

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

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

**(ICSID CASE NO. ARB/09/12)**

**BETWEEN:**

**PAC RIM CAYMAN LLC**

*Claimant*

**v.**

**THE REPUBLIC OF EL SALVADOR**

*Respondent*

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**DECISION ON THE RESPONDENT’S  
PRELIMINARY OBJECTIONS  
UNDER CAFTA ARTICLES 10.20.4 AND 10.20.5**

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**THE TRIBUNAL:**

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

*ICSID Tribunal Secretary:*

*Marco Tulio Montanés-Rumayor*

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## *Glossary of Defined Terms*

“CAFTA” means the Dominican Republic-Central America-United States Free Trade Agreement of 2004.

“DOREX” means Dorado Exploraciones, Sociedad Anónima de Capital Variable.

“Enterprises” means Pacific Rim El Salvador, Sociedad Anónima de Capital Variable (also called “PRES”) and Dorado Exploraciones, Sociedad Anónima de Capital Variable (also called “DOREX”).

“Governmental Ethics Law” means Ley de Ética Gubernamental (the Respondent’s Governmental Ethics Law).

“ICSID Convention” means the International Convention on the Settlement of Investment Disputes of 1965.

“Investment Law” means Ley de Inversiones (the Respondent’s Investment Law).

“MARN” means Ministerio de Medio Ambiente y Recursos Naturales (the Respondent’s Ministry of Environment and Natural Resources).

“MINEC” means Ministerio de Economía (the Respondent’s Ministry of Economy).

“Mining Law” means Ley de Minería (the Respondent’s Mining Law of 1995, amended in 2001).

“ONI” means Oficina Nacional de Inversiones (the National Office of Investments, a division of MINEC).

“Pacific Rim” means Pacific Rim Mining Corporation.

“PRC” means the Claimant (Pac Rim Cayman LLC).

“PRES” means Pacific Rim El Salvador, Sociedad Anónima de Capital Variable.

## *List of Selected Legal Materials*

### ***Treaties:***

The Dominican Republic-Central America-United States Free Trade Agreement of 2004

The ICSID Convention on the Settlement of Investment Disputes of 1965

The Vienna Convention on the Law of Treaties of 1969

### ***Salvadoran Laws:***

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

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

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

### ***Arbitral Materials:***

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

*Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008

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

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

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

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

*TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic*, Respondent's Memorial on Jurisdiction, 21 November 2008

*TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic*, Claimant's Counter-Memorial on Jurisdiction, 13 February 2009

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

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

***Other Materials:***

Antonietti, Aurélia. "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules", *21 ICSID Review: Foreign Investment Law Journal* 427 (2006)

*Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S. Ct. 1937 (2009)

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

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

Menaker, Andrea J. "Benefiting from Recent Experience: Developments in the United States' Most Recent Investment Agreements", *12 U.C. Davis Journal of International Law & Policy* 121 (2005)

Message from the President of the United States Transmitting Legislation and Supporting Documents to Implement the Dominican Republic-Central America-United States Free Trade Agreement, 23 June 2005

*Neitzke v. Williams*, 490 U.S. 319 (1989)

Parra, Antonio R. "Suggested Changes to the ICSID Rules and Regulations," *Working Paper of the ICSID Secretariat*, 12 May 2005

Parra, Antonio R. "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes," *41 The International Lawyer* 47 (2007)

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

Sheppard, Audley. "The Jurisdictional Threshold of a Prima-Facie Case" in *The Oxford Handbook of International Investment Law* (2008)

Williams, David. "Jurisdiction and Admissibility" in *The Oxford Handbook of International Investment Law* (2008)

## ***PART I: INTRODUCTION***

### ***A: The Parties***

1. *The Claimant:* The named Claimant is Pac Rim Cayman LLC (also called “Pac Rim Cayman” or “PRC”), a legal person organized under the laws of Nevada, USA, with its principal office at 3545 Airway Drive, Suite 105, Reno, NV 89511, USA. The Claimant is owned by Pacific Rim Mining Corporation (also called “Pacific Rim”), a legal person organized under the laws of Canada. In these arbitration proceedings, the Claimant advances several claims against the Respondent both on its own behalf and on behalf of its subsidiary companies, collectively described as the “Enterprises.”
2. *The Enterprises:* The Enterprises are legal persons organized under the laws of the Respondent, namely: (i) Pacific Rim El Salvador, Sociedad Anónima de Capital Variable (also called “PRES”), with its principal office at 5 Avda. Norte, No. 16, Barrio San Antonio, Sensuntepeque, Cabañas, El Salvador; and (ii) Dorado Exploraciones, Sociedad Anónima de Capital Variable (also called “DOREX”), with its principal office at the same address. PRES is the owner of certain rights in the mining areas denominated as “El Dorado Norte,” “El Dorado Sur” and “Santa Rita,” and DOREX is the owner of certain rights in the mining areas denominated as “Huacuco,” “Pueblos” and “Guaco.” These mining areas are located in Cabañas and San Vicente, in the northern part of El Salvador.
3. *ICSID & CAFTA:* The Claimant is a national of a Contracting State to the Convention on the Settlement of Investment Disputes (the “ICSID Convention”), namely the USA. The USA is a Contracting State to the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA”), in force for the USA as from August 2005.
4. The Claimant’s legal representatives are Arif H. Ali, R. Alexandre de Gramont, R. Timothy McCrum, and Theodore Posner Esqs, all of Crowell & Moring LLP, 101 Pennsylvania Avenue NW, Washington DC 20004, USA.

5. *The Respondent:* The Respondent is the Republic of El Salvador. For present purposes, the relevant Ministries of the Respondent's Government are (i) the Ministry of Economy, *Ministerio de Economía*, (also called "MINEC"); and (ii) the Ministry of Environment and Natural Resources, *Ministerio de Medio Ambiente y Recursos Naturales* (also called "MARN"); and the relevant division within MINEC is the National Office of Investments, *Oficina Nacional de Inversiones* (also called "ONI").
6. The Respondent is a Contracting State to the ICSID Convention. It is a Contracting State to CAFTA, in force for the Respondent as from March 2006.
7. The Respondent's legal representatives are Lic. Romeo Benjamín Barahona, Fiscal General de la República, Fiscalía General de la República, Final 48 Calle Oriente y 19 Avenida Sur, Residencial Primavera, Santa Tecla, La Libertad, El Salvador; and Derek C. Smith and Luis Parada Esqs, both of Dewey & LeBoeuf LLP, 1101 New York Avenue, NW., Suite 1100, Washington D.C. 20005, USA.

***B: The Dispute***

8. *The Claims:* As asserted by the Claimant (but denied by the Respondent), the claims pleaded by the Claimant and the Enterprises allege (i) the Respondent's arbitrary and discriminatory conduct, lack of transparency, unfair and inequitable treatment in failing to act upon the Enterprises' applications for a mining exploitation concession and environmental permits following the Claimant's discovery of valuable deposits of gold and silver under exploration licenses granted by MINEC for the Respondent; (ii) the Respondent's failure to protect the Claimant's investments in accordance with the provisions of its own law and (iii) the Respondent's unlawful expropriation of the investments of the Claimant and the Enterprises in El Salvador.
9. It will be necessary for the Tribunal to examine more closely the factual allegations made by the Claimant later in this decision. For present purposes, the factual and legal bases for the Claimant's claim may be summarized as follows:

10. As alleged, the Claimant advances claims arising out of unlawful and politically motivated measures taken against the Claimant's investments by the Government of the Respondent, acting by its President (President Saca), the Ministries, MARN and MINEC.
11. It is alleged that in 2002 the Respondent induced and encouraged Pacific Rim, the Claimant and the Enterprises to spend tens of millions of US dollars to undertake mineral exploration activities in El Salvador acting with licenses duly granted by the Respondent's Government, in accordance with Salvadoran law and with the approval of Salvadoran officials; and that the Enterprises proceeded to explore for and find gold and silver and then to prepare for their extraction. It is alleged that under Salvadoran law and according to the Government's direct and explicit representations, the Enterprises were entitled to proceed to extract such minerals upon the successful completion of the exploration phase. The Claimant and the Enterprises had devoted enormous resources to approved exploration activities and in pursuing the proper regulatory procedures in order to pursue the subsequent extraction phase.
12. It is alleged that the investments made by the Claimant and the Enterprises included (*inter alia*) building infrastructure, community development initiatives, mineral exploration and mine development conducted in an environmentally and socially responsible manner.
13. However, in March 2008, it is alleged that President Saca abruptly and without any justification announced that, as President, he opposed granting any new mining permits to the Enterprises. This announcement followed an extended period during which the Respondent had ceased to communicate with the Enterprises. Without governmental action, the Enterprises could not exercise what they considered as their vested rights, which had been earned through the costly and time-consuming mineral exploration phase, to proceed to the extraction and exploitation phase.
14. It is alleged that, although the Enterprises pressed for an explanation of why they had been effectively shut off from communication with the Government, only after

President Saca's announcement did the Enterprises understand that they had become the target of something other than mere bureaucratic delay or incompetence. Rather, President Saca, without any legal or other valid reason, had simply decided to shut down the Enterprises and deprive them and the Claimant of their substantial and long-term investments in El Salvador.

15. As a result of the Government's actions and inactions, it is alleged that the rights held by the Enterprises were rendered virtually worthless and the Claimant's investments in El Salvador were effectively destroyed, causing losses to the Claimant and the Enterprises measured in hundreds of millions of US dollars.
16. In light of the Government's actions and inactions, it is alleged by the Claimant that the Respondent breached its obligations under Section A of CAFTA, namely:
  - (i) CAFTA Article 10.3: "National Treatment";
  - (ii) CAFTA Article 10.4: "Most-Favored Nation Treatment";
  - (iii) CAFTA Article 10.5: "Minimum Standard of Treatment";
  - (iv) CAFTA Article 10.7: "Expropriation and Compensation"; and
  - (v) CAFTA Article 10.16.1(b)(i)(B): as to "investment authorizations."
17. The Claimant also alleges that the Respondent has breached the Salvadoran Investment Law, which prohibits expropriation without compensation, as well as unjustified or discriminatory measures which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of foreign investments (Articles 5 – Equal Protection, 6 – Non-discrimination and 8 – Expropriation).
18. The Claimant also alleges that the Respondent has breached the Salvadoran Mining Law (Articles 8, 14, 19 and 23), Article 86 of the Salvadoran Constitution, Article 1 of the Salvadoran Civil Code and Article 4(j) of the Salvadoran Governmental Ethics Law.

19. The Claimant alleges that, as a result of the Respondent's unlawful actions and inactions, the Claimant and the Enterprises have incurred damages measured in hundreds of millions of US dollars, including investment expenses in excess of US\$ 77 million, together with interest.
20. *The Answers:* The Respondent denies all the Claimant's allegations in the strongest terms. The Respondent also does not accept the jurisdiction of this Tribunal to decide these claims on their merits. More immediately, the Respondent submits that almost all these claims are 'inadmissible' under CAFTA Articles 10.20.4 and 10.20.5, which submission is the subject-matter of this decision.

### ***C: The Arbitration Agreement***

21. The arbitration agreement between the Parties, as invoked in paragraph 19 of the Claimant's Notice of Arbitration, results, on the one hand, from the consents expressed by the Respondent in Article 10.17 of CAFTA and Article 15(a) of the Investment Law and, on the other hand, from the consent expressed thereto by the Claimant in its Request for Arbitration.
22. Article 10.17 of CAFTA provides (in the English version), in relevant part:

*"1. Each Party consents to the submission of a claim to arbitration under this Section [i.e. Section B: "Investor-State Dispute Settlement"] in accordance with this Agreement.*

*2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) ... for written consent of the parties to the dispute ... "*

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

*"In the case of disputes arising among foreign investors and the State, regarding their investments in El Salvador, the investors may submit the*

*controversy to: (a) The International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by ... arbitration, in accordance with the Convention on Settlement of Investment Disputes Between States and Investors of Other States (ICSID Convention) ... ”<sup>1</sup>*

24. The Claimant submits that each of its claims, disputed by the Respondent, give rise, as regards the ICSID Convention, to a legal dispute between the Respondent as a Contracting State and the Claimant as a national of another Contracting State, arising directly out of an investment, which the Claimant and the Respondent have consented in writing to submit to the Centre (ICSID), within the meaning of the ICSID Convention.
25. The Claimant also submits, as regards the Investment Law, that its disputed claims likewise give rise to a dispute between the Claimant as a foreign investor and the Respondent as the State relating to an investment made by the Claimant in El Salvador, within the meaning of the Investment Law, which the Claimant and the Respondent have consented in writing to submit to the Centre (ICSID), within the meaning of the ICSID Convention.
26. Pursuant to CAFTA Article 10.18.4, the Claimant affirmed in its Notice of Arbitration that neither the Claimant nor the Enterprises had previously submitted any of the breaches alleged in the Notice of Arbitration to any other binding dispute resolution procedure for adjudication or resolution (paragraph 23); and, further, the Claimant pleaded in its Notice of Arbitration, pursuant to CAFTA Article 10.18.2(b)(ii), that the Claimant and the Enterprises waived their rights to initiate or continue any domestic proceeding with respect to any measure alleged to constitute a breach in the Notice of Arbitration (paragraph 24).

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<sup>1</sup> The original Spanish text of Article 15 of the Investment Law provides: “En caso que surgieren controversias ó diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los tribunales de justicia competentes, de acuerdo a los procedimientos legales. En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia: (a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI); ...”

27. A copy of such waiver, the original of which was delivered to the Respondent with the Notice of Arbitration, was attached as Exhibit 1 to the Notice of Arbitration. It was later amended, as described below.
28. In addition to such waiver, the Claimant and the Enterprises sought to reserve the right in the Notice of Arbitration, pursuant to CAFTA Article 10.18.3, to initiate or continue any proceedings for injunctive relief not involving the payment of damages before any administrative or judicial tribunal of the Respondent for the purposes of preserving their rights and interests during this arbitration (paragraph 25).

***D: The Arbitral Tribunal***

29. The Claimant, pursuant to CAFTA Article 10.16(6) and the ICSID Convention, appointed as arbitrator by its Notice of Arbitration in these arbitration proceedings: Professor Dr Guido Santiago Tawil of M&M Bomchil, Suipacha 268, 12<sup>th</sup> Floor, C1008AAF, Buenos Aires, Argentina.
30. The Respondent, pursuant to CAFTA Article 10.19 and the ICSID Convention appointed by letter dated 14 July 2009: Professor Brigitte Stern, 7 rue Pierre Nicole, Paris, 75005, France.
31. The Parties, pursuant to CAFTA Article 10.19 and ICSID Convention Article 37(2)(a), agreed to appoint as the President of the Arbitral Tribunal, on 13 November 2009: V.V.Veeder Esq of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.

***E: The Arbitral Procedure***

32. *Written Pleadings:* The Claimant submitted its Notice of Arbitration on 30 April 2009 pursuant to Article 36 of the ICSID Convention, CAFTA Article 10.16 and Article 15(a) of the Respondent's Investment Law, following the Claimant's Notice of Intent to submit a claim made to the Respondent pursuant to CAFTA Article 10.16(2) on 9

December 2008, such claim said to relate to events taking place more than one year previously (for ease of reference, here called the “Notice of Arbitration” and the “Notice of Intent” respectively).

33. The Claimant’s Notice of Arbitration is not a short document. It comprises 131 numbered paragraphs over 54 pages, not including attached exhibits. Moreover by paragraphs 7 and 105, the Notice of Arbitration refers back to the Claimant’s Notice of Intent, also by itself a substantial document. The Notice of Intent was Exhibit 9 to the Notice of Arbitration.
34. Later in these proceedings, given the terms of these references back to the Notice of Intent, it was not entirely clear whether the Notice of Arbitration formally incorporated the Notice of Intent. It would not ordinarily matter, save that the Notice of Intent expressly alleges arbitrary, unjustified and discriminatory conduct by the Respondent whereas the Notice of Arbitration does not make the same allegations, save for the reference to and summary of the Notice of Intent in paragraph 105 of the Notice of Arbitration. On the second day of the Oral Hearing (see below), whilst contending primarily that the Notice of Arbitration sufficiently pleaded its Claims, the Claimant requested, in the alternative, an amendment to its Notice of Arbitration by specifically incorporating the relevant words from its Notice of Intent into paragraph 105 of its Notice of Arbitration [D2.413<sup>2</sup>].
35. There was no question of the Respondent being thereby caught unfairly by surprise, having received both the Notice of Intent and the Notice of Arbitration; nor is the Respondent otherwise prejudiced by the Claimant’s proposed amendment. In the Tribunal’s view, it is indeed arguable that the Notice of Arbitration is sufficiently pleaded by incorporating the Notice of Intent. For present purposes, however, to curtail this somewhat technical debate, the Tribunal is here content to treat the Notice of Arbitration as amended in the manner requested by the Claimant.

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<sup>2</sup> References to the *verbatim* transcript of the Oral Hearing are here made thus: “D2.413” signifies the second day of the Oral Hearing, at page 413 of the transcript.

36. The Acting Secretary-General of ICSID registered the Claimant's Notice of Arbitration as a request for arbitration under Article 36(2) of the ICSID Convention on 15 June 2009.
37. The Respondent submitted its Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 on 4 January 2010 (for ease of reference, here called the "Preliminary Objections").
38. A preliminary meeting with the Tribunal and the Parties was held by telephone conference-call on 12 January 2010 to establish (*inter alia*) the time-table for addressing the Preliminary Objections on an expedited basis, the proceedings on the merits being suspended pursuant to CAFTA Article 10.20.4(b) and 10.20.5.
39. The Claimant submitted its Response to the Preliminary Objections on 26 February 2010 (for ease of reference, here called the "Response"), in accordance with the procedural time-table established following the preliminary meeting as amended by order of the Tribunal.
40. The Respondent submitted its Reply to the Response on 31 March 2010 (for ease of reference, here called the "Reply"). It contained, *inter alia*, the expert legal opinion of Professor W. Michael Reisman on "The International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10."
41. The Claimant submitted its Rejoinder to the Reply on 13 May 2010 (for ease of Reference, here called the "Rejoinder"). It contained, *inter alia*, the expert legal opinion of Professor Don Wallace Jr in response to Professor Reisman's opinion.
42. *Procedural Orders:* Upon receipt of the Respondent's Preliminary Objections, the Tribunal suspended these arbitration proceedings as to the merits pursuant to CAFTA Articles 10.20.4(b) and 10.20.5 and established the schedule for considering these objections (described above) until further order or award.

43. The Tribunal has made several other procedural orders in these proceedings leading up to the Oral Hearing, principally its orders issued on 5 March, 21 April, 24 May and 10 June 2010.
44. As required by CAFTA Article 10.21(1), the written phase of these arbitration proceedings has been made publicly available on the Respondent's web-site<sup>3</sup>.
45. *The Oral Hearing:* As requested by the Parties pursuant to CAFTA Article 10.20.5, the oral hearing took place at the World Bank, Washington DC, USA over two days on 31 May and 1 June 2010. It was recorded by English and Spanish stenographers; and as required by CAFTA Article 10.21(2), the hearing was made publicly available, contemporaneously by live-stream, in both English and Spanish languages, on ICSID's web-site. It remains available on ICSID's web-site.<sup>4</sup>
46. The Respondent was represented by Mr. Benjamín Pleités (Secretary General of the Attorney General's Office), Mr. Daniel Ríos (Legal Adviser from the Ministry of the Economy), Ms. Arely Elizabeth Mejía and Ms. Celia Beatriz Lizama (both from the Ministry of the Economy), Mr. Enilson Solano (from the Respondent's Embassy in Washington DC) and from Messrs. Dewey & LeBoeuf: Mr. Derek Smith, Mr. Aldo Baldini, Mr. Luis Parada, Mr. Tomás Solís, Ms. Erin Argueta, Ms. Paula Corredor, Ms. Mary Lewis, and Mr. Eric Stanculescu. The Claimant was represented by Mr. Tom Shrake (President and CEO of Pacific Rim); and from Messrs. Crowel & Moring LLP: Mr. Arif H. Ali, Mr. Alexandre de Gramont, Mr. R. Timothy McCrum, Mr. Theodore Posner, Ms. Ashley R. Riveira, and Ms. Erica Franzetti.
47. The USA, as a Non-Disputing Party, attended the Oral Hearing, being represented by Mr. Mark Feldman, Ms. Jennifer Thornton, Mr. Neale Bergman, and Ms. Kimberley Claman (all from the US Department of State).

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<sup>3</sup> See the Respondent's web-site:  
[http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&Itemid=63)

<sup>4</sup> See ICSID's web-site: <http://icsid.worldbank.org>.

48. At the end of the Oral Hearing, the Parties confirmed that (i) the deadline for issuing this decision should be extended to 2 August 2010, as an “extraordinary cause” pursuant to CAFTA Article 10.20.5 [D2. 459 & 461] and (ii) that the decision could be first issued in the English version, with the Spanish version to follow at a later date [D2. 472].
49. *Post-Hearing:* The Tribunal made arrangements for the submission of written comments by CAFTA Contracting States (other than the Respondent) pursuant to CAFTA Article 10.20.2; and it also made separate arrangements for third persons to apply to the Tribunal for permission to make written submissions as *amici curiae* pursuant to CAFTA Article 10.20.3 and ICSID Arbitration Rule 37(2).
50. As regards *amici curiae*, the Tribunal made and publicised the following procedural order on 10 June 2010:

*“In accordance with Article 10.20.3 of the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA-US) and ICSID Arbitration Rule 37(2), the Tribunal invites any person or entity that is not a Disputing Party in these arbitration proceedings or a Contracting Party to DR-CAFTA-US to make a written application to the Tribunal for permission to file submissions as an amicus curiae.*

*All such written applications should:*

- (1) be emailed to ICSID at icsidsecretariat@worldbank.org by Wednesday, 16 June 2010;*
- (2) in no case exceed 20 pages in all (including the appendix described below);*
- (3) be made in one of the languages of these proceedings, i.e. English or Spanish;*
- (4) be dated and signed by the person or by an authorized signatory for the entity making the application verifying its contents, with address and other contact details;*
- (5) describe the identity and background of the applicant, the nature of any membership if it is an organization and the nature of any relationships to the Disputing Parties and any Contracting Party;*

*(6) disclose whether the applicant has received, directly or indirectly, any financial or other material support from any Disputing Party, Contracting Party or from any person connected with the subject-matter of these arbitration proceedings;*

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

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

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

*Pursuant to CAFTA Article 10.21.2, a webcast of the oral hearing on preliminary objections held on 31 May and 1 June 2010, is available at the Centre's website.”*

51. No such submissions were received under CAFTA Article 10.20(2); and no applications were received by the Tribunal pursuant to its order made under CAFTA Article 10.20(3) and ICSID Arbitration Rule 37(2).

***F: Relief Claimed by the Parties***

52. *The Claimant:* The Claimants' formal prayer for relief from the Tribunal is set out in the Notice of Arbitration (paragraph 128, pages 53-54), there stated to be without prejudice to the Claimant's rights to amend, supplement or restate such relief in these arbitration proceedings:

*“(1) Declare that El Salvador has breached the terms of CAFTA and of the Salvadoran Investment Law.*

*(2) Award compensation in excess of US \$77 million for out-of-pocket expenses incurred in connection with mineral exploration activities upon the Exploration Licenses and associated rights and obligations, including real estate, materials, equipment, labor, and attorneys' fees and costs.*

*(3) Award a sum in compensation to be proven in the arbitration for losses sustained as a result of PRC and the Enterprises being deprived of their investment and property rights pursuant to CAFTA, the Exploration Licenses, and Salvadoran law, including, inter alia, the right to complete exploration activities at all sites subject to their control, the right to obtain exploitation concessions for those same sites, the right to develop the valuable minerals discovered, reasonable lost profits, and indirect losses; while this sum has not yet been quantified, it is far in excess of the amount of expenditures made by PRC and the Enterprises.*

*(4) Award costs associated with any proceedings undertaken in connection with this arbitration, including all professional fees and costs.*

*(5) Award pre- and post- award interest at a rate to be fixed by the tribunal.*

*(6) Grant such other relief as counsel may advise and that the Tribunal may deem appropriate.”*

53. *The Respondent:* The Respondent stated the relief currently sought from the Tribunal first in its Preliminary Objections and lastly at the end of the Oral Hearing.

54. As set out in its Preliminary Objections (paragraph 125), the Respondent requests from the Tribunal the following relief:

*(1) “Suspend the proceedings on the merits while these preliminary objections are pending, with the exception of the issues on the merits raised in these preliminary objections” [Suspension was ordered by the Tribunal: see above]*

*(2) “Dismiss all claims in this arbitration related to Pacific Rim El Salvador’s application for a mining exploitation concession in the El Dorado project.”*

*(3) “Dismiss all claims in this arbitration related to the exploration license for the Santa Rita project.”*

*(4) “Dismiss all claims related to allegations of violations of CAFTA Articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), and 10.16.1(b)(i)(B).”*

*(5) “Declare that the Tribunal does not have competence to decide Claimant’s claims under the Investment Law of El Salvador and, as a*

*consequence, dismiss all claims under the Investment Law and any other domestic law of El Salvador.”*

(6) “*Issue an order awarding the Republic of El Salvador its share of the arbitration costs and its attorney’s fees incurred related to these objections, plus interest from the time of the decision until payment is made, at a rate to be established at the appropriate time.*”

(7) “*Grant the [Respondent] any other remedy that the Tribunal considers proper.*”

55. At the end of the Oral Hearing, the Respondent set out the relief it currently seeks in the Tribunal’s decision on its Preliminary Objections, as follows:

(1) “*With respect to Claimant’s claims concerning an application for El Dorado exploitation concession the Tribunal finds that, as a matter of law, Claimant’s claims are not claims for which an award in favor of Claimant may be made. Therefore, Claimant’s claims are dismissed;*”

(2) “*With respect to Claimant’s claims concerning alleged breaches of the Santa Rita exploration license the Tribunal finds that, as a matter of law, Claimant’s claims are not claims for which an award in favor of Claimant may be made. Therefore, Claimant’s claims are dismissed;*”

(3) “*With respect to Claimant’s alleged breaches of CAFTA Articles 10.3 National Treatment and 10.4 Most-Favored-Nation Treatment the Tribunal finds that, as a matter of law, Claimant’s claims are not claims for which an award in favor of Claimant may be made. Therefore, Claimant’s claims are dismissed;*”

(4) “*With respect to Claimant’s alleged breaches of investment authorizations the Tribunal finds that, as a matter of law, Claimant’s claims are not claims for which an award in favor of Claimant may be made. Therefore, Claimant’s claims are dismissed;*”

(5) “*Claimant has expressly waived its right to initiate an arbitration proceeding under the dispute settlement provision of the Investment Law of El Salvador for the same measures alleged to constitute breaches of CAFTA. In view of the terms of the Claimant’s express waiver, the Tribunal finds that it has no competence to entertain such a proceeding and/or hear any claims arising thereon. Therefore, Claimant’s claims that have been raised by invoking jurisdiction under the Investment Law of El Salvador are dismissed.*”

(6) “As to costs, in view of all the above findings, and pursuant to CAFTA Article 10.20.6, the Claimant is ordered to pay for all the costs and attorney’s fees incurred by both Parties in these Preliminary Objections. The Parties will submit to the Tribunal a statement of the costs and legal fees incurred in this arbitration as well as any other relevant circumstances that the parties consider relevant for the Tribunal’s consideration.”

## **PART II: THE RELEVANT ISSUES**

56. ***Introduction:*** This is a complex, controversial and important case. It appears to have engendered substantial controversy and widespread disquiet, not limited to the Claimant and the Respondent. By this decision, the Tribunal addresses only the limited procedural issues raised by the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5. As will appear below, the Tribunal does not otherwise address any other procedural issues or any of the merits, particularly whether or not any of the Claimant's pleaded claims are well-founded in law or fact. Apart from the Tribunal's decision on these limited issues under CAFTA Articles 10.20.4 and 10.20.5, it should not be assumed that the Tribunal has made any decision on the merits of any of the Claimant's claims or on any of the Respondent's several responses (pledged or unpledged), both as to the merits or otherwise.
57. In making this decision, the Tribunal has considered all the written and oral submissions of the Parties. In order to explain the grounds for the Tribunal's decision, it is necessary below to cite or summarise a certain number of these submissions at some length, but not all of them. The fact that a submission is not cited or summarised below does not signify that it was not considered by the Tribunal.
58. ***The Respondent's Preliminary Objections:*** As already indicated in Part I above, the Respondent filed Preliminary Objections pursuant to CAFTA's expedited procedure in CAFTA Articles 10.20.4 and 10.20.5 to request the dismissal by the Tribunal of the Claimant's claims relating to the application for a mining exploitation concession in El Dorado, as well as the dismissal of the Claimant's other CAFTA claims and the dismissal of all the Claimant's non-CAFTA claims in these ICSID arbitration proceedings, together with an order for costs against the Claimant.
59. The Claimant disputes each of the Respondent's Preliminary Objections and requests a decision from the Tribunal dismissing them all, together with an order for costs against the Respondent.

60. It is convenient here to summarise briefly each of the Respondent's Preliminary Objections, before returning to them more fully later below *seriatim*, together with the Claimant's responses. (This summary reflects the submissions advanced by the respondent and does not reflect the views of the Tribunal).
61. *The El Dorado Claim:* The Claimant's principal claim relates to El Dorado. As regards this claim, the Respondent submits that the Claimant has failed to discharge its burden with regard to PRES' alleged entitlement to such a concession on two specific grounds. First, contrary to the Claimant's suggestion, there is no automatic right to a concession under Salvadoran law. Second, instead of pleading the required factual bases in its Notice of Arbitration, the Claimant merely asserts a legal conclusion that PRES has purportedly "perfected" a legal right to an exploitation concession, subject only to the Government's failure to approve an Environmental Impact Study and issue an Environmental Permit. The Respondent contends that the Claimant has therefore failed to plead essential facts to demonstrate that PRES complied with, as the Claimant admits, the "plain and explicit" requirements under Salvadoran law which must be satisfied before a company may seek, still less obtain, a mining exploitation concession from the Respondent.
62. The Claimant's failure to plead the necessary facts, so the Respondent contends, follows from PRES' failure to comply with those legal requirements, as demonstrated by the "undisputed facts" evident from the Claimant's own documents. Thus, even if the Respondent's Government were to approve the Environmental Impact Study and grant the necessary Environmental Permit, the "undisputed facts" show that PRES would still not have any legal right to obtain the exploitation concession. In short, even assuming as true all of the Claimant's factual allegations regarding the Environmental Permit, the alleged actions or inactions of the Respondent's Government can have caused the Claimant no legal harm.
63. The Respondent submits that the El Dorado claim, as pleaded by the Claimant, must therefore fail. The Respondent concludes that all claims by the Claimant relating to El

Dorado are not claims “for which an award in favour of the Claimant may be made” within the meaning of CAFTA Articles 10.20.4 and 10.26.

64. *Other CAFTA Claims:* As regards the Claimant’s other CAFTA claims relating to the exploration licenses granted to the two Enterprises, the Respondent seeks the dismissal of all claims related to the Santa Rita exploration licence. The Claimant has similarly failed to plead the factual or legal basis to bring any claim related to the Santa Rita exploration licence; and, in any event, the Claimant has already lost any rights it may have had to renew the Santa Rita exploration licence when PRES failed to seek the renewal of the exploration license on the requisite timely basis. The Respondent also seeks the dismissal of other secondary CAFTA claims for which the Claimant has not provided a factual basis, pursuant to CAFTA Articles 10.20.4 and 10.26.
65. *Non-CAFTA Claims:* The Respondent likewise seeks the dismissal of all non-CAFTA claims advanced by the Claimant on the ground that the Claimant has violated CAFTA’s exclusivity clause and its own express waiver by introducing claims under the Investment Law that are based on the same measures which the Claimant alleges are breaches of CAFTA, pursuant to CAFTA Article 10.20.5.
66. *Reservation:* As already noted above, the filing of preliminary objections under CAFTA Articles 10.20.4 and 10.20.5 was not intended by the Respondent to signify that the Respondent accepted the jurisdiction of ICSID or the competence of the Tribunal to decide the merits of the Parties’ dispute. The Respondent recorded in its Preliminary Objections (paragraph 7) that if the Claimant were to continue with these arbitration proceedings beyond the stage of the Tribunal’s decision on the Respondent’s Preliminary Objections, the Respondent reserved the right to object to the jurisdiction of the Centre and the competence of the Tribunal regarding any remaining claims, pursuant to CAFTA Article 10.20.4(d), the ICSID Convention and the ICSID Arbitration Rules.

### **PART III: THE RELEVANT LEGAL TEXTS**

67. **Introduction:** It is convenient to set out here, in full, the relevant provisions of CAFTA Section B: Investor-State Dispute Settlement, to which subsequent reference is made later in this decision; namely CAFTA Articles 10.16, 10.18, 10.20.4, 10.20.5 and 10.22.

68. CAFTA Article 10.16: Submission of a Claim to Arbitration

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

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

(i) *that the respondent has breached*

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

(B) *an investment authorization, or*

(C) *an investment agreement*

*and*

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

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

(i) *that the respondent has breached*

(A) *an obligation under Section A,*

(B) *an investment authorization, or*

(C) *an investment agreement;*

*and*

- (iii) *that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.*
2. *At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:*
- (a) *the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;*
  - (b) *for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*
  - (c) *the legal and factual basis for each claim; and*
  - (d) *the relief sought and the approximate amount of damages claimed.*
3. *Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:*
- (a) *under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;*
  - (b) *under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or*
  - (c) *under the UNCITRAL Arbitration Rules.*
4. *A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (“notice of arbitration”):*
- (a) *referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;*

- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General; or
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent.

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

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

....

## 69. CAFTA Article 10.18: Conditions and Limitations on Consent of Each Party

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

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

- (a) *the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and*
- (b) *the notice of arbitration is accompanied,*
  - (i) *for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and*
  - (ii) *for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers*

*of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute*

*settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.*

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

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

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

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

## 70. CAFTA Articles 10.20.4 & 10.20.5: Conduct of the Arbitration

....

4. *Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.*

- (a) *Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).*

- (b) *On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.*
- (c) *In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.*
- (d) *The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.*

5. *In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.*

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

## 71. CAFTA Article 10.22: Governing Law

1. *Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the*

*issues in dispute in accordance with this Agreement and applicable rules of international law.*

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

- (a) *the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree; or*
- (b) *if the rules of law have not been specified or otherwise agreed:*
  - (i) *the law of the respondent, including its rules on the conflict of laws; and*
  - (ii) *such rules of international law as may be applicable.*

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

## **PART IV: THE RELEVANT FACTUAL ALLEGATIONS**

### **A: Introduction**

72. Given the terms and effect of CAFTA Article 10.20.4(c), cited in Part III above, it is necessary for present purposes to bear carefully in mind the factual allegations made by the Claimant in its Notice of Arbitration.
73. These are, at this stage, only allegations pleaded by the Claimant; each material allegation is denied or expressly not admitted by the Respondent; and the Tribunal cannot here address, under CAFTA Article 10.20.4(c), whether or not any of these disputed allegations are or could be established or negated by actual evidence.
74. Moreover, given the significance of the Claimant's pleading allegedly supporting its factual case, it is necessary here to cite at length part of the Claimant's Notice of Arbitration (with its own footnotes). For obvious reasons, it would here be wholly inappropriate for the Tribunal to seek to summarise these factual allegations in its own words.

### **B: The Claimant's Notice of Arbitration**

75. The following numbered paragraphs 26 to 81 are taken *verbatim* from the Claimant's Notice of Arbitration, ostensibly as the Claimant's pleaded "Factual Bases for the Claim" relevant to CAFTA Article 10.20.4:

26. *"The Claimant's and Enterprises' claims arise out of El Salvador's arbitrary and discriminatory conduct, lack of transparency, and unfair and inequitable treatment in failing to act upon the Enterprises' applications for a mining exploitation concession and for various environmental permits following PRC's discovery of valuable deposits of gold and silver under exploration licenses granted by MINEC, as well as El Salvador's failure to protect Claimant's investments in accordance with the provisions of its own law, and its expropriation of Claimant's and the Enterprises' investments. The relevant factual background underlying these claims is summarized below.*

A. *Overview of the Legal Framework for Mining in El Salvador*  
27. *In 1996, El Salvador enacted a new and modern Ley de Minería (“Mining Law”).<sup>5</sup> It replaced an antiquated mining law that had been in place since 1922. The new law was born of the Government’s stated desire to attract increased investment in - and increased exploration and extraction of - the country’s natural minerals. The Preamble of the 1996 Mining Law explicitly states that the law was enacted as a result of the obsolescence of the Mining Code of 1922, and the need to adopt new legal rules for modern times. Thus, according to its Preamble, the 1996 Mining Law was designed to “promote the exploration and exploitation of mining resources by means of the application of modern techniques allowing an integral use of the minerals,”<sup>6</sup> Moreover, the same Preamble acknowledged the paramount importance of modern legislation, which would be desirable to mining investors and promote the social and economic development of the areas where the minerals might be located.<sup>7</sup>*

28. *Pursuant to the Mining Law’s corresponding regulations (“Mining Law Regulations”),<sup>8</sup> MINEC is the authority charged with regulating all mining activity within El Salvador. All mining companies, whether local or foreign, must apply to MINEC in order to receive a license to explore for precious metals in a specific area, and subsequently for an exploitation concession once precious metal deposits are confirmed.*

## 1. MINEC Licensing Requirements

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<sup>5</sup> See Legislative Decree No. 544 of December 14, 1995, published in the Official Diary No. 16, Book 330, of January 24, 1996. Until 1996, mining activities in El Salvador were governed by the *Código de Minería* of 1922 and the *Ley Complementaria de Minería* of 1953. The Mining Law was amended in 2001. Legislative Decree No. 475 of July 11, 2001, published in the Official Diary No. 144, Book 352, of July 31, 2001. The Mining Law has not been modified since then.

<sup>6</sup> *Id.*, Preamble (emphasis added). The original Spanish text of the second preambulatory clause reads: “Que el Código de Minería fue emitido por Decreto Legislativo sin número, de fecha 17 de mayo de 1922, publicado en el Diario Oficial N° 183, Torno 93, del 17 de agosto de ese mismo año, resultando a la fecha obsoletas sus disposiciones, lo que hace necesario emitir normas que además de ser acordes a la época actual, promuevan la exploración y explotación de los recursos mineros mediante la aplicación de sistemas modernos que permitan el aprovechamiento integral de los minerales....”

<sup>7</sup> The original Spanish text of the third preambulatory clause reads: “Que es de primordial importancia que nuestro país cuente con un cuerpo normativo que armonice con los principios de una economía social de mercado, conveniente para los inversionistas del sector minero; a efecto de propiciar la creación de nuevas oportunidades de trabajo para los salvadoreños; promoviendo el Desarrollo Económico y Social de las regiones en donde se encuentran localizados los minerales, permitiendo de esta manera al Estado la percepción de ingresos tan necesarios para el cumplimiento de sus objetivos.”

<sup>8</sup> Contemporaneously with the Mining Law of 1996, the President of El Salvador enacted the Regulations to the Mining Law, with the purpose of developing the application of the newly-adopted legal rules and defining several technical terms contained therein. *See* Executive Decree No. 68 of July 19, 1996, published in the Official Diary No. 144, Book 332, of August 8, 1996. The Mining Law Regulation was modified in 2003. *See* Executive Decree No. 47 of June 20, 2003, published in the Official Diary No. 125, Book 360, of July 8, 2003.

29. Article 9 of the Mining Law provides that only those applicants that demonstrate the technical and financial ability to develop mining projects can obtain mining rights.

30. Exploration licenses are granted by resolution issued by MINEC's Dirección de Hidrocarburos, y Minas ("Department of Mines").<sup>9</sup> The applicant seeking an exploration license must file an application with the Department of Mines, enclosing certain requirements, which include a technical exploration program, evidence of the applicant's technical and financial ability, and experience in mining activities.<sup>10</sup> Once an application is filed, the Department of Mines performs a physical inspection of the proposed exploration area.<sup>11</sup> Upon completing this inspection and evaluating the application, the Department of Mines must issue a resolution that either grants or denies the exploration license.<sup>12</sup>

31. If an exploration license is granted, the Mining Law imposes a number of obligations on the licensee. Specifically, Article 22 of the Mining Law sets out the obligations of an exploration licensee to demonstrate the extent of its investment activities to MINEC in detail. For example, licensees are required to: (a) comply with a technical program for exploration activities approved by the Department of Mines;<sup>13</sup> (b) demonstrate on an annual basis to the Department of Mines the activities and investments that were undertaken by the licensee pursuant to the technical program; (c) file annual reports describing, *inter alia*, the nature of the minerals being explored, the nature and extent of the licensees' exploration efforts, the results of those efforts, the corresponding expenses incurred, and plans for future explorations;<sup>14</sup> and (d) pay the annual license fee. In short, licensees must undertake and maintain substantial exploration activities, in compliance with the requirements of the Mining Law, in order to preserve their right to continue to explore. A licensee cannot simply "sit on its rights" to develop a claim merely by paying a license fee.

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<sup>9</sup> Article 13. Pursuant to this provision, the Mining Law instructed the Department of Mines to establish "special areas of mining interest."

<sup>10</sup> Mining Law, Article 37.

<sup>11</sup> Mining Law, Article 38.

<sup>12</sup> Mining Law, Article 39.

<sup>13</sup> Pursuant to Article 37 of the Mining Law, an applicant interested in an exploration license must provide, *inter alia*, a technical program of exploration, which shall include the intended mining activities and the minimum investment amount for each activity.

<sup>14</sup> The last annual report must include the estimate mineral reserves and the model for exploration of the deposits. In addition to these requirements, Article 17 of the Mining Law Regulation establishes that the annual report must include a summary of the works performed by the licensee and the total investment amount.

*32. While the Mining Law imposes detailed obligations on exploration licensees, it also extends to them significant rights and assurances. In particular, the Mining Law establishes a two-phase framework applicable to mining extraction activities. Article 23 of the Mining Law provides in relevant part:*

*Once the exploration is concluded and the existence of economic mining potential on the authorized area is proved, the granting of the Concession for the exploitation and utilization of minerals shall be requested; which Concession will be verified through an Accord with the Ministry, followed by the granting of a Contract between the Ministry and the Holder, for a thirty (30) year term, which may be extended if the interested party requests it, if in the judgment of the Department [of Mines] and the Ministry, the requisites established by this Law are fulfilled.<sup>15</sup>*

*33. As already set out above, during the mineral exploration phase, licensees are required to make substantial investments while also assuming significant risk. In accordance with the regime established by the Mining Law, the exploration phase may last up to eight years,<sup>16</sup> during which time the mining company expends significant capital in its attempt to locate and develop mineable deposits of minerals.*

*34. Therefore, under the two-phase framework, a licensee who completes the exploration phase is entitled to proceed to the mineral extraction or “exploitation” phase - without which all of the investment and effort devoted to the exploration phase would be wasted. Once the exploration phase is concluded and the licensee has determined that there is “economical mining potential” at a site, the licensee has the right to request an exploitation concession for the purpose of mineral extraction in order to protect its exclusive rights over the license area.<sup>17</sup> Moreover, the Government is required to grant the licensee an exploitation concession once the exploration phase is concluded, the existence of mineable deposits has been demonstrated, and the licensee has both filed*

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<sup>15</sup> Mining Law, Article 23. The original Spanish text reads: “Concluida la exploración y comprobada la existencia del potencial minero económico en el área autorizada, se solicitará el otorgamiento de la Concesión para la explotación y aprovechamiento de los minerales; la cual se verificará mediante Acuerdo del Ministerio seguido del otorgamiento de un contrato suscrito entre éste y el Titular por un plazo de treinta años, el cual podrá prorrogarse a solicitud del interesado, siempre que a juicio del Ministerio cumpla con los requisitos que la Ley establece.”

<sup>16</sup> Mining Law, Article 19. Exploration licenses are granted for an initial period of four years, which can be extended by the Department of Mines for periods of two years, up to a maximum of eight years.

<sup>17</sup> Mining Law, Article 23.

*the application provided in Article 36 of the Mining Law and enclosed the documents described below.<sup>18</sup>*

*35. For purposes of submitting an application to receive an exploitation concession, the pertinent documents provided by the law to be attached to a concession application are set out in Article 37 of the Mining Law. These documents include presentation of:*

- ◊ *A description of the area for which the concession is requested;*
- ◊ *A showing that the licensee owns or is authorized to use the real estate property where the mine project is located;*
- ◊ *The relevant Permiso Ambiental<sup>19</sup> (“Permit”) issued by MARN and accompanied by a copy of the corresponding Estudio de Impacto Ambiental<sup>20</sup> (“EIA”);*
- ◊ *An Estudio de Factibilidad Técnico Económico (“Feasibility Study”); and*
- ◊ *A five-year Program a de Explotación (“Development Plan”).*

*36. In addition to the requirements of the Mining Law, Article 18 of the Mining Law Regulation requires that the applicant for the exploitation concession submit a summary of the proposed work and investment to be made during the initial exploitation phase.*

*37. In accordance with Article 38 of the Mining Law, as well as applicable principles of Salvadoran administrative law, if a qualified licensee fails to comply with any of these requirements for presentation of a concession application, MINEC must grant the licensee a reasonable period to cure. However, the licensee does not lose its right to obtain the exploitation concession because of such a failure; that right is perfected upon the discovery and demonstration of the existence of mineable ore deposits in the license area in accordance with Article 23. Indeed, the Mining Law makes it clear that the right to develop a mine constitutes a property right, subject to all the protections of the Salvadoran Constitution and other applicable laws.<sup>21</sup>*

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<sup>18</sup> Mining Law, Articles 23, 36 and 37.

<sup>19</sup> Environmental Permit.

<sup>20</sup> Environmental Impact Study.

<sup>21</sup> Mining Law, Article 10 (concessions are deemed property rights (*bienes inmuebles*) and can be the subject matter of security interests); Mining Law, Article 11 (constructions and equipment become accessories to exploration or exploitation rights); Mining Law, Article 14 (mining rights can transferred as other property rights); Mining Law,

*38. Under the legal framework established by the Mining Law, the mining company assumes the great risks inherent in the exploration phase. However, it undertakes those risks with the expectation that, if it is able to prove that a discovery of a valuable mineral deposit has been made and otherwise complies with the requirements of the Mining Law, it will be able to obtain an exploitation concession. Without that expectation, no one would undertake exploration. Only during the exploitation phase can a mining company extract metal from the land and begin to generate a return on the substantial upfront investment it has made during the exploration phase. Receiving an exploitation concession after demonstrating that the discovery of a valuable mineral deposit has been made and otherwise complying with the requirements of the Mining Law represents the benefit to be derived from the large expense incurred by a mining licensee during the exploration phase. In short, the promise of an exploitation concession is the reason why companies undertake their investments in the first place.*

*39. To be sure, the mining company undertakes the risk that the mine will not be viable for valid technical or engineering reasons. But the mining company does not undertake the risk that the Government will arbitrarily or capriciously either deny the company its right to proceed to the exploitation phase, or, as in this case, destroy its investment simply by failing to act once the company has successfully completed the exploration phase and complied with all of the legal requirements to obtain an exploitation concession.*

## *2. MARN's Environmental Permit Process*

*40. As indicated above, Article 37 of the Mining Law requires that the applicant for an exploitation concession attach an environmental permit to its application. In addition, pursuant to Articles 19 and 82 of the Ley del Medio Ambiente ("Environmental Law"),<sup>22</sup> an entity seeking to engage in mining exploration or exploitation must apply to MARN for an environmental permit before undertaking those activities.*

*41. The administrative procedure to obtain an environmental permit is detailed in Article 19 of the Regulations to the Environmental Law (the "Environmental Law Regulations").<sup>23</sup> In order to obtain the required*

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Article 49 (exploration licenses and exploitation concession subject to public registration as other property rights); Mining Law, Article 54 (mining rights create servitudes affecting third parties' property rights, in favor of titleholders of licenses or concessions).

<sup>22</sup> See Legislative Decree No. 233 of March 2, 1998, published in the Official Diary No. 79, Book 339, of April 5, 1998.

<sup>23</sup> See Executive Decree No. 17 of March 21, 2000, published in the Official Diary No. 73, Book 347, of December 4, 2000.

*environmental permit, the company must initially file an environmental form containing the preliminary information requested by MARN.<sup>24</sup> Once it has received the form, MARN issues the terms of reference for the preparation of a “multidisciplinary” EIA.<sup>25</sup> The EIA then filed by the applicant is subject, first, to a technical review by MARN, second, to public comment,<sup>26</sup> and, third, to a report on the public comments to be issued by MARN. MARN is only authorized to provide a single set of observations on the EIA during the process. Once the applicant has responded to these observations, MARN is authorized to provide further comments only in relation to new facts or information that the applicant may have provided in its responses.<sup>27</sup> In turn, if the applicant cannot adequately respond to these further comments, the permit may be denied.<sup>28</sup> If the applicant does respond adequately, the permit will be granted.<sup>29</sup> In any case, the permit must be either granted or denied within sixty (60) working days of submission of the original EIA.<sup>30</sup>*

42. *As discussed below, the Enterprises complied strictly with all of the requirements imposed on them under the Mining Law and its regulations, the Environmental Law and its Regulations, and all other applicable law to obtain the requisite exploration and exploitation environmental permits.*

#### *B. Pacific Rim Invests in El Salvador*

43. *In consideration of and reliance on the legal framework set forth above, in April 2002, Pacific Rim set its sights on investing in El Salvador by merging with Dayton Mining Corporation (“Dayton”), a Canadian mining company that had been operating in El Salvador on its own or through affiliated companies since 1993. In particular, Dayton had two exploration licenses: one for El Dorado Norte, and one for El Dorado Sur.<sup>31</sup>*

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<sup>24</sup> Environmental Law, Article 22; Environmental Law Regulations, Articles 20 and 21.

<sup>25</sup> Environmental Law, Article 23; Environmental Law Regulations, Article 19.

<sup>26</sup> Pursuant to Articles 25 of the Mining Law and 32 of the Environmental Law Regulations, the EIA must be published in a national newspaper and be presented before the local communities potentially affected by the project.

<sup>27</sup> Environmental Law, Article 33.

<sup>28</sup> *Id.*

<sup>29</sup> Environmental Law, Article 29; Environmental Law Regulations, Article 34. Once MARN has issued a resolution approving the EIA, the applicant is required to deposit an environmental compliance bond. Upon the bond being deposited, MARN must issue the environmental permit.

<sup>30</sup> Environmental Law, Article 24; Environmental Law Regulations, Article 34. This period can be extended for sixty (60) additional business days in the case of “complex” applications.

<sup>31</sup> The original titleholder of the El Dorado exploration area was the New York and El Salvador Mining Company, Inc., which sold its license to explore the area to Kinross El Salvador, Sociedad Anónima de Capital Variable (“Kinross-ES”) in 1993. Kinross-ES was wholly owned by Mirage Resource Corporation, which merged with

*44. Because of El Salvador's unique geological features, it was and is an ideal location for an environmentally responsible mining company such as Pacific Rim. In particular, El Salvador is a country dominated by "low sulfidation" geological systems, which allow for non-acid-generating precious metals recovery, and therefore for mining with minimal environmental impacts. In addition, the high-grade, vein-type precious metal deposits found in El Salvador, and specifically in the area of Las Cabañas, are suitable for underground mine development, which has a significantly reduced impact on the environment and community surrounding the mine site as compared to "open-pit" mines.*

*45. In connection with its due diligence for the Dayton merger, Pacific Rim of course studied and relied upon the new Mining Law and Mining Regulations that had been enacted in 1996, as well as the 2001 amendments. While those amendments - which extended the number of years for which exploration licenses could be granted - were under review, on June 28, 2001, the Government issued Decree No. 456.<sup>32</sup> This decree extended the validity of all exploration licenses due to expire in 2001 until the end of the year, in order to allow the Legislative Assembly sufficient time to promulgate the amendments to the Mining Law that were necessary to allow for further extensions of the relevant licenses. Significantly, the Preamble to Decree No. 456 stated that the reasons for the "emergency" extension of the exploration licenses included the "great importance [of mining activity] to the economy of the country; as it generates investments by national and foreign companies, contributing in this way to the creation of jobs and development in the areas where these activities are made.<sup>33</sup> Moreover, the decree acknowledged that the expiration of the exploration licenses would cause "great prejudice" to the investors in light of the investments that they had made in pursuit of their exploration activities.<sup>34</sup>*

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Dayton Acquisitions Inc, a wholly owned subsidiary of Dayton Mining Corp., in April 2000. In 1996, in accordance with the new mining legislation that had been introduced that year, the Government confirmed Kinross-ES's exploration rights over the area for a period of three years, pursuant to Resolution No.1, dated July 10, 1996, and Resolution No.2, dated July 23, 1996. By means of those same resolutions, MINEC divided the El Dorado exploration area into two separate claim areas, denominated "El Dorado Norte" and El Dorado Sur." The Government then twice renewed these licenses, granting a second two-year extension via resolutions dated December 10, 2001.

<sup>32</sup> Legislative Decree No. 456 of June 28, 2001, published in the Official Diary No. 130, Book No. 352, of July 11, 2001.

<sup>33</sup> The original Spanish text of Decree No.456 states, in relevant part: "Que la actividad minera es de mucha importancia para la economía del país; ya que genera inversiones de empresas nacionales y extranjeras, contribuyendo de esta manera a la generación de empleo y desarrollo en las áreas donde éstas se efectúan ..."

<sup>34</sup> The original Spanish text of the Preamble Decree No. 456 states, in relevant part: I. Que la actividad minera es de mucha importancia para la economía del país; ya que genera inversiones de empresas nacionales y extranjeras, contribuyendo de esta manera a la generación de empleo y desarrollo de las áreas donde éstas se efectúan; ... III. Que las empresas antes mencionadas han realizado inversiones millonarias para llevar a cabo tal actividad, por lo

*46. In addition to relying on the country's specific promotion of the mining sector, Pacific Rim was impressed by the pro-foreign investment legal framework that recently had been introduced and that was actively being promoted by EI Salvador during the same time frame. In 1999, for example, the Government had adopted a new Investment Law, which, inter alia, granted equal conditions for national and foreign companies,<sup>35</sup> and prohibited the Government from expropriating foreigners' property without compensation.<sup>36</sup> Indeed, the purported aim of this law was to avoid the application of any unjustified or discriminatory measures that could impede the normal activities of foreign investors. Paragraph IV of the Preamble to the Investment Law specifically states:*

*That to increase the level of foreign investment in the country, an appropriate legal framework should be established that contains clear and precise rules in accordance with best practices in this area, enabling the country to compete internationally in the effort to attract new investment . . .<sup>37</sup>*

*47. Furthermore, in 2000, the Government founded the Agenda de Promoción de Inversión de El Salvador ("PROESA").<sup>38</sup> The specific aim of PROESA is to generate employment, transfer technology, and aid the country's development process through the attraction of foreign investment to Salvadoran industries. And in that same time period, El Salvador had signed or ratified various bilateral and multilateral*

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que, la circunstancia antes señalada les causaría grandes perjuicios, en razón de que actualmente existe depresión en los precios en los precios internacionales del oro, dificultándose la captación de capital.

<sup>35</sup> Investment Law, Legislative Decree No. 732, 1999, Article 5 (El Sal.) ("Foreign investors and the commercial companies in which they participate, shall enjoy the same rights and be bound by the same responsibilities as local investors and partnerships, with no exceptions other than those established by law, and no unjustified or discriminatory measures which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of their investments, shall be applied to them."). The original Spanish text states: "Los inversionistas extranjeros y las sociedades mercantiles en las que estos participen, tendrán los mismos derechos y obligaciones que los inversionistas y sociedades nacionales, sin más excepciones que las señaladas por la ley, sin que puedan aplicárseles medidas injustificadas o discriminatorias que obstaculicen el establecimiento, administración, uso, usufructo, extensión, venta y liquidación de sus inversiones."

<sup>36</sup> Investment Law, Article 8 (El Sal.) ("According to the Constitution of the Republic, expropriation shall proceed, due to legally established cause of public need or social interest, prior advance payment of fair indemnity..."). The original Spanish text of Article 8 states: "De conformidad a lo establecido en la Constitución de la República, la expropiación procederá por causa de utilidad pública o de interés social, legalmente comprobados, previa una justa indemnización...."

<sup>37</sup> The original Spanish text states: "Que para incrementar el nivel de inversiones extranjeras en el país, debe establecerse un marco legal apropiado que contenga reglas claras y precisas, de acuerdo a las mejores prácticas en esta materia, que le permita competir internacionalmente en el esfuerzo de atraer inversiones nuevas."

<sup>38</sup> National Investment Promotion Agency of EI Salvador. See PROESA Home Page, <http://www.proesa.com.sv> (last visited April 27, 2009).

*investment protection and promotion treaties aimed at further assuring the rights of foreign investors in the country. Thus, between 1995 and 2002, El Salvador undertook a number of actions specifically aimed at increasing foreign investment flows and securing the rights of foreign investors.*

48. *In addition to the financial, legal, scientific, technical, and operational due diligence that is customarily completed in merger and acquisition transactions such as the one undertaken by Pacific Rim, the company's senior management also held due diligence meetings with the Government. In the course of these meetings, Pacific Rim's representatives received assurances from the Ministers of both MINEC and MARN that the mineral rights in the El Dorado license areas had been legally acquired and properly administered under the relevant laws. In particular, high-level officials from MINEC's Department of Mines gave their assurances that the company's local operating subsidiary (which, at the time, was called Kinross-ES) would be granted an exploitation concession upon confirming the commercial mining potential of the El Dorado exploration site.*

49. *Assured by its due diligence into the legal, economic, political, and technical aspects of the Salvadoran mining claims, in April 2002, Pacific Rim consummated its merger with Dayton and thereby acquired the assets of Dayton in El Salvador, Chile, and the United States. As a result of the transaction, Pacific Rim became the owner of Kinross-ES, Dayton's wholly owned Salvadoran operating authority, and of Kinross-ES' mineral exploration rights in various license areas in El Salvador. Of principal importance among these areas (as noted above) were two contiguous license areas known as "El Dorado Norte" and "El Dorado Sur," located in the administrative department of Cabañas.*

50. *In January 2003, Kinross-ES was renamed "Pacific Rim El Salvador" (previously defined as "PRES"). PRES' mining rights in the El Dorado Sur and El Dorado Norte license areas were acknowledged by the Government of El Salvador in Resolutions No. 181, dated December 5, 2003, and No. 189, dated December 18, 2003. Resolutions 181 and 189 specifically modified all previous exploration licenses issued with respect to the El Dorado Norte and El Dorado Sur areas, recognizing PRES as the owner of all exploration rights in those areas.*

51. *On November 30, 2004, Pacific Rim vested sole ownership rights in PRES in its subsidiary, PRC. On August 11, 2005, MINEC's Oficina Nacional de Inversiones (previously defined as "ONI") acknowledged PRC's status as the new owner of PRES via Resolution No. 383-R.<sup>39</sup>*

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<sup>39</sup> See Resolution No. 383-R dated August 11, 2005, here attached as Exhibit 2. PRC's last updates of its registered investment in the Enterprises are here attached as composite Exhibit 3.

*52. In June 2005, PRC incorporated a second Salvadoran enterprise, DOREX, in order to acquire exploration rights over three additional license areas contiguous to, and partially overlapping with, the El Dorado Norte and El Dorado Sur license areas.<sup>40</sup> As stated above, these three areas are known as “Huacuco”, “Pueblos” and “Guaco” (collectively with El Dorado Norte and El Dorado Sur, the “El Dorado Project”).*

*53. Since 2002, Pacific Rim, PRC, and the Enterprises have spent many tens of millions of U.S. dollars in El Salvador on infrastructure, community development initiatives, and mineral exploration and development activities related to the El Dorado Project. Their activities in El Salvador have been undertaken in reliance on and with the reasonable investment-backed expectation of being able to engage in income-generating mine development pursuant to a legally authorized exploitation concession. To ensure their entitlement to such a concession, the Enterprises have complied at all times with the provisions of the Mining Law, the Environmental Law, and all other relevant Salvadoran laws. Their continued investment in El Salvador has been based on the Government’s express support for the Enterprises’ mining operations in the country.<sup>41</sup> As of this filing, Pacific Rim, PRC, and the Enterprises have invested in excess of US\$ 77 million in mining operations and related activities in El Salvador.*

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<sup>40</sup> As explained in greater detail below, when PRES sought an exploitation concession for El Dorado Norte and El Dorado Sur in 2004, MINEC explained that it could not approve a concession covering such a large area. The parties agreed to “carve out” the smaller areas of Huacuco, Pueblos, and Guaco, which would be the subject of a separate administrative process.

<sup>41</sup> In December 2003, for example, MINEC recognized PRES as the new holder of the El Dorado Norte and El Dorado Sur exploration licenses, and also granted PRES additional extensions to both exploration licenses via MINEC Resolutions Nos. 191 and 192. See composite Exhibit 4. Likewise, MARN granted the company environmental permits for exploration activities undertaken on the El Dorado Norte and El Dorado Sur license areas on June 15, 2004, by means of MARN Resolution No. 151-2004. See Exhibit 5.

A further example of the Government’s prior interest and willingness to allow and support PRC’s mining operations is shown by PRES’s experience with the Santa Rita exploration license. On July 8, 2005, MINEC granted an exploration license to PRES to search for minerals in Santa Rita, a mining claim near El Dorado. Accordingly, in September 2005, PRES applied to MARN to receive the environmental permit related to the exploration of the Santa Rita License. During this process, PRES filed an EIA and participated in the public consultation process as required by the Environmental Law. On May 30, 2006, MARN granted the requested environmental permit. These Government’s actions with respect to the initial development of Santa Rita strengthened PRC’s expectations that it would receive similar environmental permits for its other claims, including El Dorado.

Time would tell that the Santa Rita permit would be the last that PRC and the Enterprises would receive from the Government. Although PRES has received both the exploration license and environmental permit for Santa Rita, and has invested substantial resources in exploration activities, the Government’s recent actions and current attitude towards mining has made any further development of this claim area impossible. PRC’s claim includes its lost investments in connection with Santa Rita.

### *C. The El Dorado Exploitation Concession*

54. During 2002 and 2003, PRES<sup>42</sup> carried out significant exploration activities at the El Dorado site under valid exploration licenses. By early 2004, PRES had verified the substantial gold ore deposits at the El Dorado Norte and El Dorado Sur License areas. PRES immediately undertook the necessary steps to secure an exploitation concession from MINEC, and accordingly, in March 2004, filed an application with MARN for an environmental permit in order to be able to commence exploitation activities on those areas.

55. In furtherance of its application for the environmental permit, PRES prepared the required EIA for exploitation activities (the "Exploitation EIA") for submission to MARN. The Exploitation EIA was a thorough and detailed study, fully assessing the baseline environmental conditions and the projected environmental impacts of the mining and reclamation activities using best available operating practices and mitigation measures.

56. In a letter dated August 25, 2004, PRES received assurances from the Director of the Department of Mines, Ms. Gina Navas de Hernández, that the company's rights to solicit a concession over the El Dorado Norte and El Dorado Sur license areas would not be affected by any potential delay in receiving the environmental permit.<sup>43</sup>

57. In September 2004, PRES filed its Exploitation EIA with MARN. By December 2004, the company had not yet received a response to its EIA. Notwithstanding this lack of information, in order to comply with the requirements of the Mining Law - which mandates that a licensee apply for an exploitation concession upon termination of the exploration phase – and in reliance on MINEC's earlier representations that delays at MARN would not affect its application, PRES formally submitted its application for a mining exploitation concession to MINEC on December 22, 2004. Pursuant to preliminary discussions between PRES and MINEC, the concession application covered only a portion of the area previously covered by the El Dorado Norte and El Dorado Sur exploration licenses. Specifically, MINEC explained that it could not approve a concession covering such a large area. Accordingly, PRES and MINEC worked together to define an acceptable portion of the two license areas over which PRES could solicit an exploitation concession. The areas that were "carved out" of the original proposed concession areas were the Huacuco, Pueblos, and Guaco areas, where PRES had not

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<sup>42</sup> Previously known and doing business as Kinross-ES.

<sup>43</sup> See Exhibit 6.

*carried out significant exploration work, and for which DOREX later acquired exploration licenses.*

58. *In the meantime, in February 2005, MARN responded to the EIA that PRES had submitted in September 2004 with a series of observations. These observations were fully addressed by the company via a supplemental volume to the EIA, which PRES submitted to MARN in April 2005.*

59. *After receiving additional input from MARN, PRES submitted a final Exploitation EIA in September 2005, which addressed not only the comments provided by MARN in April, but also responses to further observations PRES received from MARN in August 2005.*

60. *In October 2005, in accordance with the Environmental Law and MARN's instructions, PRES published information related to the EIA in local newspapers in order to allow the public the opportunity to provide comments on the assessment. At the same time, PRES held public meetings with the local communities to present and explain the EIA. Then, in March 2006, MARN provided PRES with the observations to the EIA that had been submitted during this required public comment period.*

61. *In July 2006, MARN supplemented these observations with thirteen additional comments. Although the provision of these additional comments was not contemplated within the permitting process - which was supposed to conclude with the public comment period - PRES nevertheless provided detailed written responses to each of them. Thus, by September 2006, PRES filed a response to the public comments on the EIA, and in October, the company filed a response to MARN's additional thirteen comments.*

62. *Finally, in December 2006, PRES presented the Ministry with a plan for a state-of-the-art water treatment facility that the company proposed to build in order to treat any effluent from the mining and processing operations. This proposal, like the company's responses to MARN's additional thirteen comments, was not contemplated within the permitting process, but was rather provided upon the informal request of MARN.*

63. *With the submission of the water treatment facility proposal, PRES had addressed every observation and concern expressed by MARN (whether reasonable, substantiated, or otherwise) throughout the extended EIA review process. Indeed, since December 2006, MARN has not once expressed any concerns as to the adequacy of the company's EIA. It has likewise never expressed any doubt as to PRES's full compliance with all of the requirements of the permitting process. As*

*such, in accordance with Salvadoran law, PRES is entitled to receive an environmental permit for mining on the EI Dorado site.*

*64. From December 2006 through December 2008, however, MARN ceased all official communication with the company in regards to its application, notwithstanding the fact that Salvadoran law clearly stipulates that MARN must take definitive action on EIA submissions within 60 business days, and even under exceptional circumstances, within a maximum of 120 business days. Despite this requirement, MARN did not provide, and still has not provided, PRES with any justification for MARN's inexplicable silence. Indeed, on December 5, 2008, MARN requested that PRES provide information about the same water treatment plant that PRES had already submitted in December 2006.<sup>44</sup> As discussed below, it is now apparent that MARN's inaction had been directed from above, and specifically from the offices of President Saca.*

*65. As a result of the Government's inaction, PRES has been unable to obtain the exploitation concession to which it is legally entitled, and which it legitimately expected to receive upon complying with the requirements of the environmental permitting process. With the exception of the environmental permit that remains unjustifiably withheld by the government, PRES has met all of the requirements to receive the concession. Nevertheless, the company has been unable to develop any mining activities in EI Salvador over the last two years.*

#### *D. The Exploration Licenses for Pueblos, Guaco, and Huacuco*

*66. As mentioned above, in anticipation of the expiration of the exploration licenses for EI Dorado Norte and EI Dorado Sur in 2004, PRES engaged MINEC in discussions that same year with respect to the possibility of converting the entire area covered by the two EI Dorado exploration licenses into one exploitation concession. These discussions led to a "carve out" of a central portion of the two license areas, over which the exploitation concessions had been formally solicited. The area surrounding this carve-out was then divided into three small exploration areas, denominated Huacuco, Pueblos, and Guaco. MINEC agreed to grant PRC's new-established subsidiary, DOREX, three additional exploration licenses for these three areas.*

*67. Thus, in September 2005, DOREX was granted exploration licenses for Huacuco, Pueblos, and Guaco by, respectively, Resolution No. 205 (dated September 28, 2005), Resolution No. 208 (dated September 29, 2005), and Resolution No. 211 (dated September 29, 2005). DOREX*

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<sup>44</sup> On December 8, 2008, in response to this request, PRES informed MARN that its request had already been answered during the EIA review process.

*immediately began the process of receiving the necessary environmental authorizations to continue exploration of the newly-designated sites, which had been commenced by PRES under the El Dorado Norte and El Dorado Sur exploration licenses.*

68. *In November 2005, DOREX submitted an environmental permit application for the Huacuco license area to MARN. In December, MARN responded to the application with a request for an EIA regarding the impact of the exploration activities to be undertaken. The requested EIA was submitted to MARN by DOREX on February 17, 2006. MARN then asked for, and DOREX posted, public announcements regarding the EIA in May 2006. In November 2006, MARN indicated that the environmental permit for Huacuco was all but ready to be awarded, and asked that DOREX submit the required environmental financial assurance bond – a bond which is normally requested and deposited only after final approval of the relevant EIA.*

69. *DOREX submitted the bond to MARN as requested. Since then, however, the Ministry has failed to act on its application, even though the Environmental Law itself requires MARN to execute the license within ten business days of approving the EIA. Moreover, although there had been some communication between DOREX and MARN in the months following the submission of the application, all communication channels inexplicably shut down in December of 2006, the same month that PRES submitted the final proposal in connection with its exploitation permit application for EI Dorado. Clearly, this silence could not be attributed to any technical problems with the applications. Indeed, with respect to Huacuco, as with respect to EI Dorado, no such problems or concerns were ever expressed.*

70. *MARN's subsequent actions vis-à-vis the Enterprises followed the same pattern. Thus, in October 2006, DOREX had submitted environmental applications for both the Pueblos and Guaco exploration license areas. MARN responded to both applications within that same month, requesting that DOREX submit an EIA for each license area, which DOREX proceeded to provide in August 2007. The Ministry acknowledged receiving the Guaco EIA in November 2007, and requested that DOREX respond to observations on it. In turn, MARN acknowledged the Pueblos EIA in January 2008, and requested that the company answer observations regarding that assessment as well. Rather than express legitimate concerns, however, many of MARN's observations to the two EIAs simply requested information that had already been included within the original assessments provided to it.*

71. *Nevertheless, in order to be responsive to the request, DOREX answered all the observations presented to it by the Government*

*regarding the Guaco license on February 8, 2008 and regarding the Pueblos license on March 26, 2008. DOREX's responses largely reiterated and expanded upon many of the same details discussed within the original EIAs, since MARN's observations concerned information that had already been provided therein.*

72. *Since responding to the observations, which should have resulted in the EIAs passing on to the public phase of the evaluation, DOREX has received no further communications from MARN regarding either the Guaco or Pueblos applications. In short, as with PRES's environmental permit application for exploitation activities on the El Dorado Sur and El Dorado Norte license areas, MARN's conduct with respect to DOREX's environmental permit applications for exploration of Huacuco, Pueblos, and Guaco reflects the arbitrary about-face in the Government's policies with respect to the Enterprises' operations in El Salvador.*

#### *E. President Saca's 2008 Announcement of Opposition to PRC's Investment Activities*

73. *Initially, the Enterprises legitimately believed that MARN's inaction was an unofficial temporary aberration, perhaps the result of bureaucracy, incompetence, inter-agency lack of communication, or some combination of those factors. As such, the Enterprises continued to meet with MARN in the hope of achieving a negotiated solution to what they considered to be only a temporary impasse, and were repeatedly assured by senior government officials that the permits would be issued imminently.*

74. *In 2008, it became clear that the Government's delay tactics with respect to the issuance of the Enterprises' various permits had been designed and implemented with the unlawful, discriminatory, and politically motivated aim of preventing the Enterprises' mining operations.*

75. *In March 2008, President Saca<sup>45</sup> publicly stated that he opposed the granting of any pending mining permits. At a press conference, President Saca announced that he intended to revisit the entire legal framework that was already in place to regulate mining in El Salvador, the very system on which PRC and the Enterprises had relied in investing many tens of millions of dollars in the country. According to press accounts, President Saca stated (among other things):*

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<sup>45</sup> President Saca came into power in March 2004. He was recently voted out of office and will be replaced by President-elect Carlos Mauricio Funes Cartagena as of June 1, 2009.

*What I am saying is that, in principle, I do not agree with granting [pending mining] permits.*<sup>46</sup>

76. *PRC and the Enterprises were astonished by President Saca's assertions, which were contrary to the duly adopted El Salvadoran Mining Law and the stated 2001 policy of the Government in favor of "mining activity" because it "is of great importance to the economy of the country[,] as it generates investments by nationals and foreign companies, contributing in this way to the creation of jobs and development in the areas where these activities are made."*<sup>47</sup> By letter dated April 14, 2008, Mr. Tom Shrake, who serves both as a Director and a Manager of PRC, wrote to President Saca:

*We have been unable to obtain a formal response from the government with respect to our proposed exploitation project for El Dorado. Similarly, our other exploration projects are awaiting receiving their respective permits, as well as our new applications for exploration licenses.*

...

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

...

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

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<sup>46</sup> See Exhibit 7. The original Spanish text reads in pertinent part: "El presidente de El Salvador, Elias Antonio Saca, aseguró este martes que 'en principio' se opone a la concesión de permisos para nuevas explotaciones mineras en el país y pidió al Congreso estudiar el tema a profundidad. 'El tema de la minería es un tema que hay que estudiarlo a profundidad. Yo entiendo que los diputados han formado una comisión (y) que hay que hacer una ley, el ministerio del Medio Ambiente y el ministerio de Economía están caminando de la mano con los diputados,' aseguró Saca en una rueda de prensa. 'Lo que estoy diciendo es que, en principio, yo no estoy de acuerdo con otorgar esos permisos,' señaló el mandatario en referencia a 26 proyectos mineros que están requiriendo los permisos de explotación. La explotación minera es adversada por la iglesia y la oposición de izquierda por considerar que contaminará los mantos acuíferos y destruirá el medio ambiente en general, en el escaso territorio de 20.742 km<sup>2</sup> de El Salvador..." See *Presidente de El Salvador pide cautela ante proyectos de explotación minera*, INVERTIA, Mar. II, 2008, <http://cl.invertia.com/noticias/noticia.aspx?idNoticia=200803112248AFP 224800-TX-SXH27&idtel>.

<sup>47</sup> Decree 456, *supra* note 34.

*in the Free Trade Agreement between Central America, the United States and the Dominican Republic (CAFTA-DR).<sup>48</sup>*

77. *Nonetheless, President Saca adhered to his newly announced “policy” of opposing the issuance of mining permits. President Saca continued to assert that El Salvador’s existing mining law had to be rewritten. He also vaguely asserted that a “country-wide environmental strategic study” needed to be undertaken - while offering no other details. In a press interview dated July 15, 2008, President Saca was specifically asked about PRC and the Enterprises’ pending permits. He responded:*

*[F]or now, I will not grant mining permits, until two requirements are satisfied.<sup>49</sup>*

78. *The first requirement, according to President Saca, was that new mining legislation had to be passed, notwithstanding the vested rights of PRC and the Enterprises under the existing Mining Law enacted in 1996, and amended in 2001, which remains the law today. The second requirement, he said, was for MINEC and MARN to complete a vague “study” on the possible effects of mining on the entire country. President Saca acknowledged, however, that he did not know what the study would entail, or even whether it had been started.<sup>50</sup> In fact, as of the date of this Notice, no such study has been completed (or to our knowledge, even commenced).*

79. *Notwithstanding President Saca’s comments, and the Government’s actions and inactions, the Enterprises engaged in several meetings with the Government in 2008 in an effort to resolve the matter amicably. Nonetheless, President Saca’s public statements adhered to the position he had announced in March 2008. Thus, in February 2009, President Saca was quoted in the press as stating:*

*While Elias Antonio Saca is in the Presidency, he will not grant a single permit [for mining exploration], not even environmental permits, which are issued prior to [the mining permits] being granted by the Ministry of Economy.*

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<sup>48</sup> See Exhibit 8.

<sup>49</sup> See Saca afirma que no concederá permisos de extracción minera, [cadenaglobal.com](http://www.cadenaglobal.com/noticias/default.asp?not=182976&sec=8%20-%2056k), July 15, 2008, <http://www.cadenaglobal.com/noticias/default.asp?not=182976&sec=8%20-%2056k>. The original Spanish text of the article reads: “Al ser consultado sobre declaraciones de la empresa canadiense Pacific Rim, que podría iniciar un proceso de arbitraje internacional contra el Estado, Saca dijo que ‘hoy por hoy no daré ningún permiso para la minería, mientras no se cumplan’ dos requisitos.”

<sup>50</sup> *Id.*

*[PRC and the Enterprises] are about to file an international complaint and I would like to reaffirm, I would prefer to pay the \$90 million then give them a permit.<sup>51</sup>*

80. *Despite the Enterprises' best efforts to reach a negotiated solution with the Government, as of the time of this Notice, the Government's conduct has impeded the ability of the Enterprises to conduct mining activities and benefit from their investments. The Government has also impeded their ability to obtain further financing for their activities - financing which would without doubt be forthcoming were the permits in hand - and has thereby rendered further operation of their activities virtually impossible.*

81. *In addition to EI Salvador's refusal to act upon its obligations, the Government has further compounded the unfairness of its treatment of PRC's investments by requiring the Enterprises to continue costly exploration work on those very license areas for which they have requested, but have not yet been granted, environmental permits. For example, DOREX filed all of the required annual reports for its exploration licenses over Guaco, Pueblos, and Huacuco in 2007 and 2008, and has - at significant expense - complied with the Mining Law and the Environmental Law to the extent possible without having received the environmental permits. On the other hand, MINEC representatives informed company officials that physical work such as drilling and trenching would also need to be completed on those license areas in 2008 in order to maintain them in good standing, even though DOREX cannot legally conduct these activities due to MARN's unjustified refusal to approve the EIAs submitted by DOREX in connection with those areas.*

82. *The Enterprises have satisfied all legal requirements and have responded to all of the observations presented by MARN, in most cases exceeding the requirements of the law and international standards. Significantly, the Government has not actually denied any of the Enterprises' applications; indeed, it cannot, as it has no legal basis to do so. Instead, it has unlawfully failed to act upon these applications, thus effectively preventing the Enterprises from continuing their operations without providing them the benefit of due process, and indeed without providing any justification whatsoever for its decision. This conduct constitutes a gross abuse of administrative discretion, which is impermissible under both Salvadoran and international law."*

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<sup>51</sup> See <http://www.laprensagrafica.com/index.php/economia/nacional/20190.html>. The original Spanish text reads: "Mientras Elías Antonio Saca esté en la presidencia, no otorgará ni un tan solo permiso, (para la explotación minera) ni siquiera permisos ambientales, que son previos a los que otorga el Ministerio de Economía" and "Están a punto de entablar una demanda internacional y les quiero dejar claro algo, prefiero pagar los \$90 millones a darles un permiso."

### **C: President Saca**

76. It will be noted that the Claimant's allegations address specifically several statements attributed to the Respondent's Head of State from 2004 to 2009, President Saca, particularly the statements allegedly made by him in March 2008 (as set out above in paragraph 75 of the Claimant's Notice of Arbitration), July 2008 (paragraph 77, *ibid*) and February 2009 (paragraph 78, *ibid*).
77. It suffices for present purposes to address only the first of these alleged statements. As published, it formed part of a press report from AFP dated 11 March 2008, exhibited to the Claimant's Notice of Arbitration (Exhibit 7); and it merits citing here in full, as translated into English:

*'Salvador – Mining*

*President of El Salvador asks for caution regarding mining exploitation projects*

*The President of El Salvador, Elías Antonio Saca, stated on Tuesday that "in principle" he is against the granting of permits for new mining exploitations in the country and asked the Congress to review this issue in depth.*

*"The issue of mining is a matter that must be reviewed in depth. I understand that the members of the House of Representatives have formed a committee (and) that a law must be made, the Ministry of the Environment and the Ministry of the Economy are working hand in hand with the representatives." Saca stated at a press conference.*

*"What I am saying is that, in principle, I am not in favor of granting those permits", the president said in reference to the 26 mining projects that are applying for exploitation permits.*

*Mining exploitation is opposed by the church and the left-wing opposition, since it is believed to contaminate the aquifers and to destroy the environment in general, within the limited territory of 20,742 km<sup>2</sup> belonging to El Salvador.*

*"We want to generate a space to reflect on the benefits or disadvantages of mining. And after we reflect on it, and we're shown proof that green mining exists and that it is possible to grant the exploitation permits,*

*which is what we have not given them, at that time, a law must be made to make everything very clear,” emphatically declared President Saca.*

*Last February, the Salvadoran Congress began the consultations for the approval of this controversial law with warnings, from environmental organizations and the Church, asking representatives to act “prudently” while alleging that the health of the population is at stake.*

*One of the first persons to oppose these mining projects was the archbishop of San Salvador. Fernando Sáenz, who considered the use of cyanide and cadmium for gold exploitation unacceptable, since they were “extremely poisonous” and because they “contaminate the aquifers.”*

*Mining companies, to diminish criticism, have emphasized in several messages the advantages of the so-called “green mining” for the country, which, with new techniques – they claim – may reduce damages to the environment.’*

78. Under CAFTA Article 10.20.4(c), as further explained immediately below in Part V, the Tribunal is not permitted, at this early stage of these arbitration proceedings, to investigate whether or not President Saca in fact made any of the statements recorded in this or other press reports quoted by the Claimant, nor even to decide whether these reports (if accurate) support a quite different interpretation from that alleged by the Claimant, when taking into account a more complete factual context.
79. In regard to the Respondent’s Preliminary Objections under Article 10.20.4, the Tribunal is accordingly obliged to assume, at this stage of these proceedings and taking all relevant factors into account, that the Claimant’s interpretation of President Saca’s reported statements, as pleaded in the Notice of Arbitration, are not fanciful or so unreasonable as relevant alleged facts as to be disregarded by the Tribunal for present purposes. In other words, here as elsewhere recorded in this decision, the Claimant’s factual allegations pleaded in the Notice of Arbitration, as set out above, must be assumed to be true in accordance with the express requirements of CAFTA Article 10.20.4(c) for the purpose of deciding the Respondent’s Preliminary Objections.

## **PART V: CAFTA ARTICLE 10.20.4**

### ***A: Introduction***

80. The Tribunal’s necessary starting-point in addressing the Respondent’s Preliminary Objections (it being common ground between the Parties) is the meaning and effect of CAFTA Article 10.20.4 (with Article 10.20.5), interpreted and applied as part of CAFTA under international law: see also CAFTA Article 10.22 cited in Part III above.

### ***B: CAFTA Article 10.20.4***

81. The Respondent submits that the Parties agreed to use CAFTA’s expedited procedure for the Respondent’s Preliminary Objections to the Claimant’s claims because (i) these arbitration proceedings are subject to the ICSID Arbitration Rules; (ii) the first sentence of ICSID Arbitration Rule 41(5) expressly provides that the procedure under ICSID Arbitration Rule 41(5) does not apply if “the parties have agreed to another expedited procedure for making preliminary objections ...”; and (iii) the Parties are here taken to have consented to “another expedited procedure” in the form of CAFTA Articles 10.20.4 and 10.20.5.
82. The Respondent further submits that CAFTA Article 10.20.5 allows a respondent to make a preliminary objection with regard to competence to be decided on an expedited basis; and that CAFTA Article 10.20.5, when used in conjunction with CAFTA Article 10.20.4, also allows a respondent to have a preliminary objection decided on an expedited basis. Therefore, so the Respondent concludes, CAFTA Article 10.20.5, either alone or in conjunction with CAFTA Article 10.20.4, constitutes an agreement by the CAFTA Contracting States to “another expedited procedure” for making preliminary objections.
83. The Respondent contends that the Claimant also agreed to submit to the CAFTA expedited procedure for making preliminary objections when it submitted its Notice of

Arbitration. In its amended Exhibit 1 to its Notice of Arbitration, the Claimant affirmed:

*“Pursuant to Article 10.18(2)(a) of the Central America - United States - Dominican Republic Free Trade Agreement (“CAFTA”), Pac Rim Cayman LLC (“PRC”) hereby consents to arbitration in accordance with the procedures set out in CAFTA.”*

84. In addition, so the Respondent submits, CAFTA Article 10.16.5 makes clear that CAFTA provisions pre-empt any different provision in the ICSID Arbitration Rules. Therefore, so the Respondent concludes, the Parties to this arbitration have agreed to use the CAFTA expedited procedure for preliminary objections, to the exclusion of ICSID Arbitration Rule 41(5); and the Parties’ agreement extends to all claims made by the Claimant in these ICSID arbitration proceedings.
85. The Tribunal is content to accept the Respondent’s submissions on the application to these ICSID proceedings of CAFTA Articles 10.20.4 and 10.20.5 as an expedited procedure. Indeed, the Tribunal understood that these submissions were not materially disputed by the Claimant.

### ***C: The Tribunal’s Analysis***

86. The Parties disputed the general approach to and standard of review under CAFTA Article 10.20.4. In the Tribunal’s view, these matters can be decided as follows:
87. *The General Approach:* The procedure under CAFTA Article 10.20.4 mandates the tribunal to assume the relevant factual allegations made by the claimant to be “true”, without any express qualification, namely:
88. “In deciding an objection under this paragraph [10.20.4], the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof).”

89. It is to be noted that these factual allegations can extend beyond the original notice of arbitration to include further factual allegations in an amended notice of arbitration up to the time of the tribunal's decision. This ability of a claimant to cure a notice of arbitration by pleading further factual allegations confirms that the procedure is not intended to be a technical pleading exercise where mere linguistic form should prevail over substance to the detriment of an ill-pleaded notice of arbitration.
90. However, it is only the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection. In the present case, therefore, this assumption does not extend to any factual allegation in the Claimant's Response, Rejoinder and submissions at the Oral Hearing.
91. It is also only "factual allegations" that are assumed to be true under this procedure. The phrase does not include any legal allegations. It could not therefore include a legal allegation clothed as a factual allegation. Nor could it include a mere conclusion unsupported by any relevant factual allegation without depriving the procedure of any practical application. In short, the Tribunal concludes, again, that substance must clearly prevail over form under this procedure.
92. Moreover, the procedure under CAFTA Article 10.20.4 is to be read with CAFTA Articles 10.16.1 and 10.16.2 which requires a claimant's notice of intent to claim liability for a breach and to "specify" (*inter alia*):

*"(b) for each claim the provision of [CAFTA], investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*

- (b) *the legal and factual basis for each claim; and*
- (c) *the relief sought and the approximate amount of damages claimed."*

93. It would therefore be impermissible for a claimant to evade pleading the factual basis for each of its claims in the notice of intent: a mere conclusion could not specify a factual basis. Accordingly, liability, causation and damages must be pleaded under CAFTA Article 10.16.1 and Article 10.16.2(b), (c) and (d) as regards the notice of intent.
94. Under CAFTA, the same requirement does not apply expressly to the subsequent notice of arbitration under the ICSID Convention, because of the limitation contained in CAFTA Article 10.16.5. It provides (as here relevant) that the ICSID Convention and the ICSID Institution and Arbitration Rules shall govern the arbitration “except to the extent modified by this Agreement”; and there is no such modification in CAFTA regarding the content of the notice of arbitration (or “Request for Arbitration”) in ICSID arbitration proceedings.
95. Accordingly, the Claimant’s pleading in its Notice of Arbitration must here meet the requirements of the ICSID Convention and the ICSID Institution and Arbitration Rules. Article 36(2) of the ICSID Convention and Rule 2(e) of the Institution Rules impose like obligations to plead liability, causation and damages. (Although differently worded from the equivalent provisions in CAFTA, these differences are not material in the present case).
96. There is however an essential difference between the initial pleading by a claimant, such as a notice of arbitration, and a claimant’s full presentation of its case at a hearing on the merits under the ICSID Convention. The initial pleading cannot and is not required to be a complete documentary record of the claimant’s factual evidence and legal argument. Indeed, a notice may contain few factual exhibits and still fewer legal materials.
97. It is clear from the ICSID Convention (as also CAFTA), that the initial pleading will ordinarily be followed within the written phase by several more substantive written submissions, documentary exhibits, witness statements and expert reports (including document production from the adverse party), before even passing to the oral phase

and an evidential hearing on the merits. If the initial pleading was intended to be complete, there would be no purpose in these subsequent steps.

98. The Tribunal notes the particular approach to Article 36 and Rule 2 taken by Professor Schreuer and his distinguished colleagues in *The ICSID Convention: A Commentary* (2009), at page 463: “Article 36(2) requires that ‘information’ on these points be contained in the request. Institution Rule 2 says that the request must ‘designate’, ‘state’, ‘indicate’ and ‘contain information.’ Therefore no proof is required at this stage. On most points a mere assertion in the request will suffice and the information thus given may be developed at a later stage ....” By assertion, the Tribunal assumes these authors to mean an appropriate statement specifying the factual and legal bases of the claim, without evidential proof.
99. Whilst the request of arbitration must be adequately pleaded, with relevant factual allegations under the ICSID Convention and Rules, it cannot therefore be equated to the fine-tuned instrument which emerges at the later stages of ICSID arbitration proceedings; for example: a party’s main pleadings, closing oral submissions or comprehensive post-hearing brief. Accordingly, a notice of arbitration, at the very start of the arbitration, is not therefore to be judged by a formalistic standard more appropriate to a later pleading.
100. In addition to factual allegations in the Notice of Arbitration, by CAFTA Article 10.20.4(c)’s last sentence, the tribunal may also consider relevant facts not in dispute between the parties:

*“The tribunal may also consider any relevant facts not in dispute.”*

101. The meaning of these words is plain. First, unlike the previous mandate (“shall”), it grants to the tribunal a power which the tribunal may or may not choose to exercise in the circumstances of the particular case (“may”). The Tribunal returns below to a similar factor, “may,” in the context of CAFTA Article 10.20.4 (line 4).

102. Second, it operates bilaterally, meaning that a factual admission by a claimant of a fact alleged by a respondent can be considered by the tribunal, just as a factual admission by a respondent of a fact alleged by a claimant.
103. Third, although undisputed facts are not necessarily required to emerge from the notice (or amended notice) of arbitration for this procedure, these facts must be undisputed at the time of the tribunal's decision given the opening words of Article 10.20.4(c) ("In deciding an objection under this paragraph ...").
104. Fourth, there can in practice be no dispute between the parties as to whether or not a fact is undisputed. For example, it would suffice for a claimant to withdraw its assertion or admission of a fact by an amended notice of arbitration to convert a hitherto undisputed fact into a disputed fact before the tribunal's decision. In the Tribunal's view, if that can be achieved in regard to a formal pleading, it can be equally achieved informally by a claimant or respondent as regards a fact not pleaded in the notice of arbitration. It is significant that, unlike the earlier part of this sub-article, the tribunal is not mandated to assume an undisputed fact to be true: it can only consider "a fact", not a factual allegation, because the fact is effectively agreed between the parties.
105. Accordingly, for all these reasons, the Tribunal approaches the procedure under CAFTA Article 10.20.4 tempered by a lack of formalism, with an emphasis on substance and practical common-sense.
106. As regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 with an additional ground of objection as to competence:

*"In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence ...."*

107. It is significant that the several deadlines under this expedited procedure are stringent, both for the parties (and the parties' legal representatives) and also for the tribunal. It is not intended to be a 'mini-trial', even without evidence.
108. *The Standard of Review:* The Tribunal does not consider that the standard of review under Article 10.20.4 is limited to "frivolous" claims or "legally impossible" claims, contrary to the submissions of the Claimant. These words could have been used by the Contracting Parties in agreeing CAFTA; but all are significantly absent. Moreover, the implied addition of these or similar words would significantly restrict the arbitral remedy under Article 10.20.4, when the structure of this provision permits a more natural and effective interpretation consistent with its object and purpose.
109. The Tribunal does consider that the word "may" in Article 10.20.4 (line 4) confers an important arbitral power in whether to grant or refuse a preliminary objection, to be exercised reasonably in all the circumstances of the particular case. The word "may" is not "must" or otherwise mandatory. The same meaning is evident from CAFTA's authentic language: the Spanish phrase "se pueda" is to the same effect as the English "may." In context, reversing the negative approach in Article 10.20.4, the word recognises a position where a tribunal considers that an award could eventually be made upholding the claimant's claim or, equally, where the tribunal considers that it was premature at this early stage of the arbitration proceedings to decide whether or not such an award could not be made.
110. In other words, returning to the negative language of Article 10.20.4, to grant a preliminary objection, a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection.

111. At all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.
112. Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5, as already indicated above, it is clear that an expedited preliminary objection is not intended to lead to a ‘mini-trial.’ A contrary conclusion would attribute to the CAFTA Contracting Parties a perverse intention to render investor-state arbitration even more expensive and procedurally difficult for the disputing parties, when it would seem from these provisions (read as a whole) that the actual intention of the Contracting Parties was, manifestly, the exact opposite. The procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. To that end, there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.
113. Moreover, it may be correct, as the Claimant submitted, that the non-waiver provision in Article 10.20.4(d) as to competence may allow a further intermediate stage under the ICSID Arbitration Rules before the claimant can reach the merits, thereby leading a respondent to have, in the Claimant’s words, “more than one bite at the cherry.” If this approach were correct (albeit recently doubted by another CAFTA tribunal), there would therefore be a further reason not to make the procedure under Articles 10.20.4 and 10.20.5 even more onerous for the disputing parties than it may be already.
114. Lastly, as already indicated, as the party invoking these procedures it is of course for the Respondent to discharge the burden of satisfying the Tribunal that it should make a final decision dismissing the relevant claim or claims pleaded by the Claimant in these arbitration proceedings.

**D: The Tribunal's Conclusion:**

115. The Tribunal has reached this interpretation of CAFTA Articles 10.20.4 and 10.20.5 based upon the plain and unambiguous meaning of their respective wording and the principles of customary international law declared in Article 31 of the Vienna Convention on the Law of Treaties. (The Respondent and the USA have signed but not ratified the Vienna Convention).
116. The Tribunal concludes that the object and purpose of these two provisions is to create, under CAFTA, an effective and flexible procedure for the swift and fair resolution of disputes between claimant investors and respondent host states, to be exercised reasonably by a tribunal according to all the circumstances of the particular case.
117. The Tribunal was not materially assisted by comparisons between these provisions and national court procedures in one Contracting Party, the USA, as evidenced by its President's Message of 2005 and several decisions of US courts, including the decisions of the US Supreme Court in *Neitzke v. Williams* and *Ashcroft v. Iqbal*. Not only is that message from one Contracting Party not replicated by other Contracting Parties to CAFTA, there is also no reason to equate such common law court procedures to provisions in CAFTA agreed by Contracting Parties with different legal traditions and national court procedures.
118. The Tribunal was also not materially assisted by comparisons with NAFTA or the New ICSID Arbitration Rule 41.5, which have different wording and do not share exactly the same object and purpose. Accordingly, the Tribunal has placed no reliance in this decision on the Decision of 12 May 2008 in *Trans-Global v. Jordan* and the Decision of 2 February 2009 in *Brandes v. Venezuela*. Nonetheless, the Tribunal has considered these and other legal materials, from which doubtless much more could still be learnt in other more appropriate cases.

## **PART VI: THE APPLICATION OF CAFTA ARTICLES 10.20.4 AND 10.20.5**

### ***A: Introduction***

119. It is now appropriate to apply to the Parties' respective cases the Tribunal's interpretation of CAFTA Articles 10.20.4 and 10.20.5.
120. Of the four exploration areas of which the Claimant complains in the Notice of Arbitration, three exploration areas (Guaco, Huacuco and Pueblos) surround the area of the intended El Dorado concession. The Respondent does not currently object to these claims in its Preliminary Objections; but the Respondent seeks to reserve all its rights regarding these claims to a later stage of these arbitration proceedings.

### ***B: The Respondent's Case***

121. First, tracking the Respondent's written and oral submissions, albeit not *verbatim* and omitting documentary and legal references, the Tribunal here summarises the Respondent's submissions regarding the Claimant's claims subjected to the Respondent's Preliminary Objections: (i) the El Dorado Claim; (ii) the Santa Rita Claim, (iii) Other CAFTA Claims; and (iv) Non-CAFTA Claims. As already indicated above, this summary records the Respondent's submissions and not the views of the Tribunal.
122. ***The El Dorado Claim:*** The Respondent submits that, as acknowledged by the Claimant in the Notice of Arbitration, the provisions for the granting of a mining exploitation concession under Salvadoran law are "plain and explicit" under Article 37 of the Mining Law. The specific documents the Claimant identifies as being required to obtain the mining exploitation concession are described in paragraph 35 of the Notice of Arbitration (quoted above in Part IV).

123. In addition to an Environmental Permit, these include: (i) a showing that the licensee owns or is authorised to use the real estate property where the mine project is located and (ii) an *Estudio de Factibilidad Técnico Económico* (or “Feasibility Study”).
124. In its Notice of Arbitration, according to the Respondent, the Claimant asserts the legal conclusion that PRES is entitled to obtain the El Dorado concession but for the lack of the Environmental Permit. The Claimant asserts that, under Salvadoran law, a company that holds an exploration license has a “right to obtain the exploitation concession . . . [and] that right is perfected upon the discovery and demonstration of the existence of mineable ore deposits in the license area in accordance with Article 23 [of the Mining Law]”: see paragraph 37 of the Notice of Arbitration (quoted above in Part IV).
125. The Respondent submits that the Claimant is legally wrong in both its assertion that there is an automatic right to a mining exploitation concession under Salvadoran law and its conclusion that it has complied with the minimum requirements of the Mining Law for the granting of an exploitation concession.
126. First, the Mining Law does not give to holders of exploration licenses automatic rights to exploitation concessions. The Claimant provides a self-serving interpretation of the Mining Law by focusing exclusively on one clause of Article 23 and ignoring the rest of that provision and the related provisions in Articles 40-43. These provisions specify the governmental decision-making process applicable to exploitation concessions, as well as the Ministry of Economy’s authority to grant or deny such applications. Full compliance with all the formal requirements of the Law simply affords an applicant the legal right of having its application considered by the Ministry and not a legal right to the grant of such application.
127. Second, whilst the Claimant makes allegations related to PRES’ inability to obtain an Environmental Permit, nowhere in its Notice of Arbitration does the Claimant allege that PRES submitted the other specified documents or complied with the other individual requirements to obtain the concession.

128. The Respondent contends that this lack of any factual allegations relating to these legal requirements does not meet the demands of CAFTA Article 10.16.2(c) for the “legal and factual basis for each claim” for a Notice of Intent, still less for a Notice of Arbitration.
129. According to the Mining Law, the Respondent contends that there is no automatic right to a concession, even if the applicant has submitted all the required documents. The Mining Law sets out a series of steps for reviewing the application after its submission, including publication and solicitation of comments from interested parties opposing the application. The solicitation of comments from interested parties would be a meaningless requirement if, as the Claimant asserts, the Respondent had no option but to issue the concession to the Claimant and the Enterprises.
130. Under the Mining Law, so the Respondent also contends, the Ministry of Economy’s Department of Hydrocarbons and Mines (also called the “Bureau of Mines”) can reject or accept the application; and, in accordance with Article 43 of the Mining Law, the final decision on whether to grant the concession is left to the Minister of Economy.
131. Thus, the Resolution by the Ministry of Economy (“*Acuerdo del Ministerio*”) under Article 23 of the Mining Law is only one of several possible outcomes for a concession application under Articles 36 to 43 of the Mining Law. As was the position at the time when Pacific Rim decided to make its investment in El Salvador in 2002, far from being “required to grant the licensee the concession”, the Ministry of Economy is given authority within the limits of Salvadoran law to approve or deny an exploitation concession application, taking into consideration the public interest and several other factors.
132. The Respondent contends that Articles 36 to 38 of the Mining Law regulate the verification by the Bureau of Mines that the application includes the formal requirements stated in the Mining Law. If these formal requirements are included

in the application, and after completing an initial inspection, the Bureau of Mines will register the application and will begin the administrative process for adjudicating upon the application.

133. If, however, there is a failure by the applicant to meet any of these requirements, the Bureau of Mines will grant a maximum, non-extendable period of thirty days for the applicant to remedy the deficiency. If the deficiency is not cured in the thirty-day period, the Bureau of Mines must deny the application and close the file.
134. Moreover, contrary to the Claimant's case, even if the application meets the formal requirements in the Mining Law and is registered by the Bureau of Mines, the Mining Law does not provide for the concession to be automatically granted. Rather, the registration of the application triggers an administrative decision-making process that may still result in the denial of the application at different stages.
135. First, according to the Respondent, Article 40 of the Mining Law sets out a process for publication. The Bureau of Mines must make sure that the applicant publishes a note in the official gazette and in two newspapers with the largest circulation in the country, with a summary of the application for the exploitation concession. In addition, the Bureau of Mines must send the summary of the application to the municipality where the mining project is located to be posted in the town hall.
136. Second, according to the Respondent, Article 41 of the Mining Law provides for a period of fifteen days after the publication of the notice in the official gazette for persons from the general public who have a legitimate interest in the application, or who believe that they will be negatively affected by the proposed concession, to express their opposition to the application. Article 41 provides that the Bureau of Mines will consider the objections and the applicant's response, and then decide whether to allow the process to continue or to stop there if the objections are well-founded. Either the objecting members of the public or the applicant can appeal the decision of the Bureau of Mines to the Minister of Economy.

137. Third, according to the Respondent, if the application process is allowed to continue, Article 42 of the Mining Law requires the Bureau of Mines to demarcate the area of the requested concession with sturdy markers. Once this process is concluded, the Bureau of Mines submits the matter to the Minister of Economy for his decision.
138. Finally, according to the Respondent, Article 43 of the Mining Law gives to the Minister the power to deny the concession if granting the concession would be unjustified. This provision gives to the Minister authority to evaluate the contents of the application file and order any investigations and inspections the Minister considers necessary. Article 15 of the Mining Regulations also provides factors that the Minister (and previously the Bureau of Mines) must take into account in deciding whether or not to grant the mining exploitation concession, including the national interest, the financial and technical capacity of the applicant, and the characteristics of the proposed mining operation.
139. In accordance with Article 43 of the Mining Law, the applicant can request reconsideration of an unfavourable resolution regarding the concession, which will be decided upon by the Minister. The Minister's decision on a request for reconsideration cannot be appealed.
140. Thus, the Respondent submits that Articles 40 to 43 of the Mining Law demonstrate that there is no such thing as an “automatic” right to a mining exploitation concession; and the Claimant’s allegation in regard to El Dorado is legally wrong. In other words, even if PRES had met all the formal requirements of Articles 36 and 37 of the Mining Law (which it did not), PRES’s application would still have been subject to the substantive technical evaluation of the submission, the public comment process and the legal power of the Minister of Economy to grant or deny the application.
141. The Respondent submits that it is therefore clear, as a matter of law (not fact), that PRES did not have a “perfected” right to a mining exploitation concession; and that the Claimant cannot receive any relief in this arbitration for the alleged breach of a

right which PRES never had. Accordingly, as a matter of law, the Respondent submits that the claim relating to El Dorado is not a claim for which an award in favour of the Claimant may be made under CAFTA Article 10.26.

142. Moreover, in addition to the lack of the automatic right to an exploitation concession under the Mining Law as alleged by the Claimant, even assuming the existence of such a right, PRES' application for a concession could not have been approved by the Bureau of Mines or by the Minister of Economy because the application did not comply with two separate requirements of the Mining Law recognized by the Claimant in its Notice of Arbitration.
143. As to these, the Respondent contends that the Claimant did not plead any factual allegations in the Notice of Arbitration demonstrating that PRES had met the separate requirements of Article 37 of the Mining Law, other than claiming that PRES was entitled to the Environmental Permit. The Respondent submits that the Claimant's silence was not surprising, as the undisputed facts (all deriving from the Claimant) demonstrate that PRES had in fact not complied with these legal requirements in these two respects, as described below.
144. As the Claimant contends, there is a two-stage framework for mining in El Salvador: (i) an exploration phase and (ii) an extraction, or exploitation, phase. The Mining Law contains procedures for petitioning the Government for (i) exploration licenses and (ii) exploitation concessions. The requirements for an exploitation concession are necessarily distinct from the requirements for an exploration license.
145. An exploration license is obtained with the goal of identifying whether there are valuable minerals in the ground and where they are located. The area for the exploitation concession must be determined based on what was found during exploration. Article 24 of the Mining Law provides that the mining exploitation concession area must be within the exploration area and that the surface area must be determined by the size of the mineral deposits and the technical justifications of the exploration license holder.

146. According to Article 37 of the Mining Law, an applicant for an exploitation concession must present, among other requirements, (i) documentation of ownership or authorization to use all the property that corresponds to the area of the concession and (ii) a technical and economic feasibility study, as the Claimant acknowledges in its Notice of Arbitration (see paragraph 35, quoted above in Part IV).
147. According to the Respondent, the Claimant not only failed to allege relevant facts to show that PRES complied with these two requirements, but the undisputed facts (from the Claimant's own documents) demonstrate that PRES actually did not comply (and still does not comply) with these two requirements. Nor is there any allegation that the Respondent in any way hindered PRES from complying with these two essential requirements. In short, the Claimant has failed to plead the relevant facts demonstrating PRES' entitlement to the exploitation concession at issue, not by inadvertence but because such facts do not exist to its own knowledge and could not be pleaded in good faith in its Notice of Arbitration.
148. *The Property Issue:* The first of these two requirements requires a showing that the applicant owns or is authorised to use the real estate property where the mine project is located; that is, the requirement to own or have authorization to use all the property covering the area of the exploitation concession being requested by the applicant.
149. Nowhere in its Notice of Arbitration does the Claimant allege any facts to support an allegation of such ownership or authorization. The reason is again simple: the undisputed facts show that it has no such ownership or authorization.
150. Beginning with the application itself, PRES did not allege that it owned or had permission to use the surface area over the requested concession. The concession for which PRES applied consists of an area of 12.75 square kilometres. Yet PRES provided proof of ownership or authorization to use only approximately 1.6 square kilometres, *i.e.* a mere 13% of the total area requested for the concession.

151. This deficiency in its application for a mining exploitation concession was indicated to PRES by a letter from the Bureau of Mines dated 2 October 2006, pursuant to Article 31 of the Mining Regulations. This letter gave to PRES thirty days to submit (among other documents) certified copies of the registered land purchases or authorizations for the land subject to the concession.
152. In response to this letter, PRES merely re-submitted the same documents which PRES had already submitted with its original application, making no mention of any additional land. The Claimant has never alleged that PRES owns or has authorisation to use all the property included in its application. PRES does not have and has never claimed to have authorization to use the rest of the area applied for (11.985 square kilometres); and PRES has therefore not complied with the requirement of Article 37 of the Mining Law regarding ownership or authorization to use this land.
153. The Respondent submits that, based both on the Claimant's failure to allege facts in its Notice of Arbitration showing compliance with the requirements of the Mining Law and upon the undisputed facts from the Claimant's own documents, that PRES never met what the Claimant admits is one of the "plain and explicit" requirements to obtain a mining exploitation concession under Salvadoran law: namely, making a showing that the applicant licensee owns or is authorised to use the property where the mine project is located. Having not met this essential requirement, PRES did not have any right to the mining exploitation concession in El Dorado; and the Claimant's pleaded claim must therefore fail on this ground alone.
154. *Feasibility Study:* The Respondent submits that the second requirement that PRES did not meet concerned the Feasibility Study under Article 37 of the Mining Law.
155. The Claimant's Notice of Arbitration notes this requirement; but, according to the Respondent, it then fails to allege anywhere that PRES ever submitted a completed Feasibility Study, still less any study covering the entire area in respect of which PRES applied for a mining exploitation concession.

156. According to the Respondent, PRES submitted only a “Preliminary Pre-Feasibility Study.” At the time, PRES distinguished this from the required final Feasibility Study, which it admitted was not complete. PRES submitted a “final” but still “Pre-Feasibility Study” in January 2005; but it never submitted the Feasibility Study required by the Mining Law.

157. According to the Respondent, the application explained that PRES would need more time and money fully to explore the area for which it had exploration licenses. Nevertheless, in its application, PRES included a request for the right to exploit areas that had not been completely explored, and for which it had not submitted an environmental impact assessment. This addition was not based on the Mining Law, but rather on PRES’s unilateral opinion of how it could maximize its own benefits: PRES argued that due to the cost of constructing the mine and beginning operations, it would not be reasonable to limit the area of the exploitation concession.

158. The Bureau of Mines’ letter of October 2006 to PRES also alerted PRES to its failure to provide the required Feasibility Study. It likewise gave to PRES thirty days to submit the Feasibility Study with detailed plans. Again, PRES simply re-submitted its Pre-Feasibility Study and added the requested plans for the six specific areas requested; and the required Feasibility Study was never submitted by PRES.

159. According to the Respondent, the difference between a Pre-Feasibility Study and a Feasibility Study is not merely in name. For example, Article 24 of the Mining Law specifically ties the surface area of the concession to the size of the mineral deposits and the technical justifications provided by the license holder. Thus, an applicant has to justify in a Feasibility Study the reason why it deserves to be awarded the concession area which it is requesting. The Pre-Feasibility Study commissioned by Pacific Rim by its terms demonstrates that it was clearly insufficient for this purpose; and PRES was not, in fact, in a position even to prepare the required Feasibility Study because it was requesting a concession area larger than it could justify based on the exploration and technical work it had undertaken.

160. The Respondent submits that PRES thus never completed the required Feasibility Study to allow the Ministry of Economy properly to evaluate whether or not to grant the concession and, if so, whether PRES had provided justification, and showed the technical and economic capacity, for the 12.75 square kilometres area it was requesting for the exploitation concession.
161. The Respondent concludes that this failure to complete and submit a Feasibility Study, at the time when PRES submitted its application (and ever since), is a failure to comply with the second essential requirement clearly stated in the Mining Law for obtaining an exploitation concession. Thus, so the Respondent submits, the Claimant's conclusionary statement that, “[w]ith the exception of the environmental permit that remains unjustifiably withheld by the Government, PRES has met all of the requirements to receive the [exploitation] concession”, is wholly unsupported by its own factual allegations.
162. In summary, as regards these two requirements the Respondent submits that the provisions in Salvadoran law requiring an exploitation concession applicant to submit specific documents do not violate any provisions of CAFTA or the Salvadoran Investment Law; that the Respondent complied with the Mining law in granting to PRES thirty days to remedy its deficient application; that PRES did not submit the required documentation; and that PRES thus failed to meet the essential requirements for the mining exploitation concession under Salvadoran law. As a result, any failure by the Government to issue the Environmental Permit has caused the Claimant no legal harm. The Claimant's claim for El Dorado is frivolous; it must fail *in limine*; and it should be dismissed by the Tribunal under CAFTA Article 10.20.4.
163. **Santa Rita Claim:** The Respondent seeks the dismissal of the Claimant's claim relating to the fourth exploration area included in the Notice of Arbitration, known as Santa Rita.

164. The Respondent submits that the Claimant does not include any allegation of wrongdoing by the Respondent in its Notice of Arbitration relating to Santa Rita. To the contrary, the Claimant pleads that the Respondent has granted all permits with regard to Santa Rita. However, without any factual or legal basis, the Claimant has decided to include its alleged “lost investments in connection with Santa Rita” in this arbitration.
165. In any event, the claims related to Santa Rita are completely without factual or legal basis because PRES no longer holds an exploration license in Santa Rita. PRES failed to request the renewal of the exploration license before its term expired, as required by the Mining Law and Mining Regulations.
166. Therefore, so the Respondent concludes, because neither the Claimant nor the Enterprises hold an exploration license in Santa Rita, the Claimant does not have any rights in Santa Rita upon which to base any claim against the Respondent in these arbitration proceedings. The claim relating to Santa Rita should therefore be dismissed by the Tribunal under CAFTA Article 10.20.4.
167. ***Other CAFTA Claims:*** The Respondent first contends that the Claimant has failed in its Notice of Arbitration to provide any factual bases for its claims of violation of CAFTA Articles 10.3 (National Treatment) and 10.4 (Most-Favored-Nation Treatment). Specifically, according to the Respondent, the Claimant does not allege how the Respondent has treated its own nationals (or nationals of any other State) more favourably than the Claimant. Accordingly, the Respondent submits that these unsubstantiated claims should be dismissed by the Tribunal under CAFTA Article 10.20.4.
168. The Respondent next objects to the Claimant’s allegation of a breach by the Respondent of CAFTA Article 10.16.1(b)(i)(B) with regard to alleged “investment authorizations”, where the Claimant asserts that the Respondent “has breached the express and implied terms of the Enterprises’ investment authorizations, including,

without limitation, all resolutions issued by MINEC in relation to the investments in El Salvador.”

169. The Respondent submits that CAFTA defines an “investment authorization” as “an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party.”
170. According to the Respondent, the resolutions by the *Oficina Nacional de Inversiones* (ONI) registering the investments in El Salvador are not “authorizations” but “registrations” of investments. The Claimant’s Enterprises requested such registration after the funds being registered had already been transferred to El Salvador; and there is thus no investment authorization from the Respondent that can form the basis for a CAFTA claim by the Claimant.
171. In any event, according to the Respondent, the Claimant’s general reference to alleged investment authorizations is insufficient for a CAFTA claim. CAFTA Article 10.16.2(b) requires that the notice of intent “shall specify . . . the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached.” The Claimant does no more than refer generally to “all resolutions issued by MINEC.” The Respondent submits that, because there is no investment authorization (much less one with enforceable provisions) and there is no reference to alleged breaches to the provisions of any resolution, there is no viable claim under CAFTA Article 10.16.1(b)(i)(B).
172. Accordingly, the Respondent submits that these other CAFTA claims should be dismissed by the Tribunal under CAFTA Article 10.20.4.
173. ***Non-CAFTA Claims:*** The Respondent objects to the competence of the Tribunal over all claims under the Investment Law. The exclusivity requirement in CAFTA, which precludes the Claimant from initiating any non-CAFTA proceeding involving the same measures alleged to constitute a breach of CAFTA, bars the competence of the Tribunal for all claims made by Claimant under the Investment Law and any

other domestic laws of the Respondent. The Respondent here also relies upon the expert opinion of Professor Reisman.

174. The Respondent submits that CAFTA requires exclusivity of arbitration proceedings with regard to any measures alleged to constitute a breach of CAFTA. This exclusivity requirement is included in CAFTA Article 10.18. The scope of this exclusivity requirement extends beyond the typical ‘fork-in-the-road’ provisions in many bilateral investment treaties. CAFTA requires exclusivity of the CAFTA dispute settlement provisions with respect to any claims related to the same measures alleged to constitute violations of CAFTA.
175. The Respondent contends that NAFTA Article 1121 has waiver requirements similar to CAFTA’s requirements. These waiver requirements have also been invoked by respondents with regard to local judicial and local arbitration proceedings, with the resulting dismissal of claims, either voluntarily or by order of the tribunal. For example, in the first NAFTA arbitration between *Waste Management Inc. and Mexico*, the claimant was attempting to maintain two domestic judicial proceedings and one domestic arbitration proceeding based on the same measures which the claimant was alleging constituted a violation of NAFTA in the NAFTA arbitration. The claimant argued that it was allowed to keep the concurrent proceedings because they were based on other sources of law, *i.e.*, Mexican law and not the NAFTA provisions upon which the claims in the NAFTA arbitration were based. The tribunal rejected the claimant’s interpretation of the waiver requirement because the measures being challenged in the concurrent proceedings were also the basis for the NAFTA claims in the NAFTA arbitration.
176. Until now, according to the Respondent, arbitral decisions and awards involving waivers under CAFTA and the similarly-worded waivers under NAFTA have only decided challenges involving parallel domestic proceedings based on the same measures that were alleged to constitute a breach of CAFTA or NAFTA in the non-domestic international arbitration. This was only so because that was the particular issue presented in these cases. According to the Respondent, there is nothing in the

plain text of CAFTA Article 10.18.2(b) to limit its application to domestic proceedings.

177. The Respondent cites, as an example, the first CAFTA arbitration, *TCW Group Inc and Dominican Energy Holdings, LP v. The Dominican Republic*, where the respondent made a jurisdictional objection based on the impermissible existence of two parallel international arbitrations in addition to the CAFTA arbitration, one alleging breaches of a BIT and one alleging violations of a contract but based on the same measures also alleged to constitute a breach of CAFTA in the CAFTA arbitration. The claimants disputed the requirement of identity of claimants in the parallel international arbitration which was necessary to trigger the waiver provisions, but the claimants never alleged that the waiver required by CAFTA Article 10.18.2(b) applied to domestic proceedings only. Thus, if this arbitration had not been terminated by the parties' settlement, the tribunal's decision on jurisdiction (regardless of its ruling on the claimants' identity argument) would have involved the application of the requirement of CAFTA Article 10.18.2(b) and the invocation of the corresponding waiver with regard to parallel international arbitrations.
178. Therefore, according to the Respondent, any notion that the waiver requirement applies only to parallel domestic proceedings is contradicted by the plain text of the treaty, the plain text of the waiver and the previous invocation of a waiver under CAFTA in a situation involving parallel international arbitrations.
179. The Respondent submits that these earlier NAFTA and CAFTA cases regarding exclusivity requirements and waivers lead to the conclusion that the Claimant cannot initiate parallel proceedings in domestic courts, in domestic arbitration proceedings or in another international arbitration (even in a separate ICSID arbitration) invoking jurisdiction under the Investment Law to bring claims under the Investment law (or other Salvadoran laws) based on the same measures alleged to constitute a violation of CAFTA before this Tribunal in these ICSID arbitration proceedings.

180. In the present arbitration, so the Respondent submits, the Claimant is bringing before this ICSID Tribunal two separate proceedings, one under CAFTA and the second one under the Investment Law. If allowed to proceed, the Claimant would be asserting two quite different sets of claims with regard to the exact same measures.
181. The Respondent contends that the Claimant cannot do in a single arbitration what it is not allowed to do in two separate arbitrations. Such a result would force the Respondent effectively to defend itself against two proceedings relating to precisely the same measures, with the possibility of inconsistent results because of different legal standards and different jurisdictional requirements. This is not allowed by the plain text of CAFTA Article 10.18.2(b), which was a condition to the Respondent's consent to arbitration when the Respondent became a party to CAFTA, as well as when the Claimant executed its waivers and commenced arbitration under CAFTA; and it remains a condition to the Respondent's consent.
182. The Respondent notes that several tribunals, parties to arbitration proceedings and commentators have raised the possibility of double recovery of damages as the purpose behind the waiver provisions in both NAFTA and CAFTA. The Respondent does not share that narrow interpretation, because there are other ways to address the issue of double recovery, as the claimant in *TCW v. The Dominican Republic* suggested. Instead, the Respondent focuses its objection on the plain text of CAFTA and the double jeopardy to which it would be subject in this case if CAFTA Article 10.18.2(b) did not provide otherwise.
183. According to the Respondent, the Claimant expressly accepted that the following waiver required by CAFTA was a precondition to the Parties' consent to jurisdiction under CAFTA:

*"Pursuant to Articles 10.18(2)(b)(i) and 10.18(2)(b)(ii) of CAFTA, PRC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to CAFTA, or other dispute settlement procedures, any proceeding with respect to any measure"*

*alleged in PRC’s Notice of Arbitration, dated April 30, 2009, to constitute a breach referred to in Article 10.16 of CAFTA.”*

184. In addition, according to the Respondent, the Claimant expressly consented to submit itself to CAFTA procedures earlier in that same document: “*Pursuant to Article 10.18(2)(a) of the Central America — United States — Dominican Republic Free Trade Agreement (“CAFTA”), Pac Rim Cayman LLC (“PRC”) hereby consents to arbitration in accordance with the procedures set out in CAFTA.*” According to the Respondent, the Claimant has unequivocally waived its rights to initiate or continue “any proceeding with respect to any measure alleged in PRC’s Notice of Arbitration ... to constitute a breach referred to in Article 10.16 of CAFTA” (emphasis added by the Respondent).
185. The Respondent submits that all claims under the Investment Law pleaded in the Notice of Arbitration are based on the exact same measures which the Claimant alleges to be breaches of CAFTA, namely: the Claimant’s allegations that the Respondent failed to grant a mining exploitation concession for El Dorado, and that the Respondent failed to issue Environmental Permits necessary for the renewal of the exploration licenses for the Guaco, Huacuco, and Pueblo. In fact, the Claimant addresses the factual basis for both the CAFTA and the Investment Law proceedings in a single section of the Notice of Arbitration, using the same measures as the factual basis for all claims in the two sets of legal claims. Therefore, according to the Respondent, there is an impermissible identity of measures in the two sets of legal claims advanced by the Claimant before this Tribunal.
186. Having waived its rights to initiate or continue any proceeding with respect to any measure alleged to constitute a breach of CAFTA, the Respondent contends that the Claimant has acted inconsistently with the terms of its waiver when it simultaneously invoked jurisdiction and introduced claims under the Investment Law over the same measures which the Claimant alleges are breaches of CAFTA.

187. According to the Respondent, previous CAFTA and NAFTA cases involving improper waivers with regard to pending parallel proceedings have resulted in the dismissal of the CAFTA or NAFTA claims affected by the overlapping measures. That remedy was appropriate in those cases because the tribunal deciding the objection only had the power to dismiss the claims before that tribunal, and did not have the power to terminate the concurrent proceedings. That remedy also was appropriate because that was what the respondent requested or agreed to.

188. In this case, however, the Respondent contends that this Tribunal has before it both sets of claims; and that it therefore has the power to dismiss the second set of claims. In this situation, according to the Respondent, the proper remedy for this Tribunal is to enforce the Claimant's waiver under CAFTA and to dismiss all non-CAFTA claims. This would resolve the problem, as identified by the Respondent, created by the contradiction between the Claimant's waiver and its Notice of Arbitration.

189. In conclusion, pursuant to CAFTA Articles 10.20.4 and 10.20.5, the Respondent submits that it has demonstrated that the Claimant's allegations of fact (if taken as true) and the undisputed facts show that PRES has failed to meet the requirements to obtain a mining exploitation concession in El Dorado; and that the Claimant has no valid legal claims regarding the Santa Rita exploration license. Therefore, the Claimant is not entitled to any award regarding these claims because the Respondent's alleged conduct has not caused any legal harm to the Claimant. In addition, the Claimant has not made any factual allegations to substantiate its legal allegations regarding breaches by the Respondent of CAFTA Articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), and 10.16.1(b)(i)(B). Consequently, the Respondent submits that these claims should be dismissed. Lastly, the Respondent submits that the Tribunal does not have any competence in these arbitration proceedings to decide any of the Claimant's claims under the Investment Law (or any other domestic law of the Respondent).

### **C: The Claimant's Case**

190. It is similarly appropriate for the Tribunal to summarise here the Claimant's responses to the Preliminary Objections. As with the Respondent's case, this summary is necessarily incomplete; and in tracking the Claimant's own submissions, it should not be thought that this summary represents the views of the Tribunal.
191. ***The El Dorado Claim:*** According to the Claimant, the Respondent erroneously asserts that PRES did not meet the two necessary requirements under the Mining Law for submitting an application for an exploitation concession from the Respondent. The Claimant submits that (i) PRES did demonstrate that it owned or was authorized to use the property where the El Dorado mine is to be located; and (ii) PRES did submit a proper Feasibility Study. The Claimant submits that these are issues of fact, both (a) as to what did or did not happen and (b) as to Salvadoran law, being treated as facts under international law before this Tribunal.
192. ***The Property Issue:*** As to the property issue, the Claimant submits that it must be assumed for present purposes that PRES did not fail to comply with Article 37 of the Mining Law concerning the documentary requirement for demonstrating ownership or authority to use the relevant land. The Claimant specifically pleaded in its Notice of Arbitration that PRES complied with this specific requirement of the Mining Law; see particularly paragraphs 35 and 42 of the Notice of Arbitration (quoted above in Part IV). According to the Claimant, this factual allegation, being assumed to be true under CAFTA Article 10.20.4(c) should, for present purposes, suffice to defeat the Respondent's Objection.
193. In any event, so the Claimant submits, the Respondent's interpretation of Salvadoran law is wrong. It is not the case that PRES was required to provide MINEC with proof of ownership or authorization comprising the entire surface area requested for the El Dorado concession. Article 37 of the Mining Law does not require the applicant to provide ownership of or authorization to use the entire surface of the concession area. The requirement is limited to the property within the concession area where mining

activities are to be conducted, or, as pleaded in the Notice of Arbitration, “where the mine project is located.” (Paragraph 35: quoted above in Part IV).

194. According to the Claimant, it is important to bear in mind that the mining concession sought by PRES was for an underground mine and not an open pit mine. It is a general principle of Salvadoran law that the sub-surface (with all mineral deposits thereof) is the property of the State and not of individual landowners. As stated in Article 103 of the Respondent’s Constitution: “The subsurface belongs to the State, which may grant concessions for its exploitation.”
195. The Claimant submits that this general principle is reflected in several provisions of the Mining Law. These provisions, read with Article 37, make it clear that, for an underground mine, the applicant need only demonstrate ownership or authorization of the limited surface area where mining activities are actually to be conducted, *i.e.* where the entrance to the underground mine and the above-ground mining facilities are to be physically located on the surface. The ownership of or authorization to use other surface areas under which minerals may be located (but which surface area is not to be used, disturbed or impacted by the applicant) is clearly not required by Article 37 of the Mining Law.
196. Thus, according to the Claimant, Article 2 of the Mining Law provides that “the State is the owner of all mineral deposits existing in the subsoil of the territory of the Republic, irrespective of their origin, form and physical state.” Article 10 establishes that mineral deposits existing in the subsoil constitute property distinct from the surface land under which they are located. Article 21 provides that authorization from third party landowners is required only for works to be performed on the soil surface. Article 54 provides that beneficiaries of mining rights can obtain a legal easement if use of real property owned by a third party is necessary for the development of their mining activities.

197. All these provisions confirm, in the Claimant's submission, that ownership or authorization to use all of the surface area comprising a concession area for an underground mine is not necessary under Article 37 of the Mining Law.
198. Moreover, so the Claimant contends, it would make no practical sense for the applicant to be required to obtain ownership of or authorization to use the surface land from private land-owners located above the deposit, but which surface land the applicant does not intend to use or disturb in order to mine the sub-surface. Article 37 only requires property ownership or authorization for works to be performed on the soil surface – not for the surface area overlaying underground deposits that will not be affected by the applicant's mining activities.
199. In summary, the Claimant submits that Respondent's case that PRES did not comply with this first requirement of Article 37 of the Mining Law in making its application for an exploitation concession is based on an incomplete, inaccurate and misleading presentation of the relevant facts, including facts concerning Salvadoran law and the relevant administrative record.
200. *Feasibility Study:* As to this issue, the Claimant submits that, as a matter of fact, PRES complied with Article 37 of the Mining Law because PRES did submit a Feasibility Study. Similarly to the first issue above, the Claimant contends that its factual allegation to such effect pleaded in paragraphs 35 and 42ff of the Notice of Arbitration (cited above in Part IV), being assumed to be true under CAFTA Article 10.20.4(c), should suffice to defeat the Respondent's Objection without more.
201. In any event, the Claimant contends that PRES submitted a Feasibility Study in the form of a "Preliminary Pre-Feasibility Study" with its application for the exploitation concession in December 2004, followed by a "Final Pre-Feasibility Study" in January 2005.
202. The Claimant rejects the Respondent's submission that this "Final Pre-Feasibility Study" did not comply with the requirements of Article 37 of the Mining Law. The

Respondent wrongly alleges that the difference between a Pre-Feasibility Study and a Feasibility Study is not merely a difference in name but a difference in substance. In fact, according to the Claimant, the Respondent has (*inter alia*) confused terms that have a meaningful distinction in the context of U.S. and Canadian securities laws, but which have no significance in the context of an application for an exploitation concession to the Respondent under the Mining Law of El Salvador.

203. The Claimant submits that Article 37 of the Mining Law requires an exploitation concession applicant to submit an “*Estudio de Factibilidad Técnico Económico, elaborado por profesionales afines a la materia*” – i.e. a Study of Technical and Economic Feasibility, prepared by professional persons with expertise in the relevant field. In the Notice of Arbitration, the Claimant provided a “shorthand” definition to refer to this document: a “Feasibility Study.”
204. According to the Claimant, the Mining Law and Mining Regulations set out the requirements for what is to be included in a Feasibility Study. Article 23 of the Mining Law (“Concession for the Exploitation of Mines”) provides that an application for a mining concession is made upon completion of exploration and proof of the “existence of economic mining potential on the authorised area; and Article 23 also refers to “verification of economic potential.”
205. Section 18 of the Mining Regulations (“Application for Exploitation Concessions”) provides that when: “applying for a Mine Exploitation Concession after receiving an Exploration License, proof of the existence of a deposit or deposits as described in Article 23 of the Law shall be provided via documents that are congruent or consistent with the activities and studies that were executed during the term of this License, and the final report described in the preceding section ... when the concession is requested directly, as set forth in Section 23, paragraph 3, of the Law, documentation shall be based on information on expired mining rights or from Technical Studies carried out that indicate the existence of minerals.”

206. According to the Claimant, the Respondent itself confirms that the *Estudio de Factibilidad Técnico Económico* is intended to serve this limited purpose. Specifically, the Respondent refers to the purpose of this study as “allow[ing] the Ministry of Economy to properly evaluate whether to grant the concession and, if so, whether PRES had provided justification and showed its technical and economic capacity, for the 12.75 square kilometres area it was requesting for the exploitation concession” (Paragraph 80 of its Preliminary Objections).
207. By these terms, according to the Claimant, the Final Pre-Feasibility Study submitted by PRES plainly met or exceeded the requirements of the *Estudio de Factibilidad Técnico Económico*. It is a professional report, exceeding 200 pages and prepared by numerous specialist firms under the coordination of SRK Consulting, one of the leading independent producers of feasibility studies in the mining world.
208. According to the Claimant, the Mining Law and Regulations do not define a “mineable deposit.” In preparing the study, SRK therefore used the definitions employed by the Canadian Institute of Mining, being consistent with the purpose of Salvadoran law described above.
209. Thus, as used in the study, a “mineral resource” is defined as a resource “in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction; and a “mineral reserve” means “the economically mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study.” The study must include adequate information on mining, processing, metallurgical, economic and other relevant factors that demonstrate, at the time of reporting, that “economic extraction can be justified.”
210. Consistent with these requirements, according to the Claimant, the Pre-Feasibility Study submitted by PRES included a “Statement of Mineral Reserves,” totalling 535,586 gold equivalent ounces; and this conclusion alone is sufficient to show that an economically mineable deposit exists, even after taking into account the proposed mining method; metallurgical and processing methods; and other economic, legal,

environmental, and other relevant factors which are discussed in detail throughout the study.

211. Therefore, the Claimant submits that the study submitted by PRES plainly satisfies both the letter and intent of Article 37(2)(d) of the Mining Law.
212. According to the Claimant, the Respondent confuses the standards for an *Estudio de Factibilidad Técnico Económico* under the Mining Law with those under the U.S. and Canadian securities laws for publicly traded mining companies. Again, under the mining regulatory framework in El Salvador (and most other countries), the purpose for a feasibility study is to show that there is a sufficient existence of economic mining potential in the authorized area as to justify exploitation activities. By contrast, in the context of the U.S. and Canadian securities laws, the purpose of such studies is to inform potential investors of how developed the financial model is for the intended mine. Under these securities laws, guided by industry standards used to construe these laws, a “pre-feasibility study” must provide a degree of economic reliability that is within a range of 20% to 30%. The economic reliability of a feasibility study should be within 15%.
213. The Claimant submits that it is therefore difficult (if not impossible) to prepare a study with the level of economic reliability required under that standard for a “feasibility study” *before* an environmental permit and an exploitation concession have been issued. The timing alone of the permit and concession could affect, for example, the costs of various commodities used to gauge the likely financial performance of a mining project. As stated in PRES’s application: “The studies related to a mining project are largely iterative and change according to the costs, metal prices, operating upgrades, available technology and exploration program results.”
214. The Claimant contends that the fact that PRES could not label the report a “Final Feasibility Study” (because of U.S. and Canadian securities laws) does not mean that the “Final Pre-Feasibility Study” did not satisfy the requirements of the Mining Law.

The US and Canadian requirements are higher, not lower, than the requirements under Article 37 of the Mining Law of El Salvador.

215. Lastly, so the Claimant concludes, even assuming that MINEC believed that there were any deficiencies with respect to PRES' Feasibility Study, MINEC was required actually to inform PRES and allow it to cure any such deficiencies under Salvadoran law. After that process, to the extent that PRES disagreed with MINEC's conclusions and MINEC still denied the application, PRES would have been entitled to pursue an appeal through the appellate process also provided for by Salvadoran law. MINEC never ruled one way or the other, thereby effectively destroying the Claimant's investment and leaving the Claimant without any recourse to any of the procedural or substantive protections that Salvadoran law could provide against an adverse ruling.
216. In summary, the Claimant contends that the Respondent's submission that PRES did not comply with this second requirement of Article 37 of the Mining Law, in making its application for an exploitation concession, should be rejected by the Tribunal both under Article 10.20.4(c) and in any event.
217. **Santa Rita Claim:** The Claimant submits that the Respondent overlooks the principal allegations of the Claimant's claim, namely: that long before PRES decided not to renew its Santa Rita exploration license in July 2009, the Respondent had destroyed the investment that the Claimant had made by making it clear that, no matter what applications the Claimant filed or what the Claimant did, PRES would not be allowed by the Respondent to mine at Santa Rita or elsewhere.
218. According to the Claimant, under CAFTA and international law generally, an investor does not have to continue formal compliance with a regulatory regime that the respondent government has effectively swept away in order to maintain a claim by the investor under CAFTA. The Claimant cites the arbitration awards in *Glamis Gold v. USA* and *Vivendi v. Argentina*: "[I]nternational and domestic courts do not require futile attempts that will merely waste a claimant's resources and fail to change an inevitable final decision" by the host State (*Glamis Gold Ltd. v. USA*, Award of 14

May 2009, paragraph 333; and *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Republic of Argentina*, Award of 20 August 2007, paragraph 7.5.28); and accordingly a claimant is under no obligation to continue operations after the treaty obligation invoked by the investor has already been breached by the host State.

219. In summary, the Claimant concludes that, by the Respondent's illegal acts and omissions, the Respondent made it impossible for the Claimant as an investor to pursue its mining activities anywhere in the country, including Santa Rita; and that the Objection to the Santa Rita Claim should therefore be dismissed by the Tribunal.
220. ***Other CAFTA Claims:*** The Claimant rejects the Respondent's allegation that the Claimant has failed to provide any factual basis for its claims of violation of CAFTA Articles 10.3 (National Treatment) and 10.4 (Most-Favored Nation Treatment). According to the Claimant, the Respondent also asserts wrongly that the Claimant does not allege in the Notice of Arbitration how the Respondent has treated its own nationals (or nationals of any other State) more favourably than the Claimant.
221. Contrary to the Respondent's assertions, the Claimant submits that it pleaded the relevant legal and factual bases for its claims in its Notice of Intent. It there alleged: "The Salvadoran Government's discriminatory behaviour toward the Enterprises is also reflected by the fact that other industries whose operations raise similar environmental concerns, such as power plants, dams, ports, and fishing operations, have received environmental permits during the same timeframe that the Enterprises' applications have been pending. By, *inter alia*, refusing to grant the environmental permits to PRES and DOREX while issuing those permits to other companies, El Salvador has denied to PRC the same treatment that it is required to afford, and has afforded, to investments of its own nationals and to nationals of other states." (Paragraph 35 of the Notice of Intent).
222. The Claimant contends that this pleading in the Notice of Intent was both sufficient and also effectively summarised in the Notice of Arbitration (paragraph 91); and that it should now be treated by the Tribunal as incorporated into the Notice of Arbitration

either by its original wording or under the Claimant's request to amend the Notice of Arbitration to such effect. As to the latter, as already indicated, the Tribunal is content to do so: see Part I above, at paragraph 35.

223. Moreover, according to the Claimant, the Respondent's effective ban on mining activities appears to be limited to metallic mining. In the meantime, non-metallic exploitation activities (which are conducted primarily by Salvadoran companies) continue unhindered. These contrasting facts provide further support for the Claimant's National Treatment and Most-Favoured-Nation ("MFN") Treatment claims in these arbitration proceedings.
224. In support of its case, *inter alia*, the Claimant cites the arbitral decisions in *Corn Products International, Inc. v. Mexico*, where a NAFTA tribunal set forth the similar requirements for demonstrating a breach of National Treatment (which are said to be equally applicable to MFN Treatment under CAFTA).
225. The Claimant submits that the Respondent has therefore failed to meet its burden of showing that Claimant's National Treatment and MFN Treatment claims are, as a matter of law, not claims for which an award in favour of the Claimant may be made; and accordingly its Objection should be dismissed by the Tribunal.
226. As regards investment authorizations, the Claimant submits that it alleged in the Notice of Arbitration that the Respondent had breached CAFTA Article 10.16.1(b)(i)(B) and, specifically, that MINEC had issued "investment authorizations" in the form of (i) resolutions granting exploration licenses to PRC's Enterprises and (ii) resolutions from ONI authorizing the registration of PRC's investment in El Salvador.
227. The Claimant notes that the Respondent advances two separate arguments directed at the Claimant's claims arising from its investment authorizations. First, the Respondent wrongly submits that the Claimant has not identified the resolutions at issue with the requisite specificity in its Notice of arbitration. According to the Claimant, the

Respondent is well aware of what resolutions MINEC issued to the Enterprises. Moreover, elsewhere in the Notice of Arbitration, the Claimant identified the resolutions with great specificity and included several as exhibits. According to the Claimant, this argument is simply wrong at the early stage of these ICSID arbitration proceedings.

228. Second, according to the Claimant, the Respondent is wrong to submit that the resolutions granting exploration licenses and registering the Claimant's investments do not constitute "investment authorizations" within the meaning of CAFTA Article 10.28.
229. The Claimant contends that CAFTA Article 10.16.1(a)(i) sets out three different types of instruments, the obligations of which can form the basis for a claim under CAFTA (see the full text cited above in Part III).
230. According to the Claimant, the second instrument, an "investment authorization", was meant to capture those cases where a State authorizes an investor to make investments within the State's territory, but not through an investment agreement (being the third instrument). The concept is that where, as in this case, the State has invited an investor of a Party to invest in the State through an investment authorization and has conferred rights on the investor in exchange for its investment, those rights should be enforceable under CAFTA.
231. Article 10.28 of CAFTA defines an "investment authorization" as "an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party." Article 10.28 further defines an "investment" as including "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law."
232. A footnote to this definition states: "Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment

depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit or similar instrument has the characteristics of an investment.”

233. As alleged by the Claimant in its Notice of Arbitration, the exploration licenses at issue conveyed substantial rights under Salvadoran law, including (specifically) the exclusive right to pursue an exploitation concession free from extra-legal changes to the regulatory framework. The resolutions at issue authorized licenses, which constituted covered investments under CAFTA. Hence, these resolutions and the licenses granted by them are “investment authorizations” under CAFTA.
234. The Claimant submits that there is also no question that these resolutions were in fact issued by the “foreign investment authority of a Party” because MINEC is the authority under Salvadoran law charged with responsibility over foreign investment by the Respondent.
235. Similarly, according to the Claimant, by registering these investments with ONI, a department of MINEC, the Enterprises received investment authorizations from MINEC and the Respondent. Article 17 of the Investment Law specifically requires that foreign investors “must register their investments at the ONI, which shall issue a Credential (“*una Credencial*”) granting the foreign investor status and identifying the registered investment.” A foreign investor whose investment registrations are accepted at ONI are deemed authorized to do business in El Salvador and to enjoy all the rights and protections of the Investment Law. Article 26 of the Investment Law provides that “[e]xisting foreign investment registered at the Ministry of Economy are recognized and their validity accepted, as long as they remain in good standing, for which they will automatically be afforded the guarantees and rights stipulated by this law, except on the subject of disputes arising before enforcement of this law.”

236. Thus, the Claimant submits that the resolutions issued by ONI authorizing the registration of the Claimant’s investments in El Salvador unambiguously constitute investment authorizations under CAFTA.

237. In summary, the Claimant concludes that its review of the text of CAFTA and relevant materials (including the Investment Law) demonstrates that the Respondent’s second argument is devoid of any merit. The resolutions issued by ONI authorizing the capital invested by the Claimant in El Salvador and the resolutions issued by MINEC allowing PRES to develop exploration activities in that country, constitute “investment authorizations” under CAFTA Article 10.16(1)(a)(i)(B).

238. However, according to the Claimant, that is not even the question currently before the Tribunal under the Respondent’s Preliminary Objections: the question is whether the Respondent has met the burden of demonstrating that the Claimant’s claims with respect to investment authorizations are, as a matter of law, claims for which an award in favour of the Claimant may not be granted under CAFTA Article 10.26. The Claimant submits that the Respondent has failed to meet that burden; and its Objection should therefore be rejected by the Tribunal.

239. ***Non-CAFTA Claims:*** Next, as to the Respondent’s Objection under Article 10.20.5 as to the Tribunal’s competence, the Claimant contends that by ratifying CAFTA and enacting the Investment Law, the Respondent provided its consent to arbitrate claims under both CAFTA and the Investment Law before this Tribunal; by submitting its Notice of Arbitration asserting claims under both CAFTA and the Investment Law, the Claimant has provided its reciprocal consent to arbitrate such claims before this Tribunal; and the Claimant has not waived, nor been required to waive, its right to arbitrate such claims under both CAFTA and the Investment Law before this Tribunal in these arbitration proceedings under the ICSID Convention. The Claimant here also relies on the expert opinion of Professor Wallace.

240. According to the Claimant, the Respondent’s argument to the contrary springs from its own interpretation of CAFTA Article 10.18.2. It necessarily requires the phrase “or

other dispute settlement procedures” in the concluding sub-paragraph to apply to that part of these proceedings by which the Claimant advances its claims under the Investment Law. That is not a permissible reading of this provision under international law, nor an appropriate characterisation of these ICSID proceedings.

241. The Claimant submits that there is no risk of double jeopardy to the Respondent, given that the Claimant advances all its claims at the same time within the same ICSID arbitration before the same Tribunal. There can be no unfair prejudice to the Respondent from such proceedings; nor any corresponding unfair advantage to the Claimant. If there were, the Tribunal has available powers to apply any remedy later in these proceedings, without declaring itself incompetent at this early stage of these proceedings.
242. Nor is it unusual, still less unacceptable, so the Claimant contends, for an arbitral tribunal to enjoy concurrent jurisdiction under a treaty and a municipal investment or other law. The Claimant cites as recent examples the ICSID awards in *Rumeli v. Kazakhstan* (2008) and *Duke v. Ecuador* (2008).
243. In summary, the Claimant submits that the Respondent’s case that this Tribunal lacks competence under CAFTA Article 10.20.5 should be rejected by the Tribunal.

#### ***D: The Tribunal’s Decisions***

244. Given the Tribunal’s decisions below and its concern not to prejudge, or even be seen to prejudge, the Parties’ respective cases hereon in these arbitration proceedings, it is necessary for the Tribunal to state the grounds for its decisions as succinctly as possible.
245. ***The El Dorado Claim:*** This claim is the largest and most significant claim made by the Claimant. On the alleged facts in the Notice of Arbitration, cited in Part IV of this decision, the Tribunal does not consider that the Respondent has demonstrated that this

claim, as a matter of law, is not a claim for which an award in favour of the Claimant may be made under CAFTA Article 10.26.

246. In the Tribunal's view, the issue of liability raises questions as to the interpretation and application of the Mining Law (whether treated as fact or law) which are either to be assumed to be true for present purposes or which cannot at present be decided finally in favour of the Respondent; and the issue of causation (assuming liability) raises questions of fact or mixed law and fact which cannot at present be decided finally in favour of the Respondent. As regards the issue of damages (assuming liability and causation), the Tribunal considers that it may be possible for such damages to be quantified as compensation for the loss of a chance even if (which the Tribunal does not here decide) such damages could not be characterised as compensation for the loss of an "automatic" or "perfected" right to a mining exploitation concession; and thus, if this were so, that issue too cannot at present be decided finally in favour of the Respondent.
247. ***The Santa Rita Claim:*** This is a relatively small claim, which appears to contribute little additional burden to the Respondent in defending these proceedings. Notwithstanding this claim's terse pleading in the Notice of Arbitration, on balance, the Tribunal considers it inappropriate to accept the Respondent's Objection under CAFTA Article 10.20.4 given this claim's adjectival and minor status.
248. ***Other CAFTA Claims:*** As regards the claims under CAFTA Articles 10.3 and 10.4, given the Notice of Arbitration and the Claimant's request to amend the Notice of Arbitration, the Tribunal considers that the Respondent has not established that these claims are insufficiently pleaded or that these claims, as a matter of law, are not claims for which an award in favour of the Claimant may not be made under CAFTA Article 10.26.
249. As regards the claims based on the alleged investment authorizations, the Tribunal considers that these claims raise issues of Salvadoran law which (whether treated as fact or law) cannot be decided finally at this stage in favour of the Respondent; and

accordingly, the Tribunal does not accept the Respondent's Objection under CAFTA Article 10.20.4.

250. ***Non-CAFTA Claims:*** The Tribunal does not accept the Respondent's Objection as to its lack of competence under CAFTA Article 10.20.5.
251. The Tribunal has carefully considered the expert opinions of Professor Reisman and Professor Wallace. It has not found it necessary to decide the broader issues canvassed in these two opinions, which are best left to other tribunals in other cases. In this case, the Tribunal considers that the decisive issue is relatively short.
252. Given CAFTA's stated objective in providing an effective procedure for dispute resolution and the important practical need, wherever possible, for 'one stop adjudication', the Tribunal does not accept the Respondent's interpretation of CAFTA Article 10.18(2) and its treatment of these ICSID proceedings as comprising two quite separate "dispute settlement procedures."
253. In the Tribunal's view, these arbitration proceedings are indivisible, being the same single ICSID arbitration between the same Parties before the same Tribunal in receipt of the same Notice of Arbitration registered once by the ICSID Acting Secretary-General under the ICSID Convention. To decide otherwise would require an interpretation of CAFTA Article 10.18(2) wholly at odds with its object and purpose and potentially resulting in gross unfairness to a claimant. There is no corresponding unfairness to the Respondent in maintaining these ICSID proceedings as one single arbitration. In particular, the Respondent does not here face any practical risk of double jeopardy. Lastly, it is hardly a legitimate objection to this Tribunal's competence that it exercises jurisdiction over these Parties based not upon one consent to such jurisdiction from the Respondent but based upon two cumulative consents from the Respondent. It is an indisputable historical fact that several arbitration tribunals have exercised jurisdiction based on more than one consent from one disputant party, without being thereby deprived of jurisdiction.

254. Accordingly, for all these reasons, the Tribunal does not accept the Respondent's Preliminary Objections.

## **PART VII: THE TRIBUNAL'S SUMMARY**

255. As indicated above, the Tribunal does not accept the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5.
256. In regard to each of the Preliminary Objections under Article 10.20.4, as also indicated above, the Tribunal is legally obliged to assume that the Claimant's factual allegations pleaded in the Notice of Arbitration, albeit disputed by the Respondent, are "true" in accordance with the express requirements of CAFTA Article 10.20.4(c) for the purpose of deciding these objections. Conversely, it is not permissible for the Tribunal to negate this assumption by constructing to contrary effect "relevant facts not in dispute" from other materials for the purpose of the last sentence of Article 10.20.4(c), when it is clear that such facts, as invoked by the Respondent, are disputed by the Claimant.
257. That assumption of truthfulness, as explained above, is made by the Tribunal for the limited purpose of this Decision only. It does not represent or reflect any other decision by the Tribunal itself as to the truth or falsity of any of the factual allegations pleaded by the Claimant and denied by the Respondent.
258. In summary, the Tribunal does not here grant the preliminary relief claimed by the Respondent set out above in Part I, at paragraph 54(2) to (5) and paragraph 55(1) to (6).

## **PART VIII: COSTS**

259. ***Introduction:*** There still remain the disputed issues of costs to be decided by the Tribunal, as claimed by both Parties respectively.
260. ***The Claimant:*** The Claimant requested that the Tribunal order the Respondent to bear all the costs and expenses of this Preliminary Objections' phase. The Claimant submits that its costs should be reimbursed because it has been forced to defend itself against "frivolous" Preliminary Objections made by the Respondent, within the meaning of CAFTA Article 10.20.6.
261. ***The Respondent:*** The Respondent requested that the Tribunal order the Claimant to bear all the costs and expenses of this Preliminary Objections' phase, including the Tribunal's expenses, the Respondent's costs for legal representation, with interest. The Respondent submits in turn that its costs should be reimbursed because it has been forced to defend itself against "frivolous" claims made by the Claimant, also within the meaning of CAFTA Article 10.20.6: see also its claimed preliminary relief set out in Part I above at paragraphs 54(6) and 55(6).
262. ***The Tribunal's Decision:*** Given the Tribunal's decision not to accept the Respondent's Preliminary Objections, it must follow that the Respondent's application for costs must be rejected. It does not follow, however, that the Claimant's application for costs should here be allowed, for two reasons.
263. First, the Tribunal is conscious that this was the first application made under CAFTA Article 10.20.4 and also the first time that the expedited procedure under Article 10.20.5 was invoked for a preliminary objection under Article 10.20.4. There was thus something to be learnt for all involved; and what might seem inappropriate after that lesson would not have seemed so beforehand, at the time when it mattered. In any event, in the Tribunal's view, the Respondent's Preliminary Objections cannot be regarded, even now, as "frivolous" within the meaning of CAFTA Article 10.20.6.

264. Second, as regards these particular claims, much of the costs so far incurred by the Parties will not have been wasted. Much of the work required to bring these proceedings forwards to a conclusion has now been done. In the Tribunal's view, it is unlikely that much time, effort and expenditure will have been lost overall.
265. For these reasons, the Tribunal decides to make no order as to costs at this stage under CAFTA Article 10.20.6 but to reserve its decision to the final stage of these arbitration proceedings.

## **PART IX: THE OPERATIVE PART**

266. For the reasons and on the grounds set out above, the Tribunal decides:

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

ICSID, Washington DC, USA.

[ signed ]

*Professor Dr Guido Santiago Tawil:*

Date: 2 August 2010

[ signed ]

*Professor Brigitte Stern:*

Date: 2 August 2010

[ signed ]

*V.V. Veeder Esq (President)*

Date: 2 August 2010