INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Pac Rim Cayman LLC	)	
	)	
Claimant,	)	
	)	
v.	)	**ICSID Case No. ARB/09/12**
	)	
The Republic of El Salvador	)	
	)	
Respondent.	)	

THE REPUBLIC OF EL SALVADOR'S REPLY (PRELIMINARY OBJECTIONS)

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I. INTRODUCTION

1. An examination of Claimant's factual allegations as well as relevant facts not in dispute demonstrates that Claimant has no right to the mining exploitation concession Claimant seeks to extract from the Republic. The Republic filed Preliminary Objections to request the early dismissal of Claimant's unmeritorious claims related to its allegation that it has such a right, as well as the dismissal of other claims lacking any factual basis and non-CAFTA claims filed in violation of Claimant's waiver under CAFTA Article 10.18.2.

2. Instead of dealing with the specific factual allegations it has made (and those it failed to make), Claimant responded to the Preliminary Objections by attempting to create the appearance that the issues before the Tribunal are too complicated to be decided at this stage. In doing so, Claimant has ignored the actual allegations before the Tribunal and undisputed factual record and distorted the Republic's arguments.

3. In this Reply, the Republic will again show that the relevant facts before the Tribunal are straightforward and the legal issues are appropriate for determination as preliminary objections. First, the Republic will show that the Republic and Claimant agree on certain key facts and several important legal issues relevant to the Tribunal's decision. Second, the Republic will show that the issues on which the parties disagree are legal issues, and therefore within the power of the Tribunal to decide now. Finally, the Republic will demonstrate that Claimant's claims are frivolous on the undisputed facts and thus should be dismissed in this early phase of the proceeding.

4. In doing so, the Republic will produce evidence of misleading statements made by Claimant in the course of this arbitration. For example, Claimant has told the Tribunal that it

did not know until the Republic filed the Preliminary Objections that the Republic had a different interpretation from Claimant's about the legal requirement of land ownership or authorization needed to obtain a mining exploitation concession. However, in fact, Claimant has known since at least 2005 that the Government of El Salvador did not share Claimant's self-serving interpretation of the Mining Law land requirement.[1] The Republic requests that the Tribunal take this and other misleading statements from Claimant into account when the Tribunal is called upon to decide the apportionment of the legal costs and expenses in this arbitration.

II. STANDARD OF REVIEW FOR CAFTA ARTICLE 10.20.4 OBJECTIONS

5. Having initiated a CAFTA arbitration, Claimant must comply with the legal standards that come with that choice. But as Claimant's Response to the Preliminary Objections shows, Claimant is attempting to redefine the applicable legal standard.

A. CAFTA rules and procedures govern the entire arbitration

6. Claimant does not dispute that CAFTA rules and procedures, to the extent that they modify the ICSID Arbitration Rules, govern this entire arbitration.[2] This means, among other things, that the pleading requirements for the Notice of Arbitration are those of CAFTA Article 10.16, not the requirements under the ICSID Rules, and that the applicable standards for these Preliminary Objections are those under CAFTA Articles 10.20.4 and 10.20.5, not the standards under ICSID Arbitration Rule 41(5) or some other standards that might suit Claimant's needs.

[1] In this Reply, references to "Claimant" include Pac Rim Cayman LLC and Pacific Rim El Salvador.
[2] Claimant's Response to Respondent's Preliminary Objections, Feb. 26, 2010 (hereinafter "Response"), para. 214, n. 252.

1. CAFTA includes a heightened pleading requirement

7. Contrary to Claimant's assertions,[3] CAFTA does include a heightened pleading requirement compared to the ICSID Rules.

8. Specifically, CAFTA Article 10.16 explicitly requires that a claimant identify "the legal and factual basis for each claim"[4] while the ICSID Convention, by contrast, "simply require[s] that the request for arbitration 'contain information concerning the issues in dispute'".[5] Thus, there is a heightened pleading standard for a CAFTA claim. A claimant must "claim", or allege a legal and factual basis supporting that 1) the respondent had a legal obligation towards the claimant, that 2) the respondent breached that legal obligation, and that 3) respondent's breach of that legal obligation caused 4) loss or damage to the claimant.[6]

9. Thus, a claim under CAFTA Article 10.16.1 must be based on an alleged breach by the respondent and alleged loss or damage arising out of that breach, and Article 10.16.2 requires the claimant to provide the factual basis for each claim.

10. In an effort to avoid this clear obligation to set forth specific facts supporting each claim, Claimant mischaracterizes the Republic's argument in the Preliminary Objections regarding Claimant's burden. The Republic did *not*, as Claimant suggests, insist that the Claimant submit specific items of evidence with the Notice of Arbitration.[7] Rather, Claimant must allege the specific *facts* supporting each claim. This Claimant has failed to do.

11. Claimant never alleged all the facts needed to support a claim that, even assuming as true Claimant's allegations of a breach by the Republic, it was the Republic's alleged breach of substantive rights under CAFTA which caused the damage of which Claimant complains. This

[3] *See, e.g.*, Response, para. 14.
[4] CAFTA Article 10.16.2(c) (RL-1); Response, para. 101.
[5] ICSID Convention Article 36(2); Response, para. 108.
[6] *See* CAFTA Article 10.16.1(a) and (b) and 10.16.2 (RL-1).
[7] *See, e.g.*, Response, para. 123.

is no accident. Claimant could *not* allege any facts supporting a claim that its alleged damages were caused by the Republic because, even assuming as true the facts alleged by Claimant, Claimant could not and would not have the right to receive a mining exploitation concession in El Dorado. This is because of Claimant's failure – *on the undisputed facts* – to meet other requirements for a mining exploitation concession, due to circumstances entirely within Claimant's control. In short, Claimant does not allege facts to support an allegation that it was ever entitled to an exploitation concession; to the contrary, the undisputed facts demonstrate otherwise.

12. Additionally, regarding the application for a mining exploitation concession in El Dorado, Claimant's conclusory statements – unadorned with any factual allegations – that it complied with all the requirements of the law are insufficient. Claimant did not and cannot allege that Pacific Rim El Salvador submitted the documentation which Claimant admitted "*must* accompany an application for an exploitation concession,"[8] namely, proof of ownership or authorization to use all the land in the requested concession area and a final feasibility study.

13. To divert attention from the lack of substantive factual allegations, Claimant seeks to impress the Tribunal by the sheer "volume and density" of its submission, noting that its "Notice of Intent and Notice of Arbitration together comprise 235 paragraphs and 70 pages of pleadings."[9] The best response to this argument was supplied by Claimant itself, when it candidly admitted that "[q]uantity, of course, cannot take the place of substantive allegations."[10]

[8] Response, para. 37 (emphasis added).
[9] Response, para. 113. *See also*, Response, para. 124 ("The volume and density of these documents demonstrate that . . . this case involves issues of disputed fact that are far too complex to be determined at this stage.").
[10] Response, para. 113.

2. The word "manifest" does not appear in CAFTA Article 10.20.4

14. Having first accepted (as it must) that the CAFTA Rules and procedures govern this entire arbitration, Claimant then incorrectly suggests that the standard to be applied to its claims is "similar (if not identical)" to the "manifestly without legal merit" standard set forth in the expedited procedure of ICSID Arbitration Rule 41(5).[11] But the procedure under CAFTA Article 10.20.4 (by itself or in conjunction with the expedited procedure under CAFTA Article 10.20.5) does not include the word or concept of "manifestly" without legal merit, nor does Claimant cite any authority suggesting that it does. Indeed, the existing authority is to the contrary.

15. The notion, as suggested by Claimant, that the standard in ICSID Arbitration Rule 41(5) was somehow equivalent to standards like the CAFTA standard in Article 10.20.4 that do not incorporate the concept of "manifestly" was rejected by the tribunal in *Brandes Investment Partners v. Venezuela*. The *Brandes* tribunal declared that "[t]he level of scrutiny of '*manifestly*' obviously provides a far higher threshold than the *prima facie* standard normally applied for jurisdiction under Rule 41(1) where the factual premise for the decision on jurisdiction is normally taken as alleged by the Claimant."[12] In other words, the tribunal recognized that the addition of the word "manifestly" provided for a higher standard governing the granting of a preliminary objection under ICSID Arbitration Rule 41(5) than a standard which allows scrutiny of the sufficiency of the facts alleged by the claimant, such as under an ICSID Arbitration Rule 41(1) jurisdictional objection or a CAFTA preliminary objection.

[11] Response, para. 83.
[12] *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ICSID Case No. ARB/08/3, Feb. 2, 2009, para. 62 (CL-12; full case provided as **RL-15).**

3. CAFTA provides for greater scrutiny of the claims

16. The procedure for preliminary objections under CAFTA contemplates a more thorough analysis of the viability of claims than the expedited ICSID Arbitration Rule 41(5) procedure. This conclusion is further supported by a comparison of the time periods governing objections under the two regimes. Contrary to Claimant's argument that "unlike Article 10.20.4, Rule 41(5) contains no proscribed time limits for briefing and deciding the objection,"[13] both ICSID tribunals that have considered objections under Rule 41(5) have referenced the strict time limits imposed by that Rule.

17. The first tribunal, in *Trans-Global*, stated, "the prescribed time-limits [under Rule 41(5)] are severely truncated", noting the "time-limit of 30 days for the objection, . . . the requirement that the objection be addressed to the tribunal at or before the first session, the latter ordinarily to take place within 60 days of the tribunal's constitution, . . . [and] the requirement that the tribunal decide the objection quickly, particularly (if appropriate) by a written, reasoned award 'at the first session or promptly thereafter'."[14] Likewise, the tribunal in *Brandes* commented that "the revision of 2006 introducing Rule 41(5) provides very short time-limits".[15]

18. Claimant argues that the briefing schedule in *Trans-Global* was somewhat similar to this case, with a difference of "roughly eight weeks."[16] But when the entire procedure is considered, there is no similarity between the schedule in an ICSID Arbitration Rule 41(5) objection and a CAFTA Article 10.20.5 objection. In *Brandes*, the objection was filed on December 19, 2008 and the decision was dispatched to the parties 45 days later on February 2,

[13] Response, para. 94.
[14] *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ICSID Case No. ARB/07/25, May 12, 2008, para. 90 (emphasis added) (RL-5).
[15] *Brandes*, para. 54 (RL-15).
[16] Response, para. 95.

2009. The *Trans-Global* objections were filed on February 25, 2008, there was a hearing in April, and the decision was dispatched to the parties on May 12, 2008. That was 77 days. On the other hand, in *RDC v. Guatemala*, a CAFTA case, an objection was filed under the expedited procedure of CAFTA Article 10.20.5 on May 29, 2008, the hearing was on October 10, and a decision was dispatched to the parties on November 17, 2008. In that CAFTA case the decision was issued 172 days after the objection. The CAFTA rules provide for up to 180 days for a determination on Preliminary Objections under the expedited procedure of Article 10.20.5—*four times* longer than the amount of time consumed by the Rule 41(5) procedure in the *Brandes* arbitration and more than *twice* as long as was taken in *Trans-Global*.

19. In the current case before the Tribunal, the Preliminary Objections were filed on January 4, 2010. There will be two rounds of briefings, with Claimant receiving more than 50 days for its Response and 30 days for its Rejoinder, and with more than 30 days between the filing of the last written submission on April 28 and the hearing on May 31. The Tribunal will have more than 30 days after the hearing to issue its decision. The time allotted by CAFTA Article 10.20.5, 180 days from the filing of the Preliminary Objections, is more than adequate to fully brief and decide the purely legal issues now before the Tribunal.

20. Claimant's argument also ignores the fact that the standard to decide CAFTA Article 10.20.4 objections must be the same regardless of whether the objection is filed solely under Article 10.20.4 or using the expedited procedure of CAFTA Article 10.20.5. Therefore, the level of the Tribunal's analysis cannot be compromised because a respondent chooses to file an objection under CAFTA Article 10.20.4 in conjunction with Article 10.20.5, as CAFTA expressly allows if the respondent raises the objection within 45 days of the constitution of the

Tribunal, as the Republic did in this case. Claimant is incorrect to suggest that the option of an expedited procedure impacts the standard to decide an Article 10.20.4 objection.

21. The issues before the Tribunal are legal issues. The essence of the Preliminary Objections is that Claimant is not entitled to a favorable award *as a matter of law*. The Republic's Preliminary Objections demonstrate, on the undisputed facts, that Claimant never had a right to a mining exploitation concession due to reasons for which Claimant does not blame the Republic and which were wholly within the control of Claimant. All of the facts cited by the Republic to demonstrate this point came from Claimant's own documents and statements, so there cannot be any allegation of surprise. Indeed, Claimant asserted repeatedly in its Notice of Arbitration that it had complied with all the other requirements to be awarded the concession, only to complain that it was not prepared to make a showing that it did meet the requirements when the Republic filed its Preliminary Objections, and now to suggest that the issue is too complicated to be decided in 180 days. Either Claimant knew the facts supporting its case before it filed the arbitration or it did not. The evidence suggests that Claimant knew its case was frivolous and still decided to go forward, hoping to pressure the Government of El Salvador to give in to Claimant's demand for a concession Claimant does not have a right to receive.

B. The purpose of CAFTA Article 10.20.4 is to dispose of frivolous claims

22. The parties agree that the purpose of the inclusion of the preliminary objections in CAFTA Article 10.20.4 is for the Tribunal to dispose of frivolous claims.[17]

23. However, Claimant argues that the Republic's Preliminary Objections may not be granted unless it is a "legal impossibility" for Claimant to succeed. Claimant argues that a "legal impossibility" standard is suggested by the words "is not a claim for which an award in favor of the claimant may be made under Article 10.26." Specifically, Claimant's argument is that

[17] Response, para. 80.

because Article 10.20.4 contains the word "may," which means "possible," and that "the opposite of 'possible', of course, is 'impossible'", the standard for CAFTA Article 10.20.4 is that of legal impossibility.[18] This "logic" is of course faulty and insufficient to reach such conclusion. Even the authorities Claimant cites do not support Claimant's argument.

24. The term *legal impossibility* is a term of art with a special meaning in legal parlance which cannot simply be read into a treaty unless it is expressly in the text.[19] According to Black's Law Dictionary, legal impossibility is "[i]mpossibility due to the fact that what the defendant intended to do is not illegal even though the defendant might have believed that he or she was committing a crime."[20] The standard of legal impossibility simply bears no relation to the standards applied to preliminary objections in CAFTA Article 10.20.4 and similar proceedings in national courts.

25. The Tribunal therefore should reject the notion that "legal impossibility" is a standard that can be made applicable to CAFTA Article 10.20.4 objections. As stated in CAFTA itself, the standard is that even assuming as true all of Claimants' factual allegations in support of any claims in the Notice of Arbitration (to the extent there are such factual allegations), and taking into account relevant facts not in dispute, the Tribunal should dismiss any claim that, *as a*

[18] Response, para. 72.
[19] Article 31(1) of the Vienna Convention is clear in this respect: "A Treaty shall be interpreted *in good faith* in accordance with the *ordinary meaning to be given to the terms* of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (emphasis added) (CL-10). *See, also,* Oppenheim's International Law, Vol. I, 1271-1272 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (**RL-16**) ("The general rule of interpretation laid down in Article 31 of the Vienna Convention adopts the textual approach . . . . That such a textual approach – on which the International Law Commission was unanimous – is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice, which has also emphasised that interpretation is *not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain* . . . ." (emphasis added).
[20] Black's Law Dictionary 824 (9th ed. 2009) (**RL-17**).

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

26. It is worth noting, nonetheless, that if the standard applied to this case were some formulation of a standard that it is, *as a matter of law*, impossible to grant relief to Claimant based on its factual allegations and the undisputed facts in the record, the Republic would still prevail on its preliminary objections. Under the law applicable to this matter, it is impossible to make an award to Claimant because, as demonstrated herein, based on Claimant's factual allegations and the undisputed facts, the breaches alleged by Claimant could not have caused the harm alleged by Claimant, as required by CAFTA Article 10.16.1(a).

27. Claimant also asserts that "the definition of 'frivolous' under U.S. law is entirely consonant with that of legal impossibility."[21] Claimant cites a United States Supreme Court case and several lower court decisions. The Republic first notes that this is an international arbitration based on a multilateral treaty in which the procedural practice of the municipal courts of one of the Parties to the treaty does not have value as precedent. However, the Republic will briefly address the policy and practice of the courts of the United States in addressing frivolous claims, for two reasons: first, as noted in the Preliminary Objections and in Claimant's Response, the practice of the courts of the United States has been mentioned as the foundation for CAFTA Article 10.20.4;[22] second, Claimant has inaccurately suggested that the practice in United States courts is to dispose of claims only if they are "legally impossible."[23] The Republic shows below that Claimant is wrong.

[21] Response, para. 75.
[22] Preliminary Objections, para. 24; Response, para. 74.
[23] Response, para. 75.

28. First, the cases provided by Claimant do not even mention Claimant's suggested standard of "legal impossibility."[24] In *Townsend,* for example, the Ninth Circuit described frivolous as "used to denote a filing that is both baseless and made without a reasonable and competent inquiry."[25] The court discussed the purpose of Rule 11 of the Federal Rules of Civil Procedure as to deter "baseless", "improper", or "unwarranted allegations."[26] Clearly, the Republic of El Salvador is justified in asserting that the claims brought by Claimant were baseless, improper, and unwarranted given that Pacific Rim El Salvador indisputably did not comply with other requirements to obtain the mining exploitation concession it now claims it has a right to receive. Moreover, the arbitration was "filed without reasonable inquiry"[27] because, for example, the company's arguments about the legal sufficiency of its land permits under Salvadoran law had already been presented to the Government and rejected, as will be shown below. To make the same arguments five years later in international arbitration and feign surprise about the nature of the requirement *is* frivolous.

29. The U.S. Supreme Court case cited by Claimant, *Neitzke v. Williams*, deals with the issue of whether a *pro se*, *in forma pauperis* civil rights lawsuit by a prisoner that fails to state a claim is automatically frivolous. In other words, the case could not be further from the situation of a Canadian corporation employing a large experienced law firm to bring an international arbitration against a sovereign State. Moreover, the line Claimant quoted was not the Court's definition of frivolous; instead the Court actually said: "a complaint, containing as it

[24] Response, para. 80.
[25] *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990) (CL-30).
[26] *Townsend*, at 1363.
[27] *Townsend*, at 1366.

does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact."[28]

30. Second, in authority which Claimant fails to cite when discussing its baseless "legal impossibility" standard, the U.S. Supreme Court recently affirmed the insufficiency of conclusory statements to overcome a motion to dismiss. In *Ashcroft v. Iqbal*, the United States Supreme Court commented that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[29] Likewise, in *Bell Atl. Corp. v. Twombly*, (another United States Supreme Court case not cited by Claimant) the Court explained that "more than labels and conclusions" are required and that "a formulaic recitation of the elements of a cause of action will not do".[30]

31. Thus it is not enough to generally assert that all requirements were met; Claimant must "nudge[] [the] claims across the line from conceivable to plausible."[31] Indeed, in United States federal practice, the standard is plausibility, which requires "more than a sheer *possibility*" of the alleged elements of the claim.[32] In order to survive a motion to dismiss, the Court has required factual allegations as to the "specific time, place, or person[s] involved".[33] In short, the United States Supreme Court has directly rejected Claimant's argument that under United States procedure claims that are merely "possible" will survive.

32. Finally Claimant discusses the decision in *Methanex*, the NAFTA arbitration which is considered to be the reason for including the Article 10.20.4 procedure in CAFTA,

[28] *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (CL-27) (emphasis added).
[29] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (**RL-18**).
[30] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (**RL-19**).
[31] *Twombly*, 550 U.S. at 570.
[32] *Iqbal*, 129 S. Ct. at 1949 (emphasis added).
[33] *Twombly*, 550 U.S. at 565, n. 10.

where the United States argued that a claim was inadmissible.[34] As Claimant highlights, the United States government argued in *Methanex* "that taking all of the allegations of fact made to be true, including uncontested facts . . . as a matter of law, *there can be no claim*, and that the claim is ripe for dismissal at this stage for that reason."[35] While the quoted language was not posited as a definition of the legal standard under NAFTA, the Republic submits that taking the facts presented by Claimant as true, including uncontested facts—and without counting legal conclusions dressed up as factual allegations—there can be no viable claims related to El Dorado or Santa Rita, nor any claims based on the MFN or National Treatment clauses against the Republic of El Salvador for which an award in favor of Claimant may be granted.

33. Claimant's excuse that the case is too complex to be decided in a preliminary objection [36] must not be allowed to defeat the purpose of CAFTA Article 10.20.4. The alleged complexities of a case, even if they actually existed and could cause a case to last six years if it goes to its full length, as in the *Methanex* arbitration,[37] should not defeat the purpose of this provision—to dispose at the outset of frivolous claims, such as those submitted by Claimant in this arbitration.[38] The complexities alleged by Claimant are in fact irrelevant because, as indicated below, the Republic's Preliminary Objections can be decided based on a circumscribed

[34] Response, para. 77.
[35] Response, para. 77.
[36] *See, e.g.*, Response, paras. 13, 124, 142.
[37] *Methanex Corporation v. United States of America*, Final Award, UNCITRAL Arbitration, Aug. 3, 2005 **(RL-20**).
[38] In this connection, Professor Vandevelde in commenting on the *Methanex* arbitration has noted that: "[t]he absence of a procedure for challenging the legal sufficiency of the claim had meant that the United States was required to participate in an arbitration that lasted for nearly six years and that was so frivolous that the tribunal held that it had no jurisdiction; that assuming it had jurisdiction, it would have ruled against the claimant on the merits; and that the claimant was required both to pay the full costs of the arbitration and to reimburse the United States for its legal costs . . . . " Kenneth J. Vandevelde, U.S. International Investment Agreements 608 (2009) (**RL-21**).

legal determination considering only Claimant's factual allegations and straightforward undisputed facts.

C. Claimant must make factual allegations, not legal conclusions

34. Claimant needs to make factual allegations in support of its claims in the Notice of Arbitration to satisfy the pleading requirements of CAFTA. However, factual allegations are very different from legal conclusions, and Claimant only presented legal conclusions in the Notice of Arbitration regarding compliance with the requirements to obtain a mining exploitation concession.

35. Claimant persists in making legal conclusions instead of factual allegations. For example, Claimant argues that a naked statement that Pacific Rim El Salvador complied with all the requirements of the Mining Law "should in itself put an end to the objection."[39] However, the statement that Claimant has complied with the requirements of the Mining Law is a legal conclusion that has a factual component and a legal component. Claimant cannot state a legal conclusion and try to dress it up as a factual allegation. It is one thing to allege that an event occurred, for example that documents were submitted, and another to attach legal effects to that event. To conclude that a submission of documents "complied with all [the] requirements" of the Mining Law is a legal conclusion that can only be confirmed with reference to the laws of El Salvador as applied to the facts.[40] It is not an allegation of fact.

[39] Response, para. 142. *See, also*, Response, paras. 121-122 (listing statements in the Notice of Arbitration referring to complying with all the requirements as "'factual allegations' to support its claim that it satisfied all of the requirements under Salvadoran law to obtain an exploitation concession").
[40] On the application of municipal law to facts related to the investment and property rights in the host country, see Section II.E, below.

D. *As a matter of law* does not mean *in the absence of facts*

1. The Preliminary Objections must be decided *as a matter of law*

36. The parties agree that the Preliminary Objections must be decided *as a matter of law*. CAFTA Article 10.20.4 states that the Tribunal shall address as a preliminary question any objection by the Republic 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. In deciding the objection under CAFTA Article 10.20.4, the Tribunal shall assume to be true Claimant's factual allegations. The Tribunal may also consider any relevant facts not in dispute.

37. The Republic agrees in principle with Claimant's definition of the term *as a matter of law*, namely, "[w]hatever is to be ascertained or decided by the application of statutory rules or the principles and determinations of the law, as distinguished from the investigation of particular facts…"[41] In this regard, as the Republic will show below, assuming Claimant's actual allegations of fact to be true and taking into account the undisputed facts before the Tribunal, Claimant was never, and is not now, entitled to the mining concession it seeks, *as a matter of law*, pursuant to the law of El Salvador. Therefore, *as a matter of law*, pursuant to CAFTA, Claimant's claim is not a claim for which an award in favor of Claimant can be made.

2. Facts are necessary and proper in CAFTA preliminary objections

38. Saying that a preliminary objection will be decided *as a matter of law* does not mean, however, that the decision must be made *in the absence of facts*. First, the facts alleged by Claimant must be considered, as well as any other essential undisputed facts which are *not* alleged. Moreover, CAFTA Article 10.20.4(c) expressly authorizes the Tribunal to consider any

[41] Response, para. 70.

relevant facts not in dispute. Claimant cites no authorities for its assertion that this review of other relevant facts must be "extremely limited".[42]

39. As the Republic has noted in its Preliminary Objections, the necessity and role of facts is even recognized in the more abbreviated procedure for preliminary objections under ICSID Arbitration Rule 41(5). Even under Rule 41(5), the *Trans-Global* tribunal recognized that some facts—indeed, facts outside of the Request for Arbitration—needed to be considered to resolve a preliminary objection. The tribunal was clear: "Rule 41(5) of the ICSID Arbitration Rules does not limit this Tribunal's inquiry to the Claimant's Request for Arbitration."[43] That tribunal took into account "the Claimant's submissions explaining its claims pleaded in the Request for Arbitration, as well as the Respondent's responses thereto."[44] Indeed, the tribunal also commented "that it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced."[45] In CAFTA arbitration, the factual premise must be present since the Notice of Intent, and with even more reason in the Notice of Arbitration.[46]

3. The Republic is entitled to use facts not alleged in the Notice of Arbitration

40. It is precisely because Claimant did not include key factual allegations necessary to support its claims in the Notice of Arbitration that the Republic has to look for facts outside the Notice of Arbitration. Those facts show, *as a matter of law,* that Claimant's claims are not claims for which an award in favor of Claimant may be made. Claimant cannot use the

[42] Response, para. 90.
[43] *Trans-Global*, para. 45 (RL-5).
[44] *Trans-Global*, para. 45.
[45] *Trans-Global*, para. 97.
[46] CAFTA Article 10.16.1 and 10.16.2.

insufficiency of its factual allegations to attempt to insulate its frivolous claims from a preliminary objection.

41. As Claimant acknowledges, the Republic submitted "excerpts from Claimant's regulatory filings in El Salvador, multiple filings by the Claimant before the United States Securities and Exchange Commission, numerous pieces of correspondence, press clippings, and various other types of documents".[47] The Republic thus relied upon Claimant's own documents and statements by one of Claimant's executives, to present undisputed facts to the Tribunal. Claimant has had the opportunity to dispute any of those facts it considered disputable, but the key facts relied on by the Republic as the basis for its Preliminary Objection remain undisputed. For example, the following facts are undisputed and relevant to decide the main aspects of the Preliminary Objections:

- ◊ Pacific Rim El Salvador applied for a 12.75 square kilometer concession;
- ◊ However, to date Pacific Rim El Salvador has only submitted documentation showing ownership or authorization for less than 2 square kilometers of land;
- ◊ Pacific Rim El Salvador never submitted a final feasibility study but only submitted a document entitled "Final *Pre-Feasibility* Study," and that study only covered reserves located under an area of less than 0.3 square kilometers of the requested concession; and
- ◊ Pacific Rim El Salvador failed to apply to renew the Santa Rita exploration license until after it expired and the time to renew had lapsed.

As anticipated, Claimant's Response does not dispute any of these facts. This is perhaps not surprising, given that these facts are found in Claimant's own representations to regulatory agencies, the public, and the Government of El Salvador. Thus, the Tribunal should consider these facts as undisputed.

[47] Response, para. 92.

42. Even in the expedited procedure under United States domestic law that the CAFTA expedited procedure was modeled after, it is possible to bring in extrinsic evidence to support the early dismissal of a frivolous case. The summary that the United States President submitted with the CAFTA implementing legislation noted that the Chapter Ten dispute resolution mechanism "includes provisions similar to those used in U.S. courts to dispose quickly of frivolous claims."[48] Because the practice of the courts of the United States has been mentioned as the foundation for CAFTA Article 10.20.4, the Republic makes a brief reference to the practice of the courts of the United States in addressing frivolous claims, in addition to the discussion in sub-section II.B above, for illustrative purposes only.

43. In United States federal practice, a motion to dismiss will be granted "if the complaint lacks an allegation regarding an element necessary to obtain relief".[49] Moreover, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."[50] Although "facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions."[51] Thus, in deciding motions to dismiss, U.S. courts look for specific factual allegations and even allow consideration of materials in addition to the complaint.

44. In addition, Federal Rule of Civil Procedure 12, paragraph (d), provides that if on a motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56".[52] Thus, a motion to dismiss is not rejected for including extrinsic evidence, but may be transformed into a

[48] 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, June 23, 2005, at 1085 (RL-3).
[49] James Wm. Moore et al., Moore's Federal Practice § 12.34, at 12-98 (**RL-22**).
[50] Moore's Federal Practice, at 12-79.
[51] Moore's Federal Practice, at 12-79 to 12-81.
[52] United States Federal Rule of Civil Procedure 12(d) (**RL-23**).

motion for summary judgment. Converting a motion to dismiss into a motion for summary judgment "ensures that when a court considers matters extraneous to the complaint, the plaintiff receives notice of this and is given an opportunity to contest the defendant's evidence by submitting material that controverts it."[53]

45. CAFTA 10.20.4(c) specifically states that "[t]he tribunal may . . . consider any relevant facts not in dispute." This means that the CAFTA procedure allows for broader consideration of extrinsic material than the motion to dismiss, more similar to a motion for summary judgment.

46. Consideration of extraneous evidence is proper in a motion for summary judgment, and, by extension, in an objection under CAFTA Article 10.20.4. Federal Rule 56 provides that summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[54] Likewise, under CAFTA Article 10.20.4, an arbitral tribunal should dismiss a claim based on a preliminary objection if the Parties' submissions and oral arguments demonstrate 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."[55]

E. Questions of Salvadoran law are legal issues and thus within the Tribunal's power to decide in this phase of the arbitration

47. Claimant has conceded that it does not have an automatic right to a concession.[56] Claimant has also conceded that the concession can only be obtained if the applicant complies with the requirements of the Mining Law of El Salvador.[57] Claimant has noted that *as a matter*

[53] Moore's Federal Practice, at 12-92 (RL-22).
[54] United States Federal Rule of Civil Procedure 56(c) (RL-23).
[55] CAFTA Article 10.20.4.
[56] Response, para. 130.
[57] Response, paras. 4, 130, 132, 133.

of law means "[w]hatever is to be ascertained or decided by the application of statutory rules or the principles and determinations of the law . . . ."[58]

48. It would appear, then, that the parties agree that, *as a matter of law*, Claimant must have complied with the requirements set forth in Salvadoran law to have acquired a right to a mining exploitation concession, a right Claimant is now seeking to have this Tribunal recognize. The question of the existence of this right is a question that has to be determined, *as a matter of law*, under the laws of El Salvador.

49. However, Claimant asserts that the Republic's arguments based on Salvadoran law are unavailing during this phase of the arbitration because "as a matter of international law, questions of municipal law are considered issues of fact, and are therefore entirely inappropriate for resolution in the context of a Preliminary Objection that is supposed to be decided as a matter of law."[59]

50. Claimant overstates the principle upon which it relies and confuses its application. Municipal laws are sometimes treated as facts in circumstances having no applicability here. In international arbitrations like this one, municipal law is used as the applicable law regarding particular issues related to the investment and rights in the host country. In such cases, as will be explained in detail below, the interpretation and application of municipal law is treated as a matter of law, not as a fact.

51. Claimant relies on two judgments by the Permanent Court of International Justice ("PCIJ") and commentary in support of the idea that municipal law can only be treated as a fact in international law.[60] However, the cases Claimant relies upon were decided by the PCIJ in the very different context of State-to-State disputes. The commentary Claimant relies on also

[58] Response, para. 70.
[59] Response, para. 126.
[60] Response, para. 127.

discusses principles and jurisprudence emanating from State-to-State disputes and, even in that context, recognizes that municipal law is not always treated as fact.

52. Claimant's reliance on those cases and commentary is misguided. First, the judgments on which Claimant relies do not involve situations where the PCIJ treated municipal laws as facts. Claimant first relies on the *German Interests* (*Upper Silesia*) case.[61] But the passage of the Court's decision cited in paragraph 127 of the Response was not a decision as to how municipal law was to be treated. The issue of whether municipal law would be treated as a fact was simply not in dispute between the parties and therefore not before the Court. Commenting on the dictum from that case, Professor Brownlie noted that an international tribunal will apply municipal law when appropriate and that the dictum of the Court was not definitive that the Court would not have interpreted Polish law as law.[62]

53. In the *Serbian Loans* case,[63] which the Court followed and relied upon in the *Brazilian Loans* case,[64] the Court decided that it could apply municipal law, and it did. In both cases, the dispute before the Court concerned the question of the monetary bases to be used for the service of the loans at issue. The Court recognized that this was a question governed by municipal law, as it referred to the rights of the holders of the loans under such instruments and

[61] *German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (series A) No. 7, at 19 (May 25) (CL-19).
[62] Ian Brownlie, Principles of Public International Law at 40 (5th ed. 1998) (CL-32). Professor Brownlie further noted that "[c]ertain judges of the International Court have stated as a corollary of the proposition that 'municipal laws are merely facts' that an international tribunal 'does not interpret national laws as such'. This view is open to question." *Id*. at 40.
[63] *Case Concerning the Payment of Various Serbian Loans Issued in France*, 1929 P.C.I.J. (series A) Nos. 20/21, at 17-20 (July 12) (**RL-24**).
[64] *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, 1929 P.C.I.J. (series A) Nos. 20/21, at 121 (July 12) (CL-13).

municipal law determines those rights.[65] The Court further declared that Article 38 of the Statute of the Court did not prevent it from applying municipal law if the parties had so agreed.[66]

54. Claimant quotes from the *Brazilian Loans* case: "All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which may be applied."[67] As Claimant's authority, Durward V. Sandifer explains, "[f]rom this rule it appears that although the Court does not consider itself bound to know the local law of the States appearing before it, at the same time it does not consider such law simply a question of fact to be proved by evidence produced by the parties."[68] He notes that this doctrine "leaves the Court free, perhaps even obligated, to resolve through its own researches any uncertainty concerning such a law, if the parties fail to produce adequate proof."[69]

55. Moreover, Claimant's authority Sandifer continued:

> The rule adopted by the Permanent Court of International Justice was sound for a tribunal before whom such a multiplicity of parties might appear, often in the same proceeding. However, there seems to be no reason why ad hoc tribunals established for limited purposes, usually by two States, should not follow the ordinary rule of municipal procedure of taking judicial notice of 'domestic law,' including in such a case the law of the parties.[70]

56. Professor Zachary Douglas agrees that although treating municipal law as a fact may be sensible in some State-to-State disputes, there is a broader role for municipal law in investor-State arbitration. He explains that municipal laws are treated as facts by the International Court deciding State-to-State disputes because, in most cases, "the legal issues to be

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[65] *Serbian Loans*, at 20; *Brazilian Loans*, at 121-124.
[66] *Serbian Loans*, at 19-20 (RL-24).
[67] Response, para. 127.
[68] Durward V. Sandifer, Evidence Before International Tribunals 391 (Rev. ed., 1975) (CL-39).
[69] Sandifer, at 391.
[70] Sandifer, at 393. Claimant's authority concludes that more use of judicial notice by international tribunals could shorten and simplify trials. *See id.* at 396.

determined by the International Court are governed exclusively by international law."[71] However, as Professor Douglas goes on to explain, this situation "is patently not the case within the investment treaty regime, where the object of every claim is property rights grounded in a particular municipal legal order."[72]

57. Thus, the very nature of an investment dispute is grounded in consideration of the rights and obligations of the parties under municipal law. As Professor Douglas notes, "[a]ny dispute concerning the existence or extent of the rights *in rem* alleged to constitute an investment that arises in investment treaty arbitration must be decided in accordance with the municipal law of the host state for this is not a dispute about evidence (facts) but a dispute about legal entitlements."[73]

58. In fact, as early as 1964, before the growth of investor-State arbitration, C. Wilfred Jenks recognized that the argument that an international court or tribunal can only "ascertain as a fact the content of the relevant municipal law . . . appears to be an underestimate of what international courts and tribunals in fact do and must do when matters coming before them are governed in part by municipal law."[74]

59. Jenks concluded that municipal law is often used by international tribunals to determine rights, obligations, and effects of transactions and commented, "[i]t is neither necessary nor desirable to describe municipal law when so applied as 'a fact'." He asserted, "[i]t is applied as the proper law of the particular transaction in virtue of international law; as such it constitutes a part of the law applied by international courts and tribunals and an essential element

[71] Zachary Douglas, The International Law of Investment Claims 69-70 (2009) (**RL-25**).
[72] Douglas, at 69-70.
[73] Douglas, at 70 (emphasis added).
[74] C. Wilfred Jenks, The Prospects of International Adjudication 8 (1964) (**RL-26**).

in the promotion of the rule of law in world affairs."[75] Likewise, Professor Douglas expressed, "[r]eliance upon the doctrine of municipal laws as facts before an international tribunal undermines the coherent development of international investment law because it trivializes the critical role of municipal law as the source of the rights comprising the investment."[76]

60. Other commentators agree. According to Newcombe and Paradell, the law of the host state is "relevant to a number of . . . threshold issues . . . such as . . . the nature and the scope of the rights making up the investment and whether they vest on a protected investor, the conditions imposed or assurances granted by national law for the operation of the investment, as well as the nature and scope of the government measures allegedly in breach of the [international investment agreement]."[77]

61. Newcombe and Paradell assert that "[t]he role of domestic law in defining and regulating the investor's acquired rights is entirely logical" because "the investment rights and state conduct at issue in [international investment agreement] disputes arise in the context of legal relationships governed by domestic law."[78] These authors believe that the investment agreements and international law "leave these questions to be decided, in principle, by the law of the host state."[79] Noting the principle cited by Claimant that domestic law is relevant to factual issues, they comment:

> An important difference, however, is that being part of the proper law, a treaty tribunal may not treat domestic law as a fact that must be proven by the parties. The principle of *iura novit curia* requires a tribunal to establish, interpret and apply any legal rules relevant to the case before it, including any domestic law rules.[80]

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[75] Jenks, at 603.
[76] Douglas, at 72 (RL-25).
[77] Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 93-94 (2009) (**RL-27**).
[78] Newcombe and Paradell, at 95.
[79] Newcombe and Paradell, at 95.
[80] Newcombe and Paradell, at 95 (emphasis added).

62. Claimant also makes the untenable assertion that the "principle that municipal law cannot be determinative of international law claims applies equally to the adjudication of claims arising under investment protection treaties." Article 42 of the ICSID Convention expressly provides for municipal law as the applicable law. Many ICSID tribunals have recognized the importance of municipal law in determining investors' rights and have not hesitated to use host country's laws as the applicable law to decide the dispute.

63. Claimant relies on a passage in the *Kardassopoulos* decision where the tribunal noted that, for the purposes of the case before it, "Georgian law [wa]s relevant as a fact".[81] But in *Kardassopoulos*, the respondent was trying to invoke its own law to excuse non-compliance with international obligations. That situation is completely distinguishable from the case at hand.

64. Indeed, parts of the *Kardassopoulos* decision which are not cited by Claimant directly contradict Claimant's view. The *Kardassopoulos* tribunal noted that BIT protection does not extend to an investor who breached the local laws when making the investment and quoted: "no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State."[82] The tribunal emphasized that States maintain the control to deny BIT protection related "to the investor's actions in making the investment".[83]

65. Thus, the tribunal in *Kardassopoulos* confirmed that "[t]he requirement that an investment be made in accordance with the laws of the host State in order to benefit from a BIT's

[81] *Ioannis Kardassopoulos v. Georgia*, Decision on Jurisdiction, ICSID Case No. ARB/05/18, July 6, 2007, para. 146 (CL-22; full case provided as **RL-28**). *See* Response, para. 128.
[82] *Kardassopoulos*, para. 182 (quoting M. Sornarajah, The International Law on Foreign Investment 106 (2nd ed. 2004)).
[83] *Kardassopoulos*, para. 182.

protection is uncontroversial."[84] The Government of El Salvador is not trying to use its laws to avoid an international obligation. Rather, the Republic is using such laws in the unremarkable fashion to show that Claimant's failures to comply with the Mining Law—on the undisputed facts—would preclude Claimant from receiving an exploitation concession.

66. There are many other examples of the applicability of municipal law in investor-State arbitration. For example, the tribunal in *EnCana Corporation v. Ecuador* considered that even where the BIT provided for the dispute to be decided "in accordance with this Agreement and applicable rules of international law," the domestic law of the host country had to be used to determine what rights an investor had and how they were affected.[85] The tribunal stated that "for there to have been an expropriation of an investment . . . the rights affected must exist under the law which creates them, in this case, the law of Ecuador."[86] Accordingly the tribunal determined two questions: whether EnCana had the right under Ecuadorian law to tax refunds and whether that right was expropriated. Likewise, to determine whether the Government of El Salvador violated any international obligations, the Tribunal must first determine whether Claimant had a right to a concession under applicable Salvadoran laws applied to the undisputed facts.

67. The ICSID arbitrations in *Inceysa v. El Salvador* and *Fraport v. Philippines* also provide clear examples on the determinative nature of municipal law in adjudicating claims in the context of investment protection treaties.[87] In both cases, the tribunals declined jurisdiction because they found that the investments were made contrary to the respective municipal law.

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[84] *Kardassopoulos*, para. 174.
[85] *EnCana Corporation v. Republic of Ecuador*, Award, LCIA Case No. UN3481, UNCITRAL (Canada/Ecuador BIT), Feb. 3, 2006, para. 184 (**RL-29**).
[86] *EnCana*, para. 184 (emphasis added).
[87] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, Award, ICSID Case No. ARB/03/26, Aug. 2, 2006 (**RL-30**); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Award, ICSID Case No. ARB/03/25, Aug. 16, 2007 (**RL-31**).

68. Thus, there is an abundance of investor-State arbitration cases where tribunals apply municipal law to determine rights related to the investment. Based on these cases and the commentary distinguishing the PCIJ cases cited by Claimant, there is no question that, in this dispute, the Salvadoran Mining Law is the applicable law to decide whether Claimant has a right to the Mining Exploitation Concession that constitutes the basis for most of its claims.

III. CLAIMANT DOES NOT HAVE THE RIGHT TO A MINING EXPLOITATION CONCESSION

A. Claimant has not complied with the land ownership or authorization requirement for a Mining Exploitation Concession

69. Claimant begins its discussion of the surface land issue by stating that "PRC specifically alleges in its Notice of Arbitration that [Pacific Rim El Salvador] complied with this specific requirement of the Mining Law."[88] But a general conclusory statement about meeting a legal requirement is not a factual allegation which satisfies the CAFTA pleading requirements. Claimant's naked assertion, devoid of any facts, is insufficient to state a viable claim, particularly because the undisputed evidence, produced from Claimant's own documents, shows that Claimant had contemporaneous actual knowledge that it did not in fact comply with the land surface requirement under Salvadoran law.

70. The submissions of the parties show that the parties agree on the relevant facts necessary for the Tribunal to decide the surface land issue. As indicated below, the parties agree on 1) the area of land for which Claimant submitted proof of ownership or authorization from the owners; 2) the size of the area for which the concession was requested; and 3) that the latter was at least six times larger than the former. And the parties agree that the law requires applicants for an exploitation concession to meet the land ownership or authorization requirement. The

[88] Response, para. 142.

only difference between the parties is a narrow legal issue regarding the nature of that requirement under Salvadoran law. The Republic herein shows that Claimant's interpretation is incorrect as a matter of law, and that Claimant has known that since at least 2005.

1. The parties agree on all relevant issues of fact regarding the land surface requirement

71. It is undisputed that Pacific Rim El Salvador requested a mining exploitation concession for a 12.75 square kilometer surface area for the El Dorado project.[89]

72. It is also undisputed, from Claimant's own documents and statements, that out of the requested concession area of 12.75 square kilometers, Claimant only owns or has authorization over a surface area of approximately 1.6 square kilometers, an area less than 13% of the total area requested for the concession.

73. The surface area Claimant owns or has authorization for within the requested concession area is represented graphically in Figure 14 of Claimant's 2008 Annual Report for El Dorado (included in Exhibit R-3 to the Preliminary Objections).[90] This map shows that as late as February 2009 when the Report was filed, Claimant still only owned or had authorization for approximately the same area as when Claimant submitted its Application for the Concession three years earlier. That area was approximately 1.6 square kilometers out of the requested 12.75 square kilometers for the concession, or less than 13% of the area requested. For ease of reference Figure 14 is reproduced below. (The 12.75 square-kilometer area requested for the concession is within the pink lines. The areas Claimant owns or has authorization for are the areas in red, green, and blue colors).

[89] Application for the Concession at 4, § 2.1 (R-2; C-5). The Republic includes the maps submitted with the Application, numbered 1 through 5, as exhibits to the Reply, **R-24** through **R-28**. These maps are provided in a paper supplement as well as in an electronic format that facilitates enlargement to see more detail.

[90] The Republic provides this map as Exhibit **R-29**.

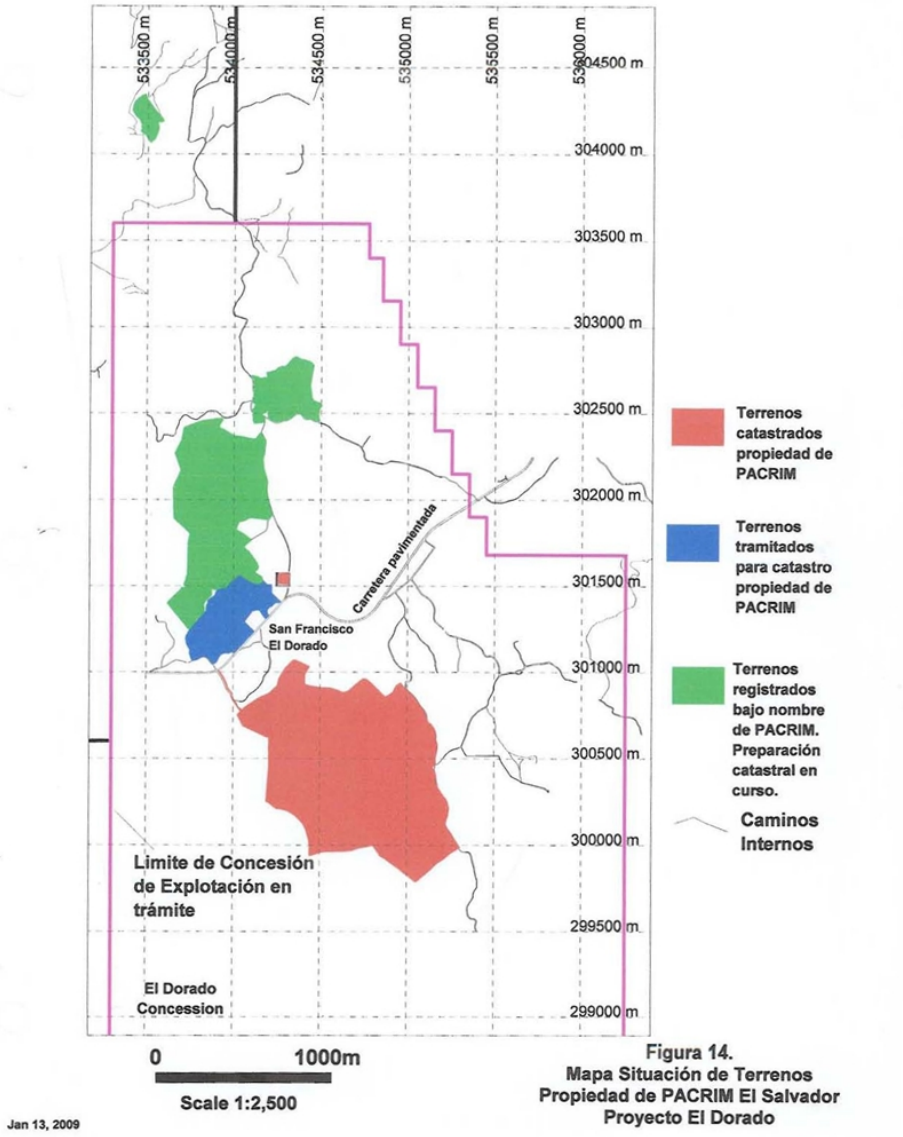

Figura 14.
Mapa Situación de Terrenos
Propiedad de PACRIM El Salvador
Proyecto El Dorado

EXHIBIT R-29

74. These are all the relevant facts the Tribunal needs to consider in order to decide the preliminary objection regarding the land surface requirement.[91] Claimant has actually confirmed these facts in its Exhibits C-6 and C-7 to the Response. Thus, the Tribunal may consider them as undisputed facts under CAFTA Article 10.20.4(c).

2. The only issue in dispute is the legal issue of the substance of the legal requirement

75. As shown above, the land surface requirement issue can be decided without "an intensely factual inquiry".[92] All that is required is a legal determination regarding the land surface requirement under Salvadoran law.

76. As stated in paragraph 58 of the Preliminary Objections, Article 37.2.b) of the Mining law requires that an applicant to a mining exploitation concession provide, "among other requirements, documentation of ownership or authorization to use all the property that corresponds to the area of the concession, and a technical and economic feasibility study."

77. Claimant argues that Article 37.2.b) of the Mining Law does not actually require that Claimant demonstrate ownership or authorization to use the land covered by the entire concession application. Rather, Claimant sets forth the unsupportable legal argument that, "for an underground mine, the applicant only needs to demonstrate ownership of, or authorization to use, the limited surface area where mining activities are to be conducted – *i.e.*, where the entrance to the underground mine and the above-ground mining facilities are to be located."[93]

78. Claimant also argues that its understanding of the law makes more sense "[b]ecause Articles 2 and 10 of the Mining Law provide that the State owns the minerals in the

[91] For purposes of this preliminary objection, the Republic does not dispute Claimant's factual allegation that Claimant owns or has authorization over the totality of the surface area where Claimant is currently proposing to locate surface infrastructure for its proposed project in the requested concession area.
[92] Response, para. 142.
[93] Response, para. 147.

subsurface, [and] it would make no sense for the applicant to have to obtain ownership of or authorization to use the surface land which may be located above the deposit, but which the applicant does not intend to use or disturb in order to mine the subsurface."[94] There are at least two flaws with this argument. First, Claimant does not (and can not) cite to any authority for this novel interpretation; indeed, as set forth below, this interpretation has already been rejected by the Government of El Salvador. Second, Claimant must comply with the Law irrespective of whether, in its view, it makes sense. In fact the requirement does make sense and, as discussed below, there are legitimate and important reasons why the Salvadoran legislature chose to impose a requirement for ownership or authorization for the entire area of the concession.

79. In any event, the Tribunal is called upon to make a determination in accordance with the actual law. The Republic maintains that the legal requirement of Article 37.2.b) of the Mining Law is for the applicant to provide documents to prove that the applicant owns or has authorization over the entire surface area of the requested concession. This is a legal requirement that Claimant knew about and failed to satisfy.

3. Claimant knew at the time of the application that the Republic did not share Claimant's self-serving interpretation of the legal requirement

80. In its Response to the Preliminary Objections, Claimant asserts that Pacific Rim El Salvador would not have "had reason to try to correct . . . alleged 'defects'" because it "had no reason to believe that MINEC considered there to be any defects or deficiencies."[95] Claimant also argues that the second warning letter from the Director of Mines to Pacific Rim El Salvador in December 2006 with respect to these defects somehow demonstrates that the Ministry of

[94] Response, para. 149.
[95] Response, para. 155.

Economy had accepted Claimant's self-serving interpretation of the land ownership requirement under Salvadoran law.[96]

81. But the undisputed facts do not support these assertions. Rather, they show that, contrary to what Claimant told this very Tribunal in a telephone conference on January 12, 2010 and later in its Response to the Preliminary Objections, Claimant was well aware that the Salvadoran Government's interpretation of the legal requirement was different than Claimant's. The undisputed facts also show that Pacific Rim Mining Corp. and its Salvadoran Enterprises were actively trying to change that legal requirement, without success, since 2005 to more closely comport with Claimant's view of what the law *should* be.

82. A short recitation of the undisputed history of this issue makes it abundantly clear that in 2005 Claimant was fully aware of the surface land requirement as set forth in Article 37.2.b) of the Salvadoran Mining Law and knew that it did not comply with that requirement as applied by the Government of El Salvador. Claimant therefore knew that its application for an exploitation concession could not and would not be approved as submitted.

83. As reflected in contemporaneous documents attached to this Reply, the authorities in the Ministry of Economy, after learning of Claimant's interpretation of the legal requirement in Article 37.2.b) of the Mining Law regarding the land surface, requested the opinion of the Ministry's own lawyers, who disagreed with Claimant's interpretation of the law.

84. The Minister of Economy also requested a legal opinion from the Secretary for Legal and Legislative Affairs to the President. In this request, the Minister of Economy specifically referred to the application by "PACIFIC RIM MINING" and the applicant's legal argument that Claimant did not need to show proof of ownership or authorization to use the entire surface area as the Bureau of Mines had requested Claimant to submit based on the Mining

[96] Response, para. 154.

Law.[97] That request also reflects that the Ministry of Economy had already consulted its own internal lawyers, who advised that the law clearly required ownership or authorization for the entire area of the requested concession.[98] The Minister's request attached a copy of the legal memorandum submitted by Claimant's local counsel dated May 5, 2005, with Claimant's arguments in support of Claimant's interpretation of the law. [99]

85. The Minister's request and the legal memorandum of May 5, 2005 submitted by Claimant's local counsel are incontrovertible evidence that Claimant knew, since at least that time, that the Bureau of Mines required documentation for all the land corresponding to the requested concession.

86. Contemporaneous documents also show that at the same time the Minister of Economy was requesting a legal opinion from the Legal Adviser to the President, Ms. Gina Navas de Hernández, the same Director of Mines who sent the two warning letters to Claimant about deficiencies in its Application, was also requesting the written opinion of the Ministry's legal adviser, Doctor Marta Angélica Méndez, on this same issue.[100]

87. The legal opinions from the Secretary for Legal and Legislative Affairs and the Legal Adviser to the Minister of Economy confirmed the Bureau's position that Mining Law

[97] *See* Letter from Minister of Economy to Secretary for Legislative and Legal Affairs with attached Memorandum, "Interpretation of the Mining Law", May 25, 2005 (mentioning that "PACIFIC RIM MINING . . . . says that for underground work it does not need to furnish proof of the availability of the property found in the surface area of the concession, as it has been legally required to do in accordance with the Mining Law.") ["PACIFIC RIM MINING . . . . manifiesta que al tratarse de trabajos subterráneos no necesita demostrar la disponibilidad del inmueble correspondiente a la superficie que comprenderá la concesión, tal como legalmente se le ha exigido de conformidad a la ley de Minería."] (**R-30**).

[98] *See* Letter from Minister of Economy (R-30) ("According to several of our attorneys, the Law is clear . . . .") ["Según algunos de nuestros abogados la Ley es clara . . . ."].

[99] *See* Memorandum, "Mining Law Interpretation" May 5, 2005, attached to Minister's Letter (R-30).

[100] *See* Letter from Director Gina Navas de Hernández to Dr. Marta Angélica Méndez, May 25, 2005 (**R-31**).

Article 37.2.b) requires an applicant to submit documents showing ownership or authorization *for the entire surface area* of the requested concession.[101]

88. In an additional attempt to assist Claimant, a contemporaneous document shows that the Minister of Economy sent a draft decree to the Secretary for Legislative and Legal Affairs of the Presidency of El Salvador, requesting an *authentic interpretation* of Article 37.2.b) of the Mining Law, to interpret that article in the way Claimant wanted it interpreted.[102] However, the Secretary for Legislative and Legal Affairs objected to this apparent attempt to *change* the law using a procedure intended only to *interpret* the law.[103] Thus, the Government of El Salvador considered Article 37.2.b) of the Mining Law to be clear and not consistent with Claimant's interpretation.

89. Contemporaneous documents also show that while the Minister of Economy was waiting for the response from the Secretary for Legislative and Legal Affairs of the Presidency, the Ministry of Economy was also considering another decree, which would have also required legislative approval, to change Articles 24 and 37 of the Mining Law in a way that would allow Claimant to meet the new amended requirements for the concession.[104]

90. In short, the uncontested documentary evidence provided with this Reply proves that Claimant knew before May 2005 that the Ministry of Economy had a very different

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[101] *See* Legal Opinion from Dr. Marta Angélica Méndez for Bureau of Mines Director, May 31, 2005 (**R-32**) (concluding that the Ministry would violate the Constitution if it granted the concession without the company having shown ownership or authorization for the entire area) and Response from Secretary for Legislative and Legal Affairs to Minister of Economy, June 20, 2005 (concluding that the company must show ownership or authorization for the entire area of a requested concession) (**R-33**).

[102] *See* Response from Secretary for Legislative and Legal Affairs to Minister of Economy regarding "Authentic Interpretation", October 6, 2005 (**R-34**). An authentic interpretation is a procedure by which the legislature can clarify or interpret a legal provision that is unclear or ambiguous. *See* Constitution of the Republic of El Salvador, Article 131(5) (CL-1).

[103] *See* Response from Secretary for Legislative and Legal Affairs to Minister of Economy regarding "Authentic Interpretation" (R-34).

[104] Letter from Bureau of Mines Director to Elí Valle with Proposed Amendments to the Mining Law of El Salvador (2005) (**R-35**).

interpretation from Claimant's about the surface land requirement in Article 37.2.b) of the Mining Law. The evidence also shows that the Ministry of Economy took steps to try to accommodate Claimant by pursuing changes in the law, but clearly understood that Claimant did not meet the requirement of Article 37.2.b) of the Mining Law regarding ownership or authorization for the entire area of the concession.[105]

91. It is significant, as noted above, that these communications and attempts to change the legal land use requirements took place in 2005, at least one year *before* Claimant alleges that the Government changed its behavior towards issuing exploration licenses and related mining permits.[106] Indeed, there is nothing in the Notice of Arbitration that pleads any facts suggesting any governmental wrongdoing whatsoever in connection with the Republic's application of the legal land ownership requirement to Claimant's Application for the Concession.

92. In short, Claimant's failure to comply with the requirement in the Mining Law regarding land ownership or authorization was entirely of its own doing and within its own control. Claimant cannot attach liability to the Republic for its own failures in this regard.

93. As an implicit acknowledgment that its interpretation of the Mining Law was not supportable, Claimant eventually shifted strategy and supported a proposal to replace the Mining Law in 2007. The proposed new law would remove the decision-making and regulatory authority from the Bureau of Mines and instead establish a new Mining Authority with representation from private industry and the mining industry.[107] Most importantly, the proposed

[105] The Republic is not presenting factual witnesses during this Preliminary Objections phase. However, the documentary evidence reflects that Claimant was aware of the Ministry's interpretation of the law and that Claimant attempted unsuccessfully to change that interpretation.
[106] *See* NOA, paras. 74, 91 (alleging that President Saca's comments in 2008 demonstrated a change in the Government's treatment of mining and were the basis for delay since 2006 in approving the applications).
[107] Proposed New Mining Law of El Salvador, Nov. 2007 (**R-36**).

new law would change the requirements for obtaining exploration licenses and exploitation concessions.

94. According to the proposed new law, an applicant would be able to obtain a "Mining Concession", which would include both exploration and exploitation, without submitting any of the documents which were then (and are currently) lacking from Pacific Rim El Salvador's concession application. An applicant therefore could receive a mining concession with no environmental permit, no feasibility study, and very limited land use documentation. Only after completing an extended 16 year exploration phase, the applicant would need to submit an environmental permit, a feasibility study, and ownership or authorization for only the land on which it would locate mining infrastructure.[108]

95. As explained in the Republic's Preliminary Objections, there is no automatic right to a concession, as Claimant had alleged in its Notice of Arbitration.[109] In fact, although Claimant asserts in its Response that this is a "strawman", the proposed new mining law supported by Claimant reversed the normal administrative presumption of denial by silence in Salvadoran law by including an automatic right to a concession in the event there was no response to the application.[110]

96. Claimant was involved in promoting and drafting the proposed law. In its 2007 Annual Report for the Canadian regulatory authorities, Pacific Rim Mining Corp. mentioned that the "Exploitation Concession application for the El Dorado project remains in process however it

[108] Proposed New Mining Law, Arts. 34, 35, 38, 52, and 54 (R-36).
[109] *See* NOA, para. 34 ("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 the application provided in Article 36 of the Mining Law and enclosed the documents described below."). *See also*, NOA, para. 37 (claiming that the right to an exploitation concession "is perfected upon the discovery and demonstration of the existence of mineable ore deposits in the license area").
[110] Proposed New Mining Law, Art. 38 (R-36).

is unlikely that a mining permit will be granted prior to the expected reformation of the El Salvadoran mining law".[111] The Company then stated, "[m]oving this project through the application process has identified shortcomings in the current law that would benefit from reform" and mentioned that a new law had been drafted taking "into consideration suggestions from various El Salvadoran political parties and mineral exploration companies including Pacific Rim."[112] The minutes of the Legislative Assembly of El Salvador also include a reference that employees of Pacific Rim El Salvador supported the draft of the new mining law their employer had a role in drafting.[113]

97. In short, instead of complying with the Mining Law, Claimant tried to pass a new law that would lessen the requirements and remove the Bureau of Mines and landowners from the process for obtaining an exploitation concession. No such new law ever passed. Claimant must therefore comply with the law which has always existed at all relevant time periods and which has been consistently interpreted by government authorities, contrary to the interpretation that Claimant now urges upon this Tribunal.

98. Given this history, the Republic is at a loss to understand how Claimant can assert that it was "surprised" to find out in the Preliminary Objections that the Salvadoran Government does not agree with Claimant's self-serving interpretation of the law. In fact, Claimant knew from at least 2005 that the Salvadoran Government held the view that Article 37.2.b) of the Salvadoran Mining Law required documentary proof that an applicant owned or had authorization for the *entire surface area of the requested concession*—a requirement as to which there is no factual dispute that Claimant does not meet.

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[111] Pacific Rim Mining Corp., 2007 Annual Report (Canada) at 10 (**R-37**).
[112] 2007 Annual Report at 10 (R-37).
[113] Regular Plenary Session No. 84 of the Salvadoran Legislative Assembly, Weekly Monitoring for December 17-21, 2007 (**R-38**).

4. The Mining Law requires proof of ownership or authorization for the entire area of the concession

99. Claimant's current, self-serving interpretation of Article 37.2.b) of the Mining Law is the same interpretation that has been argued to the Republic by Pacific Rim El Salvador since 2005. The Republic has already considered and rejected Claimant's arguments about the surface land requirement. Thus, there is no credible argument that there is a genuine material dispute as to the law's interpretation. Even if the Tribunal were to independently revisit this legal issue, however, there are valid reasons to sustain the Republic's interpretation of Article 37.2.b) of its Mining Law and to reject Claimant's self-serving interpretation.

(a) The text of the law does not support the company's self-serving interpretation of the law

100. Claimant interprets the land ownership or authorization requirement of the Mining Law to require that it show ownership or control over *only* the specific sections *within* the concession which would be directly disturbed by Claimant's above-ground activities. Thus, for example, if the planned concession were to have a mine whose underground tunnels would cover one square kilometer, if the mine shaft entrance and associated buildings were only located on half a square kilometer of land, Claimant posits that the law requires a showing of ownership or control of only the half kilometer.

101. The arguments submitted by Claimant to justify this interpretation in this arbitration, repetitions of the 2005 arguments to the Republic which were rejected, are contradicted by the provisions of the Mining Law and Claimant's own statements and actions.

102. The use of the term "inmueble" or real estate property in Article 37 demonstrates the fallacy of Claimant's legal position. Two provisions in Article 37 of the Mining Law in particular reference the "inmueble". Article 37.2.a) of the Mining Law requires an applicant to provide detailed information—such as a location map, a technical description, coordinates and

boundaries—for the "inmueble" or "real estate property in which the activities will be carried out."[114] Article 37.2.b) of the Mining Law, the Article with which Claimant failed to comply, requires that the applicant must prove ownership or authorization for the "inmueble" or real estate property. Unlike Article 37.2.a), this Article does not contain the qualifier "in which the activities will be carried out" after the term "inmueble" or real estate property.

103. In compliance with Article 37.2.a), Claimant submitted with its Application for the Concession the coordinates and maps covering the *entire area* of the requested concession, not just those parts where *surface activities* were intended to take place. Claimant's Application for the Concession and its description of the "real estate property in which the activities will be carried out" thus leave no doubt that, for purposes of that Application, the "inmueble" or real estate property referred to in Article 37.2.a), and by necessary implication 37.2.b), *is the entire area requested for the concession*.[115]

104. Specifically, sub-section 4.1 of Claimant's Application for the Concession is called "Planos de Ubicación y Descripción Técnica." This corresponds to the requirement under Article 37.2.a) of the Mining Law to provide "Plano de ubicación del inmueble en que se realizarán las actividades . . ." ("Map of the real estate property in which the activities will be carried out. . .") (Emphasis added.) The information Claimant supplied in sub-section 4.1, regarding the real estate property ("inmueble") where the activities will be carried out, provides maps and other detailed information relating to the entire 12.75 square kilometers of the requested concession.[116]

[114] Mining Law, Art. 37.2 (CL-5; RL-7).
[115] Application for the Concession at 4, § 2.1, and at 7, §§ 4.0 and 4.1 (C-5; R-2), and Maps 1 and 2 (attached as R-24 and R-25).
[116] Application for the Concession (C-5; R-2).

105. Thus, contrary to Claimant's argument in its Response to the Preliminary Objections, at the time it submitted its Application, Claimant understood the phrase "where the activities will be carried out" to refer to the entire area of the concession, not only some subset of that concession area where certain *surface activities* would take place.

106. Now, before this Tribunal, Claimant argues that the term "inmueble" in the Article 37.2.b) requirement to show ownership or authorization for the "inmueble" should be limited to the "inmueble" where surface activities will be carried out.[117] There are multiple problems with Claimant's interpretation. First, Article 37.2.b) does not contain the language of Article 37.2.a) which modifies "inmueble" with the phrase "in which the activities will be carried out." Thus, Claimant's interpretation imports the Article 37.2.a) limitation into Article 37.2.b), recognizing that the term "inmueble" in 37.2.b) refers to the same property as the term "inmueble" in 37.2.a). Second, Claimant tries to force a meaning on the "where the activities will be carried out" language of Article 37.2.a) that is not in the text of that provision. The text says simply "activities" (which would include underground activities) and not "surface activities" which is how Claimant interprets it. Finally—and most significantly—Claimant's own actions in submitting detailed mapping, coordinates and other information for the entire concession area in response to the Article 37.2.a) requirement demonstrates that Claimant well understood that the phrase "where the activities will be carried out" referenced the entire concession area, and not just some small part of it.

107. Given Claimant's historical recognition, by its actions, that the area "where the activities will be carried out" references the entire concession area, Claimant's other arguments are clearly *post hoc* attempts to justify its failure to meet the clear surface land requirement of Article 37.2.b). These arguments, in any event, fail on their own merits.

[117] Response, para. 143.

108. Claimant attempts to argue that the plain requirement to own or have authorization for the surface area of the entire concession requested should be ignored because it is proposing an underground mine rather than an open-pit mine. However, the law does not make this distinction. Even Claimant's local counsel admitted in 2005 that Article 37.2.b) places the same surface land documentation obligation on mines and quarries without taking into account their different characteristics.[118]

109. Claimant seems to be confused about the terms used in the Mining Law, assuming that the term "mine" only refers to an underground mine. In fact, the term "mine" refers to both open-pit mines and underground mines. The difference between a mine and a quarry is only the type of mineral being extracted, not the method of extraction. While mines refer to metallic mineral extraction, quarries refer to non-metallic mineral extraction.[119] Claimant's local counsel included these definitions in the May 5, 2005 legal memorandum submitted to the Bureau of Mines, yet that local counsel failed to take those definitions into account in the memorandum. Claimant continues to repeat the same mistake.

110. There is no evidence that the provision in Article 37.2.b) of the Mining Law to require the same land ownership documents for mines and quarries was unintentional. The drafters of the Mining Law could have distinguished mines from quarries, or underground mines

[118] Memorandum, "Mining Law Interpretation" May 5, 2005 (R-30) (noting that "en el Artículo 37, Num. 2, los requerimientos para la concesión de explotación de minas y canteras se combinan. . . . [E]n la letra b) se exige la misma obligación para minas y canteras, sin respetar las características distintas reconocidas en todas las otras partes de la Ley.") ["in Article 37 No. 2, the requirements for an exploitation concession for mines and quarries are combined. . . . letter b) establishes the same obligation for mines and quarries, irrespective of the distinct characteristics recognized in all other parts of the Law."].

[119] *See* Mining Law, Art. 2 ("Para los efectos de esta Ley, los yacimientos minerales se clasifican en metálicos y no metálicos, los primeros podrán ser llamados minas y los segundos canteras.") ["For the purposes of this Law, mineral deposits are classified as metallic and non-metallic, the former shall be called mines and the latter, quarries."] (CL-5; RL-7). *See also* Mining Regulations, Art. 2.2 (defining the term quarries ("canteras") by providing examples of the non-metallic minerals extracted from them) and Art. 2.17 (defining the term mine ("mina") as the "Lugar físico ya sea superficial o subterráneo donde se lleva a cabo la extracción de las sustancias minerales.") ["Physical location, whether on the surface or underground, where the extraction of mineral substances is carried out."] (CL-6; RL-8).

from open-pit mines, but chose not to do so. Instead, they chose to require ownership or authorization from all landowners in the entire concession area for either type of mine (underground or open-pit) as well as for quarries.

111. The clear meaning of Article 37.2.b) is inconvenient for Claimant because Claimant wanted an exceedingly large concession area and was unable or unwilling to obtain authorization from all the surface owners. Therefore, Claimant has resorted to challenging the requirement of Article 37.2.b) by drawing flawed comparisons to other provisions of the Mining Law.

112. First, Claimant points to Article 21 of the Mining Law, which only requires applicants for exploration licenses to obtain authorization from landowners if the work is going to be on their land. But Article 21 is inapposite here. Article 21 refers specifically to *exploration* licenses and what is at issue here is an *exploitation* concession. Moreover, the public policy issues relevant to exploration licenses are different from those relevant to exploitation concessions. Claimant's 2005 memorandum admits that most exploration work is done from above ground.[120] Because exploratory work, consisting mainly of drilling holes, is done from above ground, it makes sense to require that applicants for exploration licenses seek authorization from landowners in the area where they want to explore. The problems and risks associated with a company doing work under someone's land without that owner's authorization does not usually arise with exploration.

113. Thus, the difference between the requirement for exploration license applicants in Article 21 and the requirement for exploitation concession applicants in Article 37 makes perfect

[120] Memorandum, "Mining Law Interpretation" May 5, 2005 (R-30) ("Para el caso de la licencia de exploración . . . es procedente el permiso del propietario . . . porque usualmente las labores de exploración implican trabajos que se desarrollan desde la superficie del suelo.") ["In the case of the exploration license . . . the landowner's authorization is required . . . because exploration work usually involves work conducted from the soil surface."].

sense. Permission to explore is much less intrusive than an exploitation concession. It is reasonable that an applicant for a thirty year concession to extract minerals from the ground and chemically process them would need to present different and more extensive documentation than someone merely asking to drill holes to explore an area for potential future development. The Mining Law has separate articles for exploration licenses and exploitation concessions, and the two should not be confused.

114. Secondly, Claimant relies on Article 54, claiming that the right to easements is relevant to the interpretation of Article 37.2.b).[121] This reasoning is unfounded because, with respect to exploitation concessions, easements are a privilege for concession holders. One must have already complied with the requirements of Article 37.2.b) and been granted a concession to negotiate or receive an easement. Easements exist to facilitate mining activity once someone has obtained a license or concession, for example, when a concession holder needs access to land outside the concession area to carry out its mining activities.

115. For these same reasons, the company's interpretation of the law was rejected in 2005, and it had to initiate its failed attempt to change the law to modify this requirement. Claimant has not submitted any new or valid arguments in this arbitration to explain how it could have any right to an exploitation concession when it refused to comply with this key requirement due to its own failures, with no alleged wrongdoing by the Republic.

(b) The Mining Law purposefully and logically requires ownership or authorization from landowners

116. The requirements of the Mining Law are not only clear, but also reasonable. The requirement to obtain authorization from landowners before being given a concession to extract deposits from under their land is not, as Claimant argues, "illogical". Requiring authorization

[121] Response, para. 148.

from landowners is a rational way for the State to protect landowners and communities from a practice that could cause significant harm to their property. It is especially important in El Salvador where, as described in Pacific Rim Mining Corp. documents, there is limited experience with mining and few resources to devote to ensuring that projects the Government authorizes do not harm the communities.[122]

117. It is beyond dispute that mining under someone's land can cause damage to the land and any structures on it; such damage often results from subsidence. Subsidence is "the gradual caving in or sinking of an area of land"[123] and it occurs when land shifts to fill in a void left by mining. "Subsidence is an inevitable consequence of underground mining—it may be small and localized or extend over large areas, it may be immediate or delayed for many years."[124] Information from landowners is vital in planning underground mining to account for people's homes and the possible effects of any subsidence. In addition, it is perfectly reasonable public policy to require mining companies to obtain ownership or authorization from landowners in the entire concession area to ensure that the companies inform landowners of the intended underground activities that might affect the surface and afford them the opportunity to take appropriate steps to protect their interests. It also gives landowners the opportunity to negotiate the sale of their land and shift the risk created by mining to the party that will benefit from it, the mining company. The surface land requirement in Article 37.2.b) may be more burdensome for

[122] *See, e.g.*, Pacific Rim Mining Corp., Final Pre-Feasibility Study El Dorado Project, Jan. 21, 2005, at 127 (C-9) ("There are no modern mining operations in El Salvador; therefore, the government regulators have not had the opportunity to develop a complete understanding of mining processes and mining environmental management. Nor has El Salvador established comprehensive mining environmental management regulations.").
[123] AskOxford.com, Compact Oxford English Dictionary, "subsidence" (**RL-32**).
[124] Madan M. Singh, Mine Subsidence (Chapter 10.6) *in* SME Mining Engineering Handbook 938, (Howard L. Hartman, Seeley W. Mudd Memorial Fund of AIME, Society for Mining, Metallurgy, and Exploration Inc., 1992) (**R-39**).

the mining company than preferred by Claimant, but it establishes a reasonable legal regime intended to balance the interests of both the landowners and the mining companies.

118. The authors of a technical report on underground mining note that although "underground mining is generally viewed as resulting in less damage to the environment" than open-pit mining, "[t]he methods and size of major underground mining operations and the extent to which hydrologic and *subsidence* impacts from those operations can impact the environment make appropriateness of underground mines in certain settings questionable."[125]

119. In fact, commentators note that as early as 1556, "the Italians had forbidden any mining in or around the extensive vineyards and fields of the prime agricultural regions because of the negative impacts of subsidence and degraded water quality caused by mining".[126] Stope mining specifically can cause "unintended cave-ins, inadequate support . . . and eventual collapse of the workings over time as the inevitable consolidation of the strata takes place."[127] Backfilling, a planned mitigation technique for the El Dorado project, reduces subsidence but does not eliminate it.[128]

120. Thus, it makes perfect sense for the law to require, as it does, that the land use authorizations cover a surface area which corresponds to the area of the concession and not just the area where structures or mine openings are planned. It would be incorrect to assume, as Claimant asks this Tribunal to do, that only the limited sections of the surface where installations will be built will be impacted by an underground mine. The Republic of El Salvador is justified

[125] Steve Blodgett & James R. Kuipers, Technical Report on Underground Hard-Rock Mining: Subsidence and Hydrologic Environmental Impacts at 1 (Feb. 15, 2002) (**R-40**) (emphasis added).
[126] Blodgett, at 2 (citing Georgius Agricola, De Re Metallica (1556) (H. Hoover and L.H. Hoover eds., 1950)).
[127] Blodgett, at 5.
[128] Singh, at 942 (R-39). In any event, the issue here is not whether the El Dorado project would have caused cave-ins on any particular piece of land, but whether it was rational for the Salvadoran legislature to create a surface land requirement that allowed landowners to protect themselves from this very real possibility whenever a mining concession is going to be issued. Clearly it was.

in having enacted a law covering surface areas above underground mines. To take an example, a town in Oklahoma that had prospered from zinc and lead mining in the early 1900s recently had to be abandoned because of the danger of cave-ins caused by the deserted underground mines.[129] Similarly, residents in Pennsylvania who live over abandoned underground coal and clay mines are warned to get special "Mine Subsidence Insurance."[130] Claimant's implicit suggestion that the citizens of El Salvador are entitled to any less protection from the hazards of underground mining than citizens of other countries should be rejected out of hand.

(c) The Salvadoran Constitution guarantees security to the surface owners

121. While it is certainly not necessary for the Tribunal to make any determinations on Salvadoran Constitutional law regarding this matter, an understanding of the Constitutional underpinnings of Article 37.2.b) further illustrates that there is no basis for Claimant's assertion that the land ownership or authorization requirement established by the Republic is illogical. The Salvadoran Constitution recognizes property rights and security rights. In her opinion for the Bureau of Mines, Doctor Marta Méndez noted that mining involves dangers to life, health, and property. As she highlighted, Article 2 of the Constitution states that every person has the right to life, physical and moral integrity, freedom, security, work, property, and to be protected in the preservation and defense of the same.[131]

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[129] *See* Matthew C. Wright, A Tainted Mining Town Dies as Residents Are Paid to Leave, Washington Post, Jan. 18, 2007 (**R-41**) ("To add to Picher's misery, a federal study released in January determined that the abandoned mines beneath the city could cause cave-ins without warning. The study sealed Picher's fate, persuading Sen. James M. Inhofe . . . to drop his opposition to a federal buyout of the town. Before that, he supported funds for a cleanup.").

[130] *See* Pennsylvania Dept. of Environmental Protection, Mine Subsidence Insurance website (explaining various effects of mine subsidence) (**R-42**).

[131] Constitution of the Republic of El Salvador, Art. 2 (CL-1) ("Toda persona tiene derecho a la vida, a la integridad física y moral, a la libertad, a la seguridad, al trabajo, a la propiedad y posesión, y a ser protegida en la conservación y defensa de los mismos."). *See also,* Art. 11 ("Ninguna persona puede ser privada del derecho a la vida, a la libertad, a la propiedad y posesión, ni de cualquier otro de sus derechos sin ser previamente oída y vencida en juicio con arreglo a las leyes . . . ."] ["No one can be deprived of the

122. Dr. Méndez indicated that Salvadoran Constitutional jurisprudence has held that the right to security includes the right to enjoy one's property without risks, disturbances, or fear and that the State must take appropriate precautions to protect people and their property.[132] The Supreme Court of El Salvador has explained that the right to security of property includes an obligation for the State to take appropriate measures, including preventive measures, to protect the property and real estate of citizens, and failure to adopt such measures is a violation of the right to security.[133] Therefore, as Dr. Méndez explained in her 2005 opinion, "the fact that the subsoil minerals belong to the State does not mean that the State will permit excavation under private property without the owner's authorization."[134]

123. Thus the State must ensure that an exploration license holder such as Pacific Rim El Salvador complies with the provisions of the Mining Law for obtaining a concession in order to protect the Constitutional rights of its citizens. The Constitution further provides, in Article 102, that societal well-being limits economic freedom; the State shall encourage and protect

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right to life, freedom, property and possession, nor of any other rights without first being heard and judged in accordance with the law . . . ."].

[132] *See, e.g.*, Case No. 309-2001, Constitutional Branch of the Supreme Court of El Salvador, June 26, 2003 (**RL-33**) ("En su dimensión de *seguridad material*, tal derecho 'equivale a un derecho a la tranquilidad, es decir, un derecho de poder disfrutar sin riesgos, sobresaltos ni temores los bienes muebles o inmuebles que cada uno posee, o bien la tranquilidad de que el Estado tomará las medidas pertinentes y preventivas para no sufrir ningún daño o perturbación.'") ["In the dimension of *material security*, this right "is equivalent to a right to peace, meaning, a right to be able to enjoy one's goods and property without risks, disturbances or fears, and also with the peace of mind that the State will take appropriate, preventative measures to avoid any damage or disruption."].

[133] *See, e.g.*, Case No. 309-2001 (RL-33) ("esta vertiente del derecho a la seguridad . . . se refiere a que es una obligación del Estado adoptar las medidas pertinentes (incluso, preventivas) para la protección de los bienes muebles o inmuebles de los ciudadanos, de tal suerte que si no se realiza tal actividad, existiría una violación a la seguridad material que afectaría de manera directa el derecho a la propiedad.") ["this aspect of the right to security . . . refers to an obligation for the State to adopt appropriate (even preventative) measures for the protection of the goods and property of citizens, such that if the State does not act, it would be a violation of material security that would directly affect the property right."].

[134] Legal Opinion from Dr. Marta Angélica Méndez, May 31, 2005 (R-32) ("el hecho de que el subsuelo pertenezca al Estado, no significa que va a permitir que se excave subterráneamente las propiedades de particulares sin su autorización.").

private initiatives within necessary conditions to increase national wealth and assure the benefits to the greatest number of the country's inhabitants.[135]

124. Claimant seeks to interpret the law to its benefit in such a way as to deny the rights of private landowners in El Salvador, by asserting that the State must grant rights to underground minerals without considering anyone else's interests. But the Government of El Salvador cannot ignore its laws or its citizens' Constitutional rights and therefore it is correct to insist that an applicant for an exploitation concession obtain authorization from all landowners in the area corresponding to the area of the concession. In other words, far from being illogical, the requirement in Article 37.2.b) ensures that the Mining Law is consistent with the Constitution of El Salvador.

B. Claimant has not submitted a Feasibility Study that meets the legal requirements for a Mining Exploitation Concession in El Salvador

125. Claimant does not dispute that Article 37.2.d) of the Mining Law requires an applicant for an exploitation concession to submit a Feasibility Study.[136] In the Preliminary Objections, the Republic highlighted that Pacific Rim El Salvador had only submitted a "Pre-Feasibility Study" that was insufficient to fulfill the Mining Law requirements. A Feasibility Study needs to address the technical and economic justification for the concession area.[137] The Pre-Feasibility Study submitted by Claimant does neither on the undisputed facts.

126. Claimant argues that its *Pre*-Feasibility Study should be considered the equivalent of a Feasibility Study (which Claimant admits was never submitted). Specifically, Claimant indicates that its Pre-Feasibility Study "is a remarkably thorough report, exceeding 200 pages

[135] Constitution of the Republic of El Salvador (CL-1) ("Se garantiza la libertad económica, en lo que no se oponga al interés social. El Estado fomentará y protegerá la iniciativa privada dentro de las condiciones necesarias para acrecentar la riqueza nacional y para asegurar los beneficios de ésta al mayor número de habitantes del país.").
[136] NOA, para. 35; Response, para. 160.
[137] Response, para. 161.

and prepared by numerous professional firms under the coordination of SRK Consulting, one of the leading independent preparers of mining feasibility studies in the world."[138] Irrespective of the number of pages of the Pre-Feasibility Study, or who prepared it over what period of time, the undisputed facts demonstrate that this document did not meet the requirements of the Salvadoran Mining Law for the concession area applied for by Claimant.

127. First, it is worth noting that Claimant's own consultant, SRK Consulting, referenced by Claimant as one of the "leading" international professionals in this area, prepares both pre-feasibility and feasibility studies and nowhere suggests that the two are equivalent.[139] In fact, in a Mining Brochure highlighting various projects the firm has worked on, there are several references to projects that involved both a pre-feasibility and then a final feasibility study.[140] As the brochure indicates, SRK Consulting and its clients all over the world distinguish between pre-feasibility and feasibility studies. SRK Consulting only prepared a pre-feasibility study for the El Dorado project. The final feasibility study was started but has never been completed and therefore was not submitted to the Bureau of Mines.

128. Second, as for the thickness of the Pre-Feasibility Study, the volume of the submitted study cannot compensate for the fact that it is not in any way relevant to the concession area requested in December 2004 and to the requirements the application had to meet under Salvadoran law.

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[138] Response, para. 164.
[139] *See* SRK Consulting, http://na.srk.com, "Our Services" (**R-43**) ("Our services consist of the preparation of scoping studies, preliminary feasibility and feasibility studies for both underground and open pit projects.").
[140] *See* SRK Consulting, "New Mining Brochure" at 11, 13-14 (**R-44**) (mentioning projects in Brazil and Australia where SRK helped prepare both a pre-feasibility study and then a definitive feasibility study, as well as projects in Chile and Canada where the firm prepared pre-feasibility studies and the mining companies used that preliminary study to begin their full feasibility studies).

129. Article 24 of the Mining Law, entitled "Determination of the Area to be Exploited," specifically links the area of the mining exploitation concession to the size of the mineral deposit(s) and the technical justifications submitted by the applicant.[141] Accordingly, a concession applicant needs to define the area of the concession to be requested *based on the size and location of the mineral deposits the applicant found during exploration and the technical justification provided by the applicant*.[142] The Feasibility Study must describe the extent of the deposits and their economic viability, as well as provide the technical justification for the area of the concession requested.[143] The Ministry of Economy then follows a methodic process to determine whether to grant a concession, but first and foremost the applicant is only eligible for a concession if it has complied with the provisions of the Mining Law and its Regulations.[144]

130. It is thus clear that the size of the concession cannot be set arbitrarily by the applicant, but that Article 24 of the Mining Law specifically requires that the size of the concession correspond to the size of the deposits of the minerals to be mined and the technical justifications submitted by the applicant.

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[141] Mining Law, Art. 24 (CL-5; RL-7) ("Determinación del área a explotar. Art. 24. La Concesión minera otorga a su Titular, el derecho a la explotación de los minerales previamente determinados . . . y su superficie será otorgada en función de la magnitud del o los yacimientos y de las justificaciones técnicas del titular.") ["The mining Concession grants the Holder the right to extract the previously determined minerals . . . and its surface area shall be granted based on the size of the deposit(s) and the holder's technical justifications."].

[142] *See* Mining Law, Art. 24 (CL-5; RL-7).

[143] Mining Law, Art. 37.2.d).

[144] *See* Mining Law, Art. 3 (CL-5; RL-7) ("Para la exploración y explotación de minas y canteras, el Estado podrá otorgar Licencias o Concesiones, siempre que se cumpla con lo dispuesto en esta Ley y su Reglamento") ["For exploration and exploitation of mines and quarries, the State will be able to grant Licenses and Concessions, provided there is compliance with the rules established by this Law and its Regulations"] and Article 8 ("Toda persona natural o jurídica, nacional o extranjera que sea capaz e idónea, podrá obtener derechos mineros, siempre y cuando cumpla con las normas que esta Ley y su Reglamento establecen") ["Every natural or juridical person, national or foreign, who is able and appropriate, will be able to obtain mining rights, provided there is compliance with the rules established by this Law and its Regulations."].

131. Apart from the land ownership or authorization requirement deficiencies discussed above, Claimant failed to justify the requested concession area based on the size and economic feasibility of the mineral deposits and Claimant's technical capacity in a Feasibility Study as required by the Mining Law.

1. The Pre-Feasibility Study is based on only two veins covering a small portion of the requested 12.75 square-kilometer concession area

132. Claimant asserts that because the Pre-Feasibility Study includes a "Statement of Mineral Reserves", the Pre-Feasibility Study "plainly satisfies both the letter and intent of Article 37(2)(d)."[145]

133. Claimant does not mention that the reserves addressed by the Pre-Feasibility Study are contained in only one principal vein and one secondary vein (Minita and Minita 3) which collectively cover only a very small portion of the concession which was requested. [146] But these deposits cannot possibly justify a 12.75 square kilometer concession. As the Pre-Feasibility Study explains, "historic production at El Dorado was derived from four main veins in an area about 700 [meters] long and 300 [meters] wide."[147] The Pre-Feasibility Study further notes "[o]f these four, the Minita and Minita 3 veins form the resource and reserve statements presented in this report."[148] Thus the resources and reserves presented in the Pre-Feasibility Study are from two veins contained within an area which the study says is in total only about 0.21 square kilometers.

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[145] Response, para. 165.
[146] Pre-Feasibility Study, at 25-26. Pacific Rim Mining Corp.'s website concedes that the Pre-Feasibility Study was "based on mining the Minita deposit alone." Pacific Rim Mining Corp., "El Dorado", www.pacrim-mining.com (**R-45**).
[147] Pre-Feasibility Study, at 25 (C-9) (emphasis added).
[148] Pre-Feasibility Study, at 25-26. *See also*, Pre-Feasibility Study, at 43 ("The grade models upon which the resources and reserves are based were developed and constructed by MDA in conjunction with PacRim geologists and relying on work by Ronning as well. SRK has reviewed the models generated for the Minita and Minita 3 veins which contain the resources and reserves reported in this study.").

134. The description of each of the two veins confirms this. The Pre-Feasibility Study describes Minita, "in which most of the defined resources occur," as being at least 900 meters long and averaging 3 meters wide.[149] The Study then states, "[t]he Minita 3 vein is the second of two veins for which resources and reserves have been defined in this report," and describes it as almost 600 meters long with a mean thickness of 1.5 meters.[150]

135. The modeled resources used in the Pre-Feasibility Study were described in a 2003 Technical Report prepared by Mine Development Associates ("MDA").[151] This report includes a map showing the location of the Minita modeled resources (including Minita, Minita 3, and Zancudo, an exploration target) and the area easily fits inside a 300 meter by 1000 meter rectangle, confirming that the resource estimate is based on a plan to mine less than 0.3 square kilometers.[152]

136. Thus, it is undisputed that the Pre-Feasibility Study was limited to two veins in an area covering a small fraction of the total requested concession.

137. In addition, even the small area which *was* covered by the Pre-Feasibility Study was not well understood by Claimant at the time of the study. For example, the Pre-Feasibility Study explains that

> Due to the distribution and limited nature of the drilling at the north end of the Minita vein, one hole with a high-grade assay . . . estimates 2.5% of the ounces in the Minita vein. . . . [Mine Development Associates] has recommended further drilling for better definition and suggests that further drilling might generate a larger resource extending to the north and down dip. Drilling in the south end of Minita . . . indicated unresolved complexities and

[149] Pre-Feasibility Study, at 29.
[150] Pre-Feasibility Study, at 30.
[151] Technical Report on the El Dorado Project Gold and Silver Resources prepared by Mine Development Associates, Nov. 26, 2003 (**R-46**).
[152] Figure 17.3 "El Dorado Resource Area" from 2003 MDA Technical Report (provided separately as **R-47**).

this area were [sic] removed from the estimate.[153]

138. Thus, the Pre-Feasibility Study describes a plan to exploit two veins, under less than 0.3 square kilometers of land, and it evidences a lack of complete definition and understanding as to even those deposits. This information demonstrates that Pacific Rim El Salvador had not completed the necessary exploration activities to define and justify the requested 12.75 square kilometer area for an exploitation concession. As a result Claimant failed to meet the requirement of Article 24 of the Mining Law that the size of the concession be defined in terms of the size of the deposit and the technical justifications.

2. The Pre-Feasibility Study does not even mention the 12.75 square kilometer requested concession area

139. The submitted Pre-Feasibility Study does not explain how or why the applicant defined the 12.75 square kilometer area for the proposed concession. The Study instead contains very general information about the entire 75 square kilometer area of the two exploration licenses (El Dorado Norte and El Dorado Sur). This suggests that Claimant intended to develop, at some time in the future, a much more extensive project involving other (undefined) veins in the entire exploration area. But instead of devoting its time and resources to analyzing an area small enough for it to complete a full and informed proposal, Claimant chose to incompletely explore a very large area. *This choice shows that the company was more concerned with prematurely securing a right for future exploitation of an area it had not yet properly explored than complying with the clear provisions of the Mining Law.*

140. Near the end of the Pre-Feasibility Study submitted in January 2005, SRK Consulting finally mentions that Pacific Rim "has elected to convert $62.73km^2$ from within the

[153] Pre-Feasibility Study, at 48.

limits of the Exploration License areas to an Exploitation Concessions [sic]."[154] This is not only the wrong number, because the December 2004 Application for an Exploitation Concession requests an area of only 12.75 square kilometers, but also a surprising number because it covers such a large area including dozens of veins for which the Pre-Feasibility Study presents no data.

141. Thus, the Pre-Feasibility Study, completed one month after the concession application was submitted, refers to an area almost five times greater than the area requested for the concession. This cannot justify the 12.75 square-kilometer area requested *based on the size of the deposits discovered*, as required by Article 24 of the Mining Law.

142. The Mining Law does not permit a company to request a large exploitation concession area based upon a technical and economic study that looked, on a preliminary basis, only at two veins in a tiny fraction of the requested area. Rather, the law requires a feasibility study to justify and discuss the entire area requested. It is impossible for the evaluators to determine the project's economic and technical viability when the submitted technical study failed even to define, much less examine, the entire area at issue.

143. The undisputed facts in Claimant's own documents demonstrate that Pacific Rim El Salvador was never focused on the 12.75 square kilometer concession area, but was instead planning to explore and eventually exploit several other veins in an enormous 75 square kilometer exploration area. In fact, the January 2005 Pre-Feasibility Study, completed the month the El Dorado exploration licenses expired, includes a section on "Exploration Targets", highlighting its intent to explore Zancudo, Nueva Esperanza, La Coyotera, Nance Dulce, and

[154] Pre-Feasibility Study, at 140 (emphasis added).

"[s]everal other vein targets . . . yet to be drilled."[155] Some of the "exploration targets", such as Nance Dulce and La Coyotera, are even outside the requested concession area.[156]

144. The Pre-Feasibility Study even mentions a potential open-pit mine, which would raise many new technical and environmental questions. The Study states, "La Coyotera is a significant exploration target with potential for future open-pit exploitation."[157]

145. Thus, despite filling over 200 pages, including information about exploration targets outside the requested concession area, the Pre-Feasibility Study is deficient as a final feasibility study because, *inter alia*, it fails to show, based on the exploration findings, that the requested 12.75 square kilometer area for a mining project was 1) based on the size and location of the mineral deposits the applicant found during exploration to show the economic feasibility of the concession proposed and 2) technically justified, as required by the Mining Law.[158]

3. Without any detailed technical review, it is clear that the Pre-Feasibility Study did not meet the minimal requirements to justify a concession under Salvadoran law

146. The legal deficiencies of the Pre-Feasibility Study are evident on its face. Rather than contesting these deficiencies directly, Claimant accuses the Republic of purportedly confusing the standards for such a study in El Salvador with those under U.S. or Canadian securities laws.[159] Claimant is incorrect. The Republic is not questioning the Pre-Feasibility Study's degree of economic reliability or getting into other technical assessments at this early

[155] Pre-Feasibility Study, at 31.
[156] *See* Application for Concession, at 5, § 2.2 (C-5; R-2) (listing veins outside the concession area, but within the exploration licenses: Nance Dulce, San Matías, Coyotera, Porvenir, El Gallardo, Iguana, and La Huerta).
[157] Pre-Feasibility Study, at 31 (emphasis added). In addition to this reference to La Coyotera in the Pre-Feasibility Study, the parent company also refers to a potential open-pit mine to exploit the Nueva Esperanza vein. *See* Pacific Rim Mining Corp., http://www.pacrim-mining.com/s/Eldorado.asp (**R-48**) (showing a chart of the 2003 resource estimate with the statement that the "*Nueva Esperanza vein resource is near surface,*[and] *potentially open-pitable*"). The Nueva Esperanza vein is within the requested concession area, but data on its reserve estimates was not included in the Pre-Feasibility Study.
[158] Mining Law, Art. 37.2.d).
[159] *See* Response, para. 166.

stage. The Republic is merely pointing out that a Pre-Feasibility Study—under *any* reasonable reading of the governing legal standard—cannot provide the technical and economic justifications for the requested 12.75 square kilometer concession. This Pre-Feasibility Study is deficient on the undisputed facts because 1) it is based on mining a deposit located under less than 0.3 square kilometers, and 2) it does not even refer to (much less study) the 12.75 km^2 requested concession area, but rather generally references the desire to explore *in the future* an area five times larger. As the Pre-Feasibility Study expressly concedes, it was not submitted with an intent to justify the 12.75 square-kilometer concession, as the law required, but was intended to achieve a very different goal: to facilitate "[t]he conversion of the exploration licenses to exploitation concessions, and Development of capital fund-raising activities."[160]

147. Pacific Rim Mining Corp. was clear about these intentions at the time it commissioned the Pre-Feasibility Study. Therefore, this Tribunal need not (and should not) accept Claimant's new assertion that this Pre-Feasibility Study was in actuality a full Feasibility Study of the 12.75 square kilometer area, sufficient to justify a thirty-year exploitation concession. This contention is absurd. The actual, legally required Feasibility Study was never completed. Claimant completed the Pre-Feasibility Study because it wanted to continue exploring and maintain its claim over a large area when its exploration licenses expired on January 1, 2005.

148. Claimant cannot blame the Government of El Salvador for Claimant's own stubbornness in not seeking a smaller concession area, which it might have been able to technically and economically justify. In the concession application, Pacific Rim El Salvador explained that it was requesting a larger area than it had fully explored based on the low operating costs and high capital costs, claiming that it would not be reasonable based on its

[160] Pre-Feasibility Study, at 9.

investment to request the smaller area.[161] Having consciously made this decision, Claimant must now live with the consequences.

4. Claimant's assertion that it could not have done a Feasibility Study is false

149. Finally, Claimant would have this Tribunal believe that what is plainly entitled a "Pre-Feasibility Study" is in reality a "Final Feasibility Study" but that Claimant could not give it this title because of U.S. and Canadian securities laws.[162] This is a completely false and new assertion. Claimant's parent company has been talking about doing a final feasibility study since at least 2006 and never once remarked that such a study was impossible to accomplish because of legal requirements or otherwise.

150. In a 2007 letter to shareholders included in its 2007 Annual Report, Pacific Rim Mining Corp. declared that the "results of an updated El Dorado resource estimate incorporating the Balsamo deposit are expected by December 2007, and work on the feasibility study, which is approximately 2/3 completed, will resume shortly thereafter."[163] Consistent with the other projects mentioned in the brochure by SRK Consulting, a pre-feasibility study was completed and then work began on the feasibility study. As noted in the Preliminary Objections, Pacific

[161] *See* Application for Concession, at 6, § 2.3 (C-5; R-2) ("Este estudio [de pre-factibilidad] muestra claramente, que debido a los buenos costos operacionales, grandes costos capitales y tasa interna de retorno (TIR) muy baja, que cualquier cosa que extienda la vida de la operación será favorable al proyecto, y por ende a los trabajadores, las municipalidades . . . , la República de El Salvador, y a los inversionistas. Basado en esto, no nos parece razonable solicitar solamente el área de las vetas Minita y Minita 3, área de la planta y presa de colas, sino que también las otras áreas cercanas donde se encuentran vetas mineralizadas y zonas geológicamente identificadas como zonas con potencial, como área de Concesión.") ["This [pre-feasibility] study clearly shows that, due to the favorable operating costs, high capital costs and very low internal rate of return (IRR), anything that extends the life of the operation will be beneficial to the project and therefore the workers, the municipalities . . . , the Republic of El Salvador and the investors. Based on the above, we do not think it reasonable to request only the areas of the Minita and Minita 3 veins, plant and tailings dam, but also other nearby areas containing mineralized veins and geological zones identified as having potential as the Concession area."].

[162] Response, para. 169.

[163] Letter to Shareholders, *in* Pacific Rim Mining Corp., 2007 Annual Report, at 2 (R-37) (emphasis added).

Rim Mining Corp.'s 2009 regulatory filing mentioned that completion of the feasibility study was then recently deferred.[164]

151. Neither Pacific Rim Mining Corp. nor Pacific Rim El Salvador has ever suggested that the feasibility study currently on hold is different from the feasibility study required by the Salvadoran Mining Law. If the feasibility study currently on hold were a different document only relevant for United Stated and Canadian securities laws, Claimant would not have any reason to mention it in its reports to the Government of El Salvador.

152. But in fact, not only does Pacific Rim Mining Corp. discuss the pending final feasibility study in the news and in its reports for its Canadian and United States shareholders, but Pacific Rim El Salvador has referred to the pending Feasibility Study in documents submitted to the Government of El Salvador. For example, Pacific Rim El Salvador's 2008 Annual Report submitted to the Government of El Salvador makes reference to the Feasibility Study still being completed.

153. In a section titled, "Feasibility Study: General Comments", Pacific Rim El Salvador explained to the Government of El Salvador that after recalculating the reserves in July 2006, the company began technical work to complete the "final feasibility study" during 2008.[165] Moreover, the company promised that the new study, projected for 2009, would be "more

[164] Preliminary Objections, para. 87; (R-20) ("In February 2009 . . . the Company decided to defer completion of the feasibility study . . . .").

[165] 2008 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession (Informe Anual 2008 de Exploración Para Los Trabajos Realizados Por Pacific Rim El Salvador S.A. de C.V. en la Propuesta Concesión de Explotación El Dorado) (Feb. 2009), § 7 (R-3) ("Durante el año 2006 el Estudio de Factibilidad Final para el proyecto El Dorado fue detenido para reorganizar los datos obtenidos en campañas pasadas de perforación a cargo de PACRIM. Luego de un informe de avance en la revisión del cálculo de reservas en Julio de 2006, se empezaron los trabajos técnicos para retomar y completar el estudio final de factibilidad a principios de 2008.") ["In 2006, the Final Feasibility Study for the El Dorado Project was delayed in order to reorganize the data obtained in past drilling campaigns conducted by PACRIM. After a progress report on the revised calculation of reserves in July 2006, technical work began to resume and complete the final feasibility study in early 2008."].

complete" and would include additional information, including: structural and geotechnical studies, a final hydrogeological study, a detailed costs study, revised plans for the tailings dam, the underground mine, and the processing plant, and a new resource estimate.[166] Thus, the Annual Report submitted to the Bureau of Mines in early 2009 shows that the company was working on a final feasibility study and acknowledged the shortcomings of the 2005 Pre-Feasibility Study.

154. Thus, Claimant's argument to the Tribunal that the 2005 Pre-Feasibility Study was sufficient to meet the requirements for the Mining Law must be rejected as inconsistent with Claimant's report to the Government of El Salvador, only one year ago , indicating that it was still working on *and had not yet completed*, the required Feasibility Study.

155. It is abundantly clear from the undisputed facts that both SRK Consulting and Claimant knew that a pre-feasibility study and a feasibility study were two different things, and that the "pre-feasibility" study which was submitted utterly fails to justify the economic and technical feasibility of the requested area of the concession.

[166] *Id.* ("Los datos obtenidos de las perforaciones hechas en 2007 y otros estudios técnicos con la información existente en el proyecto van a dar como resultado a principios de 2009, un Estudio de Factibilidad más completo que el presentado en años pasados. Este nuevo estudio incluye estudios técnicos tales como: Estudios metalúrgicos en nuevos cuerpos mineralizados y el proceso de extracción; Estudios estructurales y geotécnicos; Estudio Hidrogeológico Final Proyecto El Dorado; Estudio detallado de costos para el desarrollo y operación de mina; Revisión del Estudio de Presa para Pila de Colas; Revisión del Estudio de Mina Subterránea y Planta de Proceso; Nuevo cálculo de recurso minero. Como se mencionó anteriormente, todos estos datos serán incorporados en un actualizado Estudio de Factibilidad en 2009.") ["The data obtained from holes drilled in 2007 and other technical studies along with the existing information on the project will result in a Feasibility Study in early 2009 that is more complete than those presented in past years. The new study includes technical studies such as: Metallurgical studies on new mineralized bodies and the extraction process; Structural and geotechnical studies; Final Hydrogeological Study for the El Dorado Project; Detailed cost study for mine development and operation; Revised Tailings Dam Study; Revised Underground Mine and Processing Plant Study; New calculation of mining resource. As mentioned above, all these data will be included in an updated Feasibility Study in 2009."].

C. Claimant cannot cure the defects in its Application for the Mining Exploitation Concession

156. As the preceding sections have demonstrated, Claimant knew about the defects in its application and failed to correct them. Instead of modifying its application to fit the legal requirements, Claimant tried to change the legal requirements to fit its application.

157. Claimant now argues that it could have fixed the defects in its application by reducing the size of the requested concession to the very limited surface area that Claimant either owns or for which Claimant has provided authorizations.[167] This argument is in fact irrelevant, given that Claimant knew of the problem at least as early as 2005 and chose not to change its application. Thus only Claimant is responsible for not having "fixed" its application.

158. However, even if Claimant had been willing to reduce the area of the requested concession from 12.75 square kilometers to the 1.6 square kilometers covered by Claimant's ownership or authorizations, Claimant would still not have met the legal requirement to obtain the concession. This is because Claimant did not own or have authorization for the land directly above a portion of the access ramp and most of the underground mine Claimant proposed to construct.

159. The surface area Claimant owns or has authorization for is represented in Map 5 to the Application for the Concession (included in Exhibit R-2 to the Preliminary Objections). Map 5 only includes an area of four square kilometers, or less than one-third of the total area requested for the concession, in the center of the requested area. As Map 5 shows, the proposed mine for the concession is under a surface area of less than 0.2 square kilometers. Map 5 also

[167] Response, para. 156.

shows that Claimant does not even own or have authorization for much of the surface area above the proposed underground mine.[168]

160. For ease of reference Map 5 is reproduced below. (The areas Claimant either owns or has authorization for are within the pink lines. The structure of the underground mine is located at the top of the map, showing the tunnels and spirals of the ramps. An underground access ramp connects the underground mine to the processing facilities above the ground in the lower half of the map).

[168] *See* Map 5 (R-28).

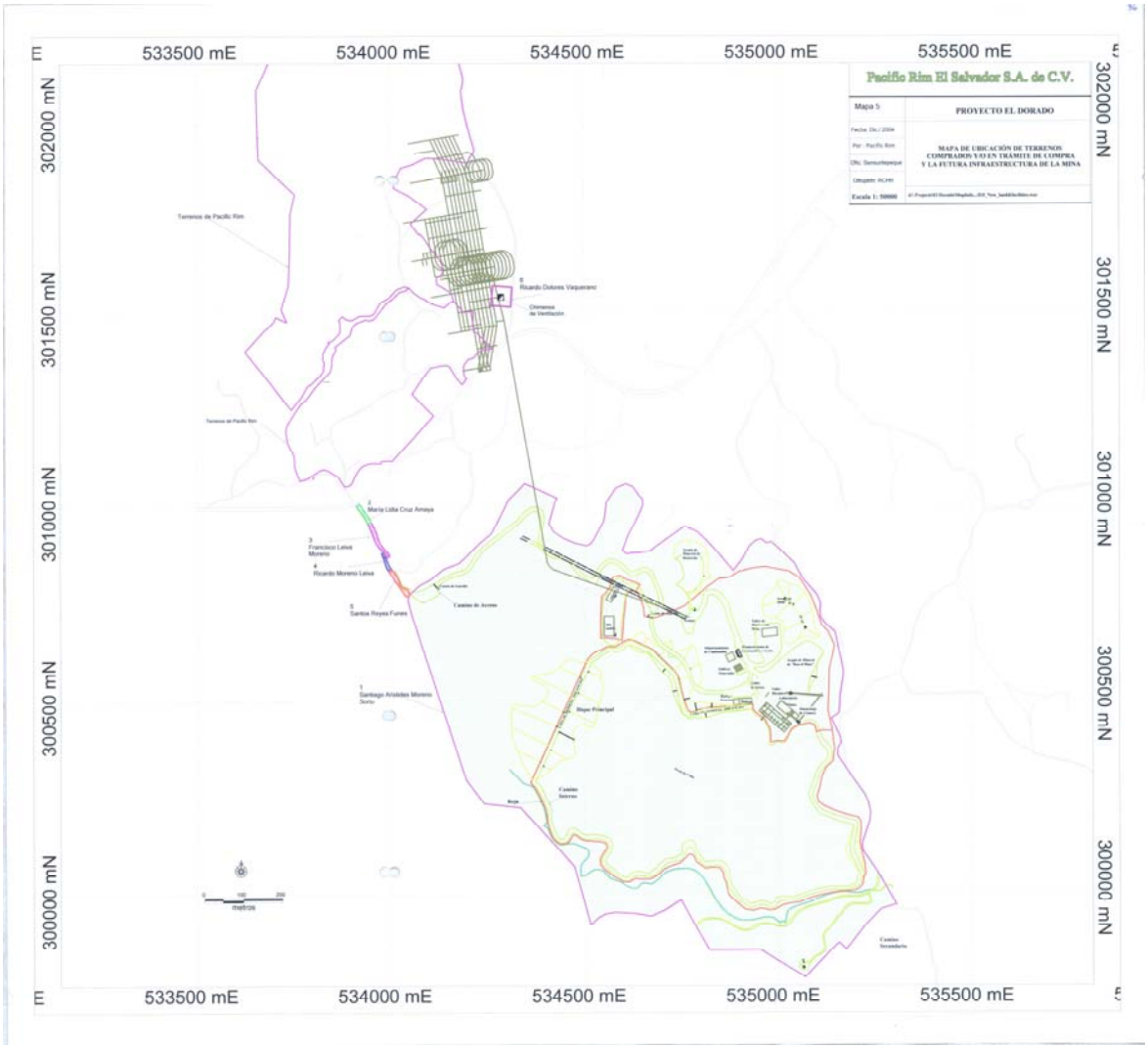

EXHIBIT R-28

161. In addition, according to Claimant's own documents, a significant portion of the gold deposits denominated Minita and Minita 3 are located outside the underground projection of the surface area owned by Claimant or for which it has authorization.[169] Taking the information regarding the size and location of the Minita and Minita 3 deposits provided by Claimant in its Pre-Feasibility Study, and superimposing it on the relevant area of Map 5 (that includes the

[169] See Figure 4.3 of the Pre-Feasibility Study (C-9) and Figure 9.1 of the 2003 MDA Technical Report (R-46). Figure 4.3 is attached separately as Exhibit **R-49** and Figure 9.1 is attached separately as Exhibit **R-50**.

location of the proposed underground mine and the areas Claimant owns or has authorization for), shows that most of the underground mine area and access ramp (more than 80%), and a significant portion of the surface area above the combined Minita and Minita 3 deposits (more than 60%), are outside the areas for which Pacific Rim has ownership or authorization.[170] The graphic below shows the results of this superimposition. (The areas Claimant either owns or has authorization for are within the pink lines. The structure of the underground mine is located at the top of the map, showing the tunnels and spirals of the ramps. The locations of the Minita and Minita 3 deposits, taken from the Pre-Feasibility Study submitted by Claimant in January 2005, are shown in red and blue colors, respectively. These locations have been georeferenced and superimposed on a portion of Map 5, which shows the location of the proposed underground mine in relation to the areas Pacific Rim owns or has authorization for).

[170] This demonstrative exhibit is provided in more detail as Exhibit **R-51.**

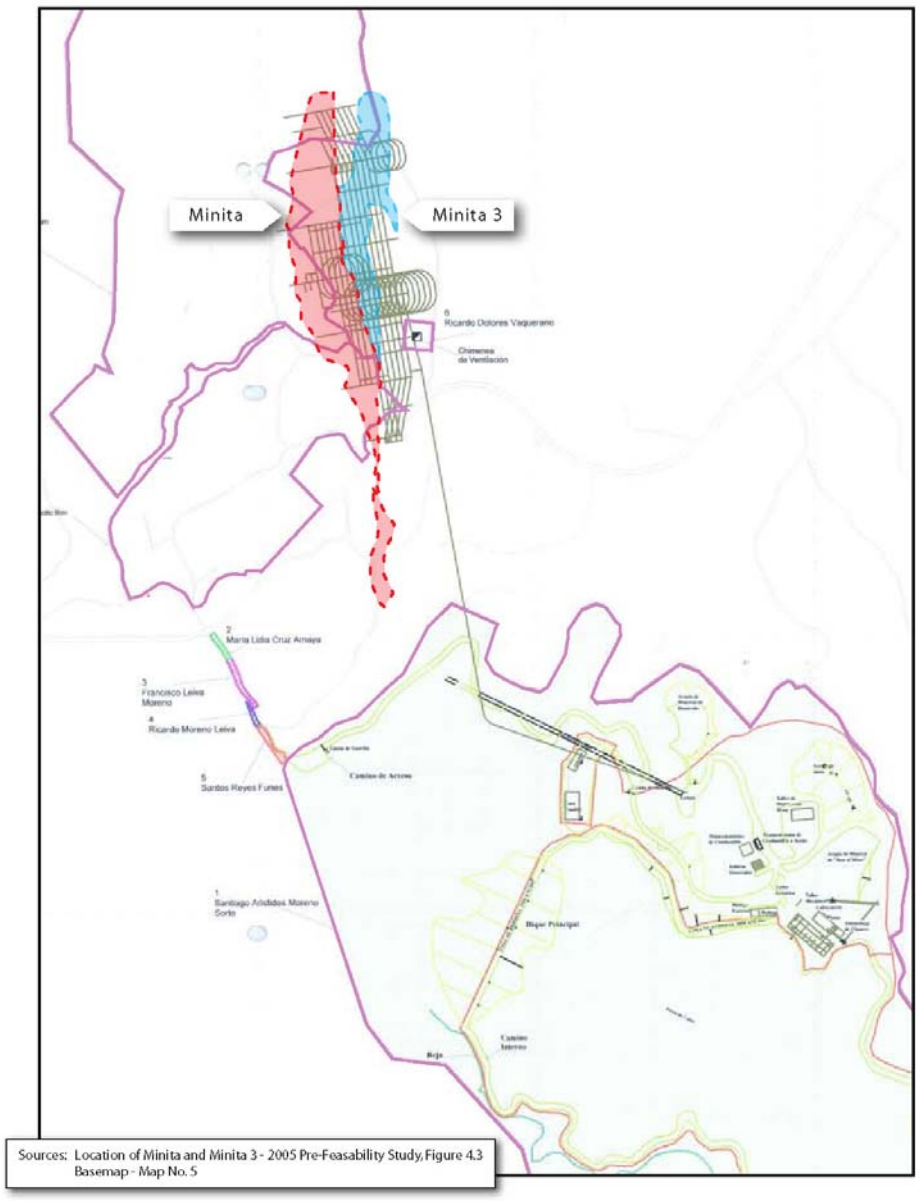

EXHIBIT R-51

162. The conclusion that significant portions of Minita and Minita 3 are located outside areas Pacific Rim owns or controls is confirmed by a graphic representation on Map 5 of the

cross-section of Minita and Minita 3 from the technical report on which the Pre-Feasibility Study is based.[171]

163. As stated in Section III.B above, Minita and Minita 3 constitute the sole basis for the calculation of reserves in the Pre-Feasibility Study Claimant submitted to justify the economic feasibility of its application for the entire 12.75 square-kilometer concession application. Article 24 of the Mining Law requires that the size of the concession be determined in relation to the size of the mineral deposits to be exploited. In short, because Claimant's own submissions to the Government demonstrate that a significant portion of the mineral deposits used to justify the concession is not even located under the land Pacific Rim owns or has authorization for, the Ministry of Economy could not have legally granted a concession to Claimant even if Claimant had reduced the area of the requested concession to the 1.6 square kilometers for which it has shown ownership or authorization.

164. Therefore, Claimant's allegation that it could have met the legal requirement for a concession by reducing the size of the requested concession to the areas Claimant owned or had authorization for is simply not supported by Claimant's own submissions. Moreover, as noted, Claimant was fully aware since 2005 of the surface land requirement and did nothing to cure the defect.

D. Claimant's non-compliance with the requirements to obtain a Mining Exploitation Concession means that, *as a matter of law*, an award in favor of Claimant cannot be made

165. It is a general principle of law, recognized in international law, that to give rise to responsibility or liability, an alleged injury has to be the result of, or have a causal link with, the

[171] This demonstrative exhibit is provided as Exhibit **R-52**; the cross-section of Minita and Minita 3 comes from the 2003 MDA Technical Report (R-46).

alleged breach.[172] It is also a general principle of law, recognized by international law, that no one can rely on his or her own wrongdoing as the basis for a claim against another party.[173]

166. CAFTA Article 10.16, which governs the submission of a claim to arbitration, expressly reflects the first of these principles in the text of the Treaty. Under this provision, a claimant may submit to arbitration a claim that the respondent has breached an obligation under Section A, an investment authorization or an investment agreement *and* that the claimant or its enterprise has incurred *loss or damage by reason of, or arising out of, that breach.*[174]

167. In the present case, even if the Republic had approved the environmental impact study and issued the environmental permit—the alleged governmental failure which Claimant complains about in its Notice of Arbitration—Claimant would still not be able to claim an entitlement to an exploitation concession because Claimant has failed to meet other independent requirements to obtain the concession.

168. The reason Claimant does not have a right to the concession is Claimant's own failure to comply with the requirements of the Mining Law, confirmed by contemporaneous undisputed documentary evidence. When this evidence is considered in the context of the applicable Salvadoran Law (whose correct interpretation Claimant confirmed by its failed attempts to change it), it is clear that the necessary causality between the alleged breach and the alleged injury is lacking.

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[172] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 241 (1953) (CL-35, additional excerpts provided as **RL-34**). *See also, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, July 24, 2008, para. 778 (**RL-35**) (finding no causation and stating that "it is well settled that one key requirement of any claim for compensation . . . is the element of causation.").

[173] Cheng, at 149. *See also, Inceysa Vallisoletana S.L., v. Republic of El Salvador*, para. 240 (RL-30) (finding "that the investment made by Inceysa violates the principle *Nemo Auditur Propiam Turpitudinem Allegans* . . . .").

[174] CAFTA Article 10.16.1.

169. The case of *Fraport v. Philippines* is illustrative on the effects to be attached to Claimant's conscious non-compliance with the law and the implications of its attempts to have the law changed to its benefit. In *Fraport*, the claimant knowingly structured its investment in violation of the Philippine's Anti-Dummy Law. The tribunal ultimately declined jurisdiction, because claimant's investment was not made in accordance with the laws of the host State as required by the relevant BIT.[175]

170. The tribunal agreed with the claimant that a foreign investor is entitled to rely upon the State's contemporaneous manifestations of its laws,[176] but also found that an investor's "failure to comply with the national law to which a treaty refers will have an international legal effect."[177] Indeed, in analyzing the question of whether or not an investment has been made in accordance with the law of the host State, the tribunal noted:

> In some circumstances, the law in question of the host state may not be entirely clear and *mistakes may be made in good faith*. An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue…. In this case, the comportment of the foreign investor, *as is clear from its own records*, was *egregious* and cannot benefit from presumptions which might ordinarily operate in favour of the investor.[178]

171. In the present case, the Republic has established that Claimant was aware of the Republic's contemporaneous manifestations of the requirements of the Law. No good faith mistakes by Claimant can thus be alleged in this respect. Claimant's legitimate expectation could only have been that an application for a concession would only be granted if it complied with the requirements of the Mining Law, as reasonably and justifiably interpreted by the Republic, and Claimant knew that it did not comply with those requirements. Therefore, it was, or should have

[175] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (RL-31).
[176] *Fraport*, paras. 392-393.
[177] *Fraport*, para. 394.
[178] *Fraport*, paras. 396-397 (emphasis added).

been, aware that the issuance of an environmental permit was irrelevant to its failure to obtain an exploitation concession for El Dorado.

IV. CLAIMANT CANNOT MAKE ANY LEGAL CLAIMS RELATED TO THE SANTA RITA EXPLORATION LICENSE

172. Claimant's still unspecified claim related to Santa Rita[179] can be resolved based on a single fact: Pacific Rim El Salvador did not request a renewal of the exploration license before its expiration date, as required by Salvadoran law.[180] Therefore, Pacific Rim El Salvador lost the possibility of renewing the Santa Rita exploration license due to its own negligence.

173. In its Response, Claimant tries to divert attention from this simple truth by introducing extraneous issues about what was allegedly happening with unrelated applications in other areas,[181] but the fact remains that the Government of El Salvador is not in any way responsible for Pacific Rim El Salvador's failure to renew its exploration license in a timely manner as required by the Mining Law. Pacific Rim El Salvador tried to obtain an exemption from the law to submit an application after the term of the license had already expired, something that is not allowed by Articles 27 of the Mining Law and Article 11 of the Mining Regulations. [182]

174. Claimant now is telling the Tribunal that its Salvadoran enterprise, Pacific Rim El Salvador, made a conscious decision to allow the license to expire. Claimant goes so far as to

[179] Claimant still has not made any factual allegations as to how it claims the Republic has done anything wrong with regard to the Santa Rita exploration license.
[180] *See* Letter from Pacific Rim El Salvador to Bureau of Mines, July 17, 2009 (R-21) (requesting an extension of the Santa Rita exploration license); Bureau of Mines Resolution, July 16, 2009 (R-22) (noting the legal provisions relevant to exploration license extensions and that the Santa Rita license expired on July 14, 2009); Bureau of Mines Resolution, July 20, 2009 (R-23) (denying the extension as the license had expired on July 14, 2009).
[181] Response, paras. 181, 182.
[182] Article 27 of the Mining Law (CL-5; RL-7) and Article 11 of the Mining Regulations (CL-6; RL-8) require that the application for an extension of an exploration license must be filed before the current exploration period expires.

state, "Respondent's argument on the Santa Rita claim is based on *the decision by Pacific Rim El Salvador* not to seek renewal of its exploration license when it expired on 14 July 2009 (after the Notice of Arbitration was filed)."[183] *But not only did Pacific Rim El Salvador seek renewal of its exploration license,*[184] *Claimant's other Salvadoran entity, DOREX, immediately filed a new application for an exploration license after Pacific Rim El Salvador's application was denied for being presented after the license expired.*[185]

175. Claimant's attempt to blame the Government has to be premised on the false assertion that "PRES decided not to renew its Santa Rita exploration license in July 2009."[186] In reality, Claimant cannot allege any acts or omissions by the Government affecting the Santa Rita exploration license because Pacific Rim El Salvador was granted an exploration license and an environmental permit for this area.[187]

176. Claimant tries to tie its Santa Rita claims to former President Saca's comments in late 2008 and early 2009. But in July 2009, after those comments, Claimant's enterprises, Pacific Rim El Salvador and DOREX, applied for an extension and then for a new exploration license at Santa Rita.

177. Pacific Rim Mining Corp. knew about the risks of investing in the new mining industry in El Salvador,[188] but took the risks in hopes of making a substantial profit. Claimant

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[183] Response, para. 180.
[184] Letter from Pacific Rim El Salvador to Bureau of Mines, July 17, 2009 (R-21) (requesting an extension of the Santa Rita exploration license).
[185] *See* Pacific Rim Mining Corp., "Santa Rita", http://www.pacrim-mining.com/s/ES_SantaRita.asp (**R-53**) (mentioning that, "[s]ubsequent to the end of fiscal 2009, the Santa Rita exploration licence [sic] expired and was immediately re-staked by the Company's subsidiary DOREX.").
[186] Response, para. 181.
[187] *See* NOA, para. 53, n. 42 ("On July 8, 2005, MINEC granted an exploration license to PRES to search for minerals in Santa Rita . . . . On May 30, 2006, MARN granted the requested environmental permit.").
[188] *See, e.g.*, Pre-Feasibility Study, at 127 (acknowledging that El Salvador's limited experience with mining raised concerns about: "Limited technical resources for reviewing permit applications (i.e. the EIS), potentially resulting in approval delays; Unclear permitting requirements, potentially resulting in

has no legal or factual basis for any claims related to Santa Rita; the fact that Pacific Rim El Salvador's application was untimely is the sole reason for any harm to the Santa Rita investment.[189] Claimant has not alleged otherwise, and therefore any claims related to Santa Rita should be dismissed.

V. CLAIMANT HAS NOT SUBTANTIATED ITS OTHER CAFTA CLAIMS

A. Claimant has not identified a suitable comparator for either a Most-Favored-Nation or a National Treatment claim

178. In its Preliminary Objections, the Republic explained that Claimant can make no claims based on the Most-Favored-Nation or National Treatment standards because it has failed to identify investors "in like circumstances" receiving more favorable treatment, as required for this claim to succeed. Claimant's Response does not provide any new facts identifying *suitable comparators*. Indeed, Claimant has failed to identify any other investor whatsoever, whether "in like circumstances" or not. Thus, the undisputed fact remains—there is no identified investor, either domestic or from another country, much less one in like circumstances who has received more favorable treatment on the basis of nationality.[190] Consequently, these claims must be dismissed.

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approval delays and/or perceived non-compliance; and Potential for development of regulations or compliance criteria that are not relevant and/or applicable to mining operations").

[189] Pacific Rim Mining Corp. even conceals the loss of the Santa Rita exploration license in its most recent filings before the Securities and Exchange Commission, filed after Pacific Rim El Salvador failed to request the extension of the Santa Rita exploration license before its expiration, and the Bureau of Mines informed Claimant that the Mining Law did not allow for exceptions. *See* Pacific Rim Mining Corp., Report of Foreign Issuer (Form 6-K, ex. 99-2) § 3.2, March 17, 2010 (**R-54**) ("The Santa Rita gold project is located . . . immediately northwest of the El Dorado project and is 100% owned by the Company.").

[190] Newcombe and Paradell, at 147 (RL-27) ("International economic treaties limit nationality-based discrimination through two distinct non-discrimination obligations: national and most-favored-nation treatment.").

179. Claimant argues that it did identify the basis of these claims in its Notice of Intent.[191] However, Claimant cannot rely on the Notice of Intent to supply the basis of its legal claims and the factual allegations in support of those claims if Claimant did not include them in the Notice of Arbitration. To have its claims considered by the Arbitral Tribunal, and for the Republic to properly exercise its defense in an arbitral proceeding, Claimant has to submit its claims in the Notice of Arbitration. The text of CAFTA Article 10.16.4 is clear that a "*claim shall be deemed submitted* to arbitration under [Section B] *when the claimant's notice or request for arbitration* (notice of arbitration): (a)… *is received by the Secretary-General*" of ICSID.[192] The Notice of Intent and Notice of Arbitration are two different documents, which serve different legal purposes, at different phases in the dispute resolution mechanism of CAFTA.

180. NAFTA includes a similar provision regarding the requirement to file a Notice of Intent before initiating arbitration. As noted by the NAFTA Free Trade Commission, "the notice of intent naturally serves as the basis for consultations and negotiations between the disputing investor and the competent authorities of a Party."[193] By contrast, the Notice of Arbitration, as the clear text of CAFTA and the Institution Rules of ICSID[194] set forth, is what delimits the claims for purposes of an arbitration proceeding, without prejudice of the parties' further briefing on the merits and possible ancillary claims or counter-claims.

181. As an example of the different legal significance between the Notice of Intent and the Notice of Arbitration, Claimant refers in its Notice of Intent to five exploration licenses Claimant reserved a right to include as part of the claims.[195] These licenses were not included as

[191] Response, para. 184.
[192] CAFTA Article 10.16.4 (emphasis added) (RL-1).
[193] Statement of the NAFTA Free Trade Commission on Notices of Intent to submit a claim to arbitration, October 7, 2004 (**RL-36**).
[194] ICSID Institution Rule 2.
[195] NOI, para. 32, n. 10.

claims in its Notice of Arbitration and are therefore excluded from the present arbitration.[196] At the same time, Claimant's written waiver refers only to any measure alleged in PRC's "Notice of Arbitration, dated April 30, 2009."[197] This limiting language introduced in the updated June 4, 2009 waiver, and not present in the original waiver submitted with the Notice of Arbitration, shows Claimant's intent to limit the legal significance of the waiver to the contents of the Notice of Arbitration. Having so limited its waiver, Claimant cannot be allowed to revert to the Notice of Intent to try to provide factual allegations for claims in the Notice of Arbitration, if the factual allegations are not included in the Notice of Arbitration.

182. However, even if it were appropriate to reference the Notice of Intent to provide the basis for the claims (which it is not), the Notice of Intent itself also fails to supply the legal and factual bases for this claim. The Notice of Intent merely listed some *industries*, stating: "The Salvadoran Government's discriminatory behavior 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."[198] As a matter of law, this vague and general comment about "other industries" does not fulfill Claimant's obligation to allege facts to support a claim that a specific, identified national or foreign investor or investment in like circumstances has received more favorable treatment than Claimant.

183. CAFTA does not provide that if a country allows companies in one industry to proceed with certain investments notwithstanding environmental issues, it must also grant permits to all other investors in other industries notwithstanding environmental concerns. There

[196] Conversely, Claimant makes no claim in its Notice of Intent with respect to Santa Rita, but it is included with its Notice of Arbitration.
[197] Claimant's Consent & Waiver (R-1).
[198] Response, para. 184; NOI, para. 35.

would be no investment agreements if States were going to be held to such a standard. What CAFTA actually provides is that a Party "shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors [and "to investors of any other Party or of any non-Party"[199]] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[200]

184. The MFN and National Treatment provisions in CAFTA are intended to protect investors from nationality-based discrimination. As two commentators recently observed, "[t]he national treatment standard is an empty shell that obtains substantive content in relation to the treatment afforded to someone or something else."[201] Claimant must point to a domestic or foreign investor who is being treated more favorably than Claimant's entities—"[t]he required standard of treatment depends on the treatment of the applicable treaty-defined comparator."[202]

185. Claimant has failed to identify an investor or investment that was treated more favorably in like circumstances based on nationality. Simply mentioning other industries that allegedly raise environmental concerns is insufficient. The same two commentators explain that "MFN and national treatment are both relative standards" and "the comparison made between the treatment of two investors or investments requires the identification of the applicable comparator and an assessment of whether the investor or investment at issue has been accorded less favourable treatment."[203]

186. Claimant cites *Corn Products v. Mexico* for three requirements: treatment of an investment, a foreign (or domestic) investor "in like circumstances", and treatment less favorable

[199] CAFTA Article 10.4 (RL-1).
[200] CAFTA Article 10.3.
[201] Newcombe and Paradell, at 148 (RL-27).
[202] Newcombe and Paradell, at 149.
[203] Newcombe and Paradell, at 224.

than that afforded the comparator. Without further comment, Claimant asserts that it meets these requirements and that it "has identified a number of other investors in like circumstances,"[204] when what Claimant has done is merely point to other industries in its Notice of Intent.

187. A proper reading of *Corn Products v. Mexico*, however, shows that Claimant's comparison here is insufficient to sustain its claim. The claimant in that case, "a producer of [High Fructose Corn Syrup] for the Mexican soft drinks market", argued that it was in like circumstances "to a sugar producer which was also seeking to supply to the same market".[205] The tribunal began its analysis noting, "it is necessary to begin with a comparison between domestic and foreign investors operating in the same business or economic sector as the claimant".[206] The tribunal found there were like circumstances in that case because both products were in direct competition with each other.[207] In stark contrast to that case, Claimant did not mention any investors in the same industry or in direct competition with it, nor could it allege that actions taken by the government were designed to give other investors an advantage over it.

188. In *Methanex*, the tribunal made clear that an investor cannot make comparisons to less similar investors when more similar investors are all being treated equally. The tribunal cited *Pope & Talbot, Inc. v. Government of Canada* and said, "[i]t would be a forced application of [the NAFTA National Treatment provision] if a tribunal were to ignore the identical comparator and to try to lever in an, at best, approximate (and arguably inappropriate)

[204] Response, para. 187.
[205] *Corn Products International, Inc. v. The United Mexican States*, Decision on Responsibility, ICSID Case No. ARB(AF)/04/01, Jan. 15, 2008, para. 53 (CL-15, full case provided as **RL-37**).
[206] *Corn Products*, para. 120 (emphasis added).
[207] *Corn Products*, para. 120.

comparator. The fact stands—Methanex did not receive less favourable treatment than the identical domestic comparators, producing methanol."[208]

189. The tribunal noted that "the ethanol and methanol products cannot be said to be in competition".[209] As in *Methanex*, Claimant cannot look farther than to its direct competitors for an appropriate comparator. However, Claimant has utterly failed to even identify *any* direct competitors, much less allege facts to show that the Government has treated any competitors—domestic or foreign—more favorably than it has treated Claimant on the basis of nationality.

190. In the *UPS* arbitration, the tribunal extensively discussed the differences between courier deliveries and international mail processing. The tribunal noted that the two programs were not in like circumstances.[210] The fact that international couriers are not in like circumstances to international mail deliverers demonstrates how similar investors have to be, and, thus, how lacking Claimant's claims and assertions are.

191. Claimant tries to overcome the fact that it can identify no investors in like circumstances by complaining that the Government's acts are against only metallic mining while "non-metallic exploitation activities (which are conducted primarily by Salvadoran companies or companies of non-Parties) continue".[211] There are several problems with this general assertion (aside from the fact that it still fails to name an investor or investment).

192. First, the only citation for the claim that El Salvador is banning metallic mining does not say any such thing. Claimant cites a newspaper article which quotes President Funes discussing the recent murder of a community member who had spoken out about the potential hazardous effects of mining in the community. The article says that the President "ruled out that

[208] *Methanex Corporation v. United States of America*, Part IV Chapter B, para. 19 (RL-20).
[209] *Methanex*, Part IV Chapter B, para. 28.
[210] *United Parcel Service of America, Inc v. Government of Canada*, Ad hoc – UNCITRAL Arbitration Rules, Award on the Merits, May 24, 2007, paras. 119-120 (**RL-38**).
[211] Response, para. 185.

his Government would authorize in-country mining exploration and exploitation projects to which social organizations are opposed out of fear for their effects on the environment."[212] But that statement does not show any discrimination whatsoever, as it appears to apply by its own terms to all proposed investors.

193. Second, non-metallic mining is not similar to gold mining and therefore the comparison is a red herring. Tribunals insist on very similar situations for the MFN and National Treatment comparators.

194. For example, and with respect to MFN, in a case under the Lithuania-Norway BIT, *Parkerings-Compagniet AS v. Lithuania*, a Norwegian company complained that its parking complex facility was rejected but that a Dutch company was allowed to build a parking complex on the same site. The tribunal commented that the "essential condition of the violation of a *MFN* clause is the existence of a different treatment accorded to another foreign investor in a similar situation."[213]

195. The *Parkerings* tribunal quoted the NAFTA tribunal from *Pope & Talbot, Inc. v. Government of Canada* that "in like circumstances" is determined by looking at whether the investor is "in the same business or economic sector".[214]

196. In that case, there were "obvious similarities" between the investors: both planned to build a parking facility in the Old Town district of the city.[215] But the tribunal found, "despite similarities in objective and venue . . . the differences of size of [the two] projects, as

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[212] C-2, ("El presidente de El Salvador, Mauricio Funes, descartó hoy que su Gobierno autorice proyectos de exploración y explotación minera en el país a los que se oponen organizaciones sociales por temor a sus efectos medioambientales.").
[213] *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/8, Sept. 11, 2007, para. 369 (**RL-39**).
[214] *Parkerings-Compagniet*, para. 370 (citing *Pope & Talbot, Inc. v. Government of Canada*, paras. 78-79).
[215] *Parkerings-Compagniet*, para. 381.

well as the significant extension of the latter into the Old Town near the Cathedral area, are important enough to determine that the two investors were not *in like circumstances*."[216]

197. Similarly, in *GAMI Investments, Inc v. Mexico*, the tribunal did not find a violation of the National Treatment standard where particular sugar mills were expropriated. The tribunal found that the circumstances at issue were not "so 'like' those of non-expropriated mill owners that it was wrong to treat GAM differently".[217] Conceding that the Mexican Government may have been "misguided" or "clumsy in its analysis", the tribunal asserted, "ineffectiveness is not discrimination."[218] Thus, since the tribunal considered that the "measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity",[219] the claimant's National Treatment claim was rejected.

198. In this case, Claimant did not identify in the Notice of Arbitration one single investor, domestic or foreign. Thus, it has also failed to show that any such investor was "in like circumstances" and received more favorable treatment on the basis of nationality. At best (if resort is had to Claimant's Notice of Intent) Claimant has simply pointed to other *industries*. The National Treatment and Most-Favored-Nation claims should be dismissed because Claimant has failed to fulfill the minimal burden of identifying a single investor, domestic or foreign, "in like circumstances" and by failing to allege sufficient facts to make the claims plausible.

B. Claims related to "Investment Authorizations" should be dismissed

199. CAFTA Article 10.16.1(a) allows for claims that a respondent has breached an obligation under Section A, an investment authorization, or an investment agreement. Tribunal

[216] *Parkerings-Compagniet*, para. 396.
[217] *GAMI Investments, Inc. v. The Government of the United Mexican States*, Final Award, Ad hoc—UNCITRAL Arbitration Rules, Nov. 15, 2004, para. 114 (**RL-40**).
[218] *GAMI Investments*, para. 114.
[219] *GAMI Investments*, para. 114.

decisions interpreting the definition of "investment authorization" demonstrate that neither Claimant's exploration license extensions from the Bureau of Mines nor the investment registrations from the *Oficina Nacional de Inversiones* ("ONI") are "investment authorizations." Thus, claims related to "investment authorizations" also must fail as a matter of law.

200. First, there are no authorizations with binding commitments from the Government of El Salvador to Claimant. Other arbitral tribunals have found "investment authorization" where the State entered into contracts, but Claimant can point to no contracts authorizing its investment in El Salvador. Neither the exploration licenses nor the ONI registrations contain any language binding the State to act or not act in any way.

201. Second, CAFTA defines "investment authorization" as "an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party."[220] Thus, by definition, there can be no "investment authorization" from any entity other than the Party's foreign investment authority.

202. Professor Mark Kantor highlights, "the concept of 'investment authorization' is limited to authorizations granted by the 'foreign investment authority' of a Party, not all competent authorities."[221] CAFTA Parties did not intend to allow all domestic law claims in through this provision, but only claims based on a specific authorization from the designated foreign investment authority with respect to a specific investment with binding commitments by the State. Neither the Bureau of Mines nor the entire Ministry of Economy of El Salvador is the foreign investment authority of El Salvador.

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[220] CAFTA Article 10.28 (RL-1).

[221] Mark Kantor, The New Draft Model U.S. BIT: Noteworthy Developments, 21 (4) Journal of International Arbitration 383, 386 (2004) (**RL-41**). *See also, Generation Ukraine Inc. v. Ukraine*, Award, ICSID Case No. ARB/00/9, Sept. 16, 2003, para. 8.12 (**RL-42**) (declining jurisdiction over domestic law claims partly because there were no investment authorizations where it was "never . . . suggested that the Order on Land Allocation or the Construction Permits were granted by Ukraine's Party's 'foreign investment authority'").

1. The Republic undertook no binding obligations that would constitute an "investment authorization"

(a) Claimant's comparison to PSEG fails

203. Claimant presents *PSEG Global Inc v. Republic of Turkey* as an ICSID case where the tribunal "found no difficulty in concluding that similar permits and authorizations [to the exploration licenses and ONI registrations obtained by PRES] constituted 'investment authorizations.'"[222] The comparison is misleading.

204. First, Turkey's argument in the *PSEG* arbitration was very different than El Salvador's objection. Unlike El Salvador's argument that it did not breach any rights conferred on Claimant by any investment authorization under CAFTA, Turkey argued there was no jurisdiction in the first instance because, it claimed, there was no investment.[223]

205. Second, the situation of the *PSEG* claimants was not at all similar to Claimant in El Salvador. Pacific Rim El Salvador has no concession. The *PSEG* claimants not only had a Concession Contract, but also, after the Concession Contract was executed, "[a] Permission Certificate authorizing the Project Company to invest and do business in Turkey was issued".[224]

206. It is difficult to imagine how this case, where the tribunal looked at an executed Concession Contract and a Permission Certificate to find that there was a dispute arising out of an investment for purposes of jurisdiction, supports Claimant's assertions here that either the grant of a one-year extension on an exploration license or the ONI registrations can be the basis for a substantive claim related to an application for an exploitation concession.

207. Unlike a Concession Contract or a Permission Certificate allowing the company to construct plants and conduct all types of mining activities, the documents identified by

[222] Response, para. 197.
[223] *PSEG Global Inc., et. al. v. Republic of Turkey*, *Decision on Jurisdiction,* ICSID Case No. ARB/02/5, June 4, 2004, para. 54 (CL-28, full case provided as **RL-43**).
[224] *PSEG*, para. 41.

Claimant do not authorize investment or bind the State. In the license extensions, the Bureau of Mines said Pacific Rim El Salvador could explore in the El Dorado area until January 1, 2005. Pacific Rim El Salvador did explore until that date—and long after—and there is no allegation that El Salvador failed in any way to comply with the extension. The ONI registrations merely document after the fact that money entered the country and do not authorize anything. Thus, Claimant's allegation that the PSEG arbitration dealt with "similar permits and authorizations" is a mischaracterization of the facts.

(b) The ICSID tribunal in *Mihaly v. Sri Lanka* required a clear showing of intent to be bound by the State for there to be an "investment authorization"

208. The *Mihaly v. Sri Lanka* tribunal was called to decide whether there was an investment for purposes of the ICSID Convention.[225] In the process of making its decision, the tribunal found that none of the documents it considered constituted an investment agreement or an investment authorization under the BIT, because those documents did not contain any binding obligation either on Sri Lanka or on the claimant.[226] This was the case even though the parties had signed a Letter of Intent, Letter of Agreement, and Letter of Extension, and the Letter of Extension included the promise: "the Government shall use its best efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper or advisable under applicable laws and regulations in Sri Lanka to consummate the transactions contemplated hereby as promptly as practicable."[227]

209. In the present case before the Tribunal, a mere registration of an investment after the investment had already been made, or an extension of a permission to explore, with no

[225] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award, ICSID Case No. ARB/00/2, March 15, 2002, para. 48 (**RL-44**).
[226] *Mihaly*, para. 59.
[227] *Mihaly*, para. 46.

promises by the government to take any action, cannot be investment authorizations. There is no language in any of these documents that contains any binding obligation.

2. ONI, the investment authority of El Salvador, does not provide "investment authorizations"

210. Unlike the respondents in cases where tribunals have found investment authorizations, El Salvador has not signed any contracts assuming any binding commitments regarding Claimant's specific investments. ONI merely registers investments after the money has already entered the country and after it has already been invested.

211. ONI's role registering investments after they have already been made is very different from the role of investment authorities in other countries that do have the system of investment authorizations. For example, Article 3 of the Chilean Investment Law states,

> Foreign investment authorizations shall be evidenced in contracts executed by means of a public deed and signed, on behalf of the Chilean State, by the President of the Foreign Investment Committee . . . [or] by the Executive Vice-President and, for the other party, by the persons contributing the foreign capital, hereinafter called 'foreign investors' for purposes of this Law.[228]

212. The Chilean law mandates that the State sign contracts authorizing foreign investments. These contracts would meet the CAFTA definition of "investment authorization". But the Investment Law of El Salvador has no similar requirement, and ONI does not authorize investments.

213. Nonetheless, Claimant invokes Article 26 of the Investment Law—which simply states that the Investment Law applies to existing registrations at the time of its passage.

[228] Decreto Ley 600 (Chile) (Dec. 16, 2003) (**RL-45**) ("Las autorizaciones de inversión extranjera constarán en contratos que se celebrarán por escritura pública y que suscribirán, por una parte, en representación del Estado de Chile, el Presidente del Comité de Inversiones Extranjeras cuando la inversión requiera de un acuerdo de dicho Comité o el Vicepresidente Ejecutivo en caso contrario, y por la otra, las personas que aporten capitales extranjeros, quienes se denominarán 'inversionistas extranjeros' para todos los efectos del presente decreto ley.").

Claimant asserts: "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."[229] But, regardless of whether that is true or not, being "deemed authorized to do business in El Salvador" is not an "investment authorization" under CAFTA—it is not an authorization from the foreign investment authority relating specifically to Claimant or Claimant's investment. A comparison to the Chilean system makes it abundantly clear that Article 26 is not an "investment authorization."[230]

3. Neither the Bureau of Mines nor the Ministry of Economy is the foreign investment authority of El Salvador

214. To attempt to justify its allegation that the exploration licenses issued by the Bureau of Mines are "investment authorizations", Claimant alleges that the Ministry of Economy is the "foreign investment authority of a Party" under Salvadoran law charged with responsibility over foreign investment.[231] But Article 16 of the Investment Law of El Salvador, which is cited by Claimant for this proposition, states that ONI, *not* the Ministry of Economy, is "the office in charge of facilitating, centralizing, and coordinating the governmental procedures that under the law must be followed by national and foreign investors for the execution of their various economic, commercial, fiscal and migratory obligations or of any other kind."

215. Similarly, there is no support for the proposition that the Bureau of Mines is the "foreign investment authority" of El Salvador. As its name correctly suggests, the Bureau of

[229] Response, para. 196.
[230] *See, e.g.*, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, ICSID Case No. ARB/01/7, May 25, 2004, paras. 163-166 (**RL-46**) (finding that where Chile had signed a Foreign Investment Contract, "[a]pproval of a Project in a location would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view" and "approval of an investment by the FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably.").
[231] Response, para. 195.

Hydrocarbons and Mines oversees the hydrocarbons sector and the mining sector, not investments.

4. Claimant could not have possibly relied on the ONI registrations to make an investment

216. Even if anyone assumed, for the sake of argument only, that the ONI registrations were "investment authorizations," the ONI registrations submitted by Claimant are irrelevant for purposes of this arbitration. Claimant submits two ONI registrations, No. 368-MR and No. 387-MR, dated July 30, 2008 and August 13, 2008.[232] Less than four months later, on December 9, 2008, Claimant filed its Notice of Intent. Claimant cannot possibly have found binding commitments in those ONI registrations in July and August of 2008, and then found breaches of those alleged commitments which could be the basis for claims in a Notice of Intent filed in December 2008.

217. In short, there can be no claims based on the ONI registrations, primarily because they are not authorizations. Moreover, even if they were construed to be authorizations, the alleged Republic wrongdoing asserted by Claimant did not occur between the issuance of the registrations and the Notice of Intent. There were no commitments, investments, and breaches alleged during that time. Accordingly, Claimant has not identified an investment authorization it received from the Salvadoran investment authority with binding commitments that could serve as the basis for CAFTA claims, because none exists.

218. Claimant has misstated the provisions of CAFTA and El Salvador's Investment Law when alleging that the Ministry of Economy has issued investment authorizations. Neither the Bureau of Mines nor ONI have issued an investment authorization to Claimant, as neither one issues investment authorizations at all.

[232] Response, para. 198 & Resolutions No. 368-MR and No. 387-MR (C-12).

VI. WAIVER PRECLUDES CLAIMANT FROM INVOKING JURISDICTION AND MAKING CLAIMS UNDER SALVADORAN LAW REGARDING THE SAME MEASURES CLAIMANT ALLEGES ARE CAFTA VIOLATIONS

219. As a condition to initiate an international arbitration under CAFTA, Claimant was required to execute and submit a waiver of any right to initiate or continue any proceeding with respect to any measure alleged to constitute a breach referred to in CAFTA Article 10.16. Indeed, Claimant executed a waiver and submitted it with its Notice of Arbitration. Claimant later redrafted the waiver during the process of registration of the case and submitted a new waiver with similar language on June 4, 2009. Claimant's new and current waiver reads:

> 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.[233]

220. Having properly executed and submitted a waiver of any rights Claimant might have had to submit non-CAFTA claims with respect to the measures alleged to constitute a breach referred to in CAFTA Article 10.16 before any other dispute settlement procedures, Claimant nonetheless is trying to subject El Salvador to two proceedings related to the same measures, one proceeding under CAFTA and one proceeding under the Investment Law of El Salvador. This is prohibited by the plain text of the CAFTA waiver Claimant executed and submitted.

221. Claimant does not dispute that the measures on which it is basing its claims under the Investment Law of El Salvador are the same measures Claimant is alleging are breaches referred to in CAFTA Article 10.16.

[233] Claimant's Consent & Waiver (R-1) (emphasis added).

222. Of course, absent a waiver like that required by CAFTA, it would be possible in investment treaty arbitration for a claimant to invoke jurisdiction based on multiple instruments and to raise multiple sets of claims related to the same measures, either in the same arbitration or in separate arbitrations. There are examples of multiple invocations of jurisdiction and multiple sets of claims in the same arbitration in addition to those cited by Claimant in its Response,[234] including the first ICSID arbitration against El Salvador several years ago.[235] But the key difference between those cases and this arbitration is that the instruments containing consent to arbitration in those cases did not include a waiver requirement such as the one in CAFTA.

223. Claimant chose to invoke jurisdiction under CAFTA. A claimant's ability to invoke the consent to jurisdiction of the CAFTA Parties to international arbitration is conditioned on the CAFTA claimant's effective waiver of any right to initiate or continue other proceedings for claims related to the same measures alleged to constitute a breach referred to in CAFTA Article 10.16. Having chosen to initiate this arbitration under CAFTA, and having executed a valid waiver of any right to bring other claims related to the same measures alleged to constitute a breach referred to in CAFTA Article 10.16, Claimant cannot escape the legal consequences of its choice and have "two bites at the apple." It makes no difference under CAFTA whether the two bites are taken before two separate arbitration tribunals or before a single arbitration tribunal.

224. The Tribunal should enforce Claimant's waiver by declaring that the Tribunal does not have competence under the Investment Law of El Salvador to decide claims for alleged breaches of the substantive rights of the Investment Law of El Salvador or of any other law of El Salvador. At this Preliminary Objections phase, this is the only way to deal with Claimant's

[234] Response, para. 208.
[235] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* (RL-30).

choice to act inconsistently with its waiver and to insist on trying to have two proceedings based on the same measures alleged to be breaches of CAFTA.

225. Because Claimant chose in its Response to the Preliminary Objections to continue disregarding its own waiver instead of desisting from its second set of claims, and because certain issues raised by the Republic's request to the Tribunal are issues of first impression under CAFTA, the Republic requested an expert opinion from Professor W. Michael Reisman, a respected professor of International Law at Yale Law School. Professor Reisman's Opinion is attached to this Reply and is incorporated as part of the Reply.

226. In his *Opinion on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10*, Professor Reisman explains that the location and the wording of the waiver requirement leave no doubt that this is a jurisdictional issue of utmost importance, and that the waiver plays a key role in protecting the rights of respondent States in CAFTA arbitration.[236]

227. Professor Reisman also concludes that the plain text of the waiver provision of CAFTA Article 10.18.2 is clear, and that as a result, Article 31 of the Vienna Convention on the Law of Treaties requires a textual interpretation and application of that provision.[237]

228. There is no justification to deviate from the plain text of that provision, as the plain text makes clear that the waiver applies in the broadest possible terms to prevent the filing of any claims in any type of dispute settlement procedure related to any measure alleged to violate the provisions of CAFTA Article 10.16.[238]

[236] Expert Opinion of Professor W. Michael Reisman on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, March 22, 2010, paras. 27-28 ("Prof. Reisman's Opinion").
[237] Prof. Reisman's Opinion, paras. 24, 44, 45, 46.
[238] Prof. Reisman's Opinion, paras. 24, 44, 45, 46.

229. To interpret the waiver provision otherwise, as Claimant is urging the Tribunal to do, would amount to applying the wrong law for purposes of Article 52 of the ICSID Convention.[239]

230. Professor Reisman's conclusions are as follows: [240]

(a) CAFTA, as a treaty, is to be interpreted according to the international canons of interpretation set out in the Vienna Convention on the Law of Treaties ["VCLT"].

(b) The VCLT requires that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose."

(c) CAFTA Article 10.18.2(b) states, in relevant part and in peremptory terms, that "[n]o claim may be submitted to arbitration under [Article 10.16.1(a)] unless . . . the notice of arbitration is accompanied . . . by the claimant's written waiver … of any right to initiate . . . before any . . . other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."

(d) Pursuant to CAFTA Article 10.18.2(b)(ii), PRC's letter of June 4, 2009 has waived its right to initiate any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16. By operation of that waiver, PRC has waived such claims as it may have had arising under the Salvadoran Investment Law.

(e) The ordinary meaning of Article 10.18.2(b) in its context and in the light of its object and purpose is clear. PRC's waiver as required by that provision precludes it from bringing the non-CAFTA claims for the same measures, regardless of whether those claims are heard concurrently before the same tribunal.

(f) PRC insists on its right to bring, for the same alleged measures, a CAFTA claim and a claim for another dispute settlement procedure before this Tribunal, thus violating the terms of its own purported waiver.

(g) By a proper application of the waiver and as necessitated by CAFTA Article 10.18.2, this Tribunal should, therefore, dismiss, with prejudice, all of PRC's claims arising from the Salvadoran Investment Law which are based on the same measures as its CAFTA claims.

[239] Prof. Reisman's Opinion, para. 19.
[240] Prof. Reisman's Opinion, para 47.

231. Claimant's choice to disregard its waiver is exposing the Republic to harm and prejudice. The Republic has already been forced to spend money to defend itself against this improper double invocation of jurisdiction and the improper second set of claims, and if this invocation of dual jurisdiction is allowed to stand, the Republic will be exposed to additional expenses, double jeopardy, and other potential negative consequences which the waiver is intended to prevent.

232. The fact that the waived claims are brought before the same Tribunal that is hearing the CAFTA claims is of no relevance and does not alleviate the problems with the manner in which Claimant has elected to proceed. Previous experiences with single international arbitrations involving multiple invocations of jurisdiction are illustrative of the difficulties and inefficiencies that the CAFTA waiver is designed to prevent.

233. For example, in *Inceysa v. El Salvador*, the previous ICSID case in which El Salvador also had to defend itself against abusive and frivolous claims, the claimant simultaneously invoked the dispute settlement provisions of the Investment Law of El Salvador, the El Salvador-Spain BIT, and a contract. The tribunal recognized that it had been seized based on different legal instruments with different applicable laws, and decided the parties' case, as pleaded on jurisdictional grounds, separately for each instrument. The parties had to plead three different cases in a single arbitration with the resulting additional costs and risks inherent in a duplicative proceeding. The additional costs and burdens inherent in multiple proceedings, albeit before the same tribunal, are clear from the tribunal's Award. The tribunal noted:

> The controversy on the competence of this Arbitral Tribunal and the jurisdiction of the Centre has been raised by the parties based on different bodies of laws. . . . In this sense, basically jurisdiction has been alleged based on two types of laws, some international and some of an internal nature. Consequently, the analysis to be

> made by the Arbitral Tribunal on its own competence will be divided according to these two legal systems.[241]

234. In the case of *Tradex Hellas v. Albania*, the claimant simultaneously invoked the dispute settlement provisions of the Albania-Greece BIT and the Albanian Foreign Investment Law. That case provides a clear example of the differences in legal regimes between a local investment law and a treaty. Indeed, the tribunal found that the request for arbitration had been filed before the entry into force of the BIT and consequently decided that it had no jurisdiction under the BIT.[242] It decided, however, that it had jurisdiction under the Foreign Investment Law.[243] The case then proceeded to the merits and was decided based solely on the Foreign Investment Law. As a result, even though the respondent prevailed on the merits, the respondent was forced to incur all the expenses and the risks relating to the proceeding,[244] which would not have happened if the BIT had included a waiver provision like CAFTA's requiring the claimant to renounce the double invocation of jurisdiction. The result in that case highlights the fact that the proceedings initiated under a treaty and under an investment law are different and independent proceedings that can lead to different results, even if before a single tribunal.

235. Allowing Claimant to invoke jurisdiction under the Investment Law of El Salvador and continue these improper claims beyond the Preliminary Objections would effectively nullify Claimant's waiver and therefore invalidate the consent granted in advance by the CAFTA Parties to accept international arbitration. Under those circumstances, the Republic would be forced to challenge, in addition to any other jurisdictional objections it may already have, the jurisdiction of the Centre for the CAFTA claims (because of the repudiated waiver), the

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[241] *Inceysa Vallisoletana, S.L. v. El Salvador*, paras. 130-131 (RL-30).
[242] *Tradex Hellas S.A. v. Republic of Albania,* Decision on Jurisdiction, ICSID Case No. ARB/94/2, Dec. 24, 1996, at 179 (**RL-47**).
[243] *Tradex Hellas S.A.*, Decision on Jurisdiction, at 195.
[244] *Tradex Hellas S.A. v. Republic of Albania,* Award, ICSID Case No. ARB/94/2, April 29, 1999, para. 207 (**RL-48**).

competence of the Tribunal to decide the Investment Law claims (because of the waiver), and even the proper constitution of the Tribunal to decide claims under the Investment Law (because the Tribunal has been constituted as a CAFTA Tribunal).

236. These additional jurisdictional challenges would substantially increase the time and expense to dispose of Claimant's frivolous case. Bringing this objection at this time, the earliest possible point in the arbitration to make such objection, is the most resource-efficient way to deal with this issue caused by Claimant's desire to have "two bites at the apple" when it had already agreed to have just one. The Republic therefore requests the Tribunal to declare that it does not have competence to decide any claims under the Investment Law of El Salvador and under any other law of El Salvador.

VII. CONCLUSION

237. Claimant has failed to assert a viable claim against the Republic under the CAFTA pleading standards. CAFTA requires claimants to plead *specific facts* supporting the claim, not simply conclusory statements to the effect that the claimant is entitled to an award in its favor. Moreover, the CAFTA rules expressly permit consideration of other relevant undisputed facts.

238. Claimant's Notice of Arbitration does not meet the CAFTA standards. The facts which are pled, assumed to be true, coupled with facts which the Claimant has not disputed, show that the Claimant was not (and is not) entitled to a Mining Exploitation Concession from the Republic, and that Claimant has failed to substantiate its other CAFTA claims. Therefore, the Republic could not have caused any of Claimant' s alleged harms. The alleged and undisputed facts include the following:

Failure to Meet Land Ownership and Authorization Requirement

239. Claimant failed to comply with the surface land requirements necessary to obtain a concession. Specifically, Claimant applied for a concession with a 12.75 square-kilometer surface area, while only showing ownership or authorization for less than 2 square kilometers of land. Moreover, contemporaneous documents from Claimant and its counsel show that Claimant understood at the time that it did not meet this legal requirement—through no fault of the Republic—and so it attempted to change the law. This legislative effort failed.

240. Claimant's efforts to now advance once again, before this Tribunal, an interpretation of the law that government officials have already repeatedly rejected should not be countenanced. Claimant seeks to have this Tribunal conclude that rights over less than 2 square kilometers should suffice to support a concession more than six times as large. Claimant says the Republic should be satisfied with the fact that Claimant has secured land rights where buildings and the mine shaft opening will be located. But this "interpretation" of the law is not consistent with the language of the Mining Law or Claimant's contemporaneous recognition of the Government's application of the law's requirements.

241. Nor does Claimant's "interpretation" comply with the law's policy or spirit. The history of underground mining concessions throughout the world demonstrates the significant effects that such activities can have upon landowners above the underground mine. Claimant's position cynically ignores such landowners and their rights, contrary to Salvadoran law.

Failure to Submit a Feasibility Study

242. It is also undisputed that Claimant never submitted a Feasibility Study covering the area of the requested concession, but only submitted a document entitled "Final *Pre-*

Feasibility Study." Again, nothing in the Notice of Arbitration lays any fault for this failure with the Republic. This failure, independently, warrants dismissal of the claims.

243. Claimant cannot deny it never submitted a Feasibility Study. Rather, Claimant now argues that the "*Pre-Feasibility* Study" which it did submit should be considered as the *equivalent* of a Feasibility Study, because it purportedly complied with all the legal requirements. This argument, too, is inconsistent with the undisputed facts.

244. First, the "Pre-Feasibility Study" is insufficient on its face to provide economic and technical justification for a 12.75 square kilometer application, as that study by its own terms only covered reserves located under less than 0.3 square kilometers of land in the requested concession area.

245. Second, Claimant's own professional consultant recognized the significant differences between a feasibility study and a "pre-feasibility" study, and indeed has done both for other projects, for other companies. However, only the latter was done in this case.

246. Most significantly, Claimant *in this very case* repeatedly made undisputed statements to the Republic and to its investors promising that it was working on what it never delivered—the Feasibility Study. Claimant should not be permitted to now ignore its previous representations that the Feasibility Study would be different, and extensive—and therefore compliant with the law, unlike the Pre-Feasibility Study that it did submit.

Failure to Identify Another Investor, in "Like Circumstances" or Not

247. Claimant's assertion of a right to recover under CAFTA Most-Favored-Nation or National Treatment Standards is flawed by the fundamental failure to identify any investor "in like circumstances" that was treated by the Republic any differently than Claimant on the basis of nationality. Indeed, the Tribunal is not even called upon here to resolve the typical debate as

to whether an identified investor is "in like circumstances" or not, as Claimant's Notice of Arbitration *fails to identify any other investor whatsoever*.

248. Nor can Claimant's reference to the Notice of Intent save it from this fatal defect. First, Claimant is not permitted to support the adequacy of the pleading of its claims by reference to any document other than the Notice of Arbitration. Second, and in any event, even resort to the Notice of Intent, if permitted, would not rescue this claim as the Notice of Intent likewise *fails to identify a single other investor—whether situated in "like circumstances" or not.* The Notice of Intent only identifies other *industries*, and Claimant fails to name a single authority which has permitted such a claim to go forward on such insubstantial, non-specific comparisons.

249. The undisputed fact remains—Claimant has failed to identify a single investor, either domestic or from another country, much less an investor in like circumstances who has received more favorable treatment on the basis of nationality. Consequently, this claim is frivolous and must be dismissed.

Other CAFTA Claims

250. Claimant has failed to allege facts indicating that the Republic has violated any "investment authorizations" for the simple reason that the instruments Claimant refers to in its Notice of Arbitration are not, as a matter of law, "investment authorizations", and it has not alleged any document that imposes contractual obligations upon the Republic.

251. Claimant has also failed to state a claim related to the Santa Rita exploration license because it has not even alleged any wrongdoing by the Republic in relation to this project. In addition, Pacific Rim El Salvador negligently failed to apply to renew the Santa Rita exploration license until after it expired, and thus lost the possibility of renewing that exploration license.

Waiver

252. Claimant has also waived the right, by the terms of its express waiver and pursuant to the terms and policy of CAFTA, to bring before this Tribunal or any other Tribunal any separate claims for alleged violations of the Salvadoran Investment Law by virtue of the same measures which form the basis of its CAFTA claims. Therefore, Claimant's invocation of jurisdiction under the Investment Law should be rejected and its claims under the Investment Law should be dismissed.

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253. In short, while Claimant tries to muddy the waters with issues and facts not pertinent to the determination of the Republic's Preliminary Objections, the relevant facts are straightforward and the legal questions before this Tribunal are simple. When the irrelevancies are stripped away, it is clear from a consideration of the alleged and undisputed facts that, *as a matter of law*, Claimant has failed to assert any viable claim against the Republic for which an award in favor of Claimant may be granted.

VIII. PRAYER FOR RELIEF

254. The Republic incorporates by reference the Prayer for Relief requested in the Preliminary Objections dated January 4, 2010.

Dated: March 31, 2010

Respectfully submitted,

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