INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

THE REPUBLIC OF EL SALVADOR'S COUNTER-MEMORIAL ON THE MERITS

Fiscalía General de la República de El Salvador

Foley Hoag LLP

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Timeline for Pac Rim Cayman v. El Salvador Dispute

01/24/1996	Mining Law enters into force, with a maximum exploration license period of 5 years. (CL-210)
07/10/1996	Kinross receives 3-year exploration license for El Dorado Norte. (C-326)
07/23/1996	Kinross receives 3-year exploration license for El Dorado Sur. (C-317)
09/10/1997	Pac Rim Cayman LLC ("PRC") is formed by Pacific Rim Mining Corp. ("PRMC") as a holding company incorporated in the Cayman Islands. (C-12)
07/15/1999	Kinross obtains 2-year extension for both El Dorado exploration licenses. This brings the total time for both licenses to 5 years, the maximum at the time. The expiration of the El Dorado licenses was thus going to be in July 2001. (C-329, C-330)
03/--/2000	Dayton Acquisitions, a subsidiary of Dayton Mining Corporation, merges with Mirage Resource Corporation, acquiring its Salvadoran interests. (Memorial, para. 72)
06/28/2001	Legislative Decree No. 456 extends all exploration licenses for that year until December 31, 2001. (CLA-211)
07/11/2001	Amendment to the Mining Law enters into force, extending the maximum period of exploration from 5 to 8 years. (Memorial, para. 76)
12/10/2001	Kinross obtains second 2-year extension for both El Dorado exploration licenses. (C-268, C-269)
04/--/2002	PRMC merges with Dayton Mining Corporation, Inc., acquiring Kinross El Salvador and the El Dorado exploration licenses. (Memorial, para. 128)
01/--/2003	Kinross El Salvador changes its name to Pacific Rim El Salvador, S.A. de C.V. ("PRES"). (NOA, para. 50)
12/18/2003	PRES obtains third extension of the El Dorado exploration licenses. This extension is for one year, beginning January 1, 2004. This brings the total length of the licenses period to eight years, the limit. (C-13)
09/08/2004	PRES submits first Environmental Impact Study ("EIA") for El Dorado to the Salvadoran Ministry of the Environment ("MARN"). (Memorial, para. 175)
12/15/2004	PRES writes to MARN letting the Minister know that more than 60 days have passed since original El Dorado EIA was submitted with no response and that the company is suffering damages as a result of this delay. (R-55)

12/22/2004	PRES submits its application for the exploitation concession to the Salvadoran Ministry of the Economy ("MINEC"). (R-2)
01/01/2005	*The El Dorado Norte and El Dorado Sur Exploration Licenses finally expire*.
01/21/2005	PRES submits a final Pre-Feasibility Study based only on the Minita deposit. (C-9)
02/01/2005	MARN responds to first El Dorado EIA with observations. (C-133)
4/21/2005	PRES responds to MARN's observations "Vol. IV." (C-136)
5/05/2005	PRES's local counsel submits memorandum arguing that the land ownership or authorization requirement should not apply for underground mining concessions. (R-30)
06/01/2005	Dorado Exploraciones SA de CV ("DOREX") is formed in El Salvador and added to PRC's corporate structure.
06/28/2005	Bureau of Mines informs Pac Rim that the office of the Secretariat for Legislative and Judicial Affairs agrees with the interpretation of the Ministry of Economy and the Bureau of Mines regarding the land ownership or authorization requirement. Fred Earnest reported to Tom Shrake that surface owner authorization was one of the main things missing from PRES's concession application and that obtaining it was "a nearly (if not totally) impossible task." (C-291)
07/27/2005	Ericka Colindres leaves MARN unable to finalize MARN's comments on the El Dorado EIA. (Memorial, para. 242)
09/08/2005	Second EIA for El Dorado project submitted to MARN in response to comments and further observations from MARN in April and August 2005. (C-8)
09/23/2005	Public consultation period opens for El Dorado EIA. (C-152)
09/28-29/2005	DOREX obtains exploration licenses for Huacuco, Pueblos, and Guaco. (Memorial, para. 210)
09/--/2005	MINEC considered trying to amend the Mining Law to exclude underground mines from the land ownership or authorization requirement – what Pac Rim needed for its application to proceed – but this did not happen. (R-35, C-400)
10/--/2005	Dr. Robert Moran issues report concluding that the El Dorado exploitation EIA would not be acceptable to regulatory agencies in most developed countries. (C-165)

01/--/2006	Ericka Colindres joins PRES as Supervisor of Environmental Protection. (Colindres Witness Statement, para. 3)
01/16/2006	PRES submits EIA for Santa Rita exploration; the environmental permit for exploration is received in June. (Memorial, paras. 326, 329)
02/17/2006	DOREX submits EIA for Huacuco exploration. (Memorial, para. 341)
03/29/2006	MARN officials meet with F. Earnest, E. Colindres, and L. Medina of PRES to discuss observations from public comment period on El Dorado EIA. (C-163)
06/--/2006	MARN official allegedly told Claimant that all mining projects are "en stop." (C-168)
07/5-6/2006	MARN revokes Commerce Group's environmental permits after inspection found lack of compliance with the terms of the permits.
07/09/2006	Newspaper quotes Minister of Environment Barrera stating that the Ministry will not authorize any mining project that will harm the environment. (R-120)
07/14/2006	MARN provides additional observations on El Dorado EIA. (C-169)
08/11/2006	Dr. Manuel Pulgar-Vidal, hired as a consultant, submits his final report regarding mining in El Salvador, concluding that the country is currently not equipped to move forward with mining and recommending that the country complete a Strategic Environmental Evaluation before making a decision about whether or not to develop mining and, if so, under what conditions. (R-129)
09/12/2006	PRES sends response to observations from public consultation. (C-170)
10/02/2006	MINEC writes to PRES giving it 30 days to provide the documents missing from its exploitation concession application: documentation of land ownership or authorization, an environmental permit, and a technical, economic feasibility study. (R-4)
10/25/2006	PRES sends responses to MARN's "Final Observations." (C-171)
11/07/2006	PRES responds to MINEC's October 2nd letter, claiming just impediment with regard to the environment permit, but does not provide documentation of land ownership or authorization for the area requested or a feasibility study. (R-5)
11/09/2006	Pac Rim admitted in a news release that it may not be able to get the concession until the Mining Law was changed. (C-309)
12/04/2006	MINEC responds to PRES's November letter, giving PRES 30 days to turn in its Environmental Permit. (R-6)

12/05/2006	PRES submits water treatment plant proposal in response to Ministry's July observations. (C-174)
12/13/2006	PRMC announces suspension of drilling at Santa Rita because of local opposition. (C-263) The suspension continues into 2008.
01/--/2007	The 30-day period under the law for PRES to respond to the Ministry of Economy's warning letters runs out without PRES having submitted the missing requirements.
05/07/2007	At a meeting with Minister of Economy and Minister of Environment, all mining companies are told that "all mining activity in the country would be halted until such time as an *Evaluación Ambiental Estratégica* . . . of the mining industry was conducted." (Memorial, para. 298)
06/24/2007	Minister of Environment Carlos Guerrero quoted in news report confirming that the Ministry would not be granting concessions until a study of the potential effects of mining was completed. (R-122)
08/07/2007	DOREX submits EIA for Guaco. (Memorial, para. 350)
08/17/2007	DOREX submits EIA for Pueblos. (Memorial, para. 350)
10/24/2007	By this date, Claimant had hired its international arbitration counsel and C&M Capitolink became a registered lobbyist for Claimant in the United States. (R-128, R-118)
11/--/2007	Claimant supports a New Mining Law in El Salvador that would change the requirements it had not met to obtain an exploitation concession. (R-36)
12/11/2007	PRC is de-registered in the Cayman Islands. (R-68)
12/13/2007	Pac Rim Cayman LLC is registered as a limited liability company in Nevada. (R-69)
03/11/2008	According to a press report, President Saca urges caution regarding mining exploitation, saying that the legislature should study the issue. (C-1)
11/24/2008	PRES, on the verge of submitting its Notice of Intent, writes to MARN asking for the status of its environmental permit request. (Memorial, para. 302)
12/04/2008	MARN responds to the request for a status update by sending observations regarding the water treatment plant. (C-180)
12/09/2008	PRC files Notice of Intent to submit a claim to arbitration under CAFTA.

02/--/2009	PRMC decided to defer completion of the Feasibility Study that it had been working on since 2006. (R-20)
04/30/2009	PRC files Notice of Arbitration.
07/14/2009	Santa Rita exploration license expires. (R-23)
07/17/2009	PRES attempts to request an extension of the four year Santa Rita exploration license. (R-23)
07/20/2009	MINEC tells PRES that the Santa Rita license expired on the 14th and cannot be renewed after that date. (R-23)
07/22/2009	DOREX reapplies for the expired Santa Rita exploration license. (Memorial, para. 334)

I. INTRODUCTION

1. This case is about a Canadian mining company that purchased exploration rights in El Salvador when time was running short to apply for a mining exploitation concession. The company then decided to make a big gamble and failed.

2. Instead of accepting the consequences of its decisions, the company started this arbitration to try to force the Government to grant it a gold mining concession to which it never had any right. It is now trying to convince this Tribunal to order the people of El Salvador to pay for the company's failed gamble and, in fact, to pay it a windfall from the national treasury by awarding "lost profits" based on property rights the company never had.

3. When Pacific Rim went to El Salvador in April 2002, it knew that the two exploration licenses held by its predecessors, granted in 1996, would soon reach the eight-year limit and could not be extended past January 1, 2005. This meant that Pacific Rim only had two and a half years to conduct the exploration work necessary to prepare the application for a mining exploitation concession in that area. Pacific Rim could have made the reasonable decision to concentrate its time, money, and effort on completing the work necessary to apply for an exploitation concession for a small, well-understood area within the vast area licensed for exploration. Pacific Rim could have focused on the "Minita" deposit, the only deposit in the exploration areas for which Pacific Rim was able to complete even a pre-feasibility level study.

4. Instead, Pacific Rim made a conscious decision to embark on a risky and highly speculative "two-track strategy," engaging in new exploration activities in the expiring license areas as it attempted to prepare the required materials for a concession application. Pacific Rim, rather than focus on fulfilling the legal requirements for a smaller area, sought to stake its claim to as much land as possible for future exploration. Pacific Rim wanted to continue exploring the

expiring license areas by including a large unexplored area in its requested concession and acquiring new exploration licenses to engage in exploration activities elsewhere, even as it struggled to meet the requirements for its application for the exploitation concession that should have been the sole object of its attention.

5. As a result of its decision to stake out as much land as possible for future exploration, Pacific Rim submitted an incomplete application for an unreasonably large concession area, failing to fulfill the minimum requirements to have its application admitted for consideration. In fact, because of its risky and speculative "two-track strategy," Pacific Rim would not have been able to meet the requirements even for a smaller concession only covering the Minita deposit. But Pacific Rim was not interested in a smaller concession; it wanted everything. Pacific Rim expected the Government to grant it rights and permits regardless of the company's failure to comply with the relevant legal provisions. It viewed the law as a "formality" that could not stand in its way.

6. Pacific Rim also misunderstood the good will and good intentions of multiple Salvadoran Government officials, who went out of their way to help Pacific Rim be in a position to complete its application for the concession. These Government officials allowed Pacific Rim to submit an incomplete application for the concession in December of 2004 and held the application without review for almost two years, to avoid triggering the Mining Law's mandatory time limits to correct deficiencies in the application. This gave Pacific Rim close to an additional two years to try to complete a Feasibility Study, but it still failed to do so. These officials also tried to accommodate Pacific Rim with another legal requirement it could not meet, the requirement to show land ownership or authorization from the landowners for the requested

concession area, by attempting to change the Mining Law so that Pacific Rim's application could meet the requirement.

7. Instead of appreciating the extraordinary efforts that these Salvadoran Government officials made to help it, Pacific Rim has acted as if these officials, and the entire Government of El Salvador, had a legal obligation to do whatever was necessary, including change its laws, so that Pacific Rim could obtain the concession it wanted. Pacific Rim expected El Salvador's Government officials to bend to its whims.

8. But these officials from the Executive Branch of Government were unable to change the relevant provision of the law as Pacific Rim wanted. So Pacific Rim changed its strategy and drafted a new law that reversed in its favor all the requirements it could not comply with. Pacific Rim hired lobbyists in El Salvador to gain legislative support for its new law and in the United States to put pressure on El Salvador to accommodate the company. Pacific Rim also tried to enlist the assistance of President Saca to get its new law through the National Assembly. But the law was not passed and as a result Pacific Rim's concession application remained subject to the requirements of the Mining Law in force at the time Pacific Rim went to El Salvador.

9. What Pacific Rim still fails to understand is that it was obligated to comply with the laws of El Salvador and neither El Salvador nor any other country in the world has a legal obligation to change its laws to accommodate a foreign investor. As established in another ICSID case in which El Salvador was a respondent and prevailed, it is the foreign investor who has the legal obligation to make its investment in accordance with the laws of the host State. This self-evident principle is also recognized in the text of the Investment Law of El Salvador, the sole instrument under which this arbitration proceeds.

10. Pacific Rim initiated this arbitration in April 2009, using a shell subsidiary called Pac Rim Cayman ("Pac Rim") as the claimant,[1] after its attempt to intimidate the Government of El Salvador with the threat of a CAFTA arbitration did not work. Four years later, and after all CAFTA claims were dismissed for lack of jurisdiction, this arbitration proceeds to the merits phase, exclusively based on the jurisdiction the Tribunal found it had under the Investment Law of El Salvador.

11. Pac Rim comes to this Tribunal seeking an award for $301 million, as the alleged value of six underground gold and silver deposits plus two early exploration areas in El Salvador.[2] Pac Rim seeks this $301 million based on a theory that it has property rights over the mineral deposits that are still underground, in expired exploration areas, even though Pac Rim never had an application for a mining exploitation concession admitted, much less awarded, to allow for their extraction.

12. This case is simple. In fact, the key issue to be decided in this arbitration has been defined and answered since 2010, when El Salvador filed its Preliminary Objections trying to bring an early end to a claim that, in El Salvador's view, is devoid of legal merit: **Pac Rim was not legally entitled to a mining exploitation concession and has no rights in the exploration licenses included in its claims. El Salvador breached no legal duty toward Pac Rim and is not liable for any alleged damages as a result of not granting the concession and not granting new environmental permits for exploration.** This Counter-Memorial

[1] For ease of reference, we will use "Claimant" and "Pac Rim" throughout the Counter-Memorial to refer to the companies, even though it was the Canadian parent, Pacific Rim Mining Corp., and not Pac Rim Cayman acting in El Salvador.

[2] Four of the six deposits involved in Pac Rim's claims were inside an area of 12.75 km^2 Claimant applied for as a mining exploitation concession, called the "El Dorado concession application." The other two deposits were in exploration areas outside of that 12.75 km^2 area. The two early exploration areas are outside the original El Dorado exploration license areas. See map on page 16 for the locations of the exploration licenses and deposits.

demonstrates that in fact Pacific Rim's losses were caused by its own actions and decisions, not by any conduct of El Salvador. As a result, all of Pac Rim's claims must be dismissed.

13. **Section II** is the most important Section of this Counter-Memorial. In this Section, El Salvador demonstrates that all of Pac Rim's claims must fail for lack of legal merit. El Salvador demonstrates that Pac Rim's claims related to its application for a mining exploitation concession in El Dorado must fail because Pac Rim did not meet the legal requirements to obtain the concession, independent of any action or inaction by El Salvador with regard to the environmental permit. ***First,*** Pac Rim did not comply with the legal requirement to provide evidence of ownership or authorization from the owners of the surface of the area requested for the concession. ***Second,*** Pac Rim did not submit a feasibility study to provide the technical and economic justification for the concession for which it was applying.

14. El Salvador's arguments during the Preliminary Objections Phase of this arbitration are now confirmed by recognized mining experts, international mining law experts, and Salvadoran law experts. They each confirm that Pac Rim did not have a right to the concession. As a result, Pac Rim's claims related to ***Minita***, ***South Minita***, ***Balsamo***, *and* ***Nueva Esperanza*** fail.

15. El Salvador also shows that Pac Rim cannot sustain any claims that any acts or omissions of the Government caused it any harm with respect to the other exploration licenses included in its claims.

16. To support its case on the merits and for lost profits, Pac Rim urges the Tribunal to believe that two repealed mining codes from El Salvador uphold its argument that it acquired property rights over mineral deposits located in exploration areas by the mere fact of their discovery. Regardless of what these old mining codes from 1881 and 1922 might have said

when they were in force, they were not the law of El Salvador when Pac Rim made its investment in 2002 and when Pac Rim applied for the concession in 2004. Contrary to those old codes, El Salvador's Constitution, Mining Law, and Investment Law that were in force at all relevant times for Pac Rim's investment, clearly provide that the subsoil belongs to the State and that any mineral deposits in the subsoil continue to belong to the State until they are extracted pursuant to a mining exploitation concession granted by the State in accordance with the provisions of the Mining Law. Thus it is not possible under current Salvadoran law for a private party, including Pac Rim, to acquire property rights in mineral deposits in El Salvador. The law permits a private investor to acquire rights to extract minerals upon the granting of an exploitation concession, but, as indicated, Pac Rim was never able to meet the requirements to receive such a concession.

17. El Salvador further demonstrates that neither Pac Rim nor its subsidiaries had a legal right to continue exploring in the El Dorado area after the original exploration licenses expired on January 1, 2005. This is an additional reason why all of Pac Rim's claims related to the mineral deposits that it continued to explore in the 12.75 km^2 area of the requested exploitation concession must fail.

18. With regard to the deposits located in the new exploration licenses known as Guaco, Huacuco, and Pueblos, El Salvador demonstrates that neither Pac Rim nor any affiliated company had a right to obtain these new exploration licenses to the extent that they overlapped with the expired exploration licenses of El Dorado Norte and El Dorado Sur. The Salvadoran Mining Law and the Mining Regulations prohibited Pac Rim and any affiliated company from obtaining new exploration licenses that included any areas of expired exploration licenses that had been held by any other company affiliated with Pac Rim. The two mineral deposits located

in those new exploration license areas that Pac Rim has included among its claims in this arbitration (***Nance Dulce and Coyotera***), are located in the area of the expired El Dorado Norte and El Dorado Sur exploration licenses. By operation of the law, Pac Rim lost any rights to those deposits when the old exploration licenses expired on January 1, 2005, and Pac Rim did not include those deposits in an application for a mining exploitation concession. Thus, there is no legal basis for Pac Rim to make claims about those two deposits in this arbitration.

19. With regard to any deposit in the former exploration license area of ***Santa Rita***, the license expired in 2009 with no allegation that the Government had impeded Pac Rim's exploration of the area. Neither Pac Rim nor its subsidiaries had any right to explore or to apply for a new exploration license after Pac Rim allowed the initial exploration period to expire without having applied for a renewal. Thus, any such claims must be dismissed.

20. Finally, with regard to the exploration areas known as ***Zamora/Cerro Colorado***, Pac Rim has not presented any evidence that it has any exploration rights to those areas. Therefore, Pac Rim cannot claim compensation for a right it has not established.

21. The facts set forth in Section II are sufficient to dismiss all of Pac Rim's claims in this arbitration. El Salvador submits that the Tribunal's inquiry should, therefore, end here. However, for the sake of completeness, El Salvador will respond to the rest of Pac Rim's arguments.

22. **Section III** discusses the problems with Pac Rim's application for an environmental permit for exploitation and El Salvador's efforts to develop a responsible policy regarding metallic mining, including the suspension of review of environmental permit applications related to metallic mining announced to all mining companies in El Salvador in May 2007. El Salvador would like to note, however, that this issue is unnecessary to decide this case.

El Salvador's actions in this area did not affect Pac Rim's rights (or lack thereof) to a concession or to exploration licenses, because Pac Rim had, by its own decisions and actions, lost all its rights and failed to meet the legal requirements to acquire additional rights before any such policy was implemented. Nothing that the Government did or did not do could have caused damage to Pac Rim.

23. In **Section IV**, El Salvador shows that it did not breach any of its obligations under the Investment Law.

24. This arbitration has only been allowed to proceed under the Investment Law of El Salvador. Having invoked jurisdiction under the Investment Law and seeking its protection, Pac Rim cannot escape the consequences of that choice. The most important consequences of the fact that this arbitration only proceeds under the Investment Law of El Salvador are: 1) the only claims that may be brought in this arbitration are claims regarding the rights and obligations included in the Investment Law; 2) Salvadoran law is the applicable law in this arbitration; 3) the Investment Law places limitations on investments related to mining activities in the subsoil that Pac Rim must comply with, including the exclusive jurisdiction of the courts of El Salvador to decide disputes related to exploration licenses and exploitation concessions; and 4) a three-year statute of limitations applies to Claimant's claims related to the application for the El Dorado concession.

25. El Salvador applies these legal principles to the facts of this case, to show that El Salvador did not and could not have breached its obligations under the Investment Law.

26. In **Section V**, El Salvador demonstrates that Pac Rim cannot possibly claim damages with reference to any value it has calculated for the deposits still underground. The Constitution of El Salvador, the Mining Law, and the Investment Law are clear that underground

mineral deposits belong to the State until the moment they are extracted pursuant to a mining exploitation concession. Pac Rim never held a concession. El Salvador then shows that there is no alternative theory of damages that could result in an award of damages to Pac Rim. El Salvador will finally show that the valuation methods proposed by Pac Rim not only are the wrong valuation methods for this case, but are also applied in a significantly flawed manner.

27. **Section VI** includes a reservation of rights with regard to jurisdiction. El Salvador wants to make it clear that it is filing this Counter-Memorial on the Merits under an express reservation of its right under the Convention with regard to the Tribunal's finding that it has jurisdiction to decide this dispute under the Investment Law of El Salvador. El Salvador also raises two additional objections identified after the Tribunal's decision that allowed this case to proceed to the merits under the Investment Law of El Salvador.

28. **Section VII** is the conclusion. At the end of this case, it will be clear that Pac Rim's real dispute with El Salvador is that El Salvador did not live up to Pac Rim's unfounded expectation that El Salvador had an obligation to do anything to accommodate Pac Rim, including change its Mining Law so that Pac Rim's application for the concession could be granted. But El Salvador was not under any legal obligation to change its Mining Law to eliminate important legal requirements Pac Rim could not meet, and Pac Rim cannot expect that this Tribunal will render an award creating a legal obligation where none exists.

29. Finally, in **Section VIII**, El Salvador will demonstrate that Pac Rim's conduct in this arbitration justifies an order that Pac Rim reimburse El Salvador for all of its legal expenses and costs in this arbitration. Pac Rim demanded a concession in El Salvador without complying with the legal requirements. It then initiated an arbitration alleging a perfected right to the concession when it knew it had no such right. When it was confronted with undisputable

evidence in the Preliminary Objection phase of this arbitration that it had no right to a concession, Pac Rim insisted on prolonging the arbitration, promising to provide evidence and expert testimony to prove its compliance with the requirements of Salvadoran law. Pac Rim thus forced El Salvador to suffer the full expense of a defense on jurisdiction and the merits, but more than three years later, it has not delivered on its promises.

30. The worst part of Pac Rim's behavior in this arbitration has been how it has changed its statement of the facts and its arguments at every phase of this arbitration, doing whatever it believes it will take to survive to the next phase.

31. Most notably, during an earlier phase of the arbitration, Pac Rim asserted specific facts regarding when it knew of a dispute with El Salvador that allowed it to survive El Salvador's Abuse of Process objection. Pac Rim asserted during the proceedings on jurisdiction that it had no idea there was a dispute with El Salvador until March 2008 (after Pac Rim's change of nationality from the Cayman Islands to Nevada in December 2007), when President Saca made a statement to a newspaper. But now Claimant freely admits that it was told in May 2007 (and thus before the change of nationality), that no environmental permits for metallic mining exploration and exploitation would be processed for anyone until after El Salvador conducted a Strategic Environmental Evaluation. This is the very fact Pac Rim previously claimed it did not know until March 2008. Pac Rim admits for the first time in paragraph 300 of its Memorial that "by this point [May 2007], the Claimant was aware that the delay PRES faced at MARN was political and would therefore not be resolved by means of technical environmental assessment, but only through political means."

32. Had Pac Rim admitted this fact during the jurisdictional objection phase, this case could have ended with an award on jurisdiction. Instead, El Salvador has been forced to proceed

to the merits of this case, where Pac Rim has resorted to frivolous arguments based on old, repealed mining codes and on a convoluted interpretation of the word "and" in Article 37 of the Mining Law, to try to defend an indefensible argument from the Preliminary Objections phase. Pac Rim's continued insistence that it should be granted a concession or paid hundreds of millions of dollars no matter its noncompliance with the legal requirements and no matter its abuse of the international arbitral system has resulted in a considerable waste of time and resources for the Government and the people of El Salvador.

33. Having presented this summary of El Salvador's complete response to Pac Rim's Memorial, we now turn to the decisive issue in this arbitration: *was Pac Rim entitled to a mining exploitation concession in El Dorado and to the exploration licenses included in its claims*? The answer is no.

II. PAC RIM'S CLAIMS MUST FAIL BECAUSE PAC RIM DID NOT HAVE A RIGHT TO A MINING EXPLOITATION CONCESSION OR TO THE EXPLORATION LICENSES

34. In its 300-plus page Memorial claiming damages of more than $300 million, Claimant spends remarkably little time explaining the rights it claims to have had in El Salvador. Claimant lists several deposits and properties without acknowledging that many of these are merely areas which Claimant hoped to explore or to which Claimant hoped to stake a claim. Claimant was nowhere near obtaining (or even requesting) the rights to mine these deposits. Claimant only ever submitted one application to mine one single deposit in El Salvador, and that application did not meet the requirements of the Salvadoran Mining Law.

35. Claimant creates confusion by referring to the entire 75 km^2 area as "the El Dorado Project,"[3] when there is really no such thing. The exploration rights to this area expired on January 1, 2005 and the alleged "Project" consists of an application for a 12.75 km^2 area exploitation concession which could not even be admitted for evaluation under the Mining Law and the remaining 62.25 km^2 which were not subject to any application for an exploitation concession.

36. Claimant obtained the existing exploration licenses to El Dorado Norte and El Dorado Sur, a 75 km^2 area originally granted in 1996, by merging with Dayton in 2002. As Claimant knew, Dayton had obtained those licenses in March 2000 at a time when "the El Dorado Norte and El Dorado Sur Exploration Licenses were rapidly approaching their final expiration date."[4] Dayton convinced the Government to amend the Mining Law and grant it an emergency legislative extension to allow for more exploration: in 2001, the Government

[3] Claimant Pac Rim Cayman LLC's Memorial on the Merits and Quantum, Mar. 29, 2013 ("Memorial") at ii.

[4] Memorial, para. 72.

extended the maximum exploration term from five to eight years.[5] Catherine McLeod-Seltzer, President of Pacific Rim Mining Corp., in a 2004 interview, explained that El Salvador has "very friendly mining laws . . . which we, as a matter of fact, had a hand in helping the government draft so that El Salvador would be open and receptive to mining investment and allow deposits to be developed in a timely way."[6] Thus, Claimant knew when it obtained the licenses that all exploration of the 75 km^2 El Dorado license area needed to be complete before the licenses' eight-year exploration term finally expired on January 1, 2005.[7]

37. But Claimant failed to complete its exploration goals before the licenses expired. When the exploration period ended, Claimant applied for an exploitation concession based on a pre-feasibility level proposal to mine a single deposit, the Minita deposit. In Part A below, we describe how Pac Rim's 2004 exploitation concession application for the Minita deposit failed to meet several requirements of the Salvadoran Mining Law. The incomplete application was inadmissible and the requested concession could therefore not be granted under the law. The Government is in no way responsible for Claimant's failure to submit the required materials. As a result, Claimant had no right to the exploitation concession for Minita, the only deposit for which Claimant requested a concession.

38. Moreover, following expiration of the exploration licenses acquired from Dayton, Claimant had no rights to the deposits in those areas. The Mining Law explicitly prohibits continued exploration in the expired license area and grants no continuing rights to the former

[5] Memorial, para. 76.

[6] Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., June 28, 2004 (C-336).

[7] Memorial, para. 140 ("at PRES's request, on 18 December 2003, MINEC extended the terms of the El Dorado Norte and El Dorado Sur Exploration Licenses to 1 January 2005. According to Article 19 of the Amended Mining Law, the Exploration Licenses could not be extended beyond a total of eight years.").

license holder.[8] Claimant is therefore wrong to indicate that it has some sort of continued claim to the area after the eight-year exploration term expired. As Gina Navas de Hernández, former Director of the Bureau of Mines, explains: "The holder of the now-expired license that does not apply for an exploitation concession does not retain any right over any deposit it may have discovered during the exploration license's period of validity."[9] Claimant did not apply for a concession to mine any of the other deposits mentioned in its Memorial. As we describe below, Claimant's attempts to evade the prohibition against continued exploration—both by requesting an unjustified, large area for the concession and by securing new exploration licenses through another subsidiary—fail under the law.[10] Thus, entirely apart from any alleged acts or omissions from the Government, Pac Rim had no rights and could have had no lawful expectations for rights to the other deposits within the expired El Dorado license area including Coyotera, Nueva Esperanza, South Minita, Balsamo, and Nance Dulce.

39. Finally, in Part B, we show that Pac Rim also did not have the rights it claims with respect to other exploration licenses. Claimant received the exploration license and environmental permit for exploration of Santa Rita and was unable to complete its planned exploration because of local opposition.[11] Claimant then failed to request a renewal of the Santa Rita exploration license before it expired. Claimant tried to request a new license through both

[8] Mining Law of El Salvador, Legislative Decree No. 544, Dec. 14, 1995, published in the Official Gazette No. 16, Book 330 of Jan. 24, 1996, *amended by* Legislative Decree No. 475, July 11, 2001, published in the Official Gazette No. 144, Book 352 of July 31, 2001 ("Mining Law"), Arts. 16, 19, 27.d) (**Authority RL-7(bis)**).

[9] Witness Statement of Gina Mercedes Navas de Hernández, Dec. 16, 2013 ("Navas de Hernández Witness Statement"), para. 16 ("El titular de la licencia ya expirada que no solicita una concesión de explotación no conserva ningún derecho sobre cualquier yacimiento que haya descubierto durante la vigencia de la licencia de exploración.").

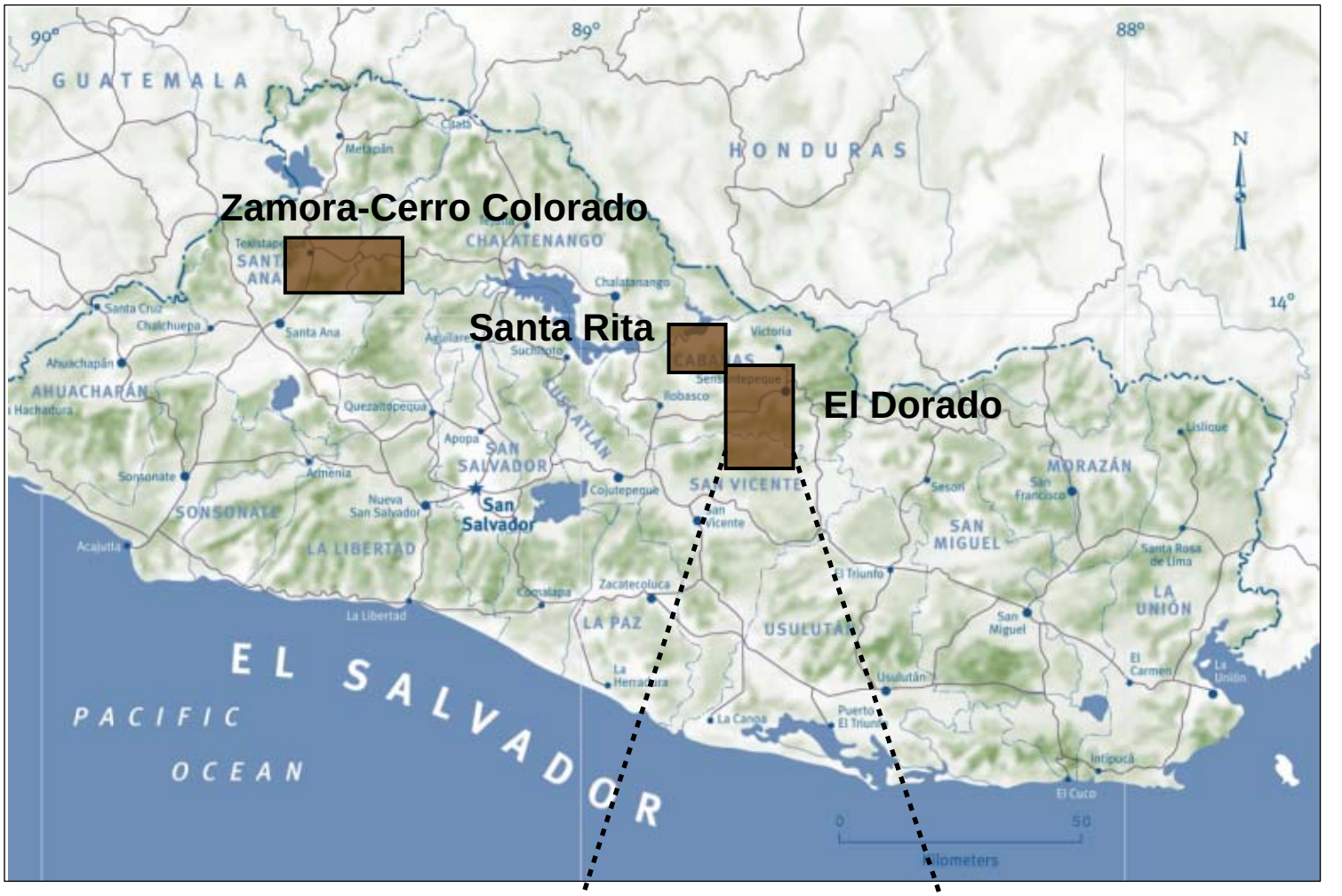
[10] Regulations of the Mining Law of El Salvador and its Amendments, Legislative Decree No. 47, June 20, 2003, published in the Official Gazette No. 125, Book 359 of July 8, 2003 ("Mining Regulations"), Art. 17 (**Authority RL-8(bis)**).

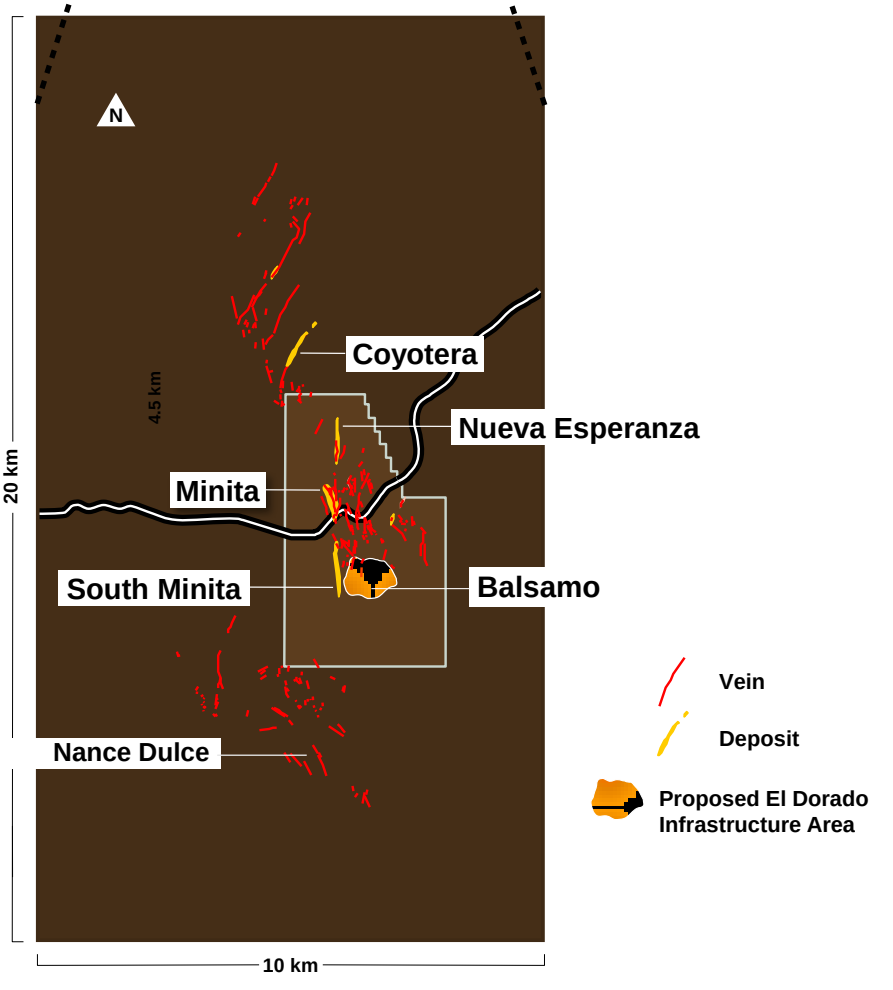
[11] Memorial, paras. 331-334.

of its Salvadoran subsidiaries but, in accordance with the Mining Law, no new license was granted.[12] Claimant now has no rights to explore Santa Rita and no claims that any acts or omissions of the Government affected its rights to Santa Rita. In addition, Claimant has not even attempted to describe its alleged rights or claims regarding the "early exploration properties" of Zamora/Cerro Colorado.[13] Claimant, admittedly, had not been granted any rights to these areas.

[12] Mining Law, Art. 27 (RL-7(bis)); Mining Regulations, Arts. 11, 17 (RL-8(bis)).

[13] Memorial, paras. 669, 687.





The map above shows the exploration areas identified by Claimant as part of its claims in this arbitration. The 200 km^2 area on the right, which Claimant labels "El Dorado" includes the Guaco, Huacuco, and Pueblos exploration license areas surrounding the 12.75 km^2 area of the requested concession (in light brown). The deposits for which Claimant seeks damages are identified by name. Claimant's Pre-Feasibility Study was based on a proposal to mine only the Minita deposit.

A. Pac Rim did not have a right to a Mining Exploitation Concession in El Dorado

1. The legal regime for mining under the Salvadoran Mining Law

40. As Claimant explains, there is a two-step framework for mining in El Salvador: an exploration phase and an extraction, or exploitation, phase.[14] El Salvador's Mining Law outlines the procedures for requesting the different authorizations needed for each step: exploration licenses and exploitation concessions.

41. The two steps are distinct. A company obtains an exploration license to identify whether there are valuable minerals in the ground, where they are located, and whether they can be economically mined. Once a deposit has been located and studied, an applicant can choose an area from within the exploration area to request for exploitation. The surface area of the concession is determined based on the size of the mineral deposits and the applicant's technical justifications.[15] The exploitation concession should be requested after exploration is complete.[16] The Mining Law does not allow for an applicant to seek a larger area for its exploitation concession in order to continue unfinished exploration.[17]

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[14] Memorial, para. 51.

[15] Mining Law, Art. 24 (RL-7(bis)).

[16] Mining Law, Art. 23 (RL-7(bis)) ("Concluida la exploración y comprobada la existencia del potencial minero económico en el área autorizada, se solicitará el otorgamiento de la Concesión para la explotación y aprovechamiento de los minerales…") ["Upon conclusion of the exploration, and proof of the existence of the mining economic potential in the authorized area, the granting of the Concession for the exploitation and use of the minerals will be requested…"].

[17] In fact until the 2001 amendments, the law expressly limited the concession area to 5 km^2, with a provision to extend the area to a total of 10 km^2 if the Bureau deemed it necessary for the best use of the deposits. Mining Law of El Salvador, Legislative Decree No. 544, Dec. 14, 1995 (prior to amendment), Art. 24 (CL-210). Claimant's predecessor, Dayton, supported the amendment. Pacific Rim Mining Corp., News Release, *Changes to Salvadoran Mining Law*, Aug. 23, 2001 (C-225).

42. As Claimant repeatedly affirms, the State owns deposits in the ground.[18] Under the Mining Law, ownership of the minerals is only transferred to the exploitation concession holder when the minerals have been extracted from the subsoil.[19] As explained by international mining law expert James Otto, who has helped draft mining laws in many countries: "the State is the owner of in-situ mineral deposits and the concession holder is the owner of the minerals extracted from State-owned deposits."[20] Thus, during exploration, when the minerals remain in the subsoil, there is no transfer of ownership. There can be no change in ownership unless and until the mineral deposits found in the subsoil are extracted from the ground pursuant to a valid exploitation concession granted by the State.

43. Therefore, according to the Salvadoran Mining Law, an exploration license holder has the right to explore and has no property rights in the deposits. On the other hand, an exploitation concession holder—someone who has studied a deposit, defined the area necessary to mine that deposit, met the concession application requirements, and received the concession—has a real property right: the right to extract the minerals from the ground.[21]

[18] Mining Law, Art. 2 (RL-7(bis)) ("Son bienes del Estado, todos los yacimientos minerales que existen en el subsuelo del territorio de la República, cualesquiera que sea su origen, forma y estado físico…") ["All mineral deposits existing in the subsoil of the territory of the Republic, regardless of origin, form and physical state, are the property of the State . . ."]; Investment Law of El Salvador, Legislative Decree No. 732, Oct. 14, 1999 ("Investment Law"), Art. 7(b) (**Authority RL-9(bis)**) ("El subsuelo pertenece al Estado, el cual podrá otorgar concesiones para su explotación.") ["The subsoil belongs to the State, which may grant concessions for its exploitation."]; Memorial, paras. 16, 39, 433.

[19] Mining Law, Art. 35 (RL-7(bis)).

[20] Expert Report of James M. Otto on Eight Mining Law Questions, Dec. 19, 2013 ("Otto Expert Report") at 9.

[21] Mining Law, Art. 10 (RL-7(bis)).

a) The old repealed mining codes of 1881 and 1922 are irrelevant to interpret the 1995 Mining Law

44. The current Mining Law, drafted in 1995, is and has always been applicable to Claimant's activities in El Salvador. The earlier mining codes cited repeatedly by Claimant[22] were revoked long before 2001, the year Claimant began considering investing in El Salvador.[23] Article 75 of the 1995 Mining Law specifically repeals the 1922 mining code, which had replaced the 1881 mining code.[24] Claimant's lengthy discussion of the earlier provisions, none of which ever applied to Claimant, is disingenuous. The content of provisions that do not apply—and never applied—to Claimant's investment is irrelevant.[25] Claimant's application for an exploitation concession and its alleged rights in this arbitration must be considered based on the text of the 1995 Mining Law. Claimant cannot override the clear provisions of El Salvador's 1995 Mining Law by speculating about El Salvador's historical treatment of mining.

45. Claimant relies on the repealed laws to allege that the current Salvadoran law provides an automatic right to a concession for an exploration license-holder who discovers and demonstrates the existence of mineable deposits in the area of the exploration license.[26] According to Claimant, "the most critical element of El Salvador's historical framework for mining . . . was its clear and unequivocal recognition that the discoverer of a valuable mineral

[22] Memorial, paras. 16-23, 49, 51, 86 n.156, 458-460, 462-467, 479, 507-508, 561, 571-572.

[23] Memorial, para. 94.

[24] Mining Law, Art. 75 (RL-7(bis)). *See also* Expert Report of José María Ayala Muñoz and Karla Fratti de Vega on Administrative Law: Analysis of Issues Related to Salvadoran Mining Law, Dec. 20, 2013 ("Ayala/Fratti de Vega Expert Report") at 8 ("[T]odas las normas en los Códigos Mineros anteriores a 1995 han sido derogadas expresamente y carecen absolutamente de fuerza normativa.") ["[A]ll provisions in the Mining Codes enacted prior to 1995 have been expressly repealed and have absolutely no legal force."].

[25] Ayala/Fratti de Vega Expert Report at 6 ("Si una ley es expresamente derogada por una ley posterior, la ley antigua deja de tener efectos jurídicos.") ["If a law is expressly repealed by a subsequent law, the prior law ceases to have legal effects."].

[26] Claimant Pac Rim Cayman LLC's Notice of Arbitration, Apr. 30, 2009 ("NOA"), para. 37; Memorial, para. 482.

deposit has the right to demand a concession from the State for the exploitation of that deposit."[27] To support its proposition that explorers can "demand" concessions from the State, Claimant cites the 1881 and 1922 Mining Codes and then claims it would be "absurd" to consider that the 1995 Mining Law does not grant such sweeping rights to explorers.[28] In fact, the opposite is true: it is absurd to try, as Claimant does, to insert into the 1995 Mining Law provisions that the Salvadoran legislature eliminated when it repealed the old laws. Claimant tries to cobble together an argument from Articles 10, 19, and 23 of the Mining Law that an exploration rights holder gains "a substantive right to the grant of a Concession upon the conclusion of exploration work that results in the verification or proof of the existence of economic mining potential."[29] Both the conclusion and the assertions on which it is based are flawed.[30]

46. Pac Rim cannot identify any provision in the 1995 Mining Law to support its conclusion because the law does not say what Pac Rim wants it to say: an exploration rights holder does not have the right to demand a concession from the State. Pac Rim's assertions about the various provisions of the Mining Law not only fail to support its conclusion, but also are distortions of the actual text and meaning of the Salvadoran provisions. In the following sub-sections, El Salvador explains how the plain text of the Mining Law contradicts Claimant's alleged interpretations.

[27] Memorial, para. 465.

[28] Memorial, paras. 466-468.

[29] Memorial, para. 482.

[30] *See* Memorial, paras. 471-482 (arguing that Article 10 grants "real property rights" to exploration license holders; the subsurface minerals subject to an exploration license "once located, become the object of the Exploitation Concession;" and the language of Article 23 regarding concessions is mandatory).

i. An explorer does not acquire an ownership interest in a deposit by the mere discovery of that deposit within an exploration area

47. Claimant's first mischaracterization is that Article 10 provides real property rights to exploration license holders.[31] Article 10, in fact, says nothing about exploration licenses or their holders. The Article refers only to "the concession." Claimant tries to evade this by asserting:

> [T]he term "concession" as used in Article 10 is not limited to the "Exploitation Concession," as the latter term is used in later provisions of the law. Instead, it includes also the "Exploration License," which, as employed in the Amended Mining Law, amounts to a "concession" within the general meaning of that term.[32]

48. Claimant cites no source for this assertion. In fact, it is clear from the law that the terms "license" and "concession" were used purposefully with distinct and clear meanings.[33] There is no basis for ignoring the distinction included in the law and arguing that this particular use of the term "concession" is somehow different from all other uses of the same term in the same law. The text of Article 10 is clear and is limited to exploitation concessions. Claimant cannot simply redefine the term "concession" in this provision because its flawed legal theory depends on such redefinition.

49. Dr. Tinetti, El Salvador's Constitutional law expert, confirms that an exploration license confers only the right to explore and the right to request an exploitation concession:

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[31] Memorial, paras. 471-475.

[32] Memorial, para. 472.

[33] *See* Otto Expert Report at 10 ("Throughout the Mining Law, the term concession is used consistently to denote matters relating to the authorization that grants the right to mine and process minerals. The term concession is not applied to matters pertaining to exploration prior to the granting of a concession, and where matters pertaining to such exploration are addressed, the term 'license' is consistently used throughout the Mining Law.").

> An exploration license granted under Article 19 of the Mining Law only vests the holder with the exclusive right to conduct mining activities to find the mineral deposits for which it has been granted, as well as the exclusive right to apply for the appropriate concession. Neither of these rights entails the acquisition of the deposits located in the exploration area simply by the mere fact of having discovered it. This would imply a sort of appropriation of goods that already have an owner—the State—which would be null and void under the Salvadoran legal framework. Whoever is granted a license of this kind knows in advance that they may not raise ownership claims by virtue of such license, according to the above-cited article.[34]

50. In addition, not even exploitation concessions confer ownership rights to the subsurface minerals—much less exploration licenses, as Claimant suggests.[35] Indeed, the real property interest of exploitation concession holders is the right to exploit the subsurface minerals.[36] Mining law expert James Otto explains:

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[34] Expert Report of José Albino Tinetti on Salvadoran Constitutional Law, Dec. 9, 2013 ("Tinetti Expert Report"), para. 26 ("La licencia de exploración que se otorga de conformidad al Art. 19 de la Ley de Minería, únicamente confiere al titular la facultad exclusiva de realizar actividades mineras para localizar los yacimientos de las sustancias minerales para las que ha sido otorgada y el derecho también exclusivo de solicitar la concesión respectiva. Ninguna de esas facultades conlleva la adquisición de los yacimientos que se encuentren en el área de exploración por el mero hecho de haberlo descubierto, lo cual implicaría una especie de ocupación de bienes que cuentan con propietario –el Estado-, lo cual carecería de validez de acuerdo al ordenamiento jurídico salvadoreño. Aquél al que se le otorga una licencia de este tipo sabe de antemano, en virtud de lo que dispone el artículo precitado, que no puede fundamentar pretensiones de dominio en tal licencia."). *See also* Ayala/Fratti de Vega Expert Report at 13 ("[L]icencias de exploración minera otorgan el derecho a realizar actividades de localización y exploración de sustancias minerales, y en el caso de realizar un descubrimiento, solicitar la concesión de explotación de las sustancias que se descubran siempre y cuando se cumplan determinados requisitos (formales y sustantivos) establecidos en la ley de Minería y su Reglamento…. Por ende, el titular de una licencia de exploración **no** adquiere un derecho de propiedad del yacimiento por el hecho de encontrarlo. El que descubre sólo adquiere un derecho (que no es el de propiedad sino el derecho a explotar) en el caso que se le otorgue una concesión.") ["[M]ining exploration licenses grant the right to engage in activities of locating and exploring for mineral substances, and in the event of making a discovery, to apply for a concession to exploit the substances discovered, provided that certain requirements (formal and substantive), which are established in the Mining Law and its Regulations are met. . . . Hence, the exploration license holder **does not** acquire an ownership right over the deposit on account of finding it. The discoverer only acquires a right (which is not an ownership right but a right to exploit) if it is granted a concession."] (emphasis in original).

[35] Memorial, para. 473.

[36] Otto Expert Report, Question 1. *See also* Tinetti Expert Report, para. 31 ("La regulación constitucional de la materia por parte del Art. 103, ha fundamentado el Art. 35 de la ley de Minería de conformidad al

> Article 10 states that a concession is a real property right and is transferable. It does not say that subsoil deposits are owned by the concession holder; that is precluded by Constitution Article 103, Mining Article 2, and Mining Regulations Article 3. A concession does not grant its holder ownership of minerals in the ground. The concession rights to exploit the subsurface mineral estate, not the actual deposits, constitute the real property interest created by Article 10. In effect, it is the right to mine subsoil deposits (i.e. the concession), not the subsoil deposits themselves, which constitute the legally created real property right.[37]

51. It is clear, therefore, that Claimant's argument is based on a false premise. Article 10 of the Mining Law confers no rights on exploration license holders and the right it confers on exploitation concession holders is the right to extract minerals from the ground.

ii. An explorer has an exclusive right to apply for a concession, nothing more

52. Claimant's assertions about Article 19 of the Mining Law are just as inaccurate as its assertions about Article 10. Claimant cites Article 19 as supporting its expert's conclusion that "the right [to the concession] is born and from the outset adds to the assets of the exploration license holder by mere operation of law."[38] According to Claimant, if a concession is not automatically granted, "the 'exclusive right' conferred under Article 19 would be deprived of practical effect."[39] Claimant ignores that the exclusive right is to request a concession. There is no right to receive the concession.[40]

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cual el titular de la concesión –y sólo éste– será el dueño de los minerales '*extraídos*.' Consecuentemente si aún no se es titular de una concesión, o si los minerales todavía permanecen en el subsuelo, el propietario de ellos es el Estado.") ["In the Constitution, this matter is regulated under Article 103, which is the basis for Article 35 of the Mining Law, according to which the concession holder (and no one else) shall be the owner of the '*extracted*' minerals. As a consequence, if there is not yet a concession holder, or if the minerals are still in the subsoil, they belong to the State."].

[37] Otto Expert Report at 10.

[38] Memorial, para. 477 (citing Fermandois Expert Report at 66-67).

[39] Memorial, para. 485.

[40] *See* Ayala/Fratti de Vega Expert Report at 16 ("El hecho de tener licencia de exploración, y descubrir el recurso minero, sí da derecho (exclusivo en algunos casos) a solicitar la concesión, pero no exime al

53. Contrary to Claimant's allegations, the effect of the exclusive right to apply for a concession is simply that no one else is permitted to apply for a concession in the area of a valid exploration license as long as the application for the concession is filed before the exploration license expires. The license holder still has to meet the requirements for its exploitation concession application to be granted. Once an exploration license holder applies for a concession, the right provided for in Article 19 has been exercised. If the license holder fails to apply for a concession before the license expires, that exclusive right is relinquished.

iii. Pac Rim was not required to apply for a concession and the Ministry was not required to grant the concession

54. Pac Rim makes the surprising assertion that, under Article 23 of the Mining Law, it is "mandatory" that a "concession 'shall be requested' by the Exploration License holder, and that it 'shall be verified' by the Ministry."[41] This is not accurate. In fact, an explorer has no obligation to apply for an exploitation concession,[42] and granting of an exploitation concession is not mandatory.[43]

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solicitante de cumplir los requisitos, formales y sustantivos, necesarios para tener derecho a la concesión de explotación. Esto es, el titular de una licencia de exploración no tiene, per se, derecho a obtener concesión de explotación.") ["The fact of having an exploration license and discovering the mining resource, does give one the right (an exclusive right in certain cases) to apply for the concession, but does not exempt the applicant from meeting the necessary requirements, formal and substantive, to be entitled to obtain the exploitation concession. In other words, an exploration license holder that discovers minerals does not, *per se*, have a right to obtain an exploitation concession."] (emphasis in original); Navas de Hernández Witness Statement, para. 17 ("Es importante hacer notar que la Ley de Minería solamente da un derecho de *solicitor* un concesión, pero no da ningún derecho a *recibir* la concesión.") ["It is important to point out that the Mining Law only confers a right to *request* a concession, but it grants no right to *receive* the concession."] (emphasis in original).

[41] Memorial, para. 482.

[42] Otto Expert Report at 26 ("[l]ike mining codes in most other nations, the El Salvador Mining Law does not require the holder of an exploration license that has made a discovery to apply for a mining concession").

[43] Otto Expert Report, Question 2.

55. As mentioned above, the Mining Law does provide that the license holder has an exclusive right to apply for a concession in the area of the license. Therefore, once studies show that it would be economically and technically feasible to mine a certain deposit, and the license holder has the required technical competence and financial means to carry out exploitation, it would make sense to apply for the concession while one still has the exclusive right to apply for it. Nevertheless, it is never mandatory that an exploration license holder apply for the concession. The Salvadoran Mining Law leaves it up to the exploration rights holder to decide if, and when, to apply for a concession. As described by mining legislation expert James Otto: "The exploration license holder may choose to apply for a concession on an exclusive basis during the term of its license, apply on a non-exclusive basis after its license has expired, or choose to never apply."[44] Thus, Pac Rim did not have to apply for a concession at all and, having chosen to apply for a concession, Pac Rim was not required to apply for the concession before the exploration licenses expired.

56. In addition, it is not mandatory for the Ministry to grant a concession. According to the Mining Law, there is no automatic right to a concession, even if the applicant has submitted the required documents, which Claimant did not do. Indeed, the Mining Law sets forth a series of steps for reviewing the application after it is submitted.[45]

57. Mining legislation expert James Otto explains that the Salvadoran Mining Law describes both "competency requirements" and "concession application requirements."[46] First, a concession applicant must show that it has the required technical and financial competence to

[44] Otto Expert Report at 28.

[45] Mining Law, Arts. 38-43 (RL-7(bis)).

[46] Otto Expert Report, § 2.2.

carry out the mining exploitation project.[47] The financial and technical competence standards for exploitation are necessarily more onerous than those for exploration. Logically, a company needs more money and more technical expertise to extract and process gold than it does to discover gold-bearing veins in the ground. The Government has an interest in avoiding granting a concession to a company that could cut corners to save costs, abandon the project partway through, or make technical mistakes that could negatively impact the environment and local communities. Thus, it is only sensible that a company that discovers deposits is not automatically granted a concession to extract those minerals from the ground. The company must show that it is financially and technically capable of realizing the much more complicated exploitation project in a sound manner.

58. Second, an applicant must provide all the documentation required for a concession application.[48] As described by Mr. Otto, the requested documents provide necessary information for the Government's decision on the application: "Each of the documentation required as part of the concession application requirements under Mining Law Article 37 serve a government informational need, and are important for deciding whether or not to grant a mining concession."[49] The application will not be admitted for consideration without the required documents.[50]

59. Once an application is admitted for review (which Pac Rim's was not), there is a process leading to a determination of whether or not a concession should be granted. The Bureau of Mines must ensure that the applicant publishes information about its application and

[47] Mining Law, Arts. 6, 8, 9 (RL-7(bis)); Otto Expert Report, § 2.2.

[48] Otto Expert Report, § 2.2.

[49] Otto Expert Report at 15.

[50] Navas de Hernández Witness Statement, paras. 19-21.

provide fifteen days for persons from the general public who have a legitimate interest in the application, or who believe that they will be negatively affected by the proposed concession, to express their opposition to the application.[51] Under the Mining Law, the Bureau of Mines will consider the objections and the applicant's response, and then decide whether to allow the process to continue or to stop there if the objections are well-founded.[52]

60. If the process continues following publication, the Bureau of Mines will submit the matter to the Minister of Economy for his/her decision. The Minister can evaluate the contents of the application file, order any investigations and inspections he/she deems necessary, and then decide whether or not to grant the concession.[53] Article 15 of the Mining Regulations provides factors that the Minister must take into account in deciding whether or not to grant the mining exploitation concession, including the national interest, the financial and technical capacity of the applicant, and the characteristics of the proposed mining operation.[54]

61. Thus, the plain text of the Mining Law and Regulations demonstrates that there is no such thing as an automatic right to a mining exploitation concession as Claimant alleges. Even if Pac Rim had met the formal requirements of the Mining Law, which it did not, the application would still have been subject to a substantive technical evaluation, the public comment process, and the bounded power of the Minister of Economy to grant or deny the

[51] Mining Law, Arts. 40-41 (RL-7(bis)).

[52] Mining Law, Art. 41 (RL-7(bis)) ("resolverá sobre la Oposición, dentro de los siguientes quince días hábiles, declarándola sin lugar si no fuere fundada, en cuyo caso ordenará se continúe con el trámite de la solicitud.") ["After the evidence is submitted, the Bureau shall issue a decision on the Objection within the next fifteen business days, rejecting it if it is unjustified, in which case the Bureau shall order the processing of the application to continue."]. The Article provides that either the objecting members of the public or the applicant can appeal the decision of the Bureau of Mines to the Minister of Economy.

[53] Mining Law, Art. 43 (RL-7(bis)).

[54] Mining Regulations, Art. 15 (RL-8(bis)).

application for the exploitation concession. The text of the law in contrast to Claimant's mistaken allegations is shown in the following table:

Claimant's Mistaken Interpretation	**Text of 1995 Mining Law**	**Clear Meaning**
According to Article 10, "exploration rights under the Amended Mining Law constitute real property rights of the titleholder."[55]	Art. 10. The deposits referred to in this Law are real property that differ from the properties that constitute surface land; not so the quarries that are an integral part of the surface where they are found, provided they are located at the surface; consequently, a concession is a real property right that is transferrable by an inter vivos act, with the prior authorization of the Ministry; consequently, said concession is capable of being a security for mining operations.	*Article 10 does not accord a real property right to exploration license holders.*
Article 19 provides a right to the concession for minerals located within the exploration license area.[56]	Art. 19. The Exploration License vests in the License Holder the exclusive power to perform mining activities, to locate the deposits of mineral substances for which it was granted, within the limits of the area conferred and to an indefinite depth. In addition, it confers the exclusive right to apply for the respective concession.	*Article 19 provides a license holder the exclusive right to apply for a concession; nothing more.*
"The language of Article 23 is mandatory. It states unequivocally that the concession 'shall be requested' by the Exploration License holder, and that it 'shall be verified' by the Ministry."[57]	Art. 23. Upon conclusion of the exploration, and proof of the existence of the mining economic potential in the authorized area, the granting of the Concession for the exploitation and use of the minerals will be requested; the granting of such Concession shall materialize through a Resolution from the Ministry, followed by the granting of a contract between the Ministry and the License Holder for a term of thirty years, which may be extended at the request of the interested party, provided it complies with the requirements established in the Law, in the opinion of the Ministry. . . .	*Pac Rim was not required to apply for a concession, and the Ministry was not obligated to grant Pac Rim's application.*

62. Thus, Claimant's allegation that it had a right to demand an exploitation concession from El Salvador upon a simple showing that it had discovered a deposit is

[55] Memorial, para. 471.

[56] Memorial, para. 477.

[57] Memorial, para. 482.

unsupportable.[58] Claimant's allegations are disproven by the text of the Mining Law provisions on which it seeks to rely.

b) Mandatory nature of the requirements in Article 37.2 of the Mining Law

63. Claimant incorrectly insists that there is only one "fundamental substantive condition for the granting of a concession," which it claims is the discovery of a mineral deposit in an exploration license area.[59] But Article 37.2 of the Mining Law provides a list of requirements that must be submitted with an application for an exploitation concession:

> a) Plot plan of the property where the activities will be carried out, a cartographic map of the area, topographic plan and its respective technical description, extension of the requested area where its location, boundaries and name of bordering properties are irrefutably established;
>
> b) The ownership deed of the property or the authorization legally granted by the owner;
>
> c) The Environmental Permit issued by the competent authority, with a copy of the Environmental Impact Study;
>
> d) The Technical-Economic Feasibility Study prepared by professionals engaged in the subject matter;
>
> e) The exploitation program for the first five years, signed by a geologist or a competent professional in the subject matter;
>
> f) The others established in the regulations.[60]

64. The requirements of Article 37 are mandatory for an application to be considered.[61] Salvadoran Constitutional law expert Dr. Tinetti confirms that an applicant cannot expect its application to be considered, much less granted, if it has not complied with the legal requirements: "Therefore, if an applicant for a mining exploitation concession does not meet all

[58] Memorial, para. 52 (referring to the exploration license being "followed immediately by an exploitation concession upon discovery of a mineable deposit"). *See also* Memorial, paras. 465-468.

[59] Memorial, para. 488.

[60] Mining Law, Art. 37.2 (RL-7(bis)).

[61] Otto Expert Report at 15 ("The submission of all the listed documentation listed in the Article is mandatory.").

the requirements established by the law on this matter, its claim to obtain the concession is without merit."[62] Article 18 of the Mining Regulations reinforces the need for applicants to submit all the documentation listed in Article 37.[63] Claimant, in its Notice of Arbitration, in fact admitted that the requirements to obtain a mining exploitation concession under Salvadoran law are "plain and explicit,"[64] and that it needed an environmental permit to complete its application. Claimant cannot now claim that the other requirements can be ignored.

65. As El Salvador explained in its Preliminary Objections, in addition to the lacking environmental permit, Claimant failed to comply with two of the other Article 37.2 requirements for an exploitation concession application: the land ownership or authorization requirement and the feasibility study requirement. We will describe these fundamental deficiencies in the next two subsections.

2. Claimant did not comply with the land ownership or authorization requirement

66. In the Preliminary Objection phase of this arbitration, Claimant insisted that its compliance with Article 37.2.b), the land ownership or authorization requirement, was "an intensely factual inquiry"[65] that could not be decided in a preliminary stage. Claimant promised it would "produce evidence – including expert evidence – to demonstrate" that it had met the requirements of Article 37.2.[66] In its Memorial on the Merits, however, Claimant has produced

[62] Tinetti Expert Report, para. 50.

[63] Mining Regulations, Art. 18 (RL-8(bis)).

[64] NOA, para. 8.

[65] Claimant Pac Rim Cayman LLC's Response to Respondent's Preliminary Objection, Feb. 26, 2010 ("Response (Preliminary Objections)"), paras. 13, 142; Claimant Pac Rim Cayman LLC's Rejoinder on Respondent's Preliminary Objection, May 12, 2010 ("Rejoinder (Preliminary Objections)"), para. 142.

[66] Rejoinder (Preliminary Objections), para. 132. *See also* Transcript of Hearing on Preliminary Objections, May 31, 2010, at 153:13-154:3.

no new factual evidence to counter the evidence submitted by El Salvador showing that Claimant utterly failed to comply with the land ownership or authorization requirement.

67. Claimant likewise produced no expert testimony that it met the Article 37.2.b) requirement, but rather presented an entirely new argument that "Article 37(2)(b) is not an applicable requirement for exploitation concessions for metallic minerals."[67] Thus, having been given all the time it needed to produce evidence and experts, Claimant has been unable to meet its promise to the Tribunal that it would demonstrate compliance with the requirement. Instead, Claimant has changed course and now argues that the requirement does not apply to it. Therefore, the fact remains: Claimant did not comply with Article 37.2.b) of the Mining Law and, for that reason alone, had no right to a concession.

a) Claimant wanted more than it could have been legally entitled to

68. Claimant's problem with Article 37.2.b) was never that Claimant did not understand the requirement, or thought it did not apply to gold exploitation concessions, but rather that Claimant could not comply with Article 37.2.b) and still stake its claim to the huge area it desired. Instead of changing its strategy to seek a smaller concession, Claimant pressed ahead, demanding a concession without complying with the applicable legal provisions.

69. Claimant's problem is clearly illustrated from Claimant's Memorial and related documents. According to Claimant, Pac Rim was finalizing its concession application in late November 2004, without having decided the area of the concession.[68] Of course Pac Rim could not have spent the time necessary to consult and reach agreements with landowners since it had

[67] Memorial, para. 560. *See* Expert Statement of John P. Williams on Mining Law, Mar. 27, 2013 ("Williams Expert Statement") at 32 ("All of the documentation requirements set forth in Article 37.2 of the Amended 1996 Mining Law relate to the application for a metallic mining Concession except the requirement in subparagraph (b).").

[68] Memorial, para. 190.

not even decided what area to request—Pac Rim was solely focused on requesting the largest area possible for its concession.[69] Claimant admits that it originally applied for a 62 km^2 area, without regard to the Mining Law requirements for a concession application.[70] Indeed, in the concession application, Pac Rim explained that it was requesting a larger area than it had fully explored based on the low operating costs and high capital costs, claiming that it would not be "reasonable" based on its investment to request the smaller area required to mine the one deposit it had a plan to mine.[71]

70. According to Claimant's own admissions, after being told that 62 km^2 was "too large" an area,[72] Pac Rim reduced the requested area to 12.75 km^2, and still ignored the Mining Law requirements. Pac Rim never attempted to provide documentation showing ownership or authorization for the entire area it requested. Pac Rim's own officials discussed the failure to comply with the "surface owner authorization issue" in June 2005:

> There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and

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[69] Memorial, para. 192.

[70] Memorial, para. 205, n.393.

[71] Application: Conversion of El Dorado Norte and El Dorado Sur Licenses into an El Dorado Exploitation Concession (Solicitud: Conversión de Licencias El Dorado Norte y El Dorado Sur a Concesión de Explotación El Dorado), Dec. 22, 2004 ("Concession Application" or "Application") at 6, § 2.3 (R-2) ("Este estudio [de pre-factibilidad] muestra claramente, que debido a los buenos costos operacionales, grandes costos capitales y tasa interna de retorno (TIR) muy baja, que cualquier cosa que extienda la vida de la operación será favorable al proyecto, y por ende a los trabajadores, las municipalidades . . . , la República de El Salvador, y a los inversionistas. Basado en esto, no nos parece razonable solicitar solamente el área de las vetas Minita y Minita 3, área de la planta y presa de colas, sino que también las otras áreas cercanas donde se encuentran vetas mineralizadas y zonas geológicamente identificadas como zonas con potencial, como área de Concesión.") ["This [pre-feasibility] study clearly shows that, due to the favorable operating costs, high capital costs and very low internal rate of return (IRR), anything that extends the life of the operation will be beneficial to the project and therefore the workers, the municipalities . . . , the Republic of El Salvador and the investors. Based on the above, we do not think it reasonable to request only the areas of the Minita and Minita 3 veins, plant and tailings dam, but also other nearby areas containing mineralized veins and geological zones identified as having potential as the Concession area."].

[72] Memorial, para. 205.

> the authorization of the land owners. . . . the latter is a nearly (if not totally) impossible task.[73]

71. Thus, Claimant's own documents show that Pac Rim knew that it had not met this requirement and chose not to change its request to reflect the very limited area for which it met this requirement. By 2008, when Pac Rim argues it first became aware of its dispute with El Salvador, the time to correct this defect had long passed. Pac Rim never provided the required documentation of ownership or authorization. Claimant hoped to get away with ignoring this requirement because it considered that compliance would be a "nearly (if not totally) impossible task."[74] Claimant cannot now demand compensation by arguing that its application should have been exempt from complying with this Mining Law requirement.

b) Claimant provided proof of ownership or authorization for less than 13% of the area requested for the concession

72. Claimant did not allege or provide evidence that it owned or had permission from the landowners for the surface area over the requested concession in its Application for an Exploitation Concession. Pac Rim provided proof of ownership or authorization for only approximately 1.6 km^2 of the 12.75 km^2 area requested—*i.e.*, less than 13% of the total area requested.[75]

73. This deficiency was brought to Claimant's attention almost immediately. As Pac Rim was forced to admit in its Rejoinder to El Salvador's Preliminary Objections (after having feigned surprise that this was an issue at all), "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

[73] Memo from Fred Earnest to Tom Shrake regarding Surface Owner Authorization Issue, June 28, 2005 ("Pac Rim Internal Memo re Surface Owner Authorization") (C-291) (emphasis added).

[74] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[75] Concession Application at 4 (R-2).

entire land surface overlaying the concession."[76] Soon thereafter, on May 5, 2005, Pac Rim sent its own opinion, prepared by its Salvadoran legal counsel, outlining its argument that it did not need authorizations from landowners for the entire area of the concession for an underground mine.[77]

74. Claimant now further admits that the Bureau of Mines informed Pac Rim in June 2005 "that the office of the Secretariat for Legislative and Judicial Affairs had reviewed the mining law and was in agreement with the interpretation of the Ministry of Economy and the Division of Mines."[78] So Claimant contradicts its own allegations that there was "considerable uncertainty within both MINEC and the Bureau of Mines on the issue" and that Claimant was trying to help "resolve the confusion."[79] In fact, Claimant's exhibit shows that it was informed at the time that the Ministry and the Bureau of Mines had agreed on an interpretation and that this interpretation had been affirmed by the President's Secretariat for Legislative and Legal Affairs. Fred Earnest, the President of Claimant's Salvadoran subsidiary, reported to Tom Shrake that surface owner authorization was one of the main things missing from Pac Rim's concession application.[80] There was no "uncertainty" or "confusion" about the requirement.[81] Mr. Earnest

[76] Rejoinder (Preliminary Objections), para. 30.

[77] Letter from Minister of Economy to Secretary for Legislative and Legal Affairs, May 25, 2005 with attached Memorandum, "Interpretación Ley de Minería," May 5, 2005 (R-30).

[78] Pac Rim Internal Memo re Surface Owner Authorization (C-291) (emphasis added).

[79] Memorial, paras. 217, 219.

[80] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[81] Navas de Hernández Witness Statement, para. 45 ("El hecho que la Ministra de Economía haya solicitado la opinión de la Secretaría para Asuntos Legislativos y Jurídicos de la Presidencia de la República no significaba que nosotros tuviéramos ninguna duda sobre el significado de ese requisito. Era simplemente un intento de buscar una opinión de alto nivel respecto de la posición de que no se debería hacer el requerimiento de la propiedad del inmueble, como una muestra de tratar de ayudarle a un inversionista extranjero, ante su insistencia.") ["The fact that the Minister of Economy requested the opinion of the Secretary for Legal and Legislative Affairs of the Office of the President of the Republic

noted that if the Bureau of Mines requested the missing application components, Pac Rim would have 30 days to produce the "authorizations of the land owners," something Mr. Earnest noted was "a nearly (if not totally) impossible task."[82] Mr. Earnest expressed relief that the Bureau of Mines was "sympathetic" and holding off on starting the 30-day period for curing defects in the application—"this buys us time."[83]

75. More than a year later, however, with no resolution of this key issue, the Bureau of Mines finally triggered the 30-day period by sending a *prevención* (warning letter) dated October 2, 2006. This letter gave Pac Rim thirty days to submit items missing from its application, including certified copies of the registered land purchases or authorizations for the land subject to the concession.[84]

76. In response to the October 2006 letter, Pac Rim merely submitted updated ownership or authorization documents related to the same parcels it had referred to in its original application; the area of land accounted for did not significantly change.[85] In fact, in its report of activities in El Dorado for 2008 submitted to the Salvadoran Ministry of Economy, Pac Rim

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does not mean that we had any doubt about the meaning of this requirement. It was simply an attempt to seek a high-level opinion regarding the position that the property ownership requirement should not be followed, as an attempt to assist a foreign investor, at its insistence."].

[82] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[83] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[84] Letter from Bureau of Mines to Pacific Rim El Salvador, Oct. 2, 2006 (R-4) ("Para mejor proveer PREVIENESE, a la Sociedad 'PACIFIC RIM EL SALVADOR, S.A. DE C.V.', . . .de conformidad a lo establecido en los Artículos 36, 37 numeral 2 y 38 de la Ley de Minería, para que en el plazo de TREINTA DIAS presente a esta Dirección la documentación siguiente: 1. Copias certificadas de los Testimonios de venta de los inmuebles debidamente inscritos o autorizaciones otorgadas en legal forma por los propietarios del área solicitada para la explotación de la mina. . . .") ["The Bureau, in order to better reach a decision, WARNS the company PACIFIC RIM EL SALVADOR, S.A. DE C.V., . . . as established in Articles 36, 37 numeral 2, and 38 of the Mining Law, that within THIRTY DAYS it must submit the following documentation: 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 . . . ."] (emphasis added).

[85] Letter from Pacific Rim El Salvador to Bureau of Mines, Nov. 11, 2006 (R-5).

included a map of the areas it owned that clearly shows that it still had not complied with the land ownership or authorization requirement.[86] Rounding up, the area it claimed to own is equivalent to, at most, 1.62 km^2, which is less than 13% of the requested area.[87]

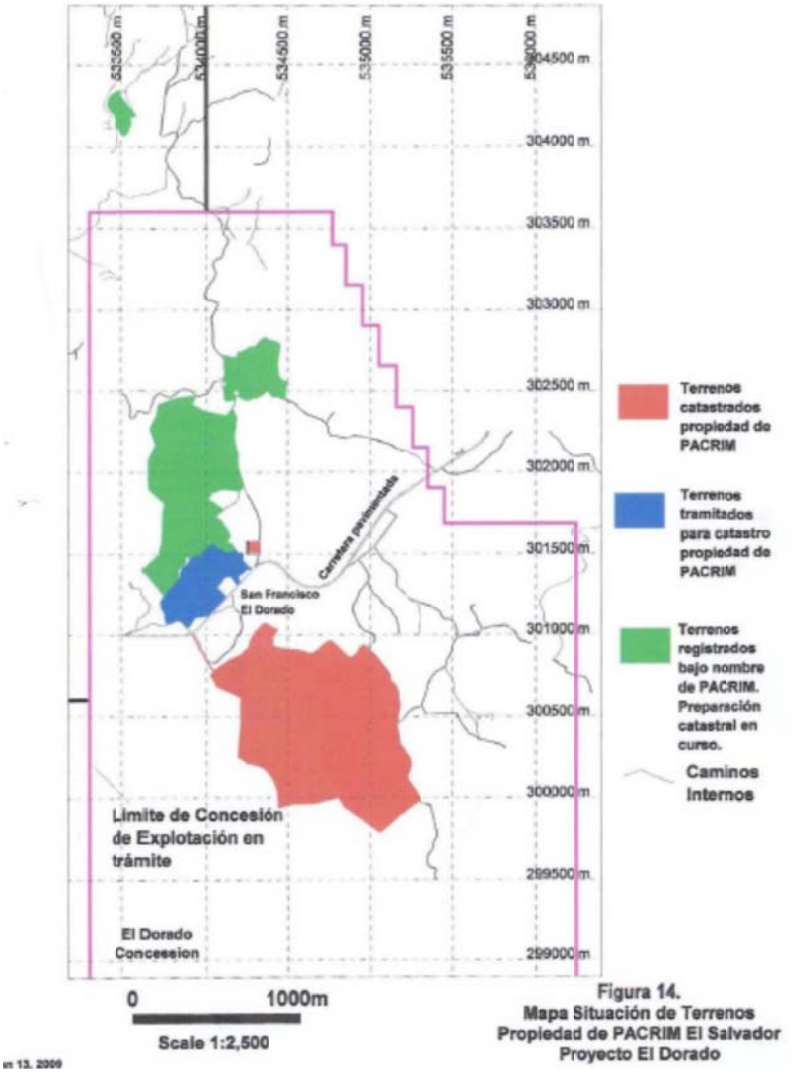

Figura 14.
Mapa Situación de Terrenos
Propiedad de PACRIM El Salvador
Proyecto El Dorado

Pac Rim submitted this map with its 2008 Annual Report to the Government. (R-3) The pink outline is the requested concession area and the colored shapes are the only land for which Pac Rim claimed to have ownership or authorization.

77. Article 38 of the Mining Law only allows a maximum 30-day time limit to cure a defect in an application for a mining exploitation concession after the official warning letter is

[86] 2008 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession, Feb. 2009 ("2008 Annual Report"), § 6 (R-3).

[87] 69 + 93 = 162. The conversion from hectares to km^2 is 100:1, so 162 hectares is 1.62 km^2. 1.62/12.75= 0.127.

received by the applicant.[88] After this period had run (or even after the second 30-day period granted in December had run), the application could no longer be lawfully admitted, reviewed, or adjudicated. Once the thirty days passed and the application defects were not corrected, the only option under the law was for the application to be rejected.

78. Thus, Pac Rim did not own or have authorization for the property at issue. In its Memorial on the Merits, Pac Rim does not allege any new facts about owning or having authorization for additional land.[89] It is, therefore, indisputable that Claimant failed to comply with this mandatory requirement for its exploitation concession application to be admitted.

c) The land ownership requirement applies to the entire area requested in a concession

i. The requirement is not limited to surface properties the project proponent plans to directly affect

79. The requirement of Article 37.2.b) applies to all property covered by the concession. There is no limiting language in the provision:

> The following documentation shall also be submitted: . . .
>
> b) The ownership deed of the property or the authorization legally granted by the owner;

80. In response to El Salvador's Preliminary Objections, Claimant argued that, "for an underground mine, the applicant only needs to demonstrate ownership of, or authorization to use, the limited surface area where mining activities are to be conducted – *i.e.*, where the entrance to the underground mine and the above-ground mining facilities are to be located."[90] This argument was properly rejected by the Government in 2005.[91] Although Pac Rim now primarily

[88] Mining Law, Art. 38 (RL-7(bis)).

[89] Memorial, Section IV.F.

[90] Response (Preliminary Objections), para. 147.

[91] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

argues that Article 37.2.b) simply does not apply to applications for metallic concessions, El Salvador will explain why the argument limiting the requirement to surface areas directly impacted, included in the Memorial as a fallback argument,[92] is incorrect.

81. ***First,*** Pac Rim's interpretation is not supportable based on the text of Article 37 of the Mining Law. Two provisions in Article 37.2 of the Mining Law use the term "*inmueble*." Article 37.2.a) requires an applicant to provide detailed information—such as a location map, a technical description, coordinates and boundaries—for the "*inmueble en el cual se realizarán las actividades*" or "property where the activities will be carried out."[93] Article 37.2.b), the Article with which Claimant failed to comply, requires that the applicant must prove ownership or authorization for the "*inmueble*" or "property." Unlike Article 37.2.a), this Article does not contain the qualifier "where the activities will be carried out" after the term "property."

82. Claimant thus makes two mistakes in interpreting 37.2.b). Claimant tries to import the Article 37.2.a) limitation into Article 37.2.b) even though the latter has no language qualifying the general term, "property." In addition, Claimant tries to force a meaning on the "where the activities will be carried out" language of Article 37.2.a) that is not in the text of that provision. Even if the text of 37.2.a) were applicable to the ownership or authorization requirement (which it is not), there would be no basis for limiting the reference to "activities" to "surface activities." Claimant's interpretation ignores the fact that activities can happen on the surface and underground.

83. ***Second***, at the time it submitted its Application, Claimant understood the phrase "where the activities will be carried out" to refer to the entire area of the concession. In

[92] Memorial, para. 576 ("as Claimant pointed out on numerous occasions during the preliminary phase of these proceedings, PRES did obtain all the surface rights over areas that would have been affected by its proposed mining operations").

[93] Mining Law, Art. 37.2 (RL-7(bis)).

compliance with Article 37.2.a), Claimant submitted the coordinates and maps covering the entire area of the requested concession with its Application for the Concession, not just those parts where surface activities would take place. Claimant's Application for the Concession and its description of the "property where the activities will be carried out" thus leave no doubt that, for purposes of that Application, the "inmueble" or "property" referred to in Article 37.2.a), and by necessary implication 37.2.b), is the entire area requested for the concession.[94] Claimant's own actions in submitting detailed mapping, coordinates and other information for the entire concession area in response to the Article 37.2.a) requirement demonstrates that Claimant well understood that the phrase "where the activities will be carried out" referenced the entire concession area, and not just some small part of it.[95]

84. ***Third***, the argument that the explicit requirement to own or have authorization for the surface area of the entire concession requested should be ignored for underground mines forces a distinction that is not found in the law. In this regard, it is worth noting that given Claimant's "preliminary" plans and its desire to expand its operations after obtaining the concession, it is impossible for Pac Rim to have known in 2004 what surface property it would need to physically affect for its surface works. The drafters of the Mining Law could have distinguished underground mines from open-pit mines, but reasonably chose not to do so. Indeed, the drafters specifically defined "Mine" as: "The physical place, whether at the surface or underground, where the extraction of mineral substances is carried out."[96] The drafters

[94] Concession Application at 4, § 2.1, and at 7, §§ 4.0 and 4.1 (R-2); Map 1, Location of Concession, Concession Application, Dec. 2004 (R-24) and Map 2, Location of Concession, Concession Application, Dec. 2004 (R-25).

[95] Under Salvadoran Law, the doctrine of "*actos propios*" (estoppel) would apply to preclude Claimant from arguing that the term "property" means something different in Article 37.2.b).

[96] Mining Regulations, Art. 2 (RL-8(bis)) (emphasis added).

purposefully required ownership or authorization from all landowners in the entire concession area for either type of mine.

ii. The requirement applies to both mines and quarries

85. In its Memorial, Claimant has now changed its principal argument for why it did not have to comply with Article 37.2.b), but the new argument is as unsupportable as the earlier one. Whereas Claimant's first line of attack was to draw a distinction (not in the law) between open-pit and underground mines, Claimant's newest argument attempts to make a distinction (not found in Article 37.2) between metallic mines and non-metallic quarries. Claimant's argument centers on the unambiguous word: "and." According to Claimant and its expert John Williams:

> As the title to Article 37(2) indicates, that provision applies to "Concession for Exploitation of Mines and Quarries," meaning that it contains the documentation requirements for *both* types of concessions. "Mines" are defined in Article 2 of the Amended Mining Law as metallic mineral deposits, whereas "quarries" are referred to as non-metallic mineral deposits. As Mr. Williams observes, Article 37(2) "is not entitled 'FOR EXPLOITATION CONCESSION FOR METALLIC **OR** NON-METALLIC MINERALS,' which would imply that it contains the documentation requirements for either type of Concession."
>
> In turn, the determination of whether the requirement in Article 37(2)(b) is intended to apply to applicants for metallic mining concessions must be made on the basis of a systematic review of the Amended Mining Law, viewed in light of the Constitution of El Salvador.[97]

86. This argument is baffling. How could the title of Article 37.2 be clearer? Number 1 lists the requirements for applications for exploration licenses, number 2 lists the requirements for applications for exploitation concessions for mines and quarries, and number 3 lists the requirements for applications for processing plants. If the application requirements for exploitation concessions for mines were different from those for quarries, there would simply be

[97] Memorial, paras. 563-564.

a separate subparagraph, or some other indication that 37.2.b) was limited to quarries. Otherwise, the fact that number 2 applies to concessions for both mines and quarries indicates that the listed documentation is required for both types of applications. This is the plain meaning of the text, and this is what Claimant had understood until coming up with a new argument for the merits stage of this arbitration. Its new argument that a concession applicant should conduct a "systematic review" of the Mining Law in light of the Constitution, to determine whether each requirement, a) through f), applies to its application is absurd and unworkable.[98]

87. Based on the alleged ambiguity of the meaning of "and" in Article 37.2, Claimant allegedly conducted a "systematic review" of the Mining Law and found two Articles that purportedly support the argument that Claimant can disregard this requirement. Claimant, ignoring the use of the word "inmueble" in the same Article, claims that Article 30, which is solely about quarry exploitation, is the only "substantive antecedent for that term."[99] But Claimant is mistaken. "Inmueble" means property, unqualified. The meaning is clear and does not require a search for supplementary means of interpretation.[100] The term cannot be restricted as Claimant sought to do before to *property affected by surface works*, nor as Claimant seeks to do now to *property where non-metallic minerals are found*.[101]

88. Claimant also repeats its flawed argument that Article 10 recognizes that exploration and exploitation rights holders have a real property right in subsoil metallic mineral

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[98] Memorial, para. 564.

[99] Memorial, para. 565.

[100] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31 (RL-81).

[101] Claimant's argument is thoroughly undermined by the use of "inmueble" in Article 37.1.a), requiring a map and technical description of the property to be included in a requested exploration license. Mining Law, Art. 37.1.a) (RL-7(bis)) ("Plano de ubicación del inmueble en el cual se realizarán las actividades, descripción técnica y extensión del área solicitada") ["Plot plan of the property where the activities shall be carried out, technical description and extension of the requested area"]. This property for exploration is not limited in the ways Claimant seeks to impose.

deposits.[102] As already explained, Article 10 recognizes that exploitation concession holders have a property right to extract the State-owned deposits. Of course the State can, and in fact must, consider the rights of private landowners before granting concessions.

89. Claimant makes a further interpretative mistake by assuming that quarries always relate to materials at the surface. Accepting Pac Rim's new argument regarding "mines **or** quarries" versus "mines **and** quarries" would lead to the nonsensical result that an application for a concession to exploit a metallic deposit with an open-pit mine (*i.e.*, not a quarry) would not be subject to the requirement of showing ownership or authorization of the land.[103] If, as Claimant insists, Article 37.2.b) does not apply to metallic deposits, concessions for open-pit mining would be granted without requiring any documentation of ownership or authorization for the property! If Claimant's interpretation were correct, the entire surface of a landowner's property could be excavated and removed without so much as consultation with that owner. Metallic minerals, like non-metallic minerals, can be located at the surface or in the subsoil. In either case, mines or quarries, for minerals at the surface or underground, an applicant for an exploitation concession in El Salvador must provide documentation of ownership or authorization for the land included in the requested concession.

iii. The requirement is not unconstitutional

90. Claimant finally argues that applying Article 37.2.b) to metallic mine exploitation concessions would be contrary to the "basic constitutional order in El Salvador, which establishes that the mining of metallic minerals, as a productive use of the State's own property,

[102] Memorial, para. 567.

[103] Mining Regulations, Art. 2 (RL-8(bis)) (defining "Mine" as: "The physical place, whether at the surface or underground, where the extraction of mineral substances is carried out." / "MINA: Lugar físico ya sea superficial o subterráneo donde se lleva a cabo la extracción de las sustancias minerales.").

is an activity in the public interest."[104] But Claimant seeks to take this point too far. Mining can be in the public interest when it can be done in a technically and environmentally safe manner. But every time someone seeks to mine, it is not necessarily in the public interest. For this reason, the Mining Law requires applicants to submit detailed information, including evidence of land ownership or authorization, to help the Ministry make the right decision depending on the circumstances of each specific case. This requirement has always been in the Mining Law applicable to Claimant and is, in fact, grounded in the Constitution.

91. The Salvadoran Constitution recognizes property rights and security rights. In her 2005 opinion for the Bureau of Mines, Dr. Marta Méndez, a primary drafter of the 1995 Mining Law,[105] noted that mining involves dangers to life, health, and property.[106] As she highlighted, Article 2 of the Constitution states that every person has the right to life, physical and moral integrity, freedom, security, work, property, and to be protected in the preservation and defense of the same.[107]

92. Dr. Méndez indicated that Salvadoran Constitutional jurisprudence has held that the right to security includes the right to enjoy one's property without risks, disturbances, or fear

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[104] Memorial, para. 570 (emphasis in original).

[105] Navas de Hernández Witness Statement, para. 44.

[106] Legal Opinion from Dr. Marta Angélica Méndez for Bureau of Mines Director, May 31, 2005 (R-32).

[107] Constitution of the Republic of El Salvador, Legislative Decree No. 38, Dec. 16, 1983, published in the Official Gazette No. 281, Book 234 ("Constitution"), Art. 2 (**Authority RL-121**) ("Toda persona tiene derecho a la vida, a la integridad física y moral, a la libertad, a la seguridad, al trabajo, a la propiedad y posesión, y a ser protegida en la conservación y defensa de los mismos.") [Every person has the right to life, physical and moral integrity, liberty, security, work, property and possession, and to be protected in conservation and defense of the same.]. *See also* Constitution, Art. 11 ("Ninguna persona puede ser privada del derecho a la vida, a la libertad, a la propiedad y posesión, ni de cualquier otro de sus derechos sin ser previamente oída y vencida en juicio con arreglo a las leyes . . . .") ["No one can be deprived of the right to life, freedom, property and possession, nor of any other rights without first being heard and judged in accordance with the law. . . ."].

and that the State must take appropriate precautions to protect people and their property.[108] Indeed, the Supreme Court of El Salvador has explained that the right to security of property includes an obligation for the State to take appropriate preventive measures to protect the property of citizens.[109] Therefore, as Dr. Méndez, a drafter of the Mining Law in question, explained in her 2005 opinion, "the fact that the subsoil minerals belong to the State does not mean that the State will permit excavation under private property without the owner's authorization."[110]

93. Salvadoran Constitutional law expert, Dr. Tinetti, confirms that the requirement is congruent with the Constitution. He begins by noting that the Mining Law expressly recognizes that the subsoil belongs to the State in Article 2. It is therefore clear that the drafters of the Mining Law were well aware of this Constitutional provision.[111] Accordingly, there is no basis for assuming, as Claimant does, that the Mining Law drafters unintentionally included the area where only the subsurface would be directly impacted when requiring ownership or authorization

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

[109] Case No. 309-2001, Constitutional Chamber of the Supreme Court of El Salvador, June 26, 2003 (RL-33) ("esta vertiente del derecho a la seguridad . . . se refiere a que es una obligación del Estado adoptar las medidas pertinentes (incluso, preventivas) para la protección de los bienes muebles o inmuebles de los ciudadanos, de tal suerte que si no se realiza tal actividad, existiría una violación a la seguridad material que afectaría de manera directa el derecho a la propiedad.") ["this aspect of the right to security . . . refers to an obligation for the State to adopt appropriate (even preventative) measures for the protection of the goods and property of citizens, such that if the State does not act, it would be a violation of material security that would directly affect the property right."].

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

[111] Tinetti Expert Report, paras. 7-9.

for the area of the concession. Dr. Tinetti agrees with Dr. Méndez that the drafters purposefully required the landowners' authorization even for activities in the subsoil to protect the landowners' Constitutional rights.

94. Dr. Tinetti confirms Dr. Mendez's 2005 analysis of Article 2 of the Constitution. He explains that the right to property is absolute:

> dominion or ownership is an absolute right, since it places the owner in a situation of legal authority that is enforceable not only against specified persons, but also against everyone or anyone (*erga omnes*). These types of rights do not impose a specific obligation, but a general duty to respect and not interfere with the legal authority granted to the owner by law.[112]

95. Claimant disregards this provision when it insists that the State must grant rights to underground minerals without considering anyone else's interests. But the Government of El Salvador cannot ignore its laws or its citizens' Constitutional rights. The Constitution provides that societal well-being limits economic freedom; the State shall encourage and protect private initiatives within necessary conditions to increase national wealth and assure the benefits to the greatest number of the country's inhabitants.[113] As Dr. Tinetti explains, the Salvadoran Supreme Court has confirmed that the right to economic freedom is limited by the need to protect others' individual rights and the best interests of the community:

> However, it is important to point out that it is common to mistake economic freedom for a license to believe that there only exists a general right to freedom, where private initiative can be absolute and unlimited. But the truth is each individual's right to economic freedom, in terms of legal freedom, may only exist and operate

[112] Tinetti Expert Report, para. 13.

[113] Constitution, Art. 102 (RL-121) ("Se garantiza la libertad económica, en lo que no se oponga al interés social. El Estado fomentará y protegerá la iniciativa privada dentro de las condiciones necesarias para acrecentar la riqueza nacional y para asegurar los beneficios de ésta al mayor número de habitantes del país.") ["Economic freedom is guaranteed, provided that it does not conflict with social interests. The State shall encourage and protect private enterprise within the conditions necessary to increase national wealth and ensure that its benefits reach the greatest number of the country's inhabitants."].

> subject to a number of legal and constitutional limitations aimed at ensuring a harmonic exercise of such right without interfering with other individuals' freedom and community wellbeing and interest[114]

96. The Mining Law, therefore, correctly provides that an applicant for an exploitation concession must obtain authorization from all landowners in the area corresponding to the area of the concession.[115] El Salvador must ensure that an applicant such as Pac Rim complies with the provisions of the Mining Law for obtaining a concession in order to protect the Constitutional rights of its citizens. Thus, far from being contrary to the Constitutional order of El Salvador, the requirement in Article 37.2.b) ensures that the Mining Law is consistent with the Constitution of El Salvador.

97. Claimant's argument would be misguided in any event because only the Supreme Court of El Salvador can rule that a law is unconstitutional.[116] In this case, Pac Rim did not challenge the land ownership or authorization requirement of the Mining Law before the Supreme Court of El Salvador. Unless and until the Supreme Court were to declare the

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[114] Tinetti Expert Report, para. 16 (quoting Constitutional Chamber of the Supreme Court of Justice, Final Judgment No. 2-92, July 26, 1999 (Appendix 3 to Tinetti Expert Report)) ("Sin embargo es importante señalar que, muchas veces, se incurre en el error de confundir libertad económica con la licencia y el desenfreno y creer que únicamente existe un derecho general de libertad, en donde la iniciativa privada puede ser absoluta e ilimitada, cuando lo cierto es que el derecho de libertad económica de cada uno, en cuanto libertad jurídica, únicamente puede existir y operar con sujeción a una serie de limitaciones constitucionales y legales, encaminadas a asegurar su ejercicio armónico y congruente con la libertad de los demás y con el interés y el bienestar de la comunidad.").

[115] Tinetti Expert Report, para. 19 ("El artículo que reconoce y garantiza en la Constitución de El Salvador el derecho de propiedad o dominio por un lado y el que garantiza la libertad económica, por el otro, son dos normas válidas y coherentes en principio. . . . Tal como se detalla en el apartado anterior, sí pueden existir supuestos en los cuales ellos pueden entrar en conflicto y éste es el verdadero fundamento de la decisión de quienes decretaron la Ley de Minería para establecer el requisito contenido en el Art. 37.2.b) de la Ley de Minería.") ["The article of the Salvadoran Constitution that recognizes and guarantees the right to property or domain, on the one hand, and the article that guarantees economic freedom, on the other, are two equally valid, coherent rules, in principle. . . As explained in the previous section, there may be situations where they may conflict, and that is the true reason behind the decision of the lawmakers who drafted the Mining Law to establish the requirement of Article 37.2.b)."].

[116] Constitution, Art. 174 (RL-121).

requirement unconstitutional, Article 37.2 is the law and must be complied with. No one can simply decide a requirement is unconstitutional and choose to ignore it. As long as the law is in effect, and regardless of any arguments about its Constitutionality, all Goverment officials, including the Director of the Bureau of Mines, must comply with it and oblige applicants to comply with it.

d) Claimant admits that it did not own or have permission from the owners of the area requested in the concession

98. Claimant alleges that it has satisfied the requirement of Article 37.2.b) in one single sentence of its Memorial without providing any information about the land it owns or is authorized to use. According to Claimant, "as Claimant pointed out on numerous occasions during the preliminary phase of these proceedings, PRES did obtain all the surface rights over areas that would have been affected by its proposed mining operations."[117] As proof of its compliance, Claimant cites its argument in the Preliminary Objections stage that the requirement applies to land "where the mine project is located,"[118] which it inexplicably limited to "where the entrance to the underground mine and the above-ground mining facilities are to be located."[119] The Tribunal will recall that Claimant insisted that this issue could not be determined at that stage because it was "an intensely factual inquiry."[120] But now Claimant provides no new facts.

99. Claimant follows its conclusory statement harkening back to its arguments in the Preliminary Objections stage with the assertion that "PRES maintained good relations with all the surface owners within the proposed El Dorado Exploitation Concession area, and believed it

[117] Memorial, para. 576.

[118] Response (Preliminary Objections), para. 143.

[119] Response (Preliminary Objections), para. 147.

[120] Response (Preliminary Objections), para. 13.

could get whatever 'permission' that may be required from them if it became necessary."[121] This is not true. The exhibit Claimant cites in the very same paragraph states the opposite. In June 2005, Fred Earnest wrote to Tom Shrake describing the surface owner authorization issue as one of the "main things" missing from Pac Rim's concession application. He wrote that getting authorizations from all the land owners was "a nearly (if not totally) impossible task."[122] Indeed, this is exactly what Pac Rim had told the Minister of Economy, who at the time described that Pac Rim owned just the area of the plant, "but not the rest of the area, and they believe that it is impossible to obtain all the permissions because there are many owners."[123]

100. Pac Rim's assessment in 2005 was correct. Obtaining ownership or authorization for all the land within their desired 12.75 km^2 area would have been nearly impossible. There are approximately 1,000 individual owners within that area.[124]

101. Pac Rim did not have the required authorizations, could not obtain them, and decided to pursue other means to demand the concession without complying with the law. The Tribunal will recall Claimant's admission in the Preliminary Objections stage:

> 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

[121] Memorial, para. 576.

[122] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[123] Letter from Minister of Economy to Secretary for Legislative and Legal Affairs, May 25, 2005 with attached Memorandum, "Interpretación Ley de Minería," May 5, 2005 (R-30) (emphasis added).

[124] El Salvador obtained information from the Salvadoran National Land Registry in 2010 that there are about 987 properties in the requested concession area. The index of registered owners obtained from the National Registry is attached as **Exhibit R-127**.

> Mines would ultimately resolve its apparent uncertainty on this issue in Claimant's favor. Claimant chose the latter course.[125]

102. As already noted, however, there was no "uncertainty."[126] Pac Rim knew the requirement and chose not to comply. Even Pac Rim's new argument that it did not know what kind of authorization was required is far-fetched.[127] According to the exhibit that Claimant provides on this point, the Director of the Bureau of Mines answered Pac Rim's questions about what was required, and Pac Rim simply did not like the answer and argued with her about it.[128] Pac Rim's suggestion that the authorization be directed to El Salvador is nonsense. As Gina Navas de Hernández, former Director of the Bureau of Mines, explains, "Permission could be a lease agreement, or authorization so that Pacific Rim could carry out mining exploitation activities, whether on or below the property for which authorization is given."[129] Claimant's new arguments about the requirement are just *post hoc* excuses for its deliberate choice to ignore the requirement while seeking to change the law.

e) <u>El Salvador did not have a legal obligation to advise Claimant how to cure the defect in its application</u>

103. Claimant even tries to excuse its lack of compliance by implying that it would have complied with the law if only the Government had explicitly told the company how to do so.[130] Indeed, Pac Rim now labels the statements from the Bureau of Mines about its non-

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[125] Rejoinder (Preliminary Objections), para. 49.

[126] Navas de Hernández Witness Statement, paras. 43-45.

[127] Memorial, para. 576 ("the question of what kind of 'permission' PRES could obtain was not easily resolved, given that these surface owners did not have any legitimate interest in the activities that PRES would be carrying out.").

[128] Memorial, para. 576 (quoting Pac Rim Internal Memo re Surface Owner Authorization (C-291)).

[129] Navas de Hernández Witness Statement, para. 50.

[130] Memorial, para. 229 ("if the Bureau of Mines had asked PRES to purchase additional lands or to revise its application for an Exploitation Concession to include a smaller concession area, PRES would have done so.").

compliance with Article 37.2.b) as "conversations with MINEC about clarifying the Amended Mining Law" and claims that it did not consider its failure to comply a "fundamental flaw" in its application because of the support it had received from Government officials.[131] In other words, Pac Rim did not think it would have to fix its deficient application because Government officials had allegedly voiced support for its project. But to make claims under the Investment Law, Claimant must have complied with Salvadoran law.

104. The weakness of Claimant's position is demonstrated by the fact that Claimant has been forced to argue that it cannot be held responsible for its failure to comply with the law (which never changed and was applicable from the time Claimant made its investment) because the Government did not tell it specific steps to take to cure the defect in its application. In fact, Claimant did not need the Government to tell it how to fix the application; Pac Rim has already admitted that it knew its options and chose to try to change the law instead of complying with it:

> 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.[132]

105. The Government applied the law. The Government went above and beyond what it needed to do by allowing the company extra time to fix its application.[133] Claimant wants to take the Government's goodwill and convert it into a legal obligation to ignore any defects in its application, change the law, or tell the company what to do to get the concession. But the Government's efforts to help the company cannot become an obligation to ignore or change its

[131] Memorial, para. 230.

[132] Rejoinder (Preliminary Objections), para. 49 (emphasis added).

[133] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

law for Pac Rim. As explained by former Minister of Economy, Yolanda de Gavidia, the Government's support of Pac Rim was always limited to helping it obtain the concession lawfully: "At no time was I willing to grant Pacific Rim, or any other company, a concession to which it was not entitled under the laws of El Salvador."[134] Eventually goodwill runs out and an applicant is solely responsible for its failure to comply with the legal requirements.

f) Claimant chose not to try to cure the defect but instead assumed the risk of trying to change the mining law

106. Claimant took advantage of the extra time to try to change the law. Indeed, Pac Rim knew as early as 2005 that its application could not move forward unless the law or the Government's interpretation of the law changed. Former Minister of Economy Yolanda de Gavida describes that Pac Rim could not comply with the land ownership or authorization requirement because "they expressed to me that it was impossible for them to meet this requirement given the large number of land owners in the area they wished to obtain as a concession."[135] When the May 5, 2005 memorandum from Claimant's local counsel arguing against the Government's interpretation of Article 37.2.b) did not sway the Bureau of Mines and the Ministry of Economy, the company began seeking alternative courses of action.

107. As Claimant describes in its Memorial:

> In the matter of the interpretation of the law regarding the need to obtain the authorization of the surface owners, the "Ministra de Economia" has acknowledged that something needs to be done. Meetings have been held with political consultants to determine the best course of action should it become necessary to seek an authentic interpretation or a change in the law. It is hoped that a

[134] Witness Statement of Yolanda Mayora de Gavidia, Dec. 20, 2013 ("Gavidia Witness Statement"), para. 7 ("En ningún momento yo hubiera estado dispuesta a otorgarle a Pacific Rim, ni a otra empresa, una concesión a la que no tuviera derecho de conformidad con las leyes de El Salvador.").

[135] Gavidia Witness Statement, para. 4.

> course of action will be clear after the meetings to [be] held during Tom Shrake's visit in September.[136]

108. Shortly thereafter, Pac Rim's local counsel sought an "authentic interpretation."[137] Pac Rim's local counsel sought assistance from Ricardo Suarez in the Vice-President's Office to obtain the "kind of authentic interpretation that we need for the mining project to move forward."[138] Pac Rim repeatedly touts Mr. Suarez's response as sympathetic to its constitutional argument, but omits the part of the response where Mr. Suarez explicitly advised that the Mining Law as written had to be observed.[139] Mr. Suarez informed Pac Rim that their "interpretation" would actually be a "reform" of the law under the guise of an interpretation and that this would not be permitted in the Salvadoran legal system:

> We share your opinion that the legal requirement that surface landowners authorize subsurface mining is not consistent with the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil is the State. . . .
>
> **However, that is the current legal text, and the one that must be observed.**
>
> Regarding how to reconcile that text with State ownership, and specifically as relates to the "authentic interpretation" proposal that you have prepared, it appears to us that in contrasting the current text of Section 37 with the text of the proposed interpretation, rather than clarifying an opaque passage of the law, you would be changing its meaning, assigning a different scope—although logical and desirable—to the text.
>
> This would mean that rather than an interpretation, we are dealing with a reform of the text under the guise of an interpretation,

[136] Memorial, para. 222 (quoting El Dorado Project Report for the Month Ending 31 August 2005 (C-288)) (original emphasis omitted, current emphasis added).

[137] Memorial, para. 224.

[138] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 (C-289) (emphasis added).

[139] Memorial, paras. 214, 224, 574. It is worth noting that Mr. Suarez had no power to interpret the law in any event. That is a power that belongs solely to the Salvadoran legislature under Article 131 of the Constitution.

> something allowed for neither in our legal system, nor in the doctrine that inspires it.[140]

109. A couple of weeks later, in an opinion requested by the Minister of Economy, the Secretary for Legislative and Legal Affairs of the Presidency of El Salvador likewise objected to this apparent attempt to change the law using a procedure intended only to interpret the law.[141] Claimant complained repeatedly in the Preliminary Objection phase that El Salvador relied on this internal memorandum.[142] But now Claimant has produced an e-mail from the Vice-President's Office sent to Claimant's local counsel two weeks earlier arriving at the same conclusion: Claimant's proposed "interpretation" would actually change the meaning of the text of the law—"rather than an interpretation, we are dealing with a reform of the text under the guise of an interpretation, something allowed for neither in our legal system, nor in the doctrine that inspires it."[143] As former Minister de Gavidia explains, the response confirmed what she and her colleagues in the Ministry already knew: the requirement was for the entire area of the concession.

> The fact that I had asked the Secretary for Legal Affairs of the Office of the President of the Republic, first for its opinion, and then for an authentic interpretation of this requirement, was not because I or my trusted colleagues harbored any doubt regarding the interpretation of this provision of the Mining Law. Faced with the repeated and insistent requests by Pacific Rim's representatives, I made these attempts to be sure there was no way the law could be interpreted in the manner Pacific Rim insisted it should be interpreted, which seemed to be the only way that Pacific Rim would be able to move forward with its concession application.[144]

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[140] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 (C-289) (bold added, underline in original).

[141] Response from Secretary for Legislative and Legal Affairs to Minister of Economy re: "Authentic Interpretation," October 6, 2005 (R-34).

[142] Claimant's Rejoinder (Preliminary Objection), paras. 2, 35, 43.

[143] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 (C-289) (emphasis in original).

[144] Gavidia Witness Statement, para. 5.

110. Pac Rim then supported an effort to change the law. The Minister of Economy considered amending the Mining Law to change Articles 24 and 37 to get rid of the surface land ownership or authorization requirement for underground mines.[145] The proposed amendments would specifically exclude underground mines from the land authorization or ownership requirement.[146] The President of PRES, Fred Earnest, passed the proposal on to his colleagues and bosses at Pac Rim, describing the proposed amendment that for underground operations the company would only need authorizations for where surface installations would be constructed as "exactly what we need."[147]

111. According to Claimant, this initiative was not actually introduced in 2005, and Pac Rim decided to wait for the law to be changed: "Mr. Shrake and the Companies believed that if a legislative solution could be implemented, such a solution would be preferable to further reducing the concession area or trying to buy or acquire authorization to use more surface land."[148] Thus, even though Pac Rim knew that this was one of the "main things" missing from its application, Pac Rim made no efforts to fix it. Instead, it focused on lobbying the Salvadoran legislature to pass the amendments.[149]

112. By November 2006, Pac Rim admitted in its public reports that the law needed to be changed for its application to move forward: "Pacific Rim's Exploitation Concession

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[145] Letter from Bureau of Mines Director to Elí Valle with Proposed Amendments to the Mining Law of El Salvador, Sept. 13, 2005 ("Letter to Elí Valle with Proposed Amendments to the Mining Law") (R-35).

[146] Letter to Elí Valle with Proposed Amendments to the Mining Law (R-35).

[147] Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, and Bill Gehlen, Oct. 25, 2005 (C-400) (emphasis added).

[148] Memorial, para. 229.

[149] Email from Fred Earnest to Tom Shrake, Feb. 15, 2006 (C-295) ("we have sought and obtained the commitment of support for the project from the PCN [one of the moderate parties – their vote along with ARENA will ensure that the reform passes]. With a great deal of satisfaction, I can inform you that we are ready in the legislative area").

application for the El Dorado project remains in process however it is uncertain whether the El Dorado Exploitation Concession will be granted prior to the forthcoming reformation of the El Salvadoran Mining Law."[150] And by 2007, Pac Rim was even more open about the fact that there would be no concession until the law was changed. In its 2007 Annual Report for the Canadian regulatory authorities, Pacific Rim Mining Corp. mentioned that "it is unlikely that a mining permit will be granted prior to the expected reformation of the El Salvadoran mining law."[151]

113. Following the failed efforts to reinterpret or amend the law, Claimant supported a proposal to replace the Mining Law in 2007, which would require ownership or authorization for only the land on which the company would locate mining infrastructure.[152] Claimant also increased its efforts in 2007 to obtain its concession through "political means."[153] In mid-2007, Claimant was communicating with Mark Klugmann, a political consultant,[154] and counting on its "leading lobbyist and political strategist," Fidel Chavez Mena, to work with President Saca's cousin, Herbert Saca, to move forward.[155] Claimant has admitted that by late 2007 it had engaged C&M Capitolink, and one of its U.S. lobbyists traveled to El Salvador with Mr. Shrake in December 2007 and February 2008 to meet with "various officials of the Salvadoran Government."[156] Ms. Mary Anastasia O'Grady, a columnist for the *Wall Street Journal*, also

[150] Pacific Rim Mining Corp., News Release, *El Dorado Project Update*, Nov. 9, 2006 (C-309) (emphasis added).

[151] Pacific Rim Mining Corp., 2007 Annual Report (Canada), with Letter to Shareholders at 10 (R-37) (emphasis added).

[152] Proposed New Mining Law of El Salvador, Nov. 2007, Arts. 34, 35, 38, 52, 54 (R-36).

[153] Memorial, para. 300.

[154] Email from Tom Shrake to Mark Klugmann, May 18, 2007 (C-306).

[155] Email from Tom Shrake to several recipients, Aug. 14, 2007 (C-307).

[156] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 **(Exhibit R-128)**.

traveled to El Salvador in February 2008 and attended a dinner with Mr. Shrake, the U.S. lobbyist, and several Salvadoran Government officials.[157] Tom Shrake, Pac Rim's President and CEO, testified:

> We considered various--at this point we considered various remedies to the situation. I mean, I talked to counsel in El Salvador I was lobbying. I was lobbying in the United States to pressuring El Salvador. I was doing numerous--numerous things at that point.[158]

114. But the Salvadoran Mining Law was not changed, despite Claimant's best efforts. Claimant filed this arbitration when its efforts to change the law failed.

g) In any event, Claimant would have been unable to cure the defect even if it had reduced the size of the concession to the smallest possible size

115. Even if Claimant had been willing to reduce the area of the requested concession from 12.75 km^2 to the 1.6 km^2 covered by Claimant's ownership or authorizations, Claimant would still not have met the legal requirement to obtain the concession. Claimant did not own or have authorization for even the land directly above a portion of the access ramp and most of the underground mine Claimant proposed to construct.

116. The surface area Claimant owns or has authorization for is represented in Map 5 to the Application for the Concession. Map 5 only includes an area of 4 km^2, or less than one-third of the total area requested for the concession. As Map 5 shows, the proposed mine for the concession is under a surface area of less than 0.2 km^2 of land, for much of which Claimant did not show ownership or authorization.[159]

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[157] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 (R-128).

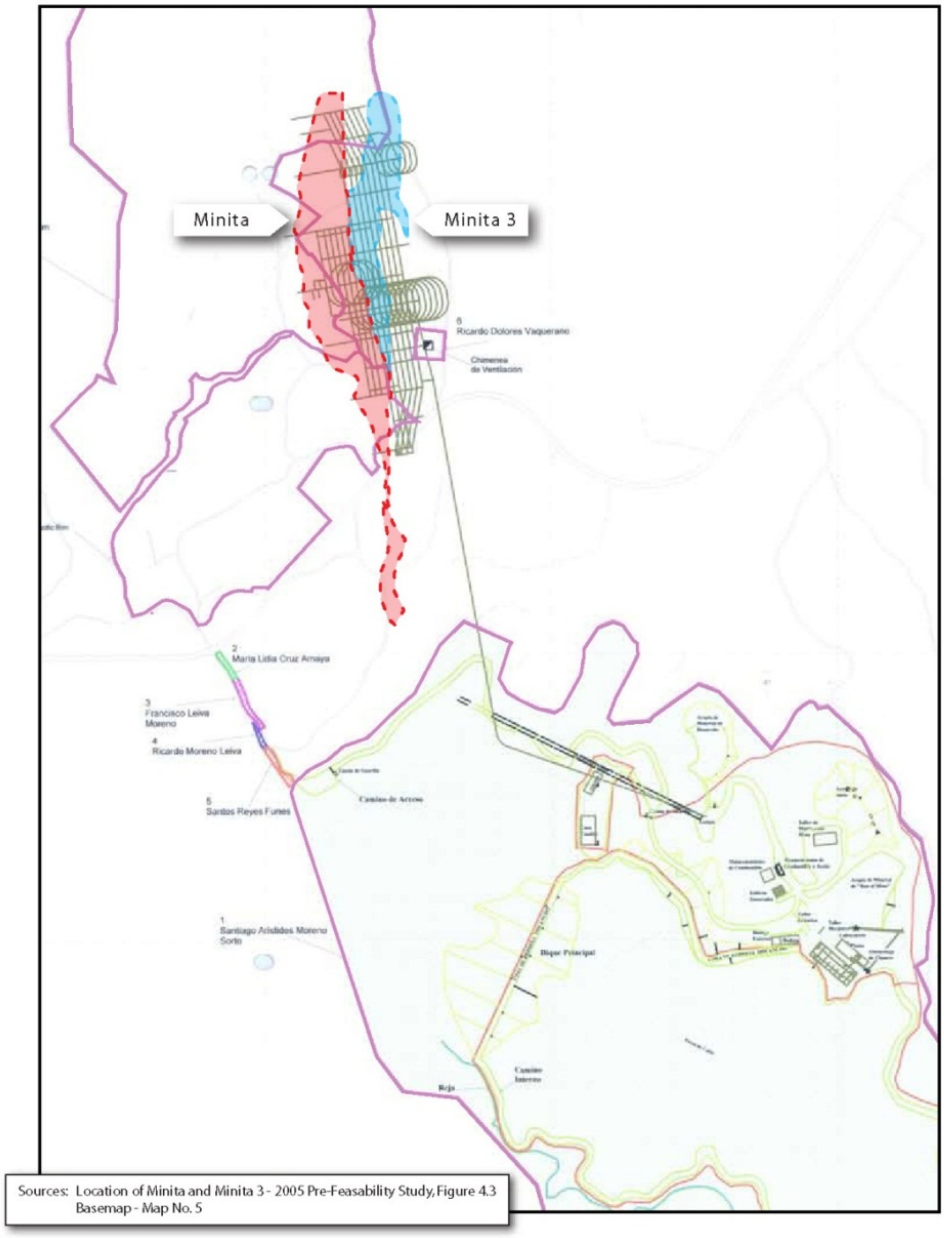
[158] Transcript of Hearing on Objections to Jurisdiction, May 3, 2011, at 461:14-19.

[159] *See* Map 5, Lands Purchased or in Process and Location of Infrastructure, Concession Application, Dec. 2004 (R-28).

117. In addition, according to Claimant's own documents, a significant portion of the gold deposit denominated Minita is located outside the underground projection of the surface area owned by Claimant or for which it has authorization.[160] Superimposing the information regarding the size and location of the Minita and Minita 3 veins provided by Claimant in its Pre-Feasibility Study on the relevant area of Map 5 shows that most of the underground mine area and access ramp (more than 80%), and a significant portion of the combined Minita deposit (more than 60%), are outside the areas for which Pacific Rim has ownership or authorization.[161] The graphic below shows the results of this superimposition:

[160] *See* Figure 4.3, "Overall Plan View Decline and Minita Zones" (from Pre-Feasibility Study, Jan. 2005) (R-49), and Figure 9.1, "Schematic Cross-Section of the Main Minita Veins," (from MDA Technical Report, Nov. 2003) (R-50).

[161] This demonstrative exhibit has been provided in more detail as Exhibit R-51.



The structure of the underground mine is located at the top of the map, showing the tunnels and spirals of the ramps. The locations of the Minita and Minita 3 veins, taken from Claimant's 2005 Pre-Feasibility Study, are shown in red and blue. These locations have been georeferenced and superimposed on a portion of Map 5, which shows the location of the proposed underground mine in relation to the areas, outlined in pink, for which Pac Rim claims ownership or authorization.

118. As will be discussed below, the Minita deposit, with two veins (Minita and Minita 3), constitutes the sole basis for the calculation of reserves in Claimant's Pre-Feasibility Study submitted to justify the economic feasibility of its application for the entire 12.75 km^2 concession application. In short, because Claimant's own submissions to the Government demonstrate that a significant portion of the mineral deposit it proposed to mine is not even located under the land it owns or has authorization for, the Ministry of Economy could not have legally granted the concession, even if Claimant had reduced the area requested to the 1.6 km^2 for which it has shown ownership or authorization.

119. Therefore, Claimant's own submissions disprove its allegation that it could have met the legal requirement for a concession by reducing the size of its requested concession to the areas it owned or had authorization for. Moreover, as noted, Claimant was fully aware since at least 2005 of the surface land requirement and did nothing to cure the defect.

h) Conclusion on land surface requirement

120. El Salvador's Mining Law required Pac Rim to own or obtain permission of the landowners for the entire area included in its concession application. Pac Rim was fully aware of this requirement, but did not obtain ownership of or authorization for the land included in its exploitation concession application. Rather, Pac Rim sought to change the law. The Salvadoran Mining Law was not changed, despite Pac Rim's best efforts throughout 2005, 2006, and 2007, and then Pac Rim began preparing to file this arbitration as a new way to pressure the Government in late 2007.[162] Claimant avoided a decision on this issue in the Preliminary Objection phase by promising to provide factual evidence and expert reports demonstrating its compliance with the requirement. Given the opportunity, however, Claimant has provided no

[162] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 (R-128).

new evidence and only a new argument that it did not have to comply. As a result, it is indisputable that Claimant did not comply with Article 37.2.b), one of the mandatory requirements for its exploitation concession to be admitted by the Bureau of Mines. Due to its failure to comply with the land surface requirement, Claimant could not have been granted an exploitation concession.

3. Claimant did not comply with the requirement to submit a Feasibility Study

121. Claimant likewise failed to comply with Article 37.2.d) of the Mining Law: Claimant did not submit a technical, economic Feasibility Study. With its Concession Application, Pac Rim submitted only a "Preliminary Pre-Feasibility Study."[163] It submitted an updated version of the Pre-Feasibility Study one month later in January 2005, but it never completed the actual Feasibility Study required by Salvadoran law.

122. The October 2006 letter from the Bureau of Mines, mentioned above with regard to the land ownership and authorization requirement, also alerted Pac Rim to its failure to provide the required Feasibility Study with detailed plans.[164] Consistent with its failure to act in connection with the land ownership and authorization requirement, in its response to the request from the Bureau of Mines for a Feasibility Study and professional plans, Pac Rim simply re-submitted its Pre-Feasibility Study and added the plans for the six specific areas requested.[165]

123. Claimant now alleges that

> the El Dorado PFS *was in fact a feasibility study* as that term is generally understood by *mining specialists* such as the members of Pacific Rim management that were responsible for making the

[163] Concession Application at cover letter (R-2).

[164] Letter from Bureau of Mines to Pacific Rim El Salvador, Oct. 2, 2006 (R-4).

[165] Letter from Pacific Rim El Salvador to Bureau of Mines, Nov. 11, 2006, at 3.b (R-5) (including engineering and design of the ramp, access routes and infrastructure, a tailings dam, a flow plant, method of exploitation of the subterranean mine, and closure of the mine).

> determination whether to proceed with the El Dorado Project, as well as the Bureau of Mines personnel charged with reviewing PRES's Concession Application.[166]

This claim is simply not true. First, Claimant and SRK Consulting knew the difference between pre-feasibility and feasibility studies and specifically contracted for a pre-feasibility study. Second, Pac Rim was working on the actual feasibility study from 2006 into 2009, and it admittedly never completed that study, which it concedes is the same "feasibility study required by the Salvadoran Mining Law."[167] Third, even ignoring that admission, the content of the Pre-Feasibility Study shows that it is not sufficient to be considered anything more than a preliminary study.[168]

a) Difference between a Pre-Feasibility and a Feasibility Study is not a mere formality

124. The difference between a Pre-Feasibility Study and a Feasibility Study is not merely in the name. The level of detail and the confidence level of a feasibility study will be greater than that of a pre-feasibility study.[169] Behre Dolbear, a well-regarded independent expert advisor to the minerals industry with extensive experience, reviewed Claimant's Pre-Feasibility Study and concluded that it was less comprehensive than what would be required for a full feasibility study:

> The document Pacific Rim submitted to the Government is clearly stated to be a "Pre-feasibility Study" and does not meet the

[166] Memorial, para. 522 (emphasis in original).

[167] Rejoinder (Preliminary Objections), para. 154.

[168] Expert Report of Behre Dolbear Minerals Industry Advisors, El Dorado Concession Application and Related Exploration Areas, Jan. 6, 2014 ("Behre Dolbear Expert Report"), para. 34 ("Behre Dolbear concludes, based on its experience that the Pre-feasibility Study does not contain sufficient technical detail and supporting documentation for it to be considered a Feasibility Study, as stipulated by international mineral industry reporting codes.").

[169] Behre Dolbear Expert Report, paras. 19-23. *See also* Behre Dolbear Expert Report, para. 29 ("A feasibility study requires much greater depth of detail than a Pre-feasibility Study to verify its findings and increase the accuracy of cost estimation.").

> comprehensiveness of a Feasibility Study under international standards or that would be considered necessary by the Government for it to make a decision as to whether or not an Exploitation Concession should be granted.[170]

125. In 2004, Pac Rim was not in a position to complete the required feasibility study because it had not finished the exploration and technical work for the area it wanted to include in its application. Claimant therefore completed and submitted the less detailed, less definite Pre-Feasibility Study and then began working on the required Feasibility Study.

126. Both Claimant and SRK Consulting, the company contracted to prepare the Pre-Feasibility Study, recognized that it was "a Canadian National Instrument 43-101 . . . compliant Pre-Feasibility Study for the El Dorado Project located in El Salvador."[171] In addition, the Pre-Feasibility Study states that it was based on a "Conceptual Underground Mine Design" by McIntosh Engineering.[172] Thus, the document itself emphasizes that it is not a Feasibility Study and does not have the requisite level of detail to support Claimant's application for a 12.75 km^2 exploitation concession.

127. Claimant, in fact, did not rush to complete the required Feasibility Study because it hoped to propose expanded operations including a deposit called South Minita, whose discovery was announced only after the application for the concession was filed. Thus, in September 2005, Claimant reported:

> Pacific Rim's exploration strategy is to continue to drill test South Minita, which remains open at depth and along strike, until the Company is satisfied that the target has been adequately delineated, and then commission a resource estimate for this gold zone. The Company will then amend the Minita pre-feasibility study to take into consideration the new ounces defined by the

[170] Behre Dolbear Expert Report, para. 28.

[171] Pacific Rim Mining Corp., Pre-Feasibility Study, El Dorado Project, Jan. 21, 2005 ("Pre-Feasibility Study") at i (C-9).

[172] Pre-Feasibility Study at 9 (C-9) (emphasis added).

> South Minita resource estimate, which will provide an economic analysis of a proposed operation that involves mining Minita and South Minita simultaneously.[173]

128. Indeed, in December 2005, Claimant was planning to "commission a preliminary economic assessment of a combined Minita/ South Minita operation . . . followed by a full feasibility study for this expanded operation."[174] At the time, Claimant explicitly stated that it would not move forward with its El Dorado mine plans until a "full feasibility study of a proposed expanded program" was undertaken.[175] Claimant did in fact hire SRK Consulting to prepare the required feasibility study in 2006.[176] Nothing in SRK's 2006 proposal suggests that the Pre-Feasibility Study it prepared in 2005 was anything more than a preliminary study; indeed SRK estimated that it would cost about half a million dollars to complete the required El Dorado Feasibility Study.[177]

129. As Claimant's own documents describe, by late 2006—after the Bureau of Mines had sent the *prevención* (warning letter) requiring that Pac Rim submit the Feasibility Study within 30 days or have its file closed—Pac Rim had been unable to complete and was still working on the required Feasibility Study:

- In November 2006, PRMC reported: "A feasibility study for the El Dorado project is in progress. Certain engineering information garnered from technical drilling in and around the Minita and South Minita deposits has taken longer to

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[173] Pacific Rim Mining Corp., News Release, *South Minita Gold Zone Continues to Evolve as a Key Component of Pacific Rim's Exploration Strategy*, Sept. 9, 2005 (C-253) (emphasis added).

[174] Pacific Rim Mining Corp., News Release, *South Minita Definition Drilling Nears Completion; New El Dorado Exploration Targets to Become Focus of 2006 Drill Program*, Dec. 6, 2005 (C-254).

[175] Pacific Rim Mining Corp., News Release, *Pacific Rim Announces Fiscal 2006 Second Quarterly Results*, Dec. 13, 2005 (C-405). *See also* Pacific Rim Mining Corp., News Release, *Pacific Rim Announces Fiscal 2006 Third Quarterly Results*, Mar. 14, 2006 (C-428) ("A full feasibility study of a proposed expanded operation will be undertaken before a decision to commence construction of an access / haulage ramp on the El Dorado is made.").

[176] SRK Consulting Proposal for El Dorado Project Feasibility Study, Jan. 2006 (C-42).

[177] SRK Consulting Proposal for El Dorado Project Feasibility Study, Jan. 2006, at 19 (C-42).

complete than originally expected, which has caused a delay in generating components necessary to complete the bankable feasibility study. As a result . . . the anticipated timeframe for completion of the study has been extended to the second calendar quarter of 2007."[178]

- In December 2006, PRMC reported: "drilling for the purposes of collecting geotechnical data was completed during the current quarter. The information from the geotechnical drilling is required to complete certain components of the El Dorado feasibility study that is currently underway."[179]

130. Indeed the proposed new mining law pushed by Pac Rim in 2007 demonstrates that Pac Rim was well-aware that it had not fulfilled Article 37.2.d). The proposed new law included a provision in Article 98 for pending applications. This proposed article provided for continued application processing for any company that had "demonstrated as of the entry into force of this Law the existence of mining potential in the authorized area pursuant to the submission of a pre-feasibility study."[180] This special provision would apply only to Pac Rim. Article 98 provided that it was "without prejudice to the provisions of the preceding article," which maintained the requirement of a technical economic feasibility study. Thus, the new law Claimant supported would have allowed Pac Rim, and only Pac Rim, to receive a concession based on simply demonstrating the existence of mining potential with just a pre-feasibility study.

131. Pac Rim needed such a change to the law because Claimant never completed the required feasibility study. In February 2007, after Pac Rim had received the warning letter in October 2006 and the allotted time had passed to cure the defect in its application by submitting a feasibility study, Claimant chose to put the feasibility study "on hold" to further explore the

[178] Pacific Rim Mining Corp., News Release, *El Dorado Project Update*, Nov. 9, 2006 (C-309) (emphasis added).

[179] Pacific Rim Mining Corp., News Release, *Pacific Rim Announces Fiscal 2007 Second Quarter Results*, Dec. 15, 2006 (C-427) (emphasis added).

[180] Proposed New Mining Law, Art. 98 (R-36).

Balsamo deposit. In 2008, the company described its plans to complete a feasibility study with a definite mine plan for El Dorado:

> Pacific Rim is proceeding with the El Dorado project feasibility study, which had been put on hold in February 2007 in order to drill define the Balsamo gold deposit, quantify its gold resources and include them in the updated study. Completion of the feasibility study will provide the Company and its shareholders with a mine plan for El Dorado based on the updated resource estimate and providing a measure of the project's value based on the current prices of commodities and consumables.[181]

132. But the feasibility study and mine plan were never completed. The 2008 Annual Report submitted to the Government of El Salvador explains that the company began technical work to complete the "final feasibility study" during 2008.[182] Pac Rim promised that the new study, projected for 2009, would be "more complete" and would contain additional information, including: structural and geotechnical studies, a final hydrogeological study, a detailed costs study, revised plans for the tailings dam, the underground mine, and the processing plant, and a new resource estimate.[183]

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[181] Pacific Rim Mining Corp., News Release, *Pacific Rim Suspends Further Drilling in El Salvador Until Mining Permit Granted; Local Staffing Reduced*, July 3, 2008 (C-262).

[182] 2008 Annual Report, § 7 (R-3) ("Durante el año 2006 el Estudio de Factibilidad Final para el proyecto El Dorado fue detenido para reorganizar los datos obtenidos en campañas pasadas de perforación a cargo de PACRIM. Luego de un informe de avance en la revisión del cálculo de reservas en Julio de 2006, se empezaron los trabajos técnicos para retomar y completar el estudio final de factibilidad a principios de 2008.") ["In 2006, the Final Feasibility Study for the El Dorado Project was delayed in order to reorganize the data obtained in past drilling campaigns conducted by PACRIM. After a progress report on the revised calculation of reserves in July 2006, technical work began to resume and complete the final feasibility study in early 2008."].

[183] 2008 Annual Report, § 7 (R-3) ("Los datos obtenidos de las perforaciones hechas en 2007 y otros estudios técnicos con la información existente en el proyecto van a dar como resultado a principios de 2009, un Estudio de Factibilidad más completo que el presentado en años pasados. Este nuevo estudio incluye estudios técnicos tales como: Estudios metalúrgicos en nuevos cuerpos mineralizados y el proceso de extracción; Estudios estructurales y geotécnicos; Estudio Hidrogeológico Final Proyecto El Dorado; Estudio detallado de costos para el desarrollo y operación de mina; Revisión del Estudio de Presa para Pila de Colas; Revisión del Estudio de Mina Subterránea y Planta de Proceso; Nuevo cálculo de recurso minero. Como se mencionó anteriormente, todos estos datos serán incorporados en un actualizado Estudio de Factibilidad en 2009.") ["The data obtained from holes drilled in 2007 and other technical

133. In short, Pac Rim's own documents repeatedly acknowledge the shortcomings of the 2005 Pre-Feasibility Study and the need for a Feasibility Study, something that Pac Rim kept delaying and never completed. Until this arbitration, Pac Rim never indicated that the Pre-Feasibility Study was anything more than its name implied. Indeed, having contracted for and submitted a "Pre-Feasibility Study," Pac Rim is estopped from arguing that the study was actually something more.

b) Pac Rim has admitted that it did not submit the required Feasibility study

134. In the Preliminary Objection phase of this arbitration, Claimant accepted that it had not ever completed the required Feasibility Study. As Claimant stated in its Rejoinder on the Preliminary Objections,

> 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. They are the same document.[184]

135. Nevertheless, in its Memorial on the Merits, in direct contradiction to its earlier admission, Claimant asserts:

> the El Dorado PFS *was in fact a feasibility study* as that term is generally understood by *mining specialists* such as the members of Pac Rim management that were responsible for making the determination whether to proceed with the El Dorado Project, as well as the Bureau of Mines personnel charged with reviewing PRES's Concession Application.[185]

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studies along with the existing information on the project will result in a Feasibility Study in early 2009 that is more complete than those presented in past years. The new study includes technical studies such as: Metallurgical studies on new mineralized bodies and the extraction process; Structural and geotechnical studies; Final Hydrogeological Study for the El Dorado Project; Detailed cost study for mine development and operation; Revised Tailings Dam Study; Revised Underground Mine and Processing Plant Study; New calculation of mining resource. As mentioned above, all these data will be included in an updated Feasibility Study in 2009."].

[184] Rejoinder (Preliminary Objections), para. 154 (emphasis added).

[185] Memorial, para. 522 (emphasis in original).

136. Claimant's new assertion is demonstrably false. Claimant already admitted that its Pre-Feasibility Study is not the complete "feasibility study required by the Salvadoran Mining Law."[186] Claimant repeatedly stated that it was working on the complete feasibility study off-and-on from 2006 into 2009, when it decided to defer completion of that study (*i.e.*, the one required by Salvadoran law) to "sav[e] cash."[187] Therefore, Claimant's assertion now that "*mining specialists*" would view the submitted Pre-Feasibility Study as a feasibility study even though Claimant spent several years after submitting the pre-feasibility study working on a complete feasibility study with new information, which still "would have to be updated considerably" to qualify as a "feasibility study" in the United States or Canada is outrageous. Pac Rim has repeatedly acknowledged, by words and actions, that the required Feasibility Study was never done.

137. Pacific Rim Mining Corp.'s U.S. Government filing in September 2009 confirms, once and for all, that no Feasibility Study has ever been completed. Tellingly, Claimant in no way blamed El Salvador for such failure but rather attributed the decision not to proceed to "unpredictability in capital costs" due to "recent economic volatility." Specifically, Pacific Rim Mining Corp. explained:

> A feasibility study for the El Dorado project . . . was initiated in fiscal 2006 and put on hiatus between late fiscal 2007 and early fiscal 2009 while the basis of the study was expanded due to the discovery of the Balsamo deposit. In February 2009 . . . the Company decided to defer completion of the feasibility study due to: unpredictability in capital costs as changes in commodity prices due to recent economic volatility become reflected in the prices for capital items; the Company's focus on saving cash until these inputs have stabilized and the study can accurately reflect changed

[186] Rejoinder (Preliminary Objections), para. 154.

[187] Pacific Rim Mining Corp., Report of Foreign Issuer (Form 6-K) Exhibit 99.2, Sept. 14, 2009, § 3.1.2 (R-20).

economic realities; and, uncertainty in the timing of the El Dorado permitting process.[188]

138. This feasibility study, the completion of which Claimant deferred in 2009, is according to Claimant, "the same document" as "the feasibility study required by the Salvadoran Mining Law."[189]

139. Thus, Claimant has expressly admitted that:

- the required Feasibility Study was never completed,
- the required Feasibility Study has been indefinitely delayed or was never possible because of incomplete exploration or insufficient resources (and for no reason attributable to El Salvador),
- there have been new deposit discoveries and changes in the "economic landscape" since the Pre-Feasibility Study, and
- the document it has been working on would have to be "updated considerably" to be considered a Feasibility Study in the United States or Canada, Claimant's home country.

140. These admissions clearly show that the submitted Pre-Feasibility Study did not and could not cover the necessary technical and economic information for the Ministry to rely on it to make a decision regarding an exploitation concession. Indeed, Pac Rim admits that it told the Ministry that it was working on expanding the known resources after submitting the Pre-Feasibility Study.[190]

c) The Pre-Feasibility Study submitted by Pac Rim would be insufficient to support the application for the concession in El Dorado

141. Claimant argues that, regardless of the name of the Pre-Feasibility Study and contrary to its admission that it was working on the "more complete" required feasible study, the

[188] Pacific Rim Mining Corp., Report of Foreign Issuer (Form 6-K) Exhibit 99.2, Sept. 14, 2009, § 3.1.2 (R-20).

[189] Rejoinder (Preliminary Objections), para. 154.

[190] Memorial, para. 527.

submitted Pre-Feasibility Study fulfilled the requirement of Article 37.2.d) because 1) it included a statement of reserves; and 2) a "top mining finance company" allegedly was lining up to finance the project based on the results of the Pre-Feasibility Study.[191] Neither of these assertions, however, addresses the fact that the submitted Pre-Feasibility Study failed to provide sufficient information or detail to justify the 12.75 km^2 concession requested by Pac Rim.

142. According to Article 24 of the Salvadoran Mining Law, the surface area of a mining exploitation concession "shall be granted based on the magnitude of the deposit or deposits, and the technical justifications given by the Concession Holder." Thus, the information in a Feasibility Study about the deposits and the mine plan has to justify the concession area requested. Claimant's submitted Pre-Feasibility Study falls short.

i. The Pre-Feasibility Study is based on a "Conceptual Mine Plan"

143. Behre Dolbear, expert advisors to the minerals industry throughout the world, describe the mine plan as basic and integral to any mining project.[192] They note that the Mine Plan referenced in Claimant's Pre-Feasibility Study was a "conceptual design" so it "would at best be considered at pre-feasibility level accuracy, and possibly at the lower accuracy of a scoping or Conceptual level study."[193]

144. Behre Dolbear further noted that the Pre-feasibility Study:

- "lacks a full range of technical studies that are normally included in a full Feasibility Study" and
- "does not supply a sufficient amount of detailed engineering drawings in order to support full Feasibility Study accuracy. The Pre-feasibility Study does not include

[191] Memorial, paras. 517-520.

[192] Behre Dolbear Expert Report, para. 30.

[193] Behre Dolbear Expert Report, para. 30.

> detailed engineering drawings that are used for design and materials/supplies estimation that increase cost estimation accuracy."[194]

145. As a result of these and other deficiencies, Behre Dolbear conluded that the Pre-Feasibility Study "does not contain sufficient technical detail and supporting documentation for it to be considered a Feasibility Study, as stipulated by international mineral industry reporting codes."[195]

ii. The Pre-Feasibility Study is based on only one deposit covering a small portion of the requested 12.75 square-kilometer concession area

146. Claimant heavily relies on the fact that the Pre-Feasibility Study included a statement of "reserves" for the Minita deposit,[196] but does not mention that those reserves are contained in a very small portion of the requested concession area.[197] A study of the Minita deposit cannot possibly justify a 12.75 km^2 concession. As the Pre-Feasibility Study explains, the Minita and Minita 3 veins, which were part of the Minita deposit and were the basis for the resources and reserves reported in the Pre-Feasibility Study, are two of four veins "in an area about 700 [meters] long and 300 [meters] wide."[198] Thus the resources and reserves presented in the Pre-Feasibility Study are from two veins contained within an area of only about 0.21 km^2.

147. As Behre Dolbear explains, a much smaller concession area would have been sufficient to mine the Minita deposit:

> Behre Dolbear considers the El Dorado Project as proposed in the Pre-feasibility Study would require approximately 1.60 square

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[194] Behre Dolbear Expert Report, para. 32.

[195] Behre Dolbear Expert Report, para. 34.

[196] Memorial, para. 518.

[197] Pre-Feasibility Study at 25-26 (C-9). Pacific Rim Mining Corp.'s website concedes that the Pre-Feasibility Study was "based on mining the Minita deposit alone." Pacific Rim Mining Corp., "El Dorado," www.pacrim-mining.com (R-45).

[198] Pre-Feasibility Study at 25-26 (C-9) (emphasis added).

> kilometers to safely execute the mine plan for the Minita deposit within the concession boundaries. . . . It is Behre Dolbear's opinion that Pacific Rim's Exploitation application for 12.75 square kilometers of area rather than the project estimate of 1.6 square kilometers shown to be necessary for the El Dorado mine operation, is excessive and includes surface area that Pacific Rim wished to have for continuing its exploration programs.[199]

148. In addition to the fact that the Pre-Feasibility Study was limited to two veins in an area covering a small fraction of the total requested concession, even that area was not well understood by Claimant at the time of the study. For example, the Pre-Feasibility Study explains that:

> Due to the distribution and limited nature of the drilling at the north end of the Minita vein, one hole with a high-grade assay . . . estimates 2.5% of the ounces in the Minita vein. . . . [Mine Development Associates] has recommended further drilling for better definition and suggests that further drilling might generate a larger resource extending to the north and down dip. Drilling in the south end of Minita . . . indicated unresolved complexities and this area were [sic] removed from the estimate.[200]

149. Thus, the Pre-Feasibility Study evidences a lack of complete definition and understanding as to even the Minita deposit. This reconfirms that Pac Rim had not completed the necessary exploration activities for the required Feasibility Study, even with respect to the one deposit it proposed to mine.

[199] Behre Dolbear Report, paras. 44, 46.

[200] Pre-Feasibility Study at 48 (C-9) (emphasis added).

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

150. Claimant admits that the Pre-Feasibility Study was submitted before Claimant defined the 12.75 km^2 area for the concession.[201] As El Salvador explained in the Preliminary Objection phase, "[n]ear the end of the Pre-Feasibility Study submitted in January 2005, SRK Consulting finally mentions that Pacific Rim 'has elected to convert 62.73km^2 from within the limits of the Exploration License areas to an Exploitation Concessions [sic].'"[202] So the Pre-Feasibility Study contains very general information about an area almost five times greater than the area eventually requested for the concession. Far from justifying the requested area as the area required to mine a known deposit, the Pre-Feasibility Study was completed without regard to the 12.75 km^2 area for the proposed concession. Such a study simply cannot justify the 12.75 km^2 area requested based on the size of the deposits discovered, as required by Article 24 of the Mining Law.

151. In fact, the January 2005 Pre-Feasibility Study, completed the month the El Dorado exploration licenses expired, includes a section on "Exploration Targets," highlighting Claimant's intent to explore Zancudo, Nueva Esperanza, La Coyotera, Nance Dulce, and "[s]everal other vein targets . . . yet to be drilled."[203] Some of the "exploration targets," such as Nance Dulce and La Coyotera, are even outside the requested concession area.[204] Indeed, the

[201] Memorial, para. 205 ("As Claimant is now aware, following the submission of the Concession Application and the El Dorado PFS, the Bureau of Mines concluded that the originally requested Concession area of 62 square kilometers was too large.").

[202] Reply (Preliminary Objections), para. 140 (citing Pre-Feasibility Study at 140 (C-9) (emphasis added)).

[203] Pre-Feasibility Study at 31 (C-9).

[204] *See* Concession Application at 5, § 2.2 (R-2) (listing veins outside the concession area, but within the exploration licenses: Nance Dulce, San Matías, Coyotera, Porvenir, El Gallardo, Iguana, and La Huerta).

Study states, "La Coyotera is a significant exploration target with potential for future open-pit exploitation."[205]

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

153. Thus, despite filling over 200 pages, the Pre-Feasibility Study does not fulfill the requirements of Salvadoran law because, *inter alia*, it fails to show that the requested 12.75 km^2 area for a mining project was 1) based on the size and location of the mineral deposits the applicant found during exploration; and 2) technically justified.[206]

iv. It is clear that the Pre-Feasibility Study did not meet the minimal requirements to justify a concession under Salvadoran law

154. The legal deficiencies of the Pre-Feasibility Study are evident on its face: 1) it is based on a "conceptual mine plan;" 2) it is based on mining a deposit located under an area of approximately 0.21 km^2; and 3) it does not even refer to (much less study) the 12.75 km^2 requested concession area, but rather generally references the desire to explore an area five times larger in the future. As expressly conceded in the Pre-Feasibility Study, it was not submitted

[205] Pre-Feasibility Study at 31 (C-9) (emphasis added). In addition to this reference to La Coyotera in the Pre-Feasibility Study, Claimant also refers to a potential open-pit mine to exploit the Nueva Esperanza vein. *See* Pacific Rim Mining Corp., http://www.pacrim-mining.com/s/Eldorado.asp (R-48) (showing a chart of the 2003 resource estimate with the statement that the "*Nueva Esperanza vein resource is near surface,*[and] *potentially open-pitable*"). The Nueva Esperanza vein is within the requested concession area, but data on its reserve estimates was not included in the Pre-Feasibility Study.

[206] Mining Law, Arts. 24, 37.2.d) (RL-7(bis)).

with an intent to justify the 12.75 km^2 concession, as the law required, but was intended to achieve a very different goal: to facilitate "[t]he conversion of the exploration licenses to exploitation concessions, and Development of capital fund-raising activities."[207] Claimant completed the Pre-Feasibility Study because it wanted to continue exploring and maintain its claim over a large area when its exploration licenses expired on January 1, 2005. The actual, legally-required Feasibility Study was never completed.[208]

155. As mining law expert James Otto describes, it is not uncommon for junior companies to prepare a pre-feasibility study to attract the necessary financing or partnership required to carry out the full feasibility study:

> Many exploration companies are capable of preparing pre-feasibility studies or having one prepared for them, but a full feasibility study (as required by Mining Law Article 37.2(d)) is costly and requires specialized expertise not usually found in an exploration company. It is common for junior exploration companies to use a pre-feasibility study as an aid in acquiring additional funding or to attract a partner or suitor in order to acquire competency and to pay for a full feasibility study.[209]

156. Thus, it made sense for Pac Rim to begin with a pre-feasibility study as a first step to secure funds.[210] It does not make sense, however, to later claim that that preliminary study was sufficient for the Government to rely on for a decision on whether or not to grant a 30-year concession to extract its mineral resources.

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[207] Pre-Feasibility Study at 9 (C-9).

[208] Rejoinder (Preliminary Objections), para. 154 ("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. They are the same document.").

[209] Otto Expert Report at 28.

[210] *See* Behre Dolbear Expert Report, para. 70 (noting that between 2003 and 2008, "Pacific Rim received no funds from operations that it either managed or operated" and thus, "was not an operating company and could rightly be described as a 'junior miner.'").

157. Claimant knew that a pre-feasibility study and a feasibility study were two different things, and that the "Pre-Feasibility Study" it submitted with its application for a 12.75 km^2 exploitation concession did not demonstrate the economic and technical feasibility of the requested concession.

d) Claimant had to submit a Feasibility Study with its application

158. Pac Rim submitted its concession application on December 22, 2004. Even after it was notified of problems with that application, Pac Rim never submitted a new application or a feasibility study. The application's compliance with the legal requirements (or lack thereof) must be determined based on the materials submitted to the Government at the time.

159. Pac Rim's application was deficient as submitted in 2004, and remained deficient following the requests from the Bureau of Mines in late 2006. Pac Rim could not legally continue exploration activities in the area of El Dorado after the exploration licenses had expired on January 1, 2005. Legally, Pac Rim's Feasibility Study had to be completed based on the exploration done before the licenses expired.[211] Thus, long before any alleged breach in 2008, Pac Rim had submitted a deficient application. Following the 2006 *prevención*, Pac Rim had a maximum 30-day time limit to cure the defects in its exploitation concession application.[212] Thirty days after the second *prevención*, when the defects had still not been cured, the only option under the law was for the application to be rejected. From that point forward, Pac Rim

[211] Mining Regulations, Art. 18 (RL-8(bis)) ("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 congruentes o acordes con las actividades y estudios que fueron ejecutados durante la vigencia de esa Licencia y el informe final a que se refiere el Artículo anterior.") ["When an Exploitation Concession is applied for, and it has been preceded by an Exploration License, the existence of the deposit or deposits referred to in Art. 23 of the Law shall be proven with the documents that are consistent or in accordance with the activities and studies that were performed during the effective term of such License and the final report referred to in the previous Article."].

[212] Mining Law, Art. 38 (RL-7(bis)).

could not receive the concession based on its incomplete application. By its own choices—1) beginning with a decision to purchase exploration licenses close to their expiration date, 2) followed by its decision to attempt to capture the largest area possible for future exploration rather than comply with the law, and 3) culminating in its decision not to comply with two key requirements for an exploitation concession under the Mining Law—Pac Rim had no right to an exploitation concession as of the end of 2006.

160. Pac Rim could have submitted a new application, but it never did. It could have considered seeking a smaller concession area, which it might have been able to technically and economically justify, but it chose not to. Claimant relies, without explanation, on 2006 and 2008 resource estimates,[213] but these documents were not part of any application to the Government. Although Claimant includes information about all the deposits it hoped to explore and stake a claim to in El Salvador, Claimant's actual claim is that the Government should have granted a concession based on the 2004 application. Therefore, based on Claimant's own choices, the rights alleged in this arbitration must be evaluated with regard to the 2004 application and the insufficient materials presented with it.

4. El Salvador did not have a legal obligation to change its Mining Law so that Pac Rim's application could be approved under a new law

161. Pac Rim asserts its claims under the Salvadoran Investment Law. But Pac Rim itself has failed to comply with the laws of El Salvador. A company seeking mining rights in El Salvador may only obtain those rights by complying with the Mining Law and Regulations. According to Article 3 of the Mining Law: "For the exploration and exploitation of mines and quarries, the State may Grant Licenses or Concessions, provided the provisions of this Law and

[213] Memorial, paras. 365-367.

its Regulations are met."[214] Having failed to comply with the law, Pac Rim does not have the rights it claims under that law.

162. Pac Rim alleges that it conducted due diligence in El Salvador in 2001 before deciding to merge with Dayton and acquire the El Dorado exploration licenses.[215] The laws in effect in 2001 are the same laws applicable to Pac Rim's application, including the 1995 Mining Law with which it failed to comply.

163. But in fact, Pac Rim considered itself exempt from complying with the law. Pac Rim states that it viewed the requirements of the Mining Law as "a formality":

> Pac Rim filed its Concession Application with MINEC in December 2004 **with the reasonable understanding that the application procedure was a formality**: given the long history of Government interest in development of the El Dorado Project and the open working relationship that prevailed between Pac Rim and the Bureau of Mines, there was simply no question that upon administrative verification of the substantive requirements of the law – which largely consisted of verification of the identified proven ore reserves and MARN's sign-off on the environmental viability of the Project – the Concession would be granted.[216]

164. This is the crux of the dispute between Claimant and the Government. The Government was very accommodating to Pac Rim for a number of years, and Claimant decided that it could take advantage of that supportive relationship. Claimant knew the country wanted to increase non-agricultural job opportunities to reduce poverty,[217] and it therefore benefitted from "extraordinary signs of good will shown by the Bureau of Mines and the *Asamblea*" and the

[214] Mining Law, Art. 3 (RL-7(bis)) ("Para la exploración y explotación de minas y canteras, el Estado podrá Otorgar Licencias o Concesiones, Siempre que se cumpla con lo dispuesto En esta Ley y su Reglamento.") (emphasis added).

[215] Memorial, paras. 123-127.

[216] Memorial, para. 454 (emphasis added).

[217] Memorial, para. 26.

Bureau of Mines' "active collaboration" to try to help bring a successful project to Cabañas.[218] But Pac Rim was not satisfied with the "extraordinary signs of good will" it received. Instead, knowing it had not complied with the legal requirements, Pac Rim tried to pressure the Government into granting the concession anyway. Based on the Government's previous support and good-faith efforts to work with the company, Pac Rim expected the Government to do whatever Pac Rim wanted, including change its laws, to allow Pac Rim to obtain a huge concession without meeting several legal requirements.

165. But as Gina Navas de Hernández explains, where the application failed to comply with the requirements under the Mining Law, the Bureau of Mines could not, and would not, admit the application to be processed.[219] Claimant has attempted to sustain its claims in this arbitration by insisting that it received vague "assurances" in support of its project, but Claimant itself had to admit that no one ever assured Pac Rim that it could receive the concession without complying with the law.[220]

a) Pac Rim wanted to stake its claim to the largest possible area, seeking "extraordinary profits"

166. Pac Rim has repeatedly told this Tribunal that it is an environmentally and socially responsible mining company.[221] But, in fact, Claimant was not focused on carefully designing a mine and obtaining the needed authorizations for the small area around a known deposit to develop a mine with the least negative impact possible. Rather, Claimant was solely

[218] Memorial, para. 628.

[219] Navas de Hernández Witness Statement, paras. 60-61.

[220] Transcript of Hearing on Objections to Jurisdiction, May 3, 2011, at 473:5-8 (Q: Did you ever receive any assurances that your Concession application would be approved if it did not comply with the existing law? A. No").

[221] NOA, para. 14; First Witness Statement of Thomas C. Shrake, Dec. 31, 2010 ("First Shrake Witness Statement"), para. 41.

focused on staking the largest claim possible to sell off at extraordinary profits. As shown in Claimant's own exhibits, Pacific Rim Mining Corp. is an exploration company that saw El Salvador as an opportunity to make "extraordinary profits."[222] As Pac Rim explained to its shareholders in 2000, the year before it turned its attention to El Salvador,

> Our exploration strategy is to acquire highly prospective early stage projects, enhance their value through exploration and sell the project or the Company to an established major mining company at a premium.[223]

167. This was in line with Tom Shrake's experience as a mine-finder[224] and the company's activities in El Salvador.[225] As Tom Shrake told shareholders in 2002: "Profitability is our focus."[226] As a result, Pac Rim deliberately chose to focus its time and resources on exploration,[227] instead of preparing the necessary studies and materials for a much smaller, more reasonable concession area. As Behre Dolbear describes, stretching resources to cover multiple exploration areas can result in decisions that are not based on a complete understanding of all available data, incomplete testing and fieldwork, and poor planning and allocation of available

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[222] Pacific Rim Mining Corp., 2002 Extraordinary General Meeting, Presentation to Shareholders, Apr. 10, 2002 ("Pac Rim 2002 Presentation to Shareholders") at 1 (C-218).

[223] Pacific Rim Mining Corp., 2000 Annual Report at 2 (C-338).

[224] Memorial, para. 97 ("[I]n short, over the past thirty years, he has found numerous significant mineral deposits in Latin America and the United States (many of them in Nevada).") (emphasis added).

[225] Memorial, para. 120 ("Mr. Shrake's expectations extended well beyond the El Dorado Project.").

[226] Pac Rim 2002 Presentation to Shareholders at 2 (C-218) (emphasis added).

[227] *See e.g.*, Pacific Rim Mining Corp., News Release, *Additional Drill Results From El Dorado Program*, Sept. 23, 2002 (C-233) ("The Company has adopted a deliberate, systematic approach to its current drill program, which is designed to locate additional high-grade chutes separate from the known resource in the Minita Vein."); Pacific Rim Mining Corp., News Release, *Pacific Rim Mining Corp. Announces Second Quarter Results*, Dec. 17, 2003 (C-362) ("Cognizant of the market premiums afforded to producers with larger operations, and with a series of high quality vein targets on the El Dorado project remaining to be tested, Pacific Rim will concurrently conduct additional exploration drilling in the search for new chutes of mineralization.").

funds.[228] For Pac Rim, Behre Dolbear considers that the strategy of pursuing other exploration areas "made it less likely that Pacific Rim would be able to complete the extensive work to meet the requirements of an exploitation concession for Minita."[229]

168. In accordance with its focus on profits, although Claimant did not have all the data necessary for a "preliminary economic assessment ('scoping study') for the El Dorado project,"[230] at the end of 2003, it nevertheless turned its "focus for the immediate future" in March 2004 "to build on our El Dorado resource by continuing to scout drill high priority vein targets."[231] Thus, with very limited time left to carry-out the feasibility study and the environmental impact study, as well as gather the materials for its concession application, Pac Rim pursued parallel tracks to both apply for the concession and continue exploration "with the goal of enlarging the resource further."[232] In November 2004, when it should have been finalizing its materials for its concession application, Pac Rim "commenced a resource definition drill program at the newly discovered South Minita district."[233]

169. The next month, Pac Rim submitted the application for an exploitation concession, noting that it would need more time and money to fully explore the area: "Basically,

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[228] Behre Dolbear Expert Report, para. 76.

[229] Behre Dolbear Expert Report, para. 83.

[230] Pacific Rim Mining Corp., News Release, *Pacific Rim Mining Corp. Announces Second Quarter Results*, Dec. 17, 2003 (C-362).

[231] Pacific Rim Mining Corp., News Release, *Pacific Rim Mining Corp. Announces Third Quarter Results*, Mar. 15, 2004 (C-365) (emphasis added).

[232] Memorial, para. 161 (citing Pacific Rim Mining Corp. 2004 Annual Report (C-29)). *See also* Witness Statement of Ericka Colindres, Mar. 22, 2013 ("Colindres Witness Statement"), para. 59 (explaining that in 2004, "the company at no time wished to suspend the exploration program since its results were continually increasing the value of the project"/ "la empresa no quería suspender el programa de exploración en ningún momento, ya que los resultados del mismo seguían cada vez más aumentando el valor del proyecto.").

[233] Memorial, para. 159.

more years are needed for a detailed assessment of the entire area covered by the Licenses."[234] Pac Rim insisted that it should be granted an exploitation concession covering areas that had not been completely explored, and for which it had not submitted an environmental impact assessment.[235] This approach was not based on El Salvador's Mining Law, but rather on Claimant's unilateral opinion of how it could maximize its benefits: Pac Rim argued that due to the cost of constructing the mine and beginning operations, it would not be "reasonable" to request only the area needed to mine the Minita deposit.[236] In fact, Pac Rim insisted that it had the "right" to develop El Dorado "to its maximum potential" based on the investments it had made.[237] Pac Rim perhaps could have filed a more complete application if it had focused on

[234] Concession Application, § 2.2 (R-2) ("Limitaciones en el método de exploración y en los recursos financieros no le han permitido perforar cada veta encontrada o blanco de exploración identificado. En forma sencilla, se requieren más años para evaluar detalladamente la totalidad del área de las Licencias.") ["Limitations in the exploration method and financial resources have not allowed it to drill all discovered veins or identified exploration targets. Basically, more years are needed for a detailed assessment of the entire area covered by the Licenses."].

[235] Concession Application, § 2.2 (R-2) ("Se incluyó en el área de la concesión el área de la mina planificada y el área de procesamiento. Además, se incluyó la veta Nueva Esperanza al norte y la veta Minita Sur en el sur. Estas han sido incluidas debido a su cercana proximidad al área de operación planificada y por su potencial para ser incluidas en el plan operacional en el futuro cercano. Habiendo dicho eso, se reconoce que operaciones mineros (sic) en las vetas Nueva Esperanza y/o Minita Sur requerirán un estudio de impacto ambiental aprobado antes de que cualquier actividad minera pueda comenzar en estas vetas.") ["The area of the planned mine and the processing area were included in the concession area. The Nueva Esperanza vein to the north and the Minita Sur vein to the south were also included due to their close proximity to the planned operating area and because of their potential to be included in the operations plan in the near future. That being said, we recognize that mining operations in the Nueva Esperanza and/or Minita Sur veins would require an approved environmental impact study before any mining activity in these veins could begin."].

[236] Concession Application, § 2.3 (R-2) ("[N]o nos parece razonable solicitar solamente el área de las vetas Minita y Minita 3, área de la planta y presa de colas, sino que también las otras áreas cercanas donde se encuentran vetas mineralizadas y zonas geológicamente identificadas como zonas con potencial como área de Concesión") ["[W]e do not think it reasonable to request only the areas of the Minita and Minita 3 veins, plant and tailings dam, but also other nearby areas containing mineralized veins and geological zones identified as having potential as the Concession area."].

[237] Concession Application, § 2.3 (R-2) ("Es la opinión de Pacific Rim que el derecho de evaluar y desarrollar el distrito El Dorado, a su potencial máximo, le pertenece legalmente a Pacific Rim. Esta opinión se basa en nuestro fiel cumplimiento con las exigencias de la 'Ley de Minería y Sus Reformas' con relación a las Licencias El Dorado Norte y El Dorado Sur y basado en las inversiones hechas hasta el momento como parte de este cumplimiento.") ["It is Pacific Rim's opinion that the right to evaluate and

meeting the requirements for one deposit, but that would not have satisfied Claimant's desire for "extraordinary profits."

b) It was to Pac Rim's benefit to have the concession application stalled while it tried to change the law

170. It was to Pac Rim's benefit that the Bureau of Mines kept the concession application open long after it should have been rejected. This allowed time for efforts to change the law and allowed Pac Rim to incorrectly insist that it could continue some exploration activities in the requested concession area. As Fred Earnest wrote to Tom Shrake in June 2005, action by the Bureau of Mines related to the items missing from Pac Rim's application "would start a 30-day clock," but because the Bureau was "sympathetic" to Pac Rim, it was holding off—"this buys us time."[238]

171. As described above, the company supported several efforts to change or replace the law. In 2005, the Minister of Economy considered amending the Mining Law to change Articles 24 and 37 to accommodate the company.[239] The changes would allow the area of the concession, based on the size of the deposits and the technical justifications of the applicant, to "be expanded for purposes of protecti[ng]" the requested deposits and would specifically exclude underground mines from the land authorization or ownership requirement.[240]

172. When the law was not amended, Claimant supported a proposal to replace the Mining Law in 2007. The proposed new law would remove the decision-making and regulatory

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develop the El Dorado district to its maximum potential legally belongs to Pacific Rim. This opinion is based on our strict compliance with the requirements of the "Mining Law and Its Reforms" in relation to the El Dorado Norte and El Dorado Sur Licenses and the investments made up to the moment as part of this compliance."].

[238] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[239] Letter to Elí Valle with Proposed Amendments to the Mining Law (R-35).

[240] Letter to Elí Valle with Proposed Amendments to the Mining Law (R-35) ("pudiéndose ampliar por razones de protección").

authority from the Bureau of Mines and instead establish a new Mining Authority with representation from private industry and the mining industry.[241] According to the proposed new law, an applicant would be able to obtain a "Mining Concession," which would include both exploration and exploitation, without submitting any of the documents lacking from Pac Rim's concession application (an environmental permit, a feasibility study, and land documentation). Only after completing an extended 16-year exploration phase, the applicant would need to submit an environmental permit, a feasibility study, and ownership or authorization for only the land on which it would locate mining infrastructure.[242] In fact, the proposed law went so far as to reverse the normal administrative presumption of denial by silence in Salvadoran law by including an automatic right to a concession in the event there was no response to the application.[243]

173. Instead of complying with the Mining Law, Claimant tried to change the law to lessen the requirements and remove the Bureau of Mines and landowners from the process for obtaining an exploitation concession. Pac Rim was using the Government's goodwill to keep its application alive while it pursued efforts to change the law and, in fact, as will be described below, continued unauthorized exploring in the requested concession area. The Government had no obligation to change its law for Claimant and, in fact, the law was not changed. Claimant therefore had to comply with the law in effect at all relevant times, which was consistently interpreted by the Government, contrary to the interpretations that Claimant has presented to this Tribunal.

[241] Proposed New Mining Law (R-36).

[242] Proposed New Mining Law, Arts. 34, 35, 38, 52, 54 (R-36).

[243] Proposed New Mining Law, Art. 38 (R-36).

5. Pac Rim did not have a right to continue exploring after the original exploration licenses expired and its application for the concession was pending

174. Pac Rim ran out of time to complete its exploration goals in El Dorado: the El Dorado exploration licenses finally expired on January 1, 2005. After that date, Claimant had no right to continue exploring in the 75 km^2 area of the original licenses.

175. According to Mining Law Article 27.d), expiration of the term of the exploration license terminates the license. El Salvador's administrative law experts explain: "licenses only produce effects from the day on which they are granted up until the day on which they expire."[244] Thus, once the final extension of an exploration license has expired, the holder of the expired license relinquishes any rights to the license area and the deposits therein. The holder of the expired license can apply for a concession if it meets the requirements to file the application, but unless and until such application is granted the holder of an expired license has no rights to the area.

176. Moreover, as mining law expert James Otto finds: "There is no provision in the Mining Law that temporarily preserves or saves any right previously granted under an expired exploration license even in the case where a mining concession application is pending."[245] Pac Rim specifically requested more time to explore and was "consistently" told that its exploration licenses could not be extended.[246] As a result, continued exploration was without authorization, prohibited by Article 16 of the Mining Law.[247]

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[244] Ayala/Fratti de Vega Expert Report at 34 ("las licencias sólo producen efectos desde el día en que se otorgan y hasta el día en que expiran.").

[245] Otto Expert Report at 30.

[246] Email from Fred Earnest to Tom Shrake, Nov. 8, 2004 (C-392).

[247] Mining Law, Art. 16 (RL-7(bis)) ("Prohíbese realizar las actividades mineras a que se refiere esta ley, sin la correspondiente autorización…") ["It is forbidden to carry out the mining activities referred to in this law without the corresponding authorization…"].

177. Nevertheless, contrary to the law, "Pac Rim continued to invest millions of dollars in exploration activities in El Salvador, embarking upon an aggressive target-generation and exploration program during 2005."[248] Any exploration in El Dorado after January 1, 2005, even in the requested concession area, was a "serious infringement" of Salvadoran law.[249] Such exploration, without a valid exploration license, was done at Claimant's own risk.[250] As explained by El Salvador's administrative law experts, there is no implied right to explore, even if the Government was informed of the ongoing exploration and did not seek to end it: "the Bureau may grant an exploration license by an act with the content established by law, but it cannot grant one, and did not grant one, by other means."[251] Claimant cannot now seek compensation from the State for its unauthorized exploration activities.

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178. Thus, Claimant did not ever have the right to a concession and has no other rights in the area of the expired El Dorado licenses. Any alleged breach in 2008 could not have caused any harm to Claimant—it had no rights that could have been affected.

[248] Memorial, para. 256 (emphasis added).

[249] Mining Law, Art. 69 (RL-7(bis)) ("Constituyen infracciones … graves las siguientes"); Otto Expert Report at 30.

[250] The risk Claimant assumed was even greater given Claimant's admission "when the discussion of reforming the Amended Mining Law continued through 2007 and no further progress was made on the ED Mining Environmental Permit application or the Exploitation Concession application, the Companies began to understand that the delay PRES faced with respect to its Concession application would not be resolved by through the technical assessment, but only through political means." Memorial, para. 321.

[251] Ayala/Fratti de Vega Expert Report at 36 ("la Dirección puede otorgar la licencia de exploración mediante un acto con el contenido establecido en la ley pero no puede otorgarlo, ni lo otorgó, de otra manera.").

B. Pac Rim did not have a right to apply for and receive other exploration licenses included in its claims

1. Claimant did not have a right to apply for and receive the exploration licenses in Guaco, Huacuco, and Pueblos

179. The Mining Law and its Regulations prohibit Pac Rim and its affiliated companies from applying for and receiving new exploration licenses covering any area of the expired exploration license areas.

180. Under the Salvadoran Mining Law, there is an eight-year maximum term for exploration.[252] The holder of an expired license is not allowed to continue exploring or to request new exploration rights for the same area. The Salvadoran Mining Regulations explicitly prohibit former exploration rights holders and related entities from obtaining another exploration license for any part of the original license area: "Once the term of the Exploration License or its extension has expired, the Holder may not obtain directly, or through another person, another exploration license over all or part of what the expired License covered."[253] This Regulation enforces the time limit for exploration; the eight-year limit established in Article 19 of the Mining Law would be rendered meaningless if the company could simply start over with a new license through a related company.

181. As the Salvadoran administrative law experts explain,

> The regulations, by so specifying, ***are developing the Law, since, without contradicting it,*** they specify that the maximum limit of the extensions established by Law cannot be rendered meaningless through the intervention of a new legal entity.[254]

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[252] Mining Law, Art. 19 (RL-7(bis)).

[253] Mining Regulations, Art. 17 (RL-8(bis)) ("Cumplido el plazo de la Licencia de Exploración o de su prórroga, el Titular no podrá obtener por sí, ni por interpósita persona, otra licencia de exploración sobre la totalidad o parte de lo que comprendía la fenecida.").

[254] Ayala/Fratti de Vega Expert Report at 37 ("El reglamento, al hacer esta precisión, ***está desarrollando la Ley, pues sin contradecirla,*** precisa que el límite máximo de las prórrogas que establece la Ley no pueda vaciarse de contenido por vía de interponer una nueva entidad jurídica.") (emphasis in original).

182. Thus, neither PRES nor DOREX, both wholly owned subsidiaries of Pac Rim, had the right to obtain another exploration license for any of the 75 km^2 area covered by the El Dorado Norte and El Dorado Sur exploration licenses after those licenses expired on January 1, 2005. This, however, is exactly what Claimant sought to do. The exploration licenses Pac Rim applied for and received, through DOREX, in Guaco, Huacuco, and Pueblos overlapped substantial parts of the expired El Dorado Norte and El Dorado Sur exploration license areas. As explained by Claimant: "On 26 August 2005, DOREX applied for Exploration Licenses for the areas known as Guaco, Huacuco, and Pueblos, covering the remainder of the area of the original Exploration Licenses outside of the newly defined Concession area."[255]

183. Claimant had no right to obtain those licenses and was prohibited under Salvadoran law from doing so. As explained by El Salvador's experts on Salvadoran administrative law, even if the Bureau of Mines made a mistake in granting the exploration licenses, the grant does not become legal because the Bureau cannot ignore the law.[256] The grant of the Guaco, Huacuco, and Pueblos exploration licenses was not legal. Thus, these exploration licenses granted to DOREX would be null and void to the extent of the overlap between the new licenses and the expired licenses held by PRES.[257] As a result, Pac Rim cannot make any claims based on deposits located in the overlapping areas.

[255] Memorial, para. 209 (emphasis added).

[256] Ayala/Fratti de Vega Expert Report, § 7.3.2.b.

[257] Otto Expert Report at 32 ("In the event that a Government officer should grant an exploration license in contradiction to this prohibition, such grant would be *ultra vires* (i.e. beyond the power of the official to grant) and such grant would thus be considered null and void.").

a) The two deposits included as claims in this arbitration located in Huacuco and Pueblos were located in the overlap area with the expired licenses

184. Claimant includes in its claims two deposits from the original 75 km^2 exploration area that are outside the 12.75 km^2 requested concession area: Coyotera and Nance Dulce.[258] Figure 4.2 of a technical report prepared for Claimant in 2008 shows the areas of the requested concession and the new exploration licenses, indicating that Coyotera is included in the Pueblos license and Nance Dulce is in the Huacuco license area.[259]

185. Claimant had no legitimate right to these deposits. Its right to explore in the 75 km^2 area of El Dorado Sur and El Dorado Norte expired on January 1, 2005. Any exploration rights to Coyotera and Nance Dulce ended when the El Dorado exploration licenses expired, and under Salvadoran law, those rights could not be extended for Pac Rim or any related entity. Claimant, therefore, cannot ask this international arbitral Tribunal to award it damages for having never been granted the environmental permits to continue exploring these areas. There is no legitimate expectation to receive environmental permits and be allowed to continue exploration in an area for which the maximum term of exploration had expired, based on new licenses that were not granted legally.

186. Claimant had the opportunity, following the maximum eight-year exploration period, to choose an area, or areas, for which to seek an exploitation concession. Claimant did not seek an exploitation concession for the Coyotera or Nance Dulce deposits because it could not meet the legal requirements for those areas: it had not sufficiently studied them. Thus,

[258] *See* Memorial, para. 139 (describing Coyotera as located within the El Dorado Project area) and para. 159 (describing the discovery of the Nance Dulce vein in the El Dorado project area in May 2004).

[259] Technical Report Update on the El Dorado Project Gold and Silver Resources, Mine Development Associates Mar. 3, 2008, at 15 (R-9).

following January 1, 2005, when the exploration licenses expired and Claimant did not request an exploitation concession for these deposits, Claimant had no rights to them.[260]

2. Claimant did not have a right to a new exploration license in Santa Rita

187. Claimant has no rights in Santa Rita, having allowed the exploration license to expire. PRES received the exploration license and the environmental permit for this area, but then failed to request the renewal of the exploration license before the term expired, as required by the Mining Law and Regulations.[261]

188. Prior to the expiration of the license, there was no alleged breach or damage affecting Claimant's exploration rights. Indeed, as Claimant explains in its Memorial, Claimant was forced to suspend its exploration drilling program at Santa Rita from late 2006 through late 2007 because of local opposition.[262] Thus, Claimant's early exploration activities at Santa Rita were suspended, through no fault of El Salvador, when Claimant attended the May 7, 2007 meeting with the Ministers of Economy and Environment during which the mining companies were told that all mining activity in the country would be halted until the EAE was conducted.[263]

189. Nothing that El Salvador did or did not do in 2008 affected Claimant's early exploration rights in the Santa Rita license area. In 2009, the exploration license expired. Claimant wanted to continue exploring and requested an extension of the license.[264] The

[260] Ayala/Fratti de Vega Expert Report at 34 ("En este sentido, las licencias sólo producen efectos desde el día en que se otorgan y hasta el día en que expiran.") ["In this regard, licenses only produce effects from the day on which they are granted up until the day on which they expire."].

[261] Bureau of Mines Resolution, July 16, 2009 (R-22) (noting the legal provisions relevant to exploration license extensions and that the Santa Rita license expired on July 14, 2009); Bureau of Mines Resolution, July 20, 2009 (R-23) (denying the requested extension).

[262] Memorial, para. 331.

[263] Memorial, para. 298.

[264] Letter from Pacific Rim El Salvador to Bureau of Mines, July 17, 2009 (R-21) (requesting an extension of the Santa Rita exploration license).

Government denied Claimant's request as not allowed by Articles 27 of the Mining Law and Article 11 of the Mining Regulations.[265] Then Claimant re-applied for the same license through its other Salvadoran subsidiary, DOREX.[266] Thus, long after the alleged breach in March 2008, Claimant tried to "re-stake" its claim to Santa Rita through both PRES and DOREX.[267]

190. But as described above, an exploration rights holder is not allowed, directly or indirectly through related entities, to seek a new exploration license after its license expires. The Santa Rita license expired on July 14, 2009. Pac Rim simply missed the deadline to request an extension. Pac Rim's attempt to use DOREX to circumvent the legal limits on exploration rights holders failed. The Ministry did not grant the license to DOREX.[268] The fact that the license was not granted is in accordance with Article 17 of the Mining Regulations, and the only lawful response would have been to deny the application.[269] Claimant, having allowed its exploration license to expire, has no rights to Santa Rita and could have no legitimate expectation of being granted new rights to Santa Rita contrary to the Mining Law provisions.

191. Therefore, Claimant holds no exploration license in Santa Rita, and Claimant does not have any rights in Santa Rita upon which to base any claims in this arbitration.

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[265] Bureau of Mines Resolution, July 16, 2009 (R-22).

[266] Memorial, para. 334.

[267] *See* Pacific Rim Mining Corp., "Santa Rita," http://www.pacrim-mining.com/s/ES_SantaRita.asp (R-53) (mentioning that, "[s]ubsequent to the end of fiscal 2009, the Santa Rita exploration licence [sic] expired and was immediately re-staked by the Company's subsidiary DOREX.").

[268] Claimant submitted a copy of the application without annexes with its exhibit C-424. Aside from the legal impediment, this application would not support granting the license in any case; the application refers to a request for a new exploration license called "Cimarrón," proposes an exploration plan for the "Cimarrón" license, and provides a table of costs for the "Sesori" license.

[269] Mining Regulations, Art. 17 (RL-8(bis)); Ayala/Fratti de Vega Expert Report, § 7.3.2.c.

3. Claimant has not established that it has or ever had any rights in Zamora/Cerro Colorado

192. Pac Rim's claims related to Zamora and Cerro Colorado may be the clearest demonstration of Claimant's greed and exaggerated claims against El Salvador. These claims are absolutely meritless.

193. In its Memorial, Claimant describes that "in February 2006, Pac Rim signed a Letter of Intent to acquire an interest in the Zamora gold Project"[270] and that in September 2006, it "acquired" the Cerro Colorado project.[271] Claimant says nothing more about these areas, except to include them in damages calculations. Claimant makes no allegations about licenses or environmental permits for these areas or about any actions or omissions by the Government with respect to these areas.

194. In fact, according to Pac Rim's own description of these areas on its website: "The Company has not yet received confirmation that the licences it staked in the Zamora -- Cerro Colorado project area have been formally granted."[272]

195. The Bureau of Mines has no record of having transferred licenses for these areas to Pac Rim. Pac Rim has no exploration rights to Zamora and Cerro Colorado recognized by the Bureau of Mines, and it never did. It is absurd that these areas have been included in Claimant's alleged damages calculations.

196. Including these areas is simply the most blatant attempt by Pac Rim to demand payment for something to which it never had any right. The Tribunal will recall that when Pac Rim tried to acquire these licenses in 2006, the problems with its exploitation concession were very clear: Pac Rim was trying to change the law and convince Salvadorans that mining would

[270] Memorial, para. 361.

[271] Memorial, para. 364.

[272] Pacific Rim Mining Corp., "Projects: Zamora/Cerro Colorado, El Salvador" (C-425).

not hurt the environment. Even so, Pac Rim thought that was the opportune time to "conduct an intensive reconnaissance-style project generation initiative within El Salvador to capitalize on its unique geological knowledge and continue to build its portfolio of high-quality gold projects."[273] Yet again, instead of focusing on complying with the law, Pac Rim was focused on "staking additional ground," describing how its "'first to market' advantage in El Salvador continues to bear new opportunities."[274]

197. There is not even an allegation of El Salvador violating any obligations or causing any harm with respect to these areas. Pac Rim is cavalierly wasting the Tribunal's time by alleging that it is entitled to damages for areas where it tried to stake ground, but did not even obtain licenses or get to the point of applying for environmental permits. Damages calculations related to these areas should be summarily rejected.

4. Even if Claimant had any valid exploration licenses, they would not be "real property rights in a mineral estate," as Pac Rim claims

198. Finally, even if Claimant could establish that it had any exploration rights, such rights would not give rise to the claims Pac Rim has presented in this arbitration. As explained above,[275] an exploration license grants the right to explore and study a particular area and nothing more. Despite Claimant's insistence otherwise, an exploration license does not "constitute real property rights."[276] Under the plain text of the Mining Law, only an exploitation concession is a right *in rem*.[277] Therefore, Claimant is incorrect to assert that it is somehow

[273] Pacific Rim Mining Corp., News Release, *Pacific Rim Mining Acquires Cerro Colorado Gold Project in El Salvador*, Sept. 25, 2006 (C-258).

[274] Pacific Rim Mining Corp., News Release, *Pacific Rim Mining Acquires Cerro Colorado Gold Project in El Salvador*, Sept. 25, 2006 (C-258).

[275] *See* Section II.A.1.

[276] Memorial, para. 471.

[277] Mining Law, Art. 10 (RL-7(bis)).

entitled to the fair market value of either the mineral deposits located within or the area of the exploration licenses it claims.[278]

199. Claimant is unable to make claims based on exploration rights in Guaco, Huacuco, Pueblos, Santa Rita, and Zamora/Cerro Colorado. El Salvador is not responsible for Claimant's failures with regard to each of these license areas. Moreover, even if Claimant had legally obtained the exploration licenses and environmental permits for exploration, that would still be a long way from planning a mine, demonstrating its financial and technical ability to mine that deposit, demonstrating the technical and economic feasibility of its mine plan, obtaining the required authorizations from landowners, etc. that would have been necessary to apply for and obtain a concession.[279]

200. As a result, in addition to the fact that Claimant's exploration license claims fail first and foremost because Claimant has no exploration rights and could not have had any legitimate expectations to receive those rights under the Mining Law and Mining Regulations, any alleged exploration license would not constitute property rights that entitle Pac Rim to the windfall of "extraordinary profits" it seeks in this arbitration.

[278] Memorial, paras. 662, 669.

[279] Behre Dolbear highlights that "exploration is a high-risk business" with "fewer than one in one hundred" preliminary exploration projects becoming producing mines. Behre Dolbear Expert Report, para. 60.

III. PAC RIM WAS NOT ENTITLED TO AN ENVIRONMENTAL PERMIT FOR EXPLOITATION

201. Claimant's failures to comply with the land ownership or authorization and Feasibility Study requirements—both necessary for an exploitation concession application—are individually sufficient to show that Claimant did not have a right to a concession and therefore has no claim with respect to the El Dorado concession application.[280] Nevertheless, El Salvador will briefly address the third, distinct item missing from Claimant's application for an exploitation concession: the environmental permit. El Salvador will first explain the Ministry of Environment's legitimate general concerns about its capacity to evaluate, monitor, and supervise metallic mining in the country. El Salvador will then mention some of the most significant concerns about Pac Rim's proposed project. Finally, El Salvador will describe the reasonable steps the Government has taken to protect its people and the environment.

A. Realization by the Ministry of Environment that it lacked the capacity to fulfill its obligations to protect the Salvadoran population and the environment

202. El Salvador has a responsibility to protect its people and the environment; this obligation is reflected in several provisions of the Salvadoran Constitution:

- "it is the obligation of the State to secure for the inhabitants of the Republic, the enjoyment of liberty, health, culture, economic well-being and social justice."[281]
- "The health of the inhabitants of the Republic constitutes a public good. The State and people are obligated to see to its conservation and restoration."[282]
- "It is the State's duty to protect natural resources, as well as the diversity and integrity of the environment, to ensure sustainable development."[283]

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[280] *See* Section II.A above.

[281] Constitution, Art. 1 (RL-121) ("es obligación del Estado asegurar a los habitantes de la República, el goce de la libertad, la salud, la cultura, el bienestar económico y la justicia social").

[282] Constitution, Art. 65 (RL-121) ("La salud de los habitantes de la República constituye un bien público. El Estado y las personas están obligados a velar por su conservación y restablecimiento.").

[283] Constitution, Art. 117 (RL-121) ("Es deber del Estado proteger los recursos naturales, así como la diversidad e integridad del medio ambiente, para garantizar el desarrollo sostenible.").

203. The Salvadoran Environmental Law confirms and further details the State's obligation under the Constitution to protect the environment.[284] The Ministry of Environment is responsible for carrying out the national environmental policy.[285] The Salvadoran national environmental policy specifically provides that: "The principle of prevention and precaution shall prevail in the management of environmental protection."[286] Thus, the Ministry must evaluate environmental impact studies and make decisions about whether or not to grant permits in line with the Precautionary Principle, *i.e.*, it must err on the side of caution.

204. El Salvador does not have recent experience with metallic mining. The Ministry of Environment was just created in 1997 and Pac Rim's Environmental Impact Study ("EIA") was the very first one the Ministry had to evaluate for metallic mining in general and gold in particular. Around the time that it was considering Pac Rim's EIA for its proposed exploitation project, the Ministry of Environment realized that it lacked the capacity necessary to open the country up for metallic mineral exploitation. The Ministry lacked the resources to sufficiently evaluate proposed projects' impacts and to monitor and enforce compliance with environmental norms during operations. Dr. Manuel Pulgar-Vidal, contracted in 2006 to advise the Ministry of Economy regarding the suitability of mining exploitation in El Salvador, described the view that "the Ministry of Environment is not equipped to effectively assume a strong environmental

[284] Environmental Law of El Salvador, Legislative Decree No. 233, published in Official Gazette No. 79, Book 339 of Apr. 5, 1998 *amended by* Legislative Decree No. 237, published in Official Gazette No. 47, Book 374 of Mar. 9, 2007 ("Environmental Law"), Art. 1 (CL-2).

[285] Environmental Law, Art. 3 (CL-2).

[286] Environmental Law, Art. 2.e) (CL-2) ("En la gestión de protección del medio ambiente, prevalecerá el principio de prevención y precaución.").

policy regarding mining activity."[287] Dr. Pulgar described that this was due to lack of experience and expertise on the subject, lack of sufficient personnel, and an insufficient budget.[288]

205. Dr. Pulgar, who currently serves as Peru's Minister of Environment, noted that the insufficient resources at the Ministry of Environment had already resulted in a backlog of more than 2,000 environmental impact studies.[289] Claimant, in fact, knew the Ministry was overwhelmed and dealing with a new industry. According to Claimant, the delays it experienced with MARN "did not seem particularly surprising" because both the Mining Law and the Environmental Law were "relatively new" and "[t]here had been almost no gold mining activities in the country for many years."[290] Dr. Pulgar noted that the lack of resources and delays heightened concerns among Salvadorans who depend on the Government, through the Ministry of Environment, to protect the communities and the environment:

> the levels of citizen distrust regarding the Ministry's capabilities are also high. There does not seem to be any credibility in the sense that the Ministry of Environment is in a position to undertake what would entail making a decision regarding environmental impact studies as specialized as those relevant to an activity such as mining.[291]

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[287] Manuel Pulgar-Vidal, Final Report: Mining activity, overview of development, environment, and social relations, Aug. 11, 2006 ("Pulgar Final Report") at 13 (**Exhibit R-129**). *See also*, Tau Group, Final Report: Strategic Environmental Assessment of the Metallic Mining Sector of El Salvador, Ministry of Economy of El Salvador Foreign Cooperation Unit, Sept. 8, 2011 ("Tau Final Report") at 65 (**Exhibit R-130**) ("Provocada principalmente por las carencias que presentarían las instituciones competentes para llevar a cabo la labor de gestión, seguimiento y fiscalización de la actividad minero metálica. Esto es, por ejemplo en el caso específico del MARN para el seguimiento de los efectos ambientales de cualquier actividad económica que pueda provocar esos efectos.") ["Primarily due to the shortcomings presented by the competent institutions to manage, track and audit metallic mining activity. For example in the specific case of MARN, for tracking the environmental effects of any economic activity that could cause said effects."].

[288] Pulgar Final Report at 13 (R-129).

[289] Pulgar Final Report at 47 (R-129).

[290] Memorial, para. 255.

[291] Pulgar Final Report at 47-48 (R-129).

206. In his August 2006 report, Dr. Pulgar described the concerns of the Salvadoran communities, including that:

- "El Salvador is a country measuring 21,041 square kilometers with a population of nearly 7 million inhabitants, resulting in one of the highest population densities in Latin America with almost 350 people per square kilometer;"
- "the population density, acute deforestation, and poor use of water resources inevitably place the country in a situation that is moving toward 'water stress;'"
- "the potential of locating mining operations in the area of influence of the Lempa River basin, the country's most important water source which supplies water for more than a third of the population, creates a risk that could result in contamination negatively affecting water quality levels;" and
- "the country's experience shows that the little activity that has been carried out has been done irresponsibly."[292]

207. Regarding this last point, the only other recent experience in El Salvador with gold extraction was with the North American company, Commerce Group Corp. Commerce Group had received an exploitation concession before the new Mining Law and Environmental Law were enacted, so it was grandfathered into the new system without having to go through the full environmental impact study approval process. In 2005-2006, environmental audits of Commerce Group's property revealed that Commerce Group was not complying with the environmental measures established in its environmental permits to prevent and mitigate negative environmental impacts. Therefore, in July 2006, the Ministry revoked the environmental permits for Commerce Group. Unfortunately, the Government continues to deal with the unmitigated harm caused by Commerce Group's past operations:

> According to the Latin American Water Tribunal, there is acid drainage in the mining canton of San Sebastián, Santa Rosa de Lima Municipality, and the department of La Unión, and it was able to document acid drainage coming out of a mine that shut down 30 years ago. . . .

[292] Pulgar Final Report at 11-15 (R-129).

> In 2006 CEICOM sponsored a technical study of the water quality of the San Sebastián River, specifically at three strategic points: El Comercio Stream, El Taladrón Stream and the leaching dike. The most significant water analysis data, shown in Table 17, indicated that all the samples contained heavy metals—such as manganese, copper, iron and aluminum—in excess of the allowable limits for potable water. In other words, with amounts of metals, the river water was unsafe for human consumption. Moreover, the pH of the streams was also very low—acidic water—and far from levels considered appropriate for human consumption.[293]

208. Thus, in 2006, the Ministry of Environment 1) had received Dr. Pulgar-Vidal's report describing the Ministry's insufficient capacity and resources to take on the tasks assigned to it and 2) was just beginning to understand the extent of the unmitigated harm to the San Sebastián River by earlier gold exploitation and processing activities. In addition, the social movement against mining was gaining momentum in El Salvador.[294] The Ministry knew it had to be careful and it had legitimate concerns that it was not equipped to evaluate, permit, and monitor metallic mining in such a way as to effectively safeguard the population and the environment.[295]

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[293] Tau Final Report at 47-48 (R-130) ("Según el Tribunal Latinoamericano del Agua, existe un drenaje ácido en el cantón minero de San Sebastián, Municipio de Santa Rosa de Lima, departamento de La Unión, y pudo documentarse un drenaje ácido que salía de una mina que suspendió sus labores hace 30 años. . . . En 2006, CEICOM impulsó un estudio técnico de la calidad del agua del río San Sebastián, específicamente en tres puntos estratégicos del río: Quebrada El Comercio, Quebrada El Taladrón y Dique de Lixiviación. Los datos más relevantes de los análisis de agua . . . indicarían en todos los muestreos valores de metales pesados —como manganeso, cobre, hierro y aluminio—por encima de los límites de la norma de agua potable. Es decir, que con estas cantidades de metales, el agua de este río resultaría nociva para el consumo humano. Además, el pH de las quebradas sería asimismo muy bajo —agua ácida— y lejano a valores aptos para el consumo humano.").

[294] Pulgar Final Report at 9 (R-129) ("las acciones en oposición a la minería tienen poco más de 1 año") ["the actions in opposition to mining have been ongoing for little more than a year"].

[295] Pulgar Final Report at 14 (R-129) (noting, with respect to Pacific Rim's application, the view that "the country lacks the tools to ensure that this environmental impact can be appropriately dealt with and to prevent the operator from evading compliance with its obligations." / "el país carece de herramientas para asegurar que este impacto ambiental puede ser adecuadamente cubierte y para evitar que el operador se excluya del cumplimiento de sus obligaciones."); Gavidia Witness Statement, para. 9 (noting that Minister Barrera "was aware of his Ministry's limitations to be able to assess this type of risk [of environmental damage] and ensure that there was no damage to the environment or to the life and health

209. As a result of these concerns, in July 2006, in a spread in a Salvadoran newspaper, Minister Barrera publicly explained that the Ministry would not authorize any project that would harm the environment.[296] The lead-in to the story under the title, "Farewell to Mining," explained:

> The Ministry of Environment does not have the capacity to ensure environmental protection with gold exploitation projects in Cabañas and other places. Recognizing the deficiency, the Minster signals a "no" to the mining companies.[297]

210. Almost a year later, in June 2007, his successor, Carlos Guerrero, confirmed that the Ministry would not be granting concessions until a study of the potential effects of mining was completed.[298] And it was therefore no surprise eight months later, in March 2008, that then-President Saca "ask[ed] for caution regarding mining exploitation projects," and reiterated the need to study the potential impacts of mining in the country before deciding how to go forward:

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of the people, particularly for exploitation projects, which carried greater risks." / "estaba consciente de las limitaciones que tenía en su ministerio para poder evaluar este tipo de riesgo y asegurar de que no hubiese daños al medio ambiente así como a la vida y a la salud de las personas, particularmente para proyectos de explotación, que eran lo que tenían mayors riesgos.").

[296] *La Prensa Gráfica*, *Enfoques*, "Adiós a Las Minas," July 9, 2006 (Interview with Minister of the Environment) (**Exhibit R-120(bis)**). *See also* Gavidia Witness Statement, para. 10 ("El ministro Barrera llegó a la conclusión de que no podía seguir otorgando permisos ambientales para la exploración de minería metálica, ni otorgar el permiso ambiental a Pacific Rim, mientras no pudiera asegurar de que no habría daño ambiental, y así lo dijo públicamente a mediados del año 2006. Por eso pensamos en buscar mejorar el marco legal y las capacidades institucionales antes de embarcarnos en esas actividades.") ["Minister Barrera concluded that he could not continue to approve environmental permits for metallic mining exploration, or grant Pacific Rim the environmental permit, as long as he was unable to ensure that there would be no environmental damage, and he stated this publically in mid-2006. It was for this reason that we thought about seeking to improve the legal framework and institutional capacity prior to going ahead with these activities."].

[297] *La Prensa Gráfica*, *Enfoques*, "Adiós a Las Minas," July 9, 2006 (R-120(bis)).

[298] *El Diario de Hoy*, "Protesta contra explotación minera," June 24, 2007 (R-122) ("[S]ostiene que no se concederán licencias de explotación, algunas ya solicitadas por las empresas, hasta que el país cuente con un diagnóstico sobre los efectos de la minería, mismo que podría tardar por lo menos un año.") ["[H]e maintains that exploitation licenses will not be granted, some of which have already been requested by companies, until the country completes a study of the effects of mining, which could take at least a year."].

> We want to generate a space to reflect on the benefits or disadvantages of mining. And after we reflect on it, and we're shown proof that green mining exists and that it is possible to grant the exploitation permits, which is what we have not given them, at that time, a law must be made to make everything very clear.[299]

211. The increased awareness in 2005-2006 of mining's potential impacts in the country, both by the Ministry of Environment and the local communities, necessarily impacted consideration of Pac Rim's application for a 30-year, 12.75 km^2 exploitation concession in Cabañas.

B. The Ministry of Environment had legitimate concerns about Pac Rim's proposed project specifically

212. In addition to the serious concerns about metallic mining in El Salvador in general, the Ministry had legitimate concerns about Claimant's El Dorado permit application. Claimant did not adequately address the Ministry's concerns, but instead approached the Ministry of Environment with the same dismissive attitude that it had for issues raised by the Ministry of Economy. For example, right from the start of the process, rather than seek guidance from the Ministry, Pac Rim simply told MARN officials that it would "present the conceptual design of the Project," and would prepare the engineering designs "in a later stage."[300] Pac Rim further asserted that it would continue exploration activities "during the permitting process for the Project, and also during the construction and operation phases of the Project, to continue gathering data."[301]

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[299] *Invertia*, "Presidente de El Salvador pide cautela ante proyectos de explotación minera," Mar. 11, 2008 (C-1).

[300] Memorandum from A. Juarez, Consultoría y Tecnología Ambiental, S.A. to Pacific Rim Mining Corp. – El Dorado EIA's Team, Jan. 14, 2004 (C-105).

[301] Memorandum from A. Juarez, Consultoría y Tecnología Ambiental, S.A. to Pacific Rim Mining Corp. – El Dorado EIA's Team, Jan. 14, 2004 (C-105).

213. The Terms of Reference show that the Ministry did not accept Pac Rim's plan to present a "conceptual design" and continue exploring. The Ministry spent considerable time on the Terms of Reference for the El Dorado EIA, explaining that they were difficult to draft "due to the project's sensitive nature."[302] The Terms of Reference issued in July 2004 require very detailed information. Among the 30 points for "Project Description," Claimant was asked to, *inter alia*:

- "Describe and provide details concerning the activities to be carried out in each of the project's phases of implementation, from site preparation, construction, production processes to the closure of operations and rehabilitation."
- "Characterize and estimate the volumes of soil and unusable materials to be removed during the implementation and operation phase (especially for the mine), [and] management and siting with regard to final disposal."
- "Submit a map indicating the direction of rainwater drainage and discharge points with their respective minimum engineering work to prevent erosion (channeling, protection of the course and natural banks of rivers and streams, access points, etc.). **Under no circumstance shall the course of rivers or streams be obstructed or altered by the project's implementation.**"
- "Submit a geotechnical assessment (taking into consideration seismic factors) in the **tunnel, mine and residue dam area**, such that their stability may be ensured during the operations and project implementation phases."[303]

214. Pac Rim submitted its EIA in September 2004, and the first observations from the Ministry in February 2005 show that Pac Rim had not complied with the Terms of Reference. The observations begin by noting that Pac Rim had not accurately described the area to be occupied by the project nor identified the veins to be exploited.[304] Additional comments

[302] Email exchange between Fred Earnest and Luis Trejo, July 22, 2004 (C-119) ("Debido a lo delicado del proyecto, hemos tenido algunos inconvenientes en la preparación de los TdR") ["Due to the project's sensitive nature, we have had some problems in the preparation of the ToR"].

[303] Ministry of Environment, Terms of Reference for El Dorado Exploitation Project, July 2004 (C-120) (emphasis in original).

[304] Observations from MARN on the Environmental Impact Study for the El Dorado exploitation project, Feb. 1, 2005 (C-133).

requested significant additional information, including about impacts on water, the environmental management plan and proposed mitigation measures, cyanide transport, and the mine closure plan.[305] An internal e-mail reveals that Pac Rim did not intend to provide all of the requested information to the Ministry. Rather, Pac Rim complained that "[i]t seems that one or two of the reviewers think that we should be providing information that won't be available until detailed designs are done" and planned to argue about 10% of the observations.[306]

215. Thus, just like Claimant ignored the requirements for an exploitation concession, Claimant never submitted the materials requested by the Ministry of Environment with regard to its environmental permit application. For example, the updated EIA submitted in 2005 still lacked a mine closure plan.[307] It also listed several components of the Environmental Management Plan that would "be developed" at a later date, including the Cyanide Management Plan.[308] Thus, similar to its approach with the Ministry of Economy, Pac Rim expected to be granted an environmental permit without providing all of the required information.

[305] Observations from MARN on the Environmental Impact Study for the El Dorado exploitation project, Feb. 1, 2005 (C-133).

[306] Email from Fred Earnest to Tom Shrake, Feb. 3, 2005 (C-132) (emphasis added).

[307] Environmental Impact Assessment "El Dorado Mine Project," Sept. 2005 ("2005 EIA") at 7-111 (C-8) ("A detailed reclamation plan will be developed during the engineering phase of the Project and based on final designs.").

[308] 2005 EIA at 7-68 (C-8) ("As part of the Project Environmental Management Plan, Pacific Rim will develop and prepare a Solid and Hazardous Management Plan describing the general procedures for handling fuels, chemical products and reagents. This plan will be established pursuant to the environmental laws and regulations of El Salvador, the environmental guidelines of the World Bank/IFC and good international practices. Each plan is specific for the project site and individual facilities. Once the designs are completed, appropriate plans will be developed. A separate plan will be developed for cyanide as described in Section 7.3.6."). *See also* Expert Report of Ian Hutchison and Terry Mudder, 29 Mar. 2013 ("Hutchison and Mudder Expert Report") at 18-19 (listing separate plans that "would be developed" as part of the comprehensive Environmental Management Plan).

1. Comments from the public consultation were "difficult to address"

216. In October 2005, the El Dorado EIA entered the period of public consultation as provided for in Article 25 of the Environmental Law. One of the issues that has since been identified as needing improvement is that the law requires a very limited review process. Article 25 provides that the study should be made available to the public for only 10 days.[309] Claimant complied with this requirement by having one copy available at the Ministry in San Salvador for 10 days. There was no electronic copy and no one was allowed to make photocopies.[310]

217. Dr. Robert E. Moran, a consultant with more than 30 years of international experience in water quality, hydrogeology, and geochemistry work, reviewed Pac Rim's EIA and visited MARN, the proposed mine site, and nearby communities in October 2005. He concluded: "This EIA would not be acceptable to regulatory agencies in most developed countries."[311] He focused his detailed observations on water issues and criticized that the El Dorado EIA:

- included incomplete water quantity and inadequate water quality baseline data;
- lacked stream flow measurements necessary to measure surface water;
- presented no baseline concentrations for numerous chemical constituents in the water, including arsenic, mercury, nitrate, and sulfate;
- insufficiently addressed the toxic byproducts released by the INCO cyanide detoxification process; and
- failed to consider the cumulative impacts of Pac Rim's stated plan to develop other deposits near Minita.[312]

218. In its Memorial, Claimant describes that the two sets of public comments opposing the proposed El Dorado project, signed by more than 200 people from the local

[309] Environmental Law, Art. 25 (CL-2).

[310] Pulgar Final Report at 44 (R-129).

[311] Robert E. Moran, Technical Review of the El Dorado Mine Project Environmental Impact Assessment, El Salvador, Oct. 2005 ("Dr. Moran's Technical Review") at v, 15 (C-165).

[312] Dr. Moran's Technical Review at 3, 4, 6, 8, 11, and 13 (C-165).

communities, cited Dr. Moran's report as technical support for their opposition.[313] What Claimant fails to highlight in the Memorial is that, according to contemporaneous correspondence between Claimant's officers, MARN officials considered the observations from the public consultation "very strong and difficult to overcome."[314] The Ministry shared the public comments with Pac Rim at a meeting in March 2006. At that meeting, Fred Earnest, President of PRES, told the MARN officials that Pac Rim was evaluating Dr. Moran's report and had found that some of its observations were valid and should be taken into consideration, especially with regard to analyzing water quality and quantity.[315]

219. At the meeting, MARN mentioned the observation from the public that some of the annexes to the EIA were only available in English. Fred Earnest explained that they chose not to translate the attached technical reports in order to "preserve the clarity of the language of the expert."[316] MARN emphasized that it would nevertheless be important to have translations for the public to be able to evaluate the material. Pac Rim responded by disparaging the local community organization against mining and questioning the motives of the community members opposed to its project.[317]

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[313] Memorial, para. 268.

[314] Email from Erwin Haas to Fred Earnest, Feb. 28, 2006 (C-159) (emphasis added).

[315] Minutes of Meeting between MARN and Pac Rim Representatives regarding the "El Dorado Exploitation" and "Santa Rita Exploration" Projects, Mar. 29, 2006 ("Public Consultation Meeting Minutes") at 2. Claimant submitted these minutes as C-163, but did not include translation. El Salvador is providing the exhibit with translation as **Exhibit R-131**.

[316] Public Consultation Meeting Minutes at 4 (R-131).

[317] Public Consultation Meeting Minutes at 4-5 (R-131) ("El titular del proyecto mencionó que ellos saben que la ONG ADES está ligada a organizaciones internacionales, y que han auspiciado dos foros en contra de la minería, y que esta organización tiene un trabajo de prestar dinero y tienen sospecha que las personas que han firmado el documento en contra del proyecto son personas que tienen préstamos pendientes.") ["The project representative mentioned that they know that the NGO ADES is associated with international organizations, and they have sponsored two anti-mining meetings and that the organization's business is to lend money and they suspect that the people who have signed the document against the mining project are people who have loans pending."].

2. Claimant's dismissive response

220. Pac Rim provided its responses to the public consultation observations in September 2006. In March, it had been informed that the three options following its response were that 1) the project could move on to a public consultation at the municipal level; 2) there would be a favorable finding on the project; or 3) there would be an unfavorable finding.[318] Thus, Claimant should have understood that its response was important to the Ministry's decision on how to proceed. The flippant tone of Claimant's response is therefore surprising.

221. In its Memorial, Claimant alleges that Dr. Moran's report contained errors and omissions, mentioning "[f]or instance" that PRES promised to obtain 100% of the water it required from rainwater collection.[319] This, however, could hardly be an omission in Dr. Moran's report because it was actually a change from the plan outlined in the EIA implemented after Dr. Moran's report: "**it is clarified that** the water supply proposal on **page 6-39 of the EIS presented has been modified**, since **100% of the total demand for water by the El Dorado Mining Project (10.8 liters/second) would be supplied by the rainwater harvesting**."[320] Page 6-38 of the EIA, the document presented for public consultation (*i.e.*, the document reviewed by Dr. Moran), provides that the project will have two water sources: rainwater and "[w]ater from underground wells."[321] Thus, the assertion that Pac Rim could rely solely on collected rainwater and would therefore have no negative impact on water supply was new in late 2006. The change

[318] Public Consultation Meeting Minutes at 6 (R-131); Memorial, para. 270.

[319] Memorial, para. 286.

[320] Response Report to the Technical Review for the El Dorado Mining Project done by Robert E. Moran and the Summary Table of the Opinions and/or Observations Created by MARN, Sept. 2006 ("Response to Public Consultation Observations") at 8 (C-170) (emphasis in original). *See also id*. at 13, 67.

[321] 2005 EIA at 6-38 (C-8).

is mentioned in the response to the public consultation observations without any new analysis or data.

222. Claimant, even knowing that the Ministry was considering the first EIA for metallic mining and had comments from the local community in opposition to the project which it considered "very strong and difficult to overcome,"[322] treated the other technical observations with disdain. Thus, in response to Dr. Moran's observation that other countries allow more time and access to EIAs for the public consultation requirement, Claimant responded: "The El Dorado Mining Project is located in El Salvador, not in the United States nor Canada."[323] In response to the observation that many mining projects around the world do have some negative environmental impact, Claimant said it was "irresponsible" to compare its proposed mine to the others, commenting: "The number of similar mines is less than 5, and according to the knowledge of the company, none of these are generating negative impacts."[324] Finally, in response to observations about toxic byproducts of the INCO treatment process, Claimant retorted: "The tailings deposit has not been considered or envisioned to be a sanctuary for aquatic organisms."[325]

223. Regarding the observation that civil society had doubts about the claims in the EIA that the proposed project would have no negative impacts on water, Claimant complained that "almost no one understands the technology available and the procedures implemented to avoid the impacts and control the risks associated with the activity" and that "lack of knowledge

[322] Email from Erwin Haas to Fred Earnest, Feb. 28, 2006 (C-159).

[323] Response to Public Consultation Observations at 10 (C-170).

[324] Response to Public Consultation Observations at 12 (C-170).

[325] Response to Public Consultation Observations at 71 (C-170).

influences the negative opinions and lack of trust."[326] Of course, this response, claiming that no one understands how the company will prevent and mitigate negative impacts, only confirms that the company's public consultation process had not been effective.

224. Claimant likewise refused to acknowledge the problem observed by Dr. Moran that its requested concession area included areas of exploration, but the EIA did not consider or mention any potential cumulative impacts if other mines were eventually permitted. Ignoring the fact that it was trying to expand its project to include South Minita by 2006,[327] Claimant commented that "all observations related to other projects are illogical."[328] Claimant's response is, at best, disingenuous. Claimant itself created the cumulative impact issue by including exploration areas within the area requested for an exploitation concession. Of course the Ministry needed to consider Claimant's express plan to expand the mine or build other mines once it got its permit. As described by mining experts Behre Dolbear, "[t]he potential cumulative impacts of operating multiple projects concurrently are wide-ranging and . . . Pacific Rim's studies do not provide sufficient information to estimate the additional cumulative impacts to the proposed current Project."[329] Ignoring its expansion plans results in an inadequate impact assessment.

225. This once again highlights the central reason why Claimant's investment in El Salvador failed long before any alleged acts of the Government in 2008: Claimant was greedy. It

[326] Response to Public Consultation Observations at 22 (C-170).

[327] Pacific Rim Mining Corp., News Release, South Minita Delineation Drilling Yields Additional High Grade Gold; Updated Resource Calculation Initiated, Mar. 27, 2006 (C-256) ("Pacific Rim's exploration emphasis over the past year and a half has been to expand and develop the El Dorado mine proposed in the Company's January 2005 pre-feasibility study . . . . This strategy will continue through 2006 with the calculation of a new resource estimate for the El Dorado project, the completion of a feasibility study to examine the economics of an expanded operation at the Minita -- South Minita deposit, and, upon receipt of a mining permit, the commencement of underground ramp construction.").

[328] Response to Public Consultation Observations at 92 (C-170).

[329] Behre Dolbear Expert Report, para. 123.

had purchased exploration rights in El Salvador when they were near their final termination date, but still wanted to appropriate for itself a vast area for future exploration. Part of its strategy for doing this was to improperly include exploration prospects in the area for which it requested an exploitation concession, rather than request an exploitation concession for an area for which it at least had a chance of completing the required technical work. The fact that the EIA did not cover the expansion plans is another clear sign that Claimant simply had not done the work necessary to justify the 12.75 km^2 concession for which it had applied. It asked El Salvador to approve an environmental permit and an application for an exploitation concession without providing the required technical information for the vast majority of the area requested. Claimant expected the Salvadoran Ministries to abdicate their Constitutional duty to protect the health and welfare of the Salvadoran people.

226. Claimant did, however, accept some of Dr. Moran's observations and try to improve its submission accordingly. Claimant recognized as "valid" Dr. Moran's observation that the baseline data was incomplete and stated that it was gathering and presenting new data on the quantity of water.[330] In response to Dr. Moran's comments on water quality and risks due to seismic activity, Claimant also provided more recent data.[331] In addition, Claimant provided a translation of two of the EIA's annexes and the seismic risk evaluation presented in the original EIA in response to Dr. Moran's observations.[332]

3. Claimant's expert report does not address the Ministry's concerns

227. Claimant has submitted a short report from two U.S.-based experts, Drs. Hutchison and Mudder, asserting that the EIA for the El Dorado exploitation permit fully

[330] Response to Public Consultation Observations at 17 (C-170).

[331] Response to Public Consultation Observations at 48, 87 (C-170).

[332] Response to Public Consultation Observations at 78, 87 (C-170).

complied with Salvadoran and international standards.[333] They do not provide any details on either the standards or the alleged compliance. Although Drs. Hutchison and Mudder list Dr. Moran's October 2005 technical review as a document they reviewed, their report does not respond directly to Dr. Moran's criticisms.

228. Drs. Hutchison and Mudder apparently based their report on updated information that was never provided to the Government in support of the El Dorado exploitation concession requested in 2004, such as the 2008 MDA Report,[334] and are therefore under the misconception that the geological findings for this project are based on "two comprehensive feasibility and technical studies."[335] In fact, as described above, PRES only submitted one pre-feasibility study to the Government in support of its request for an exploitation concession. In addition, the 2005 EIA, which is allegedly the subject of Claimant's expert report, actually relies on data from a 1995 "Prefeasibility Report" and a 1997 "Baseline Study."[336] Neither of these documents is listed among those reviewed by Claimant's experts.

229. Moreover, Claimant's experts make assertions contradicting Claimant's own admissions with no explanation or discussion. For example, they assert that as a result of the INCO process, "cyanide is transformed into other benign constituents,"[337] even though Claimant accepted that the process would have some non-benign byproducts ("with toxicity much lower than that of cyanide") and asserted that the tailings deposit should not be expected to be a "sanctuary for aquatic organisms."[338] The experts likewise assert that "[d]etailed baseline water

[333] Hutchison and Mudder Expert Report at 22.

[334] Hutchison and Mudder Expert Report at 2.

[335] Hutchison and Mudder Expert Report at 13.

[336] 2005 EIA at 1-5 (C-8).

[337] Hutchison and Mudder Expert Report at 16.

[338] Response to Public Consultation Observations at 71 (C-170).

quality and related environmental studies were completed over an extended time period"[339] for the preparation of the EIA even though Claimant itself admitted that Dr. Moran's observation that the baseline data was incomplete and inadequate was "valid."[340] Behre Dolbear confirms that the sections of Claimant's EIA dealing with water issues were insufficient:

> [T]he EIA lacks sufficient data on water issues in at least three areas: 1) no factual estimates of water consumption and availability are provided by PRES; 2) most of the database is incomplete and/or is outdated (*i.e.*, completed prior to year 2000); and 3) baseline studies are not available. Behre Dolbear, therefore, concludes that the Hydrology and Hydrogeology sections of the report require supplementary information based on actual measurement and sample analysis of stream, spring, well and underground water sources. Considering that this information is not available, this section of the report would not meet EP, International or Salvadoran Standards.[341]

230. Claimant's experts also refer to several important plans "that would be developed and implemented" once the project was underway including "a detailed closure or rehabilitation plan [that] would be developed."[342] They then, however, inexplicably reach broad conclusions about these yet to be developed plans, asserting that "[t]he EIA . . . established effective management plans not only during operation but also during the construction and closure phases of the Project" and "[t]he proposed cyanide management plan fulfilled the requirements of the Cyanide Code."[343] Not surprisingly, they do not get into details or explain the bases for these conclusions. Behre Dolbear, on the other hand, notes that Claimant's closure plan was

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[339] Hutchison and Mudder Expert Report at 19.

[340] Response to Public Consultation Observations at 17 (C-170).

[341] Behre Dolbear Expert Report, para. 113.

[342] Hutchison and Mudder Expert Report at 18. *See also* 2005 EIA at 7-33 (C-8) ("With the purpose of complementing this plan, written detailed procedures will be established to include all the activities involving management of the Project's cyanide.") and at 7-111 ("A detailed reclamation plan will be developed during the engineering phase of the Project and based on final designs.").

[343] Hutchison and Mudder Expert Report at 20-21.

"conceptual" and would need to be updated "to include a manual of internal and external reports, their schedule and the decommissioning of the mine and plant facilities."[344] As a result, Behre Dolbear concluded that "the current Closure and Reclamation Plan submitted in the EIA does not comply with the level of detail required for a feasibility level design."[345]

231. Thus, Claimant's expert report does not address the Ministry's significant concerns about Pac Rim's proposed project. In 2004-2006, Claimant inadequately considered possible impacts on water, dismissed the public's concerns as either dishonest (signatures from people who owed money) or resulting from a lack of knowledge, and refused to address the fact that it was expressly planning to develop other deposits in the area which would necessarily affect the proposed project's impacts. In this arbitration, Claimant's experts, unconvincingly, deny that any of these issues exist and baldly assert that the EIA met all Salvadoran and international standards.

4. Pac Rim resigned itself to getting the environmental permit through political means

232. In this arbitration, Claimant survived the abuse of process objection to jurisdiction by denying El Salvador's assertion that any dispute between Pac Rim and El Salvador existed long before any alleged statement by President Saca in 2008. The materials Claimant has submitted with its Memorial in fact confirm that its dispute with the Government existed earlier. In this phase, Claimant has admitted that it knew that the Government was not going to issue the environmental permit for exploitation in 2006 (or by May 7, 2007 at the latest)[346] and that it

[344] Behre Dolbear Expert Report, para. 133.

[345] Behre Dolbear Expert Report, para. 133.

[346] Memorial, paras. 273, 297-298.

focused its efforts on seeking a political solution. Claimant's contradictory statements are compared side-by-side below:

Jurisdiction Phase	Inconsistent information in the Merits Phase
"I was particularly surprised to learn that the Government is now claiming that there was a dispute between the parties in 2006. In fact, nothing could be further from the case. . . . From my meetings with Salvadoran officials prior to the 2002 merger with Dayton and well into 2008, officials at the highest levels in the Salvadoran Government repeatedly expressed support for our project, and, particularly in 2007 and 2008, assured us that the permits necessary to conduct extraction activities at El Dorado would be forthcoming. I recall numerous such meetings on my many trips to El Salvador.[347]	**June 2006**: a MARN official told Ericka Colindres that "all mining projects were 'on hold,' on the orders of the Minister."[348] **early 2007**: "Ms. Colindres went to MARN to request the assistance of Zaida Osorio, head of the *Gerencia de Evaluación Ambiental* . . . in encouraging Mr. Córdova of MARN to make progress with the evaluation of the responses that PRES had submitted after the Public Consultation. At this time, Ms. Osorio told Ms. Colindres that Minister Guerrero had ordered all permits relating to mining, including exploration, to be put on hold."[349] **May 7, 2007**: Pac Rim representatives attended a meeting with Minister Guerrero and Minister de Gavidia at which "the mining companies were informed that all mining activity in the country would be halted until such time as an *Evaluación Ambiental Estratégica* . . . of the mining industry was conducted."[350]

233. In its new account of events, Claimant also admits that, long before 2008, it was pursuing political means of putting pressure on the Ministry of Environment to get the environmental permit in spite of the Ministry's concerns.[351] Indeed, as early as 2005, Pac Rim was lobbying both Ministries: relying on "political consultants" regarding the surface land issue

[347] First Shrake Witness Statement, paras. 89-90 (emphasis added).

[348] Memorial, para. 273 (emphasis added); First Witness Statement of Ericka Colindres, Mar. 22, 2013, para. 120.

[349] Memorial, para. 297 (emphasis added).

[350] Memorial, para. 298 (emphasis added).

[351] Emails between Pete Neilans and Ericka Colindres, Jan. 3, 2007 (C-193) ("I realize that this issue with MARN and the Ministry of Economy are political . . . The principal idea is to get technical approval. I will fight for that.").

with the Ministry of Economy and an "image consultant who has ties to Hugo Barrera," Marvin Galeas, with MARN.[352]

234. After mid-2007, when the mining companies were told without reservation that all mining activity would be halted until El Salvador could complete a Strategic Environmental Assessment, Claimant only increased the political pressure. Claimant provides little detail of what happened after May 2007 with respect to its environmental permit application, but the little information it has provided is entirely inconsistent with what it initially alleged:

Preliminary Objection Phase	**Inconsistent information since provided**
"From December 2006 through December 2008, however, MARN ceased all official communication with the company with respect to its application, notwithstanding the fact that Salvadoran law clearly stipulates that MARN must take definitive action on EIA submissions within 60 business days, and even under exceptional circumstances, within a maximum of 120 business days. Despite this requirement, MARN did not provide, and still has not provided, PRES with any justification for its inexplicable silence."[353]	"**Throughout 2006 and 2007** the Companies continued to engage with MARN on the issue of the ED Mining Environmental Permit . . ."[354] **March 7, 2007**: "Ms. Colindres attended a meeting with Minister Guerrero, and the *Comisión Nacional de Medio Ambiente* (National Commission for the Environment . . .), in which she presented the technical and environmental features of the El Dorado Mine Project."[355] **May 7, 2007**: Pac Rim representatives attended a meeting with Minister Guerrero and Minister de Gavidia at which "the mining companies were informed that all mining activity in the country would be halted until such time as an *Evaluación Ambiental Estratégica* . . . of the mining industry was conducted."[356] **May 2007**: "As Mr. Shrake and Ms. Colindres affirm, by this point, the Claimant was aware that the delay PRES faced at MARN was political and would therefore not be resolved by means of technical environmental assessment, but only through political means."[357] **December 2007 and February 2008**: A U.S. lobbyist traveled to El Salvador with Tom Shrake and met with "various officials of the Salvadoran Government, including officials of MARN."[358]

[352] El Dorado Project Report, Month Ending August 31, 2005 (C-288); Email from Fred Earnest to Tom Shrake, Nov. 25, 2005 (C-285).

[353] Response to Preliminary Objections, para 49 (emphasis added).

[354] Memorial, para. 260.

[355] Memorial, para. 296.

[356] Memorial, para. 298 (emphasis added).

235. Thus, Claimant now admits that, by 2007, it resolved to use "political means" to push its application through MARN.[359] From the exhibits provided by Claimant with its Memorial, one can see that within days of the announcement to the mining companies about halting all mining activity, Claimant was communicating with Mark Klugmann, a political consultant, about an "interesting" meeting with the Vice President.[360] Another email in August 2007 shows that Claimant was counting on its "leading lobbyist and political strategist," Fidel Chavez Mena, to work with President Saca's cousin, Herbert Saca, to move forward.[361] Claimant has also admitted that a U.S. lobbyist traveled to El Salvador with Mr. Shrake in December 2007 and February 2008 to meet with "various officials of the Salvadoran Government, including officials of MARN."[362] Ms. Mary Anastasia O'Grady, a columnist for the *Wall Street Journal*, attended a dinner with Mr. Shrake, Pac Rim's U.S. lobbyist, and several Salvadoran Government officials in San Salvador in February 2008.[363] Claimant confirmed during this arbitration that it had engaged C&M Capitolink as a lobbyist by October 2007.[364] Tom Shrake, Pac Rim's President and CEO, testified:

> We considered various--at this point we considered various remedies to the situation. I mean, I talked to counsel in El Salvador I was lobbying. I was lobbying in the United States to pressuring

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[357] Memorial, para. 300; Second Witness Statement of Thomas C. Shrake, Mar. 21, 2013 ("Second Shrake Witness Statement"), para. 128.

[358] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 (R-128) (emphasis added).

[359] Memorial, paras. 300-301.

[360] Email from Tom Shrake to Mark Klugmann, May 18, 2007 (C-306).

[361] Email from Tom Shrake to several recipients, Aug. 14, 2007 (C-307).

[362] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 (R-128).

[363] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 (R-128).

[364] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011 (R-128).

> El Salvador. I was doing numerous--numerous things at that point, so yeah.[365]

236. Thus, contrary to Claimant's original assertion that it faced "inexplicable silence" from MARN, the truth is that Claimant was informed of both the technical concerns about its application and the general concerns regarding metallic mining in El Salvador. Claimant used all of 2007 and 2008 to lobby both within El Salvador and in the United States to put outside pressure on the Salvadoran Government to grant the environmental permit despite all the concerns that had been raised. According to Claimant, it initiated the late 2008 correspondence with MARN to ask for a status update (breaking the alleged silence) when it "was on the verge of submitting its Notice of Intent."[366] In other words, when Claimant's lobbying efforts failed, Claimant initiated this arbitration as the next step in putting pressure on the Government.

C. Pac Rim did not earn the necessary social license to operate

237. As Claimant recognizes, social license to operate is "of paramount importance."[367] Dr. Pulgar also highlighted that it is essential for companies to obtain social license:

> it is currently not possible to think that an operation will be able to carry out its activities without obtaining social license.
>
> This license is not the result of an administrative process, or of a decision from the authority, but rather the result of the company's own capacity to obtain it.[368]

238. When Pac Rim's efforts to earn the approval of the communities failed, however, it did not accept the communities' "no" to its proposed projects. As described by the *amici* submission:

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[365] Transcript of Hearing on Objections to Jurisdiction, May 3, 2011, at 461:14-19.

[366] Memorial, para. 302.

[367] Second Shrake Witness Statement, para. 85.

[368] Manuel Pulgar-Vidal, Recommendations: Mining activity, overview of development, environment, and social relations, Aug. 11, 2006 ("Pulgar Recommendations") at 24 (**Exhibit R-132**).

> It is uncontroverted that opposition to Pac Rim's plans for El Salvador arose organically from the first-hand experiences of affected local communities and their commendable efforts to organize and protect themselves. Indeed, the first stirrings of opposition were engendered by Pac Rim itself when in 2003 and 2004, as it ramped up exploratory drilling work, its technicians and engineers trespassed on the private property of local residents, drilling exploratory wells without permission and in a manner that was both "suspicious and arrogant."[369]

239. According to *amici*, the opposition grew and "by late 2007, 62.5% of Salvadorans were against allowing metals mining in El Salvador, despite the lobbying campaign deployed by Pac Rim."[370] When presented with the concerns of the communities in March 2006, however, Claimant responded that ADES, the local Association for Economic and Social Development, lends money and Claimant therefore suspected that the more than 200 citizens who signed the letter opposing their project were "people with loans pending."[371] Likewise, when anti-mining protesters prevented Claimant from realizing its exploration program in Santa Rita, the company assumed "we still had the social license from the local communities and saw this as a case of a few doing harm to the majority."[372]

240. In his report on the situation in El Salvador in August 2006, Manuel Pulgar-Vidal, who currently serves as Peru's Minister of Environment, described the "strong pressure by various local groups opposed to the development of mining activity" based on the idea that mining "has historically not only failed to generate development, but has also significantly impacted the environment through poor practices."[373] As opposition grew in the communities

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[369] *Amicus Curiae* Submission by Member Organizations of *La Mesa Nacional Frente a la Minería Metálica de El Salvador*, May 20, 2011, at 3.

[370] *Amicus Curiae* Submission by *La Mesa* at 4.

[371] Public Consultation Meeting Minutes at 4-5 (R-131).

[372] Memorial, para. 331 (citing Second Shrake Witness Statement, para. 92).

[373] Pulgar Final Report at 6 (R-129).

around Claimant's proposed projects, Claimant increased its spending on "public relations" to convince everyone to accept its projects. The 2008 Annual Reports that Claimant filed with the Salvadoran Government show that Claimant spent more than $1 million on public relations activities between 2007 and 2008.[374]

241. Claimant's actions were not without consequence. The communities around Claimant's activities in Cabañas have become highly polarized for and against mining. Tragically, the situation escalated in 2009. In August 2009, Amnesty International reported on the murder of an environmental activist and described:

> Threats, attacks and intimidation against activists reportedly began at least as early as May 2008 when campaigning against mining exploration in the area began and have intensified since January this year when activists denounced electoral irregularities following the elections.[375]

242. A few months later, Amnesty issued another alert after two more people were killed in December 2009 and the staff of Radio Victoria, a community radio station that had reported on the anti-mining campaign, received threatening messages indicating that they would be next:

> The threats followed the killings of two anti-mining activists in Cabañas department: Gustavo Marcelo Rivera in June and Ramiro Rivera on 20 December. Ramiro Rivera was the legal representative of the NGO Cabañas Environment Committee (*Comité Ambiental de Cabañas*), and had survived an August attack in which he was shot eight times.

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[374] Pacific Rim El Salvador, S.A. de C.V., Guaco Project Costs, Aug. 21, 2008 (**Exhibit R-133**) (reporting $110,740 on Public Relations, $37,625 on Public Relations Administrative Personnel, and $281,880 on Indirect Public Relations); Pacific Rim El Salvador, S.A. de C.V., Huacuco Project Costs, Aug. 21, 2008 (**Exhibit R-134**) (reporting $66,906 on Public Relations, $22,732 on Public Relations Administrative Personnel, and $170,303 on Indirect Public Relations; Pacific Rim El Salvador, S.A. de C.V., Pueblos Project Costs, Aug. 21, 2008 (**Exhibit R-135**) (reporting $113,047, $38,409, and $287,753, respectively). The total expenditures on these three public relations costs across the three licenses in one year was $1,129,395.

[375] Amnesty International: Urgent Action, Death Threats for Demanding Justice, Aug. 27, 2009 (**Exhibit R-136**).

> On 26 December, another member of the Cabañas Environment Committee was killed. Dora Alicia Recinos Sorto, who was eight months pregnant, was shot dead, and her two-year-old child was wounded. Her husband, José Santos Rodríguez, is the Cabañas Environment Committee spokesperson.[376]

243. El Salvador highlights these events to show that there is a large, passionate, informed anti-mining contingent in the local communities. In these circumstances, Claimant's insistence that all the anti-mining people were either "being imported from outside areas at the encouragement of certain NGOs"[377] or people with pending loans from ADES is not credible. This failure to acknowledge that the public had legitimate concerns is part of the reason that Claimant lacked the necessary social license to operate. Indeed, a 2007 survey of Salvadorans in the communities to be impacted by mining indicated that:

- 80.8% thought that the impact of mining on water pollution would be serious or very serious;
- 84.9% agreed with the statement that mining companies harm the environment; and
- only 18.9% considered El Salvador an appropriate country for metallic mining.[378]

244. The Salvadoran population was justifiably concerned about the significant negative impacts that metallic mining could have on the environment. Pac Rim proposed a six-year mining operation, so the direct benefits would be relatively short-lived, though the environmental impact could last much longer.[379] For example, Pac Rim's commitment to "purify" water from its tailings pond, which was not "considered or envisioned to be a sanctuary

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[376] Amnesty International: Urgent Action, Two Activists Killed, Others Threatened, Jan. 4, 2010 (**Exhibit R-137**).

[377] Memorial, para. 332 (citing Press Release, Santa Rita Drill Program Update, Dec. 13, 2006 (C-263)).

[378] Universidad Centroamericana "José Simeon Cañas" Institute on Public Opinion, Survey on Knowledge and Perceptions of Mining in Areas Affected by Mining in El Salvador, Nov. 2007, at 27, 39, 54 (**Exhibit R-138**).

[379] Pulgar Final Report at 14 (R-129).

for aquatic organisms," before discharge into the San Francisco River,[380] did not address fears of a tailings dam spill, possibly as the result of an earthquake. A tailings dam spill could be devastating.[381]

245. In short, Pac Rim never convinced the communities that the limited benefits that would flow from its proposed Project were worth the risks.[382] As a result, Pac Rim lacked the necessary social license to go forward.

D. Strategic Environmental Evaluation

246. Dr. Pulgar, in his report on the status of environmental, social, and development issues regarding mining activity in El Salvador in 2006, found that the country lacked a common vision regarding the potential for developing the mining sector, there was a lack of information about potential environmental impacts, there was no water policy that would ensure the protection of water quality and availability during mining activities, there were gaps in the environmental and mining legislation as well as institutional capacity, and there were inadequate mechanisms and regulation of citizen participation in the decision-making process.[383] As a result, he considered that El Salvador was not ready to move forward with mining at that time:

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[380] Response to Public Consultation Observations at 71-72 (C-170).

[381] *See, e.g.*, Report of the ICOLD Committee on Tailings Dams and Waste Lagoons, "Tailings Dams Risk of Dangerous Occurrences," U.N.E.P. Bulletin 121 (2001), ISSN 0534-8293, at 15-16 (**Exhibit R-139**) (listing several examples of tailings dam failures) and 53 (concluding "Failures of tailings dams continue to occur despite the available improved technology for the design, construction and operation. The consequences of these failures have been heavy economic losses, environmental degradation and, in many cases, human loss.").

[382] *See* Behre Dolbear Expert Report, para. 125 (describing local inhabitants' concerns stemming from "fears that water used by the company will diminish their current supply for potable and other uses; there will be pollution of water by cyanide and metals downstream, that leakage from the TSF will pollute underground water, the TSF may fail, and that there will be limited new jobs for a short period of time and lack of credibility of Pacific Rim.").

[383] Pulgar Recommendations at 3-5 (R-132).

> [T]he current situation, with opposing views not just in relation to the law and policy, can result in any future performance of the activity being carried out in an environment of growing conflict.
>
> In response to this, to think or attempt to conclude that all of this responds to political ends, limited information, or possible radicalism of organizations will not bring about a solution, and will instead impact the fundamental elements of what generates polarization and will be reflected in even more conflictive situations. International experience shows that these positions should be channeled through dialogue, creating forums for consensus-building, and by incorporating mechanisms that build credibility among the parties. . . .
>
> [T]he proposals should be comprehensive. It is not enough to think that the solution involves nothing more than amending the 1995 Mining Law or that this task should fall only to the Ministry of Economy.[384]

247. Dr. Pulgar recommended a Strategic Environmental Assessment to identify and evaluate potential environmental impacts of any mining policy in El Salvador.[385] In line with the concerns raised during the Pac Rim public consultation, he noted that the "situation regarding availability and quality of water resources is a central element for the strategic environmental assessment."[386] Following a Strategic Environmental Assessment, Dr. Pulgar envisioned a series of discussions based on the information gathered to 1) address the current conflict and opposing

[384] Pulgar Recommendations at 5 (R-132) ("la situación actual, con posiciones encontradas no sólo en relación a la ley y la política, puede generar que cualquier desarrollo de la actividad en el futuro se haga en condiciones de creciente conflicto. Frente a ello pensar o intentar interpretar que todo esto responde a fines políticos, poca información o eventual radicalismo de las organizaciones, no generará solución alguna y más bien incidirá en las bases de lo que genera la polarización y se reflejará en situaciones aun más conflictivas. Las experiencias internacionales demuestran que estas posiciones deben canalizarse a través del diálogo, la generación de espacios de construcción de consensos y la incorporación de mecanismos que generen credibilidad entre las partes. . . . [L]as propuestas deben ser integrales. Es insuficiente pensar que la solución pasa por tan sólo modificar la Ley de Minería de 1995 o que esta tarea está en manos tan sólo del Ministerio de Economía . . ."). *See also* Gavidia Witness Statement, para. 11 ("Dr. Pulgar concluded in his report, submitted to me in August 2006, that El Salvador was not ready for metallic mining activity . . ." / "El Dr. Pulgar concluyó en su reporte, que me fue presentado en agosto del 2006, que El Salvador no estaba listo para la actividad minera metálica . . .").

[385] Pulgar Recommendations at 9 (R-132).

[386] Pulgar Recommendations at 10 (R-132).

views to begin building a consensus vision on mining and 2) develop "the country's vision and . . . determine whether carrying out mining activity falls within that vision."[387]

248. Although President Saca's administration took some steps toward realizing the Strategic Environmental Assessment, nothing was underway by the time he left office in 2009. President Funes, who took office in mid-2009, agreed that a Strategic Environmental Assessment was necessary and contracted the Tau Group to study and evaluate issues related to metallic mining in El Salvador in 2010. Throughout this period, El Salvador reasonably continued the suspension of processing of environmental permit applications for metallic mining. There was never, as Claimant alleges, a "ban" (denoting a permanent prohibition) on metallic mining. Rather, as Claimant admits it was informed in May 2007, El Salvador made the reasonable decision to suspend the review of applications for environmental permits related to metallic mining (a "moratorium") to take the time to study the situation and the potential impacts before it could decide how and when to move forward.

249. Dr. Robert Goodland, a World Bank environmental advisor from 1971-2001 and technical director of the World Bank's independent Extractive Industry Review from 2001-2004, was part of a technical committee appointed by the Ministry of Environment and Ministry of Economy in 2010 to review the work of the international consulting company hired to carry out the Strategic Environmental Evaluation study of metallic mining in El Salvador. Dr. Goodland was in the last step of finalizing an expert opinion to submit with this Counter-Memorial when he suddenly passed away on December 28, 2013. We include the final draft of his expert

[387] Pulgar Recommendations at 12 (R-132). *See also* Gavidia Witness Statement, para. 11 (describing that Dr. Pulgar recommended an EAE "as a necessary instrument for El Salvador to be able to decide on whether to develop the metallic mining industry, and if so, under what conditions." / "como un instrumento necesario para que El Salvador pudiera tomar una decisión sobre si desarrollar la industria de minería metálica y si la respuesta era afirmativa, bajo cuáles condiciones.").

opinion explaining his view, based on his extensive experience and unique knowledge of the situation in El Salvador, that a moratorium on metallic mining was a legitimate and reasonable precautionary step given the circumstances in El Salvador at the time.[388]

250. The Tau Group's Final Report confirmed the concerns previously raised by Dr. Moran and local communities and noted in Dr. Pulgar's 2006 report. The Tau Report discussed the water concerns and risks of natural disaster,[389] and found that "the most concerning environmental aspects are the potential harm the activity might cause to the environment, aggravating the existing environmental vulnerability and poor water quality issues."[390] The Report includes a table of the arguments raised against metallic mining, which mentions social conflict, health problems, and the fact that any employment benefits would be very short-lived, in addition to the environmental concerns.[391] According to this Report, "Opposition to mining appears to be a constant in most of the community organizations and generally among the population affected by mining activity."[392]

251. The Tau Report found:

> El Salvador is a country facing significant challenges. The country's environmental vulnerability is particularly elevated due to a high population density—the highest in Central America—with institutions frequently having limited capabilities and resources for effectively carrying out their duties and priorities, and often lacking in credibility according to Salvadoran citizens,

[388] Expert Opinion of Robert Goodland on the Government of El Salvador's Moratorium on Metal Mining, Dec. 17, 2013 ("Goodland Expert Opinion"). El Salvador intends to file a corroborating expert opinion at a time to be specified by the Tribunal.

[389] Tau Final Report at 6-10, 12-14 (R-130).

[390] Tau Final Report at 20 (R-130) ("los aspectos ambientales que más preocupan son los posibles daños que la actividad pueda generar sobre el medio ambiente, agravando el problema de la vulnerabilidad ambiental y de baja calidad del agua.").

[391] Tau Final Report at 21 (R-130).

[392] Tau Final Report at 27 (R-130) ("La oposición a la minería parece ser una constante en la mayoría de las organizaciones comunales y, de forma general, en la población afectada por la actividad minera.").

> with significant levels of pollution and degradation in most of its natural resources—also entailing health risks—and with a large part of its territory subjected to a greater risk of suffering natural disasters . . . .
>
> These conditions of vulnerability present a significant obstacle to the possibility of the country being able to guarantee effective metallic mining through controlling its environmental and social risks and impacts, and in making an overall positive contribution to the country's social and economic development.[393]

252. Accordingly, the Tau Report recommended either prohibiting metallic mining in El Salvador, "the most advisable option" from an environmental standpoint, or allowing mining in the mid to long-term, once certain economic, social, and environmental guarantees could be met.[394]

E. Moratorium law still pending

253. In July 2012, consistent with the Strategic Environmental Evaluation Report, the Government proposed a moratorium until compliance with certain goals could be achieved, noting that "the Strategic Environmental Assessment advises the utmost caution and the greatest respect for the precautionary principle and to that effect, recommends postponing any metallic mining activity until compliance with the relevant social and environmental guarantees is assured."[395] According to the proposed law, the moratorium could end when various

[393] Tau Final Report at 73 (R-130) (citing a report by the United Nations Disaster and Coordination team, 2010) ("El Salvador es un país que enfrenta grandes retos. Condicionado por una elevada densidad de población—la mayor de un país centroamericano—,con instituciones muchas veces escasas de capacidades y recursos para el desarrollo efectivo de sus funciones y prioridades, y a menudo faltas de credibilidad entre los salvadoreños, con niveles importantes de contaminación y degradación de gran parte de sus recursos naturales—implicando además riesgos para la salud—y con una gran parte de su territorio con riesgo elevado de sufrir catástrofes naturales, la vulnerabilidad ambiental del país es especialmente elevada. . . . Estas condiciones de vulnerabilidad suponen una barrera importante a la posibilidad de que el país pueda garantizar una minería metálica eficaz en el control de sus riesgos e impactos ambientales y sociales, y en realizar una contribución neta positiva al desarrollo social y económico del país.").

[394] Tau Final Report at 79 (R-130) ("la opción más aconsejable").

[395] Proposed Moratorium Law, July 17, 2012 ("Proposed Moratorium Law") (**Exhibit R-140**).

improvements had been made, including: "far-reaching strengthening of the institutions responsible for environmental assessment, control, and monitoring;" "far-reaching strengthening of the mining regulatory institutions;" and "development of taxation, financial, compensatory, and other policy instruments that will guarantee a progressive distribution of mining profits."[396] The decree is still pending before the Salvadoran legislature.

254. El Salvador's actions to seek an informed solution to the complex issues it faces with regard to metallic mining are the best course to protect its environment and citizens. As Dr. Goodland concluded in his expert opinion:

> Given the high level of violence surrounding the issue of mining in El Salvador and the current lack of institutional strength, significant changes are needed before mining could make a meaningful contribution to sustainable development in the country. Such changes will take time. El Salvador has a chance to "do it right" by focusing on regional planning, institutional strengthening, environmental education of its citizens, and scientific rigor in environmental decision-making. Such an approach would encourage only the best actors in the mining industry to apply for permits.[397]

255. Until the necessary changes are made, environmental protection cannot be ensured and there is no social license to operate. And until environmental protection can be ensured, the only reasonable course of action would be to not allow mining. As explained by Salvadoran Constitutional law expert Dr. Tinetti, a moratorium with respect to metallic mining in El Salvador is Constitutional because it is a reasonable step to protect important collective interests, including "environmental integrity and every individual's right to a healthy environment, as well as the protection of the health of inhabitants of the Republic."[398]

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[396] Proposed Moratorium Law, Art. 4 (R-140).

[397] Goodland Expert Opinion at 17.

[398] Tinetti Expert Report, paras. 60-61.

256. However, as already stated, El Salvador's decisions regarding metallic mining in general and Pac Rim's environmental permit specifically did not have any impact on Pac Rim. Pac Rim's application for an exploitation concession failed to comply with two additional, independent requirements under the Mining Law. Whether or not Pac Rim received the environmental permit, its application for an exploitation concession would not have been admitted for consideration without the required land documentation and feasibility study. Likewise, El Salvador's policy decision did not affect any rights with regard to exploration licenses because Pac Rim did not have a right to the exploration licenses for which it claims damages.

IV. PAC RIM'S CLAIMS UNDER EL SALVADOR'S INVESTMENT LAW ARE WITHOUT MERIT

257. El Salvador already demonstrated that Pac Rim did not have a right to an exploitation concession and did not have a right to the mineral deposits located in other exploration areas. Without those rights, Pac Rim's losses cannot be attributable to El Salvador. Therefore, Pac Rim's claims in this arbitration, which are all grounded on claims of expropriation of alleged property rights that Pac Rim never had, would fail under any system of law. As a result, the Tribunal need not go any further to decide this case in favor of El Salvador.

258. However, for the sake of completeness, El Salvador will also demonstrate in this section that El Salvador has not breached its obligations under the Investment Law.

A. The Tribunal's jurisdiction to decide this dispute is limited by the Investment Law

259. Claimant initiated this arbitration in March 2009 invoking ICSID jurisdiction under two separate instruments: CAFTA and the Investment Law of El Salvador. The Tribunal decided in June 2012 that there is no jurisdiction under CAFTA, but allowed the arbitration to proceed to the merits on a finding of jurisdiction under the Investment Law of El Salvador.

260. As further explained in Section VI below, El Salvador maintains that there is no jurisdiction to decide this particular dispute under the Investment Law. However, even if there were jurisdiction, the Tribunal's jurisdiction would have to be exercised within the strict limits established by the Investment Law itself.

261. Pac Rim admits in paragraph 401 of its Memorial that "[t]he claims in this arbitration are brought under Article 15 of the Investment Law of El Salvador." Having invoked jurisdiction to ICSID arbitration under the Investment Law of El Salvador, Pac Rim cannot escape the consequences of that choice.

262. The main consequences of the fact that this arbitration proceeds only under the Investment Law of El Salvador are that: 1) the only claims over which the Tribunal can exercise jurisdiction are claims regarding the rights and protections included in the Investment Law; 2) Salvadoran law is the applicable law to decide the content of those substantive rights and protections and determine whether El Salvador has breached them; 3) Claimant's investment was made subject to a significant limitation imposed in the Investment Law on investments related to the exploitation of the subsoil; and 4) a three-year statute of limitations applies to Claimant's claims related to the application for the El Dorado concession.

1. The only claims that can be made in an arbitration under Article 15 of the Investment Law of El Salvador are claims regarding the substantive rights and protections included in the Investment Law

263. The Investment Law of El Salvador includes substantive rights and protections for investors. In its Notice of Arbitration filed with the ICSID Secretariat in April 2009, Claimant recognized the specific claims it could make under the Investment Law. Pac Rim alleged that "the Government's conduct violates Articles 5 (equal protection), 6 (non-discrimination), and 8 (compensation for expropriation)."[399] Accordingly, Pac Rim requested that this Tribunal "[d]eclare that El Salvador has breached the terms of CAFTA and of the Salvadoran Investment Law."[400]

264. Claimant had originally intended to benefit primarily from the rights and protections under customary international law included in CAFTA by changing its nationality from the Cayman Islands to the United States in December 2007. But Pac Rim's claims under CAFTA were dismissed for lack of jurisdiction, and Pac Rim is therefore unable to bring customary international law claims in this arbitration. Instead of accepting the loss of its

[399] NOA, para. 90 (emphasis added).

[400] NOA, para. 128 (emphasis added).

CAFTA claims, Pac Rim is now trying to "internationalize" its remaining claims in its Memorial.[401] As a signal of this repackaging of its claims, Pac Rim has changed its request for relief and now requests this Tribunal to "[d]eclare that Respondent has breached the terms of the Foreign Investment Law (sic), the Constitution, and general principles of international law."[402]

265. But this attempt to expand the available sources for its claims fails. The only substantive rights and protections upon which Pac Rim may attempt to frame its remaining claims in this arbitration are those specifically included in the Investment Law. Any jurisdiction to decide this dispute based on the Investment Law must be limited to deciding whether El Salvador has breached the substantive rights and obligations specifically included in the Investment Law.

266. The substantive rights and protections included in the Investment Law that Pac Rim alleged from the beginning as having been breached by El Salvador are those included in **Articles 5** (*equality for all investors*), **6** (*non-discrimination*), and **8** (*compensation for expropriation*) of the Investment Law. It is nonsensical to suggest that the Investment Law includes these specific rights and protections, but also allows the importation of a whole set of unnamed causes of action for rights under customary international law (or any other law). This is especially so given that there is not a single provision in the Investment Law that can lead anyone to believe that some additional rights and protections, not specifically included in the Law, could be the basis for claims under the Investment Law.

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[401] *See, e.g.*, Memorial, paras. 614, 617, 620-622, 641 (attempting to include claims regarding breaches of principles of economic freedom, legal certainty, legality, legitimate expectations, etc.).

[402] Memorial, para. 692 (emphasis added). The Investment Law of El Salvador is not a "Foreign Investment Law" in its title because it applies both to domestic as well as to foreign investors. This is the main source of Pac Rim's mistake trying to internationalize this law.

267. Indeed, the text of the Investment Law confirms that the protection afforded to investors is limited to those rights and protections it expressly includes. The law applies to domestic as well as to foreign investors and includes a principle of equality for all investors established by Article 5. The law is not called the "*Foreign* Investment Law of El Salvador," but the "Investment Law of El Salvador." The difference is significant. The fact that the Investment Law applies to both domestic and foreign investors, and includes a commitment to treat them equally, is fatal to Pac Rim's attempts to internationalize El Salvador's Investment Law.

268. Article 5 of the Investment Law, under the title "Equality for all investors" provides that: "Foreign investors and the commercial companies in which they participate shall have the same rights and obligations as national investors and companies, with no other exceptions save for those set forth by law . . . ."[403] Therefore, unless the Investment Law or any other law of El Salvador creates a specific exception where foreign investors will be treated differently than domestic investors, the rights and obligations of foreign investors under the Investment Law will be exactly the same as the rights and obligations of domestic investors.

269. When the legislators intended to grant foreign investors certain rights specific to them, they expressly included a provision granting such exception. One example is the right to repatriate the proceeds of their investments.[404] Another example is the right to bring disputes to international arbitration. Article 15 of the Investment Law provides that:

> If controversies or differences arise between national or foreign investors and the State, regarding the investments they have made in El Salvador, the parties may resort to the competent courts of justice, in accordance with legal procedures.

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[403] Investment Law, Art. 5 (RL-9(bis)) ("Los inversionistas extranjeros y las sociedades mercantiles en las que éstos participen, tendrán los mismos derechos y obligaciones que los inversionistas y sociedades nacionales, sin más excepciones que las señaladas por la ley").

[404] Investment Law, Art. 4 (RL-9(bis)).

> In case of disputes between foreign investors and the State, regarding their investments made in El Salvador, the investors may submit the dispute:
>
> a) To the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of resolving the dispute through mediation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) . . . .[405]

270. This right, however, does not include a right for foreign investors to make claims under "general principles of International Law" or customary international law that are not available to domestic investors. Domestic investors can only make claims based on the rights and protections specifically included in the Investment Law. Domestic investors cannot make claims under "general principles of International Law" such as claims for "fair and equitable treatment" under customary international law.[406] According to the Salvadoran Civil Code, the

[405] Investment Law, Art. 15 (RL-9(bis)) ("En caso que surgieren controversias o diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los tribunales de justicia competentes, de acuerdo a los procedimientos legales. En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia: a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio CIADI)…."). Article 15 of the Investment Law of El Salvador was amended in July 2013, by removing the reference to international arbitration. The amendment does not apply retroactively and therefore has no effect on this arbitration.

[406] The customary international law rules and principles pertaining to the treatment of aliens do not apply, as such, to the nationals of the host State. By way of example, the European Court of Human Rights has indicated in its case law that the standard of protection for property rights, including the compensation required in case of expropriation, differs significantly depending upon the nationality of the claimant. Thus, where interference with property rights is at the hands of the claimant's own state of nationality, the standard of compensation will be assessed according to the Court's rather deferential European human rights jurisprudence, whereas when the interference is at the hands of a state other than the claimant's own, customary international law will provide the standard. The fundamental reasons prompting the recognition of this difference in treatment are reflected in the seminal decision of the European Court of Human Rights in the *James and Others v. United Kingdom* case. As the Court stressed in that case: "Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been

Investment Law must be read and interpreted in a way where the law is internally consistent in all its parts and, therefore, does not contradict itself.[407] It would be contrary to the principle of "equality for all investors" established in Article 5 of the Investment Law, if foreign investors could make claims under "general principles of International Law" while domestic investors cannot make such claims, without a specific exception for the different treatment.

271. Furthermore, allowing other types of claims from outside the Investment Law would create inconsistent rulings in the different dispute settlement procedures provided for by Article 15 of the Investment Law. A foreign investor can choose to submit its dispute to the courts of El Salvador, which would only hear claims based on the rights and protections included in the Investment Law. El Salvador's law does not acknowledge the direct effect of customary international law and the courts of El Salvador cannot adjudicate claims based on "general principles of International Law" or customary international law in the absence of a treaty or another specific binding agreement to apply such principles of International Law. A Salvadoran judge would not be able to resort to customary international law even when there is a vacuum or *lacuna* in Salvadoran law. Article 19 of the Salvadoran Civil and Commercial Procedure Code lists the only sources to which a Salvadoran judge can resort in cases of *lacunae* in the law, and customary international law is not included on that list.[408] Therefore, there would not be a legal

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consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals." *Case of James and Others v. The United Kingdom*, European Court of Human Rights, Application No. 8793/79, Judgment, Feb. 21, 1986, para. 63 (**Authority RL-122**).

[407] Civil Code of El Salvador, Un-numbered Decree, published in the Official Gazette No. 85, Book 8, Apr. 14, 1860, *amended by* Decree No. 512, published in the Official Gazette No. 236, Book 365, Dec. 17, 2004 ("Civil Code"), Art. 22 (**Authority RL-123**).

[408] Civil and Commercial Procedure Code of El Salvador, Legislative Decree No. 712, Sept. 18, 2008 ("Civil and Commercial Procedure Code"), Art. 19 (**Authority RL-124**).

basis to allow different claims regarding different rights and protections, depending on whether the dispute is filed before the courts of El Salvador or in an international arbitration.[409]

272. This limitation on the jurisdiction of a tribunal deciding a dispute under the Investment Law of El Salvador has already been upheld in a unanimous award by the first ICSID tribunal that was presented with this situation. In *Inceysa Vallisoletana v. El Salvador*, the claimant was attempting to bring claims under the Investment Law which were outside of the rights and protections included in the Investment Law. El Salvador rejected the claimant's attempt to introduce claims from outside the Investment Law, and the tribunal agreed with El Salvador.

273. The *Inceysa* tribunal stated without qualification that "in order to invoke the arbitration jurisdiction provided in the Investment Law, there must be a claim with substantive grounds in said law."[410] The tribunal added that the Investment Law "grants jurisdiction to the Centre only to hear disputes arising from the application of the Law."[411] While the particular situation in the two cases was different, the general principle enunciated by that tribunal applies to any attempts by a claimant to bring in any extraneous provisions as claims of breach of the Investment Law.

274. Pac Rim alleges that a reference to treatment that is "fair and equitable" in the letter of submission of the draft law by the Minister of Economy, and a reference to the "best

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[409] *See* Expert Report of José Roberto Tercero Zamora on the El Salvador Investment Law, Dec. 9, 2013 ("Tercero Expert Report"), para. 40 ("In this situation of legal equality, it is not possible to maintain that for the mere fact that a foreign investor decides to bring its claim under the Investment Law before an international tribunal, the law applicable to the dispute would be different." / "Ante esta situación de paridad legal, no es dable sostener que por el solo hecho de que un inversionista extranjero decida presentar su reclamo bajo la Ley de Inversiones ante un tribunal internacional, el derecho aplicable a la controversia sería diferente.").

[410] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006, para. 333 (RL-30) (emphasis added).

[411] *Inceysa v. El Salvador*, para. 334 (RL-30) (emphasis added).

practices" recognized in international investment included in the Statement of Purpose of the Investment Law, open the door for it to bring claims based on the "principle of fair and equitable treatment" and "the protection of foreign investors' legitimate expectations" in an arbitration under the Investment Law.[412] Pac Rim is mistaken.

275. First, Pac Rim fails to understand that a letter from a minister, or a statement of purpose, cannot change the plain meaning of the text of the law. These references do not import extraneous causes of action not found in the provisions of the law specifically included by the drafters. Article 5 of the Investment Law is clear that domestic and foreign investors will have the same rights unless a specific exception is created by the law. And there is no exception in the law allowing foreign investors to make claims for breaches of "general principles of International Law."

276. Second, even the documents cited by Pac Rim fail to support its allegation. Pac Rim fails to observe that the paragraph immediately preceding the reference to "fair and equitable" treatment in the Minister's letter specifically refers to the law being meant to attract both domestic and foreign investors.[413] Thus, the use of the term "fair and equitable" is not for just foreign investors, but for all investors under this domestic law. It cannot, therefore, be used to attempt to open the door to "general principles of International Law" for just foreign investors invoking the Investment Law before an international tribunal. Pac Rim also fails to include the first two lines in the paragraph from which it quotes, stating that the principles of protection are to be applied to investments "in general" and not only to foreign investments, as Pac Rim is attempting to do. By failing to note these important qualifications, Pac Rim overlooks and fails

[412] Memorial, paras. 407-411.

[413] Statement of Purpose ("*Exposición de Motivos*") of the Investment Law of El Salvador at 5 (**Authority RL-101(bis)**).

to apply the principle of equality of treatment established in Article 5 of the text of the Investment Law itself.

277. With regard to the Statement of Purpose, it is also important to note that the Statement, after listing the substantive protections included in the Investment Law, states that "it is important to expressly establish the conditions afforded to the protections, so that the investor has a clear and precise knowledge of the rules under which they could establish and develop their investments and the guarantees that they are entitled to have."[414] The Investment Law, by referring to the necessity of expressly including the protections afforded to investors, unequivocally limits those guarantees to those specifically included in the Law. Bringing in additional protections from other sources would not only violate the principle of equality between domestic and foreign investors created by Article 5 of the Investment Law, but also defeat the law's purpose of providing clear and precise rules for all investment, foreign and domestic.[415] Consequently, this Tribunal must reject Pac Rim's attempts to bring in claims based on "general principles of international law" through a back door that does not exist. To do otherwise would amount to an annullable excess of any jurisdiction the Tribunal might have with regard to this dispute.[416]

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[414] Statement of Purpose ("*Exposición de Motivos*") of the Investment Law of El Salvador at 5 (RL-101(bis)) ("es importante establecer en la ley de una manera expresa las condiciones del referido tratamiento, de tal manera, que el inversionista tenga conocimiento de una manera clara y precisa las reglas en las que establecerá y desarrollará sus inversiones, así como también, las garantías a las que tiene derecho.") (emphasis added).

[415] Tercero Expert Report, para. 57 (describing that opening the door to extrajudicial sources for interpreting the law "would be inconsistent with the intention of producing an 'appropriate legal framework containing clear and precise rules' and the intention of providing the foreigner with the constitutional protection of his/her right to legal security." / "sería incongruente con la intención de producir un 'marco legal apropiado que contenga reglas claras y precisas' y la intención de dispensar al extranjero la protección constitucional a su derecho a seguridad juridical.").

[416] *Ad hoc* Committees have held that there may be an excess of powers if a tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking. *See Compañia de Aguas del Aconquija AS and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment,

278. Likewise, Pac Rim's request for the Tribunal to declare that El Salvador has breached El Salvador's Constitution would exceed the scope of any jurisdiction the Tribunal might have under the Investment Law. Nowhere in the Investment Law is there a grant of authority for an international arbitral tribunal to decide on the constitutionality of the actions of the Government. That is an area reserved by Article 174 of the Salvadoran Constitution to the Constitutional Chamber of the Supreme Court of El Salvador.[417] By asking the Tribunal to make such statement, Pac Rim is also asking the Tribunal to commit an annullable excess of its jurisdiction.

2. Salvadoran law is the applicable law to decide the content of the Investment Law's substantive rights and protections

279. Article 42(1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties." By invoking

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July 3, 2002, para. 86 (**Authority RL-125**); *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, Nov. 1, 2006, paras. 47, 48, 67 (**Authority RL-126**); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, Sept. 25, 2007, para. 47 (**Authority RL-127**); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, Sept. 1, 2009, para. 45 (**Authority RL-128**); *Industria Nacional de Alimentos, S.A. and Indalsa Perú ("Lucchetti"), S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, Sept. 5, 2005, para. 99 (**Authority RL-129**); *M.C.I. Power Group L.C. and New Turbine, Inc. v. The Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, Oct. 19, 2009, para. 56 (**Authority RL-130**). Committees have also held that there could be an excess of powers when the tribunal exceeds the scope of its jurisdiction. *See Klöckner v. The Republic of Cameroon*, ICSID Case No. (ARB/81/2), Decision on the Application for Annulment Submitted by Klöckner Against the Arbitral Award, Oct. 21, 1983, para. 4 (**Authority RL-131**); *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, para. 42 (**Authority RL-132**).

[417] Constitution, Art. 174 (RL-121) ("La Corte Suprema de Justicia tendrá una Sala de lo Constitucional, a la cual corresponderá conocer y resolver las demandas de inconstitucionalidad de las leyes, decretos y reglamentos, los procesos de amparo, el habeas corpus, las controversias entre el Órgano Legislativo y el Órgano Ejecutivo a que se refiere el Art. 138 y las causas mencionadas en la atribución 7a. del Art. 182 de esta Constitución.") ["The Supreme Court will have a Constitutional Chamber, which shall hear and resolve challenges of unconstitutionality of laws, decrees and regulations, amparo processes, habeas corpus, disputes between the Legislative and Executive Branches referred to in Article 138 and the reasons mentioned in the 7th power of Article 182 of this Constitution."].

jurisdiction under the Investment Law, Claimant agreed to the application of Salvadoran law to its dispute.[418]

280. Pac Rim, however, argues that because Article 15 of the Investment Law does not include a specific reference to what the applicable law would be in a dispute submitted to international arbitration, there is no agreement on the applicable law.[419] Pac Rim's interpretation is wrong because Article 15 must be viewed in context of the Investment Law, as required by Article 22 of the Salvadoran Civil Code.

281. This contextual reading of Article 15 mandates that any dispute settlement procedure initiated under the Investment Law of El Salvador must apply Salvadoran law as the applicable law to decide the dispute, to the exclusion of any other system of law. Any foreign investor that invokes jurisdiction under the Investment Law is bound by that choice of law for purposes of Article 42 (first sentence) of the ICSID Convention and must be presumed to have agreed to that choice of law as a condition to perfect any consent El Salvador may have given under Article 15.[420]

282. The main reasons that Salvadoran law must be the applicable law in any proceeding under the Investment Law are: 1) the principle of equality between domestic and foreign investors established in the Investment Law; 2) the desire to apply clear and consistent rules in the settlement of disputes under the Investment Law; 3) all investments located in El Salvador are subject to Salvadoran law; and 4) in particular, all investments related to mining rights in the subsoil are expressly made subject to Salvadoran law.

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[418] Tercero Expert Report, paras. 26-27.

[419] Memorial, paras. 402-404.

[420] As indicated above, in its Notice of Arbitration Pac Rim requested that this Tribunal "[d]eclare that El Salvador has breached the terms of CAFTA and of the Salvadoran Investment Law."

a) The principle of equality between domestic and foreign investors demands that Salvadoran law must be the applicable law

283. As stated earlier, El Salvador's Investment Law applies to both domestic and foreign investors. In addition, Article 5 of the Investment Law establishes a principle of equality between domestic and foreign investors. Under the title "Equality for all investors," Article 5 provides that: "Foreign investors and the commercial companies in which they participate shall have the same rights and obligations as national investors and companies, with no other exceptions save for those set forth by law . . . ." This means that, unless the Investment Law, or any other law, creates a specific exception where foreign investors will be treated differently than domestic investors, the rights and obligations of foreign investors will be exactly the same as the rights and obligations of domestic investors.

284. Before the July 2013 amendment of Article 15 of the Investment Law (which does not affect this case), one of the exceptions where the rights of foreign investors are different from the rights of domestic investors, was that foreign investors, in addition to the option of submitting a dispute to the local courts of El Salvador, also had the option to submit the dispute to international arbitration.[421] A domestic investor who has a dispute with El Salvador, on the other hand, only has one option: to resort to the courts of El Salvador to resolve the dispute.

285. In the case of a domestic investor submitting the dispute to a Salvadoran court, the Salvadoran court is bound to apply Salvadoran law to decide the dispute.[422] A foreign investor's choice to take the dispute to international arbitration does not change the applicable

[421] Article 15 of the Investment Law was amended in July 2013, by removing the reference to international arbitration. That amendment only applies after it entered into force. For ease of reference, we will refer to Article 15 as the text stood when this arbitration was initiated.

[422] Article 2 of the Civil and Commercial Procedure Code mandates judges to rule according to the Constitution, laws and other norms of the juridical order. *See* Civil and Commercial Procedure Code, Art. 2 (RL-124).

law to decide its dispute under the Investment Law. Article 15 gives foreign investors a choice of forum, not a choice of law. Because there is no specific exception created for the applicable law in Article 15, the principle of equality established in Article 5 of the Investment Law requires that the same law must apply to a dispute submitted by a domestic investor (who has to submit its dispute to Salvadoran courts) as to a dispute submitted by a foreign investor (who can choose to submit its dispute to Salvadoran courts or to international arbitration).

286. The principle of equality between domestic and foreign investors would be violated if a domestic investor could only have its dispute resolved applying Salvadoran law, while a foreign investor would have broader interpretations and causes of action available under international law if it chose to initiate an international arbitration rather that to submit the dispute to the courts of El Salvador.[423]

b) The objective of consistency also demands that Salvadoran law be the applicable law

287. Article 15 gives a foreign investor the choice to submit its dispute to the courts of El Salvador or to submit the dispute to international arbitration. If the foreign investor chooses to submit the dispute to the courts of El Salvador, the domestic court must apply Salvadoran law to decide the dispute.[424]

288. The foreign investor cannot change the applicable law simply by choosing to submit its dispute to international arbitration. Salvadoran law must still apply to the dispute. To ensure a predictable and consistent environment for investment in El Salvador, the same body of law must be applied to the same dispute, no matter if the dispute settlement procedure chosen by the foreign investor is a domestic court of law or an international arbitration tribunal.

[423] Tercero Expert Report, paras. 32-36.

[424] Civil and Commercial Procedure Code, Art. 2 (RL-124).

c) All investments located in El Salvador are subject to Salvadoran law

289. Article 16 of the Salvadoran Civil Code provides that all investments located in El Salvador are made subject to the laws of El Salvador, even when the owners are foreigners that do not reside in El Salvador.[425] When Pacific Rim decided to make its investment in El Salvador, Pacific Rim voluntarily agreed to submit to Salvadoran law in all aspects of its investment. Legal expert José Roberto Tercero confirms that foreign investors, like Pacific Rim, are subject to Salvadoran law:

> The Salvadoran legal system leaves no doubt that foreigners are subject to the general legality of the entire Salvadoran legal system, in all ways it may be applicable: "Foreigners, from the moment in which they arrive to the Republic's territory, will be strictly obligated to respect the authorities and to obey the laws, and they will acquire the right to be protected by them."[426]

290. Moreover, Mr. Tercero explains that the legislative history of the Investment Law makes it clear that the unanimous understanding of the legislators that enacted the Investment Law was that all investments made in El Salvador would be subject to Salvadoran law:

> the legislative record of the Investment Law confirms that the legislator's intention has been that foreign investors have to comply with the general parameters of legality set up by the entire legal system, in addition to the morals and good habits according to the standards of the Salvadoran community, protected under positive law. Concepts foreign to Salvadoran regulations were not incorporated.[427]

[425] Civil Code, Art. 22 (RL-123).

[426] Tercero Expert Report, para. 51 (quoting Article 96 of the Constitution) ("El sistema legal salvadoreño no deja duda de que los extranjeros están sujetos a la legalidad general de la totalidad del ordenamiento jurídico salvadoreño, en todo lo que les fuere aplicable: 'Los extranjeros, desde el instante en que llegaren al territorio de la República, estarán estrictamente obligados a respetar a las autoridades y a obedecer las leyes, y adquirirán el derecho de ser protegidos por ellas.'").

[427] Tercero Expert Report, para. 53 (emphasis added) ("el historial legislativo de la Ley de Inversiones confirma que la intención del legislador ha sido que las inversiones extranjeras tienen que cumplir con los parámetros generales de legalidad configurados por todo el ordenamiento jurídico, además de la moral y

291. As a result, any investor choosing to invest and establish rights in El Salvador agrees that Salvadoran law will apply to its investment and its rights under the Investment Law.[428]

d) All investments related to mining rights in the subsoil are subject to Salvadoran law

292. Article 7.b) of the Investment Law provides a limitation for investments related to the exploitation of the subsoil, and makes these investments subject to the Constitution and applicable secondary laws. In this case, the applicable secondary law is the mining law. Article 7 of the Mining Law specifically states that the holders of exploration licenses or exploitation concessions, regardless of their nationality, are subject to the laws of El Salvador.

293. The dispute settlement procedures included in Article 15 of the Investment Law are no different in this regard. Thus, in accordance with Article 7 of the Mining Law, "the applicable laws are those of the Salvadoran legal system, both for nationals as well as for foreigners," and "any claim from a foreigner arising under the Mining Law to be heard by the courts with jurisdiction will be judged on the basis of Salvadoran law."[429] It would make no sense to provide that Salvadoran law applies to Pacific Rim's investments in El Salvador, and specifically to investments related to mining rights, and then apply a different law to a dispute about that investment.

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buenas costumbres según la norma de la comunidad salvadoreña, protegidas en la ley positiva. No se incorporaron conceptos extraños a la normatividad salvadoreña.").

[428] Tercero Expert Report, para. 29.

[429] Tercero Expert Report, paras. 42-43 ("las leyes aplicables son las del ordenamiento salvadoreño, tanto para nacionales como para extranjeros" y "cualquier pretensión de un extranjero surgida bajo la Ley de Minería de que deban conocer los tribunales competentes será juzgada en base al derecho salvadoreño.").

3. The Investment Law imposes a significant limitation on investments related to the exploitation of the subsoil

294. Article 7.b) of the Investment Law provides that investments regarding exploitation of the subsoil are limited by the Constitution and applicable secondary laws.

295. In the case of the exploitation of the subsoil for mineral rights, the applicable secondary law is the Mining Law. Article 4 of the Salvadoran Civil Code states that the provisions of the Mining Law will apply preferentially, and Article 72 of the Mining Law itself establishes that the Mining Law is the special law for the subject area, and it prevails over any other legal provisions.[430]

296. As explained in the Expert Report of José Roberto Tercero, Article 7 of the Investment Law imposes an obligation to comply with the requirements of the Mining Law on the holders of exploration licenses and exploitation concessions as a condition to their investment being protected by the Investment Law.[431]

297. The first effect of Claimant's obligation to comply with the Mining Law is that Claimant cannot make any claims under the Investment Law if it has not complied with the requirements of the Mining Law. In this particular case, as amply demonstrated in Section II above, under the Mining Law, Pac Rim did not and could not have property rights over the deposits, and thus any claim for expropriation of these deposits is completely without any basis in law. In addition, Article 7.b) of the Investment Law is very clear when it states that "the subsoil belongs to the State." That article was already in the law when Pac Rim made its investment, and it is therefore utterly disingenuous for Pac Rim to come to this Tribunal alleging that it owns the mineral deposits that lay in the subsoil.

[430] Tercero Expert Report, paras. 76-77.

[431] Tercero Expert Report, paras. 63-69.

298. The second effect of these two articles is that, because Pac Rim did not comply with the requirements of the Mining Law to obtain a mining exploitation concession, and did not comply with the requirements in the Mining Law and in the Mining Regulations to obtain the exploration licenses in Guaco, Huacuco, Pueblos, Santa Rita, and Zamora/Cerro Colorado, Pac Rim cannot base its claims on these allegations under the Investment Law.

299. The final, and perhaps the most important effect of Article 7.b) of the Investment Law, in combination with Article 7 of the Mining Law, is that they provide a specific limitation of jurisdiction for disputes related to mining exploration licenses and mining exploitation concessions.

300. Article 7 of the Mining Law provides:

> **JURISDICTION**
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> Art. 7. The Mining License or Concession Holders, be they national or foreign, are subject to the laws, Courts and Authorities of the Republic, and are absolutely precluded from resorting to claims in the diplomatic protection venue; and the respective contracts must establish that in everything related to the application, interpretation, performance or termination of same, they waive their domicile and submit themselves to the Courts of San Salvador.[432]

301. Therefore, as Mr. Tercero concludes in his report, to the extent a dispute arises under the Investment Law of El Salvador in relation to a mining exploration license, or in relation to a mining exploitation concession, that dispute is referred through Article 7.b) of the Investment Law, and Article 7 of the Mining Law, to the exclusive jurisdiction of the courts of

[432] Mining Law, Art. 7 (RL-7(bis)) ("Los titulares de Licencias ó concesiones Mineras, sean nacionales ó extranjeros, quedan sujetos a las leyes, Tribunales y Autoridades de la República, no pudiendo de ninguna forma recurrir a reclamaciones por la vía de protección diplomática; debiendo establecerse en los contratos respectivos que en todo lo relativo a la aplicación, interpretación, ejecución o terminación de los mismos, renuncian a su domicilio y se someten a los Tribunales de San Salvador.").

El Salvador.[433] As a consequence, the Tribunal lacks jurisdiction under Article 15 of the Investment Law to decide this dispute, because the Mining Law (the relevant secondary law referred to in Article 7.b) of the Investment Law) establishes the exclusive jurisdiction of the Salvadoran courts to resolve mining disputes, thus overriding the general provisions of Article 15 of the Investment Law.[434]

4. A three-year statute of limitations applies to Claimant's claims related to the application for the El Dorado concession

302. Another consequence of the fact that this case proceeds only under the Investment Law of El Salvador is that Pac Rim's claims related to the Ministry of Environment's failure to grant it an environmental permit for exploitation are time-barred under the relevant statute of limitations in Salvadoran law. Pursuant to Salvadoran law, a claimant's right to initiate an action ends if the claimant does not initiate its claim within the applicable statute of limitations, and the period runs from the date of the alleged unlawful act.[435] As described in Section VI.B.2 below, by the time Pac Rim initiated this arbitration in April 2009, its claim that the Ministry of Environment unlawfully failed to grant the environmental permit necessary for it to obtain the exploitation concession was time-barred.

B. Pac Rim has not alleged any facts and has not made any arguments in support of a claim of breach of Articles 5 or 6 of the Investment Law

303. Claimant has invoked the Salvadoran Investment Law and must make its claims based on alleged violations of that law. In its 333-page memorial, however, Pac Rim only mentions in passing the articles of the Investment Law that it alleges El Salvador has breached. Although Pac Rim made a passing reference to a breach of Articles 5 (equality for all investors)

[433] Tercero Expert Report, paras. 70-82.

[434] This conclusion is further explained in the additional objection to jurisdiction included in subsection VI.B.1 below.

[435] Civil Code, Arts. 2231(2), 2253, 2083 (RL-123) .

and 6 (non-discrimination),[436] Pac Rim has not presented any evidence and has not made any argument that it has been treated less preferentially than domestic investors, or that it has been discriminated upon based on nationality, residence, race, gender, or religion.

304. And it could not be any other way. In fact, the record demonstrates the exact opposite. Salvadoran Government officials went out of their way to try to help Pac Rim complete its application. They even sought a change in the law to assist Pac Rim with one requirement it could not meet, and waited while Pac Rim tried to complete other requirements. Therefore, Pac Rim cannot possibly make an argument of breach of Articles 5 or 6 of the Investment Law, and any purported claim under these two articles must be dismissed.

C. The facts alleged by Pac Rim cannot support a claim of breach of Article 8 of the Investment Law

305. Under Salvadoran law, expropriation is the taking of a property right by the State for a legally justified reason with payment of fair compensation.[437] As El Salvador's legal experts explain, for an expropriation to take place, a specific property right must be taken away.[438] Pac Rim was not deprived of any property rights by El Salvador and therefore cannot make a claim for expropriation under Article 8 of the Investment Law.

306. First, with regard to the properties that Pac Rim does own, Pac Rim still owns them and El Salvador has not deprived Pac Rim of its title to those properties. Second, with regard to alleged mining rights, Article 10 of the Mining Law clearly states that only mining

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[436] Memorial, para. 659.

[437] Tinetti Expert Report, para. 38 ("expropriación de conformidad a lo que se entiende por ésta nuestra Constitución . . . implica privar coactivamente a una persona de la titularidad de un bien o de un derecho") ["expropriation in accordance with what the term means under our Constitution . . . would require a coercive deprivation of the ownership of property or of a right"]; Ayala/Fratti de Vega Expert Report, Section 10.1.a.

[438] Ayala/Fratti de Vega Expert Report, Section 10.1.a.

exploitation concessions are real property rights.[439] Pac Rim did not have an exploitation concession, or even a "vested right" to a concession. A hope to obtain a concession is not something that can be expropriated.[440] Moreover, as explained by Salvadoran Constitutional law expert, Dr. Tinetti, if Pac Rim disagreed with the Ministry's processing of its concession application, it should have brought its claim to the Salvadoran Supreme Court under the Law of Administrative Litigation Jurisdiction.[441] Pac Rim first failed to comply with the requirements of the Mining Law to have its application for an exploitation concession even admitted for consideration.[442] Pac Rim then chose not to fix its application and not to seek recourse in El Salvador when said application was not admitted. It did not take the appropriate steps to establish rights and protect its interests under the laws of El Salvador. As a result, Pac Rim cannot ask this international arbitration Tribunal constituted under the Investment Law of El Salvador to compensate it for an alleged expropriation of its (non-existent) "right" under Salvadoran law to a concession.

307. Finally, because the mineral deposits in the subsoil belong to the State, Pac Rim does not, and never did, have property rights to the mineral deposits it claims. The Constitution

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[439] Mining Law, Art. 10 (RL-7(bis)) ("la concesión es un derecho real e inmueble transferible por acto entre vivos, previa autorización del Ministerio; por consiguiente, la aludida concesión es susceptible de server como garantía en operaciones mineras.") ["a concession is a real property right that is transferrable by an *inter vivos* act, with the prior authorization of the Ministry; consequently, said concession is capable of being a security for mining operations."].

[440] Tercero Expert Report, para. 21. *See also* Ayala/Fratti de Vega Expert Report, § 10.3.c ("menos aún podría sustentarse la exigencia de lucro cesante, pues como se ha enfatizado PRES no tenía un derecho como tal, sino una simple esperanza de obtener la concesión, no contando con parámetros objetivos que otorguen certeza de ganancias futuras no concretadas. Es claro que no pueden indemnizarse las simples esperanzas.") ["Much less can a demand for lost profits be sustained, since, as has been emphasized, PRES had no right *per se*, but a mere hope of obtaining the concession, without having met the objective parameters to ensure the certainty of future earnings not yet attained. It is clear that one cannot compensate simple hopes."].

[441] Tinetti Expert Report, paras. 42-44.

[442] Section II.A above.

of El Salvador, Article 7.b) of the Investment Law, and Article 2 of the Mining Law, all in effect before Pac Rim made its investment in El Salvador, all declare that the mineral deposits located in the subsoil belong exclusively to the State. Article 103 of the Constitution of El Salvador provides that "[t]he subsoil belongs to the State, which may grant concessions for its exploitation."[443] Accordingly, Article 7 of the Investment Law provides that "[i]n accordance with the provisions of the Constitution of the Republic and secondary laws, investments will be limited in the following activities and terms … b) the subsoil belongs to the State, which may grant concessions for its exploitation."[444] And Article 2 of the Mining Law provides that "[a]ll mineral deposits existing in the subsoil of the territory of the Republic, regardless of origin, form and physical state, are the property of the State . . . ."[445] The Salvadoran administrative law experts confirm: "The deposit is a good in the public domain, belonging to the State, not susceptible to private ownership."[446]

308. Thus, Pac Rim's argument that it somehow obtained property rights to deposits in the subsoil as an explorer is manifestly contrary to Salvadoran law. As already described, Article 10 of the Mining Law only grants a real property right (the right to exploit mineral deposits but not ownership) to the holder of an exploitation concession, and an explorer only has

[443] Constitution, Art. 103 (RL-121) ("El subsuelo pertenece al Estado el cual podrá otorgar concesiones para su explotación.").

[444] Investment Law, Art. 7 (RL-9(bis)) ("De conformidad a lo establecido en la Constitución de la República y en las leyes secundarias, serán limitadas las inversiones en las actividades y términos siguientes: . . . b) El subsuelo pertenece al Estado, el cual podrá otorgar concesiones para su explotación").

[445] Mining Law, Art. 2 (RL-7(bis)) ("Son bienes del Estado, todos los yacimientos minerales que existen en el subsuelo del territorio de la República, cualesquiera que sea su origen, forma y estado físico").

[446] Ayala/Fratti de Vega Expert Report at 18 ("El yacimiento es bien de dominio público del Estado, no susceptible de propiedad privada.").

a right to apply for a concession.[447] Pac Rim never held anything more than exploration licenses. Consequently, Pac Rim cannot make any claim for expropriation for deposits located in the subsoil.

309. Although Pac Rim has no claims of expropriation, direct or indirect, it is also important to note that, as Salvadoran Constitutional law expert Dr. Tinetti explains in his Report, there is no concept of indirect expropriation in Salvadoran law.[448] Without a deprivation of a property right, there can be no expropriation under Salvadoran law.[449] Thus, a claim under Article 8 of the Investment Law must be based on property rights having been taken away. Because Pac Rim did not have a concession, a right to a concession, or a property right to the mineral deposits it claims, it cannot support a claim of breach of Article 8 of the Investment Law.

310. As a result, Pac Rim has no recognizable claims under the Salvadoran Investment Law.

D. Pac Rim would not have been able to sustain a claim for expropriation under international law in any event

311. As explained in Section IV.A, Pac Rim's claims in this arbitration must be assessed pursuant to Salvadoran law because the case is based solely on the Investment Law of El Salvador and there is no relevant bilateral or multilateral investment treaty. Because the Investment Law is the only source of jurisdiction, Claimant's claims must be based on alleged violations of that law, and not on other sources. But even if Pac Rim could bring a claim for expropriation under customary international law, such a claim would also fail.

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[447] *See* Section II.A.1.a above; Ayala/Fratti de Vega Expert Report, § 3; Tinetti Expert Report, § 2.2; Otto Expert Report at 10.

[448] Tinetti Expert Report, paras. 33-40.

[449] Tinetti Expert Report, para. 38.

1. Pac Rim had no valid mining rights capable of being expropriated under international law

312. The first step in assessing the existence of an expropriation under international law is to "identify the assets allegedly expropriated."[450] Indeed, it is axiomatic that "[t]here cannot be an expropriation of something to which the Claimant never had a legitimate claim."[451] Thus, the distinguished *Generation Ukraine v. Ukraine* tribunal held that "[s]ince expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred."[452]

313. Under international law, this "meticulous" assessment of the existence of proprietary rights claimed by a claimant is governed by the municipal law of the host state.[453] As Professor Zachary Douglas explains: "[i]nvestment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognizable by the municipal law of the host state. General international law contains no substantive rules of

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[450] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009, para. 442 (**Authority RL-133**). *See also Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, para. 8.8 (CL-193) ("Since there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place, the legal materialisation of the Claimant's alleged investment is a fundamental aspect of the merits in this case"); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, para. 320 (**Authority RL-134**) ("the Tribunal is of the view that, in these circumstances the Claimant has not proven the juridical fact on which the second limb of its expropriation case is based, i.e., that it had a clear right to recover the purchase price in that proceeding such that the court's failure to so order constituted an expropriation.").

[451] *Generation Ukraine v. Ukraine*, para. 22.1 (CL-193).

[452] *Generation Ukraine v. Ukraine*, para. 6.2 (CL-193) (emphasis added).

[453] Zachary Douglas, The International Law of Investment Claims, para. 101 (2009) (RL-25); Christopher Dugan et al., Investor-State Arbitration 441 (2008) (**Authority RL-135**) ("Whether an investor possesses a vested property right or a legitimate expectation regarding a particular right (contractual or otherwise) may, at least in the first instance, turn on the legal status of that property under national law.").

property law."[454] Consequently, "[w]henever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property."[455]

314. Here, Claimant fails to show this *sine qua non*. It argues that a "*de facto* mining ban" allegedly imposed by El Salvador constitutes an unlawful expropriation of its right to a gold and silver exploitation concession.[456] But Claimant can point to no concession granting it such rights. Instead, Claimant tries to concoct a "right" to the exploitation concession on the basis of a hodgepodge of reasons, including the fact that it submitted an application for the exploitation concession; its prior exploration in the area for which it seeks the exploitation concession; and its discovery of mineable ore deposits.[457] Claimant even attempts to resuscitate repealed mining laws dating back to 1881 and 1922 in arguing that it had a right to the exploitation concession.[458] As explained at length in Section II above, none of these arguments are availing. El Salvador cannot have expropriated Claimant's right to the exploitation concession under international law because Claimant has failed to show a legitimate right to the exploitation concession on the basis of Salvadoran law.

315. As also explained in Section II, Claimant did not acquire any valid rights to the mineral deposits through exploration licenses. Pursuant to Article 19 of the Mining Law, Claimant could not acquire new exploration rights to areas of the expired licenses in Guaco, Huacuco, and Pueblos after the original El Dorado exploration licenses expired in January 2005. Claimant also held no right to explore in Santa Rita because its original exploration license

[454] Douglas, para. 101 (RL-25).

[455] Douglas, para. 102 (RL-25).

[456] Memorial, para. 633 and Section IV.

[457] Memorial, para. 449.

[458] Memorial, paras. 457-468.

expired in July 2009 and it failed to submit a timely application for the extension of those rights in accordance with Article 27 of the Mining Law and Articles 11 and 17 of the Mining Regulations. It was also impossible for Claimant to acquire exploration rights in Zamora and Cerro Colorado because it never even applied for those rights. In any case, even if Claimant had somehow managed to show that it had acquired valid exploration licenses, these could not form the basis of an expropriation claim under international law because exploration licenses do not constitute property rights in mineral deposits under Salvadoran mining law.[459]

2. Pac Rim has failed to establish that El Salvador's regulatory conduct constitutes expropriation under international law

316. Even if Claimant had acquired valid rights to mineral deposits in El Salvador, the Government's moratorium in the issuance of environmental permits for metallic mining does not constitute expropriation under international law.[460] By asserting that El Salvador's moratorium constitutes an expropriation, Claimant asks the Tribunal to consider whether this governmental regulatory action amounts to an indirect expropriation. Indirect or regulatory expropriation under international law refers to the fundamental deprivation of a property's use as a result of State action.[461] Since the only difference between direct and indirect expropriation under international law is that there is no formal transfer of title or control in the property under an

[459] Section II.B.4 above.

[460] The nature and reasons for El Salvador's moratorium are explained above in Section III. In the present section, El Salvador cites cases for their discussion of the factors used to determine whether or not there has been an expropriation under international law. El Salvador does this only to show that Claimant could not even show a breach under such standards. El Salvador, however, does not express any views about these cases' findings on the content of a State's obligations under customary international law regarding issues other than those specifically referred to in this section.

[461] *See* Ian Brownlie, Principles of Public International Law 508-09 (6th ed. 2003) (**Authority RL-136**) (explaining that expropriation connotes deprivation of a person's use and enjoyment of his property).

indirect expropriation, an exercise of legitimate non-discriminatory police power that merely reduces the value of an investment is not an expropriatory act.[462]

317. International arbitration tribunals have set out three considerations for assessing whether regulatory conduct constitutes indirect expropriation.[463] The fact-specific inquiry considers (a) the economic impact on the investor of the allegedly expropriatory measure; (b) the extent of the measure's interference with the "reasonable investment-backed expectations" of the investor; and (c) the character of the measure. As shown below, an assessment of these three considerations demonstrates that El Salvador's moratorium does not constitute an expropriation of Claimant's rights.

a) The moratorium did not destroy the economic value of Claimant's investment

318. The first inquiry into whether government regulation amounts to expropriation asks to what degree the investment's economic value was diminished by the regulation. As the *CMS Gas Transmission v. Argentina* tribunal put it, the essential question is "to establish whether the enjoyment of the property has been effectively neutralized."[464] Unless a claimant can show that the State's regulation destroyed or radically diminished the economic value of its

[462] *See* Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 Stan. J. Int'l L. 373, 399 (1985) (**Authority RL-137**).

[463] Vaughan Lowe, *Regulation or Expropriation?* 55(1) Current Legal Problems 447, 461 (2002) (**Authority RL-138**); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. of Int'l Economic L. 1037, 1051 (2010) (**Authority RL-139**).

[464] *See CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 262 (**Authority RL-140**); *Ronald S. Lauder (United States) v. The Czech Republic*, UNCITRAL, Final Award, Sept. 3, 2001 (CL-168).

investment to such an extent that it, for all practical purposes, confiscated the property, no indirect expropriation can be found.[465]

319. The *Glamis v. United States* tribunal, for example, deemed this factor dispositive in finding that a series of governmental delays and denials of environmental permits for a gold mining project in the United States were not expropriatory.[466] In the tribunal's opinion, the initial step in assessing a claim for indirect expropriation analyzes whether "the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto…had ceased to exist."[467] After finding that the claimant's project had retained a value that exceeded $20 million after the permit delays and denial, the tribunal held that "[i]n light of this significantly positive valuation…the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Claimant's investment."[468]

320. Here, Claimant has offered no indication that the moratorium destroyed or "radically" diminished the value of its investment in El Salvador. Claimant has retained full control of its investment during El Salvador's moratorium.[469] This is evident from the fact that OceanaGold acquired the 80% of Claimant's shares it did not already own in November 2013 in a share swap equivalent to a sum of C$10.2 million.[470] The corresponding amount in US dollars

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[465] *Pope & Talbot Inc. v. The Government of Canada*, NAFTA, Interim Award, June 26, 2000, para. 102 (**Authority RL-141**); *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, Nov. 15, 2004, para. 126 (RL-40); *Glamis Gold, Ltd. v. United States of America,* UNCITRAL, Award, May 14, 2009, paras. 357, 360 (**Authority RL-142**).

[466] *Glamis Gold v. USA*, paras. 357, 360 (RL-142).

[467] *Glamis Gold v. USA*, para. 357 (RL-142).

[468] *Glamis Gold v. USA*, para. 536 (RL-142).

[469] *See* Dugan et al. at 457 (RL-135).

[470] OceanaGold, Pacific Rim Mining Acquisition Presentation, Oct. 2013 (**Exhibit R-141**); OceanaGold and Pacific Rim Mining Corp., Media Release, "OceanaGold and Pacific Rim Mining Complete Plan of

was US$9.6 million on Nov. 27, 2013 (for 80% of the shares), which implies a value of US$12.0 million for 100% of the shares. On that occasion, OceanaGold described the El Dorado Project as "an established high grade gold-silver resource," which along with "Pacific Rim's stable of exciting exploration targets in El Salvador provides OceanaGold with a first-mover advantage into an underexplored but geologically highly prospective region."[471] Mick Wilkes, Managing Director & CEO of OceanaGold noted in particular:

> I am very pleased to welcome Pacific Rim shareholders and employees to OceanaGold. I believe that our company strengths developed over the past twenty-three years in New Zealand and the Philippines provides for a strong platform to begin the successful journey with the many stakeholder groups in El Salvador. Our Company has a long and successful track record of operating gold mines in partnership with local communities in a safe and sustainable manner and we look forward to working with our key stakeholders in El Salvador to unlock the significant opportunity that exists at El Dorado for the people of El Salvador.[472]

321. Clearly, Pac Rim's investment in El Salvador still had value as recently as November 2013. When it entered into the agreement with OceanaGold, Pac Rim still had the land property rights it had acquired and the hope of being able to obtain an exploitation concession in the future. Because the moratorium did not destroy the value of Claimant's investment, the claim that it amounted to expropriation fails as a matter of law.

b) Claimant had no investment-backed reasonable expectation to expect that El Salvador would not reform its environmental and mining laws

322. The second factor at issue in an alleged indirect expropriation pertains to a claimant's reasonable investment-backed expectation that its investment would not be disturbed

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Arrangement," Nov. 27, 2013 ("OceanaGold and Pac Rim Complete Plan of Arrangement") (**Exhibit R-142**).

[471] OceanaGold and Pac Rim Complete Plan of Arrangement (R-142).

[472] OceanaGold and Pac Rim Complete Plan of Arrangement (R-142).

as a result of the State's regulatory actions.[473] Whether or not a State has furnished promises or specific assurances to that effect has proven dispositive for several tribunals.

323. In *Methanex v. United States,* for example, the tribunal established that as a matter of general international law, a non-discriminatory regulation for a public purpose is neither compensatory nor compensable "unless specific commitments had been given by the regulating government to the then putative investor contemplating investment that the government would refrain from such regulation."[474]

324. The *Feldman v. Mexico* tribunal dismissed an indirect expropriation claim on the grounds that the claimant had failed to show that he had made his investment in reliance on promises of the Mexican government that were subsequently breached. Even though the tribunal described Mexico's regulatory actions as "*arbitrary*, " "*inconsistent*, " "*ambiguous and misleading, perhaps intentionally so in some instances*," and without "*transparency*," it did not characterize them as expropriatory under international law because Mexico had not specifically assured the claimant that it would not institute the regulatory measures that claimant complained of.[475]

325. For the *Total S.A. v. Argentina* tribunal, the fact that Argentina had not signed a stabilization agreement was dispositive in its holding that the regulatory action complained of

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[473] *See, e.g. Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 (**Authority RL-143**).

[474] *Methanex Corporation v. United States of America*, NAFTA, Final Award, Aug. 3, 2005, Part IV, Chapter D, para. 7 (RL-20) (emphasis added).

[475] *See Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/01, Award, Dec.16, 2002, paras. 132-133, 149 (**Authority RL-144**). The *PSEG v. Turkey* tribunal applied a similarly strict standard, holding that "legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed." *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 2007, para. 241 (CL-86).

did not amount to an expropriation.[476] The absence of such an agreement promising to maintain certain regulatory conduct militates against the finding that a claimant had legitimate expectations that laws or regulations would not change or be more stringently applied.[477]

326. In this case, this factor is even stronger. Claimant had no reasonable investment-backed expectation – and much less a right – to an environmental permit and an exploitation concession. Claimant did not have a legal right to demand that El Salvador ignore its laws or change its laws to accommodate Pac Rim's application. The moratorium is thus not an expropriation under international law.

c) The regulatory nature of El Salvador's moratorium supports a finding of no indirect expropriation

327. The final factor that international tribunals have considered in assessing whether a state has indirectly expropriated an investor's rights is the character or nature of the conduct complained of, including whether it featured physical force.[478] Given the necessary balance between the protection of foreign investments and domestic public welfare, regulatory policy is typically not considered to constitute expropriation. As Professor Andrew Newcombe has explained, "[p]roperty is a social institution that serves social functions" and thus cannot be used

[476] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, Dec. 27, 2010, para. 197 (**Authority RL-145**).

[477] *See* Dugan et al. at 440 (RL-135).

[478] *Methanex Corp. v. USA*, Part IV, Chapter D, para. 7 (RL-20); *Feldman v. Mexico*, para. 106 (RL-144); *Saluka Investments BV v. The Czech Republic,* UNCITRAL, Partial Award, Mar. 17, 2006, para. 255 (RL-74); *Lauder v. Czech Republic*, para. 198 (CL-168); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award on the Merits, Nov. 13, 2000, para. 281 (CL-230); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, para. 119 (CL-197); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, para. 603 (**Authority RL-146)**.

in a manner detrimental to public order and safety without the possibility that the State would interfere and regulate such behavior.[479]

328. International tribunals have refused to find that a State executing regulatory power in a *bona fide* and non-discriminatory manner expropriated an investor's rights.[480] The *Tecmed v. Mexico* tribunal, for example, held that it is "undisputable" that "the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever."[481]

329. Similarly, the *Saluka v. Czech Republic* tribunal held that "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[482] So, too, did the *Lauder v. Czech Republic* tribunal.[483]

330. Claimant has failed to demonstrate that a moratorium on metallic mining in El Salvador would represent the rare circumstances in which regulatory conduct should be deemed expropriatory. First, Claimant had no rights that could have been affected by a moratorium. Second, any mining rights Claimant obtained or hoped to obtain in El Salvador were to be

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[479] Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, Transnational Dispute Management, July 2007, at 13 (**Authority RL-147**).

[480] *See*, *e.g.*, *Feldman v. Mexico*, para. 106 (RL-144); *Saluka v. Czech Republic*, para. 255 (RL-74); *Lauder v. Czech Republic*, para. 198 (CL-168); *S.D. Myers v. Canada*, para. 281 (CL-230); *Tecmed v. Mexico*, para. 119 (CL-197); *CME v. Czech Republic*, Partial Award, para. 603 (RL-146). *See also* Muthucumaraswamy Sornarajah, The International Law on Foreign Investment 385 (2d ed. 2004) (**Authority RL-148**) ("The starting point must always be that the regulatory interference is presumptively non-compensable.").

[481] *Tecmed v. Mexico*, para. 119 (CL-197) (emphasis added).

[482] *Saluka v. Czech Republic*, para. 255 (RL-74).

[483] *Lauder v. Czech Republic*, para. 198 (CL-168).

exercised in accordance with the State's environmental laws and regulations. As discussed in Section III above, the very first article of the Salvadoran Constitution establishes that "it is the obligation of the State to secure for the inhabitants of the Republic, the enjoyment of liberty, health, culture, economic well-being and social justice."[484] The Constitution also notes that it is "the State's duty to protect natural resources, as well as the diversity and integrity of the environment, to guarantee sustainable development."[485]

331. As Claimant was well aware, concerns about metallic mining in general and its activities in particular were a source of great controversy and social tension in El Salvador. As discussed in Section III, there was concern that the Ministry of Environment was ill-equipped to assess and manage the environmental havoc that gold mining activities were likely to wreak. In this context, El Salvador's moratorium was an appropriate, non-discriminatory, exercise of police power undertaken out of a *bona fide* concern regarding the impact of metallic mining activities in El Salvador and the Constitutional requirement that the Government minimize and mitigate any potential harm arising from such activities. It does not, therefore, constitute expropriation under international law.

332. In conclusion, we note that international tribunals have repeatedly held that investment arbitrations are not intended to protect investors from commercial risk inherent in their business ventures or to bail out an investor from its poor judgment. The *Waste Management v. Mexico* tribunal, for example, refused to make the respondent state compensate for the failure of an investor's flawed business plan:

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[484] Constitution, Art. 1 (RL-121) ("es obligación del Estado asegurar a los habitantes de la República, el goce de la libertad, la salud, la cultura, el bienestar económico y la justicia social").

[485] Constitution, Art. 117 (RL-121) ("Es deber del Estado proteger los recursos naturales, así como la diversidad e integridad del medio ambiente, para garantizar el desarrollo sostenible.").

> it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.[486]

333. Here too, El Salvador should not be made to compensate Pac Rim for its failure to realize its El Dorado Project. This is so not only because the moratorium was legitimate regulatory conduct, as demonstrated in Section III, but also because Pac Rim had no rights that could have been affected by the moratorium, as demonstrated in Section II. Having taken the calculated risk to expand the scope of its project beyond its ability to develop it in accordance with the limits of Salvadoran law in the hopes that El Salvador would change its laws to accommodate Claimant, Claimant alone must bear the consequences of its failure to obtain the rights required to develop its project. Claimant would not be able to support a claim of expropriation even if this Tribunal were asked to decide such a claim under international law.

[486] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB/AF/00/3, Award, Apr. 30, 2004, para. 177 (RL-76). *See also Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000, para. 64 (**Authority RL-149**) ("Bilateral Investment Treaties are not insurance policies against bad business judgments."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, para. 178 (RL-46) ("BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen.").

V. DAMAGES

A. Pac Rim is not entitled to compensation

334. Despite the inherent factual and legal weaknesses in Pac Rim's case, Claimant asks for damages in excess of $300 million. Factually, El Salvador has already shown that Pac Rim had no right to an exploitation concession or to the exploration areas it claims because it failed to meet the requirements under the Mining Law. Accordingly, Claimant has not established that the moratorium destroyed or radically diminished the value of Claimant's investment after March 2008. As a matter of law, Claimant has completely failed to establish that El Salvador breached its obligations under domestic law or rules of international law (the latter of which is inapplicable to this matter). It follows that Claimant is not entitled to any compensation. While it is unnecessary to proceed any further under these circumstances, for the sake of completeness El Salvador will set forth further reasons why Claimant does not have any right to compensation under Salvadoran law or general principles of international law.

335. In the sections that follow, El Salvador will show that: (1) Claimant has failed to show a causal link between any unlawful conduct by El Salvador and any harm to Pac Rim; (2) the applicable law in this arbitration is Salvadoran law which provides a basis for compensation; (3) the valuation methods used by Pac Rim's valuation experts are incorrect and have been implemented in a seriously flawed manner; and (4) Claimant is not entitled to pre-judgment interest.

1. There is no causal link between El Salvador's conduct and any harm to Pac Rim, and therefore Pac Rim cannot be compensated for any damages in this arbitration

336. As El Salvador has explained, these proceedings are governed by Salvadoran law. Claimant's attempt to invoke inapplicable general principles of international law must fail. But even if these rules were applicable, they would not provide a basis for its claim for

compensation. Under international law, a State is only under an obligation to make reparation for damages *caused* by an internationally wrongful act.[487]

337. Claimant appears to assume (without any explanation) that the requisite causal link has been met.[488] However, Claimant has not proven that its alleged damages were caused by unlawful acts of El Salvador.

338. The determination of causation is both a factual and a legal inquiry.[489] It is a factual analysis in that a claimant must establish that the respondent's unlawful act actually caused its damages.[490] While factual proximity is necessary, it is not sufficient to meet the

[487] Article 31(1) of the ILC's Draft Articles on the Responsibility of States contemplates this fundamental principle: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." The Commentary explains that "[t]his phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act." *Report of the International Law Commission on the work of its fifty-third session*, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) ("ILC Draft Articles"), Comment (9) to Article 31, at 92 (**Authority RL-79(bis)**). *See also* Bin Cheng, General Principles of International Law as Applied by Courts and Tribunals 253 (2006) (**Authority RL-150**) ("… the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act.").

[488] Memorial, para. 664.

[489] Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice 171-172 (2011) (**Authority RL-151**). *See also* Sergey Ripinsky and Kevin Williams, Damages in International Investment Law 135-136 (2008) (**Authority RL-152**).

[490] *See e.g.*, *Otis Elevator Company. v. The Islamic Republic of Iran and Bank Mellat (formerly Foreign Trade Bank of Iran)*, Award No. 304-284-2, 14 Iran-US Claims Tribunal Rep. 283 (1987) , para. 47 (1987) (**Authority RL-153)** ("the Tribunal holds that a multiplicity of factors affected the Claimant's enjoyment of its property rights in Iran Elevator, among them its position as a minority shareholder in an inactive company and the changed circumstances of the Iranian elevator market. However, the Tribunal is not convinced that the Claimant has established that the infringement of these rights was caused by conduct attributable to Iran…"). *See also* Case Concerning Elettronica Sicula S.p.A. (USA v. Italy), Judgment of 20 July, 1989 I.C.J. Reports 15, para. 101 (**Authority RL-154**) (concluding that "[t]here were several causes acting together that led to the disaster to ELSI. No doubt the effect of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.").

requirement of causation. The legal aspect of causation imposes limits on damages where the injury is considered too unforeseeable, indirect, or remote from the harm.[491]

339. Accordingly, a State may be internationally responsible without necessarily engaging an obligation to pay compensation due to the absence of causation.[492] The recently published decision of *Nordzucker v. Poland* illustrates such a situation. The dispute arose out of Nordzucker's failure to acquire two Polish sugar companies through a privatization process. In the second Partial Award, the tribunal decided that Poland violated the Germany-Poland BIT by failing to finalize the sales "within a reasonable time and uselessly protracting [the process]" and by not "communicat[ing] transparently with the candidate investor during the last period of the pre-contractual phase" of the sales procedure.[493] Nordzucker claimed damages of €153.7 million arising from a "set-back of at least half of a year," "costs for the useless follow-up of the process" and its "loss of the opportunity."[494] The tribunal rejected the entire claim, stating:

> Such presentation of Norducker's damages assumes that Nordzucker would have acquired the two Groups but for Poland's infringement of the BIT. It also assumes that the sale of Gdańsk and Szczecin Group to Nordzucker would have gone through in any event and that no event, other than the breach of the BIT which

[491] *Hoffland Honey Co. v. National Iranian Oil Co.*, Award No. 22-495-2, 2 Iran-US Claims Tribunal Rep. 41 (1983), at 2 (1983) (**Authority RL-155**) ("we think it is clear from the pleadings and the evidence attached thereto that proximate cause has not been alleged. The sales of oil were a 'cause' of Hoffland's loss only in the sense that had there been no oil, and thus no chemicals, the loss would not have occurred. The sales were thus a 'cause, but not the proximate cause.'"). *See also SD Myers Inc. v. Canada*, UNCITRAL, Second Partial Award, Oct. 21, 2002, para. 140 (CL-236).

[492] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, para. 189 (**Authority RL-156**) ("there is no general rule requiring damage as a constituent element of an international wrong giving rise to State responsibility."). *See also Biwater Gauff Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, paras 779, 787 (RL-35) ("Compensation for any violation of the BIT…will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by BGT.").

[493] *Nordzucker v. The Republic of Poland*, UNCITRAL, Third Partial and Final Award, Nov. 23, 2009 (**Authority RL-157**).

[494] *Nordzucker v. Poland*, para. 39 (RL-157).

> the Arbitral Tribunal found Poland to have committed, could have caused the sale to Nordzucker to fail.
>
> These assumptions are inaccurate...[495]

340. The requisite causal connection was missing in that case. Nordzucker was unable to prove it would have acquired the companies in the absence of Poland's breach if for example it had increased the price of its offer. The tribunal concluded that "Poland had no legal obligation to sell these Groups to it and was free to refuse its consent to the sale or to the investment. There having been no investment in these two Groups, Nordzucker cannot claim damages for the loss of those investments."[496]

341. Similarly, too many unsubstantiated assumptions "destroys the causality between the breach committed by the State and the loss of the alleged future cash flows."[497] In the *Al-Bahloul* case, the tribunal had found Tajikistan liable under the Energy Charter Treaty for failing to ensure the issuance of licenses pursuant to four hydrocarbon exploration agreements. Nevertheless, no compensation was found to be owing due to insufficient ties between the breaches and the alleged damages:

> Claimant asks the Tribunal to accept the assumption that he would have been able to acquire financing for the exploration (but he had no definite offer of financing, just expressions of interest), that upon exploration he would have found hydrocarbons (although the probabilities were low and there is no evidence that any other company seems to have found hydrocarbons so far) and that he would have been able to exploit and sell the oil (although he had no proven experience in this field.)[498]

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[495] *Nordzucker v. Poland*, paras. 48-49 (RL-157).

[496] *Nordzucker v. Poland*, para. 60 (RL-157).

[497] *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. 064/2008, Final Award, June 8, 2010, para. 96 (**Authority RL-158**).

[498] *Al-Bahloul v. Tajikistan*, para. 95 (RL-158) (emphasis in original).

342. As described in Section II, none of the losses Pac Rim claims in relation to the six mineral deposits and two early exploration areas can be traced back to any unlawful conduct of El Salvador. But even if for the sake of argument El Salvador committed a wrongful act, there is no factual causation between Pac Rim's alleged damages and any act of El Salvador. The alleged wrongful act complained of by Claimant is the alleged announcement of a moratorium on mining by President Saca in March of 2008. Claimant has not and cannot establish any causal link between President Saca's press statement and any injury to Claimant. It must be recalled that Claimant now admits that it was specifically told of the moratorium based on the precautionary principle on May 7, 2007 and thus admits that any alleged injury from that moratorium necessarily predates Claimant's self-imposed prohibition on making any claims for damages for acts prior to March 2008. More fundamentally, regardless of President Saca's alleged statement to the press in March 2008, the unapproved EIA, and the moratorium, Pac Rim still lacked valid mining rights to all the deposits for reasons unrelated to any alleged act by El Salvador. First, the exploitation concession application had not been granted due to Claimant's failure to comply with at least two requirements contained in Article 37.2 of the Mining Law as well as failing to acquire an environmental permit. Thus, Claimant had no rights to the Minita deposit or any other deposits in the concession application area. In addition to the incomplete nature of Claimant's application, the Pre-Feasibility Study only purported to justify mining the Minita deposit. The other deposits (Balsamo, South Minita and Nueva Esperanza) had either not been discovered or sufficiently drilled to be included in the application. Claimant had no right to further explore in the application area and no right to any deposits discovered through illegal exploration. Second, the Coyotera and Nance Dulce deposits were within the area of the original exploration licenses that had expired on January 1, 2005 and therefore neither Pac Rim nor an

affiliated company could legally acquire exploration licenses covering the same areas under the Mining Law. Third, Claimant allowed its exploration license to Santa Rita to lapse in 2009 without renewing it. Fourth, Pac Rim never acquired any rights to Zamora/Cerro Colorado. Simply put, El Salvador cannot have caused damage to rights Pac Rim did not possess.

343. In addition to the complete lack of mining title, Claimant, as a matter of law, never possessed a compensable real property right in the mineral deposits according to Salvadoran law. According to El Salvador's mining law expert, James Otto, the Constitution, Mining Law and Regulations provide that ownership of minerals in the ground remain with the State.[499] The concession holder, as distinguished from the holder of an exploration license, has a property right to extract minerals from the underground deposits. Pac Rim never obtained an exploitation concession to begin the extraction of minerals and thus never had property rights of any kind related to the mineral deposits in El Salvador. But even if Claimant held a valid exploitation concession, Pac Rim would still not own the mineral deposit in the subsoil. Because Claimant's claims to injury are based on an alleged property right to mineral deposits in the subsoil, El Salvador could not have caused the damage claimed by Pac Rim. Claimant cannot be compensated for the alleged loss of property that it did not own or that it could never legally own.

344. Pac Rim's failure to establish a legal right to the deposits severs any possible causal link between the alleged harm and the damages claimed. To award damages to Claimant, the Tribunal would have to make several unreasonable assumptions that are either contrary to Salvadoran law or to actual events that have transpired. For example, Claimant would have had to have explored, completed a Feasibility Study, acquired the surface rights over the requested

[499] Otto Expert Report at 8-9. *See also* Tinetti Expert Report, paras. 8, 21, 31-32; Tercero Expert Report, para. 68; Ayala/Fratti de Vega Expert Report at 9, 33.

concession area and completed the necessary studies to remedy the deficiencies in its EIA to even claim a property right to exploit the Minita, South Minita, Balsamo, and Nueva Esperanza deposits. Even then, Pac Rim's rights would have been limited to the minerals exploited. If in this hypothetical world Pac Rim had actually met the requirements to obtain the concession it sought (which at the time its officers stated was "nearly (if not totally) [an] impossible task"),[500] there are still a large number of speculative events that would have had to occur for Claimant to have any rights to minerals. To begin extraction, Pac Rim would have had to secure financing, procure bids and hire contractors, order machinery, and construct the plant and surrounding infrastructure as well as obtain permits by the Government. Similarly, Claimant would have had to apply for renewals for Santa Rita within the appropriate time to explore the area but this would still not have conferred any property rights. Furthermore, assuming any right to the Coyotera and Nance Dulce deposits after the expiration of the original exploration licenses in January 2005 would violate Salvadoran law. Claimant would also have had to wind back the clock to legally acquire rights to Zamora/Cerro Colorado. And even if these licenses had been legally acquired, there is no guarantee that economically mineable minerals would have been found after exploring those areas. There are simply too many unsubstantiated assumptions associated with Pac Rim's claim. As the *Nordzucker* and *Al-Bahloul* cases recognize, even if a tribunal determines a breach of a legal obligation has occurred, it cannot award damages on the basis of a speculative claim.

345. In sum, the lack of factual causation warrants the rejection of Pac Rim's damages claims. Claimant has no valid rights to the deposits and has failed to allege any wrongdoing by

[500] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

El Salvador. Naturally, having failed to prove factual causation, Claimant has failed to establish legal causation. Without causation, there can be no entitlement to damages.

B. The applicable law on damages

1. Salvadoran law is the applicable law in this arbitration

346. In an earlier phase of these proceedings, the Tribunal rejected Pac Rim's CAFTA-based claims in their entirety. Although the Tribunal kept the door open to claims under El Salvador's Investment Law, Claimant has squandered this opportunity to continue with its case. Instead, Claimant has focused its efforts on re-introducing its failed treaty claims through the guise of customary international law that cannot apply to this case that proceeds only under the Investment Law. Pac Rim's justifications for importing principles of international law are unconvincing, contradictory, and without any basis.

347. To establish the applicability of international law in this arbitration, Pac Rim claims that the parties have not agreed on the application of a substantive law. Not only is this wrong, as El Salvador has already explained above in Section IV.A, but it is also inconsistent with Claimant's assertion that this arbitration is governed by Salvadoran law.[501] Claimant nevertheless attempts to derive support for its tenuous position from Article 42(1) of the ICSID Convention which provides for, in the absence of an agreement between the parties, the application of domestic laws and international law *as may be applicable*.[502] Despite this, Pac Rim claims that the remedies for damages under domestic and international law are consistent in any event.[503]

[501] Memorial, paras. 642-643.

[502] Memorial, paras. 642-643.

[503] Memorial, paras. 643, 654-655.

348. As demonstrated in Section IV.A above, in light of the parties' agreement that Salvadoran law is the applicable law in this arbitration, the Tribunal must apply the laws of El Salvador, including legal principles on damages.

2. Salvadoran law provides a basis for compensation for Claimant's alleged losses

349. Pac Rim seeks damages due to alleged breaches under "the Foreign Investment Law, the Constitution, and general principles of international law."[504] With respect to the Investment Law, Claimant articulates a single breach on the grounds of expropriation,[505] claiming that President Saca's statements reported in the press allegedly announced a ban on mining that effectively prevented the company and its subsidiaries from enjoying their rights.[506] Pac Rim admits that Salvadoran law establishes an obligation to compensate an injured party. At no time does Claimant suggest that Salvadoran laws provide inadequate compensation.

350. As explained by El Salvador's administrative law experts, Ayala Muñoz and Fratti de Vega, the need to provide for fair compensation in the event of an expropriation is recognized under Salvadoran law:

> Therefore, expropriation ***presupposes the existence of a right*** that is adversely affected by the government intervention, that is, the State's decision based on grounds contemplated by the legal system and the prior existence (or subsequent in those cases expressly contemplated in the Constitution and in the Law) of fair compensation.[507]

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[504] Memorial, para. 692.

[505] Paragraph 659 of Claimant's Memorial states "Respondent has acted in a manner contrary to the Investment Law and the Constitution of El Salvador, including under: Article 5 (equal protection), 6 (non-discrimination) and 8 (compensation for expropriation)." Despite this bald assertion, Claimant has not bothered to explain how El Salvador has allegedly violated those standards. *See* Memorial, Section V: Respondent's Breaches.

[506] Memorial, para. 639.

[507] Ayala/Fratti de Vega Expert Report at 47 ("Por tanto, la expropiación ***presupone la existencia de un derecho*** que se ve afectado por la intervención estatal, la decisión adoptada por el Estado con fundamento

Jurisprudence establishes that compensation must be fair, current and full *("justicia, actualidad e integralidad"*). For an expropriation based on a public utility, the Expropriation Law sets a maximum amount of compensation at 125% of the value declared to the tax authorities.[508] In other words, the law provides for compensation at a 25% premium over the declared value of the expropriated property. Damages for lost profits, as Claimant notes, are also available; however, such losses must be foreseeable and reasonably certain ("*previsible con un grado de certeza razonable*").[509] Compensation is, however, limited to the maximum 125% of declared tax value.

351. However, El Salvador's administrative law experts noted that Pac Rim did not have any rights capable of being expropriated. In the absence of a concession, Pac Rim had failed to acquire any property rights. All that existed was the hope of obtaining a concession but this cannot be equated with being granted a concession. That is, a mere hope cannot be expropriated.[510] Therefore, Pac Rim is not entitled to compensation under the laws of El Salvador.

352. Even assuming that Claimant had acquired a concession and the concession had been expropriated, its damages claim is still fundamentally flawed. Pac Rim has quantified its damages based on the estimated amount of minerals contained in the subsoil. Claimant's valuation goes against a basic tenet of the Constitution which declares that the State owns mineral deposits in the subsoil.[511] If its investment had been expropriated, at most Pac Rim would be entitled to 125% of the declared value of the expropriated property, but not the value of

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en una causa prevista por el ordenamiento jurídico y la existencia previa (o posterior en los casos expresamente previstos en la Constitución y en la Ley) de una justa indemnización.") (emphasis in original).

[508] Ayala/Fratti de Vega Expert Report at 51.

[509] Ayala/Fratti de Vega Expert Report at 48.

[510] Ayala/Fratti de Vega Expert Report at 50.

[511] Otto Expert Report, Question 1.

the mineral resources. Furthermore, without an operating mine or a record of production, compensation for lost profits would not be available because such losses are not foreseeable or quantifiable with a reasonable degree of certainty, and would be purely speculative.[512] Rather, Pac Rim would only have been able to recover the amounts legitimately invested that Pac Rim could prove and that were registered as investments with the National Investment Office (ONI) pursuant to Article 17 of the Investment Law.[513]

353. Thus, the laws of El Salvador provide adequate compensation for an expropriation. There is no legal justification or need to resort to general principles of international law. But Claimant simply has no right to compensation because it has no right capable of being expropriated. This fact remains unchanged under international law.

3. Claimant would not be entitled to compensation under general principles of international law

354. Principles of customary international law have no role to play in deciding this dispute. But Claimant's recourse to these principles to sustain its damages claim is futile in all events. These principles, embodied in the ILC Draft Articles and the *Chorzów Factory* case, establish State responsibility to make full reparation for an internationally wrongful act.[514] Both sources, however, are not applicable to this arbitration and even if they were relevant to these proceedings, they would not give Claimant the remedy it seeks.

355. First, Claimant's reliance on these legal authorities is misplaced because they apply to disputes between States. For example, Article 33(1) of the ILC Draft Articles expressly states:

[512] Ayala/Fratti de Vega Expert Report, § 10.3.c.

[513] Tercero Expert Report, para. 62.

[514] Memorial, para. 649.

> The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.[515]

356. Similarly, the PCIJ in the *Chorzów Factory* case distinguished between injuries suffered by a State and a private entity. The PCIJ observed: "Rights or interests of an individual, the violation of which rights causes damages are always in a **different plane to rights belonging to a State**, which rights may also be infringed by the same act."[516] The Court, in particular, noted that the harm suffered by States and individuals is different: "The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State."[517] Thus, Claimant incorrectly relies on rules governing the relations between States. It clearly follows that Claimant is not entitled to compensation on the basis of these legal authorities.[518]

357. Second, Claimant suggests that the Tribunal apply general principles of international law without regard to domestic laws, or in the alternative, due to a lacuna in the standard of compensation under Articles 5, 6, and 8 of the Investment Law.[519] Claimant cites to only one decision for its extraordinary proposition to apply international law directly without

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[515] ILC Draft Articles, Art. 33, at 94 (RL-79(bis)). Subparagraph (2) recognizes the possibility of a non-State actor invoking State responsibility on its own account under, for example, a human rights treaty or bilateral or regional investment protection agreements. However, those primary rules will determine whether and to what extent non-State entities are entitled to invoke State responsibility on their own account.

[516] *Case Concerning the Factory at Chorzów* (*Germany v. Poland*), 1928 P.C.I.J (Series A) No. 17, Judgment (Sept. 13) at 28 (CL-225) (emphasis added).

[517] *Factory at Chorzów* (*Germany v. Poland)* at 28 (CL-225).

[518] El Salvador submits that the *Chorzów Factory* case is also inapplicable to support Pac Rim's claim for heightened damages for an unlawful expropriation. Memorial, para. 647. The PCIJ emphasized that Poland's conduct was ***not an expropriation*** but rather a ***seizure*** of property that could not be expropriated even against compensation. *See Factory at Chorzów* (*Germany v. Poland*) at 46 (CL-225).

[519] Memorial, paras. 658-660. Claimant has incorrectly cited to Article 9, instead of Article 8.

reference to Salvadoran law. Unsurprisingly, Claimant has misinterpreted this case.[520] Such an erroneous approach would also offend the agreement of the parties to apply Salvadoran law. Furthermore, assuming a lacuna exists, the Tribunal need not resort to international law because Claimant has not stated a claim under Articles 5 or 6 and there was no illegitimate act or omission that would impose an obligation on El Salvador to compensate Claimant for an unlawful expropriation.[521]

358. In any event, Pac Rim would not be entitled to damages even on the application of these international law principles. According to Claimant, whether Salvadoran or international law is applied, the Tribunal must compensate Pac Rim for the damages it suffered by placing it in the position it would have enjoyed but for El Salvador's wrongful acts.[522] However, Claimant would not as of March 2008 (much less some later date) have obtained an exploitation concession regardless of President Saca's alleged statement. Pac Rim had not met the legal requirements for an exploitation concession and did not have any reasonable prospect of doing so. The Feasibility Study remained stalled and unfinished, the Environmental Impact Study lacked crucial studies, and Pac Rim did not have ownership rights over the land above its

[520] In *Wena Hotels v. Egypt*, the respondent brought an application to annul the award. The case was brought under the UK-Egypt BIT. Egypt had been found liable for breaching the fair and equitable treatment provision and for committing an expropriation. Egypt argued that the award should be annulled on the grounds that *inter alia* the tribunal had manifestly exceeded its power by failing to apply the applicable law which in its view was Egyptian law. The *ad hoc* Committee found that the parties had not made a choice on the applicable law so it was compelled to interpret Article 42(1) of the ICSID Convention. The Committee made clear that it was not elaborating precise conclusions on the meaning of Article 42(1) but was only tasked with deciding if the tribunal had manifestly exceeded its powers. The Committee decided the tribunal had not exceeded its powers by applying the BIT because Egyptian law equates treaties with domestic law. As the Committee stated, "[t]his treaty law and practice evidences that when a tribunal applies the law embodied in a treaty to which Egypt is a party it is not applying rules alien to the domestic system of this country." Thus, the tribunal had given effect to Egyptian laws by applying the investment treaty. *See Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, Feb. 5, 2002, paras. 37-46 (**Authority RL-159**).

[521] Ayala/Fratti de Vega Expert Report at 54.

[522] Memorial, para. 655.

proposed concession. Nor could Claimant have been legally permitted to hold new licenses over areas (namely Huacuco, Guaco and Pueblos) that overlapped with the original expired exploration licenses. Finally, none of El Salvador's alleged bad acts would have changed the outcome of Claimant's careless management of the Santa Rita exploration license that was allowed to lapse or its failure to acquire mining rights to Zamora/Cerro Colorado. Thus, even under general principles of international law, Claimant would not be entitled to compensation.

C. Pac Rim's quantum analysis is seriously flawed

359. In this section, El Salvador will explain: (1) what valuation methods FTI Consulting used to quantify Claimant's mining interests in El Salvador; (2) why the valuation methods selected by Claimant's damages experts are without legal basis; and (3) what significant errors Claimant's experts have made in the implementation of these methods. El Salvador submits that these errors render Claimant's valuation entirely useless such that it cannot be used as a basis for awarding compensation.

1. Valuation methods and assumptions used by Claimant's experts

360. Claimant has engaged Howard Rosen and Jennifer Vanderhart of FTI Consulting ("FTI") to provide a quantification of damages sustained by Claimant as a result of the alleged breaches by El Salvador. FTI has applied three methodologies resulting in an amended total claim of $301 million.

361. The assumptions underlying FTI's calculations are reason enough to reject its analysis. Claimant instructed its damages experts to provide a valuation based on three faulty assumptions:

- In Claimant's but-for scenario, Pac Rim would have developed and operated the "El Dorado Project" and related mineral exploration licenses.[523] However, it is

[523] Expert Report of Howard N. Rosen and Jennifer Vanderhart, FTI Consulting, on Damages, Mar. 28, 2013 (Amended Aug. 16, 2013) ("FTI Expert Report"), para. 3.6. *See also* Memorial, para. 662.

improper to assume that as of the valuation date construction of the mine could have commenced immediately. This assumption is factually incorrect because Pac Rim had not met (and was unlikely to meet) the legal requirements to be granted an Exploitation Concession for El Dorado.[524] With respect to the exploration licenses, Claimant could not legally possess certain licenses (Coyotera and Nance Dulce deposits), had not explored another license area it did hold that it then allowed to expire (Santa Rita) or never acquired mining rights that would have enabled it to apply for a license (Zamora/Cerro Colorado). This scenario is also contrary to Claimant's assertion that it is not seeking damages for breaches before March 11, 2008 because it captures losses arising from the alleged delay in the approval of the EIA that occurred prior to this date. Under the correct but-for scenario, there is no moratorium on metallic mining, the EIA is under review, the exploitation concession application is refused for non-compliance with the legal requirements of Article 37.2 and Claimant's only valid exploration license expires with no allegation of Government interference. Under this scenario, Navigant concludes "a reasonably informed buyer is unlikely to ascribe any value to Claimant's interests in the Mineral Deposits."[525]

- The valuation date is the day immediately preceding the March 11, 2008 statement by President Saca.[526] This date is wrong. Even Claimant implies that an earlier date would have been appropriate such as 2004 (prior to its change of corporate nationality) when it requested an environmental permit.[527] El Salvador agrees that an earlier date should be used. Even using the events as described by Claimant, the correct date would be May 7, 2007 (i.e., when Claimant acknowledged that the Ministers of Economy and the Environment announced that the processing of environmental permits for metallic mining exploration and exploitation would be halted until the Strategic Environmental Assessment was conducted).[528]

[524] For example, the Feasibility Study had been put on hold indefinitely and would have only covered the Minita deposit and, according to Claimant, the South Minita and Balsamo deposits. But the incomplete Feasibility Study did not cover the Nueva Esperanza, Coyotera or Nance Dulce deposits. Further, Claimant lacked surface rights to the entire area of the requested concession.

[525] Expert Report of Brent C. Kaczmarek and Kiran P. Sequeira, Navigant Consulting Inc., Jan. 10, 2014 ("Navigant Expert Report"), para. 93 (emphasis added).

[526] FTI Expert Report, para. 2.1.

[527] *See* Memorial, paras. 665-666.

[528] Memorial, para. 298. Claimant now admits that it was informed of the moratorium on May 7, 2007. The Tribunal will recall that in the jurisdictional phase of this arbitration, Claimant professed to have no knowledge of the alleged measures until March 2008. It is clear now that Claimant hid this fact from the Tribunal to survive the abuse of process objection. To avoid having its claim dismissed, Claimant stated that it would not seek compensation for measures taken prior to March 2008. Thus, Claimant is barred from seeking damages for measures implemented before that date.

- The standard of compensation is fair market value ("FMV").[529] Claimant appears to assume that FMV is the relevant standard because it has been used in other arbitrations. Claimant's intellectual shortcut is erroneous because it ignores that this arbitration is being conducted under the laws of El Salvador. As such, compensation is limited to 125% of the value declared to tax authorities.[530]

362. Claimant's experts proceed to calculate damages based on these erroneous assumptions. FTI applies an Income-based approach and two Market-based approaches.[531] First, it uses the Discounted Cash Flow (DCF) method (an income-based approach) to value the reserves for the Minita deposit reported in the Pre-Feasibility Study.[532] Second, FTI applies two variants of market-based methods to estimate the value of the resources in the Minita, Balsamo, South Minita, Nance Dulce, Coyotera and Nueva Esperanza deposits on the basis of allegedly comparable public companies and transactions.[533] FTI also uses the comparable transactions approach to estimate the value of the Santa Rita and Zamora/Cerro Colorado exploration properties which have no provable mineral resources.[534] However, as will be explained in the following section, these approaches are not appropriate in this case.

[529] FTI Expert Report, para. 2.1.

[530] Ayala/Fratti de Vega Expert Report at 51.

[531] Memorial, para. 669.

[532] The Minita deposit is the only deposit that contains both reserves and resources. The other deposits only include resources.

[533] FTI Expert Report, para. 6.24.

[534] FTI Expert Report, para. 6.25.

2. Pac Rim used the wrong valuation methods to calculate damages in this case

a) FTI's analysis ignores a third valuation method

363. In its report, FTI explains that there are three main approaches to value a going concern:[535] (1) Income-based approach, (2) Market-based approach, and (3) Cost-based approach. However, it only employs the first two approaches.

364. The cost approach is a kind of asset-based approach. As FTI explains, the cost approach determines value "based on the principle that a notional purchaser would not spend more on an asset than it would cost them to construct the asset themselves."[536] According to Rosen and Vanderhart, a cost-based approach *might* produce a less reliable result in this case because the costs incurred by Pac Rim to advance the Mineral Properties before the valuation date *may* not reflect the business' ability to generate future cash flows.[537] However, this reasoning goes against the valuation standards FTI purports to have followed.

365. In its report, FTI states that it has referred to the Standards and Guidelines for Valuation of Mineral Properties produced by the Canadian Institute of Mining, Metallurgy and Petroleum ("CIMVAL").[538] The CIMVAL standards recommend valuation approaches depending on the stage of development. The summary chart, replicated from the CIMVAL standards, on page 24 of the FTI report clearly indicates that the cost approach should be used to value exploration, and in some cases, mineral resource properties. Despite FTI's own classification of the Balsamo, South Minita, Nance Dulce, Coyotera and Nueva Esperanza

[535] El Salvador notes that valuation of a going concern is a false premise since none of the deposits were turned into an operating mine.

[536] FTI Expert Report, para. 6.18(iii).

[537] FTI Expert Report, para. 6.15.

[538] FTI Expert Report, para. 6.20.

deposits as "mineral resource properties" and Santa Rita and Zamora/Cerro Colorado properties as "exploration properties" under CIMVAL, FTI fails to apply the cost approach to any of its mining interests.[539]

366. By contrast, El Salvador's valuation experts, Brent Kaczmarek and Kiran Sequeira of Navigant Consulting ("Navigant"), have concluded that should Claimant be entitled to compensation, the cost-approach would be better suited in this case for the exploration properties which have no defined resources.[540] Navigant observes that early exploration properties are "most often sold or purchased for no upfront consideration, but rather contingent consideration if a commercial discovery is ultimately made."[541] This is because "[t]he early, uncertain stage of these deposits is a significant factor affecting their value."[542]

367. Similarly, by providing compensation for an expropriated investment based on the amounts invested, the cost approach is thereby endorsed under Salvadoran law. As previously explained, the Expropriation Law uses the owner's estimate of the property's value presented to tax authorities in assigning the amount of compensation due (or the original cost of the property if there is no tax declaration). The property holder is entitled to up to 125% of the value declared to the tax authorities.[543] Given that Salvadoran law is the applicable law in these proceedings, FTI's failure to apply this third method of valuation is a major error.

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[539] El Salvador is not suggesting that the CIMVAL Standards should be applied in this arbitration but merely points out the inconsistency in Claimant's valuation approach. Nor does El Salvador necessarily agree with FTI's classification of the deposits and properties.

[540] *See* Navigant Expert Report, para. 161. *See also* Ripinsky & Williams at 135-136 (RL-152).

[541] Navigant Expert Report, para. 161, n.166.

[542] Navigant Expert Report, para. 17.

[543] Ayala/Fratti de Vega Expert Report at 51.

b) The basis of FTI's DCF calculation lacks foundation

368. The Discounted Cash Flow (DCF) Approach is one of the two methods FTI applies to value the Minita deposit. FTI uses the DCF method to quantify the value of the mineral reserves and comparables approaches to calculate the mineral resources in the deposit. As the applicable law in this arbitration, Salvadoran law determines all aspects of this case, including the amount of compensation. Thus, the application of these methods, which are premised on a different standard of compensation (i.e., fair market value), is inappropriate to establish the amount of compensation in this arbitration. FTI's proposed methods also fail under principles of international law which Pac Rim incorrectly claims are relevant in this case.

369. Income-based approaches, such as the DCF method, reflect the present worth of cash flows expected to be generated in the future. Simply stated, the DCF method calculates the sum of future cash flows projected to a specific period of time and then discounts them back to the present value by using a discount rate.[544] As a forward-looking valuation tool, a number of assumptions and subjective judgments must be made about future revenues, market conditions and risks (e.g., technical, financial and geopolitical). The *ILC Draft Articles* recognize the limits of the DCF approach:

> difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyzes a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[545]

[544] Ripinsky & Williams at 195 (RL-152).

[545] ILC Draft Articles, Comment (26) to Article 36, at 103-104 (RL-79(bis)) (emphasis added).

A valuation based on numerous unsupported assumptions lacks the requisite level of certainty and may be considered overly speculative. It is well established in international law that a tribunal must not award compensation for speculative damages.[546]

370. Tribunals have treated historical profits as the best evidence of a business' future earnings potential.[547] Without a record of past performance or current performance, the results generated by the DCF approach are much too speculative and uncertain. Accordingly, a business must be a going concern to establish future profits with any reasonable degree of certainty. Contrary to Claimant's assertion, the DCF method is not widely accepted in international law for valuing "both going concerns and greenfield investments."[548] This notion of a "going concern" has been endorsed by the World Bank FDI Guidelines[549] and international jurisprudence.

371. In *Metalclad v. Mexico*, for example, the tribunal found the Respondent liable for interferences by local governments with the claimant's efforts to establish a hazardous waste

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[546] *See e.g.*, *Rudloff Case (Merits)*, US-Venezuela Mixed Claims Commission, (1903-5) IX U.N.R.I.A.A. 255, at 258 (**Authority RL-160**) ("Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss."); *Shufeldt claim (Guatemala, United States of America)*, PCA Case II U.N.R.I.A.A. 1079, Award, July 24, 1930, at 1099 (**Authority RL-161**) ("lucrum cessans must be the direct fruit of the contract and not too remote or speculative."); *Amoco International Finance v. Iran*, Award, July 14, 1987, 15 Iran-US CTR 189, para. 238 (CL-228) ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damages can be awarded."); ILC Draft Articles, Comment (27) to Article 36, at 98 (RL-79(bis)) ("Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.").

[547] *See also* Ripinsky & Williams at 211 (RL-152).

[548] Memorial, para. 670 (emphasis added).

[549] World Bank, Legal Framework for the Treatment of Foreign Investment, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment: Volume II* (1992) at 42, para. 6(i) (**Authority RL-162**) (stating that compensation may be determined "for a going concern with a proven record of profitability, on the basis *of* the discounted cash flow value"). Page 26 of the Report explains: "This method is regarded as appropriate for valuing enterprises with a firmly established income-producing capacity because it recognizes that the economic value of such an enterprise to its owner is a function of the cash that the enterprise can be expected to produce in future. However, particular caution should be observed in applying this method as experience shows that investors tend to greatly exaggerate their claims of compensation for lost future profits. Compensation under this method is not appropriate for speculative or indeterminate damage, or for alleged profits which cannot legitimately accrue under the laws and regulations of the host country."

landfill. The tribunal considered alternative methods of compensation based on: (1) a DCF analysis of future profits and (2) the value of Metalclad's actual investments in the landfill. The tribunal ultimately awarded damages based on the amounts invested in the project rather than for lost profits. It concluded that the DCF analysis was not appropriate because "the landfill was never operative and any award based on future profits would be wholly speculative."[550]

372. Likewise, the *Biloune* tribunal noted that "[n]ormally, in cases of expropriation of a going concern, the most accurate measure of value of the expropriated property is its fair market value, which in its nature takes into account future profits. The discounted cash flow method of valuation is often used to calculate the worth of the enterprise at the time of the taking."[551] However, the panel determined that the claimant had not provided "realistic proof of the future profits of the company." The claimant had submitted a contemporaneous financial report projecting expected profits of the investment. The tribunal did not consider the report an economic forecast of profits but rather a projection intended to encourage investors. Further, at the time of the expropriation, the project remained uncompleted and inoperative. Therefore, the tribunal concluded there was no basis to calculate future profits.

373. Most recently, this notion of a going concern was confirmed in the *Arif v. Moldova* case. The tribunal in that case rejected a DCF calculation to value an airport store because it never opened or generated any revenue. The panel stated: "the DCF methodology is not appropriate for a business that never operated and where a satisfactory basis for its projected revenues has not been demonstrated. Use of the DCF methodology in these circumstances gives

[550] *Metalclad v. Mexico*, para. 121 (RL-143).

[551] *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana,* UNCITRAL, Award on Compensation and Costs, June 30, 1990, at 228 (**Authority RL-163**).

an excessively speculative outcome."[552] Consequently, the tribunal calculated the claimant's damages on a wasted cost basis.

374. It is without dispute that Pac Rim never brought the El Dorado project, or any other mining project for that matter, into operation. El Salvador's Mining experts, Behre Dolbear, observe that during the relevant period (or any time since), Pac Rim never operated any mines or advanced any project to the completion of a feasibility study, let alone the construction or operating phases.[553]

375. In fact, the El Dorado project was nowhere near operational without a valid exploitation concession, without a Feasibility Study, and without surface area rights. From a practical standpoint, the project was not even fully developed on paper, much less in the real world:

- There was no infrastructure (e.g. roads, bridges, camp) on the site;
- No pre-operational work had been completed (e.g. removal of overburden);
- Neither the processing plant nor project infrastructure (e.g. tailings ponds) had even begun to be built;
- The proposed mining process and costs were not studied to a high degree of accuracy;[554]
- The mine plan was still at the pre-feasibility level and detailed engineering had not yet been started;[555]
- Contract bids had not been procured;[556]
- Environmental risks had not been adequately studied;[557] and

[552] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013 para. 576 (**Authority RL-164**).

[553] Behre Dolbear Expert Report, para. 89.

[554] Behre Dolbear Expert Report, paras. 32-33.

[555] Behre Dolbear Expert Report, paras. 32-33.

[556] Behre Dolbear Expert Report, paras. 32-33.

- Claimant had not finalized financing arrangements.[558]

Thus, not only did Pac Rim have no record of earnings, but the project was at such an early stage of development that lost profits cannot be projected under the DCF method with any degree of certainty.

376. Tribunals have displayed a similar reluctance to order damages for lost profits based on inadequate economic data and unperformed work. *AAPL v. Sri Lanka* is often credited with establishing this proposition. In *AAPL*, the tribunal held that neither the goodwill nor the future profitability of the shrimp farm could be established under the claimant's DCF projection with a reasonable degree of certainty because the company was "not only newly formed and with no records of profits, but also incurring losses and under-capitalized."[559] Similarly, the tribunal in *SPP v. Egypt* deemed the DCF method inappropriate because the hotel development was still in its infancy and had very little history on which to base its projected revenues.[560] Following the *SPP* and *Metalclad* decisions, the tribunal in the *Wena Hotels* case[561] declined to apply the DCF method on the grounds that the claimant's 18-month period of operations provided an insufficient basis to establish lost profits and the claimant had not completed renovations. The tribunal further questioned whether Wena had sufficient funds to finance this work.

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[557] Behre Dolbear Expert Report, § 7.

[558] Behre Dolbear Expert Report, para. 91.

[559] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 103 (**Authority RL-165**).

[560] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Case No. ARB/84/3, Award on the Merits, May 20, 1992, para. 188 (**Authority RL-166**).

[561] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000 (**Authority RL-167**).

377. The *Autopista* case provides a further example of a tribunal unwilling to award damages for lost profits that cannot be justified by economic projections.[562] To support its claim for lost profits, the claimant submitted projections of cash flows included in the economic-financial plan of the concession agreement. The tribunal found this evidence failed to meet the standards for awarding lost profits under Venezuelan law and international law because it required adjustments if certain events occurred and could not guarantee projected amounts of shareholder flows. Further, the claimant had no record of profits and had not completed the main purpose of the agreement which was to construct a bridge. Therefore, the tribunal declined to award lost profits in the absence of a sufficient degree of certainty.

378. Because Pac Rim never managed to bring the mine into operation, FTI implements the DCF approach based on the financial model contained in the Pre-Feasibility Study ("PFS") completed by SRK Consulting in January 2005. Using the PFS, FTI arrives at its amended estimated value of $67.5-80.6 million for the Minita reserves. However, like the economic analyses rejected in the *Biloune* and *Autopista* cases, the PFS does not provide a sufficient economic basis to apply the DCF method. The use of the PFS, in the nature of a basic engineering study,[563] to estimate the present value of future cash flows renders Claimant's valuation uncertain and inherently speculative. Indeed, Navigant explains the inherent limits of using SRK's Pre-Feasibility Study:

> we would note that it adds considerable uncertainty to the projections. For example, SRK notes in their report that the level of accuracy of their capital cost estimate is +/- 25 percent, indicating a broad range of potential values for the Reserves. In its expert report, Behre Dolbear also notes that pre-feasibility studies typically have an estimation accuracy of +/- 25 to 30 percent.

[562] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, Sept. 23, 2003 (**Authority RL-168**).

[563] Behre Dolbear Expert Report, paras. 21-23.

> Given the uncertainty of the projections contained in the pre-feasibility study, FTI's DCF valuation is inherently less reliable than the DCF valuation of other gold mines for which detailed feasibility studies have been completed.[564]

Thus, the Pre-feasibility Study provides a less certain economic basis to generate lost profits through the DCF method.

379. Investment tribunals have also viewed with skepticism claims for lost profits where a large disparity exists between the amounts invested and profits allegedly foregone. In *Tecmed*, the tribunal viewed the vast difference in the amount invested by the claimant (US$4 million) and the sums sought based on its DCF calculation (US$52 million) as an indication that the investor's estimate was "likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant's investment."[565] Similarly, in *Wena Hotels* the tribunal referred to the incongruence between the amount requested (GB£ 45.7 million) and Wena's stated investment (approximately US$8.8 million) as one of the reasons to deny an award of lost profits.[566] Here the large difference between the US$77 million allegedly invested by Claimant[567] and the more than US$300 million claimed in damages raises legitimate concerns as to the speculative nature of FTI's calculations.

380. Navigant's analysis casts further doubt as to the reliability of FTI's DCF valuation. Navigant performed a reasonableness check of FTI's DCF calculation by comparing it to SRK's valuation of the Minita reserves. Applying FTI's 12% cost of capital to discount SRK's net

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[564] Navigant Expert Report, para. 164.

[565] *Tecmed v. Mexico*, para. 186 (CL-197).

[566] *Wena v. Egypt*, Award at 918-919 (RL-167).

[567] *See* NOA, para. 128(2). However, Claimant has not provided any evidence to support this assertion. Moreover, less than $34 million was registered with El Salvador's National Investment Office (ONI) by Claimant. *See e.g.*, page 4 of exhibit C-12 showing total amounts registered as of September 5, 2008. MINEC Resolutions No. 368-MR (July 30, 2008) and No. 387-MR (Aug. 13, 2008) (C-12).

present value of $ 16.9 million, results in an implied value of $ 8.7 million. By contrast, FTI values the Minita reserves within a range of $ 67.5 million to $ 80.6 million. Navigant observes:

> according to FTI, the value of the Minita Reserves has increased between *676 percent and 826 percent* between January 2005 and March 2008 even though the project had not advanced during this time period. Thus, according to FTI, the value of the Minita Reserves has increased *seven fold* in a period of 3 years due to market changes.[568]

This exponential increase in value is not explained by increased gold prices.[569] Therefore, Navigant concludes that there is no "realistic market factors which can explain FTI's inflated valuation conclusion."[570]

381. In the absence of a history of earnings or credible economic analyses to support its damages, Pac Rim's claim for lost profits is not reasonably certain. To award damages on this basis is contrary not only to Salvadoran law but also international law.

c) FTI's market-based methods do not provide accurate estimates of value

382. As previously mentioned, FTI employs two market-based approaches to value Pac Rim's other mining interests: (1) the Comparable Trading Multiples Approach (using the publicly traded price of a comparable company) and the Comparable Transactions Approach (using the price of a recently purchased comparable company). FTI uses both approaches to value the resources in the Minita deposit, the late-discovered deposits located in the exploitation concession application area (the Balsamo, South Minita and Nueva Esperanza deposits), and the deposits in the new exploration license areas that overlapped with the expired license areas (the

[568] Navigant Expert Report, para. 167.

[569] After analyzing the increase in value of publicly traded gold companies over the same period, Navigant finds that the index of gold companies increased 124% while the index of gold and silver companies increased by just 99%.

[570] Navigant Expert Report, para. 169.

Nance Dulce and Coyotera deposits). Unable to identify any comparable publicly traded companies, FTI uses the Comparable Transactions Approach alone to value the exploration properties (Santa Rita and Zamora/Cerro Colorado) which lack proven resources.

383. Market-based approaches determine the value of a business by comparing it to similar businesses, business ownership interests, or securities that are sold on the open market.[571] In some circumstances, the multiples method (such as the comparable trading and comparable transactions approaches) can be used to estimate the value of a business from the "prices of comparable assets, standardized through the use of a common variable such as earnings, cash flows, book value or revenues."[572] However, the multiples method provides only an approximation of value since no two businesses are identical.[573]

384. In this case, FTI identified seven comparable transactions and has determined a multiple based on a transaction price per ounce of gold equivalent resources for the mineral resource deposits (the Minita, Nance Dulce, Coyotera, Balsamo, South Minita and Nueva Esperanza deposits). Under the Comparable Trading Multiples Approach, FTI found one company to value the resources for each deposit on the basis of an enterprise value per ounce of gold equivalent resources. For the exploration properties (Santa Rita and Zamora/Cerro Colorado), it identified seven companies and applied a multiple based on a price per hectare basis.

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[571] Ripinsky & Williams at 193 (RL-152). *See also* Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence 10 (2008) (**Authority RL-169**) citing to International Glossary of Business Valuation Terms ("[a] general way of determining a value indication … by using one or more methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.").

[572] Ripinsky & Williams at 213 (RL-152).

[573] Ripinsky & Williams at 214 (RL-152).

385. Valuation based on comparables is only reliable if the asset being valued is sufficiently similar to the assets used as comparables and if it is feasible to adjust for the effects of differences in characteristics among the assets. Several factors can affect the comparability of mineral projects or properties such as different markets, geographic location, size, capital structure and timing. Indeed, "the choice of the comparable company and the 'market multiple' is crucial to the reliability of the method."[574]

386. This limitation has been explained in the commentary to the *ILC Draft Articles* on State Responsibility:

> Where the property in question or comparable property is freely traded on an open market, value is more readily determined…. Where the property interests in question are unique or unusual…or are not the subject of frequent or recent market transaction, the determination of value is more difficult.[575]

387. Scholarly commentary is equally cautious about market-based valuation approaches:

> First, almost all of the recent and prospective takings involve unique assets for which there is no established competitive market. Secondly, for the same reason, proxies for market value, such as transactions in other countries by other companies at other times involving comparable assets are never likely to be fully comparable; adjustment for quality, time, location, strategic interest premium, and risk are inevitable. Thirdly, market instability makes the market value dependent to a large extent upon the timing of the expropriatory events…"[576]

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[574] Kantor at 119 (RL-169). Citing to the observations of Professor Aswath Damordaran, Ripinsky and Williams note "that multiples are easy to misuse or manipulate when comparable firms are used. Given that no two firms are identical, deciding which firms are comparable involves a degree of subjectivity. Consequently, a biased analyst can choose a group of comparable firms that support a valuation that he or she wishes to arrive at." Ripinsky & Williams at 214-215 (RL-152).

[575] ILC Draft Articles, Comment (22) to Art. 36, at 103 (RL-79(bis)).

[576] Thomas W. Wälde and Borzu Sabahi, *Compensation, Damages and Valuation in International Investment Law*, Transnational Dispute Management, Feb. 10, 2007, at 16 (**Authority RL-170**).

388. International tribunals have declined on a number of occasions to use market-based valuations to establish compensation. For example, in *Phelps Dodge v. Iran* the Iran-U.S. Claims Tribunal ("IUSCT") had to evaluate damages claimed for a business established in Iran for the purpose of manufacturing and selling various wire and cable products.[577] The claimant submitted forecasts of the business' projected earnings which it determined to be reasonable based on comparisons with the actual performance of three non-Iranian wire and cable companies. It also computed an earnings multiplier by comparing the business' projected performance with the performance of a group of U.S. publicly traded corporations. The IUSCT rejected this evidence, implicitly recognizing that the performance of foreign companies in the same industry was not sufficiently comparable to the claimant's business in Iran.

389. Similarly, the comparable sales transaction approach has not been widely accepted by tribunals in investment treaty cases. For instance, in *CMS v. Argentina* the tribunal rejected both the comparable stock prices and comparable sales price approaches.[578] The panel found that the shares of the business at issue (which was not publicly traded on a stock exchange or any public market) and the company proposed for stock price comparison were not comparable. With respect to the comparable sales transaction approach, the tribunal determined that it "[has] not been provided with any significant evidence of such transactions" and consequently, "it would be a most speculative enterprise to try and determine the compensation due to CMS on that basis."[579]

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[577] *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran*, Award No. 217-99-2, 10 Iran-US Claims Tribunal Rep. 121 (1986), paras. 29-30 (**Authority RL-171**).

[578] *CMS v. Argentina*, Award, paras. 411-417 (RL-140).

[579] *CMS v. Argentina*, Award, para. 414 (RL-140).

390. The comparable transaction approach was also rejected in *Sistem v. Kyrgyz Republic*. The dispute arose from a joint venture to build and operate a hotel in Bishkek. The tribunal rejected the comparables valuation stating that it was "not persuaded that there is an adequate basis for the application of the 'multiple deals' approach." It explained that "[c]onditions in the Kyrgyz hotel sector in the period in question are not so obviously comparable with the comparators in Ireland, Sweden, the UK, the USA, and the other States" to which the claimant's expert report made reference.[580] Specifically, the tribunal pointed disapprovingly to the 30% discount applied to the multiples in order to account for conditions in the Kyrgyzstan market stating that this "reinforces the view that the valuation based on this approach involves a large measure of speculation."[581] Like the experts in *Sistem*, FTI has applied a spot price and gold grade adjustment in its comparable transaction approach which, as will be discussed in the next section, overstates the value of the deposits.

391. Finally, the *Occidental* tribunal declined to award compensation based on the comparable sales approach which it found to be unreliable. The tribunal concluded that the seven transactions identified by the respondent were of "no assistance" because "each oil and gas property presents a unique set of value parameters."[582] This decision is particularly noteworthy because of its express recognition that the comparables method was less practical for oil and gas properties which like mining projects are subject to different "value parameters."

392. In sum, market-based methodologies suffer from the same shortcoming. That is, the problem with applying a comparative-based valuation in this case is that no two mining

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[580] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic,* ICSID Case No. ARB(AF)/06/1, Award, Sept. 9, 2009, para. 162 (**Authority RL-172**).

[581] *Sistem v. Kyrgyz*, para. 162 (RL-172).

[582] *Occidental Petroleum Corporation and Occidental Exploration and Production Company (OPEC) v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct.5 2012, para. 787 (**Authority RL-173**).

properties are the same. Basing comparisons on other gold mining projects is not a useful exercise because each project has unique features, in terms of the size of resources, capital structure, risks, regulatory environment, location, management, etc. This makes valuation on the basis of comparables extremely difficult if not impossible.[583]

393. Thus, the use of the DCF and other methods in this case is questionable from a legal and practical point of view. As shall be seen below, FTI's application of these methods is riddled with errors.

3. Pac Rim applied the wrong valuation methods in a seriously flawed manner

394. As the Tribunal may recall, FTI utilizes three valuation methods to value Claimant's mining interests: the DCF method to value the Minita reserves, the Comparable Transaction and the Comparable Trading Multiple Approaches to value the resources in the six mineral resource deposits, and the comparable transaction approach to value the exploration areas. FTI concludes that the overall value of the mineral resource deposits and the early exploration areas is $ 284.9 million (amended mid-point range). El Salvador's valuation experts, Brent Kaczmarek and Kiran Sequeira of Navigant Consulting ("Navigant"), have reviewed FTI's report and have identified serious errors in their valuation calculations. While these various mistakes have been briefly summarized in this section, the Tribunal is directed to the Navigant report for a fuller account of these errors.

[583] *See* Kantor at 121-122 (RL-169) ("The very titles of these methods for valuing businesses disclose the central challenge for arbitrators – finding sufficient comparability to justify employing the value of the comparable company as a basis for arriving at the value of the business being appraised. Perhaps identical comparability exists in the hypothetical world page of theoretical economists and university professors but, in the real world of arbitration, no other enterprise likely will be precisely comparable with the company at the heart of the dispute.").

a) FTI's implementation of the DCF approach for the Minita reserves is error-ridden

395. FTI used the financial model contained in SRK's 2005 Pre-Feasibility Study as the basis for its DCF calculation. After reviewing and conducting a due diligence of the model,[584] FTI adjusted the model to reflect market conditions (e.g. metals prices, development costs, operating costs) as of the valuation date. After applying the model, FTI determined that the value of the Minita reserves was between $79.7 million and $92.8 million. This sum was revised to between $67.5 million and $80.6 million in August 2013 after FTI discovered an error related to their projection of gold prices.[585]

396. Navigant identified five errors or unsound assumptions that cause FTI to substantially overstate the value of the Minita reserves (and one error that would have actually slightly increased its value):

- First, FTI deducted depreciation from income taxes instead of pre-tax income. By doing so, FTI treated depreciation as a tax *credit* rather than a tax *deduction*. This error caused FTI to dramatically overstate the value of the Minita reserves. Correcting for this error alone reduces the value of the Minita reserves by between $10.4 million and $12 million (or 13-18%).[586]

- Second, the model unrealistically assumes that mine development could have commenced as of the valuation date and does not consider the significant additional time Pac Rim would have needed to complete a detailed (bankable) feasibility study, to obtain an exploitation concession, and to secure contractors to commence mine development. Conservatively adjusting for a 12 month delay results in a reduction in value of the Minita reserves of between $8.7 million and $10.1 million (or about 13%).[587]

[584] FTI Expert Report, para. 6.27.

[585] FTI had incorrectly applied nominal gold and silver prices in the DCF model. The DCF model is a real model (i.e., revenue and costs are projected net of inflation) so nominal prices should not be used. FTI corrected this error by using real gold and silver prices. The result of this correction was a $12 million reduction in FTI's valuation conclusion.

[586] Navigant Expert Report, para. 171. Navigant notes that the reduction in value would be greater if it took three years to complete the detailed feasibility study and commence development.

[587] Navigant Expert Report, para. 172.

- Third, FTI makes at least two errors in calculating the Weighted Average Cost of Capital (WACC): (1) FTI without explanation rounds the discount rate down by 40 basis points which wrongly increases the value of the Minita reserves by $2 million (or 3%).[588] (2) FTI understated the WACC by including debt financing on the basis of a hybrid debt and equity investment. If no debt is included in the capital structure, which FTI admits is appropriate for projects without a Bankable Feasibility Study,[589] the value of the Minita reserves decreases by between $7.9 million and $8.3 million.[590]

- Fourth, FTI overstated gold prices in the projection by relying on the wrong futures contract price. The impact of this error is a reduction in value of $3 million.[591]

- Fifth, despite conducting a due diligence, FTI fails to detect an error in the original SRK Consulting financial model. Working capital is counted twice. Double counting working capital decreases the value of the project. Had FTI corrected this error, the value of the Minita reserves would have *increased* by $2.5 million.[592]

- Sixth, FTI makes unsound assumptions regarding inflation. FTI unreasonably projects the future capital and operating costs for the mine to grow at the long-run US consumer price index (CPI) of 2.5% even though historic evidence shows that mining costs increase at rates much higher than the CPI. FTI's use of the CPI understates mining costs and thereby overstates the value of the Minita reserves.[593]

397. The totality of these errors and incorrect assumptions completely undermine the reliability of FTI's DCF analysis. Moreover, FTI relies exclusively on the DCF approach and

[588] Navigant Expert Report, para. 173, n.185.

[589] Appendix 4 to FTI Expert Report.

[590] Navigant Expert Report, para. 175. Navigant notes that the discount rate would still be understated because they reflect projections in the Pre-Feasibility Study. Because these cash flow projections are more uncertain, Navigant recommends "an additional project-specific risk premium would need to be considered to account for the greater level of uncertainty in FTI's cash flow projections" (emphasis added).

[591] Navigant Expert Report, para. 176.

[592] Navigant Expert Report, para. 177.

[593] Navigant Expert Report, para. 179.

does not test or validate their results with another valuation method.[594] Therefore, El Salvador respectfully submits that the Tribunal should disregard FTI's DCF valuation calculation.

b) FTI's implementation of the Comparable Transactions Approach is flawed and significantly overstates the value of the mineral resource deposits

398. The purchase price of a recently acquired company that is comparable to the subject company can be used to estimate the value of the subject company. FTI identified seven transactions over a four-year period (2004-2008) where the project or property acquired in Latin America was deemed comparable to the mineral resources in the six mineral resource deposits.

399. Navigant identifies three main errors in FTI's implementation of the Comparable Transactions Approach: (1) FTI's poorly-reasoned search parameters yielded non-comparable projects/properties;[595] (2) FTI incorrectly calculates a "Price Ratio" to adjust for different spot prices on the date of the transaction;[596] (3) FTI increased the valuation multiple by 300% based on its assumption that high grade gold deposits command a higher premium than lower gold grade projects.[597]

400. First, FTI's flawed implementation of FTI's Comparable Transaction Approach results in non-comparable projects/properties. FTI applies an overly-restrictive approach narrowing the search parameters to transactions in Latin America, thereby excluding potentially more comparable transactions. Instead, Claimant should have filtered transactions for a variety of other factors such as mining construction costs, cash operating costs, permitting/licensing

[594] Navigant Expert Report, paras. 146-149.

[595] Navigant Expert Report, paras. 146-149.

[596] Navigant Expert Report, para. 132.

[597] Navigant Expert Report, paras. 129, 139.

process, and environmental considerations.[598] Further, FTI did not distinguish between resources and reserves. This position is, however, misinformed because mineral reserves (unlike mineral resources) have been proven to be economically viable. It would overstate the value of the mineral resources in six deposits (Minita, Balsamo, South Minita, Nueva Esperanza, Coyotera and Nance Dulce) to compare it to projects/properties with defined reserves. A further flaw in FTI's implementation of this methodology is its failure to assign weights to the comparable transactions based on their degree of comparability with the six mineral resource deposits.

401. Second, the "Price Ratio" adjustment lacks support and significantly overstates the value of the mineral resources. The adjustment assumes that the value of late-exploration stage projects increase at the same rate as increases in gold prices.[599] But Claimant's assertion is refuted by its own evidence.[600] Navigant further confirms through statistical analysis that the value of gold companies increase at a lower rate than gold prices; specifically, the value of gold companies increase by only 0.29% for every 1% increase in gold prices. Navigant also points out that the value of junior mining companies will be more affected by other factors (including uncertainty of mineral recovery, technical barriers to development, permitting delays, environmental concerns, securing project finance, and construction delays) than by spot prices.[601] Lastly, it bears mentioning that had FTI chosen a shorter time frame for its search for comparable transactions, there would have been no need to apply an adjustment for the spot price.

[598] Navigant Expert Report, para. 147.

[599] Navigant Expert Report, paras. 132-138.

[600] Navigant Expert Report, paras. 132-134.

[601] Navigant Expert Report, para. 137.

402. Third, FTI's high gold grade adjustment further distorts the value of the six mineral resource deposits. Unable to identify any projects with a comparable gold grade, Claimant increases the valuation multiple of the lower grade projects by a factor of 300%. Unfortunately, Claimant's assumption is not borne out by its own evidence. Of the transactions selected, the two transactions with the highest gold grade had the lowest valuation multiple and price ratios but the transaction with the lowest gold grade had the highest price ratio of all the transactions.[602] Hence, FTI's exorbitant gold grade premium lacks rigorous analysis.

403. In sum, Claimant's illogical search parameters and inflated adjustments have the overall effect of overstating the valuation multiples of transactions. Accordingly, Claimant's analysis should be dismissed.

c) FTI's Comparable Trading Multiples Approach relies on a single outlier that inflates the value of the mineral resource deposits

404. The comparable trading multiples method, as known as the comparable publicly traded company approach, uses the publicly traded price of a comparable company to estimate the value of the subject company. FTI only identified one publicly traded company comparable to the six mineral resource deposits: Andean Resource's Cerro Negro project in Argentina. Yet the multiple for Cerro Negro is roughly twice as high as the highest multiple calculated in FTI's Comparable Transaction Approach.[603]

405. Navigant shows that the multiple derived by FTI is an outlier and should be disregarded for four reasons:

[602] Navigant Expert Report, para. 142.

[603] Navigant Expert Report, para. 152. Although the Pinos Altos project selected by FTI as a comparable transaction has a gold grade of 4.17 g/t, the price ratio for Cerro Negro is 1,850% higher than Pino Altos' price ratio. FTI does not, as Navigant points out, explain why Cerro Negro has such a massively higher valuation multiple nor does it demonstrate that the six mineral deposits are more similar to Cerro Negro than to Pinos Altos.

- First, at the date of the valuation, the Cerro Negro project was not a high grade gold deposit.[604]

- Second, Cerro Negro's valuation multiple is skewed because just prior to the valuation date, Andean Resources announced results of a drilling program that would nearly double the company's total resources.[605]

- Third, Cerro Negro had a pre-feasibility study in progress. By contrast, Pac Rim only completed a pre-feasibility study for one of the six mineral resource deposits.[606]

- Fourth, FTI incorrectly applied a 30% control premium to the multiple (over this already inflated value) to account for control, liquidity and post-acquisition synergies.[607] However, Navigant explains that this economic theory is outdated and has been debunked.[608]

406. Furthermore, FTI's multiple is out of line with more comparable publicly traded companies. Navigant's conducted a preliminary search of potentially comparable publicly traded companies. This investigation resulted in valuation multiples in the range of $25 to $44 per ounce, significantly below FTI's multiple of $378 per ounce.[609]

407. FTI implicitly recognizes the unreliability of this methodology by applying a low 10% weighting to the comparable publicly traded company approach (compared to a 90% weighting of the comparable transaction approach) in arriving at an overall valuation conclusion of between $194.8 million and $223.2 million for the mineral resources in the six deposits. As such, the Tribunal should attribute no weight to FTI's calculation which is based on a single outlier.

[604] Navigant Expert Report, para. 152.

[605] Navigant Expert Report, para. 155.

[606] Navigant Expert Report, para. 156.

[607] Navigant Expert Report, para. 157.

[608] Navigant Expert Report, paras. 109-113.

[609] Navigant Expert Report, para. 159.

d) FTI utilizes the wrong valuation method to value the early exploration areas

408. FTI implements the Comparable Transaction Approach for the early exploration areas. It identifies seven transactions of early stage exploration properties in Latin America and calculates a transaction value per hectare. Based on this multiple, FTI determined that Santa Rita and Zamora/Cerro Colorado had a value of $1.795 million as of 10 March 2008.

409. Navigant disagrees with the valuation method selected by FTI. In Navigant's opinion, a price per hectare valuation multiple is not a reliable indicator of value for early exploration properties. This is especially so for underground mines where the entire resource may be confined to a narrow or limited portion of the surface area.[610] It would be entirely speculative to award compensation on the basis of the size of the exploration areas. FTI's own results show the enormous range of price per hectare from $68 to $1,507, reflecting a spread of over 2,000%! Even after outliers are excluded, the range is still close to 100%.

410. Consequently, Navigant determines that the Cost Approach would be a more appropriate method to value the early exploration areas. The Cost Approach analyzes the exploration expenditures for a given property for their contribution to the exploration potential of the Mineral Property.[611] Because this information was not available, Navigant was unable to assess the value of these properties.

e) Other valuation evidence demonstrates that FTI's valuation is substantially overstated

411. When based on full information, arms-length transactions or offers made by third parties for the shares or assets of the subject company can provide an objective and reliable

[610] Navigant Expert Report, para. 161.

[611] Navigant Expert Report, para. 161.

indication of value.[612] There are two sources of evidence of the value of the mineral deposits and the early exploration areas. First, the adjusted publicly traded price of PRMC, Pac Rim's parent company, in the 30 days leading up to the valuation date was approximately $88 million. Second, PRMC conducted a private placement of new PRMC common shares in February 2008 (the month before the valuation date) that indicated a value of $86.7 million. FTI rejects this additional valuation evidence and instead relies on an inapposite valuation conducted by Scotia Capital.

412. Navigant shows there are three flaws in the FTI's reliance on the October 2007 valuation of PRMC conducted by Scotia Capital: (1) the valuation was based on the Minita reserves yet FTI has applied the multiple implied by that valuation to the less economically valuable mineral resources; (2) the valuation was based on lower operating costs and understated the capital expenditures for the project; and (3) the valuation indicated that Pac Rim was "trading in line with its development peers" which indicates that the publicly traded value of PRMC was reasonable.[613]

413. Navigant contends that the share price and private placement provide useful information about the market's assessment of the value of PRMC, and by extension the value of Pac Rim's mining interests in El Salvador. These indicia show that FTI's valuation is 325% greater than the value ascribed by the market. This premium is even out-of-step with the 30% premium that FTI suggests to account for lack of control.[614]

414. While these market sources of information are normally useful in evaluating the value of a business, these values are less reliable in this case. Navigant posits that these market

[612] Navigant Expert Report, para. 23.

[613] Navigant Expert Report, paras. 119-122.

[614] Navigant Expert Report, para. 108.

sources likely overstate the value of the mineral deposits and exploration properties because the public was not informed about the legal status of Pac Rim's mining interest. In particular, it does not appear that it was public knowledge that the exploration licenses had expired, had been improperly obtained by a related company or had not been obtained at all, or that the application for an exploitation concession was irreparably deficient.[615] Rather, Pac Rim continued to announce publicly the results of drilling conducted on the properties that lacked valid licenses or a concession.[616] As such, Navigant posits that "the market value implied by the publicly traded shares of PRMC and the private placement overstate the value of the Mineral Deposits due to this misinformation."[617]

415. Navigant concludes that based on the legal and factual issues facing the mineral deposits and exploration areas, **"we would expect the fair market value of the Mineral Deposits to be <u>next to nil</u> and the Early Exploration Areas to be <u>de minimis</u>."**[618]

D. Claimant is not entitled to prejudgment interest because it is not entitled to compensation

416. Pac Rim claims that it "is entitled to an additional award of interest in order to fully compensate them for Respondents' wrongful breaches of its domestic laws and international law."[619] Claimant seeks interest on the amount claimed from the valuation date until the date of the award at the 12-month LIBOR rate compounded on an annual basis.[620] This rate of interest and compounding convention swells Pac Rim's damages claim by $16.2 million. Claimant

[615] Navigant Expert Report, para. 186.

[616] Navigant Expert Report, para. 187.

[617] Navigant Expert Report, para. 103.

[618] Navigant Expert Report, para. 192 (emphasis added).

[619] Memorial, para. 688.

[620] FTI Expert Report, paras. 6.137-6.138.

however, has not established any entitlement to interest (nor, as explained above, has Claimant established any entitlement to compensation).

417. In fact, Claimant starts from a flawed premise. It cites to Article 38 of the ILC Draft Articles for its entitlement to interest. Claimant's position is, however, unfounded under these inapplicable rules of international law. The ILC Draft Articles on State Responsibility, which as discussed above governs the relations between States, makes clear that there is no automatic entitlement to interest. However, even under these rules there is no automatic entitlement to interest: "Interest on any principle sum due under this chapter shall be payable when necessary in order to ensure full reparation."[621] The Commentary to this Article clarifies that "[i]nterest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case."[622] It goes on to explain that: "Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation."[623] Therefore, interest will only be awarded in cases where it is deemed necessary by the Tribunal to give full reparation to the injured party.

418. Furthermore, in circumstances when interest has been awarded, international courts and tribunals have traditionally declined to award compound interest in the absence of any special reasons justifying it.[624] Similarly, investment tribunals have also awarded simple interest.[625]

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[621] ILC Draft Articles, Article 38, at 107 (RL-79(bis)) (emphasis added).

[622] ILC Draft Articles, Comment (1) to Article 38, at 107 (RL-79(bis)) (emphasis added).

[623] ILC Draft Articles, Comment (7) to Article 38, at 108 (RL-79(bis)) (emphasis added).

[624] *See e.g.*, *Case of the S.S. Wimbledon*, 1923 P.C.I.J. (Series A) No. 1 (Aug. 17) at 32 (**Authority RL-174**); *Norwegian Shipowners' Claims* (*Norway v. United States of America*), PCA Case I U.N.R.I.A.A.

419. Indeed, Claimant's reliance on the ILC Draft Articles for support for compounding interest is misplaced.[626] The Commentary explains: "given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as

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307, Award, Oct. 13, 1922, at 341 (**Authority RL-175**); *British Claims in the Spanish Zone of Morocco (Spain v. United Kingdom)*, PCA Case II U.N.R.I.A.A. 615, Award, May 1, 1925, at 650 (**Authority RL-176**); *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat*, Award No. 314-24-1, 16 Iran-US Claims Tribunal Rep. 112 (1987), para. 370 (**Authority RL-177**); *McCollough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone, The National Iranian Oil Company and Bank Markazi*, Award No. 225-89-3, 11 Iran-US Claims Tribunal Rep. 3 (1986), para. 114 (**Authority RL-178**); *Sylvania Technical Systems Inc. v. The Government of the Islamic Republic of Iran*, Award No. 180-64-1, 8 Iran-US Claims Tribunal Rep. 298 (1985) at 15 (**Authority RL-179**) ("the Tribunal has never awarded compound interest"); *R.J. Reynolds Tobacco Company v. The Government of the Islamic Republic of Iran and Iranian Tobacco Company (ITC)*, Award No. 145-35-3, 7 Iran-US Claims Tribunal Rep. 181 (1984) at 8 (**Authority RL-180**); *Anaconda-Iran Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company*, Interlocutory Award, Award No. ITL 65-167-3, 13 Iran-US Claims Tribunal Rep. 199 (1986), para. 142 (**Authority RL-181**); *International Systems & Controls Corporation v. National Iranian Gas Company, National Iranian Oil Company, the Islamic Republic of Iran*, Award No. 464-494-3, 24 Iran-US Claims Tribunal Rep. 47 (1990), para. 123 (**Authority RL-182**).

[625] *Arif v. Moldova*, para. 633(h) (RL-164) (tribunal awarded interest on a simple basis at the EURIBOR rate); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Final Award, Sept. 12, 2010, para. 692 (**Authority RL-183**) (tribunal ordered the respondent to pay simple interest on the actual LIBOR); *SAIPEM S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, June 30, 2009, para. 212 (**Authority RL-184**) (the tribunal awarded simple interest at a rate of 3.375% per annum); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008, para. 491 (**Authority RL-185**) (the tribunal applied interest at the simple active rate of the Ecuadorian Central Bank); *Desert Line LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, Feb. 6, 2008, para. 298 (**Authority RL-186**) (the tribunal awarded simple interest of 5%); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, Nov. 21, 2007, para. 300 (**Authority RL-187**) (tribunal awarded simple interest rate for U.S. Treasury bills); *Occidental Exploration and Production Company (OPEC) v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, para. 217 (**Authority RL-188**) (tribunal awarded simple pre-judgment interest at 2.75% and simple post-judgment interest 4% commencing 30 days after the award until payment); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, Mar. 14, 2003, para. 647 (**Authority RL-189**) (the tribunal awarded simple interest on the fixed rate of 10%); *Feldman v. Mexico*, para. 211 (RL-144) (tribunal ordered the respondent to pay simple interest on Mexican Treasury Certificates); *Autopista v. Venezuela*, paras. 396-397 (RL-168) (the tribunal ordered simple interest on the average lending rate of five principle Banks in the country); *SPP v. Egypt*, para. 257 (RL-166) (the tribunal awarded simple interest at the rate of 5% on the Claimant's capital invested and development costs).

[626] Memorial, para. 689.

an aspect of full reparation."[627] Having focused on its 'entitlement' to compound interest, Claimant does not provide the slightest scintilla of evidence as to any special circumstances that could justify compound interest in this case.

420. El Salvador therefore respectfully submits that Claimant is not entitled to compensation or the payment of interest.

[627] ILC Draft Articles, Comment (9) to Article 38, at 109 (RL-79(bis)).

VI. JURISDICTIONAL ISSUES

A. Reservation of rights with regard to jurisdictional issues already decided

421. El Salvador has full confidence that it will prevail on the merits of this dispute. However, El Salvador would like to emphasize that it files this Counter-Memorial while maintaining that this Tribunal lacks jurisdiction to decide this dispute. Accordingly, El Salvador reserves its rights under the ICSID Convention with regard to the Tribunal's finding that the Centre has jurisdiction and that the Tribunal has competence to decide this dispute under the Investment Law of El Salvador.

422. In particular, El Salvador maintains that Pac Rim waived its right to initiate an arbitration proceeding under the Investment Law of El Salvador when it signed and submitted the waiver required by CAFTA. In its waiver, Pac Rim renounced

> its right to initiate or continue before any administrative tribunal or court under the law of any Party to CAFTA, or other dispute settlement procedures, any proceeding with respect to any measure alleged in PRC's Notice of Arbitration, dated April 30, 2009, to constitute a breach referred to in Article 10.16 of CAFTA.[628]

International arbitration is a "dispute settlement procedure," and the proceeding under CAFTA and the proceeding under the Investment Law were two distinct proceedings, involving different causes of action but based on the same measures. The existence of two separate proceedings is demonstrated by the simple fact that the CAFTA proceeding was dismissed in its entirety and the proceeding under the Investment Law continues unaffected by that dismissal. El Salvador now finds itself in exactly the same circumstances that would have existed if Claimant had filed its Investment Law proceeding before one tribunal and its CAFTA proceeding before another. Claimant's decision to bring both proceedings before the same tribunal does not change the fact that Claimant has subjected El Salvador to two proceedings in violation of the waiver.

[628] Claimant's Consent and Waiver, Updated Exhibit 1 to Notice of Arbitration, June 4, 2009 (R-1).

423. In addition, El Salvador does not see how a dispute initiated in 2009 by a Canadian investor using a shell company with no employees, no bank account, no telephone number, no physical address, and not even a desk in its name, is being arbitrated under the ICSID Convention. El Salvador believes that the very same facts that led to the successful invocation of the Denial of Benefits provision under CAFTA inevitably lead to the conclusion that this dispute is between a Canadian investor and El Salvador. This dispute was initiated long before Canada became a Contracting State to the ICSID Convention and therefore was not a dispute between El Salvador and a national of another Contracting State. As such, this dispute does not belong under the ICSID Convention.

424. Therefore, although El Salvador will not raise these issues again before this Tribunal, El Salvador would like to emphasize that its continued appearance in this proceeding cannot be interpreted as an explicit or implicit acceptance of jurisdiction, or as a waiver of its rights under the Convention with regard to the objections to jurisdiction already submitted to the Tribunal.

B. Additional objections to jurisdiction

1. Jurisdiction for Pac Rim's claims related to mining rights is exclusively reserved to Salvadoran courts

425. In its Memorial on the Merits, Pac Rim has stated its claims in terms of alleged property rights over mineral deposits discovered during exploration. Thus, Pac Rim's claims as stated in its Memorial are directly related to the rights it had or did not have under the relevant exploration licenses. As indicated in subsection IV.A.3 above, to the extent Pac Rim's claims are related to property rights allegedly acquired under the relevant exploration licenses, and notwithstanding Article 15 of the Investment Law, those claims can only be made before the courts of El Salvador.

426. This arbitration proceeds only under the Investment Law of El Salvador. Under Article 15 of the Investment Law, both domestic and foreign investors may submit their disputes with the State to the courts of El Salvador and foreign investors are given the additional option of submitting their disputes to international arbitration. Some areas of investment, however, are subject to specific limitations in accordance with the Constitution and applicable secondary laws of El Salvador.[629] Article 7.b) of the Investment Law provides that investments regarding exploitation of the subsoil is one such area limited by the Constitution and applicable secondary laws. With regard to exploitation of the subsoil for mineral rights, the applicable secondary law is the Mining Law.

427. Under the heading "Jurisdiction," Article 7 of the Mining Law provides:

> The Mining License or Concession Holders, be they national or foreign, are subject to the laws, Courts and Authorities of the Republic, and are absolutely precluded from resorting to claims in the diplomatic protection venue; and the respective contracts must establish that in everything related to the application, interpretation, performance or termination of same, they waive their domicile and submit themselves to the Courts of San Salvador.[630]

428. Thus, as Salvadoran law expert José Roberto Tercero concludes in his report, to the extent a dispute arises under the Investment Law of El Salvador in relation to an exploration license or exploitation concession related to mining, that dispute is referred through Article 7.b)

[629] Investment Law, Art. 7 (RL-9(bis)).

[630] Mining Law, Art. 7 (RL-7(bis)) ("Los titulares de Licencias ó concesiones Mineras, sean nacionales ó extranjeros, quedan sujetos a las leyes, Tribunales y Autoridades de la República, no pudiendo de ninguna forma recurrir a reclamaciones por la vía de protección diplomática; debiendo establecerse en los contratos respectivos que en todo lo relativo a la aplicación, interpretación, ejecución o terminación de los mismos, renuncian a su domicilio y se someten a los Tribunales de San Salvador.")

of the Investment Law, and Article 7 of the Mining Law, to the exclusive jurisdiction of the courts of El Salvador.[631]

429. This provision in the Mining Law mandating that disputes related to exploration licenses and exploitation concessions must be heard by the courts of El Salvador prevails over and trumps the provisions of Article 15 of the Investment Law, in situations where the dispute is related to mining. Article 4 of the Salvadoran Civil Code states that the provisions of the Mining Law will apply preferentially.[632] Article 72 of the Mining Law itself confirms that the Mining Law is the special law for the subject area of mining, and that it prevails over any other legal provisions.[633] The Investment Law does not include any such provision making it a special law. On the contrary, Article 7 of the Investment Law specifically limits investments related to the exploitation of the subsoil to the terms of the Constitution and applicable secondary laws. Thus, as explained by Mr. Tercero, Article 7 of the Investment Law imposes an obligation to comply with the requirements of the Mining Law on the holders of exploration licenses and exploitation concessions as a limitation on their investments.[634]

430. This specific limitation on jurisdiction in disputes related to mining in the Mining Law takes precedence over the general provisions of Article 15 of the Investment Law by virtue of the preferential application of the provisions of the Mining Law. Therefore, the limitation applies by operation of law and it is not necessary for Article 15 to expressly acknowledge this limitation in its text. But in any event, Article 7 of the Investment Law expressly limits

[631] Tercero Expert Report, paras. 70-82.

[632] Tercero Expert Report, para. 76.

[633] Tercero Expert Report, para. 77.

[634] Tercero Expert Report, paras. 63-69.

investments regarding exploitation of the subsoil to the terms of the Constitution and applicable secondary laws, which in this case is the Mining Law.

431. Mr. Tercero's determination that the terms of Article 7.b the Investment Law and Article 7 the Mining Law preclude the exercise of international arbitration jurisdiction under the Investment Law in the present dispute has consequences for the consent requirement included in Article 25 of the ICSID Convention. It is universally recognized that party consent provides the foundation for arbitral jurisdiction.[635] As explained by Dr. Christoph Schreuer, "[l]ike any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."[636]

432. Here, there is no showing that El Salvador consented to the Tribunal's jurisdiction. Claimant purports to bring this case before the Tribunal on the basis of the Investment Law of El Salvador. But as is evident from the Investment Law itself, as well as the Mining Law and the Civil Code, the dispute plainly falls within a category of matters that El Salvador established would be resolved in Salvadoran courts only. Therefore, the general consent Claimant alleges under the Article 15 of the Investment Law is specifically withheld by El Salvador with respect to disputes related to mining. Because this was the legal framework in which Claimant made its investment, Claimant has no basis for claiming any right or expectation with regard to being able to resolve its dispute before an international tribunal. In the absence of consent, the Tribunal lacks jurisdiction *ratione materiae* to hear this case.

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[635] *See, e.g.*, Report of the Executive Directors on the Convention of the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, reproduced in the ICSID Convention, Regulation and Rules, para. 23 ("Consent of the parties is the cornerstone of the jurisdiction of the Centre.").

[636] Christoph Schreuer, *Consent to Arbitration, in* The Oxford Handbook of International Investment Law 830, 831 (P. Muchlinski et al. eds., 2d ed. 2009) (CL-40) (emphasis added).

433. El Salvador notes that because Claimant did not have a concession, but only exploration licenses and an application for a concession, there were no written contracts with the State. The "contracts" referred to in the second part of Article 7 of the Mining Law appear to refer to the concession contract that a concession holder would sign with the representative of the State. Pac Rim never obtained a concession and therefore never signed such contract. However, because Pac Rim is a holder of exploration licenses making claims over rights allegedly acquired during the life of those licenses, the jurisdictional provision in the first part of Article 7 of the Mining Law applies: Pac Rim is "subject to the laws, Courts and Authorities of the Republic."[637]

2. Pac Rim's claims related to its application for the El Dorado exploitation concession are time-barred

434. Pursuant to Salvadoran law, a claimant's right to initiate an action ends if the claimant does not initiate its claim within the applicable statute of limitations.[638] The applicable statute of limitations depends on the type of claims. There are only two types of civil responsibility in Salvadoran law: a) responsibility generated as a consequence of a contractual breach; and b) extra-contractual responsibility. Setting aside the fact that Pac Rim is trying to make a case for expropriation where there is none, the claims Pac Rim has alleged in this arbitration are for extra-contractual responsibility. Article 2083 of the Salvadoran Civil Code provides that, for extra-contractual responsibility, "the actions granted by this title for damages or fraud are time-barred after three years, counted from the day of perpetration of the act."[639]

[637] Mining Law, Art. 7 (RL-7(bis)) ("sujet[o] a las leyes, Tribunales y Autoridades de la República…").

[638] Civil Code , Art. 2231(2) (establishing that an action is time-barred when it is extinguished by prescription). *See also* Civil Code, Art. 2253 (providing that "[t]he prescription that extinguishes actions and rights of others requires only that a certain period of time elapse during which such actions have not been exercised." / "[l]a prescripción que extingue las acciones y derechos ajenos exige solamente cierto lapso de tiempo, durante el cual no se hayan ejercido dichas acciones. ") (RL-123).

[639] Civil Code, Art. 2083 (RL-123).

435. The time limit starts from the occurrence of the alleged wrongful act. Salvadoran law does not require actual knowledge of the alleged breach by the affected party. Article 2253 of the Civil Code provides that the time limit is to be calculated from the time that the right to initiate a claim was born and not from the time when the alleged wrongful act was known by the affected party.[640] Thus, under Salvadoran law, Claimant's arguments about when it knew it had a dispute are irrelevant. The three years run from the date of the alleged unlawful act.

436. In this arbitration, Pac Rim's claims are based on its complaint that the Ministry of Environment never ruled on its application for an environmental permit for the El Dorado exploitation concession. Pac Rim complains that its "application for an environmental permit . . . languished due to persistent personnel changes within the Ministry, understaffing, and inexperience of the technical staff charged with evaluating the permit applications."[641] Claimant argues that the other issues with its concession application would have easily been resolved, but its "primary focus remained on shepherding the slow-moving ED Mining Environmental Permitting process through MARN."[642] According to Claimant, the only thing that prevented it from obtaining the exploitation concession was the lacking environmental permit.[643]

437. Even though actual knowledge of the alleged wrongdoing is not required for the time limit to run, the record shows that Pac Rim knew in December 2004 that the Ministry of Environment had 60 business days to issue a decision regarding the environmental permit and had failed to do so.[644] Pac Rim wrote to the Minister of Environment:

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[640] Civil Code, Art. 2253 (RL-123).

[641] Memorial, para 9.

[642] Memorial, para. 199.

[643] Memorial, para. 320.

[644] Memorial, para. 179.

> On September 8, two thousand four, the Environmental Impact Study for the "EL DORADO" Project was submitted to the above-referenced Ministry. At present, more than sixty business days have already passed since the date it was submitted for your evaluation. However, no decision has been issued to us by the Ministry. Our company would like to know the reasons for the delay, given that it is causing us harm at present.[645]

438. In July 2005, Pac Rim wrote to the Minister of Economy, requesting her help and reiterating its complaint that the delay was causing it harm:

> Given that more than ten months have passed since the start of the EIA evaluation process, I respectfully request your assistance to expedite the EIA approval process. As I have told Minister Hugo Barrera, the long EIA evaluation process and the granting of the Environmental Permit for the El Dorado Mine Project is harming and delaying the investment in, and the development of, the project.[646]

439. Thus, the act that allegedly harmed Claimant, *i.e.*, the non-issuance of the environmental permit within the period established by law, had occurred in December 2004. Pac Rim, therefore, had a right to initiate a claim based on the lack of issuance of the environmental permit for its proposed exploitation project since December 2004. The three years for Pac Rim to initiate a legal action under Salvadoran law started running in December 2004 and ended in December 2007. By April 2009, when Pac Rim initiated this arbitration, claims based on El Salvador's alleged unlawful act were time-barred under Salvadoran Law.

440. Pursuant to Article 2083 of the Civil Code, Pac Rim had three years to initiate a claim for damages. Claimant's failure to exercise the rights afforded by Salvadoran law within the time prescribed by the law extinguished such right through prescription. Therefore, Pac Rim

[645] Letter from PRES to MARN, Dec. 15, 2004 (R-55).

[646] Memorial, para. 221 (quoting Letter from Fred Earnest to Minister Yolanda de Gavidia, July 19, 2005 (C-139)).

could not bring claims related to the non-issuance of the environmental permit by the time it initiated the present arbitration proceedings.

3. Conclusion on additional objections to jurisdiction

441. In accordance with ICSID Arbitration Rule 41(1), El Salvador is raising these objections "as early as possible" and "no later than the expiration of the time limit fixed for the filing of the counter-memorial." El Salvador raised objections to jurisdiction in 2010, which were decided by the Tribunal in June 2012. At the time, El Salvador reserved the right to raise additional objections to jurisdiction, stating that "to the extent the Tribunal decides to continue with the case, El Salvador reserves the right to raise additional objections at the appropriate time."[647] It was not until Claimant filed its Memorial on the Merits, alleging that there was no agreement on the applicable law, that these new objections to jurisdiction were identified while reviewing the subject of applicable law.

442. Taking into account the advanced stage of the arbitration, El Salvador does not request that the Tribunal suspend the proceeding on the merits to decide these objections as a preliminary matter. Instead, El Salvador proposes that the Tribunal consider these objections concurrently with the merits.

[647] The Republic of El Salvador's Memorial on Objections to Jurisdiction, Oct. 15, 2010, para. 467.

VII. CONCLUSION

443. El Salvador has shown that Claimant has no valid claims under the Investment Law and is not entitled to any compensation.

444. In Section II, El Salvador demonstrated that Pac Rim, due to its own decisions and actions, has no mining rights on which to base its claims.

445. First, following up on the arguments raised in the Preliminary Objections which Claimant has still not refuted, El Salvador has proven, and confirmed with expert testimony, that Claimant's principal claim—it's alleged entitlement to a 12.75 km^2 exploitation concession at El Dorado—is utterly without merit. Notwithstanding the missing environmental permit, Claimant failed to comply with two additional requirements of the Mining Law to have its application for an exploitation concession admitted for consideration. Each failure was alone sufficient to prevent Claimant from obtaining an exploitation concession. In other words, without either 1) ownership or authorization for the land in the entire requested concession area (something Claimant admitted was "nearly (if not totally) impossible"[648] to obtain); or 2) a feasibility study (something Claimant admits it began to prepare in 2006 and abandoned in 2009), Claimant could not receive the requested exploitation concession. El Salvador is not to blame for Claimant's choice to ignore the requirements of the Mining Law. Thus, even if Claimant had acquired an environmental permit, Claimant would not have been able to meet the requirements for an exploitation concession under the law and therefore does not have, and never had, a right to a concession. Since Claimant had no concession and no right to receive a concession, it has no claim to injury related to resources in the requested concession area. These facts dispose of Claimant's claims related to the one deposit for which it requested an exploration concession

[648] Pac Rim Internal Memo re Surface Owner Authorization (C-291).

(**Minita**). They also demonstrate that Claimant could have no rights with respect to any other resources in the area of the requested concession.

446. Second, El Salvador has shown that Claimant's additional claims are similarly lacking legal merit. Following the expiration of the original exploration licenses on January 1, 2005, Claimant had no continuing rights related to the deposits in the expired exploration areas. It had no authorization to continue exploring under the guise of having a pending concession application. Thus, any claims related to the unauthorized exploration in the area of the requested concession must fail for this additional reason. This includes claims related to the **Nueva Esperanza**, **South Minita**, and **Balsamo** deposits. Additionally, under the Mining Law, Claimant and its subsidiaries were precluded from obtaining new exploration licenses covering all or part of the area of the expired licenses. Therefore, any claims related to deposits in the area of the original licenses for which Claimant sought to obtain new exploration rights after the old licenses expired (**Coyotera** and **Nance Dulce**) must also fail.

447. Claimant allowed its **Santa Rita** exploration license to expire in 2009 with no allegation that the Government had impeded its exploration activities. The Mining Law precludes Claimant and its subsidiaries from obtaining a new license after letting the first license expire. Finally, El Salvador has confirmed that there is no evidence of Claimant ever having any rights in the **Zamora/Cerro Colorado** exploration license areas. Claimant, therefore, has failed to substantiate claims for any of these early exploration areas.

448. Thus, in Section II, El Salvador provided evidence and expert testimony conclusively showing that Pac Rim had no rights on which to base its claims. The rest of the Counter-Memorial demonstrated that Claimant's claims fail for multiple additional reasons:

- In Section III, El Salvador showed that, given circumstances in El Salvador, a moratorium was a legitimate exercise of the precautionary principle. El Salvador further showed that the Ministry had unresolved concerns about Pac Rim's EIA. Thus, Claimant was not entitled to an environmental permit for exploitation. But, in any event, the decision to suspend mining activities did not impact Pac Rim because, as mentioned above, Pac Rim had no rights that could be affected by such a decision.

- In Section IV, El Salvador showed that it did not breach its obligations under the Investment Law. Claimant has not alleged any facts or presented any arguments to support a claim under Articles 5 or 6 of the Investment Law. In addition, Claimant has not shown that the Government deprived it of any property right, so its claim under Article 8, for expropriation, must fail. Claimant's hope of obtaining a concession regardless of its failure to comply with the Mining Law is not compensable. Likewise, Claimant's assumption that the Government would do anything possible to help, including changing its laws, because of previous goodwill towards the company, is not compensable. Any loss Claimant suffered was caused by its own bad decisions, and not by El Salvador.

- In Section V, El Salvador showed that Claimant has no right to compensation and, in any event, its quantum calculation is seriously flawed. Claimant cannot be compensated for a concession it failed to obtain because of its deficient application. Nor can it be compensated for alleged property rights over mineral deposits in the subsoil, because these belong to the State until extracted pursuant to a valid exploitation concession.

449. From every angle, Claimant's claims have no basis in the facts or the law. Indeed, starting with its actions in El Salvador, Claimant has shown that it considers the law a mere "formality" with which it should not have to comply.[649] In El Salvador, it demanded that the Government grant it a huge concession even though it 1) had not met the substantive requirements or even submitted the required documentation under the Mining Law; and 2) had not resolved environmental concerns about its project or gained social license to operate in the local communities. In this arbitration, Claimant demands that the Tribunal compensate it even though it 1) misled the Tribunal regarding its knowledge of a dispute at the time it changed its nationality; and 2) insisted on a merits proceeding to provide evidence and expert testimony

[649] Memorial, para. 454 ("Pac Rim filed its Concession Application with MINEC in December 2004 with the reasonable understanding that the application procedure was a formality") (emphasis added).

showing its compliance with the Mining Law but provided nothing of the sort; but rather changed its argument to assert that it did not have to comply. Claimant's demands are unreasonable.

450. El Salvador notes that Claimant makes many unfounded assertions and arguments in its 333-page Memorial and accompanying witness statements and expert reports. In the interest of brevity, El Salvador has limited its response to conclusively showing that Claimant had no rights on which to base its claims, El Salvador did not breach obligations to Claimant under the Investment Law, and El Salvador is not responsible for Claimant's alleged losses. The lack of specific reference to any allegation or argument, however, does not imply acceptance of that assertion or argument, and El Salvador reserves all of its rights in this regard.

451. Claimant's gamble in El Salvador—its attempt to stake large claims and make "extraordinary profits"[650]—failed because of its own bad decisions. Claimant has not shown, and could not possibly show, that El Salvador violated any obligations to Claimant under the Investment Law. Claimant's claims under the Investment Law of El Salvador must be dismissed in their entirety.

[650] Pac Rim 2002 Presentation to Shareholders at 1 (C-218).

VIII. COSTS

452. Claimant initiated this arbitration because it thought it could intimidate and coerce El Salvador into granting a concession Claimant knew it did not qualify for under the laws of El Salvador. Even so, Claimant was obligated to know and understand the factual and legal bases for its claims. But Claimant's ever-changing arguments, both factual and legal, show that Claimant initiated this arbitration without regard for the bases of its claims. As a result, El Salvador has been forced to spend its limited resources in proceedings that should never have been initiated nor gone forward.

453. This Tribunal should order Claimant to reimburse El Salvador for all of its costs in this arbitration because Claimant brought and insisted on continuing its meritless claims. El Salvador will highlight just a few examples of the misrepresentations and inconsistencies that Claimant has relied on to get to this point in the arbitration.

A. Claimant's "perfected right" to a concession

454. Claimant began this arbitration claiming that it had a "perfected right" to an exploitation concession for El Dorado and had "met all of the requirements to receive the concession."[651] In the Preliminary Objection phase of this arbitration, however, El Salvador showed that Claimant was not entitled to a mining concession and in fact could not have lawfully been granted a concession due to its failure to comply with the legal requirements. Unable to back up its original assertions, Claimant has changed its story, contradicting itself on whether, how, and when it fulfilled the legal requirements for an application for a mining exploitation concession.

[651] NOA, paras. 2, 65, 96.

455. Claimant survived the Preliminary Objection phase by promising to provide evidence and expert testimony proving its compliance with the legal requirements to apply for the concession.[652] At the hearing, Claimant asserted:

> When we get to the merits, and we do believe it is appropriate and prudent for us to get to the merits of this case, we intend to and are confident that we will be able to rebut all of the factual allegations presented to you. We will do this through fact testimony from Mr. Tom Shrake, from Pacific Rim engineers, from Pacific Rim environmental experts, from experts in mining, from experts in feasibility studies. In fact, we might even want to take a site visit or make a site visit to figure out where the mine is and perhaps identify precisely the trajectory or the line of the mine shaft.[653]

456. But Claimant did not fulfil this promise. It has not rebutted any of El Salvador's factual allegations. On the contrary, Claimant now admits that it knew it had not complied with the requirement to provide ownership or authorization for the surface land in the area of the requested concession.[654] Its own documents confirm the facts presented by El Salvador: Claimant knew the requirements for an exploitation concession and simply "chose" not to comply with them.[655] Because Claimant is solely responsible for its failure to meet the application requirements, it should never have pursued claims asserting that it was entitled to the requested exploitation concession.

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[652] Rejoinder (Preliminary Objections), para. 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.").

[653] Transcript of Hearing on Preliminary Objections, May 31, 2010, at 153:13-154:3 (emphasis added).

[654] In its Memorial, Claimant introduced an internal memo in which it admitted that "authorization of the land owners" was one of the "main things . . . lacking in our request for the exploitation concession." Pac Rim Internal Memo re Surface Owner Authorization (C-291).

[655] Rejoinder (Preliminary Objections), para. 49.

B. Claimant's access to ICSID arbitration

457. Claimant not only insisted on pursuing an arbitration based on a non-existent right, but also managed to keep this arbitration going based on misrepresentations about when it knew of a possible dispute with El Salvador.

458. In the jurisdiction phase, Claimant could not contest the overwhelming evidence showing that the dispute existed before its change of nationality in December 2007. To try to hide the real reason why it changed nationality from the Cayman Islands to the United States in December 2007, Claimant relied on a tactical shifting of positions, repeatedly changing its identification of the "measure at issue"[656] and its explanation of when the dispute arose.[657] In its Counter-Memorial on jurisdiction, Claimant insisted that a dispute between the parties was not even foreseeable any earlier than March 2008, after the change of nationality.[658] Even though Claimant was forced to admit that by late 2007 it had hired international arbitration counsel in the United States,[659] that admission came too late and amid too many inconsistent statements to have the impact it should have.

459. Having gotten to the merits, Claimant now freely contradicts its prior testimony:

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[656] *See* NOA, para. 7 (stating that Claimant's claims were based on "measures taken . . . through the *Ministerio de Medio Ambiente y Recursos Naturales* ('MARN') and MINEC, against Claimant's investments" in 2004-2006); Claimant Pac Rim Cayman LLC's Counter-Memorial in Response to Respondent's Objections to Jurisdiction, Dec. 31, 2010 ("Counter-Memorial (Jurisdiction)"), para. 402 ("Pac Rim Cayman has maintained consistently that the measure at issue is El Salvador's *de facto* ban on mining, which President Saca first announced in March 2008.").

[657] It should be noted that the Tribunal decided not to grant El Salvador's jurisdictional objection on Abuse of Process under CAFTA and did not even consider this objection under the Salvadoran Investment Law based on these misrepresentations by Claimant. Decision on the Respondent's Jurisdictional Objections, June 1, 2012, paras. 2.110–2.111.

[658] Counter-Memorial (Jurisdiction), para. 376 ("The act supporting Pac Rim Cayman's claims of breach resulting in loss or damage is Respondent's *de facto* ban on mining as announced by President Saca in March 2008. To the extent that ban may have pre-dated the March 2008 announcement and been manifested by the earlier failures to act, those failures only became recognizable as applications of a discrete measure in breach of CAFTA obligations with the announcement.").

[659] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011, at 1 (R-128).

Jurisdiction Phase	Merits Phase
"I was particularly surprised to learn that the Government is now claiming that there was a dispute between the parties in 2006. In fact, nothing could be further from the case. . . . From my meetings with Salvadoran officials prior to the 2002 merger with Dayton and well into 2008, officials at the highest levels in the Salvadoran Government repeatedly expressed support for our project, and, particularly in 2007 and 2008, assured us that the permits necessary to conduct extraction activities at El Dorado would be forthcoming. I recall numerous such meetings on my many trips to El Salvador."[660]	"[O]n 7 May 2007, a meeting was held to which representatives of all the mining companies in the country were invited. The meeting was convened by Minister Guerrero and also the Minister of Economy, Yolanda de Gavidia. At this meeting, the mining companies were informed that all mining activity in the country would be halted until such time as an *Evaluación Ambiental Estratégica* (Strategic Environmental Assessment or '**EAE**') of the mining industry was conducted."[661]
"Only after we recognized that the regulatory delays we had been facing were due purely to political reasons – and that, for political reasons, we might not ever get the permits – did we conclude that we had a dispute with El Salvador. I cannot precisely identify that moment. I can say with certainty, however, that it did not occur until after the February 2008 financing and President Saca's March 2008 statement."[662]	"As Mr. Shrake and Ms. Colindres affirm, by this point [May 2007], the Claimant was aware that the delay PRES faced at MARN was political and would therefore not be resolved by means of technical environmental assessment, but only through political means."[663]

460. Contrary to Claimant's prior testimony to this Tribunal, Claimant now openly admits that it has been aware, since May 2007 at the latest, that no environmental permits for metallic mining exploration and exploitation would be processed for anyone until after El Salvador conducted a Strategic Environmental Evaluation. Thus, Claimant now confirms El Salvador's assertions in the jurisdictional stage: Claimant knew it had a dispute with El Salvador at least seven months before its change of nationality in December of 2007.

461. Nevertheless, Claimant continues to contradict itself in its Memorial. Shortly after admitting that it had been expressly told in 2007 that all mining activities were being halted

[660] First Shrake Witness Statement, paras. 89-90.

[661] Memorial, para. 298 (emphasis added).

[662] Witness Statement of Catherine McLeod-Seltzer, Dec. 31, 2010, para. 38 (emphasis added).

[663] Memorial, para. 300.

until a Strategic Environmental Assessment could be conducted,[664] Claimant repeats its claim from earlier phases of this proceeding that it thought the problems with its application would be resolved based on "express assurances" from the Government "throughout 2007."[665] But Claimant's bald assertion contradicting its own admissions cannot change reality.

462. If Claimant had not misrepresented to the Tribunal the actual date when it knew it had a dispute with El Salvador (which it now admits was May 2007 at the latest, five months before Claimant hired international arbitration counsel, seven months before it changed nationality from the Cayman Islands to the United States, and ten months before President Saca's statement of March 2008), this arbitration could have been resolved in the jurisdiction phase, saving the time and expenses that will be spent on the merits phase.[666]

C. New frivolous arguments on the merits

463. El Salvador is being forced to argue the merits of this case only because Claimant presented an inaccurate account of the facts regarding its rights in El Salvador and the time the dispute actually arose. In this phase, Claimant is again increasing the costs for all involved by presenting new and frivolous arguments.

464. For instance, Claimant asserts that mere discovery of deposits confers rights, reaching such a conclusion by extrapolating and linking provisions in the revoked mining codes of 1881 and 1922 to interpret the requirements in Article 37 of the 1995 Mining Law (which it refers to as mere "formalities").[667] El Salvador has already explained that the old mining codes

[664] Memorial, para. 298.

[665] Memorial, para. 322.

[666] Decision on the Respondent's Jurisdictional Objections, June 1, 2012, paras. 2.96-2.100.

[667] Memorial, paras. 499-503.

are irrelevant and they were purposefully revoked by the new Mining Law of 1995, the only law in force when Claimant made its investment in El Salvador.

465. Equally surprisingly, Claimant argues in its Memorial that "Article 37(2)(b) [the land ownership requirement] is not an applicable requirement for exploitation concessions for metallic minerals."[668] According to Claimant and its expert John Williams, "and" means "or" and "or" means "and." There is no basis for this nonsense. It is simply a last ditch effort to avoid the consequences of its failure to comply with the application requirements. Under the clear provisions of the Mining Law, as confirmed by El Salvador's experts, the land ownership or authorization requirement applies to all applications for exploitation concessions (metallic, non-metallic, underground, or open-pit).

466. These arguments, as well as Claimant's assertion that the Pre-Feasibility Study it submitted was actually the required Feasibility Study, even though it admittedly was still working on the Feasibility Study until 2009, are frivolous.

D. Conclusion on costs

467. Notwithstanding its utter failure to support its claims, Claimant insists that it should be paid hundreds of millions of dollars in spite of the fact that it has never complied with the legal requirements to have the rights it claims to have in El Salvador.

468. Claimant must be ordered to reimburse El Salvador for all the costs and expenses incurred in this arbitration because Claimant 1) initiated and continued this arbitration about a mining exploitation concession it knew it did not have a right to receive; 2) changed its nationality to gain jurisdiction under CAFTA for a pre-existing dispute; 3) hid facts from the

[668] Memorial, paras. 560-564.

Tribunal to avoid a finding of Abuse of Process; and 4) once caught red-handed, continues to add frivolous arguments in an attempt to keep this arbitration alive.

469. All of this, along with Claimant's propensity to change its account of the facts as needed throughout this proceeding, have unnecessarily prolonged this arbitration, making it much more expensive than it needed to be. Claimant's strategy from the beginning has been to complicate the simple issue of its failure to meet the requirements to obtain an exploitation concession and its subsequent failure to convince the Government to change or ignore its laws to grant Claimant the concession to which it was not entitled.

470. El Salvador therefore requests that, in accordance with Article 28(1) of the ICSID Arbitration Rules and Article 61(2) of the ICSID Convention, the Tribunal order Claimant to reimburse El Salvador's legal fees and disbursements, together with interest, and order Claimant to otherwise cover all the costs and expenses of this proceeding.[669]

[669] El Salvador will present a detailed description of the costs and legal fees incurred in this arbitration, as well as the considerations regarding interest, at the end of the merits phase.

IX. REQUEST FOR RELIEF

471. El Salvador respectfully requests that the Tribunal:

- Issue an Award stating that it lacks jurisdiction under the Investment Law of El Salvador and dismissing all claims for lack of jurisdiction;
- Should the Tribunal find that it has jurisdiction over any claim, for the reasons stated above, issue an Award dismissing all claims for lack of factual and legal merit;
- Order Claimant to pay all costs and expenses of all phases of this arbitration, and reimburse El Salvador for its legal and expert fees and costs for all phases of this arbitration, plus interest from the time of the Award until payment is made, in an amount and at a rate to be established at the appropriate time; and
- Grant El Salvador any other remedy that the Tribunal considers appropriate.

Dated: January 10, 2014

Respectfully submitted,

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