

**IN THE MATTER OF AN ARBITRATION  
UNDER THE RULES OF ARBITRATION OF THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE  
CENTRAL AMERICA – UNITED STATES – DOMINICAN REPUBLIC FREE TRADE  
AGREEMENT AND THE FOREIGN INVESTMENT LAW OF EL SALVADOR**

PAC RIM CAYMAN LLC,	)	
	)	
Claimant,	)	
	)	
v.	)	ICSID Case No. ARB/09/12
	)	
REPUBLIC OF EL SALVADOR,	)	
	)	
Respondent	)	

**CLAIMANT PAC RIM CAYMAN LLC'S  
REJOINDER ON RESPONDENT'S PRELIMINARY OBJECTION**

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## TABLE OF CONTENTS

	<u>Page No.</u>
I. INTRODUCTION AND SUMMARY OF CLAIMANT’S REJOINDER.....	1
II. RESPONDENT’S NEW FACTUAL ASSERTIONS ARE BASELESS AS WELL AS IMPROPER IN THIS CONTEXT.....	12
A. Respondent’s Factual Assertions Regarding the Alleged “Deficiencies” in Claimant’s Exploitation Concession Application .....	15
B. The Proposed Mining Legislation.....	31
III. THE STANDARD OF REVIEW FOR A PRELIMINARY OBJECTION UNDER CAFTA ARTICLE 10.20.4 (REPRISAL).....	35
A. The Standard of Review Based on the Text of the Treaty.....	36
1. “As a Matter of Law”; Taking Claimant’s Factual Allegations as True; Consideration of Facts “Not in Dispute” .....	36
2. “Not a Claim for Which an Award in Favor of the Claimant May Be Made Under Article 10.26.” .....	41
B. Respondent’s Arguments Based on U.S. Dispositive Motions Are Confused and Irrelevant.....	49
IV. RESPONDENT’S ARGUMENTS ON SALVADORAN LAW ARE INAPPROPRIATE IN THE CONTEXT OF ITS PRELIMINARY OBJECTION AND UNAVAILABLE UNDER ANY CIRCUMSTANCES .....	54
A. These Two Issues of Salvadoran Mining Law Cannot Be Decided as a Matter of International Law in a Preliminary Objection under Article 10.20.4.....	56
B. Respondent Cannot Be a Judge in Its Own Cause.....	61
C. Respondent’s Assertions Are Incorrect as a Matter of Salvadoran Law.....	63
1. The Surface Land Issue.....	63
2. The Feasibility Study Issue.....	70
V. THE NOTICE OF ARBITRATION MORE THAN SATISFIES THE PLEADING STANDARD FOR ALL OF CLAIMANT’S CLAIMS .....	76
A. There Is No Textual Support for Respondent’s Assertion that CAFTA Imposes a Heightened Pleading Requirement Compared to the ICSID Rules .....	78

B.	Claimant’s Claims with Respect to El Dorado Satisfy The Pleading Standard under CAFTA .....	81
C.	Claimant’s Claims with Respect to Santa Rita Satisfy the Pleading Standard under CAFTA .....	86
D.	Claimant’s National Treatment and Most-Favored Nation Claims Satisfy the Pleading Standard under CAFTA.....	89
E.	Claimant’s Claims for Breach of Investment Authorizations Satisfy the Standard under CAFTA .....	94
1.	An Investment Authorization Does Not Require an Investment Agreement.....	94
2.	The ONI Registrations .....	98
3.	The Licenses .....	101
VI.	THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT’S CLAIMS UNDER THE INVESTMENT LAW OF EL SALVADOR, INASMUCH AS THOSE CLAIMS ARISE FROM BREACHES OF INVESTMENT AUTHORIZATIONS .....	105
VII.	CLAIMANT HAS NOT WAIVED ITS RIGHT TO SUBMIT CLAIMS UNDER EL SALVADOR’S INVESTMENT LAW IN THE <i>SAME</i> PROCEEDING, BEFORE THE <i>SAME</i> DISPUTE SETTLEMENT PROCEDURES TO WHICH IT HAS SUBMITTED ITS OTHER CLAIMS .....	107
A.	Claimant’s Investment Law Claims Are Not Separate “Proceedings” .....	111
1.	A “Claim” is Not a “Proceeding”.....	113
2.	Respondent’s Construction Would Render the “Additional Claims” Provision of Article 10.16.4 Inutile.....	118
3.	By Reading “Proceeding” to Mean “Claim,” Respondent Wrongly Suggests That Claimant Has Waived its Treaty-Based Right to Submit Investment Law Claims to This Tribunal Implicitly, and not Explicitly.....	121
B.	Claimant’s Investment Law Claims Have Not Been Submitted to “Other Dispute Settlement Procedures” .....	123
C.	Resolution of Claimant’s CAFTA Claims and Investment Law Claims in a Single Proceeding Before the Same Dispute Settlement Procedures is Consistent with CAFTA’s Object and Purpose .....	125
1.	Joinder of claims in single proceeding does not give rise to the risks CAFTA’s waiver provision seeks to avoid .....	126
2.	Jurisprudence does not support Respondent’s interpretation.....	128

D.	Supplementary Means of Interpretation Confirm Claimant’s Interpretation of Article 10.18.2(b).....	130
VIII.	CLAIMANT IS ENTITLED TO COSTS AND ATTORNEYS FEES .....	134
IX.	CONCLUSION.....	141

## **I. INTRODUCTION AND SUMMARY OF CLAIMANT’S REJOINDER**<sup>1</sup>

1. Respondent’s Reply is an extraordinary submission in many respects. A preliminary objection is to be decided “as a matter of law” based on Claimant’s factual allegations, which *must* be taken as true, and on “any relevant facts not in dispute.” Notwithstanding the plain language of that standard, Respondent’s Reply:

- asserts multiple new factual allegations (almost all of which are disputed), in an effort to challenge the factual allegations contained in Claimant’s Notice of Arbitration;
- submits nearly 500 pages of additional exhibits to “support” its new factual allegations (almost doubling the volume of exhibits that accompanied Respondent’s original submission)<sup>2</sup>;
- irresponsibly accuses Claimant of “conscious non-compliance with the law” of El Salvador<sup>3</sup>; and

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<sup>1</sup> As used herein, Claimant includes Pac Rim Cayman LLC and its two enterprises, Pacific Rim El Salvador (“PRES”) and Dorado Exploraciones (“DOREX”).

<sup>2</sup> Respondent’s opening submission included 292 pages of exhibits (not including authorities). Its Reply includes 491 pages of exhibits (not including authorities). Respondent has now submitted 783 pages of documents (not including authorities) in support of an objection that is supposed to be decided as a matter of law.

<sup>3</sup> The Republic of El Salvador’s Reply (Preliminary Objection), 31 Mar. 2010, para. 169 (“Reply”).

- baselessly accuses Claimant (and Claimant’s counsel) of making “misleading statements . . . in the course of this arbitration.”<sup>4</sup>

These last two inflammatory and unnecessary assertions are particularly troubling, given the seriousness of the accusations and the extent to which Respondent has distorted the record in order to make them.

2. As demonstrated in this submission, Respondent has seriously mischaracterized the factual record that is now before the Tribunal – misrepresenting a number of key facts, omitting many others, and making numerous assertions that have no support at all – while actually representing to the Tribunal that its multitude of factual allegations and accusations against Claimant are “undisputed.” For example, Respondent’s assertion that Claimant “knew” that the Government had “clearly” reached an “interpretation” concerning the surface-ownership issue in 2005 is based on a number of internal communications among various executive branch officials that Claimant had never seen until Respondent submitted them to this Tribunal with its Reply.<sup>5</sup>

3. Respondent’s extended detour into the realm of disputed facts is fueled by its continued failure to provide any coherent standard for deciding its Preliminary Objection. Indeed, Respondent’s factual *and* legal arguments ride roughshod over the plain language of CAFTA Article 10.20.4. Respondent’s far-flung factual assertions (ranging from who allegedly

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<sup>4</sup> Reply, para. 4.

<sup>5</sup> It is also less than clear how Respondent’s new allegations on this point have anything to do with whether Claimant’s Notice of Arbitration, as a matter of law (and taking its allegations of fact to be true), does not support a claim on which an award in favor of the Claimant may be made. *See Discussion infra* at Section V.

communicated what to whom when Claimant made various regulatory submissions in 2004-2006, to a comparison of Claimant's gold-mining operations in El Salvador to zinc and lead mining in Oklahoma in the early 1900s<sup>6</sup>) cannot be relevant to this phase of the arbitration proceedings.

4. Equally astonishing is Respondent's steadfast refusal to acknowledge the central allegation of Claimant's Notice of Arbitration: *viz.*, that El Salvador imposed a *de facto* and extra-legal ban on all mining activities. Not once in the nearly 140 pages that comprise its Preliminary Objection and Reply does Respondent ever address Claimant's allegations that former President Saca (followed by current President Funes) illegally declared a *de facto* ban on all metallic mining activities in El Salvador, and that the administrative agencies responsible for mining in the country have, as a result, failed to take any action on Claimant's pending applications.<sup>7</sup>

5. Instead, Respondent's Preliminary Objection is largely devoted to an attempt to construct a purely speculative "alternative" theory of causation. Respondent asserts that Claimant's application for an Exploitation Concession would have been rejected in its own right *if* the Bureau of Mines had ever ruled on it, and that, therefore, the application's "deficiencies" – not the Government's *de facto* mining ban – were what "really" destroyed Claimant's investment in El Salvador.

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<sup>6</sup> See, e.g., Reply, para. 120(d).

<sup>7</sup> Claimant's Notice of Arbitration, 30 Apr. 2009, paras. 7-9, 73-81 ("Notice of Arbitration"); Claimant's Response to Respondent's Preliminary Objection, 26 Feb. 2010, paras. 52-56 ("Response").

6. Even in the context of a merits proceeding, this argument would be flimsy at best. In the context of a preliminary objection under CAFTA Article 10.20.4, it is frivolous in the extreme. Because this argument is the centerpiece of Respondent's Preliminary Objection, we will deal with and dispose of it immediately. It takes only a brief examination of the argument to demonstrate that it is unavailing under any circumstances, and that it is particularly inappropriate for consideration at this preliminary phase of the case.

7. Although the Tribunal is supposed to take *Claimant's* factual allegations as true in this proceeding, Claimant will, for the moment, turn the standard around and take *Respondent's* factual allegations as true. According to Respondent's allegations (including the allegations newly surfaced in the Reply):

- After Claimant had submitted its application for a mining exploitation concession in December 2004, certain officials at MINEC<sup>8</sup> opined that Claimant was required to obtain ownership of or authorization to use the entire surface of the concession area.
- Claimant did not obtain ownership or authorization to use the entire surface of the concession area.
- In addition, Claimant's *Estudio de Factibilidad Técnico Económico*, or "feasibility study," did not, in Respondent's view, meet the requirements of the feasibility study contemplated under El Salvador's Mining Law. (There is no suggestion that anyone in the Government ever told Claimant about this alleged issue.)

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<sup>8</sup> As set forth in Claimant's Notice of Arbitration and Response, MINEC stands for the *Ministerio de Economía*. The Bureau of Mines (*Dirección de Hidrocarburos y Minas*) is a department within MINEC.

- Because of these claimed “deficiencies,” the Bureau of Mines would have been entitled to deny the application (if it had ever ruled on it, which it did not).
- Therefore, Respondent asks the Tribunal to conclude, based on Respondent’s posited factual assertions, that the purported “deficiencies” in Claimant’s application – and not the Government’s *de facto* mining ban – caused the destruction of Claimant’s investment in El Salvador. Respondent further asks the Tribunal to conclude that the Government’s decision to impose a *de facto* mining ban on all metallic mining in the country had nothing to do with the destruction of Claimant’s investment (even though Claimant specifically alleges that the Government’s regulatory action and inaction were motivated by its subsequently announced ban<sup>9</sup>).

8. Putting aside the speculative nature of Respondent’s theory (along with the basic premise of Article 10.20.4 that it is the *Claimant’s* allegations that the Tribunal “shall assume to be true”), Respondent’s factual assertions – including its characterization of Salvadoran law on these issues – are unsupported, and in many instances, easily refuted, by the record that is already before the Tribunal. But even assuming *arguendo* that Respondent could somehow prove its factual assertions in the merits phase of this case, Respondent’s alternative causation theory would still fail. That is because even if all of Respondent’s factual assertions were accepted as “true,” Claimant would still have had at least two options, *if* the Bureau of Mines had ever ruled on and denied its application.

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<sup>9</sup> Notice of Arbitration, paras. 73-81.

9. *First*, Claimant could have revised the size of the concession area (as it had done in prior instances<sup>10</sup>) and/or purchased additional land, corrected the alleged “deficiencies” in its feasibility study, and resubmitted the application.<sup>11</sup> *Second*, Claimant could have appealed the Bureau of Mines’ denial of the application to the Supreme Court of El Salvador, since under Salvadoran law, the Supreme Court – *not* the executive agencies – has the final word about whether an administrative action complies with Salvadoran law.<sup>12</sup> Assuming *arguendo* that Respondent is correct in its characterization of Salvadoran law, and that the Supreme Court affirmed the denial, then Claimant could have again revised the concession area and/or purchased additional land, corrected the feasibility study, and resubmitted the application. Claimant was afforded none of these opportunities.

10. Of course, Respondent’s alternative causation theory – based on what Respondent terms “undisputed facts” – is purely speculative and hypothetical. It asks the Tribunal to dispose of a significant portion of Claimant’s case by concluding, as a matter of law, that (a) Respondent *could* have denied the application, if it had ever ruled on it; and (b) Respondent *would* have denied the application, if it had ever ruled on it. It also asks the Tribunal to assume that Respondent was treating and would continue to treat Claimant fairly and in good faith before and after the denial, and that none of Respondent’s conduct was affected (or would have been affected) by its *de facto* ban on all metallic mining in the courts. It is extremely unlikely that the

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<sup>10</sup> *See id.*, paras. 57, 66; Response, para. 156.

<sup>11</sup> *See* Discussion *infra* at Section IV.

<sup>12</sup> Under the appeals process available to Claimant under Salvadoran law, upon a formal denial of its application by the Bureau of Mines, Claimant could have appealed the denial first to the Minister of the Economy and then, if necessary, the Supreme Court of El Salvador. *See id.*

Tribunal could – as a matter of law or fact – take the leap of faith that Respondent asks of it, even in the context of the merits. Given that Respondent’s theory explicitly contradicts numerous allegations in the Notice of Arbitration, the Tribunal certainly cannot do so in the context of this Preliminary Objection.

11. Returning from Respondent’s world of speculation and hypotheses to the actual claims set forth in the Notice of Arbitration, the Government’s deprivation of Claimant’s rights to have its application considered fairly, consistent with Salvadoran law as well as basic notions of due process, comprises only a part of Claimant’s claims against the Government. Even if Claimant had actually been properly apprised of these alleged deficiencies (which it was not), and had corrected the alleged deficiencies (as was its right under Salvadoran law), Claimant would *not* have received an Exploitation Concession. That is because President Saca (followed by President Funes) declared a *de facto* and illegal ban on metallic mining, which MINEC and MARN have implemented by illegally refusing to take any action on any pending metallic mining applications.

12. For all its assertions of “undisputed facts,” Respondent never attempts to answer what is perhaps the most obvious question of fact: If Claimant’s application was so plainly deficient – as Respondent now argues to the Tribunal – why did the Bureau of Mines not deny it and issue a resolution? The answer is equally obvious: it was not deficient, otherwise the Bureau would have said so at the time.

13. The Bureau of Mines never ruled on the application because of domestic political considerations that ultimately led President Saca to declare and implement his *de facto* and illegal ban on metallic mining. Even before the announcement of the ban, the Government

effectively implemented it by delay, obfuscation, and, ultimately, inaction. The Government's executive agencies simply disregarded the laws that they were bound to administer and uphold.<sup>13</sup>

14. Accordingly, even if the Tribunal could consider (let alone accept) Respondent's disputed factual allegations (including its disputed characterization of Salvadoran law) in the context of this Preliminary Objection, Respondent's "alternative causation" theory would fail. Of course, the Tribunal cannot consider Respondent's disputed factual allegations (including its disputed characterization of Salvadoran law) in the context of Respondent's Preliminary Objection. Rather, the Tribunal's task is to determine, as a matter of law, whether the claims set forth in the Notice of Arbitration – taking *Claimant's* factual allegations as true – are not claims for which an award in favor of Claimant may be made. Those claims include, specifically, that Respondent's consideration of Claimant's applications was negatively affected by the Saca Administration's changing position, motivated by domestic politics, on the subject of metallic mining in El Salvador.<sup>14</sup> As discussed below, Respondent's other fact-based arguments (including, for example, its assertions of fact about the Santa Rita application process *after* Claimant's Notice of Arbitration was filed, and its various sufficiency-of-the-pleading arguments) also fail when confronted with Claimant's allegations of fact and the actual standards set forth in CAFTA Article 10.20.4.

15. In the final analysis, Respondent has offered only one argument that may be decided as a matter of law in its Preliminary Objection; that argument must also be decided against Respondent. Specifically, Respondent argues that the waiver provision of CAFTA Article

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<sup>13</sup> Notice of Arbitration, paras. 7-9, 73-81; Response, paras. 52-56.

<sup>14</sup> Notice of Arbitration, para. 9.

10.18 – requiring the claimant to waive any right to initiate or continue, in any “*other* dispute settlement procedures, any *proceeding* with respect to any measure alleged to constitute a breach referred to in Article 10.16”<sup>15</sup> – bars Claimant from bringing claims under El Salvador’s Investment Law in *this* proceeding under the ICSID dispute settlement procedures applicable to this Tribunal. Respondent has submitted an opinion by Professor W. Michael Reisman in support of this argument.

16. Respondent’s argument on this issue is fundamentally flawed for several reasons. *First*, Claimant’s Investment Law claims have two separate, independent bases, only one of which Respondent acknowledges. The first basis, which Respondent does acknowledge, lies in the Investment Law itself, which provides an array of protections coupled with consent to ICSID arbitration to resolve disputes involving those protections. The second basis, which Respondent fails to acknowledge, lies in investment authorizations it received from the Government. CAFTA Article 10.16 specifically authorizes the submission of claims for breach of investment authorizations. Professor Reisman alludes to but never actually addresses this point.<sup>16</sup> Respondent’s argument (made separately in its Reply and without support from Professor Reisman) that there must be an investment contract for there to be an investment authorization<sup>17</sup>

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<sup>15</sup> (Emphasis added).

<sup>16</sup> Professor Reisman of course acknowledges that a CAFTA tribunal may consider claims of violations of investment authorizations or investment agreements. He adds in a subordinate clause, without any analysis or elaboration, that “neither . . . *appears* to obtain in the instant case.” Opinion on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10, 22 Mar. 2010, para. 3 (“Reisman Opinion”) (emphasis added). That is Professor Reisman’s only comment on the issue in his 35-page opinion. It is fair to say that he never seriously addresses the point.

<sup>17</sup> Reply, para. 200.

is frivolous on its face (and demonstrates once again Respondent’s unfortunate tendency simply to ignore treaty language that it finds inconvenient to its positions).

17. *Second*, with respect to the basis for Claimant’s Investment Law claims that Respondent does acknowledge, Professor Reisman’s argument is simply not supported by the text, context or object and purpose of CAFTA Article 10.18. Even putting aside the issue of whether Claimant received investment authorizations from the Government, there is no support, textual or otherwise, for the argument that waiving a right to initiate or continue a *proceeding* before “other dispute settlement procedures” means that one waives the right to assert a *claim* in *this* proceeding before this ICSID dispute settlement procedure. There is no reasonable argument that this single proceeding before this Tribunal somehow involves two “proceedings” – one brought under CAFTA, and another brought under the Investment Law – with the second one precluded by CAFTA’s waiver provision. Even if the language of Article 10.18 were deemed ambiguous on this point, it would not have the effect Respondent asserts, because any waiver of a right to assert claims must be clear and unambiguous.

18. *Third*, all of the purpose and policy arguments offered by Professor Reisman – *e.g.*, that the waiver provision was designed to prevent double recovery or inconsistent judgments<sup>18</sup> – cut against his interpretation, not in favor of it. Allowing Claimant to proceed

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<sup>18</sup> *See, e.g.*, Reisman Opinion, para. 28.

with its claims under the Investment Law in this proceeding will obviate multiple actions and the possibility of double recovery or inconsistent judgments.<sup>19</sup>

19. Accordingly, Respondent's argument that Claimant waived its claims under the Investment Law when it initiated its CAFTA case also fails.

20. The remainder of this Rejoinder is divided into the following sections:

- In Section II, Claimant demonstrates that Respondent's new factual assertions are not only inappropriate in this setting, but are baseless as well.
- In Section III, Claimant again sets forth the proper standard of review for a preliminary objection under CAFTA Article 10.20.4, based on the language of the Treaty, and responds to the arguments that Respondent has made on this issue in its Reply.
- In Section IV, Claimant explains why Respondent's arguments about Salvadoran Mining Law – an issue of fact before the Tribunal – are both unavailing and entirely inappropriate for resolution in the context of this Preliminary Objection.
- In Section V, Claimant demonstrates that its Notice of Arbitration more than satisfies the pleading standard under CAFTA for all of its claims, and rebuts the arguments offered by Respondent's Reply on these issues.

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<sup>19</sup> The obvious alternative for an investor in the position of Claimant would have been for its Canadian parent to bring a separate arbitration under the Investment Law in the ICSID Additional Facility.

- In Section VI, Claimant demonstrates that the Tribunal has jurisdiction over Claimant’s claims under El Salvador’s Investment Law, given that those claims arise from breaches of investment authorizations.<sup>20</sup>
- In Section VII, Claimant demonstrates that it has not waived its rights to submit claims under El Salvador’s Investment Law in the *same* proceeding, before the *same* dispute settlement procedures to which it has submitted its other claims.
- In Section VIII, Claimant explains why it is entitled to costs and attorney’s fees under CAFTA Article 10.20.6.

## **II. RESPONDENT’S NEW FACTUAL ASSERTIONS ARE BASELESS AS WELL AS IMPROPER IN THIS CONTEXT**

21. Once again, Respondent’s factual allegations are manifestly inappropriate in the context of its Preliminary Objection. Article 10.20.4(c) provides that “[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration . . . .” It provides further that “[t]he tribunal may also consider any relevant facts *not in dispute*.”<sup>21</sup> Respondent has chosen to flout the plain language of Article 10.20.4 and to launch a “factual assault” on Claimant’s case – not only attacking the

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<sup>20</sup> In addition to the accompanying exhibits and authorities, claimant also submits the Expert Opinion of Professor Don Wallace Jr.

<sup>21</sup> (Emphasis added).

factual allegations in the Notice of Arbitration, but also waiting until its Reply to make a number of new factual assertions.<sup>22</sup>

22. That Claimant is compelled to include a rebuttal of the facts newly asserted in Respondent's Reply demonstrates how wildly off course Respondent has taken this preliminary phase of the case – which, again, is meant to address, as a matter of law, the ability of the Claimant's factual allegations (taken as true) to sustain a claim on which an award in favor of Claimant “may” be made. But it is necessary for Claimant to respond to these new allegations – and to respond at the outset – for several reasons.

23. *First*, Respondent has chosen to make a number of serious accusations against Claimant based on these new factual assertions. Respondent has specifically accused Claimant of “conscious non-compliance with the law” of El Salvador, akin to the conduct of claimants in cases such as *Fraport v. Philippines* and *Inceysa v. El Salvador*, where serious violations of domestic law (including fraud) were found to have been committed by the claimants.<sup>23</sup> In addition, based on its new allegations, Respondent has explicitly accused Claimant (and, by extension, its counsel) of attempting to “mislead” the Tribunal (including in the telephonic scheduling hearing held before the Tribunal on 12 January 2010) by “feign[ing] surprise” at Respondent's newly provided reasons for why Claimant's application “could” have been denied

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<sup>22</sup> Even a novice practitioner would have no difficulty understanding this plain and ordinary language. There is no question that Respondent's experienced and sophisticated counsel knows exactly what the language means and requires but have decided to disregard it.

<sup>23</sup> See Reply, paras. 67, 169-70 (citing *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Award dated 2 Aug. 2006) (RL-30)); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Award dated 16 Aug. 2007) (RL-31)).

(if Respondent have ever ruled on it).<sup>24</sup> Given the seriousness of these accusations, Claimant must respond to them now.

24. *Second*, as demonstrated below, Respondent’s mischaracterization of the factual record, along with its disregard for the plain language of Article 10.20.4, demonstrates a cavalier approach toward both the applicable law and facts, at the same time as it is levying serious accusations against Claimant and its counsel. One would have hoped that before leveling such accusations, Respondent would have taken steps to ensure they are based on a sound foundation. Respondent fails to have done so.

25. *Third*, the introduction of these new allegations and accusations in its Reply raise serious questions about the “tactics” Respondent has chosen to employ in pursuing its Preliminary Objection. Assuming *arguendo* that factual allegations such as these are appropriate in the context of an objection under Article 10.20.4 (though of course they are not), if these allegations were in any way relevant to the issues in Respondent’s Preliminary Objection, why were they not raised in that submission? If these allegations show – as Respondent argues – that Claimant was guilty of “conscious non-compliance” with the law of El Salvador, why were they not made along with the other factual allegations contained in Respondent’s submission in January 2010? It is difficult to come to any conclusion other than that Respondent held them in reserve in an attempt to “ambush” Claimant in its Reply. Alternatively, if Respondent did attempt to garner and present this “evidence” in the several weeks between its receipt of Claimant’s Response and the submission of its Reply, then the numerous misstatements and mistakes Respondent has made underscore why the accelerated procedures of a preliminary

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<sup>24</sup> See Reply, paras. 28, 81.

objection are not appropriate for airing (let alone resolving) factual disputes, and why Respondent's efforts to do so are thoroughly misguided. In any event, it is easy to demonstrate that Respondent's allegations and accusations lack any credible basis in the record now before the Tribunal.

26. For the reasons set forth above, Claimant will respond to and rebut the new factual allegations made by Respondent, even though Claimant is plainly not required to do so in the context of a preliminary objection made under Article 10.20.4.

**A. Respondent's Factual Assertions Regarding the Alleged "Deficiencies" in Claimant's Exploitation Concession Application**

27. In its opening submission, Respondent argued that Claimant's application for an Exploitation Concession was flawed because, according to Respondent: (1) Claimant did not demonstrate it owned or was authorized to use all of the surface land overlaying the proposed concession area; and (2) the "Final Pre-Feasibility Study" submitted by PRES did not meet the requirements for an *Estudio de Factibilidad Técnico y Económico* under El Salvador's Mining Law.

28. Respondent's new allegations involve its assertion that "Claimant has known since at least 2005 that the Government did not share Claimant's self-serving interpretation" of the land-surface ownership issue.<sup>25</sup> (There is no allegation in Respondent's submissions that Claimant knew about Respondent's alleged position that the "Final Pre-Feasibility Study" was in any way deficient.) Respondent goes on to assert that for Claimant to "feign surprise" about these alleged "deficiencies"—both at the scheduling hearing before the Tribunal in January 2010,

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<sup>25</sup> *Id.*, para. 4.

and in its Response – is “frivolous.”<sup>26</sup> Respondent’s recitation and characterization of the facts are inaccurate and misleading in numerous key respects. The actual facts are set forth in the following paragraphs, and it is these facts – alleged by Claimant in good faith based on the evidence at its disposal – that must be accepted as true for present purposes.

29. In December 2004, PRES submitted its application to the Bureau of Mines for an Exploitation Concession for portions of the El Dorado exploration site.<sup>27</sup>

30. Following the submission of the application, in March 2005, Ms. Gina Navas de Hernández, the Director of the Bureau of Mines, informed PRES that several persons in MINEC were of the view that the Mining Law required PRES to acquire ownership of, or authorization to use, the entire land surface overlaying the concession. This was one of many issues that Ms. Navas and other Government officials raised during the lengthy course of Claimant’s permitting efforts, all of which (except for the Environmental Permit) Claimant legitimately believed had been resolved by the end of 2006.<sup>28</sup> (As for the Environmental Permit, MARN’s refusal to act on PRES’s application was beyond Claimant’s ability to control.)

31. Respondent is therefore correct that the issue was identified as a *potential* concern early in the application process; it is Respondent’s depiction of subsequent events that is problematic.

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<sup>26</sup> *Id.*, para. 28.

<sup>27</sup> Notice of Arbitration, para. 57; Response, para. 46.

<sup>28</sup> Notice of Arbitration, paras. 55-63; Response, paras. 47-50, 152-154.

32. As set forth in Claimant's Response, the text of Article 37(2) of the Mining Law, read by itself, is ambiguous as to the requirement of land ownership.<sup>29</sup> It provides that an application for an Exploitation Concession must be accompanied by, *inter alia*, a "[n]otarial deed proving title to the real property or authorization granted by the owner as provided for in the law.  
...<sup>30</sup>

33. As stated by Claimant in the Response, "the text of Article 37(2)(b), by itself, is ambiguous as to *which* real property the applicant must own or have authorization to use."<sup>31</sup> However, as explained in the Response (and discussed further in Section IV below), when read in the context of the entire Mining Law, as well as Salvadoran law concerning the State's ownership of the subsoil, any ambiguity on this issue is resolved in favor of Claimant's interpretation.

34. Accordingly, in response to Ms. Navas's stated concern over the land surface issue, Claimant's outside counsel in San Salvador prepared a memorandum explaining

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<sup>29</sup> Response, para. 145.

<sup>30</sup> See Legislative Decree No. 544 *published in* 16 OFFICIAL J. 330 (24 Jan. 1996) (amended by Legislative Decree No. 475 *published in* 352 OFFICIAL J. 144 (31 Jul. 2001)) ("Mining Law") (CL-5). The Spanish original reads:

a) Plano de ubicación del inmueble en que se realizarán las actividades, hoja cartográfica del área, plano topográfico y su respectiva descripción técnica, extensión del área solicitada donde se establezcan fehacientemente su localización, linderos y nombre de los colindantes;

b) Escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario.

<sup>31</sup> Response, para. 145 (emphasis in original).

Claimant's position on this issue. That memorandum was submitted to the Bureau of Mines on 5 May 2005.<sup>32</sup>

35. According to Respondent's Reply, after the submission of the local counsel's memorandum to the Bureau of Mines, a number of internal documents were exchanged within MINEC and between MINEC and other executive branch agencies. Respondent bases much of its new factual argument on these *internal* government documents. Yet Respondent repeatedly (though inexplicably) asserts that the "undisputed evidence" in support of its arguments is "produced from Claimant's own documents."<sup>33</sup> Moreover, while also representing to the Tribunal that the "documentary evidence provided with this Reply" is "uncontested," ***Respondent never alleges that any of these internal documents were ever provided or shown to Claimant.*** Indeed, as far as Claimant is aware, ***there is no evidence that any of these documents were ever provided or shown to Claimant.***<sup>34</sup>

36. Therefore, Respondent's assertions that these documents constitute "uncontested" evidence concerning the applicable law – and "incontrovertibly" demonstrate that "Claimant knew before May 2005 that the Ministry of Economy had a very different interpretation from the

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<sup>32</sup> See *id.*, para. 84.

<sup>33</sup> See, e.g., *id.*, para. 69.

<sup>34</sup> In the several weeks that Claimant has had to investigate this issue (while responding to the various other arguments set forth in the Reply), the undersigned counsel have interviewed current and former employees of Claimant and its Salvadoran subsidiaries; interviewed Claimant's Salvadoran counsel; and have conducted additional searches of Claimant's documents. We have found no evidence that these internal government documents were ever provided to Claimant or any of its representatives. Specifically, there is no evidence that Respondent's Exhibits R-30, R-31, R-32, R-33, R-34, and R-35 were ever provided to Claimant.

Claimant's about the surface land requirement in Article 37.2.b) of the Mining Law<sup>35</sup> – are fanciful at best.

37. Moreover, many of these documents do *not* support the assertions made by Respondent in its Reply. For example, by letter dated 25 May 2005, the Minister of the Economy, Yolanda Mayora de Gavida, apparently forwarded the 5 May 2005 memorandum drafted by PRES's local counsel to Mr. Luis Mario Rodriguez, the Secretary for Legislative and Legal Affairs. Respondent asserts in its Reply that “[t]he 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.”<sup>36</sup>

38. As an initial matter, given that the Minister's letter to the Secretary was never shared with Claimant until Respondent submitted its Reply, it can hardly be “incontrovertible evidence” of what Claimant “knew” at “that time.” More fundamentally, the Minister's letter does not support the contention that “the Bureau of Mines required documentation for all of the land corresponding to the requested concession.” To the contrary, the Minister's letter briefly summarized the Claimant's position as follows:

The company's argument is that they will be mining the subsoil and the subsoil belongs to the State; and if they request permission

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<sup>35</sup> Reply, para. 90.

<sup>36</sup> *Id.*, para. 85.

from the landowners, it would amount to saying that the owners of the surface land are owners of the subsoil.<sup>37</sup>

The Minister observed that “several of our attorneys” disagreed with the 5 May 2005 memorandum’s conclusions. It did not state that the Bureau of Mines, or for that matter, MINEC, had taken any institutional or definitive position on the issue. The Minister then asked the Secretary for his “opinion on this issue.”

39. If the Bureau of Mines or MINEC had taken a definitive position on the issue at that time, why then did the Minister’s letter not say so, and why was the Minister requesting the opinion of another executive branch official on the issue?

40. Similarly, according to another document never provided to Claimant prior to the Reply, Ms. Navas also forwarded the 5 May 2005 memorandum to Dr. Marta Angélica Méndez, Legal Counsel for the Ministry. As with the Minister’s letter, Ms. Navas’s cover memorandum to Dr. Méndez did not assert any position taken by the Bureau of Mines on the issue. It simply summarized Claimant’s position and asked Dr. Méndez for her opinion.<sup>38</sup> Again, if the Bureau of Mines had taken the position that Respondent now attributes to it, why did Ms. Navas’ cover memorandum not say so? And why was Ms. Navas seeking advice on this issue from elsewhere within the Ministry?

41. Far from “incontrovertibly” showing that the Bureau of Mines and MINEC took the position that the law “clearly” required ownership or authorization for the entire surface area

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<sup>37</sup> Letter from Minister of Economy to Secretary for Legislative and Legal Affairs, 25 May 2005, with attached Memorandum, “Interpretación Ley de Minería,” 5 May 2005, at 1 (R-30).

<sup>38</sup> Letter from Bureau of Mines Director to Dr. Marta Angélica Méndez, 25 May 2005, at 1 with attached Memorandum, “Interpretación Ley de Minería,” 5 May 2005 (R-31).

of the requested concession, these documents demonstrate considerable uncertainty within both MINEC and the Bureau of Mines on the issue. The 5 May 2005 memorandum provided by PRES's Salvadoran counsel, by contrast, shows no uncertainty whatsoever on the issue.<sup>39</sup>

42. Moreover, as Respondent acknowledges, PRES's local counsel was sufficiently confident of his position that he sought an "authentic interpretation" ("*una interpretación auténtica*") to confirm it.<sup>40</sup> As Respondent states in its Reply: "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."<sup>41</sup> Again, why would the Minister send the draft decree to the Secretary if she thought this issue was clear?

43. Furthermore, the Secretary's response to the Minister dated 6 October 2005 (another document that Claimant had never seen until it was submitted with the Reply) is far less categorical than the way it is described in the Reply. Although Respondent argues that this document also demonstrates that "the Government of El Salvador considered Article 37.2.b) of the Mining Law to be clear and not consistent with Claimant's interpretation," the Secretary's response is stated in far more tentative terms, and concludes by stating: "If adoption of this is insisted upon, either as an authentic interpretation or as an amendment, an attempt should be

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<sup>39</sup> See "Interpretación Ley de Minería," 5 May 2005 Memorandum (attached to R-30 and R-31).

<sup>40</sup> Under Salvadoran law, an "authentic interpretation" is an official interpretation of a legal statute issued by the National Assembly. See CONST. OF EL SALVADOR article 131(5) (1983) (CL-1). The text in English reads, "It corresponds to the National Assembly: . . . 5 - Decreed, conduct an authentic interpretation, reform and derogate legislation." The text in Spanish reads, "Corresponde a la Asamblea Legislativa: . . . 5- Decretar, interpretar auténticamente, reformar y derogar las leyes secundarias."

<sup>41</sup> Reply, para. 88.

made to produce a clear wording to achieve its intended objective.”<sup>42</sup> In other words, the Secretary’s opinion contemplated that the draft decree might be adopted, either by way of authentic interpretation or amendment, and recommended that its language be more clearly drafted. Again, even if this document had been shared with Claimant, Claimant would not have had reason to conclude that the Bureau of Mines or MINEC had taken a definitive position on the issue. To the contrary, Respondent’s officials appeared to be struggling with the issue, which is not surprising given the ambiguity reflected in this part of the Mining Law.

44. Respondent goes on to describe two opinions that were apparently exchanged internally among executive branch officials concerning the issue. Again, there is no allegation and no evidence that these opinions were ever provided to Claimant prior to the submission of the Reply. Moreover, the opinion prepared by Dr. Rodríguez, the Secretary for Legislative and Legal Affairs, while opining that the law requires the consent of the owners of all the land within the concession area, further stated: “If consent is not obtained from the third parties, *the State could proceed to expropriate the land if it so deemed necessary.*”<sup>43</sup> In other words, the inability of an applicant to obtain ownership or authority to use all of the surface land overlaying the concession area from the landowners would *not* be fatal to the application, because the Government could simply expropriate the land (and either pay or presumably require the concessionaire to pay the property owners for the fair market value of the land at issue).

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<sup>42</sup> Response from Secretary for Legislative and Legal Affairs to Minister of Economy regarding “Authentic Interpretation,” at 4, 6 Oct. 2005 (R-34).

<sup>43</sup> Response from Secretary for Legislative and Legal Affairs to Minister of Economy at 3, 20 June 2005 (R-33) (emphasis added).

45. Thus, Respondent’s numerous categorical statements on this issue (*e.g.*, “Claimant was well aware that the Salvadoran Government’s interpretation of the legal requirement was different than Claimant’s”<sup>44</sup>; “Claimant therefore knew that its application for an exploitation concession could not and would not be approved as submitted”<sup>45</sup> “the uncontested documentary evidence provided with this Reply proves that Claimant knew before May 2005 that the Ministry of Economy had a very different interpretation from Claimant’s about the surface land requirement in Article 37.2.b) of the Mining Law”<sup>46</sup>) are simply not supported by the record that it has placed before the Tribunal.

46. Rather, Respondent’s newly submitted documents merely show that in 2005 the parties recognized that there was a *potential* issue arising from an ambiguity in Article 37(2)(b); that some officials in MINEC took the position that this ambiguity should be interpreted differently from Claimant’s interpretation; and that various proposals for addressing that ambiguity were suggested both by Claimant and by officials in the Government.

47. Yet another fundamental flaw in Respondent’s argument is its premise that executive branch officials have the final “say” in interpreting Salvadoran law. They do not. Nor do internal government memos that are not shared with the public or the interested parties constitute “rulemaking” or otherwise constitute a legitimate exercise of executive authority under Salvadoran law. These officials do not “declare” the law of El Salvador – any more than the President can “declare” that the Mining Law will no longer be enforced. Under Salvadoran law,

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<sup>44</sup> Reply, para. 81.

<sup>45</sup> *Id.*, para. 82.

<sup>46</sup> *Id.*, para. 90.

it is the Supreme Court, not the executive branch, that is charged with ultimately interpreting Salvadoran law.<sup>47</sup>

48. Thus, even assuming *arguendo* that the Bureau of Mines had adopted and held the position on the land surface issue now taken by Respondent in this case – and *if the Bureau of Mines had ever implemented that position through actual administrative action (i.e., issuing a resolution denying Claimant’s application) – Claimant could have appealed that position, first to the Minister of the Economy, and then to the Supreme Court of El Salvador.*<sup>48</sup>

49. Given that Claimant had already submitted its application when Ms. Navas raised the issue in March 2005, Claimant was therefore faced with a number of choices. Claimant could have revised the application (*e.g.*, by changing the concession size; by seeking to obtain ownership or authorization to use more surface land; by seeking to have the Government expropriate any land that private owners were not willing to sell to Claimant or authorize Claimant to use, *etc.*); or Claimant could have proceeded with the application, hoping that the Bureau of Mines would ultimately resolve its apparent uncertainty on this issue in Claimant’s favor. Claimant chose the latter course.<sup>49</sup>

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<sup>47</sup> See Legislative Decree N. 81, Articles 1 and 2, 19 Dec. 1978 (“Ley de Jurisdicción Contencioso Administrativa”) (CL-44) (providing that the *Sala de lo Contencioso Administrativo* of the Supreme Court has jurisdiction to decide disputes involving the legality of actions taken by the Public Administration).

<sup>48</sup> See Mining Law, Article 45 (CL-5) See also Ley de Jurisdicción Contencioso Administrativa, Articles 1 and 2 (CL-44).

<sup>49</sup> Respondent devotes a considerable portion of its Reply to an attempt to show, as a matter of “undisputed” fact, that Claimant could not “cure” the alleged defects in its application. See Reply, paras. 156-164. Respondent offers maps (superimposing one map on another) and other fact evidence in an elaborate effort to demonstrate that Claimant did not own and was not authorized to use land overlaying certain deposits. But even assuming *arguendo* that such facts could possibly be accepted as undisputed,

(continued...)

50. Through 2005 and 2006, Claimant continued to work with officials in the Salvadoran Government, including MARN, to have MARN act on Claimant's application for an Environmental Permit, which had been pending before it since 2004. By the end of 2006, Claimant believed that it had finally reached agreement with MARN on obtaining the permit, when Claimant agreed to build a state-of-the-art water treatment facility.<sup>50</sup> Claimant had been in constant contact with MINEC on this issue, and of course informed MINEC of its progress with MARN. Claimant finally believed that its application would be ready to move forward.

51. As discussed in Respondent's opening submission and in Claimant's Response, in October 2006, Ms. Navas sent a letter to Claimant, requesting the following documentation in connection with its application for an Exploitation Concession:

1. Certified copies of the duly recorded official transcripts of the property sales agreements or legally executed authorizations from the landowners in the area requested for mining exploitation.
2. Copy of the Environmental Permit issued by the competent authority certified by a Notary Public, with a copy of the environmental impact study including the annexes and the modifications made to said study approved by the competent authority.
3. Technical-Economic Feasibility Study prepared by professionals with proven experience in the field, which must contain the methodology for calculating mineable mineral reserves and also include the following information, such as the Detailed Design Plans for:

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(continued)

Respondent simply ignores Claimant's assertion that it might have acquired ownership of, or authorization to use, the surface land at issue, or otherwise altered its operations to mine these or other mineral deposits in the concession area.

<sup>50</sup> Notice of Arbitration, para. 62.

- a. Engineering and final design of the ramp.
- b. Engineering and design of roads and accesses and additional infrastructure.
- c. Engineering and design of the tailings dam and sterile dumps.
- d. Engineering and design of the process plan and flow diagrams.
- e. Engineering and design of the exploitation method for the underground mine.
- f. Engineering and final design of mine operation. (Mine Closing).

The plans must be submitted printed to the appropriate scale, signed and stamped by an authorized Architect or Engineer and in digital format (AutoCad), with all the respective files.

4. Exploitation program for the first five years, based on the mineral reserves to be mined. . . .<sup>51</sup>

52. In November 2006, Claimant had already submitted all of these documents (except for the Environmental Permit) with its original application two years earlier. Nonetheless, Claimant updated the documents as appropriate, and resubmitted all of them to the Bureau of Mines – except, again, for the Environmental Permit, which it was still waiting to receive.<sup>52</sup>

53. To accompany these documents, Claimant also provided a written submission to the Bureau of Mines, explaining why it was unable to submit the Environmental Permit. Claimant specifically asked the Bureau to excuse the absence of the Environmental Permit on the

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<sup>51</sup> Letter from Bureau of Mines to Pacific Rim El Salvador, 2 Oct. 2006 (R-4).

<sup>52</sup> Letter from PRES to MINEC, 8 Nov. 2006 (C-11).

grounds that there was an “Impediment with Just Cause” (“*Impedimento con Justa Causa*”).<sup>53</sup> Specifically, MARN had still not ruled one way or the other on Claimant’s application for an environmental permit, a factor that was beyond Claimant’s ability to control.<sup>54</sup> The submission also specifically observed that some of the data included in the Final Pre-Feasibility Study might change.<sup>55</sup> Indeed, Claimant had always explained to the Government, as stated in its application in December 2004, that “[t]he studies related to a mining project are largely iterative and change according to the costs, metal prices, operating upgrades, available technology and exploration program results.”<sup>56</sup> No one in the Government had ever suggested that this was problematic and, indeed, no one in the Government ever raised any issue with the Final Pre-Feasibility Study until this arbitration.

54. Ms. Navas responded in a letter dated 4 December 2006. Given Respondent’s allegations, it is worth setting forth the letter in full:

Having received on [8 November 2006] the document and attachments whereby Mr. William Thomas Gehlen, Legal Representative of the Company “Pacific Rim El Salvador, S.A. de C.V.,” *partially complies* with the warning notice<sup>[57]</sup> dated [2 October 2006], and also requests that the deadline for the presentation of the documentation relating to the environmental permit be suspended and that the company be granted three days

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<sup>53</sup> An “*Impedimento con Justa Causa*” is similar to the doctrine of *force majeure*, *i.e.*, an excusal from an obligation due to circumstances beyond one’s control.

<sup>54</sup> Letter from PRES to MINEC, 8 Nov. 2006 (C-11).

<sup>55</sup> *Id.* at 5.

<sup>56</sup> Application: Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession at 6, 22 Dec. 2004 (“Exploitation Concession Application”) (C-5, R-2).

<sup>57</sup> The word in the Spanish original is “*prevención*,” which Respondent translates as “warning letter.” In this context, however, the word “notice” or “notification” might serve as a more accurate translation.

from the delivery of the permit by the corresponding Authority to submit it in turn to this Bureau.

The undersigned Director notes that it is not feasible to suspend a deadline established in the Mining Law, but that “Pacific Rim El Salvador, S.A. de C.V.” has nevertheless properly justified, to date, the existence of an impediment with just cause to the submission of this Bureau of the Environmental Permit granted by the Ministry of the Environment and Natural Resources, and taking into consideration the administrative progress made at the Ministry in obtaining the corresponding permit, the following resolution is in order:

**The Bureau WARNS [*“PREVIÉNESE”*] “Pacific Rim El Salvador, S.A. de C.V.” through its Legal Representative that it present, within a period of thirty business days from the date following the notification of this decision, a notarized copy of the Environmental Permit issued by the competent authority, and a copy of the environmental impact study duly approved by the Ministry of the Environment and Natural Resources, and is also to indicate the place and persons designated for service of process. . . .**<sup>58</sup>

55. This is the same letter that Respondent in its opening submission alleges was delivered to Claimant but then “withdrawn.”<sup>59</sup> Whether that assertion is true as a matter of fact, and whether its withdrawal would have any significance as a matter of law, the reality is that the letter raises no issue about the land ownership and authorization documents or the “Final Pre-Feasibility Study” that had been provided with Claimant’s submission several weeks earlier, pursuant to Ms. Navas’s specific request. Instead, the letter addresses and agrees with Claimant’s argument that it had “just cause” for not submitting the Environmental Permit. The

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<sup>58</sup> Letter from Bureau of Mines to PRES, 4 Dec. 2006 (boldface added; underscoring in original) (R-6).

<sup>59</sup> Preliminary Objection, para. 63, n. 38. Respondent provided no evidentiary support for its assertion that the letter was withdrawn.

*only* additional document requested is the Environmental Permit (along with a copy of the EIS as approved by MARN).

56. In its Reply, Respondent takes issue with Claimant's assertion that, based on this correspondence, Claimant reasonably concluded that the only remaining issue with its application was the absence of the environmental permit.<sup>60</sup> What else was Claimant supposed to think? It is impossible to glean from these two letters – the last official correspondence that the Bureau of Mines ever issued to Claimant concerning its application for the Exploitation Concession – that the Bureau took issue with either the land ownership/authorization documentation or the Final Pre-Feasibility Study. *Indeed, in all of the subsequent meetings that Claimant held with officials throughout the Salvadoran Government, the discussions focused on the Environmental Permit.* Senior Government officials repeatedly assured Claimant that the Environmental Permit – and with it, the Exploitation Concession – would be issued soon.<sup>61</sup>

57. Again, the Bureau of Mines had never ruled on Claimant's application for an Exploitation Concession and MARN had yet to grant or deny Claimant's application for an Environmental Permit. Accordingly, it was entirely reasonable for Claimant to believe that the Environmental Permit was the only issue blocking Claimant from obtaining the Exploitation Concession.

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<sup>60</sup> Reply, para. 80.

<sup>61</sup> Notice of Arbitration, para. 73. Again, land surface issue had been raised well over a year before Ms. Nava's two letters at the end of 2006. Given the ambiguity of Article 37(2)(b), PRES had every reason to believe that the issue was no longer one of concern and that it had been or would be resolved in its favor.

58. Eventually, Claimant realized that the Government’s numerous delays, excuses, and failures to respond to its repeated inquiries and entreaties had been motivated by something other than bureaucracy, incompetence, inter-agency lack of communication, waffling over the proper construction of an ambiguous statutory term, or some combination of these facts.<sup>62</sup> As specifically alleged in the Notice of Arbitration, it was then that “it became clear that the Government’s delay tactics with respect to the issuance of the Enterprises’ various permits had been designed and implemented with the unlawful, discriminatory, and politically motivated aim of preventing the Enterprises’ mining operations.”<sup>63</sup> Indeed, that allegation in itself precludes Respondent’s assertion that there were – as a matter of undisputed fact – “valid” reasons to deny the application.

59. Accordingly, Respondent’s assertion that “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”<sup>64</sup> is unsupported by the record that Respondent has placed before the Tribunal. There is not a single piece of evidence – let alone evidence “produced from Claimant’s own documents” – to support that assertion. The notion that Respondent’s confidential internal communications are evidence of Claimant’s “contemporaneous actual knowledge” – or demonstrate that Claimant’s application “did not in fact comply with the land surface requirement under Salvadoran law” – would be frivolous under any circumstances. Moreover, there is *no* allegation in the Reply that the

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, paras. 48, 73.

<sup>64</sup> Reply, para. 69.

Government ever informed Claimant that there was any issue concerning the adequacy of the Final Pre-Feasibility Study.

60. Yet based on this record, Respondent asserts that Claimant (and Claimant's counsel) have attempted to "mislead" the Tribunal by "feign[ing] surprise" that Respondent is now raising these issues in this proceeding.<sup>65</sup> And, based on this record, Respondent accuses Claimant of "conscious non-compliance with the law" of El Salvador.<sup>66</sup> These are serious accusations. Respondent either failed to adequately investigate the facts before making them, or is intentionally distorting the record in order to make them. Either instance demands an award of costs and attorneys' fees to Claimant under Article 10.20.6.

61. In sum, Respondent's use of these new allegations is as unavailing for its attacks on Claimant and its counsel as it is for the issues actually before the Tribunal on Respondent's Preliminary Objection. The record (such as it is) does not remotely support them. Even if the Tribunal could consider Respondent's disputed factual assertions in the context of this proceeding, the Tribunal should properly (and resoundingly) reject them.

**B. The Proposed Mining Legislation**

62. Respondent is equally misleading in its assertion that "[i]nstead 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

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<sup>65</sup> *Id.*, paras. 4, 28.

<sup>66</sup> *Id.*, para. 169.

concession.”<sup>67</sup> Respondent asserts that Claimant, faced with the “clear” meaning of Article 37(b)(2) of the Mining Law, decided to try to amend the law. Respondent not only asks the Tribunal to accept its factual assertions as “undisputed”; it also asks the Tribunal to accept its factual assertions “[a]s an implicit acknowledgment that [Claimant’s] interpretation of the Mining Law was not supportable.”<sup>68</sup> Respondent also takes the occasion to assert that the proposed legislation had the sinister purpose of “remov[ing] the decision-making and regulatory authority from the Bureau of Mines” in order to replace it with a “new Mining Authority” represented by “private industry and the mining industry.”<sup>69</sup>

63. Once again, for Respondent to base the arguments in its Preliminary Objection on this type of factual assertions can only be explained by an intentional disregard of the plain language of Article 10.20.4. Equally troubling (if not more so) is the extent to which Respondent’s allegations are at odds with the actual facts.

64. In reality, it was the Government, not the Claimant, that initiated the efforts to amend the Mining Law. Indeed, the documents submitted by Respondent with its Reply indicate that this initiative began within MINEC. Respondent’s Exhibit 35 (which, again, Claimant never saw before Respondent submitted it with its Reply) is an internal memorandum dated 13 September 2005, apparently from an in-house MINEC lawyer, which forwarded draft

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<sup>67</sup> *Id.*, para. 97.

<sup>68</sup> *Id.*, para. 93.

<sup>69</sup> *Id.*, para. 93. In fact, the proposed legislation simply provided for a new “Autoridad Minera,” that would coordinate the permitting process among the various agencies. It was not to be placed in the hands of the “private industry” and the “mining industry,” as suggested by Respondent.

amendments to the Mining Law to the Director of the Bureau of Mines. It appears to include an attempt to clarify Article 37(b)(2) – and to do so in favor of Claimant’s interpretation.<sup>70</sup>

65. However, there is no evidence that Claimant ever saw any proposed amendments to the Mining Law until October 2005, when MINEC faxed a copy to PRES.<sup>71</sup> The October 2005 draft – not included in Respondent’s exhibits – differed in numerous respects from the September 2005 draft represented by Respondent’s Exhibit 35. The October 2005 draft proposed changes to the Mining Law that, among other things: clearly and specifically stated that for underground mining operations, a concession applicant needed to own or be authorized to use only the land where surface installations were to be constructed; and provided for indemnification to the state or third parties for any damages resulting from mining activities.<sup>72</sup>

66. Thus, while the first item was certainly helpful to Claimant (though not, in Claimant’s view, essential), the proposed amendments covered several different topics, and did not solely represent changes that would further Claimant’s interests (as depicted by Respondent in its Reply).

67. Moreover, once it became known that the Government was considering amendments to the Mining Law, Claimant sought to have its views on the amendments heard, but contrary to the suggestions of Respondent, Claimant’s proposals were hardly limited to the

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<sup>70</sup> See Letter from Bureau of Mines Director to Elí Valle with Proposed Amendments to the Mining Law of El Salvador, 13 Sept. 2005 (R-35).

<sup>71</sup> See Proposed New Mining Law of El Salvador, Oct. 2005 (C-14).

<sup>72</sup> See *id.*

surface ownership issue. Consistent with its commitment to being a socially responsible, environmentally conscious company, Claimant also offered proposals:

- to increase the royalty payments that would be paid by concessionaires to the Government;
- to add enhanced environmental rules and protections (even though such additional rules and protections would have increased Claimant's costs);
- to levy an additional tax against mining operations, with the revenues going directly to a mining division of MARN to increase the agency's ability to properly regulate the industry; and
- to establish Legacy Funds at all mining operations, which would provide millions of dollars in capital to local communities to establish new businesses once the mining resources are exhausted and the operations ceased.<sup>73</sup>

Thus, the proposed amendments were far-reaching and reflected the views of Claimant as well as numerous other interested parties. Nor were they designed simply to benefit the Mining Industry at the expense of the Salvadoran people, as Respondent gratuitously tries to depict the proposals in its Reply.<sup>74</sup>

68. Here too, Respondent's factual assertions and accusations are entirely inappropriate in the context of its Preliminary Objection. Even in the context of a merits

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<sup>73</sup> Letter from Mr. Tom Shrake to Ms. Yolanda de Gavidia, 13 June 2006 (C-15).

<sup>74</sup> A number of Respondent's other assertions concerning the proposed legislation are also false, as Claimant will demonstrate, if necessary, at the appropriate time.

proceeding, they would stretch (if not breach) the limits of acceptable zealous advocacy. In a Preliminary Objection under Article 10.20.4, they are plainly frivolous.

### **III. THE STANDARD OF REVIEW FOR A PRELIMINARY OBJECTION UNDER CAFTA ARTICLE 10.20.4 (REPRISAL)**

69. The preceding rebuttal of Respondent's factual allegations and accusations would not have been necessary had Respondent adhered to the standards for a preliminary objection as set forth in CAFTA Article 10.20.4.<sup>75</sup>

70. Despite two rounds of briefing, Respondent has still failed to state *any* coherent standard of review for its Preliminary Objection under CAFTA Article 10.20.4. Nor could Respondent articulate a reasonable or coherent standard, given the extent to which its myriad factual allegations disregard the plain language of Article 10.20.4.

71. Given the multitude of factual assertions that pervade Respondent's Preliminary Objection, it is easy to lose sight of the actual standard, which must of course be based on the language of the treaty. Accordingly, Claimant will begin by again summarizing the proper standard of review for a preliminary objection under CAFTA Article 10.20.4, based on the applicable treaty language, and taking into account the arguments that Respondent has made on this issue in its Reply. Claimant will then briefly address Respondent's confusing and irrelevant discussion of U.S. dispositive motions practice.

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<sup>75</sup> Indeed, it is less than clear that Claimant is required to respond to them at all. For the reasons set forth in the preceding section, however, Claimant hopes the Tribunal will understand why it felt compelled to do so.

**A. The Standard of Review Based on the Text of the Treaty**

72. It is telling that Respondent never addresses in any substantive manner the applicable language of Article 10.20.4. Again, that language is:

[A] tribunal shall address and decide as a preliminary question any objection by the respondent that, *as a matter of law*, a claim submitted is not a claim for which an award in favor of the claimant *may* be made under Article 10.26.

\* \* \*

- (c) In deciding an objection under this paragraph, the tribunal *shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration* (or any amendment thereof) . . . . The tribunal may also consider any relevant facts *not in dispute*.<sup>76</sup>

73. Respondent never even tries to give meaning to any of these terms (whether by themselves or in the context of the treaty’s other provisions). Instead, Respondent merely attempts to maneuver its factual assertions around the plain language of Article 10.20.4. Respondent’s efforts fail at every turn.

**1. “As a Matter of Law”; Taking Claimant’s Factual Allegations as True; Consideration of Facts “Not in Dispute”**

74. To begin with, Respondent never addresses the meaning of the phrase “as a matter of law,” other than to assert that, whatever it means, it does not require that an objection be decided “*in the absence of facts*.”<sup>77</sup> Insofar as it goes, that assertion is not inaccurate. As stated by the tribunal in *Trans-Global Petroleum v. Jordan*, “it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is

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<sup>76</sup> United States – Dominican Republic – Central American Free Trade Agreement (“CAFTA”), Article 10.20.4, 5 Aug. 2004, 43 I.L.M. 514 (2004) (RL-1) (emphasis added).

<sup>77</sup> Reply, para. 38 (emphasis in original).

advanced.”<sup>78</sup> A tribunal cannot determine, for example, if a limitations period has expired, without knowing the date of the alleged violation.

75. But examining the *factual premise* upon which a claim is based – in order to assess the legal merits of the claim – is entirely different from examining the *factual merits* of a claim. As recognized by the *Trans-Global* tribunal, the determination of an issue *as a matter of law* means that “the tribunal is not concerned, *per se*, with the factual merits of the Claimant’s . . . claims.”<sup>79</sup> An objection under Article 10.20.4 is meant to test whether, as a matter of law, the claim – taking its factual basis as true – “is not a claim for which an award in favor of the claimant may be made . . . .” If an argument under Article 10.20.4 turns on any disputed issue of fact, then the objection must fail. Accordingly, as stated in Claimant’s Response, any review of facts must necessarily be extremely limited.

76. Article 10.20.4(c) – the same paragraph providing that “[t]he tribunal may also consider any relevant facts *not in dispute*” – begins by requiring that the tribunal “*shall assume to be true* claimant’s factual allegations in support of any claim in the notice of arbitration.”<sup>80</sup> There is no plausible reading of those words that would suggest that a tribunal could consider anything other than (1) the facts as pled by the claimant and (2) facts that are “not in dispute.”<sup>81</sup>

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<sup>78</sup> *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, (Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008), para. 97 (“*Trans-Global*”) (RL-5).

<sup>79</sup> *Id.*

<sup>80</sup> CAFTA, Article 10.20.4(c) (RL-1) (emphasis added).

<sup>81</sup> Of course, an allegation by Claimant is sufficient to put a fact in dispute. The Tribunal’s role at this juncture is not to determine if a fact is properly disputed.

77. Thus, in determining issues as a matter of law, the Tribunal must winnow out all but the factual allegations pled by Claimant and such facts that are plainly undisputed. There is no room, as suggested by Respondent, for any “review of other relevant facts”<sup>82</sup> – let alone the far-reaching review proposed by Respondent in its Preliminary Objection. Respondent’s notion that the Tribunal should make determinations of disputed facts in this expedited procedure – apparently to resolve those disputed facts (and thereby render them “undisputed”) – finds no support in the text of CAFTA.

78. The *Trans-Global* tribunal, in ruling on an objection made under ICSID Arbitration Rule 41(5), held that the review of disputed facts in an objection on “legal merit” is extremely limited.<sup>83</sup> Rule 41(5) simply provides that “a party may . . . file an objection that a claim is manifestly without legal merit.” The rule does not contain the more detailed language of CAFTA Article 10.20.4 (or anything like it), requiring the tribunal to limit its consideration of factual matters to the factual allegations of the claimant, taken as true, and any facts not in dispute. Nonetheless, given that objections under Rule 41(5) are meant to dispose of claims that are “manifestly without legal merit,” the *Trans-Global* tribunal recognized that its review of factual issues was necessarily quite limited:

[T]he Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made

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<sup>82</sup> Reply, para. 38 (citing *Trans-Global*, para. 105 (RL-5)).

<sup>83</sup> See Response, para. 85; See *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3 (Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules dated 2 Feb. 2009), paras. 59-61, 70, 73 (“*Brandes*”)(CL-12 (excerpts), RL-15 (full decision)).

in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation. ***The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.***<sup>84</sup>

79. Similarly, the tribunal in *Brandes v. Venezuela*, in ruling on an objection under ICSID Arbitration Rule 41(5), had no difficulty in determining that an objection based on legal merit involves an extremely limited review of facts.<sup>85</sup> According to the *Brandes* tribunal:

***[T]he factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed.***<sup>86</sup>

In short, in deciding an objection as to “legal merit” or as a “matter of law,” a tribunal is not supposed to resolve the parties’ disputed factual allegations. Its review of factual matters must be very limited.

80. While Respondent appears to dispute this proposition (albeit without basis or explanation), it also tries hard in its Reply to cast its Preliminary Objection as involving “purely legal issues.”<sup>87</sup> Respondent’s description of its arguments as “purely legal,” however, does not withstand scrutiny – and not only because its arguments concerning Salvadoran law must be considered as issues of fact in the context of this proceeding.<sup>88</sup>

81. To rule in Respondent’s favor on its main argument (*i.e.*, that Claimant could not have received an exploitation concession for the El Dorado site because of the application’s

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<sup>84</sup> *Trans-Global*, para. 105 (RL-5) (emphasis added).

<sup>85</sup> *Brandes*, para. 61 (CL-12 (excerpts), RL-15 (full decision)).

<sup>86</sup> *Id.*, para. 61 (CL-12 (excerpts), RL-15 (full decision)) (emphasis added).

<sup>87</sup> Reply, para. 19.

<sup>88</sup> See Discussion *infra* at IV.A; see also Response, paras 127-29.

alleged deficiencies), the Tribunal would have to make, *inter alia*, the following factual determinations:

- that the Bureau of Mines definitively concluded that El Salvador’s Mining Law required Claimant to own or be authorized to use all of the land surface overlaying its proposed exploitation concession area; *and*
- that the Bureau of Mines would have denied Claimant’s entire application on this ground, if the Bureau had ever ruled on it; *and*
- the Minister of Economy would have affirmed that denial, if the Minister had ever ruled on it; *and*
- that the Supreme Court of El Salvador would have affirmed that denial, if it had ever ruled on it; *and*
- that Claimant could not have “cured” this “defect” by, for example, reducing the size of the concession area to the areas where Claimant did own the land surface, or obtaining ownership of or authorization to use additional land surface; *and*
- that the Bureau of Mines believed that the “Final Pre-Feasibility Study” submitted by Claimant did not meet the requirements for an *Estudio de Factibilidad Técnico Económico* under El Salvador’s Mining Law; *and*
- that the Bureau of Mines would have denied Claimant’s application on this ground, if the Bureau had ever ruled on it; *and*
- that the Minister of Economy would have affirmed that denial, if the Minister had ever ruled on it; *and*
- that the Supreme Court of El Salvador would have affirmed that denial, if had ever ruled on it; *and*
- that Claimant could not have “cured” this “defect”; *and*
- that none of the Government’s actions were influenced by its decision to impose a *de facto* ban on all metallic mining in the country.

82. Claimant respectfully submits that the Tribunal should not and can not attempt to make such factual determinations in the context of this Preliminary Objection. (Nor, Claimant

submits, will the record support any such factual findings when this case reaches the merits phase.)

83. In sum, Respondent’s many factual assertions – nearly all of which are disputed by Claimant – are entirely improper in the context of this proceeding. Respondent’s notion that the Tribunal’s review of factual matters should be anything other than “extremely limited” in the context of a preliminary objection under Article 10.20.4 is baseless.

**2. “Not a Claim for Which an Award in Favor of the Claimant May Be Made Under Article 10.26.”**

84. A preliminary objection under Article 10.20.4 is (or at least is supposed to be) an “objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant *may* be made under Article 10.26.” Here, too, Respondent makes no effort to construe this provision based on its actual language.

85. Claimant’s Response provided a plain-language construction of this provision. Assuming the facts pled by a claimant as true, the question is whether a claim is “not a claim for which an award in favor of the claimant *may* be made.” The combination of the negative (“not” a claim) with the word “may” (expressing possibility) connotes an award that is not possible (*i.e.*, impossible) as a matter of law. Based on this language, a preliminary objection based on Article 10.26.4 can be successful only with respect to a claim that, even assuming all of the facts to be true, is legally impossible (*i.e.*, “not a claim on which an award in favor of the claimant may be made” as a matter of law).

86. In its Reply, Respondent asserts that Claimant’s textual analysis is “faulty and insufficient to reach such conclusion,”<sup>89</sup> but provides no explanation – none whatsoever – for that assertion. Respondent offers no analysis (textual or otherwise) of its own. As is so often the case throughout its two submissions, Respondent offers many adjectives and conclusory assertions, but little or no substance to support them.

87. Respondent further asserts that “[e]ven the authorities Claimant cites do not support Claimant’s argument”<sup>90</sup> – but provides no support for that assertion either. Given that this is apparently the first time that an objection had been made under Article 10.20.4, Claimant’s argument was based almost entirely on the text of the treaty.

88. Indeed, it was Respondent that, in its opening submission, stated that CAFTA’s expedited preliminary objections procedure was designed to dispose of “frivolous” claims in a manner similar to that employed by U.S. courts.<sup>91</sup> As stated in Claimant’s Response, the treaty language at issue is unambiguous; moreover, there are no available *travaux preparatoires* which might otherwise be used as a supplementary means of interpretation.<sup>92</sup> However, it is at least worth observing that U.S. courts have defined “frivolous” in a manner that is very close to the standard articulated in Article 10.20.4, *i.e.*, one of legal impossibility. Thus, the U.S. court standards cited by Claimant include formulations such the following:

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<sup>89</sup> Reply, para. 23.

<sup>90</sup> *Id.*

<sup>91</sup> *See* Preliminary Objection, para. 24.

<sup>92</sup> Response, para. 75.

- “lack[ing] even an arguable basis in law”;<sup>93</sup>
- “it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands”;<sup>94</sup> and
- a claim involving “legal points not arguable on their merits” or “those whose disposition is obvious.”<sup>95</sup>

89. Similarly, the motion made in *Methanex Corporation v. United States* – which, as suggested by Respondent’s own authority, was a model for the expedited preliminary objection procedures contained in many of the United States’ investment treaties (including CAFTA)<sup>96</sup> – sought a determination that even on Methanex’s alleged facts, there could “*never*” be a breach of the treaty provisions.<sup>97</sup>

90. Whether it should be called “legal impossibility” or something else, the standard articulated by all of these authorities seems to be very close, if not identical, to the plain-language meaning of Article 10.20.4: *i.e.*, even taking claimant’s allegations as true, it would be impossible as a matter of law to reach a decision in claimant’s favor.

91. Respondent also takes issue with Claimant’s assertion that the standard of Article 10.20.4 is similar to the “manifestly without legal merit” standard of ICSID Arbitration Rule

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<sup>93</sup> *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 328 (1989) (CL-27)).

<sup>94</sup> *Id.* (quoting *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) (CL-23)).

<sup>95</sup> *Id.* (quoting *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000-01 (Fed Cir. 1987) (internal citations omitted) (CL-17)).

<sup>96</sup> *See id.*, para. 77 (citing Andrea J. Menaker, *Benefiting from Recent Experience: Developments in the United States’ Most Recent Investment Agreements*, 12 U.C. DAVIS J. OF INT’L LAW & POLICY 121, 127 (2005) (RL-4)).

<sup>97</sup> *Methanex Corp. v. United States*, Ad hoc – UNCITRAL Arbitration Rules, IIC 166, (Partial Award dated 7 Aug. 2002) (CL-25).

41(5).<sup>98</sup> Respondent relies on the decision in *Brandes v. Venezuela*, where the tribunal held that the inclusion of the word “manifestly” makes the standard for granting a preliminary objection under ICSID Arbitration Rule 41(5) much higher than under ICSID Arbitration Rule 41(1).<sup>99</sup> Respondent argues that CAFTA Article 10.20.4 is more akin to ICSID Arbitration Rule 41(1) than to ICSID Arbitration Rule 41(5).<sup>100</sup>

92. Here, too, Respondent’s argument cannot be reconciled with the text of the applicable provisions. Arbitration Rule 41(1) provides:

Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.<sup>101</sup>

In contrast to CAFTA Article 10.20.4, there is no language in Arbitration Rule 41(1) stating that the facts alleged by the claimant must be taken as true; that the tribunal may consider only facts that are “undisputed”; or that the standard is whether, as a matter of law and taking claimant’s allegations as true, the claim is not one on which an award in favor of the claimant “may” be made. Indeed, as this Tribunal is well aware, objections made under Arbitration Rule 41(1) often

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<sup>98</sup> Reply, paras. 14-15.

<sup>99</sup> *Id.*, para. 15 (citing *Brandes*, para. 62 (CL-12 (excerpts), RL-15 (full decision))).

<sup>100</sup> *Id.*

<sup>101</sup> ICSID Arbitration Rule 41(1).

involve full-blown evidentiary proceedings, which – when bifurcated from the merits – can take years to be resolved.<sup>102</sup>

93. As stated by the tribunal in *Trans-Global*, the ordinary meaning of the term “manifest” is “palpable” or “obvious,” and has been interpreted by ICSID tribunals in other contexts to mean “self-evident,” “clear,” “plain on its face,” or “certain.”<sup>103</sup> All of those words apply with equal force to the standard set forth in Article 10.20.4 – *i.e.*, a standard by which a claim may be denied only if, as a matter of law and taking the claimant’s factual allegations as true, the claim is “not a claim for which an award in favor of the claimant may be made . . . .”<sup>104</sup> Under that standard, a claim may be denied only if – taking claimant’s allegations as true – it is manifest (or “obvious,” “clear,” “plain on its face,” or “certain”) that the claim cannot sustain an award in the claimant’s favor.

94. That “[t]he respondent does not waive any objection as to competence or any argument on the merits because the respondent did or did not raise an objection under [Article 10.20.4] or make use of the expedited procedure set out in [Article 10.20.5]” underscores the level of certainty required for sustaining a preliminary objection in this proceeding.<sup>105</sup> If Respondent does not succeed in this Preliminary Objection, it does “not waive any objection as to competence or any argument on the merits merely because” it has raised an objection under Article 10.20.4 and/or Article 10.20.5. By contrast, if Respondent does succeed in this

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<sup>102</sup> See generally Anthony Sinclair, *ICSID Arbitration: How Long Does It Take?*, 4 GLOBAL ARB. REV. 1, 26 Oct. 2009 (“Sinclair”) (CL- 60).

<sup>103</sup> *Trans-Global*, paras. 83-84 (RL-5).

<sup>104</sup> CAFTA, Article 10.20.4 (RL-1).

<sup>105</sup> *Id.*

Preliminary Objection, a substantial portion of Claimant’s case could be over. Therefore, successful objections under Article 10.20.4 are reserved – and can only be reserved – for claims that are frivolous, *i.e.*, manifestly lacking in legal merit.

95. Finally, Respondent goes to great lengths to argue that the 180-day time period in which a preliminary injunction must be decided under Article 10.20.5 somehow changes the textual standard set forth in Article 10.20.4. As stated by Claimant in its Response, the standard is governed by the language of the applicable provision, not the time frames allowed for certain procedures.<sup>106</sup> Nonetheless, as Claimant observed in its Response, the time frame for briefing and preparing the Preliminary Objection for hearing in this case is not, when compared to other ICSID cases, significantly different than the time frame utilized for those same tasks in *Trans-Global*, which, again, was a case decided under ICSID Arbitration Rule 41(5).<sup>107</sup> (The time frame for those tasks was 52 days in *Trans-Global* as compared to 114 days in this case.)<sup>108</sup> Both under ICSID Arbitration Rule 41(5) and CAFTA Article 10.20.5, the time frame is extremely compressed compared to what is typical for briefing and convening a hearing involving substantive issues in investor-state arbitration.<sup>109</sup>

96. In its Reply, Respondent addresses instead the overall time frame for deciding the preliminary objection, *i.e.*, from the filing of the objection to the date of the decision.<sup>110</sup> But the

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<sup>106</sup> Response, para. 94.

<sup>107</sup> *Id.*, para. 95.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (citing *Trans-Global*, para. 92 (RL-5)).

<sup>110</sup> Reply, para. 18.

point is not how much time is needed (or allowed) to decide the preliminary objection, but how much time Claimant has to complete briefing and prepare for a hearing on a preliminary objection that purports to be capable of disposing of most of Claimant’s case in a matter of months. Claimant is of course sympathetic to the severe time limits under which the Tribunal must issue its decision under Article 10.20.5. However, the argument in Claimant’s Response focused on the short amount of time given to Claimant to oppose a preliminary objection that could have dire consequences for its case, while posing almost no risk to Respondent (except for an award of costs and attorney’s fees under Article 10.20.6). But even using Respondent’s measure does not change the analysis. Given that the *average* case at ICSID takes more than three years to decide,<sup>111</sup> the time frames for briefing, preparing for hearing, *and* rendering a decision under ICSID Arbitration Rule 41(5) or CAFTA Article 10.20.5 are extremely accelerated, and do not allow for the type of full-fledged determination of facts that Respondent is asking this Tribunal to perform. (Indeed, it often takes ICSID about 100 days simply to *register* a case.<sup>112</sup>)

97. At least in terms of formulating its argument in its Reply, Respondent has retreated somewhat from the assertion in its opening submission that the CAFTA expedited procedure “contemplates a more thorough analysis of the *facts* and the law by the Tribunal to assure the viability of claims than the procedures under ICSID Arbitration Rule 41(5).”<sup>113</sup> Now

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<sup>111</sup> See Sinclair at 1 (CL-60).

<sup>112</sup> See *id.* at 2.

<sup>113</sup> Preliminary Objection, para. 32 (emphasis added).

Respondent states that the CAFTA expedited procedure “contemplates a more thorough analysis of the viability of *claims* than the expedited ICSID Arbitration Rule 41(5) procedure.”<sup>114</sup>

98. But here too, Respondent’s assertion that “a more thorough analysis” of the “claims” is required under Article 10.20.4 than under Rule 41(5) is not based on any meaningful analysis of the text of the treaty. Moreover, regardless of how Respondent characterizes its arguments, the reality is that Respondent devotes the majority of its Preliminary Objection to assailing the factual allegations set forth in the Notice of Arbitration. Its assault is made not with legal arguments, but with legions of its own factual allegations, supported by over 50 exhibits comprising nearly 800 pages. There is no question that – as stated in its opening submission – Respondent is asking this Tribunal for a “thorough analysis of the *facts*,” underlying Claimant’s claims. There is also no question that, in the context of a preliminary objection that is limited to the Claimant’s factual allegations taken as true, and any facts that are not in dispute, Respondent’s factual arguments are manifestly inappropriate. (As Claimant will demonstrate at the appropriate time, to the extent it is not already evident, Respondent’s factual arguments are also frivolous on the merits, but that is not of course an issue that the Tribunal needs to address at this time.<sup>115</sup>)

99. In sum, Respondent has provided no credible or coherent standard by which its fact-based arguments – purportedly made under Article 10.20.4 – could be decided or even

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<sup>114</sup> Reply, para. 16 (emphasis added).

<sup>115</sup> However, as discussed *infra* at Section VIII, the Tribunal will need to decide whether Respondent’s Preliminary Objection is frivolous when made in the context of Article 10.20.4, and will need to do so when it renders its decision on Respondent’s Preliminary Objection, to determine whether Claimant is entitled to its costs and attorney’s fees for this phase of the proceedings. *See* CAFTA, Article 10.20.6 (RL-1).

considered by the Tribunal in the context of Respondent’s Preliminary Objection. Indeed, Respondent’s fact-based arguments do not fit within any standard that is remotely based on the text of Article 10.20.4. The Tribunal should therefore reject those arguments as frivolous, *i.e.*, manifestly lacking in legal merit.

**B. Respondent’s Arguments Based on U.S. Dispositive Motions Are Confused and Irrelevant**

100. In its opening submission, Respondent asserted that “[t]he CAFTA expedited procedure for making Preliminary Objections was drafted to allow an arbitral Tribunal to dispose of *frivolous* claims . . . on an expedited basis,” and are “similar to those used in U.S. courts to dispose quickly of *frivolous* claims.”<sup>116</sup>

101. In its Response, Claimant observed that the treaty terms at issue here are plain and unambiguous, obviating any need to consider any supplementary means of interpretation.<sup>117</sup> Nonetheless, Claimant noted that “in considering the authorities discussed by Respondent and included with its Preliminary Objection, it is worth observing that the definition of ‘frivolous’ under U.S. law is entirely consonant with that of legal impossibility.”<sup>118</sup> Claimant devoted a single paragraph of its Response to that discussion.<sup>119</sup>

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<sup>116</sup> Preliminary Objection, para. 24 (emphasis added) (quoting Message from the President of the United States Transmitting Legislation and Supporting Documents to Implement the Dominican Republic – Central America – United States Free Trade Agreement, 23 June 2005, at 1085 (excerpts) (RL-3)).

<sup>117</sup> Response, para. 75.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* Given the limited purpose for which Claimant cited these cases, Respondent’s efforts to distinguish them on the facts (Reply, para. 29) is strange as well as unavailing.

102. In its Reply, Respondent at least acknowledges “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.”<sup>120</sup> Nonetheless, Respondent purports to describe the U.S. “procedural practice” (and to do so at length) because, according to Respondent, “the practice of the courts of the United States has been mentioned as the foundation for CAFTA Article 10.20.4,” and because “Claimant has inaccurately suggested that the practice in United States courts is to dispose of claims only if they are ‘legally impossible.’”<sup>121</sup>

103. Once again, Respondent’s assertions are nothing if not misleading. There are a number of different types of motions, each with different standards, in U.S. dispositive motions practice. No one (other than Respondent) has ever suggested that “the practice of the courts of the United States” – broadly stated – is “the foundation for CAFTA Article 10.20.4.” Nor did Claimant ever suggest that the practice in U.S. courts is to dispose of claims only if they are legally impossible. Claimant’s observations were limited to the practice in U.S. courts for disposing of “*frivolous* claims” – *i.e.*, claims that lack “even an arguable basis in law”<sup>122</sup> – as that was the type of motion explicitly referred to in Respondent’s opening submission. Motions to dispose of frivolous claims are typically made under Federal Rule of Civil Procedure 12.

104. In its Reply, Respondent expands the discussion to include motions under Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 56. Although one would

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<sup>120</sup> Reply, para. 27.

<sup>121</sup> *Id.*, para. 27 (citing Preliminary Objection, para. 24; Response, para. 74).

<sup>122</sup> *Neitzke v. Williams*, 490 U.S. 319, 328 (1989) (CL-27).

not know it from reading Respondent’s Reply, these are two very different types of motions. The first is necessarily used at the outset of the case; the second is typically used toward the end.

105. Federal Rule of Civil Procedure 12(b)(6) provides for a motion to dismiss a case at its outset for “failure to state a claim upon which relief can be granted[.]”<sup>123</sup> In ruling on a Rule 12(b)(6) motion, the court must proceed “on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”<sup>124</sup> “Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations.”<sup>125</sup> A Rule 12(b)(6) motion must be granted “if as a matter of law ‘it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. . . .’”<sup>126</sup> Where a complaint is dismissed under Rule 12(b)(6) for failure to plead adequate facts, leave to amend is freely given.<sup>127</sup>

106. The standards for a Rule 12(b)(6) motion bear some resemblance to those under Article 10.20.4. But Respondent takes a considerable leap when it casually observes that Rule 12(d) provides that “[i]f, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary

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<sup>123</sup> FED. R. CIV. P. 12(b)(6) (2008) (RL-23). The cases cited in the Reply (and which Respondent criticizes Claimant for “fail[ing] to cite”) – *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (RL-18), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (RL-19) – involved Rule 12(b)(6) motions and did *not* involve any frivolous conduct on the part of any of the parties.

<sup>124</sup> *Twombly*, at 555 (RL-19).

<sup>125</sup> *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (CL-27).

<sup>126</sup> *Id.* (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

<sup>127</sup> “[L]eave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim.” 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004) (footnotes omitted) (CL-65).

judgment under Rule 56.”<sup>128</sup> Respondent goes on to assert that converting a motion to dismiss into one for summary judgment allows the court to consider “extrinsic evidence” and allows the parties to “contest . . . evidence by submitting material that controverts it.”<sup>129</sup> Respondent argues further that because CAFTA Article 10.20.4(c) specifically states that “[t]he tribunal may . . . consider any relevant facts not in dispute[,] . . . the CAFTA procedure allows for broader consideration of extrinsic material than the motion to dismiss, more similar to a motion for summary judgment” under Rule 56.<sup>130</sup>

107. Yet Respondent never bothers to inform the Tribunal of the actual standard for summary judgment, or how it is typically used in practice. Rule 56(c)(2) provides that summary judgment “should be rendered 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.”<sup>131</sup> Thus, summary judgment is sparingly granted, and when it is, there has almost always been extensive taking of evidence under the U.S. discovery rules (including, for example, depositions by oral testimony and written responses to interrogatories, document requests, and requests for admission). As Respondent’s own authority states regarding the conversion of a Rule 12(b)(6) motion to one under Rule 56:

Because of the required early timing of a Rule 12(b)(6) motion, the option of converting it a Rule 56 summary judgment motion *tends to have limited utility*. Whenever discovery may be

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<sup>128</sup> Reply, para. 44 (quoting FED. R. CIV. P. 12(d) (RL-23)).

<sup>129</sup> *Id.*, para. 44 (quoting JAMES WM. MOORE ET AL., FEDERAL PRACTICE, § 12.34[3][a] at 12-92 (RL-22)).

<sup>130</sup> *Id.*, para. 45.

<sup>131</sup> FED. R. CIV. P. 56(c)(2) (2008) (RL-23).

needed to determine whether the matters advanced by the movant outside of the pleadings may present genuine issues of material fact (thus precluding summary judgment), Rule 56(f) comes into play.<sup>132]</sup> ***That in turn will likely lead to delays, and often the need for considerable fleshing out of the facts of the case, contrary to the notion of the threshold presentation and disposition of motions to dismiss.***

Courts tend to use the conversion option only in situations in which the materials extrinsic to the pleadings ***are incontrovertible and pose discrete and dispositive issues.***<sup>133</sup>

108. Even if the drafters of Article 10.20.4 borrowed concepts from different types of U.S. motions (or, for that matter, motions employed in other legal systems), the text of Article 10.20.4 must of course be interpreted according to its own terms. Those terms differ – significantly, in many respects – from the Federal Rules cited by Respondent, as demonstrated above. Thus, Respondent’s summary of U.S. motions practice is irrelevant. Its attempt to analogize a preliminary objection under Article 10.20.4 to a U.S. summary judgment motion finds no support in any of the principles used for the proper interpretation of treaties.

109. In sum, notwithstanding Respondent’s extensive efforts to twist and distort the standard under which its Preliminary Objection under Article 10.20.4 must be decided, the standard is perfectly clear based on the plain words of the treaty: Claimant’s claims must be so palpably without merit that, as a matter of law, they could not possibly be claims on which an award may be made, even assuming all of Claimant’s allegations to be true. Respondent, having tried hard to evade that standard, has naturally come nowhere close to meeting it.

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<sup>132</sup> Rule 56(f)(2) provides that a court may allow continuance of a summary judgment motion for obtaining affidavits, depositions, or other discovery. FED. R. CIV. P. 56(f)(2) (RL-23).

<sup>133</sup> MOORE ET AL., § 12.34[3][a] at 12-93 (RL-22) (emphasis added).

**IV. RESPONDENT’S ARGUMENTS ON SALVADORAN LAW ARE INAPPROPRIATE IN THE CONTEXT OF ITS PRELIMINARY OBJECTION AND UNAVAILABLE UNDER ANY CIRCUMSTANCES**

110. Respondent seeks to dispose of most of Claimant’s case based on two propositions concerning El Salvador’s Mining Law, which, according to Respondent, this Tribunal should decide “as a matter of law” within the context of its Preliminary Objection under Article 10.20.4. *First*, Respondent asks the Tribunal to conclude, as a matter of law, that El Salvador’s Mining Law requires an applicant for an underground mine to demonstrate that it owns or is authorized to use the entire surface overlaying the concession area in order to obtain an exploitation concession. *Second*, Respondent asks the Tribunal to conclude, as a matter of law, that the *Estudio de Factibilidad Técnico Económico*, or “feasibility study” included with Claimant’s application, did not meet the requirements of the feasibility study contemplated under El Salvador’s Mining Law.

111. As set forth above and in Claimant’s Response, even assuming *arguendo* that the Tribunal could decide these issues of Salvadoran law in the context of this Preliminary Objection – and could decide them in Respondent’s favor – such decision would not dispose of Claimant’s claims concerning the El Dorado site. Among other things, the Tribunal would also have to conclude, as a matter of law, that Respondent gave adequate notice of these alleged defects to Claimant, that Claimant was afforded an opportunity to cure them, and that Claimant – having been afforded that opportunity – was unable to cure them.<sup>134</sup> Such conclusions of law cannot be

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<sup>134</sup> Contrary to Respondent’s assertion, if Respondent had ever issued a Resolution denying Claimant’s application and if the Minister of Economy and the Supreme Court of El Salvador had affirmed that determination, Claimant would be able to cure the defect by, for example, reducing the size of the concession area, and/or obtaining ownership of or authorization to use additional land surface.

made based on the facts of this case, and are certainly not supported by the record now before the Tribunal.<sup>135</sup> But given that Respondent continues to press and elaborate on these two arguments concerning the Mining Law in its Reply, we will address them here.

112. The main argument set forth by the Reply is that Respondent is entitled to declare to the Tribunal what the law of El Salvador is, and that the Tribunal should simply accept its declaration as “undisputed” and apply it “as a matter of law” under Article 10.20.4. Thus, with respect to the surface ownership requirement, Respondent asserts:

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.<sup>136</sup>

113. Similarly, although the Mining Law and its Regulations provide no guidance as to what an *Estudio de Factibilidad Técnico Económico* must contain, Respondent’s Reply asserts a host of reasons as to why Respondent now believes Claimant’s submission to be “insufficient” (even though those reasons were never articulated to Claimant and are without merit in any event).<sup>137</sup> Respondent tells the Tribunal that it should also accept these assertions as an “undisputed” matter of Salvadoran law, and apply them as a matter of law under Article 10.20.4.

114. Respondent’s arguments concerning these two issues under the Salvadoran Mining Law are unavailing for three basic reasons (though the Tribunal need not go beyond the first): (1) the Tribunal cannot decide these questions of Salvadoran Mining Law at this

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<sup>135</sup> Such issues are governed not merely by Salvadoran law, but also by international law, as El Salvador explicitly agreed to be bound by international law in ratifying CAFTA.

<sup>136</sup> Reply, para. 99.

<sup>137</sup> *Id.*, para. 125-171.

preliminary phase of the case; (2) Respondent cannot be viewed as the authority on the meaning of relevant provisions of Salvadoran law for the purpose of determining its own liability; and (3) Respondent's assertions on these two questions of Salvadoran Mining Law are simply wrong as a matter of Salvadoran law. We explain these reasons in turn.

**A. These Two Issues of Salvadoran Mining Law Cannot Be Decided as a Matter of International Law in a Preliminary Objection under Article 10.20.4**

115. Respondent's Preliminary Objection under Article 10.20.4 is directed to Claimant's claims under Article 10.16.1(b)(i)(A). CAFTA Article 10.22.1 provides that "when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), a tribunal shall decide the issues in dispute in accordance with this Agreement [*i.e.*, CAFTA] *and applicable rules of international law.*"<sup>138</sup>

116. Respondent does not dispute that the overwhelming weight of authority provides that, as a matter of international law, municipal law questions are treated as questions of fact. Indeed, Claimant cited numerous authorities in support of that principle – including the PCIJ case quoted in Claimant's Response – as well as many of the leading scholars on international law.

117. Thus, according to Professor Amerasinghe:

The principle that the tribunal is deemed to know the law applies only in respect of the law of the legal system of which the tribunal is an organ, *i.e.* public international law.

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<sup>138</sup> CAFTA, Article 10.22.1 (RL-1) (emphasis added).

In short, national laws are treated as facts, which are subject to proof in the same way as any other fact. In the *George W. Cook Case* the tribunal, while agreeing with the views of the ICJ in the *Brazilian Loans Case*, went further, stating that “just as when a foreign law is invoked before a domestic court it must be proved as matters of fact, so domestic law must be proved before an international tribunal – although not necessarily in the form in which proof is made before domestic tribunals, and that an international tribunal receives evidence of the law furnished it by the parties and may itself undertake researches[.]”<sup>139</sup>

118. Similarly, Professor Bin Cheng also relied on the *Brazilian Loans Case* in concluding that “[t]he principle [of *jura novit curia*] . . . applies only to the law of which the Tribunal is the organ,” and does not apply to questions of municipal law.<sup>140</sup> “Indeed,” Professor Cheng wrote,

“[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States.”

They are treated as facts which have to be proved like any other fact.<sup>141</sup>

119. As stated by these authorities, the rationale underlying this principle is that international tribunals are expected to be experts in international law; they are not generally expected to be conversant in the municipal laws of multiple nations.

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<sup>139</sup> CHITTHARANJAN F. AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 53-54 (2005) (citing *Heim et Chamant Case*, 3 Trib. Arb. Mixtes 50, 55 (Fr. – Ger. 1922) and quoting *George W. Cook Case (U.S. v. Mex.)*, 4 R.I.A.A. 661, 663 (1930)) (CL-31); see also *Payment in Gold of Brazilian Fed. Loans Contracted in Fr.*, 1929 P.C.I.J. (series A) Nos. 20/21, at 124 (12 Jul. 1929) (C-13).

<sup>140</sup> BIN CHENG, GENERAL PRINCIPLES LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 300-301 (1953) (“BIN CHENG”) (CL-35).

<sup>141</sup> *Id.* (quoting *German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, at 19 (25 May) (CL-19)).

120. There is no question that international tribunals are often called upon to *apply* municipal law in deciding matters of international law. In the words of Professor Crawford:

In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.<sup>142</sup>

But that does not mean that international tribunals are *deciding* questions of municipal law as a “matter of law” – and certainly not as a matter of international law, which is the applicable law here.

121. As stated by the PCIJ in the *Serbian Loans* case cited by Respondent, although the PCIJ had to *apply* municipal law in that case, it was not *deciding* municipal law questions as a matter of law. According to the PCIJ in that case:

For the Court itself to undertake its own construction of municipal law, leaving on the one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. . . . *It is French legislation, as applied in France, which really constitutes French law . . . .*

In these circumstances, the Court will confine itself to observing that, *according to the information furnished by the Parties*, the doctrine of French courts, after some oscillation, has now been established in the manner indicated by the French Government . . . .<sup>143</sup>

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<sup>142</sup> JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 89 (2002) (CL-36).

<sup>143</sup> *Case Concerning the Payment of Various Serbian Loans Issued in France* (Fr. v. Serb.), 1929 P.C.I.J. (ser. A), Nos. 20/21, at 46-47 (12 July) (“*Serbian Loans*”) (RL-24).

122. Thus, when an international tribunal is called upon to apply questions of municipal law, the parties typically (if not invariably) “furnish” information to the tribunal, usually in the form of expert opinions, interpretative materials, and other evidence. The parties must *prove* municipal law to the Tribunal. In particular, the State party cannot simply “declare” what the law is and expect the Tribunal to accept its declaration.

123. In this case, the issues of municipal law are novel. Unlike the *Serbian Loans* case, these issues of law have not been “established” by the municipal courts. To the contrary, they are provisions of a relatively new law that have never been the subject of any interpretation by any Salvadoran authority, other than the several pieces of internal executive-branch correspondence that Respondent has provided with its Reply (which addressed only the land surface issue, not the feasibility study). They have never been applied or interpreted in the context of an actual administrative proceeding, let alone addressed by a Salvadoran court. Even assuming *arguendo* that the Tribunal could consider these issues as something other than questions of fact, it is impossible to see how the Tribunal could, as a practical matter, resolve them “as a matter of law” in the context of this Preliminary Objection, based on the current record before it.<sup>144</sup>

124. Respondent cites several commentators for the proposition that because issues of international law and municipal law are often intertwined in international cases (particularly investor-state cases), municipal law should not be relegated to the status of facts.<sup>145</sup> One of

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<sup>144</sup> See, e.g., *Brandes*, para. 71 (RL-15) (declining to address questions that “necessitate the examination of complex legal and factual issues which cannot be resolved in these summary proceedings”).

<sup>145</sup> Reply, paras. 55-61.

Respondent's authorities, Professor Douglas, describes a "mosaic of applicable laws" that may sometimes need to be constructed in order to resolve international investment disputes.<sup>146</sup> Respondent is correct that the inter-relationship between international and municipal laws in investor-state (and other international) disputes can often be complex, but that merely underscores why Claimant's international law claims cannot be decided based on municipal law – and why even a resolution of the municipal law issues presented by Respondent would not advance its Preliminary Objection.

125. In the context of the scholarly debate cited by Respondent, the issue of whether to characterize questions of municipal law as facts or something else (*e.g.*, pieces of a "mosaic") is largely a theoretical matter that has little practical relevance to the questions now before the Tribunal. Those questions include: (1) whether in the context of this Preliminary Objection and based on the record before it, the Tribunal can and should try definitively to resolve, as a matter of Salvadoran law, that Claimant's application for a mining concession did or did not comply with the two provisions of the Mining Law invoked by Respondent; (2) whether and how such resolution would fit (either as a question of fact or something else) into the "applicable rules of international law" that govern Claimant's claims, and into the far broader factual allegations in the Notice of Arbitration that Respondent ignores; and (3) whether, even assuming that the Tribunal felt it could resolve the technical questions raised under El Salvador's Mining Law in this context, and based on the record before it, a host of other questions (factual and legal) would need to be resolved before the Tribunal could determine whether Claimant's claims fall within

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<sup>146</sup> ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 40 (2009) (excerpts) (RL-25).

the standard articulated by Article 10.20.4. Claimant respectfully submits that merely to pose these questions is to answer them.

126. Ultimately, the Tribunal need not decide (and certainly not at this juncture) whether the two issues raised by Respondent under El Salvador’s Mining Law should be characterized as issues of fact or something else. What is clear, however, is that these issues are inappropriate for resolution within the context of Respondent’s Preliminary Objection. It is less than certain at this juncture whether the Tribunal will need to address and resolve these questions later in this case; but the Tribunal cannot do so in light of the evidentiary record currently before it. The fact of the matter is that Respondent has not proven the law, let alone the facts upon which it relies.

**B. Respondent Cannot Be a Judge in Its Own Cause**

127. Respondent’s assertion that it has already “considered and rejected Claimant’s arguments” – so that “there is no credible argument that there is a genuine material dispute as to the law’s interpretation”<sup>147</sup> – is a dubious assertion under any circumstances. The Tribunal is precluded from simply accepting Respondent’s pronouncements of Salvadoran law by application of the principle of *nemo debet esse iudex in propria sua causa*. In accordance with this principle, Respondent cannot be viewed as the authority on the meaning of the provisions of its Mining Law for purposes of determining its *own* international liability.<sup>148</sup>

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<sup>147</sup> Reply, para. 99.

<sup>148</sup> See generally BIN CHENG, 258, 279-89 (CL-52). Thus, for example, in the *Serbian Loans* case cited by Respondent, the Tribunal did not simply accept the pronouncements of French law offered by the French government. It considered “information furnished by [both] Parties.” *Serbian Loans*, at 47 (RL-24).

128. But the assertion that Respondent has already “considered and rejected Claimant’s arguments” – and that, therefore, there is no longer any dispute concerning the law’s interpretation – is even more remarkable given the record now before the Tribunal.

129. ***Once again, Respondent never ruled on Claimant’s applications.*** There is not any evidence, or even any allegation, that Respondent ever raised any issue with Claimant concerning the feasibility study. The only evidence that Respondent “considered and rejected the Claimant’s arguments” on the land surface ownership issue consists of internal communications exchanged among various officials of the executive branch, which Respondent never provided to Claimant until it included them with its Reply. This can hardly be considered “proof” concerning the applicable municipal law.

130. Respondent’s arguments here are, of course, premised on its assertions that it in fact took the position at the time that (1) Claimant’s application was “deficient” because of the land ownership issue; and (2) Claimant’s application was “deficient” because of the feasibility study. As discussed above, the “evidence” to support the first assertion is problematic at best. The documents proffered by Respondent show only that Respondent’s officials were struggling with the correct interpretation of the surface ownership issue and with whether steps were needed to change or clarify the law. The evidence to support the second assertion is nonexistent. Respondent does not even allege that any issue concerning the feasibility study was ever raised with Claimant before this arbitration.

131. In sum, the Tribunal may not simply accept the bare word of the Respondent in its capacity as a litigating party regarding which interpretation of the law should apply to the case at hand. In this case, however, Respondent invites the Tribunal to do just that. Respondent’s

arguments on the proper interpretation of El Salvador's Mining Law should not be considered by the Tribunal – and cannot be resolved within the context of this Preliminary Objection.

**C. Respondent's Assertions Are Incorrect as a Matter of Salvadoran Law**

132. At the appropriate time in this arbitration, Claimant will produce evidence – including expert evidence – to demonstrate the propositions of Salvadoran law that are necessary to establish its claims. At this juncture of the case, however, Respondent's arguments on Salvadoran law are premature and inappropriate. But even on the limited record now before the Tribunal, it is easy to see the fundamental flaws in Respondent's assertions concerning Salvadoran law. Similar to Respondent's analysis (or lack thereof) of the relevant provisions in CAFTA on which the standards for its Preliminary Objection must be based, Respondent ignores basic legal principles in pressing its construction of Article 37(2)(b) and Article 37(2)(d) of El Salvador's Mining Law. Instead of offering an analysis based upon the text of the law, and examining the text within the overall context of the statute and Salvadoran law as a whole, Respondent devises numerous "policy" rationales – most of which are based on premises that are faulty as a matter of law and policy, and nearly all of which would require the Tribunal to embrace a host of unsupported and controversial factual assertions offered by Respondent as support for such rationales. Even a relatively brief overview of Respondent's arguments on these points (including various new assertions presented in the Reply) demonstrate why the Tribunal cannot accept these arguments as accurate statements of Salvadoran law.

**1. The Surface Land Issue**

133. Again, Article 37(2)(b) of the Mining Law provides only that the applicant must provide a "[n]otarial deed proving title to the real property or authorization granted by the owner

as provided for in the law.”<sup>149</sup> It is entirely silent as to which real property the applicant must own or obtain authorization to use.

134. However, it is well-established under Salvadoran rules of legal interpretation that the meaning of any given legal provision cannot be determined in isolation from other provisions of the same law, the intent of the legislature, or the legal system as a whole. In the words of the eminent Salvadoran jurist, Julio Fausto Fernández (who in turn quotes another leading scholar, Professor Luis Rescasens Siches):

[W]hen interpreting a legal provision, first its literal meaning must be analyzed, then its spirit must be deciphered, subsequently it must be considered within the framework of the legal institution of which it is a part (“the rule must be integrated in the institution”, says [Professor Rescasens]) and, finally, it must be construed in the legal context of its relevant legal system: Political Constitution, code, specialized law, statutes, regulations, etc.<sup>150</sup>

135. Accordingly, in its Response, Claimant undertook to analyze these provisions within the appropriate legal framework. Claimant explained that it would be contrary to the purpose of the Mining Law, as well as to Salvadoran law more broadly, to construe Article 37(b)(2) as requiring proof of ownership or authorization to use the entire surface overlaying an underground mining concession. Article 103 of the Constitution of El Salvador declares that the

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<sup>149</sup> Mining Law, Article 37(2)(b) (CL-5). The original text in Spanish reads: “Escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario.”

<sup>150</sup> JULIO FAUSTO FERNANDEZ, *ORIGEN DEL HOMBRE Y OTROS ENSAYOS* 418 (1977) (“FERNANDEZ”) (CL-56). The original text in Spanish reads, “[A]l interpretar una disposición legal, se analice primero su sentido literal, luego se trate de desentrañar su espíritu, después se considere dentro del marco de la institución jurídica de la que es una parte (‘se integre la norma en la institución’, dice el maestro) y, por último, se la sitúe en el contexto legal de conjunto del ordenamiento jurídico en que se encuentra: Constitución Política, código, ley especial, estatuto, reglamento, etc.”

subsurface, and all mineral deposits therein, are the property of the State.<sup>151</sup> The Mining Law is meant to further the public interest by facilitating the State's access to the subsoil, and the mineral deposits therein. As stated in the Mining Law's Preamble:

[I]t is of the utmost importance to our country to have a body of law consistent with the principles of a social market economy, convenient for investors in the mining sector; to facilitate the creation of new job opportunities for Salvadorans; promoting the Economic and Social Development of the regions where minerals are located, thus allowing the State to collect the revenue so necessary for the achievement of its goals.<sup>152</sup>

To allow individual surface property owners to frustrate the State's ability to access the State's mineral deposits would create a result contrary to the letter and purpose of the law – in particular, the Salvadoran Constitution – and contrary to the public interest.<sup>153</sup>

136. In its Response, Claimant analyzed the relevant provisions of the Mining Law, in the broader context of Salvadoran constitutional and other law, and arrived at the only conclusion that is consistent with the relevant Salvadoran principles of legal interpretation: that it is only necessary for the applicant to own or obtain authorization to use the surface that would be disturbed by mining activities.<sup>154</sup> As also observed in the Response, the Mining Law contains

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<sup>151</sup> CONST. OF THE REPUBLIC OF EL SALVADOR, art. 103 (CL-1).

<sup>152</sup> Mining Law, Preamble (CL-5). The original text in Spanish reads, “[E]s de primordial importancia que nuestro país cuente con un cuerpo normativo que armonice con los principios de una economía social de mercado, conveniente para los inversionistas del sector minero; a efecto de propiciar la creación de nuevas oportunidades de trabajo para los salvadoreños; promoviendo el Desarrollo Económico y Social de las regiones en donde se encuentran localizados los minerales, permitiendo de esta manera al Estado la percepción de ingresos tan necesarios para el cumplimiento de sus objetivos.”

<sup>153</sup> By declaring the subsurface and subsurface minerals to be the property of the State, the drafters of the Salvadoran Constitution intended to avoid *any* interference by individual landowners in activities of public interest, such as the mining activities.

<sup>154</sup> Response, paras. 142-157.

protections for those whose property might be affected by mining operations.<sup>155</sup> Yet the Mining Law, as well as El Salvador's Expropriation Law, also recognize that the private interest of individual is subservient to the public interests served by mining the State's mineral resources.

137. Thus, El Salvador's Expropriation Law specifically provides that mining is "declared to be for the public purpose."<sup>156</sup> As acknowledged by one of the internal executive branch memoranda submitted by Respondent with its Reply: "If consent is not obtained from the third parties, the State could proceed to expropriate the land if it so deemed necessary."<sup>157</sup> Similarly, that the beneficiary of mining rights can demand statutory easements also underscores the principle that the public interest (here, in mining) "predominates over the private interest."<sup>158</sup>

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<sup>155</sup> Reply, para. 150.

<sup>156</sup> Legislative Decree No. 33 published in the Official Journal No. 174, Vol. 127, 25 Jul. 1939 (amended by Legislative Decree No. 467, published in the official journal No. 212, Vol. 341, 13 Nov. 1998 ("Expropriation Law"), Article 2 (CL-45). In Spanish, the Article reads, "Se declaran de utilidad pública: . . . III - La Industria Minera. . . ."

<sup>157</sup> Response from Secretary for Legislative and Legal Affairs to Minister of Economy, 20 June 2005, at 3 (R-33).

<sup>158</sup> CONST. OF THE REPUBLIC OF EL SALVADOR, Article 246 (CL-1). The text in Spanish reads, "Article 246.- Los principios, derechos y obligaciones establecidos por esta Constitución no pueden ser alterados por las leyes que regulen su ejercicio. La Constitución prevalecerá sobre todas las leyes y reglamentos. El interés público tiene primacía sobre el interés privado." See Mining Law, Article 54 (CL-5). Respondent's suggestion that the easements provided for by the Mining Law are limited to the "land outside the concession area" is baseless. Reply, para. 114. There is nothing in the actual language of Article 54 to support that assertion. On the contrary, Article 25 of the Mining Law Regulations expressly provides for the constitution of necessary easements as being among the rights the concessionaire is entitled to "within the concession area." (CL-6) (emphasis added). The text in Spanish reads, "El Titular de una concesión minera puede construir e instalar dentro del área de concesión, edificios, campamentos, depósitos, ductos, plantas de bombas y fuerza motriz, cañerías, talleres, líneas de transmisión de energía eléctrica, sistemas de comunicación, caminos y demás sistemas de transporte local y otras instalaciones; así como el derecho de aprovechamiento de aguas y a la constitución de las servidumbres que le sean necesarias, sujetándose en todo a las disposiciones de la Ley y demás normas aplicables" (emphasis added).

138. In the absence of textual support for its proffered construction of Article 37(b)(2) (either in the Mining Law itself or in other relevant Salvadoran law), Respondent relies on arguments of “policy,” which in turn are based on a number of extremely far-fetched factual assertions. Respondent principally argues that “subsidence” – the movement of surface soil due to the potential collapse of underground mine workings – is what justifies the “reasonable public policy to require mining companies to obtain ownership or authorization from landowners in the entire concession area.”<sup>159</sup> Respondent argues, as matter of fact that “subsidence is an inevitable consequence of underground mining.”<sup>160</sup> Simply to state the argument is to illustrate why it is so inappropriate in this context. But since Respondent devotes considerable space to it in its Reply, we will respond to it here. As a matter of fact, the risk of ground subsidence depends on a number of factors, including the nature of the rock mass being mined, the depth of the mining activity below the ground surface, the size of the excavations, and the method of mining employed.<sup>161</sup>

139. Respondent attempts to support its theory by arguing that “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[.]’”<sup>162</sup> Respondent goes on to provide as “an example” “a town in Oklahoma that had prospered from zinc and lead mining in the early 1900s [but

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<sup>159</sup> Reply, para. 117.

<sup>160</sup> *Id.*

<sup>161</sup> See Alice S. Allen & J. Paone, *Subsidence control by backfilling*, in UNDERGROUND MINING METHODS HANDBOOK 210 at 225 (1982) (C-16).

<sup>162</sup> Reply, para. 119 (quoting Singh, at 942 (R-39)).

which] recently had to be abandoned because of the danger of cave-ins caused by the deserted underground mines.”<sup>163</sup> Respondent also reports that “residents in Pennsylvania who live over abandoned underground coal and clay mines are warned to get ‘Mine Subsidence Insurance.’”<sup>164</sup> Even if the Tribunal were to consider these arguments at this preliminary phase of the case, no useful analogies can be drawn from the examples cited by Respondent. Again, the risks of subsidence vary dramatically depending on a variety of factors. In some mining projects – such as the one at issue here – the risks are virtually non-existent.

140. First of all, in hard-rock mining, such as at the El Dorado project, instances of surface displacement are extremely rare because hard rocks deform to a lesser extent than soft rocks, such as the rocks found near coal and clay mines. Second, the mining method to be utilized in the El Dorado project – the “Modified Avoca” or “bench and fill” method – aids the restriction of surface ground displacement by reducing the amount of ground movement around the excavation.<sup>165</sup>

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<sup>163</sup> Reply, para. 120 (citing Matthew C. Wright, *A Tainted Mining Town Dies as Residents Are Paid to Leave*, WASHINGTON POST, 18 Jan. 2007 (R-41). Pennsylvania Dept. of Environmental Protection, Mine Subsidence Insurance website (explaining various effects of mine subsidence) (R-42)).

<sup>164</sup> *Id.* (citing Pennsylvania Dept. of Environmental Protection, Mine Subsidence Insurance website (explaining various effects of mine subsidence) (R-42)).

<sup>165</sup> See Environmental Impact Assessment, Section 1.1.3 (C-8); Pre-Feasibility Study, Section 4 (C-9). Under the Avoca mining method, the rocks that are removed to make the access tunnels to the deposit are stored on the surface for later use to fill the void left behind where the vein is removed – a technique known as “backfilling.” By backfilling the underground void in the vein, the walls are no longer at risk of collapsing, ensuring that the surface land not will disturbed by the underground activities. See Allen & Paone, (showing that the most widespread method of alleviating potential subsidence problems in undermined areas has been to backfill mine voids with mine refuse or some other inexpensive material that provides lateral support to the remaining mine pillars and vertical support to the mine roof and overburden) (C-16); J.C. Folinsbee & R.D.W. Clarke, *Selecting a Mining Method*, in DESIGN AND OPERATION OF CAVING AND SUBLEVEL STOPING MINES 55 (Daniel R. Stewart ed., 1986) (C-17).

141. In fact, as explained in the Technical Design Parameters for the El Dorado Mine, under the state-of-the-art method selected by Claimant, “*no surface subsidence is permissible.*”<sup>166</sup> But even if an insignificant amount of displacement occurred, the property interests of the Salvadoran landowners whose property was situated over the mineral deposits would be protected by the security deposit required by the Mining Law Regulations.<sup>167</sup> Thus, Respondent’s argument that “reasonable public policy” requires mining companies to obtain ownership or authorization from landowners in the entire concession area is unavailing. It certainly cannot substitute for an analysis based on the actual text of the provision at issue, considered within the context of the Mining Law and Salvadoran law taken as a whole.

142. In sum, Respondent’s argument that Claimant did not comply with the land ownership or authorization requirement of Article 37 of the Mining Law presumes that there is such a requirement in Salvadoran law. In fact, no such requirement exists, and for good reason: such an interpretation of Article 37 is inconsistent with cornerstone principles of Salvadoran law. Thus, even if PRES’s compliance with Article 37 were not an intensely factual inquiry that could

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<sup>166</sup> Geotechnical Design Parameters for El Dorado Mine prepared by A. Srikant and D.E. Nicholas, Call & Nicolas, Inc., Mar. 2004, at 5-1 (Annex 4.2 of the Environmental Impact Study) (**C-18**) (emphasis added).

<sup>167</sup> Mining Law Regulations, Article 14 (CL-6), “The bond or guarantee to answer for damages or injuries caused to the State or third parties as a result of the execution of mining operations will be awarded to the Ministry, the title holder being obliged to submit to the Bureau [of Mines] the original of the document, prior to issuance of the related Agreement. Such guarantee shall remain in effect for the duration of operations, and likewise, documents evidencing their extension must be submitted.” The text in Spanish reads, “La fianza o garantía para responder por los daños o perjuicios que se causen al Estado o a terceros, como consecuencia de la ejecución de las operaciones mineras, será otorgada a favor del Ministerio, estando obligado el Titular a presentar a la Dirección el original del documento, previo a la emisión del Acuerdo correspondiente. Tal garantía deberá mantenerse vigente durante el tiempo que duren las operaciones, debiendo así mismo, presentar los documentos que comprueben la prórroga de las mismas.”

be determined in the course of the Preliminary Objection, Respondent's interpretation of Article 37 should be rejected by the Tribunal.

## **2. The Feasibility Study Issue**

143. In its Reply, Respondent devotes numerous paragraphs to arguing that the "Final Pre-Feasibility Report" submitted by Claimant does not, as a matter of "undisputed fact," meet the requirements for an *Estudio de Factibilidad Técnico Económico* under Article 37(2)(b) of the Mining Law.<sup>168</sup> Respondent's principal argument appears to be that the specific gold deposits on which the Final Pre-Feasibility Report focus does not justify the size of the concession area requested. But Respondent never succeeds in tying this argument to the actual provisions of the Mining Law or the Mining Regulations.

144. Instead, Respondent asserts that the purpose of the *Estudio de Factibilidad Técnico Económico* is to justify the size of the requested concession area. Moreover, Respondent appears to assume that the *Estudio* can justify the size of the requested concession area *only* if mining deposits with economic potential are proven under the entire surface of the requested concession area. Moreover, although Respondent complains that Claimant has "accuse[d]" Respondent of confusing the requirements for Feasibility Study under U.S. and Canadian securities law with those under El Salvador's Mining Law,<sup>169</sup> Respondent persists in conflating these very different standards.

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<sup>168</sup> Reply, paras. 125-155.

<sup>169</sup> *Id.*, para. 146.

145. Once again, Respondent’s arguments find no support in the actual texts on which they purport to be based. Indeed, Respondent never properly analyzes the text setting forth the requirements for an *Estudio de Factibilidad Técnico Económico*, as set forth in the Mining Law or its accompanying regulations. Nor does Respondent ever attempt to construe the specific provisions regarding the *Estudio de Factibilidad Técnico Económico* within the context of the overall Mining Law. Performing that textual analysis demonstrates that Respondent’s arguments under Salvadoran law are without merit, and, when asserted in the context of its Preliminary Objection, inappropriate. Moreover, Respondent makes many of its points by selectively presenting portion of the Final Pre-Feasibility Study, while ignoring other critical findings.

146. Once again, Article 37(2) of the Mining Law merely provides for an applicant to include with its supporting documentation:

- (d) Economic and Technical Feasibility Study, prepared by professionals in this field . . . .<sup>170</sup>

This provision provides virtually no guidance on what is required. However, Article 18 of the Mining Regulations provide:

[w]hen applying for a Mine Exploitation Concession after receiving an Exploration License, proof of the existence of *a deposit or deposits* as described in Article 23 of the Law shall be provided via documents that are *congruent or consistent with the activities and studies that were executed during the term of this License* . . . .<sup>171</sup>

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<sup>170</sup> Mining Law, Article 37(2)(d) (CL-5). The text in Spanish reads, “Estudio de Factibilidad Técnico Económico, elaborado por profesionales afines a la material.”

<sup>171</sup> Mining Regulations, Article 18 (CL-6). The text in Spanish reads, “Cuando se solicite Concesión para la explotación de una mina y haya precedido Licencia de Exploración, la demostración de la existencia *del o de los yacimientos* a que se refiere el Art. 23 de la Ley, se hará con documentos que sean

(continued...)

147. Article 23 of the Mining Law provides:

Upon completion of exploration and *verification of existence of economic mining potential in the authorized area*, an application *shall* be made for the Concession to exploit and make use of the minerals; which shall be verified by Ministerial Order followed by the award of a contract between the Ministry and the Concessionaire for a thirty-year term, which may be extended at the interested party's request, provided that, at the Ministry's discretion, the requirements under the Law are met.

\* \* \* \*

In the event of existing mines, after verification of the economic potential of minerals, the exploitation concession may be applied for directly, with no need for an Exploration License, upon satisfaction of the requirements for concessions under the Law.<sup>172</sup>

148. Taking a step back, an Exploration License is given to the licensee “to locate the mineral deposits for which it was granted.”<sup>173</sup> An Exploration License may last up to eight years, during which time the licensee attempts to find and verify the “existence of economic mining potential in the authorized area.”<sup>174</sup> At the conclusion of the exploration phase, if the applicant

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(continued)

*congruentes o acordes con las actividades y estudios que fueron ejecutados durante la vigencia de esa Licencia.”* (Emphasis added).

<sup>172</sup> Mining Law, Article 23 (CL-5) (emphasis added). The text in Spanish reads, “Concluída la exploración y comprobada la existencia del potencial minero económico *en el área autorizada*, se solicitará el otorgamiento de la Concesión para la explotación y aprovechamiento de los minerales; la cual *se verificará* mediante Acuerdo del Ministerio seguido del otorgamiento de un contrato suscrito entre éste y el Titular por un plazo de treinta años, el cual podrá prorrogarse a solicitud del interesado, siempre que a juicio del Ministerio cumpla con los requisitos que la Ley establece. (...) Cuando se tratase de minas existentes, previa comprobación del potencial económico de los minerales, se podrá solicitar directamente la concesión para su explotación sin necesidad de la Licencia de Exploración, cumpliendo con los requisitos de Ley para las concesiones.”

<sup>173</sup> *Id.*, Article. 19 (CL-5). The text in Spanish reads, “para localizar los yacimientos de las substancias minerales para las que ha sido otorgada.”

<sup>174</sup> *Id.*, Article 23 (CL-5).

has found and can verify the “existence of economic mining potential in the authorized area,” then an application “shall” be made for a Concession “to exploit and make use of the minerals.”

149. An Exploration License expires – and may not be renewed by the original licensee – at the conclusion of eight years. At the expiration of the Exploration License held by PRES for El Dorado, PRES officials met with MINEC and specifically agreed upon the area for which PRES would seek an Exploitation Concession.<sup>175</sup> This area was for a smaller area than the area originally covered by the Exploration License; areas where PRES had not conducted significant exploration activities were “carved out” of the proposed area for the Exploitation Concession,<sup>176</sup> which, as Respondent notes, was to cover 12.75 square kilometers.

150. The Final Pre-Feasibility Study demonstrated that there were sufficient gold deposits in two specific veins – the Minita and Minita 3 veins – to demonstrate by themselves the “existence of economic mining potential in the authorized area,” as set forth in Article 23 of the Mining Law. Accordingly, the Final Pre-Feasibility Study used the Minita and Minita 3 veins to form the basis of the “resource and reserve statements” presented in the report.<sup>177</sup> However, the Final Pre-Feasibility Study also verified “the existence of economic mining potential” throughout the rest of the 12.75 square-kilometer area (and, indeed, beyond). As stated in the Final Pre-Feasibility Study:

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<sup>175</sup> Notice of Arbitration, para. 57.

<sup>176</sup> *Id.* With MINEC’s approval, Claimant’s other Salvadoran subsidiary, DOREX, then applied for and received exploration licenses for these “carved out” areas, designated as Huacuco, Pueblos, and Guaco.

<sup>177</sup> Pre-Feasibility Study at 25-26, 43 (C-9).

*The El Dorado license area contains many deposits, prospects and occurrences . . . . They are found in three sub-districts, Northern, Central and Southern, which are distinguished by the dominant vein orientations and level of hydrothermal system exposed on the present-day surface. Complex, multi-stage paragenetic histories are best displayed in what appear to be higher level veins such as La Coyotera, San Matias and Nueva Esperanza. . . .*

*The gold- and silver-bearing veins of the El Dorado district, of which at least 36 exceed one-meter in width, occur over an area exceeding 50km<sup>2</sup> . . . . Individual veins are generally less than 500m in length but range up to 2km in length, dip steeply, and generally form ridges. Some systems of related, en echelon veins have been traced for up to 3km.<sup>178</sup>*

151. Respondent’s argument focuses on the Final Pre-Feasibility Study’s use of the Minita and Minita 3 veins to form the basis of the “resource and reserve statements,” and argues that the Study is therefore limited to those two veins. Respondent further argues that the Exploitation Concession area should therefore have been limited to whatever area was necessary to mine those two veins. Respondent also cites to Article 24 of the Mining Law, which provides that the “surface area [of an Exploitation Concession] will be determined according to the magnitude of the deposit . . . .”<sup>179</sup>

152. But Respondent ignores significant portions of the Final Pre-Feasibility Study, which finds numerous mineral “deposits” throughout the proposed concession area. Respondent never explains why the Study’s use of the Minita and Minita 3 veins to form the basis of the resource and reserve statements preclude the rest of the Study’s findings – particularly its findings concerning other deposits as serving as the basis to verify “the existence of economic

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<sup>178</sup> *Id.* at 26 (emphasis added).

<sup>179</sup> Mining Law, Article 24 (CL-5). The text in Spanish reads, “. . . y su superficie será otorgada en función de la magnitud del o los yacimientos . . . .”

mining potential on the authorized mining area throughout the proposed concession area.” That is the standard set forth in Article 23 of the Mining Law, which, under Article 18 of the Mining Regulations, the Study is supposed to meet.

153. Finally, Respondent complains that Claimant has “accuse[d] the Republic of purportedly confusing the standards for [a Pre-Feasibility Study] in El Salvador with those under U.S. or Canadian securities laws.”<sup>180</sup> Respondent asserts that it “is not questioning the Pre-Feasibility Study’s degree of economic reliability or getting into other technical assessments at this early stage.”<sup>181</sup> Yet Respondent goes on to cite the 2007 Annual Report of Claimant’s parent as evidence that the “feasibility study” is not complete.<sup>182</sup> As explained at length in the Response, under the standards relevant for U.S. and Canadian securities laws, a “feasibility study” must provide a degree of economic reliability that is within 15%. A “pre-feasibility study” must provide a degree of economic reliability that is within 20% to 30%.<sup>183</sup> Thus, Claimant could not label or characterize a “pre-feasibility study” (as that term is used within the context of U.S. and Canadian securities laws) as a “feasibility study,” without potentially running afoul of U.S. and Canadian securities law. Yet, as also explained in the Response, the requirements for a “pre-feasibility study” under U.S. and Canadian securities are more than adequate to meet the requirements of the *Estudio* required under the Mining Law.<sup>184</sup>

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<sup>180</sup> Reply, para. 146.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*, para. 150.

<sup>183</sup> See Response, paras. 166-169 (and authorities cited therein).

<sup>184</sup> *Id.*, para 169.

154. Thus, Claimant is not “suggest[ing] that the feasibility study on hold is different from the feasibility study required by the Salvadoran Mining Law,” as asserted by Respondent in its Reply.<sup>185</sup> They are the same document. However, to qualify as a “Feasibility Study” for purposes of the U.S. and Canadian securities laws, the document would have to be updated considerably, to take into account the changes in material costs and other economic factors in place if and when the project were ever to recommence. That does not change the fact that the Final Pre-Feasibility Study more than met the requirements of Article 37(2)(b) of the Mining Law when it was submitted to the Bureau of Mines several years ago.

155. In the final analysis, on this and so many of its other arguments, Respondent is inappropriately asking the Tribunal to adjudicate complex and novel issues of Salvadoran law, and complex issues of fact, in an extremely accelerated procedure, while representing to the Tribunal that the issues at hand involve “pure” issues of law and “undisputed” issues of fact.

156. Whether or not Claimant’s *Estudio de Factibilidad Técnico Económico* satisfied the requirements of El Salvador’s Mining Law is not a question that the Tribunal needs to or should answer at this juncture. But if the Tribunal decides it is appropriate to decide this question now, it should decide it in the affirmative.

**V. THE NOTICE OF ARBITRATION MORE THAN SATISFIES THE PLEADING STANDARD FOR ALL OF CLAIMANT’S CLAIMS**

157. Just as Respondent fails to provide any coherent standard for deciding its Preliminary Objection under CAFTA Article 10.20.4, Respondent also fails to provide any

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<sup>185</sup> Reply, para. 151.

coherent statement of the “pleading standard” under CAFTA. As with its opening submission, Respondent’s Reply alternates between various assertions that Claimant must “allege” facts on the one hand, and must make some type of undefined “showing” on the other. Needless to say, making an “allegation” is an entirely different exercise from making a “showing.” Nor does Respondent explain how the “pleading standard” under CAFTA fits within the substantive standard for a preliminary objection under CAFTA Article 10.20.4.

158. Thus, at the outset of Respondent’s Reply, Respondent appears to concede that under Article 10.20.4, Claimant must simply “allege the specific *facts* supporting each claim.”<sup>186</sup> Yet several pages later, Respondent also concedes that “Claimant asserted repeatedly in its Notice of Arbitration that it had complied with all the other requirements to be awarded the concession [other than the Environmental Permit],” but then suggests that Claimant must now make some sort of unspecified “showing.”<sup>187</sup>

159. The question therefore remains: what exactly is the standard of pleading that Respondent thinks Claimant has failed to satisfy? Is Claimant required to “allege facts” or make a “showing”? If the former, what did Claimant fail to allege? If the latter, what “showing” is Claimant now supposed to make? Respondent never articulates a test for either of the contradictory and irreconcilable standards that it offers to the Tribunal. Nor does Respondent explain whether the requirement to make a “showing” arises under the pleading standard of CAFTA or arises in connection with – or because of – the factual assertions that Respondent has made in support of its Preliminary Objection under Article 10.20.4.

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<sup>186</sup> *Id.*, para. 10 (emphasis in original).

<sup>187</sup> *Id.*, para. 21.

160. Claimant will first address Respondent’s argument that CAFTA imposes “a heightened pleading requirement compared to the ICSID Rules”<sup>188</sup> (which has changed somewhat from the opening submission to the Reply). Then Claimant will address Respondent’s arguments that Claimant has not satisfied the pleading requirements for stating any claim in connection with the El Dorado or Santa Rita sites; has not stated any claim for breach of the Most-Favored-Nation or National Treatment claims; and has not stated any claim for breach of an investment authorization.

**A. There Is No Textual Support for Respondent’s Assertion that CAFTA Imposes a Heightened Pleading Requirement Compared to the ICSID Rules**

161. In its opening submission, Respondent asserted that the “heightened” pleading standard of “CAFTA applies not only to providing *support* for the allegation of a breach, but also with regard to *demonstrating* causation and damages.”<sup>189</sup> In its Reply, Respondent appears to have retreated somewhat from that assertion, at least in certain portions of the Reply (*e.g.*, as in its assertion that Claimant needs only to “allege” facts).

162. Respondent also appeared to argue in its opening submission that the basis for this “heightened” pleading standard resided at least in part in the standard for a preliminary objection under Article 10.20.4. Respondent’s argument seemed to be that because of CAFTA’s preliminary objection provisions, the claimant must make sufficient factual allegations for the Tribunal to perform its inquiry under Article 10.20.4, which Respondent described as involving various burden-shifting between the Claimant and Respondent, to the point where Claimant

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<sup>188</sup> *Id.*

<sup>189</sup> Preliminary Objection, para. 27 (emphasis added).

might have to “introduce evidence . . . to dispute respondent’s facts and make each particular claim plausible.”<sup>190</sup> In its Reply, Respondent seems to have largely dropped that argument as well.

163. Instead, Respondent attempts to fashion an argument based on the text of CAFTA (one of few places it does so in the Preliminary Objection). Unfortunately for Respondent, the text simply does not support its assertion. Respondent argues:

CAFTA Article 10.16 explicitly requires that a claimant identify “the legal and factual basis for each claim” while the ICSID Convention, by contrast, “simply require[s] that the request for arbitration ‘contain information concerning the issues in dispute.’”<sup>191</sup>

Respondent goes on to explain this “heightened pleading standard” as follows:

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.<sup>192</sup>

164. It is impossible to see how a provision stating that the claimant must allege that there is an obligation, that the obligation has been breached, and that the breach has caused the claimant loss or damage, provides for a “heightened pleading” standard. ICSID Institution Rule 2 requires a notice of arbitration to include, *inter alia*, “information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an

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<sup>190</sup> *Id.*, para. 30.

<sup>191</sup> Reply, para. 8 (quoting CAFTA, Article 10.16.2 (RL-1), ICSID Convention Article 36(2), and Response, paras. 101 and 108).

<sup>192</sup> *Id.* (citing CAFTA, Article 10.16.1(a) and (b) and 10.16.2 (RL-1) (emphasis in original)).

investment . . . .”<sup>193</sup> A legal dispute is typically defined as “a disagreement on a point of law or fact, a conflict of legal views or interests between parties.”<sup>194</sup> As a practical matter, very few legal disputes will not involve allegations of a legal obligation, a breach of that legal obligation, and loss or damages to the claimant caused by that breach.

165. Nor does CAFTA Article 10.16 provide more of a “heightened” pleading standard than other sets of rules that are often used in investor-state arbitration. For example, the UNCITRAL Arbitration Rules similarly provide that a notice of arbitration must include, *inter alia*:

- “A reference to the arbitration clause or the separate arbitration agreement that is invoked;”
- “A reference to the contract out of or in relation to which the dispute arises;”
- “The general nature of the claim and an indication of the amount involved, if any;” and
- “The relief or remedy sought.”<sup>195</sup>

166. Similarly, the ICC Arbitration Rules require the request for arbitration to include, *inter alia*:

- “a description of the nature and circumstances of the dispute giving rise to the claim(s);”
- “a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;” and

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<sup>193</sup> ICSID Institution Rule 2(1)(e).

<sup>194</sup> CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 93 (2d ed. 2009) (quoting numerous decisions of the International Court of Justice) (CL-59).

<sup>195</sup> United Nations Commission on International Law (UNCITRAL) Arbitration Rules Article 3(3) (CL-64).

- “the relevant agreements and, in particular, the arbitration agreement[.]”<sup>196</sup>

167. CAFTA Article 10.16.1 is hardly (if at all) more detailed in its requirements than the analogous pleading requirements of the UNCITRAL and ICC Arbitration Rules (and other comparable arbitration rules). Yet no one ever refers to the pleading requirements of the UNCITRAL and ICC Arbitration Rules as containing “heightened” pleading standards.<sup>197</sup>

168. Moreover, there is no question that with respect to each of its claims, Claimant has “alleged a legal and factual basis” that Respondent had a legal obligation toward Claimant, that Respondent breached that legal obligation, and that Respondent’s breach of that legal obligation caused loss or damage to Claimant. As demonstrated in Claimant’s Response, and reiterated below (taking into account the arguments of the Reply), Respondent’s assertions to the contrary cannot withstand scrutiny.

**B. Claimant’s Claims with Respect to El Dorado Satisfy The Pleading Standard under CAFTA**

169. Respondent never explains why Claimant’s allegations with respect to the El Dorado site are insufficient, other than to assert, repeatedly, that Claimant did not own or was not authorized to use all of the surface land overlaying the concession area, and that Claimant’s

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<sup>196</sup> Rules of Arbitration of the International Chamber of Commerce Article 4(3), Notice of Arbitration (CL-63).

<sup>197</sup> DAVID CARON ET AL., THE UNCITRAL ARBITRATION RULES: A COMMENTARY 344 (2006) (“By expressly providing for the contents of the notice [in Article 3(3)], the drafters were trying to ensure that the respondent received information ‘sufficient to apprise the respondent of the general context of the claim asserted against him’ and to ‘enable him to decide on his future course of action.’”) (CL-51); CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 147 (2000) (“The Request for Arbitration is designed to inform the other party, and the Court of Arbitration, of the nature and circumstances of the dispute giving rise to the claims and both the nature and, to the extent possible, the relief requested. Nevertheless, there is no requirement that the Request present an exhaustive statement of claim.”) (CL-55).

*Estudio de Factibilidad Técnico Económico* did not meet the requirements of Article 37(2)(b) of the Mining Law. Respondent’s argument, in essence, is that because Claimant did not specifically allege that it satisfied the requirements that Respondent now attributes to Article 37(2) of the Mining Law, Claimant did not satisfy the “heightened” pleading requirements of CAFTA with respect to its claims concerning the El Dorado site. In other words, according to Respondent, because Claimant does not agree with Respondent’s “interpretation” of these two aspects of the Mining Law – and because Claimant does not allege that its application specifically comported with Respondent’s interpretation – “Claimant does not allege facts to support an allegation that it was ever entitled to an exploitation concession . . . .”<sup>198</sup>

170. Of course, Respondent’s argument is entirely self-serving. Respondent argues that because Claimant did not specifically allege that it met what Respondent asserts to be the requirements of Article 37(2) of the Mining Laws based on Respondent’s construction (which Claimant disputes), Claimant did not satisfy CAFTA’s pleading requirements.

171. However one might characterize Respondent’s arguments on these points, they are not arguments on pleading adequacy. They are arguments that would require the Tribunal to resolve issues of Salvadoran law and make various other findings of fact. For the reasons explained above, the Tribunal need not resolve these issues of Salvadoran law at this juncture, and if it does, it should resolve them *against* Respondent. But even if the Tribunal concluded that Respondent was correct on these issues of Salvadoran law, there are additional questions of fact that would remain – *e.g.*, whether Claimant could have cured the alleged “defects” and

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<sup>198</sup> Reply, para. 11.

whether Respondent would then have treated Claimant's application fairly afterwards, given the *de facto* ban on metallic mining that Respondent imposed throughout the country.

172. Claimant's allegations in support of its claims at El Dorado are set forth at length in its Notice of Arbitration, and summarized at length in its Response. We will not repeat all of those allegations here. However, even a brief review of the allegations demonstrate that Claimant has more than satisfied the pleading standard at issue. Thus, Claimant alleged, for example, that:

a. Claimant invested in El Salvador, based on numerous promises and representations made by Salvadoran officials, and based on and in full compliance with Salvadoran law;<sup>199</sup>

b. Respondent owed and owes Claimant obligations under CAFTA, El Salvador's Investment Law, El Salvador's Mining Law, El Salvador's Investment Law, the investment authorizations made by El Salvador to Claimant, and other relevant Salvadoran law;<sup>200</sup>

c. Claimant complied with all of the requirements of Salvadoran law in order to receive an exploitation concession, except for providing a Mining Permit, which Claimant was

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<sup>199</sup> Notice of Arbitration, paras. 43-49.

<sup>200</sup> *Id.*, paras. 82-91.

unable to obtain, because MINEC unlawfully refused to rule on Claimant's application for such a permit;<sup>201</sup>

d. Because of domestic political pressures that ultimately led to President Saca's announcement of El Salvador's *de facto* ban on all mining activities, the various Government agencies responsible for acting on Claimant's applications acted illegally, arbitrarily, and capriciously, and with the intent to avoid acting on Claimant's applications rather than to apply the laws of El Salvador;<sup>202</sup>

e. While Claimant's applications languished both before and after the ban, comparable industries and operations (including non-metallic mining operations) received environmental permits and exploitation concessions);<sup>203</sup>

f. Respondent's illegal, arbitrary, capricious, and discriminatory conduct toward Claimant – both in delaying and failing to rule on its applications and in imposing a *de facto* ban on all metallic mining in the country – violated Respondent's obligations toward Claimant;<sup>204</sup>

g. Respondent's violations of these obligations caused Claimant to lose its investments, and the value of its investments, in El Salvador.<sup>205</sup>

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<sup>201</sup> *Id.*, paras. 54-65, 81; Notice of Intent, para. 23; Response, para. 4.

<sup>202</sup> Notice of Arbitration, paras. 73-81; Notice of Intent, paras. 23-24, 32, 34; Response, paras. 5-9.

<sup>203</sup> Notice of Intent, para. 35; Response, paras. 184-185.

<sup>204</sup> Notice of Arbitration, paras. 82-91; Notice of Intent, paras. 23-24, 32, 34; Response, para. 4.

<sup>205</sup> Notice of Arbitration, paras. 103-104; Notice of Intent, para. 32; Response, para. 10.

173. These allegations are set forth at considerable length, and with considerable detail, both in Claimant’s Notice of Intent and Notice of Arbitration. As an example, Claimant specifically set forth the various types of documents that were required to accompany its application for an Exploitation Concession, noting that those documents included:

- A description of the area for which the concession is requested;
- A showing that the licensee owns or is authorized to use the real estate property where the mine project is located;
- The relevant *Permiso Ambiental* (“Permit”) issued by MARN and accompanied by a copy of the corresponding *Estudio de Impacto Ambiental* (“EIA”);
- An *Estudio de Factibilidad Técnico Económico* (“Feasibility Study”); and
- A five-year *Programa de Desarrollo y Explotación* (“Development Plan”).<sup>206</sup>

Claimant also explained in detail why it did not, and was not able to, provide an Environmental Permit, while also alleging that it submitted all of the other requisite documents.<sup>207</sup>

174. By any reasonable standard, Claimant’s Notice of Arbitration – taking the facts alleged therein to be true – more than satisfactorily plead all of its claims under CAFTA, including Expropriation and Compensation (Article 10.7); Minimum Standard of Treatment (Article 10.5); Most-Favored-Nation Treatment (Article 10.4); and National Treatment (Article 10.3). Respondent’s arguments to the contrary are frivolous.

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<sup>206</sup> Notice of Arbitration, paras. 35-65.

<sup>207</sup> *Id.*, paras. 57-65.

**C. Claimant's Claims with Respect to Santa Rita Satisfy the Pleading Standard under CAFTA**

175. It is not entirely clear whether Respondent's argument with respect to Santa Rita is that Claimant did not plead adequate facts to support its claims with respect to that site, or whether Respondent's objection is that, as a matter of law and taking Claimant's allegations to be true, Claimant's claims are not claims for which an award in favor of Claimant may be made under Article 10.26. It is also difficult to see how Respondent can make either argument, given that the basis for its assertions with respect to Santa Rita involves facts that *post-date* the Notice of Arbitration.

176. It is helpful to review briefly the allegations contained in the Notice of Arbitration concerning Santa Rita, before turning to Respondent's post-Notice factual assertions. On 8 July 2005, MINEC granted an exploration license to PRES to search for minerals in Santa Rita, a mining claim near El Dorado. In September 2005, PRES applied to MARN to receive the environmental permit related to the exploration of the Santa Rita license. During this process, PRES filed an EIA and participated in the public consultation process as required by the Environmental Law. On 30 May 2006, MARN granted the requested environmental permit.<sup>208</sup>

177. However, in March 2008, while PRES's exploration license was still valid, President Saca publicly announced the Government's *de facto* ban on metallic mining activities.<sup>209</sup> On 9 December 2008, Claimant submitted its Notice of Intent.<sup>210</sup> In February

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<sup>208</sup> *Id.*, para. 53, n.42.

<sup>209</sup> Notice of Arbitration, para. 75; *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA, 11 Mar. 2008 (C-1).

<sup>210</sup> Notice of Arbitration, para. 18.

2009, President Saca confirmed the Government's *de facto* ban.<sup>211</sup> On 30 April 2009, Claimant filed its Notice of Arbitration.

178. The Notice of Arbitration alleged that the Government's *de facto* ban on metallic mining made pursuing further activities at Santa Rita futile. As stated in the Notice of Arbitration, "the Government's recent actions and current attitude towards mining has made any further development of this claim area impossible."<sup>212</sup> As with all of Claimant's other mining investments in the country, the Government's *de facto* ban had effectively destroyed Claimant's investment at Santa Rita. The factual allegations with respect to Santa Rita support the same legal claims under CAFTA as set forth above for the El Dorado site (*i.e.*, Expropriation and Compensation (Article 10.7); Minimum Standard of Treatment (Article 10.5); Most-Favored-Nation Treatment (Article 10.4); and National Treatment (Article 10.3)).

179. In its opening submission, Respondent argued that "[n]ot only is the inclusion of claims related to Santa Rita completely without factual or legal basis, but PRES no longer holds an exploration license in Santa Rita. PRES failed to request the renewal of the exploration license before the term expired, as required by Mining Law and Regulations."<sup>213</sup>

180. But the events described by Respondent in its opening submission with respect to Santa Rita all post-date the Notice of Arbitration by several months.

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<sup>211</sup> *Id.*, para. 78; *No to Mining: Presidential Commitment*, PRENSA GRAPHICA, 13 Jan. 2010 (C-3).

<sup>212</sup> Notice of Arbitration, para. 53, n.42. As further stated in the Response, Claimant's employees at the Santa Rita site have encountered violence and threats of violence from residents and/or activists. Especially since President Saca's announced ban on mining, the Government has failed to provide Claimant with full protection and security at the site. Response, para. 179, n.206.

<sup>213</sup> Preliminary Objection, para. 94.

181. Specifically, PRES (which, given the *de facto* ban on mining, has had to reduce dramatically its operations and staff in El Salvador<sup>214</sup>) missed the deadline for extending the exploration license, which was 14 July 2009.<sup>215</sup> PRES filed the extension application instead on 17 July 2009.<sup>216</sup> MINEC denied the extension application on 20 July 2009.<sup>217</sup> Accordingly, another of Claimant's enterprises, DOREX, promptly sought to obtain an exploration license over the Santa Rita site<sup>218</sup> Thus far, DOREX's application has been neither approved nor denied.

182. Claimant must acknowledge here that its description of these post-Notice events in its Response was mistaken in one respect. PRES did not make an affirmative decision to forego renewal of the license (as suggested in the Response), but rather inadvertently missed the renewal deadline. Claimant apologizes to the Tribunal for that mistake, which arose from a miscommunication as Claimant tried to investigate and respond, in an accelerated time frame, to a number of factual allegations newly raised by Respondent.

183. However, and more importantly, it does not remotely change the applicable analysis. The facts stated in the Notice of Arbitration with respect to the Santa Rita site meet any

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<sup>214</sup> At one point, Claimant had several hundred employees in El Salvador, the vast majority of whom were Salvadoran. Claimant currently has six full-time employees in the country.

<sup>215</sup> See Letter from MINEC to PRES, 20 Jul. 2009 (R-23).

<sup>216</sup> Application filed by PRES for extension of Santa Rita exploration license, 17 Jul. 2009 (R-21).

<sup>217</sup> See Letter from MINEC to PRES, 20 Jul. 2009 (R-23).

<sup>218</sup> As set forth in the Notice of Arbitration, DOREX had previously applied for and received exploration licenses for areas at which PRES's prior licenses had explored. DOREX had done so with MINEC's knowledge and approval. See Notice of Arbitration, para. 52 and accompanying footnote. Claimant's effort to maintain the exploration license over the Santa Rita claim following the imposition of the *de facto* ban is to prevent another entity from enjoying the fruits of Claimant's investment and exploration efforts, in the event that the ban is ever lifted (or if other entities seek an exploration license for Santa Rita notwithstanding the ban).

reasonable pleading standard under CAFTA. Similarly, as a matter of law, and taking allegations in the Notice of Arbitration as true, the claims with respect to Santa Rita are not claims for which an award in favor of Claimant may not be made. Moreover, given that Claimant would have been perfectly entitled to give up its efforts to continue compliance with a regulatory regime that the Government has effectively swept away, it is impossible to see how Respondent's post-Notice facts have any bearing on Claimant's claims for the Santa Rita site. As explained in the Response, a claimant is under no obligation to continue operations or pursue regulatory compliance *after* the treaty has already been breached by the host State.<sup>219</sup>

184. Here, too, the Tribunal should reject Claimant's arguments with respect to Santa Rita.

**D. Claimant's National Treatment and Most-Favored Nation Claims Satisfy the Pleading Standard under CAFTA**

185. In its opening submission, Respondent asserted that Claimant could not proceed with its claims based on its Most-Favored Nation ("MFN") and National Treatment claims because "Claimant does not allege how the Republic has treated its own nationals, or nationals of any other State, more favorably than Claimant."<sup>220</sup> In its Response, Claimant explained that it had included such allegations in its Notice of Intent, which was referenced in, and attached as an exhibit to, the Notice of Arbitration. There, Claimant identified a number of similarly-situated industries that were not subject to the same illegal, arbitrary, and capricious behavior as

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<sup>219</sup> See Response, para. 181, n.209 and cases cited therein.

<sup>220</sup> Preliminary Objection, para. 95.

Respondent showed to Claimant, and that were certainly not subject to a nation-wide ban.<sup>221</sup> In addition, Claimant observed that President Funes’s recent comments indicated that mining ban was directed only at metallic mining, while non-metallic mining projects (which are conducted primarily by Salvadoran companies or companies of non-parties) continued to receive permits and to carry on their operations.<sup>222</sup>

186. In its Reply, Respondent first argues that because Claimant identified the investors in like circumstances in its Notice of Intent instead of its Notice of Arbitration, Claimant’s MFN and National Treatment claims must fail. According to Respondent: “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.”<sup>223</sup> This is a strange argument. Claimant specifically alleged in its Notice of Arbitration that Respondent treated it with discrimination and failed to treat Claimant “with the best treatment accorded to domestic investors and their investments, and the investors and investments of any other CAFTA Party or of any non-Party.”<sup>224</sup> The Notice of Intent is specifically referenced in the Notice of Arbitration and is attached as Exhibit 8 thereto. Again, the Notice of Intent specifically alleges:

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

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<sup>221</sup> Response, paras. 183-88.

<sup>222</sup> *Id.*, para. 185.

<sup>223</sup> Reply, para. 179.

<sup>224</sup> Notice of Arbitration, para. 91.

environmental permits during the same timeframe that the Enterprises' applications have been pending. By, *inter alia*, refusing to grant the environmental permits to PRES and DOREX while issuing those permits to other companies, El Salvador has denied to Claimant the same treatment that it is required to afford, and has afforded, to investments of its own nationals and to nationals of other states.<sup>225</sup>

187. Respondent asserts that “[t]o 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.”<sup>226</sup> But Respondent does not explain why an allegation in a Notice of Intent – which is specifically referenced in, and attached as an exhibit to, the Notice of Arbitration – is not part of the Notice of Arbitration. The ICSID Rules specifically contemplate that the Notice of Arbitration will include supporting documentation.<sup>227</sup> The notion that allegations must be contained within the four corners of the Notice of Arbitration itself – and that nothing in the exhibits can be considered – cannot be reconciled with the rules permitting (and in a number of instances) *requiring* supporting documentation. Nor can Respondent seriously contend that it was not on notice of these allegations, so that it is not able “to properly exercise its defense[s]” in this arbitral proceeding.<sup>228</sup> The Tribunal can easily dismiss this argument.

188. Next, Respondent complains that Claimant identified similarly-situated investors only by investor, and that Claimant was required to identify in its Notice a “specific, identified national or foreign investor or investment in like circumstances [that] has received more

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<sup>225</sup> Notice of Intent, para. 35; *see also* Notice of Arbitration, para. 91.

<sup>226</sup> Reply, para. 179.

<sup>227</sup> *See* ICSID Institution Rules 2 and 4(2).

<sup>228</sup> Reply, para. 179.

favorable treatment than Claimant.”<sup>229</sup> But Respondent cites no authority for the proposition that Claimant must identify, at the notice-of-arbitration stage, the *specific* national or foreign investor(s) who are in like circumstances. There is nothing in the text of CAFTA or anywhere else that would require that level of detail at the pleading stage of a case.

189. Respondent also appears to argue that to be in “like circumstances,” a national or foreign investor has to be in the same industry as the claimant. According to Respondent: “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.”<sup>230</sup> To the extent that Respondent is arguing that it may issue environmental permits to domestic investors with environmental concerns, but can refuse environmental permits to similarly situated foreign investors with the same (or even lesser) environmental concerns, then that is precisely what CAFTA prohibits. Nor do the investors need to be in the same industry, as Respondent appears to suggest. As the tribunal in *S.D. Myers v. Canada* held, in the context of claims under NAFTA:

The Tribunal considers that the interpretation of the phrase “like circumstances” in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and ***the need to avoid trade distortions that are not justified by environmental concerns***. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of “like circumstances” invites an examination of whether a non-national investor complaining of less favourable treatment is in the same “sector” as the national

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<sup>229</sup> *Id.*, para. 182.

<sup>230</sup> *Id.*, para. 183.

investor. *The Tribunal takes the view that the word “sector” has a wide connotation that includes the concepts of “economic sector” and “business sector.”*<sup>231</sup>

190. As Professors Dolzer and Schreuer explain,

[T]ribunals have been cautious not to construe the basis of comparison for the applicability of the national treatment standard too narrowly. Consistent with the purpose of the rule, conditions such as “like situations” or “like circumstances” should be interpreted broadly in order to open the way for a full review of the measure under the national treatment clause. In general, there seems to be agreement that the overall legal context in which a measure is placed with also have to be considered when “like circumstances” are identified and when the identity or difference of treatment is examined.<sup>232</sup>

191. Finally, with respect to Claimant’s allegation that the government has banned metallic mining, but not non-metallic mining, Respondent asserts, with no support, that “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.”<sup>233</sup>

192. Once again, putting aside the issue of whether Respondent’s legal assertion is correct, Respondent has strayed far into the realm of disputed facts. Whether non-metallic mining is similar to gold mining, and what are the proper “sectors” of comparison for purposes of Claimant’s MFN and National Treatment, can obviously not be resolved at this preliminary juncture of the case.

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<sup>231</sup> *S.D. Myers, Inc. v. Government of Canada, Ad hoc*—UNCITRAL Arbitration Rules (First Partial Award and Separate Opinion dated 13 Nov. 2000), para. 250 (CL-51).

<sup>232</sup> RUDOLF DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 180 (2008).

<sup>233</sup> Reply, para. 193.

193. In sum, Claimant has adequately pled that Respondent owed Claimant an obligation under the MFN and National Treatment provisions of CAFTA; that Respondent breached that obligation; and the Respondent's breach caused loss or damage to Claimant. Nor is there any argument that Claimant's allegations, taken as true, do not support claims on which an award in favor of Claimant may be made. The Tribunal should reject Respondent's arguments concerning Claimant's MFN and National Treatment claims.

**E. Claimant's Claims for Breach of Investment Authorizations Satisfy the Standard under CAFTA**

194. Respondent asks the Tribunal to conclude that the investment authorizations that Claimant received were not, as a matter of law, investment authorizations within the meaning of CAFTA Article 10.16.1(b)(i)(B). Respondent offers a number of new arguments in its Reply, all of which can be easily disposed of by the Tribunal.

**1. An Investment Authorization Does Not Require an Investment Agreement**

195. The first and perhaps most remarkable argument offered on this point is Respondent's assertion that in order for there to be an investment authorization, there must also be a contract. Because Claimant did not receive a contract in El Salvador, Respondent asserts that Claimant could not have received an "investment authorization." Respondent asserts: "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.”<sup>234</sup>

196. First, and most importantly, CAFTA Article 10.16.1(b)(i) provides that the claimant may submit a claim that the respondent has breached:

- (A) an obligation under Section A,
- (B) an investment authorization, *or*
- (C) an investment agreement . . . .<sup>235</sup>

Given this language – that the claimant may submit a claim that the respondent breached an investment authorization *or* an investment agreement – the drafters obviously intended for an investment authorization to mean something different from an investment agreement. To accept Respondent’s theory, *i.e.*, that there can not be an investment authorization unless there is also an investment contract, would do violence to the plain language of the treaty.<sup>236</sup>

197. Second, while Respondent refers to “arbitral tribunals” that have supposedly made this “finding,” we are aware of only one tribunal that has ever addressed the issue: *PSEG*

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<sup>234</sup> Reply, para. 200.

<sup>235</sup> CAFTA, Article 10.16.1(b)(i) (RL-1) (emphasis added).

<sup>236</sup> “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 Article 31(1), 23 May 1969, 1155 U.N.T.S. 331 (CL-10). It is true that an “investment agreement” is a defined term under CAFTA, which does not necessarily include all contracts. But “investment authorization” is also a defined term within CAFTA, and it does not require a contract. Moreover, it would be very strange to construe subsection (B) as including certain types of contracts, and subsection (C) as including other types of contracts. The purpose of subsection (B) is plainly to capture something other than agreements or contracts.

*v. Turkey*.<sup>237</sup> Neither Claimant nor Respondent cite any other case that deals with the investment authorization issue. Although Respondent also cites *Mihaly v. Sri Lanka* – asserting that the tribunal in that case “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”<sup>238</sup> – the issue in that case was whether there was *any* “investment” for purposes of establish jurisdiction *ratione materiae*. The question of whether there was an “investment authorization” that had been breached was not analyzed by the tribunal. Rather, the *Mihaly* tribunal found that “pre-investment and development expenditures” – as reflected by a Letter of Intent, a Letter of Agreement, and a Letter of Extension – did not constitute an “investment” under the ICSID Convention or the applicable BIT.<sup>239</sup>

198. As to *PSEG*, the tribunal in that case did not conclude that an investment “agreement” was a necessary component of an investment “authorization.” Indeed, the investment authorization *preceeded* a subsequent concession agreement in that case.<sup>240</sup> As Professor Vandeveld describes it:

In *PSEG v. Turkey*, the tribunal held that an authorization issued by the Turkish Foreign Investment General Directorate to establish an investment constituted an investment authorization. Though additional permits may have been needed for the investment to

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<sup>237</sup> *PSEG Global Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5 (Decision on Jurisdiction dated 4 June 2004), paras. 106-108 (“*PSEG*”) (CL-28).

<sup>238</sup> Reply, para. 208 (citing *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2 (Award dated 15 Mar. 2002), para 48 (“*Mihaly*”)(RL-44)).

<sup>239</sup> *Mihaly*, para. 60 (RL-44).

<sup>240</sup> *PSEG*, para. 119 (CL-28).

engage in given activities or acquire certain rights, these other permits were not an essential part of the authorization. Further, *the concession contract that was subsequently was approved could not have been approved unless the investment was authorized, thus implying that the authorization given was a sufficient authorization.*<sup>241</sup>

There is nothing in *PSEG* to suggest that there cannot be an investment “authorization” without an investment “contract.”

199. Obviously, the drafters of CAFTA (and other U.S. investment treaties that use the terms “investment authorization” and “investment agreement”) intended that the term “investment authorization” to mean something *other* than an “investment agreement.” Indeed, the two terms have different definitions in CAFTA. An “investment authorization means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party . . . .”<sup>242</sup> Contrary to Respondent’s assertion, there is nothing in the definition of “investment authorization” that requires “language binding the State to act or not act in any way.”<sup>243</sup>

200. The term “authorization” is straightforward: to “authorize” means “[t]o formally approve; to sanction.”<sup>244</sup> The term “investment” is broadly defined in the treaty to include “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the

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<sup>241</sup> KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 178 (2009) (CL-61). *See also PSEG*, para. 120 (CL-28) (“The Concession Contract could not have been approved by the [Turkish legislature] if the foreign investment had not been authorized.”).

<sup>242</sup> CAFTA, Article 10.28, at 10-25 (RL-1).

<sup>243</sup> Reply, para. 200.

<sup>244</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004) (CL-66).

expectation of gain or profit, or the assumption or risk.”<sup>245</sup> The definition specifically includes “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.”<sup>246</sup>

201. Given the breadth of this definition, it plainly encompasses (1) the registrations of Claimant’s investment by the Office of National Investment (“ONI”); and (2) the licenses issued to Claimant by the Bureau of Mines. We discuss these in turn.

## **2. The ONI Registrations**

202. ONI is an agency within MINEC. According to Respondent, ONI does not provide investment authorizations; it “merely registers investments after the money has already entered the country and after it has already been invested.”<sup>247</sup> But a review of the Investment Law demonstrates that ONI registrations are plainly investment authorizations under the broad definition provided by CAFTA.

203. Under El Salvador’s Investment Law, ONI is

established as an agency of the Ministry of Economy, in charge of facilitating, centralizing, and coordinating government procedures which, in accordance with the law, must be followed by local and foreign investors, towards the execution of their economic, commercial, fiscal, immigration, and any other responsibilities; as well as to generate statistical data on those investments.<sup>248</sup>

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<sup>245</sup> CAFTA, Article 10.28, at 10-23 (RL-1).

<sup>246</sup> *Id.* at 10-24 (RL-1).

<sup>247</sup> Reply, para. 210.

<sup>248</sup> Legislative Decree No. 732, *published in* 345 OFFICIAL J. NO. 16 11 Nov. 1999, Article 16 (“Investment Law”) (CL-4). The text in Spanish reads, “Créase la [ONI] . . . como una dependencia del Ministerio de Economía, encargada de facilitar, centralizar, y coordinar los procedimientos gubernamentales que de conformidad a la ley, deben seguir los inversionistas nacionales y extranjeros para la ejecución de sus diversas obligaciones económicas, mercantiles, fiscales, migratorias y de

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204. Article 17 of the Investment Law provides that “[f]oreign investors *must register their investments at the ONI*, who shall issue a Credential [“*una Credencial*”] granting the owner foreign investor status, and stating the registered investment.”<sup>249</sup> Article 22 (“Foreign Investment Registration Application”) provides:

In order to obtain the registration of its investment, the foreign investor or his proxy shall apply for registration of the investment before ONI, provided that it complies with the corresponding legal requirements. These procedures may be carried out by the legal representative or legal counsel for the Salvadoran company in which the foreign investment was made.

The ONI must register the investment within thirty days after the date of application or compliance of any determination imposed by ONI. If the registration has not been made after such period, approval by the ONI shall be deemed granted, and the ONI shall be bound to conduct the registration and to issue the corresponding Resolution.<sup>250</sup>

205. Once a foreign investment has been registered at ONI, it is entitled to all of the protections set forth in the Investment Law. Article 26 provides: “Existing foreign investment

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cualquier otra índole; así como también, para generar estadísticas sobre dichas inversiones, está oficina y sus registros son públicos.”

<sup>249</sup> Investment Law, Article 17 (CL-4) (emphasis added). The text in Spanish reads, “Los inversionistas extranjeros deberán registrar sus inversiones en la ONI, quien emitirá una Credencial la cual le otorgará a su titular la calidad de inversionista extranjero, con expresión de la inversión registrada.”

<sup>250</sup> *Id.*, Article 22 (CL-4). The text in Spanish reads, “Para obtener el registro de su inversión, el inversionista extranjero por sí o por medio de apoderado, solicitará a la ONI la inscripción de la misma, previo el cumplimiento de los requisitos legales correspondientes. También podrá seguir estas diligencias el representante legal o el apoderado de la sociedad salvadoreña en que se efectuó o se haya efectuado la inversión extranjera. La ONI deberá registrar la inversión dentro de los treinta días hábiles siguientes al de la fecha de presentación de la solicitud o del cumplimiento de la prevención, si ésta se hubiera impuesto. Transcurrido dicho plazo, si todavía no se hubiere hecho el registro, se presumirá que la ONI lo ha autorizado y ésta quedará obligada a efectuar el registro y expedir la Resolución correspondiente ”

registrations at the Ministry of Economy are recognized and valid, which remains effective, ***and will automatically enjoy the guarantees and rights stipulated by this law . . .***<sup>251</sup>

206. There is no question that the investment registrations are “investment authorizations” within the meaning of CAFTA. First, there is no dispute between the parties that ONI is at least part of the “foreign investment authority” of El Salvador.<sup>252</sup> Second, under the Investment Law, “[f]oreign investors *must* register their investments at the ONI” in order for the investments to be authorized.<sup>253</sup> Third, once registered (*i.e.*, “authorized”), foreign investments “are recognized as valid, and will automatically enjoy the guarantees and rights stipulated by this law.”<sup>254</sup> Thus, assuming *arguendo* that Respondent is correct that there can be no investment authorization without a “binding commitment” on the part of the host State (though again, there is no language supporting that view in CAFTA), Respondent did take on a binding commitment in registering Claimant’s investments. It committed to extending the “guarantees and rights stipulated by this law” to those investments.

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<sup>251</sup> *Id.*, Article 26 (CL-4) (emphasis added). The text in Spanish reads, “Se reconoce la existencia y validez de los registros de inversión extranjera existentes en el Ministerio de Economía, los cuales quedan vigentes, por lo que gozarán automáticamente de las garantías y derechos señalados en esta ley, . . .”

<sup>252</sup> As discussed below, Respondent contends that ONI is *the* foreign investment authority of El Salvador, while Claimant maintains that MINEC is the foreign investment authority of El Salvador, of which ONI is only a part.

<sup>253</sup> Investment Law, Article 17 (CL-4).

<sup>254</sup> *Id.*, Article 26 (CL-4).

207. In sum, Respondent’s argument that ONI does not issue “foreign investment authorizations,” as that term is used in CAFTA, is entirely without merit.<sup>255</sup>

### 3. The Licenses

208. The licenses issued by the Bureau of Mines are also plainly investment authorizations. Article 9 of the Mining Law provides that for an investor (foreign or domestic) to acquire mining rights in El Salvador, it must first demonstrate its “technical and financial capacity to develop mining projects . . . .”<sup>256</sup> Article 9 specifically states: “Foreign legal entities must be lawfully authorized to perform acts of trade in the Republic.”<sup>257</sup> Once the Bureau of Mines issues a license to the investor (whether for exploration or exploitation), the investor is authorized to carry out mining activities. It is also entitled to the rights, as well as bound by the obligations, set forth in the Mining Law. Under the definition set forth in CAFTA, a mining license is plainly an “authorization” granted to a “covered investment or an investor of another Party.”<sup>258</sup>

209. The more difficult question – and one that the Tribunal does not need to resolve at this point – is whether MINEC (*i.e.*, the Ministry of Economy) and all of its agencies constitute a

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<sup>255</sup> Respondent’s assertion that there are only two ONI registrations at issue – because Claimant has submitted only two with its papers – is frivolous. Claimant specifically stated that these were examples of the registrations that ONI had made with respect to Respondent’s investments. Response, para. 189 and footnote 216. There is no requirement (Respondent cites none) that Claimant is required to submit each and every investment authorization at issue at this juncture of the case.

<sup>256</sup> Mining Law, Article 9 (CL-5). The text in Spanish reads, “Son personas idóneas para adquirir derechos mineros, quienes comprueben tener capacidad técnica y financiera para desarrollar proyectos mineros. Las personas jurídicas extranjeras deberán estar legalmente autorizadas para realizar actos de comercio en la República.”

<sup>257</sup> *Id.*

<sup>258</sup> CAFTA, Article 10.28, at 10-25 (RL-1).

“foreign investment authority,” or whether ONI is the sole “foreign investment authority” within El Salvador.<sup>259</sup> Respondent takes the latter view. However, a review of Salvadoran law shows otherwise.

210. El Salvador’s Internal Regulations of the Executive Branch establish the structure of the Executive Branch, including MINEC. Article 37 of the Internal Regulations provide that MINEC is responsible for, *inter alia*:

Seeking the economic and social development, through the improvement of the production, the productivity and the reasonable utilization of the country’s economic resources;<sup>260</sup>

Encouraging the development and providing guidance for mining and fishing planning and projects, by stimulating the investment of capital in enterprises that are efficient and appropriate to the country’s structure;<sup>261</sup>

Patrolling and monitoring enterprises and individuals engaged in commercial activities, be it national or foreign, ***and authorizing foreign companies that intend to perform permanent commercial activities in the country;***<sup>262</sup>

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<sup>259</sup> Reply, paras. 214-215.

<sup>260</sup> Executive Decree No. 24, *published in* 303 OFFICIAL J. NO. 70, 18 Apr. 1989 (amended by Executive Decree No. 53, *published in* 379 OFFICIAL J. NO. 81, 5 May 2008) (“Internal Regulation of the Executive Branch,”) Article 37, para. 1 (CL-46). The text in Spanish reads, “Procurar el desarrollo económico y social, mediante el incremento de la producción, la productividad y la racional utilización de los recursos económicos del país.”

<sup>261</sup> *Id.*, para. 5 (CL-46). The text in Spanish reads, “Fomentar el desarrollo y orientar la realización de planes y proyectos mineros y pesqueros, mediante la concesión de estímulos a las inversiones de capital en empresas eficientes y adecuadas a la estructura del país.”

<sup>262</sup> *Id.*, para. 11 (CL-46) (emphasis added). The text in Spanish reads, “Ejercer la vigilancia y fiscalización sobre los comerciantes sociales e individuales nacionales o extranjeros; autorizar a las sociedades extranjeras que pretendan realizar actividades comerciales permanentes en el país.”

Granting concessions for the exploration and exploitation of mineral deposits. . . ,<sup>263</sup>

211. The Mining Law provides that MINEC is the competent authority to decide mining-related matters; MINEC fulfills that function through its Bureau of Mines.<sup>264</sup>

212. Similarly, MINEC fulfills its responsibility over foreign investment through ONI. Under the Investment Law, ONI is “in charge of facilitating, centralizing, and coordinating governmental procedures which, in accordance with the law, must be followed by local and foreign investors, towards the execution of their economic, commercial, fiscal, immigration, and any other responsibilities; as well as to generate statistical data on those investments.”<sup>265</sup> However, the ultimate authority for foreign investment resides within MINEC. Under Article 26 of the Investment Law, foreign investment registrations reside “at the Ministry of Economy.”<sup>266</sup> Article 25 provides that “[a]ll other governmental or autonomous agencies, institutions and organizations whose activities are related to investment, are bound to cooperate with *the Ministry of Economy and [ONI]* to enforce compliance with this law and to facilitate the execution of the responsibilities of the latter.”<sup>267</sup> And while decisions concerning investment

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<sup>263</sup> *Id.*, para. 14 (CL-46). The text in Spanish reads, “Otorgar concesiones para la exploración y explotación de minerales. . . .”

<sup>264</sup> Mining Law, Article 4 (CL-5). The text in Spanish reads, “El Organismo Ejecutivo en el Ramo de Economía en adelante denominado ‘El Ministerio’, es la autoridad competente para conocer de la actividad minera, quien aplicará las disposiciones de esta Ley, a través de la Dirección de Hidrocarburos y Minas, que en adelante se identificará como ‘La Dirección.’”

<sup>265</sup> Investment Law, Article 16 (CL-4).

<sup>266</sup> *Id.*, Article 26 (CL-4).

<sup>267</sup> *Id.*, Article 25 (CL-4). The text in Spanish reads, “Las demás dependencias, instituciones y organismos gubernamentales y autónomos, cuyas actividades están relacionadas con las inversiones, estarán obligadas a colaborar con el Ministerio de Economía y la Oficina Nacional de Inversiones, para

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registrations are made in the first instance at ONI, the investor may appeal any such decision to the Minister of the Economy.<sup>268</sup> Ultimately, MINEC is responsible for “*authorizing foreign companies that intend to perform permanent commercial activities in the country.*”<sup>269</sup> That ONI, an office within MINEC, carries out certain functions for MINEC in exercising authority, does not mean that MINEC is no longer El Salvador’s Foreign Investment Authority.

213. As with so many of Respondent’s arguments, this argument is also inappropriate for resolution at this preliminary phase of the case. To the extent that the Tribunal were to resolve this issue at this preliminary phase of the case, the better reading of Salvadoran law is that MINEC, along with its internal offices, represent the Foreign Investment Authority. But this is not an issue that the Tribunal needs to resolve now, nor is it an issue that the Tribunal should resolve now.

214. In conclusion, with respect to Claimant’s claims for breach of investment authorizations, Claimant has satisfied any reasonable pleading standard under CAFTA. In addition, Claimant’s claims with respect to the investment authorizations claims, as a matter of law and taking Claimant’s allegations to be true, are not claims for which an award in Claimant’s favor may not be made. The Tribunal should reject Respondent’s arguments with respect to these claims as well.

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(continued)

lograr el cumplimiento de esta ley y facilitar el ejercicio de las responsabilidades conferidas a esta última dependencia.”

<sup>268</sup> *Id.*, Article 23 (CL-4). The text in Spanish reads, “De toda resolución relacionada con el Registro de Inversión Extranjera emitida por la ONI, se admitirá recurso de apelación para ante el Ministro de Economía, el cual deberá interponerse dentro del plazo de tres días hábiles después de haberse notificado la resolución correspondiente; y quien deberá resolver dentro del plazo de ocho días hábiles siguientes.”

<sup>269</sup> Internal Regulation of the Executive Branch, Article 37, para. 11 (CL-46) (emphasis added).

**VI. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT'S CLAIMS UNDER THE INVESTMENT LAW OF EL SALVADOR, INASMUCH AS THOSE CLAIMS ARISE FROM BREACHES OF INVESTMENT AUTHORIZATIONS**

215. There are two, independent bases for Claimant's claims under the Investment Law of El Salvador. First, as will be explained in this section, those claims are based on Respondent's breaches of obligations it owes to Claimant and the Enterprises under investment authorizations, and the Tribunal has jurisdiction *ratione materiae* to consider those breaches under CAFTA Article 10.16. Second, as will be discussed in Section VII, below, Claimant's claims for breach of the Investment Law exist, and the Tribunal has jurisdiction *ratione materiae* to consider them, by virtue of Respondent's consent to ICSID jurisdiction under Article 15 of the Investment Law, whether or not the investor is found to have received investment authorizations.

216. As discussed in the preceding Section V, above, MINEC resolutions granting exploration licenses to the Enterprises and ONI's registration of Claimant's investments in El Salvador constitute investment authorizations within the meaning of CAFTA Article 10.28. Respondent alleges that these resolutions are not investment authorizations, and Claimant has demonstrated why that allegation is baseless.

217. In its Response, Claimant discussed the legal obligations owed to Claimant and the Enterprises under the investment authorizations and the consequences of breaching those obligations.<sup>270</sup> In its Reply, Respondent does not address those issues at all. Indeed, Professor Reisman ignores Claimant's investment authorization claims entirely, stating incorrectly (and

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<sup>270</sup> See, e.g., Response, para. 212; see also Notice of Arbitration, para. 90.

with no analysis) that “claims of violations of investment authorizations” “appear[] [not] to obtain in the instant case.”<sup>271</sup>

218. Although Respondent confines its argument on investment authorizations to the assertion that ONI and MINEC resolutions are not, in fact, investment authorizations<sup>272</sup> and makes no contention regarding the legal consequences if they are and if obligations under them are breached, Claimant will review those legal consequences here.

219. By granting investment authorizations to the Enterprises, Respondent obligated itself to afford the Enterprises all of the protections set forth in the Investment Law. Thus, Article 26 of the Investment Law states that the owner of a registered investment “automatically enjoy[s] the guarantees and rights stipulated by” the Investment Law.<sup>273</sup>

220. A failure to provide those “guarantees and rights” constitutes a breach of the investment authorizations. As such, examining Claimant’s investment authorization claims requires the Tribunal to examine the rights to which Claimant was entitled as the holder of investment authorizations under the Investment Law.

221. It is indisputable that under CAFTA Article 10.16, the Tribunal has jurisdiction to consider claims of breach of investment authorizations. It also is indisputable that under CAFTA Article 10.22, the rules of law applicable to a claim of breach of an investment authorization are “the rules of law specified in the pertinent . . . investment authorization” or, failing such

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<sup>271</sup> Reisman Opinion, para. 3.

<sup>272</sup> *See, e.g.*, Preliminary Objection, para. 96; Reply, paras. 199-218.

<sup>273</sup> Investment Law, Article 26 (CL-4).

specification, “(i) the law of the respondent, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.”<sup>274</sup>

222. The nature of the investment authorization breaches being alleged in this case is failure to accord the protections of El Salvador’s Investment Law that Respondent committed to accord when it provided the investment authorizations. Accordingly, an examination of Claimant’s investment authorization claims requires the Tribunal to compare the treatment to which Claimant was entitled under the Investment Law with the treatment it actually received. Such examination, of course, will have to wait until the merits phase of this arbitration. In the meantime, however, if the Tribunal concludes that the MINEC resolutions registering Claimant’s investments and issuing Claimant’s mining permits are investment authorizations under CAFTA – or even if the Tribunal concludes that it is to make that determination during a subsequent phase of this proceeding – then Respondent’s premature arguments concerning the CAFTA waiver must be dismissed.

**VII. CLAIMANT HAS NOT WAIVED ITS RIGHT TO SUBMIT CLAIMS UNDER EL SALVADOR’S INVESTMENT LAW IN THE *SAME* PROCEEDING, BEFORE THE *SAME* DISPUTE SETTLEMENT PROCEDURES TO WHICH IT HAS SUBMITTED ITS OTHER CLAIMS**

223. Separate from Claimant’s investment authorization claims, there is an additional, independent basis for the Tribunal to examine Respondent’s breaches of obligations it owed to Claimant and the Enterprises under the Investment Law of El Salvador. Even if the Tribunal were to find that El Salvador did not grant investment authorizations to Claimant or that it did not breach those authorizations, the Tribunal still would have jurisdiction to consider claims

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<sup>274</sup> CAFTA, Article 10.22 (RL-1).

under the Investment Law, due to Respondent's express consent to ICSID jurisdiction in Article 15 of the Investment Law.

224. In this proceeding, Claimant has submitted three categories of claims. Claimant contends that the same measures by El Salvador constitute breaches of obligations under (a) Section A of Chapter 10 of CAFTA, (b) investment authorizations provided by El Salvador to Claimant, and (c) El Salvador's Investment Law. The Tribunal has jurisdiction to consider all three categories of claims in this single proceeding. It has jurisdiction over the treaty and investment authorization claims under CAFTA Article 10.16.<sup>275</sup> It has jurisdiction over the Investment Law claims under Article 15 of the Investment Law.<sup>276</sup>

225. Respondent challenges Claimant's right to pursue its Investment Law claims on the theory that Claimant waived that right. Specifically, Respondent points to the waiver Claimant provided pursuant to CAFTA Article 10.18.2(b) as an abandonment of that right. This argument is based on a flawed interpretation of CAFTA's waiver provision. In particular, Respondent misconstrues the terms "proceeding" and "other dispute settlement procedures," and it ignores the consonance with CAFTA's object and purpose of combining in a single proceeding all claims arising from the same measures (to the extent El Salvador has consented to the submission of such claims to ICSID arbitration, as it has done in both CAFTA and its Investment Law).

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<sup>275</sup> See Notice of Arbitration, paras. 92-109.

<sup>276</sup> See *id.*, paras. 110-116.

226. The proper interpretation of the waiver provision in Article 10.18.2(b) and the flaws in Respondent’s interpretation are discussed in this section and in the expert opinion of Professor Don Wallace, Jr., which is submitted with Claimant’s rejoinder.

227. In brief, Respondent first confuses “proceedings” with “claims.” Pursuant to CAFTA Article 10.18.2(b), Claimant has waived its right to initiate or continue certain “proceeding[s]” with respect to the measures in dispute. It has not waived its right to bring claims based on breaches of the Investment Law (*i.e.*, investment and investor protections contained in a municipal law instrument) and claims based on breaches of CAFTA (*i.e.*, investment and investor protections contained in an international law instrument) in the context of the same proceeding (*i.e.*, an ICSID arbitration). Despite acknowledging the paramount importance of the text in construing the scope of Claimant’s waiver,<sup>277</sup> Respondent consistently ignores the text by, in effect, improperly conflating the term “proceeding” with the term “claim.”<sup>278</sup>

228. This first interpretive error is compounded by a second error. CAFTA’s waiver provision describes the proceedings that a claimant may not initiate or continue by reference to particular venues. As relevant here, a claimant is precluded from initiating or continuing a proceeding with respect to the measures underlying its CAFTA claims before “*other* dispute settlement procedures.”<sup>279</sup> Conversely, a claimant is *not* precluded from initiating or continuing a proceeding with respect to such measures before *the same* dispute settlement procedures to

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<sup>277</sup> See, *e.g.*, Reisman Opinion, paras. 22, 25.

<sup>278</sup> See Opinion of Don Wallace, Jr., dated 12 May 2010, paras. 24-28 (“Wallace Opinion”).

<sup>279</sup> CAFTA, Article 10.18.2 (RL-1) (emphasis added).

which it has submitted its CAFTA claims. Thus, for example, a claimant may not initiate ICSID arbitration (alleging breaches of the Investment Law) and UNCITRAL arbitration (alleging breaches of CAFTA) against El Salvador simultaneously. But it may initiate a single ICSID arbitration submitting both categories of claims before a single tribunal. In construing the waiver provision to encompass proceedings before the same dispute settlement procedures, Respondent ignores the term “other.”<sup>280</sup>

229. Third, Respondent’s discussion of CAFTA’s object and purpose hurts rather than helps its argument. Respondent relies on the opinion of Professor Reisman, who states that “the object and purpose of CAFTA’s waiver requirement is to avoid the costs and inequities associated with a multiplication of proceedings which derive from the same measures.”<sup>281</sup> Accepting this characterization of Article 10.18.2(b), the joinder of Investment Law and CAFTA claims in a single proceeding is hardly contrary to CAFTA’s object and purpose. Indeed, it is precisely by joining in a single proceeding diverse claims arising from the same measures that one *avoids* the very risks Respondent argues CAFTA seeks to avoid.<sup>282</sup>

230. Finally, supplementary means of interpretation – in particular, the negotiating history of the provision from the *North American Free Trade Agreement* (“NAFTA”) from which CAFTA Article 10.18.2(b) was derived – confirm Claimant’s interpretation. This history shows that the provision’s reference to “other dispute settlement procedures” was a last-minute insertion understood by the drafters to be a “minor change[.]” to an otherwise finished text focused on the

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<sup>280</sup> See Wallace Opinion, paras. 32-37.

<sup>281</sup> Reisman Opinion, para. 38; *see also id.*, para. 33.

<sup>282</sup> See Wallace Opinion, paras. 38-41.

preclusion of proceedings in national fora running parallel to an international arbitration proceeding regarding the same underlying measure.<sup>283</sup> Respondent would ascribe to that text a broadly preclusive effect, barring the submission of claims even in the same proceeding before the same tribunal. Not only is that broad interpretation not supported by the text, context, and object and purpose of CAFTA, it also is not supported by the relevant negotiating history.

**A. Claimant’s Investment Law Claims Are Not Separate “Proceedings”**

231. As required by CAFTA Article 10.18.2(b), Claimant provided with its Notice of Arbitration written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.<sup>284</sup>

232. At issue is the scope of that waiver. To understand the scope, it is necessary to interpret Article 10.18.2(b), as Respondent acknowledges, “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.”<sup>285</sup>

233. In executing a waiver pursuant to Article 10.18.2(b), a claimant gives up “any right to initiate or continue” certain “proceeding[s].” The kinds of proceedings it may not initiate or continue are defined by reference to subject matter and venue. With respect to subject matter,

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<sup>283</sup> See MEG N. KINNEAR, ANDREA K. BJORKLUND, ET AL., INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO CHAPTER 11 1121-8 (2006) (CL-57).

<sup>284</sup> CAFTA, Article 10.18.2(b) (RL-1).

<sup>285</sup> Reply, para. 230(b) (quoting Reisman Opinion, para. 47, in turn quoting the Vienna Convention, Article 31(1) (CL-10)).

the waiver encompasses proceedings “with respect to any measure alleged to constitute a breach referred to in Article 10.16”<sup>286</sup> (*i.e.*, a breach of an obligation under Section A of Chapter 10 of CAFTA, an investment authorization, or an investment agreement). With respect to venue, the waiver encompasses proceedings “before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures.”

234. In sum, for conduct to come within the scope of the waiver it must consist of the initiation or continuation of (i) a “proceeding” that is both (ii) “with respect to any measure alleged to constitute a breach referred to in Article 10.16,” and (iii) “before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures.”<sup>287</sup> If conduct does not meet all three of these criteria, it is outside the scope of, and therefore not precluded by, the waiver.

235. Respondent contends that all three criteria are met in the case of Claimant’s Investment Law claim. That contention relies on the critical but unstated assumption that Claimant’s Investment Law claims are distinct “proceeding[s],” and that its CAFTA and investment authorization claims also are distinct “proceeding[s].” Thus, in Respondent’s view, there are pending before this ICSID Tribunal multiple proceedings, rather than a single ICSID proceeding involving multiple claims.

236. Stating this assumption reveals its absurdity. As will be discussed below, the action before this Tribunal obviously constitutes a single “proceeding” within the ordinary

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<sup>286</sup> CAFTA, Article 10.18.2(b) (RL-1).

<sup>287</sup> *Id.*

meaning of that term, as opposed to multiple proceedings, and the inclusion in this proceeding of claims based on breaches of the Investment Law of El Salvador does not constitute the initiation of separate proceedings. Respondent evidently realizes this problem with its theory and thus repeatedly substitutes “claim” for “proceeding” in describing the scope of the waiver, even though the word “claim” appears nowhere in Article 10.18.2(b).<sup>288</sup> (Professor Reisman also consistently describes the waiver’s scope by moving away from the actual text – “proceeding” – and referring instead to Respondent’s preferred term – “claim.”<sup>289</sup>)

### **1. A “Claim” is Not a “Proceeding”**

237. A “proceeding” is a “regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.”<sup>290</sup> As such, it is distinct from a “claim,” a term used in CAFTA Chapter 10 to refer to an allegation of breach of an obligation and loss or damage incurred by reason of or arising out of that breach.<sup>291</sup> Indeed, a given proceeding may encompass the examination of multiple claims.

238. This ordinary meaning of the term “proceeding” in CAFTA Article 10.18.2(b) is confirmed by the context in which it is used in the surrounding text. Throughout Chapter 10, the CAFTA Parties used the term “proceeding” (as well as the plural form, “proceedings”) in a way that plainly refers to an arbitration or other dispute settlement process, as opposed to individual

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<sup>288</sup> See, e.g., Reply, paras. 220, 223, 228, 230(d), 232.

<sup>289</sup> See, e.g., Reisman Opinion, paras. 4, 6, 7(d), 7(e), 32, 37, 41, 43, 44, 45, 46, 47(d), 47(e).

<sup>290</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004) (CL-67); see also THE OXFORD ENGLISH DICTIONARY ONLINE 545 (2d ed. 1989) (defining “proceeding” as “[t]he instituting or carrying on of an action at law; a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party.”) (CL-68).

<sup>291</sup> See CAFTA, Article 10.16.1 (RL-1).

claims asserted within a dispute settlement process. For example, under Annex 10-E, an investor of the United States is precluded from submitting to arbitration a claim of breach of an obligation under Section A of Chapter 10 if that investor previously “has alleged that breach of an obligation under Section A [*i.e.*, that *claim*] in *proceedings* before a court or administrative tribunal of a Central American Party or the Dominican Republic.”<sup>292</sup> Other provisions in Chapter 10 similarly use “proceeding” and “proceedings” in ways that clearly refer to a process rather than a claim.<sup>293</sup>

239. The context for Article 10.18.2(b) also includes the three options for submission of a claim provided for in Article 10.16: (a) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings; (b) the ICSID Additional Facility Rules; and (c) the UNCITRAL Arbitration Rules. As detailed below, all three regimes use the term “proceeding” frequently and in a manner consistent with the above-quoted definition and contrary to Respondent’s assumption that each individual claim submitted to a tribunal is a separate proceeding. One reasonably may infer that the frequent references to “proceeding” in these arbitral regimes informed the Parties’ use of the identical term in CAFTA.

240. The ICSID Convention and Arbitration Rules, the ICSID Additional Facility Rules, and the UNCITRAL Arbitration Rules all use “proceeding” to refer to the entire progression of an arbitration, as opposed to the individual claims submitted to arbitration. This

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<sup>292</sup> CAFTA Annex 10-E (RL-1) (emphases added).

<sup>293</sup> *See, e.g.*, CAFTA, Article 10.20.4(b) (referring to tribunal’s authority to suspend “proceedings” in order to address certain preliminary objections); Article 10.21 (“transparency of arbitral proceedings”); Article 10.25.8 (prescribing how a special consolidation tribunal “shall conduct its proceedings”) (RL-1); *see also* Wallace Opinion, paras. 26-28.

contrast is clear, for example, in ICSID Arbitration Rule 40(2), which provides that “[a]n incidental or additional claim shall be presented not later than in the reply . . . unless the Tribunal . . . authorizes the presentation of the *claim* at a later stage in the *proceeding*.”<sup>294</sup> Article 47(2) of the Additional Facility Rules is identical.<sup>295</sup> Article 20 of the UNCITRAL Rules similarly provides that “[d]uring the course of the arbitral *proceedings* either party may amend or supplement his *claim* or defense unless the arbitral tribunal considers it inappropriate to allow such amendment. . . .”<sup>296</sup>

241. In a similar vein, ICSID Arbitration Rule 41(2) contemplates a tribunal determining whether it has jurisdiction over a particular “claim” “at any stage of the proceeding.”<sup>297</sup> Article 45(3) of the Additional Facility Rules makes a similar distinction between “dispute” and “proceeding.”<sup>298</sup>

242. Moreover, the distinction between a proceeding and a claim is underscored by contrasting the provision at issue here – paragraph 2 of CAFTA Article 10.18 – to paragraph 4 of the same article. Both provisions place conditions on the submission of a claim to CAFTA arbitration. As has been discussed, paragraph 2 requires a claimant to forego the initiation or continuation of certain “proceeding[s].” By contrast, paragraph 4 precludes a claimant from submitting certain types of claims (in particular, claims of breach of an investment agreement or

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<sup>294</sup> ICSID Arbitration Rule 40(2) (emphasis added).

<sup>295</sup> ICSID Additional Facility Rules Article 47(2).

<sup>296</sup> UNCITRAL Rules, Article 20 (**CL-64**) (emphasis added).

<sup>297</sup> ICSID Arbitration Rule 41(2).

<sup>298</sup> ICSID Additional Facility Rules Article 45(3).

an investment authorization) to arbitration in the first place if the claimant “has previously submitted the same alleged breach to an administrative tribunal or court of the Respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.” In other words, paragraph 2 is what is commonly referred to as a “no U-turn” provision (in the sense that having initiated arbitration of claims arising from a given measure, a claimant cannot turn back to other procedures to address claims arising from that same measure), whereas paragraph 4 is what is commonly referred to as a “fork-in-the-road” provision (in the sense that having opted to submit a particular claim – *i.e.*, an “alleged breach” – to another form of dispute settlement, a claimant is barred from initiating CAFTA arbitration of that same claim).<sup>299</sup>

243. In addition to being in close proximity to one another in the same article, paragraphs 2 and 4 employ similar drafting. Both prescribe conditions and limitations in terms of conduct that has occurred or may occur before an “administrative tribunal or court . . . or other dispute settlement procedure[s].”<sup>300</sup> That drafting similarity strongly suggests that where there are drafting differences they were made deliberately.<sup>301</sup> Professor Reisman evidently agrees with

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<sup>299</sup> See CAMPBELL McLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 105-109 (2007) (CL-58). Annex 10-E of CAFTA, as discussed above, also is a fork-in-the-road provision applicable to U.S. investors. If a U.S. investor submitted a claim for breach of an obligation under Section A of CAFTA to a court or administrative tribunal of another CAFTA Party, it would be precluded from submitting the same claim to arbitration under Section B of CAFTA.

<sup>300</sup> CAFTA, Article 10.18.2(b) (RL-1).

<sup>301</sup> See, e.g. Executive Summary of First Written Submission of the United States, *United States – Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW (14 Jul. 2005), para. 17 (“The original panel correctly observed, ‘[W]e are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning’. The converse of that observation is also true in this dispute. When the drafters excluded language from the treaty, it must be assumed that they did so deliberately, and the absence of a term in one provision that is included in another provision must not be ignored; it must be accorded significance.”) (CL-48).

this observation.<sup>302</sup> However, while he calls attention to certain differences between paragraphs 2 and 4, he overlooks the most important difference. Whereas the limitation in paragraph 2 is on initiation or continuation of a “proceeding,” the limitation in paragraph 4 is on the claimant having “previously submitted the same alleged breach” (*i.e.*, claim) to another form of dispute settlement.

244. What this contrast demonstrates is that the CAFTA Parties clearly knew how to define a limitation in terms of the submission of claims rather than the initiation of proceedings when that was their intent. Paragraph 4 defines a limitation in terms of claims: “No [investment agreement or investment authorization] claim may be submitted to arbitration . . . if . . . the same alleged breach [that is, claim]” previously has been submitted to other forms of dispute settlement.<sup>303</sup> (Annex 10-E also defines limitations on submissions to arbitration by U.S. investors in terms of claims.) That the Parties chose a different formulation in paragraph 2 reflects a deliberate choice to define the condition set forth there not in terms of submission of “claims” (*i.e.*, “alleged breach[es]”) but in terms of initiation (or continuation) of “proceedings.”

245. Conflating the two distinct concepts, as Respondent does, fails to give effect to the Parties’ intent in defining the condition in paragraph 2 differently from the condition in paragraph 4. Moreover, followed to its logical conclusion, Respondent’s treatment of “proceedings” as synonymous with “claims” would lead to an anomalous result that would render another provision of Section B of Chapter 10 of CAFTA a nullity.

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<sup>302</sup> See Reisman Opinion, para. 31.

<sup>303</sup> CAFTA, Article 10.18.4 (RL-1).

**2. Respondent’s Construction Would Render the “Additional Claims” Provision of Article 10.16.4 Inutile**

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246. According to Respondent’s reasoning, a waiver provided under Article 10.18.2(b) precludes a claimant from submitting to arbitration a claim other than a CAFTA claim set forth in its notice of arbitration. A claim submitted after filing of the notice of arbitration – even a claim of the type described in Article 10.16.1 – would constitute the initiation of a new proceeding, according to this argument, and thus would be barred.

247. That result, however, is plainly contrary to Article 10.16.4, which expressly contemplates the possibility of “[a] claim submitted for the first time after [a] notice of arbitration is submitted” and prescribes the date on which such a claim “shall be deemed submitted to arbitration.” Respondent’s construction of Article 10.18.2(b) impermissibly would render the latter provision inutile.<sup>304</sup>

248. That dilemma is avoided when “proceeding” is given its ordinary meaning. In that case, a claim submitted to arbitration before the same tribunal in the same proceeding after the filing of a notice of arbitration does not constitute the initiation of a new proceeding and is not precluded by a claimant’s waiver under Article 10.18.2(b).

249. Respondent seeks to avoid the foregoing dilemma by construing the waiver as pertaining only to claims other than the claims provided for in Article 10.16.1. Thus, Professor Reisman construes the waiver under Article 10.18.2(b) as a waiver of “possible claims based on

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<sup>304</sup> See, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996), DSR 1996:I, 22-23 and n.45 (“An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”) (CL-49).

the same measures under non-CAFTA legal instruments.”<sup>305</sup> But that construction moves even further away from the actual text. To get to that construction, not only does Respondent have to read “proceeding” to mean “claim,” it then has to qualify the waiver thus understood by introducing the term “non-CAFTA,” another term that does not appear in the actual text.

250. The actual text does not require the qualifier “non-CAFTA.” Under the actual text, having filed a notice of arbitration with respect to a measure, a claimant is precluded from initiating another proceeding with respect to the same measure regardless of whether the hypothetical other proceeding is based on CAFTA claims or non-CAFTA claims. The point is that the claimant must confine its pursuit of a remedy with respect to the measure to the single proceeding it has initiated by filing a notice of arbitration under CAFTA. That does not mean, however, that the claimant is barred from joining non-CAFTA claims to its CAFTA claims in the same proceeding.

251. Respondent asserts that the joinder of CAFTA and non-CAFTA claims in a single proceeding amounts to a “circumvention” of CAFTA’s waiver provision, because a claimant would be doing in a single proceeding what it could not do in multiple proceedings.<sup>306</sup> But that characterization is based on an unsupported assumption about the CAFTA Parties’ intent. Thus, Professor Reisman asserts without citation to any authority that “the critical part of the preclusion is not the venue (‘any’ venue) where the claim based on the same measure is brought but the claim itself.”<sup>307</sup> But if “the claim itself” were indeed “the critical part of the preclusion,”

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<sup>305</sup> Reisman Opinion, para. 6; *see also id.*, paras. 7(e), 41.

<sup>306</sup> Reisman Opinion, para. 5; *see also id.*, para. 44; Reply, para. 223.

<sup>307</sup> Reisman Opinion, para. 32.

a treaty interpreter might expect the Parties to have used the term “claim” (or the related term “alleged breach”) in the text setting forth the preclusion, just as the Parties did in other text (Article 18.2.4 and Annex 10-E) setting forth different preclusions. That they did not do so must be accorded significance under ordinary rules of treaty interpretation.<sup>308</sup>

252. Moreover, the assertion that “the critical part of the preclusion is not the venue . . . but the claim itself” is belied by Respondent’s own contemporaneous explanation of the waiver provision.<sup>309</sup> In January 2005, El Salvador’s Ministry of the Economy published an explanatory document (“Documento Explicativo”). The document’s explanation of the waiver provision consists of two sentences that refer only to venues and not to claims. Thus, the explanatory document states:

Si un inversionista recurre al mecanismo de solución de diferencias del TLC, no puede recurrir a los tribunales nacionales. Si por el contrario el inversionista recurre a los tribunales nacionales y finaliza el proceso, no puede recurrir posteriormente al mecanismo del TLC.<sup>310</sup>

253. If, as Professor Reisman asserts, “the critical part of the preclusion” were “the claim itself,” one would have expected El Salvador to have highlighted this fact in the

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<sup>308</sup> See, Executive Summary of First Written Submission of the United States, *United States – Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW (14 Jul. 2005), para. 17 (CL-48).

<sup>309</sup> Reisman Opinion, para. 32.

<sup>310</sup> Ministerio de Economía, Documento Explicativo de las Negociaciones del Tratado de Libre Comercio entre Centroamérica, República Dominicana y Estados Unidos, Jan. 2005, at 18 (CL-62). The text in English reads: “If an investor resorts to the dispute settlement mechanism in the FTA, it cannot resort to national tribunals. If, on the other hand, the investor resorts to national tribunals and concludes the proceeding, it cannot resort afterwards to the mechanism in the FTA.”

explanatory document, especially given the ordinary rule entitling a foreign investor to submit claims of breach of the Investment Law to ICSID arbitration.<sup>311</sup>

**3. By Reading “Proceeding” to Mean “Claim,” Respondent Wrongly Suggests That Claimant Has Waived its Treaty-Based Right to Submit Investment Law Claims to This Tribunal Implicitly, and not Explicitly**

254. Finally, Respondent’s interpretation of “proceeding” as meaning “claim” in CAFTA article 10.18.2(b) must be rejected, because it would treat Claimant’s waiver as an implicit waiver of a right Claimant has by virtue of treaty – in particular, Article 25 of the ICSID Convention – contrary to the well-established principle that any waiver of a treaty right must be express and explicit.

255. Article 25 of the ICSID Convention extends the jurisdiction of ICSID “to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” It further provides that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.”

256. El Salvador gave its written consent to the submission of Investment Law claims to ICSID in Article 15 of that law. In view of that consent, Claimant had a right, pursuant to Article 25 of the Convention, to submit an Investment Law claim to ICSID. It also had a right not to have El Salvador unilaterally withdraw its consent to ICSID jurisdiction.

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<sup>311</sup> Notably, this provision of the Investment Law was not amended upon ratification of CAFTA to reflect the limitation El Salvador now asserts.

257. As the tribunal in *Duke Energy v. Ecuador* found, any waiver of a treaty-based right to submit a claim to arbitration “would have to be explicit.”<sup>312</sup> In that case, the claimant did not waive its right to pursue arbitration of its treaty-based rights when it entered into an arbitration agreement that provided that “[t]he Arbitration held pursuant to this Agreement will be the exclusive means for resolving all Differences related to the Investment.”<sup>313</sup>

258. In the present case, the statement that Respondent interprets as a waiver of Claimant’s treaty-based rights is even less explicit than the one the *Duke Energy* tribunal found not to constitute a waiver. In this case, the waiver says nothing about “claims” or even (as in *Duke Energy*) “differences.” It simply precludes the initiation of certain “proceeding[s].” The only way to construe that waiver as an abandonment of Claimant’s right under the ICSID Convention to submit to this Tribunal claims under the Investment Law as to which El Salvador already has given its consent to ICSID jurisdiction is to read “proceeding” as impliedly meaning “claim.”

259. Thus, even under Respondent’s theory, any waiver by Claimant of its right under the ICSID Convention to submit its Investment Law claims to this Tribunal is, at best, an implied waiver. Because a party is presumed not to waive a treaty-based right unless it does so explicitly, this is an additional reason to reject Respondent’s interpretation of Article 10.18.2(b) of CAFTA.

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<sup>312</sup> *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Arbitration No. ARB/04/19 (Award dated 12 Aug. 2008), para. 159 (CL-16).

<sup>313</sup> *Id.*, para. 158.

**B. Claimant’s Investment Law Claims Have Not Been Submitted to “Other Dispute Settlement Procedures”**

260. Even if, contrary to the discussion in the preceding section, there were a basis for treating the term “initiate . . . any proceeding” to mean “submit any non-CAFTA claim,” Respondent’s argument that Claimant’s Investment Law claims are precluded still would fail, because the procedures to which those claims have been submitted are not “other dispute settlement procedures.” (Emphasis added.)

261. As discussed above, a waiver under Article 10.18.2(b) of CAFTA applies only to certain types of proceedings. To come within the scope of the waiver, a proceeding must be “with respect to any measure alleged to constitute a breach referred to in Article 10.16,” and it must be “before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures. . . .”

262. Respondent contends that Claimant’s Investment Law claims constitute proceedings “before . . . other dispute settlement procedures.”<sup>314</sup> Thus, it contends that the present arbitral Tribunal is an “other dispute settlement procedure.”

263. That contention plainly is incorrect. The Tribunal is not an “*other* dispute settlement procedure.” It is the *same* dispute settlement procedure to which Claimant has submitted its CAFTA Section A and investment authorization claims arising from the measures at issue.

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<sup>314</sup> See, e.g., Reply, paras. 220, 228, 232; Reisman Opinion, paras. 4-5, 32-33, 47.

264. Respondent acknowledges that the waiver Claimant provided under CAFTA Article 10.18.2(b) was a waiver of its right to initiate or continue certain proceedings “before any other dispute settlement procedures.”<sup>315</sup> However, it then proceeds to ignore the word “other” and to treat the waiver as if it encompassed the very dispute settlement procedures to which Claimant has submitted its CAFTA claims.<sup>316</sup> This disregard of the text being interpreted is contrary to the ordinary rules of treaty interpretation.

265. Professor Reisman characterizes the CAFTA waiver provision as “intentionally broad.”<sup>317</sup> Whatever the intended breadth, however, it clearly is not all-encompassing. Had the Parties intended it to be so, it would have been simple enough to require a waiver of “any right to initiate or continue, before any dispute settlement procedures, any proceeding. . . .” In that case, there would have been no need to single out particular fora, such as “any administrative tribunal or court under the law of any Party.” Likewise, there would have been no need to single out “other” dispute settlement procedures.

266. In sum, the waiver required under CAFTA Article 10.18.2(b) is not a waiver of the right to initiate or continue any and all proceedings pertaining to the measures at issue. It is a waiver of the right to initiate or continue proceedings defined in part by the venues in which such proceedings could be initiated or continued, including “other dispute settlement procedures.” (Emphasis added.) “Other dispute settlement procedures,” by definition, excludes the dispute

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<sup>315</sup> Reply, para. 220.

<sup>316</sup> Tellingly, Professor Reisman’s analysis of the phrase “other dispute settlement procedures” focuses on different aspects of that phrase, such as the use of the plural form – “procedures” – and the absence of the modifier “binding” (in contrast to the corresponding phrase in paragraph 4 of Article 10.18). However, it never addresses the term “other.” See Reisman Opinion, para. 31.

<sup>317</sup> *Id.*, para. 30.

settlement procedures that have been invoked through the filing of a notice of arbitration. The initiation or continuation of a proceeding before those dispute settlement procedures is not precluded.

267. By submitting El Salvador Investment Law claims to this Tribunal, Claimant has not initiated a proceeding before “other dispute settlement procedures.” (Indeed, as discussed in Section A, above, the individual claims are not even separate “proceedings”; they are claims submitted, together with CAFTA Chapter 10, Section A and investment authorization claims, in the same single “proceeding.”) Rather, it has included those claims in a proceeding before the very same dispute settlement procedures that it invoked by filing its notice of arbitration. For this additional reason, Respondent’s argument that the Investment Law claims are barred by Claimant’s waiver is erroneous.<sup>318</sup>

**C. Resolution of Claimant’s CAFTA Claims and Investment Law Claims in a Single Proceeding Before the Same Dispute Settlement Procedures is Consistent with CAFTA’s Object and Purpose**

268. In addition to finding support in the text and context of CAFTA Article 10.18.2(b), the foregoing understanding of the scope of the waiver provided pursuant to that article finds support in CAFTA’s object and purpose. Respondent asserts, through the opinion of Professor Reisman, that “it is clear that the object and purpose of CAFTA’s waiver requirement is to avoid the costs and inequities associated with a multiplication of proceedings which derive from the same measures.”<sup>319</sup> Assuming, *arguendo*, that is the object and purpose of Article

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<sup>318</sup> See Wallace Opinion, paras. 17, 35-36.

<sup>319</sup> Reisman Opinion, para. 38; *see also id.*, paras. 28 (referring to “problem of potentially contradictory judgments”), 33, 35, & 36.

10.18.2(b), it is entirely consistent with that object and purpose to allow claims under El Salvador's Investment Law to be joined in the same proceeding with claims of breach of obligations under CAFTA Chapter 10, Section A and investment authorizations.

**1. Joinder of claims in single proceeding does not give rise to the risks CAFTA's waiver provision seeks to avoid**

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269. The risks Respondent identifies are risks that might well arise if a claimant were allowed to pursue multiple proceedings with respect to the same underlying measure (as opposed to multiple claims within a single proceeding). Thus a Respondent might be found liable once by a national court and required to pay damages based on a municipal law claim, and be found liable again by an international arbitral tribunal and required to pay damages again based on a treaty law claim. Article 10.18.2(b) prevents that from happening by requiring a claimant to waive initiation or continuation of the proceeding in national court.

270. However, this risk does not arise when the different claims are submitted in a single proceeding before the same arbitral tribunal. Far from contradicting the purpose of avoiding that risk, such joinder of claims in a single proceeding affirmatively advances that purpose.<sup>320</sup>

271. The same can be said of the other major risk that Respondent identifies, "the problem of potentially contradictory judgments."<sup>321</sup> That risk obviously is avoided when claims

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<sup>320</sup> As Professor Reisman recognizes, such joinder is "simply a matter of judicial economy." Reisman Opinion, para. 41.

<sup>321</sup> *Id.*, para. 28.

based on different legal instruments but arising from the same measure are examined by the same tribunal in the same proceeding.<sup>322</sup>

272. Professor Reisman states that “[w]hether these costs and inequities may or may not materialize . . . is irrelevant because jurisdiction for non-treaty claims arising from the same measures as those to which the Treaty applies is precluded by the clause’s text, object and purpose.”<sup>323</sup> But this statement defies logic: It invokes the treaty’s object and purpose as a basis for precluding conduct that it acknowledges may not be inconsistent with the treaty’s object and purpose. On the one hand, it is asserted that it would be inconsistent with CAFTA’s object and purpose to interpret Article 10.18.2(b) in a way that would engender particular risks, such as double recovery and inconsistent judgments. On the other hand, it is asserted that even if “these costs and inequities . . . may not materialize,” the proposed interpretation – that is, one that in this case would allow claims of breach of El Salvador’s Investment Law to be combined in a single proceeding with claims of breach of CAFTA Chapter 10 Section A obligations and investment authorizations – nevertheless “is precluded by the clause’s text, object and purpose.”

273. How, one might ask, can an interpretation be precluded by the object and purpose of Article 10.18.2(b) if the result sought to be avoided by that object and purpose “may not materialize” – and indeed, would be prevented from materializing by that very interpretation? The answer is that the interpretation is not precluded. Rather, the fact that it does not give rise to the risks sought to be avoided demonstrates that the proposed interpretation is not inconsistent with the provision’s object and purpose and therefore not precluded.

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<sup>322</sup> See Wallace Opinion, para. 41.

<sup>323</sup> Reisman Opinion, para. 38.

## 2. Jurisprudence does not support Respondent's interpretation

274. The decisions cited by Respondent are not to the contrary. None of those decisions found the pursuit of both treaty law and municipal law claims before the same tribunal in the same proceeding to be inconsistent with CAFTA Article 10.18.2(b) or the corresponding provision in NAFTA (Article 1121) or the corresponding provisions of other treaties. Indeed, the cited decisions support Claimant's position.

275. For example, the tribunal's decision in *Waste Management I* confirms Claimant's interpretation of the relevant waiver provision (materially identical in CAFTA and NAFTA) as pertaining to "proceedings before *other* courts or tribunals."<sup>324</sup> That tribunal explained that the "imminent risk" that the required waiver "seeks to avoid" is the risk that "the Claimant may obtain the double benefit in its claim for damages."<sup>325</sup> As discussed above, interpreting the waiver provision as not precluding the joinder of municipal law claims and treaty law claims in a single proceeding before a single arbitral tribunal is not at all inconsistent with the avoidance of that "imminent risk."

276. Respondent also cites the award of the tribunal in *Inceysa v. El Salvador* (an award under the Spain-El Salvador Bilateral Investment Treaty issued two years *after* CAFTA was signed) as supposedly "illustrative of the difficulties and inefficiencies that the CAFTA

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<sup>324</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (Arbitral Award dated 2 June 2000), para. 19 (RL-11) (emphasis added); *see also id.*, para. 24 ("[I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before *other* courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions." (Emphasis added.)).

<sup>325</sup> *Id.*, para. 27.

waiver is designed to prevent.”<sup>326</sup> Yet, nothing in the award evinces the “difficulties and inefficiencies” that Respondent alleges. Even the portion of the award quoted by Respondent simply makes the unremarkable observation that because jurisdiction was invoked on the basis of two different bodies of law, the tribunal would consider its competence first under one and then under the other.<sup>327</sup>

277. Respondent cites no evidence for its contention that CAFTA’s waiver provision was “designed to prevent” the “difficulties and inefficiencies” allegedly associated with a tribunal’s examination of claims under two different bodies of law (treaty law and municipal law) as illustrated by the *Inceysa* award. (Even if such evidence existed, Professor Reisman states that “[g]iven the clarity of the language of Article 10.18.2, there is, thus, no warrant for resorting to *travaux*[.]”<sup>328</sup>) That an award issued in August 2006 somehow influenced the “design[]” of an agreement that was signed two years earlier is, of course, an impossibility. And, in any event, the fact that CAFTA includes a “Governing Law” provision that expressly contemplates different claims being decided under different bodies of law<sup>329</sup> belies Respondent’s characterization of the “difficulties and inefficiencies” that CAFTA’s waiver provision was “designed to prevent.”

278. Respondent cites the decision on jurisdiction in *Tradex Hellas v. Albania* for the proposition that “the proceedings initiated under a treaty and under an investment law are

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<sup>326</sup> Reply, para. 232.

<sup>327</sup> See *id.*, para. 233 (quoting *Inceysa Vallisoletane, SL v. El Salvador*, ICSID Case No. ARB/03/26, (Arbitral Award dated 2 Aug. 2006), paras. 130-131 (RL-30)).

<sup>328</sup> Reisman Opinion, para. 32.

<sup>329</sup> CAFTA, Article 10.22 (RL-1).

different and independent proceedings that can lead to different results, even if before a single tribunal.”<sup>330</sup> However, the *Tradex* decision does not support that proposition at all. As summarized by Respondent, the tribunal in *Tradex* dismissed claimant’s treaty-based claim and then examined its municipal law claim on the merits. While in some general sense the tribunal may have reached “different results” with respect to the different claims (dismissing one while proceeding to examine the other on the merits), these were not conflicting results of the type sought to be avoided by the CAFTA waiver provision. Nor does this outcome support the characterization of individual claims as discrete “proceedings” in the sense contemplated by Article 10.18.2(b) of CAFTA.

279. In sum, the jurisprudence cited by Respondent fails to support its contention that CAFTA’s waiver provision precludes the inclusion in a single proceeding, before the same tribunal of claims of breach under Chapter 10, Section A of CAFTA, investment authorizations, and El Salvador’s Investment Law. As this contention lacks any basis in the text, context, or object and purpose of CAFTA, the Tribunal should reject it.

**D. Supplementary Means of Interpretation Confirm Claimant’s Interpretation of Article 10.18.2(b)**

280. As the above discussion demonstrates, it is clear from the text of CAFTA Article 10.18.2(b) in context and in light of CAFTA’s object and purpose that the waiver provision in that article does not preclude a claimant from joining a municipal law claim with a treaty law claim or other claim of the kind set forth in CAFTA Article 10.16 in the same proceeding before the same tribunal. Given the clear meaning of the treaty provision being interpreted, there is no

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<sup>330</sup> Reply, para. 234.

need for this Tribunal to have recourse to supplementary means of interpretation.<sup>331</sup> If, however, the Tribunal were to refer to supplementary means of interpretation, it would find further confirmation of the meaning Claimant has proposed.

281. In this regard, Claimant recalls Professor Reisman’s observation that “[t]he waiver requirement in CAFTA Article 10.18 has the same object and purpose as does the waiver requirement in NAFTA Article 1121. . . .”<sup>332</sup> In discussing the object and purpose of NAFTA Article 1121 (and therefore, indirectly, CAFTA Article 10.18), Professor Reisman cites with approval an authoritative treatise on the negotiating history of NAFTA Chapter 11.<sup>333</sup> In that treatise, the authors describe the negotiating history of Article 1121 in way that is particularly illuminating for present purposes.

282. As finally adopted, the scope of the waiver provision in NAFTA Article 1121 is similar to the scope of the waiver provision in CAFTA Article 10.18.2(b). Thus, under NAFTA, the claimant is required to waive its “right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116” (with exceptions similar to those in CAFTA Article 10.18.3).

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<sup>331</sup> Under the Vienna Convention, Article 32, “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

<sup>332</sup> Reisman Opinion, para. 35.

<sup>333</sup> Reisman Opinion, para. 35, n.17 (citing KINNEAR, BJORKLUND, ET AL., INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO CHAPTER 11 (2006)).

However, the key phrase for present purposes – “other dispute settlement procedures” – did not get inserted until very late in the negotiating process.

283. As set forth in the treatise, the text as it stood on September 4, 1992 referred to a waiver of the right to initiate or continue certain proceedings “before any administrative tribunal or court under the domestic law of any Party.” There was no reference to “other dispute settlement procedures.”<sup>334</sup> According to the authors, “Article 1121(3) [pertaining to the formalities of memorializing and transmitting a waiver] had reached its final form; the other provisions were still subject to minor changes before reaching that stage.”<sup>335</sup>

284. The authors go on to state that on October 2, 1992, Article 1121 “had reached its final form, except that there was no subparagraph 4 [pertaining to the circumstance in which a disputing Party has deprived a disputing investor of control of an enterprise].”<sup>336</sup> In point of fact, however, even at that late date, the waiver provision did not refer to “other dispute settlement procedures.”<sup>337</sup> That phrase did not appear in Article 1121 until the draft of December 10, 1992.<sup>338</sup>

285. In sum, text that is central to the issue now at hand was one of the “minor changes” made to NAFTA Article 1121 in the late stages of the negotiation of that text. Indeed,

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<sup>334</sup> KINNEAR, BJORKLUND, ET AL., INVESTMENT DISPUTES UNDER NAFTA 1121-8.

<sup>335</sup> *Id.* (emphasis added.)

<sup>336</sup> *Id.*

<sup>337</sup> See North American Free Trade Agreement (“NAFTA”), Ch. 11 (draft dated 2 Oct. 1992) (CL-47).

<sup>338</sup> See *id.* (CL-47).

it was so minor that the authors of an authoritative treatise on the history of the negotiation of NAFTA Chapter 11 considered Article 1121 to have reached its “final form” even before the text at issue was added. In that “final form,” NAFTA’s waiver provision referred only to the initiation or continuation of proceedings “before any administrative tribunal or court under the law of any Party.”

286. The implication that the addition of the phrase “other dispute settlement procedures” to the waiver provision in NAFTA Article 1121 was “minor” is consistent with the interpretation that Claimant has proposed of the corresponding provision of CAFTA. That is, the language ensures against the initiation or continuation of parallel proceedings regarding the measure at issue before a forum that might not bear the label “administrative tribunal” or “court.”

287. However, Respondent attributes a significance to the phrase “other dispute settlement procedures” that is far out of proportion to the “minor” significance it was understood to have in the NAFTA context. Respondent reads that phrase as foreclosing whole categories of claims from being submitted to a tribunal that has been established pursuant to a notice of arbitration alleging claims under Article 10.16 of CAFTA. Had that been the meaning intended by the drafters of NAFTA Article 1121, insertion of the phrase “other dispute settlement procedures” certainly could not be called “minor.” Rather, it would have represented a dramatic shift from a waiver focused on the initiation of parallel proceedings before certain venues to a waiver focused on the submission of certain claims to all venues, including the very same venue established by a notice of arbitration.

288. In sum, as Professor Reisman acknowledges, CAFTA Article 10.18.2(b) is based on NAFTA Article 1121 and shares the same object and purpose as that provision. Accordingly,

the history of the development of NAFTA Article 1121 can shed light on the corresponding CAFTA text. What that history shows is that the phrase that is key to the issue presently in dispute – “other dispute settlement procedures” – was added to NAFTA Article 1121 late in the negotiation and was considered a “minor” change to an article otherwise focused on parallel proceedings before national administrative tribunals and courts. That history confirms the significance Claimant attaches to the corresponding CAFTA text and contradicts the significance Respondent attaches to it.

### **VIII. CLAIMANT IS ENTITLED TO COSTS AND ATTORNEYS FEES**

289. But for CAFTA Article 10.20.6 – which provides that a tribunal may award to the prevailing disputing party reasonable costs and attorney’s fees incurred in opposing the objection – a respondent has virtually nothing to lose when it submits a preliminary objection under Article 10.20.4. A respondent may succeed in disposing of some or all of the claimant’s case. Yet at the same time, “[t]he respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under [Article 10.20.4] or make use of the expedited procedures set out in paragraph 5.”<sup>339</sup>

290. That is why Article 10.20.6 is so important to prevent the type of abusive filing that Respondent has made in support of its Preliminary Objection in this case.

291. Article 10.20.6 provides in full:

*When* it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing

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<sup>339</sup> CAFTA, Article 10.20.4(d) (RL-1).

party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal *shall* consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.<sup>340</sup>

292. There are several notable aspects to this provision. First, it specifically authorizes the Tribunal to award reasonable costs and attorney’s fees *when* it decides the objection. The prospect of a costs award at the end of the case, which could easily be several years down the road, may not be sufficient to dissuade a respondent from filing a preliminary objection designed to impose significant burden and cost on the claimant (especially if the respondent believes that such burden and cost might induce the claimant into an inexpensive settlement or into dropping the case altogether).

293. Second, Article 10.20.6 specifically requires the Tribunal to consider whether the claim or objection was frivolous in determining whether an award of costs and fees is warranted: “In determining whether such an award is warranted, the tribunal *shall* consider whether either the claimant’s claim or the respondent’s objection was frivolous . . . .”<sup>341</sup>

294. Claimant’s Response sets forth several definitions of “frivolous” used by U.S. courts, and several are also set forth above in Section III. Under any of those definitions, the myriad fact-based arguments that dominate Respondent’s Preliminary Objection are frivolous in the context of a preliminary objection under Article 10.20.4. In determining whether Respondent’s arguments are frivolous, the Tribunal should consider the quality of the arguments,

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<sup>340</sup> (Emphasis added.)

<sup>341</sup> (Emphasis added.)

including the accuracy of the assertions underlying them, and the extent to which they are supported by the evidence and law on which Respondent purports to rely in making them. In addition, however, the Tribunal must consider the context in which Respondent has made them.

295. Once again, the standard for deciding a preliminary objection under Article 10.20.4 is whether, “as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under 10.26.” In deciding the objection, “the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration . . . . The tribunal may also consider any relevant facts not in dispute.”<sup>342</sup>

296. Notwithstanding that plain language, Respondent supports its Preliminary Objection with nearly 800 pages of documents, which it asserts to be evidence of “undisputed facts”; utterly ignores the central allegation of Claimant’s Notice of Arbitration (*i.e.*, that the Government has banned all metallic mining in the country); and asks the Tribunal to dismiss nearly all of Claimant’s case based on what it claims the Government *might* have done *if* it had ever ruled on Respondent’s application. The overall premise of Respondent’s principal argument is frivolous; it cannot be reconciled with what any reasonable person would understand as being intended or permitted in a preliminary objection made under Article 10.20.4. The numerous additional frivolous arguments and assertions that Respondent makes along the way further compound the problem. So too does the manner in which Respondent has chosen to make many of these assertions (*e.g.*, choosing to wait until its Reply to submit various documents which it asserts constitute evidence that Claimant engaged in “conscious non-compliance with the law” of El Salvador).

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<sup>342</sup> CAFTA, Article 10.20.4(c) (RL-1).

297. In Claimant's Response, Claimant noted a number of factual and legal arguments made in Respondent's opening submission, which are manifestly without merit. If anything, Respondent's Reply contains even more such arguments and assertions. A sampling of Respondent's baseless assertions includes the following:

- Respondent argues that it is "undisputed" that Claimant "knew" that Respondent had "considered" and "rejected" Claimant's interpretation of the land surface issue, and that the "undisputed evidence" on this point was "produced from Claimant's own documents."<sup>343</sup> Yet Respondent bases this argument on internal Government documents, which do not appear to have been provided to Claimant, and which do not support the categorical description of Respondent's position offered in its Reply.
- Respondent asserts that Claimant should have known that the land surface issue was still a "problem" when it submitted its final documentation in support of its application to the Bureau of Mines in November 2008, even though the Bureau's Director, Ms. Navas, had informed Claimant in a letter dated 4 December 2006, that Claimant had "partially complied" with her request for the final documentation, except for the Environmental Permit. (This is the same letter that Respondent claimed in its opening submission was provided to PRES but then "withdrawn.")

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<sup>343</sup> Reply, paras. 69, 80-90.

- Based on the record above (and with no allegation that Respondent ever told Claimant about any alleged deficiencies concerning the Final Pre-Feasibility Study), Respondent accuses Claimant of “conscious non-compliance with the law of El Salvador,” akin to the fraud found to have been committed by claimants in cases such as *Fraport* and *Inceysa*.
- Based on the record above, Respondent accuses Claimant and its counsel of “misleading” the Tribunal and of “feign[ing] surprise” when Respondent, in its Preliminary Objection, took the position that it would have or could have rejected Claimant’s application based on the land surface issue and the feasibility study issue, *if* Respondent had ever bothered to rule on it.
- Respondent argues that its “interpretation” of the land surface issue is justified by its concern about subsidence, citing the experience of vineyards and agricultural regions in Italy in the 1500s, zinc and lead mining in Oklahoma in the early 1900s, and coal and clay mining in Pennsylvania. Based on its arguments on this point, Respondent further accuses Claimant of “implicit[ly] suggest[ing] that the citizens of El Salvador are entitled to any less protection from the hazards of underground mining than citizens of other countries . . . .”<sup>344</sup>
- Respondent devotes a considerable portion of its Reply to an attempt to argue that Claimant cannot “cure” the defects of its application, using various maps (including one map superimposed on another) and other fact evidence to

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<sup>344</sup> Reply, paras. 119-120.

demonstrate that Claimant did not own or obtain authorization to use surface land overlaying certain mineral deposits. Respondent does not address Claimant's arguments that it could simply have purchased more land or otherwise altered its operations, if the surface land issue were ever to be definitively resolved against it.<sup>345</sup>

- Despite the numerous factual assertions that pervade its submissions, Respondent repeatedly asserts that it is asking the Tribunal to decide its Preliminary Objections on “purely legal issues.”<sup>346</sup>

298. Most, if not all, of these arguments would likely be frivolous under any circumstances. But in the context of a preliminary objection, meant to dispose of claims that are frivolous as matter of law at the outset of a case, Respondent's numerous factual arguments – unsupported or contradicted by the hundreds of pages supposedly offered in their support, and accompanied by repeated assertions that they are based on “undisputed facts” and represent “purely legal issues” – go beyond mere frivolity and settle squarely in the realm of outrageous.

299. As stated in Claimant's Response, the fact that this is apparently the first time a preliminary objection asserted under CAFTA Article 10.20.4 has been raised should not dissuade the Tribunal from awarding Claimant its reasonable costs and attorneys' fees in opposing the Preliminary Objection. It is very difficult to accept that any reasonable person could believe that the various arguments asserted in the Preliminary Objection fall anywhere close to the

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<sup>345</sup> Reply, paras. 156-64.

<sup>346</sup> *E.g., id.*, para. 19.

parameters of a proper preliminary objection under CAFTA Article 10.20.4. Moreover, the number of factual assertions – and the manner in which they were presented (*e.g.*, with a number of them seemingly held in reserve for the Reply) – has made this a very time-consuming and expensive exercise, of the sort one might ordinarily expect to undertake during the merits phase (where the parties typically have three months or more to respond to one another’s principal submissions).<sup>347</sup> Indeed, there is no question that Respondent has tried to turn its Preliminary Objection into a highly compressed merits phase, where it asks the Tribunal to adjudicate various issues of the Respondent’s choosing. The volume (and, certainly for Claimant, the cost) of the submissions are comparable to what one would expect in a merits phase. But the imposition of burden and expense, along with delay, appear to be Respondent’s primary (if not sole) goals in submitting its objection.

300. Again, but for Article 10.20.6, a respondent has almost nothing to lose by filing the type of preliminary objection that El Salvador does, if the Tribunal does not award Claimant its costs and attorney’s fees for opposing this Preliminary Objection submitted here. Claimant respectfully submits that virtually every future CAFTA case will begin with a similarly fact-

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<sup>347</sup> Respondent’s numerous factual assertions have required Claimant to investigate, for example, the record of what communications were made between PRES and Salvadoran regulators in the period 2004-2006 regarding the land surface and feasibility study issues; the history concerning the Government’s (not Claimant’s) initiative to enact new mining legislation; issues of alleged “subsidence” concerns at the El Dorado site; and various factual issues concerning surface land ownership/authorization, the location of gold deposits under particular surface areas, and the ability of Claimant to change its operations if, for example, it was unable to acquire or obtain authorization to use particular surface areas. This investigation required travel to El Salvador (and elsewhere) and multiple interviews of current as well as former employees. (Claimant has had to lay off hundreds of employees as a direct result of Respondent’s conduct.) Again, these are the tasks that one would expect to undertake during the merits phase of the case, not in response to a preliminary objection that is supposed to be decided as a matter of law. Having to conduct these tasks in an extremely accelerated time frame has imposed considerable burden and expense on Claimant.

intensive, highly expensive, and wholly misguided preliminary objection designed to impose cost on the claimant and delay the proceedings.

301. The purposes of CAFTA include the creation of “effective procedures . . . for resolution of disputes.”<sup>348</sup> Article 10.20.4 and 10.20.5 are meant to further that purpose by providing a fast, efficient, and relatively cost-effective means for disposing of frivolous claims at the outset of a case. Article 10.20.6 is meant to dissuade claimants from filing such claims. But through its application to respondents as well, Article 10.20.6 is also meant to ensure that the salutary purpose of CAFTA’s preliminary objection procedures is not turned on its head by a respondent willing to abuse those procedures and undermine the goal of effective and efficient dispute resolution.

302. Applying 10.20.6 in this case would serve CAFTA’s purposes by ensuring that preliminary objections remain part of CAFTA’s “effective procedures . . . for resolution of disputes,” rather than a tool for the imposition of burden, expense, and delay.

303. Accordingly, the Tribunal should award Claimant its costs and attorney’s fees for opposing Respondent’s frivolous Preliminary Objection.

## **IX. CONCLUSION**

304. For the reasons stated above, and in Claimant’s Response, the Tribunal should reject the Preliminary Objection asserted by Respondent; award Claimant its attorneys’ fees and arbitration costs in opposing the objections; enter a procedural order for concluding the

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<sup>348</sup> CAFTA, Preamble (CA-8).

remainder of the case in a single phase; and grant such other relief as counsel may advise and that the Tribunal may deem appropriate.

Respectfully submitted,

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