA, failed to address the communities' real concerns.

2. Pac Rim's EIA Utterly Failed to Adequately Assess the Mine's Environmental Impacts and Provide Assurance to Local Communities

Professor Robert E. Moran, Ph.D., a U.S.-based hydrogeologist conducted a technical review of Pac Rim's El Dorado EIA and concluded, in no uncertain terms, that "[t]his EIA would not be acceptable to regulatory agencies in most developed countries."²¹ Specifically, Dr. Moran highlighted:

- its "near complete lack" of baseline water quantity data, preventing any meaningful assessment of the effect of the mine's expected consumption of 327,970,000 liters of water per year;²²
- its "near complete lack" of baseline water quality data, preventing any meaningful assessment not only of changes in water quality in the future but also any impacts already suffered due to Pac Rim's intensive exploratory drilling;²³
- its "failure to consider the costs to the community of 'free water use' by the mining company" through the use of ground water sources;²⁴ and
- "the lack of transparency in the public consultation process" concerning the 1400-page EIA, which Moran reports was only available for public review in a single location in El Salvador for a period of 10 days and which could not be photographed or copied.²⁵

A review of Dr. Moran's report shows plentiful support not only for the conclusions highlighted above but also many additional and equally disturbing concerns ("half-truths," as Dr. Moran puts them) as well.²⁶ For example, the "detoxification" process Pac Rim intended to use is known to produce byproducts including cyanate, thiocyanate, sulfate, ammonia, nitrate, and "free cyanide," the toxicity of which is not well understood, especially in combination.²⁷ Another chilling aspect of the EIA is that while it acknowledges that the region has a history of seismic activity, it "fails to present a specific summary of past seismic events" such as would allow for serious risk analysis and mitigation, including

²¹ Ex. B, Robert E. Moran, *Technical Review of the El Dorado Mine Project Environmental Impact Assessment* (October 2005), at 15 *courtesy link at* <http://bit.ly/guZ0gC> ("EIA Review").

²² *Id.* at iii; *see also id.* at 7 ("the EIA fails to answer in any credible, quantitative manner, the basic question: **How much groundwater is available at the site and what will be the long-term impacts to ground water resources?**") (emphasis in original).

²³ *Id.* at iii; *see also id.* at 7-9.

²⁴ *Id.* at iii. As Moran explains:

Frequently, industries in Latin America will be required to pay a nominal and artificially-low price for the use of surface waters---prices much lower than are paid by agricultural users. However, often the mining companies will simply avoid even these modest water costs by constructing wells near rivers or lakes, which then extract the surface waters indirectly, because the nearby ground waters are usually interconnected with the surface waters.

Id. at 10. The EIA does not discuss what effect this would have water table levels that are already falling in the area. *Id.* at 10-11.

²⁵ *Id.* at iii, v. Although government regulations naturally bears a good part of the blame for these specific limitations, Pac Rim appears to have made no effort to further disseminate the EIA, despite its professed commitment to the "cardinal rule [] of Corporate Social Responsibility... to maintain an open dialogue with the local communities" Shrake Decl. ¶ 69.

²⁶ *Id.* at 12.

²⁷ *Id.* at 9.

with respect to the consequences of a seismic event leading to tailings pond dam failure.²⁸ Dr. Moran also noted that many environmental impacts “do not become visible until after a mine closes.”²⁹

All this is not to say that the affected communities simply *reacted* to Dr. Moran’s review of the EIA.³⁰ They reacted to their own perceptions and direct experiences, and to the experience of other Central American communities negatively impacted by mining projects. *Amici* believe it is critical that the Tribunal recognize that these perceptions and experiences, and the communities’ decision to stand up and oppose Pac Rim, are independently legitimate and entitled to much more weight than either disputing party to this case concedes. They are not “inconvenient” facts that the Republic must “explain away;” nor are they a basis for Pac Rim to pin liability on the Republic. The communities do not and need not apologize for standing up in defense of their own rights, lives and livelihoods.

C. Pac Rim’s Involvement in Salvadoran Politics and Its Strategy for Dealing with Local Opposition Are Deeply Problematic and Have Already Caused Violent Fissures in Local Communities

As described in detail in its own briefing, Pac Rim reacted to the growing tide of grassroots opposition described above by initiating a two-pronged, patronage-based “divide and conquer” strategy at the national and local levels.

At the national level, Pac Rim, purportedly on the basis of its CEO’s “experience” with “relatively new regulatory regimes,” engaged in an intense lobbying effort to sway national officials, especially those in the country’s right-wing ARENA party that was then in power.³¹ The intent of the lobbying was, in effect, to convince officials to ignore the popular will in opposition to the El Dorado project, as so vocally expressed in public demonstrations, described in the media, and documented in reputable opinion surveys. Pac Rim’s lobbying also sought to convince officials to ignore the serious shortcomings of the El Dorado EIA described above, and to put aside inconvenient “details,” like the fact that Pac Rim had long since let its right to appeal MARN’s denial of an environmental permit lapse. The decision of then-President Saca and others in the ARENA-dominated government to stand firm in the face of such pressure is, as discussed above, a hopeful sign in the development of El Salvador’s nascent democracy.

²⁸ *Id.* at 11-13.

²⁹ *Id.* at 3. In addition to all of the above, Dr. Moran found that the EIA failed to (a) adequately assess the potential for rocks and waste materials from the mine to generate “acid rock drainage” and other types of ground and surface water contamination, *id.* at 9-10; (b) account for cumulative risks caused by the development of the El Dorado mine in combination with other planned mines, *id.* at 13-14; (f) provide for financial assurance to address unexpected environmental impacts that occur after the mine’s closure, *id.* at 14; or (g) acknowledge that the World Bank standards utilized in the EIA were and are in many respects substantially weaker than those employed in the United States, Canada, and other countries, *id.* at 12-13.

³⁰ Indeed, the communities did not need Dr. Moran’s analysis to confirm their inherent mistrust of a document produced by paid consultants to serve Pac Rim’s purposes. Dr. Moran himself recognizes that the fact that “mining companies are allowed to choose, direct and pay the consultants who prepare the EIAs . . . [means that] most metal mining EIAs are notorious for presenting overly optimistic discussions of future impacts,” and thus that civil society has justifiably learned not to fully trust them. *Id.* at 4. Nor is this lesson confined to the developing world, as many Gulf of Mexico residents may have recognized in retrospect when they learned that BP had told the United States on its permit application that it had the capability to effectively mitigate the effects of a blowout of up to 162,000 barrels/day—three to ten times the maximum flow rate of the blowout that did occur, and that BP spent months failing to mitigate. *See, e.g.,* Alison Fitzgerald, “BP Ready for Spill 10 Times Gulf Disaster, Plan Says,” *Bloomberg BusinessWeek*, May 31, 2010, *courtesy link at* <http://buswk.co/aJF5cH>.

³¹ Declaration of Thomas Shrake ¶ 75.

At the local level, Pac Rim's tactics have become intertwined with an explosion of violence that has brought widespread international condemnation and is disturbingly reminiscent of El Salvador's violent past. In this regard, foreign investment that causes violence and denial of human rights is not conducive to sustainable development and should not receive the protection of international law.

While the local residents "feel strongly" that Pac Rim's actions have played a significant role "in politically destabilizing the region," Pac Rim continues to trumpet the benefits that it could bring to local people in the area of its proposed mine.³² A patronage-based divide-and-conquer strategy is evident. At public forums, people have spoken of what they see as Pac Rim representatives'

attempt to buy their "social license to operate," through which they have provided up to \$1 million/year to various local initiatives aimed at winning local consent for the project. These initiatives include community projects, parties, and *substantial discretionary funding reportedly paid to several mayors of the region*.³³

These discretionary payments, not surprisingly, have created pockets of entrenched (and well-financed) support for the proposed mine, especially in the regional ARENA-dominated local governments.³⁴ Pac Rim officials reportedly sought to even widen the intra-community divide by "[telling] their employees that local environmental leaders, in particular members of the Environmental Committee of Cabañas, were to blame for their lack of work."³⁵

The result of Pac Rim's divide-and-conquer strategy has been the creation "of what social psychologists describe as 'corrosive communities,'" in which "an intense sociopolitical polarity [has] developed between proponents and opponents of mining [that has led] to social tensions, emotional stress, disintegration of civil society, political turmoil, and violence."³⁶ El Salvador's violent past and remaining political divisions, including the polarity between the right-wing ARENA and left-wing FMLN parties, has provided a flammable ground for violence.

The consequences for community members who have led the opposition to Pac Rim's plans have been particularly violent—and in some cases fatal. Beginning in March of 2006 and continuing through the present, several of the most vocal opponents of the proposed El Dorado mine have been the victims of murders, abductions, torture, assaults, and threats that El Salvador's Ombudsman for Human Rights has concluded "are very probably related to each other, thus enabling us to infer that they are also linked to the victims' work in defense of the environment."³⁷ In October 2010, La Mesa documented and denounced the violence against environmental defenders opposed to mining in El Salvador at a hearing at the Inter-American Commission of Human Rights of the Organization of American States.³⁸

This disturbing trend took a particularly vicious turn for the worse in 2009. The first victim was Marcelo Rivera, Director of the Association of Friends of San Isidro and a member of La Mesa. Marcelo was kidnapped from a bus in the area near the proposed El Dorado mine on June 18, 2009 and whose body, which "showed signs of torture that were consistent with former Death Squad tactics of the civil

³² IUCN Report at 21.

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ *Id.* at 17.

³⁶ *Id.* at 19.

³⁷ IUCN Report at 34 (PDDH Report).

³⁸ See Center for International Environmental Law, *Environmental Defenders in Danger: The Situation in Mexico and Central America in the Context of the Mining Industry*, (October 2010).

war,” was subsequently found at the bottom of 30 meter deep dry well. Marcelo was also an outspoken opponent of the El Dorado mine.³⁹ On September 22, 2010, three individuals were sentenced to 40 years each for their direct participation in Marcelo’s murder.⁴⁰ El Salvador’s Ombudsman has faulted the Attorney General’s office and the police for their handling of the investigation and specifically for their “refusal to view the crime in the context of the struggle against mining.”⁴¹

The next murder of a mine opponent occurred on December 20, 2009, when Ramiro Rivera, vice president of the *Comité Ambiental de Cabañas* and a leader of local opposition to Pac Rim, was gunned down by at least four gunman armed with M-16 military assault rifles as he drove a steep road near Pac Rim’s proposed Santa Rita mine site. With him in his truck at the time was José Santos Rodríguez, another outspoken Pac Rim opponent, Felicita Eschevarría, thirteen-year-old Eugenia Guavara, and two armed police guards that had been assigned to protect Ramiro. Felicita was also killed in the attack; Eugenia was severely injured. Ramiro had led actions by local people to evict exploration equipment used by Pac Rim at the Santa Rita site, and following those actions had received death threats.

Less than a week later, on December 26, 2009, another environmental defender was murdered, Dora Alicia Recinos Sorto. She was an active member of *Comité Ambiental de Cabañas*. She was shot with a rifle as she returned from a spring where she had been washing clothes. Alicia was 8 months pregnant at the time of her murder; her unborn child died with her in the attack. Her two-year-old son, who was with her when she was gunned down, was shot in the leg. A police station is located approximately 300 meters from the location of Alicia’s murder, but police stationed there were apparently unable to prevent the attack or apprehend its perpetrators.⁴²

In reaction to the murders, El Salvador’s Ombudsman issued “a public statement before the media on December 28, 2009, condemning the acts and urging for security measures to be adopted to protect the members of the Environmental Committee of Cabañas and their families. The Ombudsman stated:

Given the time elapsed between the homicide of Mr. Gustavo Marcelo Rivera Moreno and the constant complaints of death threats and attacks against members of the environmental defense organizations in the area, without conclusive and satisfactory results of investigations of the crimes, their motives and culprits, this could have been a principal factor that led to the subsequent acts of violence... On top of that, none of the criminal investigations in these cases has made any public mention of possible intellectual authors. ***This Ombudsman’s Office notes that there are sufficient elements in the homicides, in the way they have been carried out and the levels of planning involved, to lead one to believe that the homicides and other events may be related and have a common origin.***⁴³

Among the “other events” to which the Ombudsman refers in this statement are the attacks on Father Luis Quintanilla, a Catholic priest in Cabañas and a vocal opponent of Pac Rim’s plans in the area. Father Quintanilla hosts a show on Radio Victoria, a key local radio station, and has been the subject of death threats since 2006. In the summer of 2009, after being followed and photographed while driving in May of 2009 and evading masked gunman while driving on July 13, 2009, Father Quintanilla was

³⁹ IUCN Report at 13.

⁴⁰ *El Salvador: Tribunal Convicts Marcelo Rivera’s Killers*, La Mesa Communications Team, courtesy link at <http://bit.ly/hohjL8> (www.miningwatch.ca).

⁴¹ PDDH Report at 34.

⁴² *Id.* at 14.

⁴³ *Id.* at 37 (emphasis added).

stopped at roadblock on July 27, 2010 by masked gunman, who he overheard say to one another: “Should we kill him now? No, we are supposed to take him alive.” Father Quintanilla was only able to evade capture by leaping from his car and down a ravine.⁴⁴

Radio Victoria itself has also been the object of intimidation and vandalism aimed at disabling its broadcast capabilities.⁴⁵ Neftally Ruiz, a Radio Victoria reporter, was threatened in December 2007 and January 2008, after Radio Victoria refused an offer of financial assistance by Pac Rim. Neftally was told in these threats “that he should keep out of Pacific Rim’s way.”⁴⁶ The threats commonly referenced the earlier murders as examples of what would be done if the demands were not met, such as the following received by a Radio Victoria reporter on January 21, 2010: “get ready you damn Radio Victoria people because we already got the first three.”⁴⁷ The threatened violence against Radio Victoria has continued to this day. On January 11, 2011, a death threat was slipped under the door at Radio Victoria from a group identifying itself as the “extermination group.”⁴⁸

As El Salvador’s Ombudsman has concluded, there are many strong indications that these events are linked not only to one another but also to conflict in the local community engendered by Pac Rim’s planned mining and the strong democratic opposition to such plans by La Mesa.

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, 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.

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 authority to appreciate the claim for what it is, no matter how the claimant has framed it. This so-called “dispute” is in truth merely an expression of Pac Rim’s dissatisfaction with the fact that El Salvador’s public policy has begun to recognize the deeply destructive environmental and social effects that metals mining poses to local communities, as well as the emptiness of mining’s promise as path to sustainable development in El Salvador.

This shift in public policy by the government of El Salvador responds to the advocacy and demands of the member organizations of La Mesa. La Mesa has actively engaged social movements, non-governmental organizations and local communities in a political dialogue regarding metals mining, sustainable development, and the protection of human rights and the environment in El Salvador. The government’s response to La Mesa’s demands constitute an encouraging exercise in political democracy, where authorities are accountable to the governed and must reflect the preferences of society expressed through democratic channels of social dialogue.

⁴⁴ IUCN Report at 15.

⁴⁵ See *id.* at 42-49; *Urgent Action: Denounce recent wave of death threats and crimes against El Salvadoran anti-mining movement*, SHARE et al., Jan. 31, 2011, courtesy link at <http://bit.ly/eZx6l6> (www.miningwatch.ca).

⁴⁶ IUCN Report at 43.

⁴⁷ *Id.* at 49.

⁴⁸ *Id.*

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.”⁴⁹ 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.⁵⁰ Indeed, the tribunal noted that while the reality of democratic politics “may not be seen as desirable in certain quarters,”⁵¹ 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.”⁵² 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 “political” nature of the policy shifts it dislikes, it reveals that its complaints are not a legal dispute over a particular measure, but rather about 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,⁵³ nor was it designed to stand in the way of history, or freeze public policy developments.⁵⁴ 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.⁵⁵

⁴⁹ *AES Summit Generation Ltd. et al. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010, at ¶ 9.1.5.

⁵⁰ *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.”).

⁵¹ *Id.* at ¶ 10.3.34.

⁵² *Id.* at ¶ 10.3.24.

⁵³ 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)).

⁵⁴ 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.”).

⁵⁵ 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

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."⁵⁶ 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."⁵⁷ "[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."⁵⁸

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.⁵⁹

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."⁶⁰ 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."⁶¹

evolution of investment law from "shield" to "sword"); Gus van Harten, *Investment Treaty Arbitration and Public Law* (2007).

⁵⁶ Article 10.14 of CAFTA also limits the scope of a tribunal's jurisdiction to "investment disputes."

⁵⁷ Georges Abi-Saab, *Les Exceptions Préliminaires dans la Procédure de la Cour Internationale* 147 (1967).

⁵⁸ *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 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.").

⁵⁹ 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).

⁶⁰ *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*).

⁶¹ *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

While this formulation could involve a difficult line-drawing process between “measures of general economic policy” and “specific measures affecting the Claimant’s investment,”⁶² 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 so-called “de facto ban” is clearly a general (and legitimate) policy shift, perhaps one that “may not be seen as desirable in certain quarters,”⁶³ but that is nonetheless legitimate and rational and cannot serve as the sole basis for a “legal dispute” under ICSID Article 25.

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).⁶⁴ Pac Rim, however, deliberately failed to properly appeal that denial per procedures “explicitly provided in the Environmental Law for the environmental permit,”⁶⁵ choosing, instead, to pursue an extralegal and unofficial solution to the issue through discussions with various “high-ranking” Salvadoran government officials.⁶⁶

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). Pac Rim describes how Mr. Shrake and other executives regularly engaged in backroom dealings with senior individuals in the Salvadoran government to gain the legal results the company desired. 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.⁶⁷ 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.⁶⁸

Pac Rim now complains based on the failure of these unofficial back-channel discussions to bear fruit. However, such informal, extralegal processes (and any informal extralegal promises purportedly

¶ 12.; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, May 11, 2005, ¶ 59.

⁶² 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.”).

⁶³ *AES Summit* at ¶ 10.3.34.

⁶⁴ Mem. at ¶¶ 26-29.

⁶⁵ Mem. at ¶ 27.

⁶⁶ Countermem. at ¶¶ 120-21, 123; Shrake Decl. at ¶¶ 78, 85-96, 101-103, 118-121.

⁶⁷ Shrake Decl. at ¶¶ 84-86.

⁶⁸ Countermem. at ¶¶ 117-18.

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.

The weakness of Pac Rim’s jurisdictional case is illustrated by its own description of how troubled it was upon hearing in July 2006 that a “high-ranking” official (the then-Minister of the Environment, Hugo Barrera) had expressed his general view that metals mining was “inconvenient” for El Salvador.⁶⁹ Pac Rim notes that it “immediately flew” to San Salvador to talk to Mr. Barrera, who “downplayed the remarks and said they did not represent official policy.”⁷⁰ Neither, of course, did the other un-official assurances Pac Rim allegedly received and which it would have the Tribunal invest the force of law.

There are also important public policy reasons that compel the Tribunal to disallow this sort of claim. Even if nothing more untoward occurred than what Pac Rim describes in its Countermemorial, 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. Failure to abide by the law, or to use the recourses provided therein, carries direct consequences that cannot be circumvented or avoided by Pac Rim’s attempt to seize arbitral jurisdiction under CAFTA and ICSID.

Pac Rim’s attempt to paint itself as blind-sided by an invidious policy coming from the highest political rank is patently unconvincing. As described above, opposition to the proposed mine grew organically from the direct experiences of local communities and swelled, over a course of years, to a level of critical importance in national politics because it implicated fundamental debates about environmental protection, human rights and sustainable development in El Salvador. 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.⁷¹ Though not illegal, this is certainly not the sort of investor conduct that the investor-State arbitration regime was meant to encourage.⁷²

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 underlines 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.

⁶⁹ *Id.* at ¶ 122.

⁷⁰ *Id.*

⁷¹ 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 Pac Rim to try to construct a dispute over MARN’s (in)actions by referencing “assurances” from other agencies is simply disingenuous.

⁷² *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”).

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

Another arbitral tribunal recently noted in a major decision: “even a well-founded claim will be rejected by the tribunal if it is found to be abusive.”⁷³ 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.⁷⁴

More specifically, as formulated by one leading publicist, the “abuse of right” or “abuse of 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.”⁷⁵ As discussed below, *Pac Rim's* claim is abusive in multiple respects, implicating most of the foregoing factors.

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.”⁷⁶ *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. The Cayman Islands, of course, has a corporate tax rate of **zero** and a capital gains tax rate of zero,⁷⁷ and has been denounced by President Obama as housing “the biggest tax scam in the world.”⁷⁸ 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.

⁷³ *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”).

⁷⁴ 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”).

⁷⁵ 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).

⁷⁶ Counterterm at ¶ 51, 84.

⁷⁷ See Cayman Islands Tax Guide 2010, PKF Worldwide Tax Guides 2010, courtesy link at <http://bit.ly/e2Xxcb> (www.pkf.com).

⁷⁸ See Landon Thomas, “Offshore Haven Considers a Heresy: Taxation,” *NY Times*, Oct. 3, 2009, courtesy link at <http://nyti.ms/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>.

Pac Rim cites another arbitral award noting such arrangements are “not uncommon in practice,”⁷⁹ 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.⁸⁰ 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.”⁸¹ 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.⁸²

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.

This Tribunal must appreciate Pac Rim’s claim for what it really is. 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*.

Throughout its Countermemorial, Pac Rim emphasizes how Salvadoran government officials were supportive of its proposed mine. Moreover, 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 grounds it in *comments to the media* made by President Saca in 2008, which it claims evidence of a so-called “de facto mining ban.”⁸³ The government of El Salvador was not the source of Pac Rim’s problem; the media comments Pac Rim bases its claim on were mere attempts by then-President Saca to mirror popular opposition genuinely rooted elsewhere, namely in the grassroots opposition revealed by the organizing and public expression of the communities that would be affected by Pac Rim’s proposed mine.

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 *amicus curiae* brief.

Amici submit that the purpose of the dispute resolution provisions in CAFTA and of the ICSID Convention more broadly is 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

⁷⁹ Countermem at ¶ 302.

⁸⁰ NOA at ¶ 64; Countermem at ¶ 117.

⁸¹ Shrake Decl. at ¶ 10.

⁸² See, e.g., Natasha Lance Rogoff, “Haven or Havoc?,” PBS Frontline, *courtesy link at* <http://to.pbs.org/982JUQ> (www.pbs.org).

⁸³ 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”).

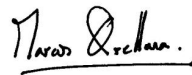
address. What has occurred here is different by an order of magnitude: in a sense this dispute is unquestionably between Pac Rim and the communities, so much so that Pac Rim cannot point to any concrete government action or measure but must instead rely on an isolated comment to the media made by a former President in the heat of a campaign in reaction to popular pressure. It is a bedrock principle of international law 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.⁸⁴ 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.⁸⁵ Pac Rim’s strategic decision to take this dispute to a forum where its principal opponent-in-interest cannot appear is improper and abusive.

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. More importantly, the Tribunal has no jurisdiction to hear a complaint against the course of a political debate.

DATED: March 2, 2011

By:



Aaron Marr Page
Counsel
FORUM NOBIS PLLC
1629 K Street NW, Suite 300
Washington, D.C. 20006
Tel. (202) 618 2218
aaron@forumnobis.org

Marcos A. Orellana
Counsel of Record
THE CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW
1350 Connecticut Avenue NW, Suite #1100
Washington, DC 20036
Tel. (202) 785-8700
morellana@ciel.org

Stuart G. Gross
Counsel
GROSS LAW
4950 Fulton St., No. 202
San Francisco, CA 94121
Tel. (415) 671-4628
sgross@gross-law.com

⁸⁴ *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).

⁸⁵ 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>.