

**IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF ARBITRATION OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND
THE FOREIGN INVESTMENT LAW OF EL SALVADOR**

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

**CLAIMANT PAC RIM CAYMAN LLC'S
REPLY ON THE MERITS AND QUANTUM**

R. Timothy McCrum
George D. Ruttinger
Ian A. Laird
Kassi D. Tallent
Ashley R. Riveira
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(1) 202 624 2500 (tel.)
(1) 202 628 5116 (fax)

Counsel for Claimant

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GLOSSARY OF KEY DEFINED TERMS

Additional Observations	Official note from MARN containing observations regarding the EIS for the ED Mining Environmental Permit application, delivered to PRES on 11 August 2005
ADES	<i>Asociación de Desarrollo Social y Económico de Santa Marta</i> (Association of Social and Economic Development in Santa Marta)
ADESCO	Association of Economic Development
Amended Mining Law	<i>Ley de Minería</i> as amended by <i>Decreto No. 475</i> (The 1996 Mining Law as amended by Decree 475 in 2001)
ANDA	<i>Administración Nacional de Acueductos and Alcantarillados</i> (National Sewage company)
ARD	Acid Rock Drainage
ARENA	<i>Alianza Republicana Nacionalista</i> (Nationalist Republican Alliance)
Asamblea	<i>Asamblea Legislativa de El Salvador</i> (Legislative Assembly of El Salvador)
Bond (or Environmental Bond)	<i>Fianza de Cumplimiento Ambiental</i> (Environmental Performance Bond)
Bureau of Citizen Participation (or DPC)	<i>Dirección General de Participación Ciudadana</i> (Bureau of Citizenship Participation within MARN)
Bureau of Environmental Management or DGA	<i>Dirección de Gestión Ambiental</i> (Bureau of Environmental Management within MARN)
Bureau of Mines	<i>Dirección de Hidrocarburos y Minas</i> (Bureau of Mines within MINEC)
Cerro Colorado Project	Exploration Project acquired by PRES in September 2006, located approximately 50 km north of San Salvador and 10 km west of the Zamora Project
CIM Standards	Canadian Institute of Mining Standards for Mineral Resources and Mineral Reserves
Claimant	PRC, PRES, and DOREX
Companies (or Pac Rim)	PRMC and its subsidiaries, including Claimant
CONAMA	<i>Comision Nacional del Medio Ambiente</i> (National Commission for the Environment)

Concession Application	Application to convert the El Dorado Exploration Licenses into an Exploitation Concession, submitted to the Bureau of Mines on 22 December 2004
CSR	Corporate Social Responsibility
CTA	<i>Consultoría y Tecnología Ambiental S.A. de C.V.</i> (Environmental Consulting and Technology) (helped prepare Environmental Impact Study with Vector)
DAJ	<i>Dirección General de Asuntos Jurídicos</i> (Bureau of Legal Affairs within MARN)
Dayton Mining (or Dayton)	Dayton Mining Corp. (merged with Pacific Rim)
DGA (or Bureau of Environmental Management)	<i>Dirección de Gestión Ambiental</i> (Bureau of Environmental Management within MARN)
DOREX	<i>Dorado Exploraciones, SA. De C.V.</i> (along with PRES, is a Salvadoran subsidiary of Pacific Rim Mining Corp.)
DPC (or Bureau of Citizen Participation)	<i>Dirección General de Participación Ciudadana</i> (Bureau of Citizenship Participation within MARN)
EAE	<i>Evaluación Ambiental Estratégica</i> (Strategic Environmental Assessment)
ED Drilling Environmental Permit	Environmental Permit related to exploration and drilling activities at the El Dorado Project
ED Mining Environmental Permit	Environmental Permit related to exploitation activities at the El Dorado Project
EIA (or Environmental Impact Assessment)	Administrative process for the granting of environmental permits pursuant to the Environmental Law
EIS	<i>Estudio de Impacto Ambiental</i> (Environmental Impact Study)
El Dorado Exploration Licenses	The El Dorado Norte and El Dorado Sur Exploration Licenses collectively
El Dorado Norte	Exploration License issued by the Bureau of Mines on 10 July 1996 for an area of 29.8696 square kilometers
El Dorado PFS (or PFS)	Final Pre-Feasibility Study, dated 21 January 2005
El Dorado Project (or Project)	Comprised of the El Dorado Norte and El Dorado Sur Exploration License areas
El Dorado Sur	Exploration License issued by the Bureau of Mines on 23 July 1996 for an area of 45.1300 square kilometers

El Salvador (or Government or Respondent or GOES)	Republic of El Salvador
EMP	Environmental Management Plan (conducted to minimize the negative impacts of the construction, operation and decommissioning phases of a project)
Enterprises	PRES and DOREX
Environmental Bond (or Bond)	<i>Fianza de Cumplimiento Ambiental</i> (Environmental Performance Bond)
Environmental Form	<i>Formulario</i> (Form required by MARN to commence the Environmental Impact Assessment)
Environmental Impact Assessment (or EIA)	Administrative process for the granting of environmental permits pursuant to the Environmental Law
Environmental Law (or LMA)	<i>Ley del Medio Ambiente 1998</i> (Environmental Law of 1998)
Environmental Permit	Administrative act authorizing the Permit-holder to carry out activity pursuant to the measures in the EIS
Environmental Regulations (or RGLMA)	<i>Reglamento General a la Ley del Medio Ambiente</i> (General Regulations for the Environmental Law)
EPCM	Engineering, Procurement and Construction Management (type of contractor in charge of the commissioning and ramp-up phases of a project)
Final Observations	Additional thirteen comments requiring further response regarding the EIS for the ED Mining Environmental Permit application, submitted to PRES from MARN on 14 July 2006
FMLN	Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front) (left-wing political party without an ideological opposition to mining)
Gibraltar	Gibraltar Mines Ltd.
GOES or Respondent (or El Salvador or Government)	Republic of El Salvador
Government or Respondent (or El Salvador or GOES)	Republic of El Salvador
Guaco Drilling Environmental Permit	Applied-for Environmental Permit related to exploration and drilling activities within the Guaco Exploration License area
Huacuco Drilling Environmental Permit	Applied-for Environmental Permit related to exploration and drilling activities within the Huacuco Exploration License area

IFC	International Finance Corporation
INCO	A widely used process by which the cyanide levels of waste water are reduced to a level safe for disposed in a tailings pond.
Investment Law	<i>Ley de Inversion de 1999</i> (Foreign Investment law of 1999)
Kinross (or Kinross El Salvador)	Kinross El Salvador, S.A. de C.V. (maintains producing gold mining operations in the Americas, Russia, and West Africa)
La Calera Project	Exploration Project located approximately 8 kilometers west of the El Dorado Project
LMA (or Environmental Law)	<i>Ley del Medio Ambiente de 1998</i> (Environmental Law of 1998)
MARN	<i>Ministerio de Medio Ambiente y Recursos Naturales</i> (Ministry of Environmental and Natural Resources)
McIntosh Report	McIntosh Engineering Conceptual Underground Mine Design & Cost Estimate, dated 26 Jan. 2005
MDA	Mine Development Associates (prepared the Technical Report Update and Mineral Resource Estimate)
MINEC (or Ministry of Economy)	<i>Ministerio de Economia</i> (Ministry of Economy)
Ministry of Economy (or MINEC)	<i>Ministerio de Economia</i> (Ministry of Economy)
Mineral Reserves	a Measured or Indicated Mineral Resources demonstrated by at least a Preliminary F
Mineral Resources	
NI 43-101	National Instrument 43-101 Standards regulating disclosures made by publicly traded Canadian companies
ONI	<i>Oficina Nacional de Inversiones</i> (National Investment Office within MINEC)
Pac Rim (or Companies)	PRMC and its subsidiaries, including Claimant
Pac Rim Exploration	Pacific Rim Exploration, Inc.
PFS (or El Dorado PFS)	Final Pre-Feasibility Study, dated 21 January 2005
Placer Dome	Placer Dome Inc.
PRC	Pac Rim Cayman LLC
PRES	<i>Pacific Rim El Salvador, S.A. de C.V.</i> (along with DOREX, is a

	Salvadoran subsidiary of Pacific Rim Mining Corp.)	
PRMC	Pacific Rim Mining Corp.	
Productive Interval	The range of elevations at which ore in an epithermal vein system is typically found	
QP	Standards	-101
PROESA	<i>Agencia de Promocion de Exportaciones e Inversiones de El Salvador</i> (El Salvador Agency for the Promotion of Exploration and Investment)	
RGLMA (or Environmental Regulations)	<i>Reglamento General a la Ley del Medio Ambiente</i> (General Regulations for the Environmental Law)	
Respondent (or El Salvador or GOES or Government)	Republic of El Salvador	
Responses	for the ED Mining Environmental Permit application, presented to MARN on 22 April 2005	
Response to Final Observations	the ED Mining Environmental Permit application, presented to MARN on 25 October 2006	
Response to Public Comments	the EIS for the ED Mining Environmental Permit, submitted to MARN on 12 Septemeber 2006	
Santa Rita Project	Exploration License area acquired by PRES in July 2005, located approximately 8 km north of the El Dorado Project	
Santa Rita Drilling Permit	Environmental Permit related to exploration and drilling activities at the Santa Rita Project	
SPMA	<i>Suprintendente de Proteccion Ambiental</i> (Supervisor of Environmental Protection)	
SRK	SRK Consulting, Inc. (prepared the January 2005 El Dorado Pre-Feasibility Study)	
TAU Final Report	TAU Group, Final Report: Strategic Environmental Assessment of the Metallic Mining Sector of El Salvador, Ministry of Economy of El Salvador Foreign Cooperation Unit, dated Sept. 8, 2011	
TMF	Tailings Management Facility	
Vector	Vector Colorado LLC (helped prepare the Environmental Impact Study with CTA)	

Zamora Gold Project

Exploration Project acquired by PRES in 2006, located approximately 50 km north of San Salvador and 10 km east of the Cerro Colorado Project

I. INTRODUCTION

1. Pursuant to Article 15 of the *Ley de Inversiones* **Investment Law** ¹ **PRC** on its own behalf and on behalf of its **PRES** **DOREX Enterprises** hereby respectfully submits its Reply on Merits and Quantum dated 11 **Reply**, in response to the Counter-Memorial on Merits **Counter-Memorial**) presented by the Government of El **Respondent, El Salvador** or **GOES**. PRC, PRES, and DOREX are **Claimant**

2. **PRMC** a public company established under the laws of Canada. PRMC and its former subsidiaries, including **Pac Rim** **Pac Rim Companies** **Companies**

3. **Memorial** PRC brought claims before the Tribunal for violations of the Investment Law of El Salvador and of the Customary International Law **Minimum Standard** **Minimum Standard** In support of these claims, Claimant demonstrated its substantial and good faith investment in the El Dorado Project – made in accordance with the laws of El Salvador – between 2002 and 2008: an investment that marked a significant step along a lengthy trajectory towards the development of a modern mining industry in El Salvador. As borne out by hundreds of factual and legal exhibits, this trajectory marked a path that had been consciously chosen and consistently implemented by the Salvadoran State since its first days as an independent republic, and certainly for many years before an experienced group of mining industry professionals came together to form the group of companies now known in this arbitration as Pac Rim.

4. Thus, following the peaceful resolution of a long civil war in the early 1990s, El Salvador took stock of its economic priorities and intensified its efforts to stimulate investment

¹ *Decreto No. 732* of 14 October 1999, published in the *Diario Oficial* No. 210, Vol. 345 of 11 **Investment Law** -4).

in a modern mining industry, and particularly in the **El Dorado Project** located in the Department of Cabañas. In fact, the Salvadoran *Asamblea Legislativa* pinpointed the development of the El Dorado Project by foreign investors as a matter of national priority on two separate occasions investment: first in 1995, when it enacted a modern Mining Law (in specific recognition of the economic benefits that modern mining at El Dorado would bring to the economically-depressed department of Cabañas); and again in 2001, when it passed an emergency decree extending the terms of minerals exploration licenses granted under the 1995 law (in recognition of the importance of safeguarding new investment in mining projects; and in specific response to the needs of Dayton Mining Company, then-owner of the El Dorado Project).

5. Pac Rim 2002 merger of Dayton Mining Company and PRMC came on the heels of this 2001 emergency decree, and was specifically calculated to ensure that the El Dorado Project would consistent with the imperatives set by the Salvadoran *Asamblea Legislativa* be developed in the most timely and effective manner possible. Thus, Pac Rim was quite literally custom-made for the purpose of meeting the goals that Respondent *itself* had previously established for the El Dorado Project. To that end, the company acquired valid mineral exploration licenses, and proceeded to work collaboratively with bureaucrats, elected officials and community members in El Salvador to ensure that the minerals covered by those licenses were developed promptly, fully, and in an environmentally and socially responsible manner.

6. As explained in the Memorial and further in this Reply, Pac Rim El Salvador included: expending tens of millions of dollars in-country, to the direct benefit of the local economy; completing confirmatory mineral exploration drilling and detailed technical studies which demonstrated the economic and environmental feasibility of mining the Minita deposit; doubling the mineral resources associated with the El Dorado Project; and harnessing the success of its high-quality technical studies and exploration efforts to attract international financing for development of the mine. In addition, Pac Rim implemented a series of highly progressive environmental and social programs which were calculated to ensure that the Department of Cabañas as well as the GOES itself would receive direct and lasting benefits

7. Notably, a number of other mineral exploration projects had already been established in El Salvador pursuant to the 1995 Minerals Law by the time that Pac Rim made its investment in 2002. Nevertheless, Pac Rim was the first company willing and able to respond to [redacted] resources and particularly the flagship El Dorado Project into active production using modern and environmentally sound mining methods. Consequently, Pac Rim understood that the relevant local stakeholders would have limited hands-on experience with modern mining, and it committed to working collaboratively with those stakeholders in order to develop a project that could serve as a model for future investors in what the company believed would soon become a major new mining jurisdiction. To that end, Pac Rim proactively addressed ambiguities and confusion about modern mining in numerous face-to-face meetings with the G [redacted] training programs; and community consultations.

8. In addition, Pac Rim disseminated extensive information about modern mining activities to the local communities surrounding its area of operations; openly shared its technical expertise with the technical staff at the relevant Government agencies; and advanced suggestions on how best to interpret or reform the relevant laws (which had not yet been applied to active mining operations) in a manner that would achieve the goals of the Government as well as those of the mining industry. At the same time, Pac Rim adopted a policy of following the [redacted] e in dealing with delays.

9. Thus, for approximately four years, Pac Rim worked collaboratively with the Government and the local communities to finalize the permitting for the El Dorado Project and prepare for the startup of mine construction. Then, in 2006, the then-Minister of *Ministerio de Medio Ambiente y Recursos Naturales* **MARN**, Hugo Barrera, unexpectedly announced his intention to use the [redacted] regulated public authority as a means of impeding the development of the mining industry. [redacted] conduct drew immediate criticism from higher authorities within the Executive Branch, resulting in a public reversal of his position, and in [redacted] In the meantime, Pac Rim acknowledged the legitimate desire of the Ministers of MARN and *Ministerio de Economía* **Ministry of Economy** **MINEC** to

update the existing Mining Law in order to increase royalties and add to existing environmental protections, and expressed its wholehearted support for these reform efforts.

10. As 2007 commenced, Pac Rim was continuing to work with MINEC to advance a reform to the mining law, while maintaining constant contact with MARN in regard to its pending permit applications under the existing Mining Law

Amended Mining Law²). Unfortunately, however, these applications were again frozen after a new Minister assumed leadership of MARN and technocrats not to take any action on applications related to metallic mining. In April 2007, mining industry representatives were publicly notified by the Ministers of MARN and MINEC that metallic
Str

11. Pac Rim was reasonably unsure how the announcement of this Strategic Assessment would or could impact its pending applications. Thus, the company continued to collaborate with the Government regarding a reform to the Amended Mining Law, which was introduced in November 2007. Over the next few months, the mining law reform remained under consideration by the relevant committee within the *Asemblea*, and Pac Rim was informed it would be considered by the full *Asemblea* in the near future. At this point, Pac Rim had sought the advice and input of the highest levels of power in El Salvador up to and including President Saca. Thus, the company understood that the bill was supported both by the *Asemblea* as well as the President.

12. Then, in March 2008, then President Saca declared a ban on all metallic mining projects in the country, abruptly and effectively nullifying the valid legal and regulatory regime upon which Claimant had relied in making its investment. The result of this gross misuse of authority by the Executive Branch of Government *de facto* on metallic mining in El Salvador, which continues to date, and consequently the destruction of and the frustration of its legitimate expectations to develop active mining operations at El Dorado.

² *Decreto No. 475* of 11 July 2001, published in the *Diario Oficial* No. 16, Vol. 352, on 31 July 2001 (CLA-212).

13. On the basis of the foregoing set of facts almost all of which are completely ignored by Respondent in its Counter-Memorial Claimant brought its claims before this Tribunal under the Investment Law and the Minimum Standard. The basic elements of those claims are as follows:

1. Pac Rim invested in El Salvador through its acquisition of property rights in relation to the El Dorado Project;
2. Pac Rim acted in reliance on its investment;
3. Pac Rim had a legitimate expectation of achieving a particular economic purpose with its investment: principally, that of developing active mineral exploitation at El Dorado;
4. that is, the implementation of a *de facto* ban by members of the Executive Branch has been demonstrated in fact;
5. The *de facto* ban is wrongful;
6. The *de facto* ban Claimant.

14. Together with the Memorial, Claimant provided ample factual and legal evidence to substantiate all six basic elements of its claims, comprising its affirmative case.

15. In its Counter-Memorial, on the other hand, Respondent has provided no documentary evidence affirmative factual case, and has either ignored or misrepresented the voluminous evidentiary record put forward by Claimant. Furthermore, the evidence upon which Respondent chiefly relies the testimony of its fact witnesses and experts is filled with inconsistencies, oversights, and misrepresentations. Thus:

- direct conflict with contemporaneous documents in the record, and the relevant witnesses have provided no explanation of how to reconcile these conflicts.
- have ignored relevant documents and have declined to . Instead, these experts have taken up the task of commenting upon disputed facts about which they have no direct knowledge, and without any accompanying citations to relevant factual evidence. Moreover, one of these experts previously provided

advice to Pac Rim about the same matters as to which she is now providing an expert opinion for the Respondent in this case, and arrived at conclusions different from the ones presented before this Tribunal. In Appendix A, Claimant sets out a summary of the inconsistencies and contradictions between her expert opinion in this proceeding and advice she previously provided to Claimant.³

16. In addition to lacking evidentiary support, the case presented by Respondent in the Counter-Memorial is also unsustainable as a matter of law. Thus, for example, acceptance of Respondent's arguments ignore the ICSID Convention, the Constitution of El Salvador and the basic principles of legal interpretation; as well as the obvious contradictions between its arguments in this arbitration and its own past conduct. To the extent that Respondent acknowledges any of its own past conduct in support of the El Dorado Project, it claims for the first time that such conduct must have been illegal, and asks the Tribunal to rely on that alleged illegality as a basis to penalize *Claimant* upon a disregard for the mandatory rules and principles of law that govern the resolution of this dispute.

17. Finally, it should be emphasized that Respondent has not attempted to provide the Tribunal with *any* counter-narrative (even an unsubstantiated one) in respect of its longstanding encouragement of foreign investment in the El Dorado Project, or Respondent's reliance on that encouragement. Moreover, Respondent has admitted the existence of the *de facto* ban as an unauthorized measure of the Executive Branch of Government; and has expressly affirmed that Pac Rim will never be afforded the opportunity to reap the benefits of its investment in the El Dorado Project.

18. In short, Respondent has effectively declined to offer a serious defense to the claims at issue, and has instead focused its rebuttal on affirmative defenses and arguments pertaining to the scope of the project.

19. In light of the manner in which Respondent has presented its defenses, the following Reply is structured as follows:

³ Appendix A

- In **Part II**, Claimant reconfirms its affirmative case on the merits, which has not been rebutted;
- In **Part III**, Claimant defenses, proving that they are erroneous and of limited relevance to this dispute; and
- In **Part IV**, Claimant affirms the scope and amount of compensation to which it is entitled.

20. In addition to the authorities and exhibits submitted herewith, this Reply is also supported by the Witness Statements and Expert Reports of:

- **Mr. Thomas C. Shrake**, who served as the President and CEO of PRMC; the President, Treasurer, and Secretary of Pacific Rim Exploration, Inc.; the Treasurer of Dayton Mining (U.S.) Inc.; and one of the Managers of PRC;
- **Ms. Catherine McLeod-Seltzer**, who served as the Chairman of the Board of Pacific Rim Mining Corp. and is a Manager of Pac Rim Cayman;
- **William T. Gehlen**, who served as the Vice-President of Exploration for Pacific Rim Exploration, Inc. and later as President of PRES and DOREX;
- **Ms. Ericka Colindres**, a former Environmental Assessment Technician in the Bureau of Environmental Management within MARN, the former Supervisor of Environmental Protection for PRES, and later as the Director of Sustainability for Pacific Rim Exploration, Inc.;
- **Elizabeth (“Betty”) García**, Director of Public Relations for PRES;
- **Juan Isidro Hernández**, Pastor of Evangelical Church of San Francisco El Dorado of the San Francisco canton, Municipality of San Isidro, Department of Cabañas, El Salvador;
- **Gilberto Vasqu ez**, a resident of the hamlet of Los Jobitos in the Municipality of San Isidro, Department of Cabañas, El Salvador;
- **Matthew L. Fuller**, Certified Professional Geologist and Licensed Engineering Geologist, served as Project Director of the El Dorado EIS;
- **Mr. Peter Brown**, the Founder and now Honorary Chairman of Canaccord Financial Inc., Chairman of Canaccord Capital Inc., and Chairman of Canaccord Genuity Corp.;
- **Mr. Steven Ristorcelli**, the Principal Geologist with Mine Development

MDA

- ***Dr. Neal Rigby***, a mining engineer with four decades of experience and former **SRK** professionals in 50 permanently staffed offices in 23 countries.
- ***FTI Consulting, Howard Rosen and Jennifer Vanderhart***, Senior Managing Director of FTI, Managing Director of FTI, respectively;
- ***Professor Arturo Femandois***, the Senior Professor of Constitutional Law at the School of Law of Pontificia Universidad Católica de Chile (Pontifical Catholic University of Chile);
- ***Dr. Ian Hutchison***, a Director of SLR Consulting, a senior-level consulting company located in Irvine, California, with groups specializing in mine planning and permitting, mine waste and water management, mine site environmental remediation, as well as remediation of industrial sites and solid waste management;
- ***Dr. Terry Mudder***, the co-owner and managing partner of TIMES Limited, an environmental science and engineering firm located in Sheridan, Wyoming, and formally a partner, office manager, and corporate consultant for SRK, a well-known international mining consulting firm; and
- ***Mr. John P. Williams***, an advisor to the World Bank and to numerous governments in Latin America and the Caribbean, Africa, Asia and the Middle East on mining law and policy, and the related investment, tax and environmental laws and regulations.

II. CLAIMANT'S AFFIRMATIVE CASE IS UNREBUTTED

21. In its Counter-Memorial and throughout this arbitration, Respondent has attempted to present the Tribunal with a selective and highly distorted vision of the reality of Pac Rim. In the imaginary world as presented by Respondent, Claimant was an unwelcome intruder whose entire investment in El Salvador was predicated on its acquisition of Exploration Licenses which it knew all along to be legally worthless. In the world as presented by Respondent, Claimant then leveraged its worthless rights in the Exploration Licenses to try to pressure an unwilling Government to ignore the law and grant it a mining concession to which it was not entitled. In the world presented by Respondent, the Government refused to grant the concession; and Pac Rim never attempted to communicate with the Government about its project except when it received specific requests for information from the administrative agencies. In the world as presented by Respondent, the Government refused requests for information dismissively. Instead, it greedily proceeded to acquire, explore for and develop mineral resources and reserves.

investor, who arrived uninvited into the territory of El Salvador with the intention of thwarting the law and defrauding the country. As the Counter-Memorial makes clear, Respondent can only maintain its distorted and false view by engaging in a highly selective reading of the factual record and applicable law.

23. Thus, in this *Part II*, Claimant again sets the record straight regarding its substantial and good-faith investment in El Salvador, which was made in full accordance with the existing laws of the country, including El .
acquisition of
support for
of that project. Acting on that basis, Pac Rim expended tens of millions of dollars on the project, thereby increasing its value exponentially; bringing employment and social benefits to the Department of Cabañas; and improving environmental protection and monitoring in the area around the project site.

surprising assertion
subsoil.⁶ However, as
property rights in El Salvador lacks credibility.

1. Pac Rim’s claims in this case depend upon its having made an “investment” subject to protection under the Investment Law

26. in this case arise under the Investment Law. According to the
r
regarding the investments made by [Pac Rim] in El Salvador ⁷

27. ⁸

Tangible and intangible assets or resources, the providing of services or financing in local or foreign currency of free convertibility, devoted to the execution of economic activities, or to the expansion or improving of existing activities, for the production of goods or services, and the generation of employment.

28. Article 3 of the Investment Law provides for the admission of local and foreign capital destined to establish commercial companies, or to the acquisition, whether total or partial, of existing commercial companies;⁹ and capital destined to the acquisition of local real estate, as well as to establish all types of real property rights.¹⁰

29. In this case, Claimant made investments in El Salvador primarily¹¹ through: (1) its *derechos mineros* El Dorado Sur Exploration Licenses (and later under the Pueblos, Guaco, Huacuco and Santa

⁶ *Id.*, para. 42.

⁷ Investment Law, art. 15 (emphasis added) (CLA-4).

⁸ *Id.*, art. 2(a).

⁹ *Id.*, art. 3(a).

¹⁰ *Id.*, art. 3(b).

¹¹ Pac Rim also made other investments in El Salvador, including through its acquisition of real estate in San Isidro.

Rita Licenses), which, in accordance with the terms of the Amended Mining Law, constitute¹²; and (2) its acquisition of the shares in PRES (previously Kinross) and DOREX.

2. Pac Rim acquired valuable mineral rights (“*derechos mineros*”) in El Salvador through its acquisition of the Exploration Licenses and its discovery of economic mining potential in the license area

30. Contrary to what is implied by Respondent in the Counter-Memorial, Claimant has never argued that Pac Rim *owned* the subsoil of El Salvador, or the minerals contained therein.¹³ Likewise, Claimant has never based the existence of the legal rights at issue in this¹⁴ If Respondent believes otherwise, it can only be because Respondent is purposefully ignoring

31. As Claimant indicated in its Memorial, exploration licenses issued under the *derechos mineros* licenseholders. In

¹² Memorial, para. 471 (citing Amended Mining Law, art. 10 (CLA-5)).

¹³ Claimant has repeatedly emphasized that the subsoil is the property of the State, which may grant concessions for its use. *See, e.g.*, Memorial, paras. 457, 16.

¹⁴

which, as Claimant explained in its Memorial, formed an important basis for the current Amended Mining Law current legal system in El Salvador in terms of the ownership of subsoil metallic minerals. In fact, both the 1881 Mining Code and the 1922 Mining Code vested original ownership of subsoil metallic minerals in the State. *See Código de Minería de la República de El Salvador*, dated 1 Mar. 1881, art. 13 (CLA-208); *Código de Minería*, adopted by unnumbered Decree on 27 March 1922, published in the *Diario Oficial* No. 183, Tomo 93, of 17 Aug. 1922, art. 12 (CLA-207); *see also, e.g., Código de Minería de la República de El Salvador*, dated 1 Mar. 1881, art. 60 (CLA-208); *Código de Minería*, adopted by unnumbered Decree on 27 March 1922, published in the *Diario Oficial* No. 183, Tomo 93, of 17 Aug. 1922, art. 17 (CLA-207); Memorial, paras. 458-60.

Under the 1922 Code, ownership of a mine could only be transferred to a private party via a concession. This concession would lapse and all rights to the mine would revert to the State in the event that the concessionaire failed to carry out work on the property su

provisions of the Code, or to implement proper health or safety measures. *See Código de Minería*, adopted by unnumbered Decree on 17 May 1922, published in the *Diario Oficial* No. 183, Tomo 93, of 17 Aug. 1922, arts. 48-57 (CLA-207).

turn, these exploration licenses amount to real property rights, as expressly provided in Article 10 of the Amended Mining Law, which provides that:¹⁵

The mineral deposits that are referred to in this Law are real consequence, the concession is a right *in rem* and transferable *inter vivos*, with the previous authorization from the Ministry; hence, the concession is susceptible to serve as guaranty in mining operations.

32. In the Counter-Memorial submission, Respondent and its experts repeatedly attempt to argue that an exploration license granted under the Amended Mining Law does not provide any property rights to the license-holder.¹⁶

is not entirely clear, but it appears to rely upon two presumptions: (1) that the subsoil is property of the State; a covered by the terms of Article 10 of the Amended Mining Law. In reality, neither of these

33. the subsoil, this issue is not in dispute and is irrelevant to the question of whether Claimant acquired property rights in relation to subsoil minerals.¹⁷

34. With regard to the legal nature of exploration licenses granted under the Amended Mining Law, these *derechos mineros*

usive and

18

¹⁵ Memorial, para. 471 *et seq.*

¹⁶ See, e.g., Counter-Memorial, para. 47 *et seq*
li

¹⁷ As acknowledged in the Ayala/Fratti Report, concessions of subsoil minerals are subject to private ownership, regardless of the nature of the subsoil minerals as property in the public domain. See Ayala/Fratti, Expert Report at 18.

¹⁸ Second Fernandois Expert Report at 13-14 (citing BERMÚDEZ SOTO, Jorge, *Derecho Administrativo General* [General Administrative Law], Ed. Legal Publishing, Santiago, 2011, pp. 114 (Continued...))

As acknowledged in the Ayala/Fratti Report, a concession amounts to a property right of the titleholder.¹⁹

35. The legal nature of the exploration license terms of the Amended Mining Law, as well as by generally-accepted public law doctrine. First, *derechos mineros* older,²⁰ a conclusion which is confirmed by reference to Article 2.8 of *derecho minero* private parties by means of licenses, concessions or contracts for mining operations, according to

21

36. Second, the *derechos mineros* conferred under the exploration license have all the characteristics of property rights. Thus, according to Article 14 of the Amended Mining Law, *derechos mineros* are fully transferable.²² Furthermore, Article 50 confirms that the right to explore for minerals may be encumbered and used as a guaranty.²³ In addition, Article 53 provides that exploration licenses of metallic minerals provide a basis for the license holder to constitute legal easements over servient surface estates.²⁴ These provisions confirm that the exploration license enjoys all the same features identified in Article 10 of the Amended Mining Law as pertaining to a real property right in relation to metallic minerals.²⁵

115 (AF-2)); accord Ayala/

mean the legal act through which approval is given to a private party, only in cases of public interest and and risk and in substitution of the State, it will provide a public service or may use, avail itself of, and exploit goods in the public domain, in

¹⁹ See, e.g., Ayala/Fratti Expert Report at 18 (acknowledging that a concession is susceptible to private ownership); p. 49 (acknowledging that a concession can be subject to expropriation).

²⁰ Amended Mining Law, art. 13 (CLA-5).

²¹ Mining Law Regulations, art. 2.8 (CLA-6).

²² Amended Mining Law, art. 14 (CLA-5); see also First Williams Expert Report at 26, n.66.

²³ Amended Mining Law, art. 50 (CLA-5).

²⁴ *Id.*, arts. 53-54 (CLA-5).

²⁵ *Id.*, art. 10 (CLA-5); see also Second Fernandois Expert Report at 23- Having established that the license causes rights to arise, it is appropriate to inquire as to its transferability. As has been observed and explored in this Report, the Mining Law expressly allows transferability of these rights inter (Continued...)

37. As Claimant indicated in its Memorial, Article 10 of the Amended Mining Law *MINAS* issued in relation to such mines is a real property right.²⁶ *minas* does not distinguish *yacimientos metálicos* licenses minerals, both of which confer rights in relation to subsoil metallic mineral deposits.²⁷ in Article 10,²⁸ and as confirmed by the remaining provisions of the Amended Mining Law, including those mentioned above.

38. Nevertheless, in the Counter-Memorial, Respondent alleges that the exploration of Article 10 of the Amended Mining Law.²⁹ This is plainly incorrect because, as mentioned above, the exploration license has to what is alleged by Respondent, the Amended Mining Law does *not* always use the terms³⁰ such that the use of the term additio

vivos, and does so in broad and favorable terms -75; First Williams Expert Report at 26-28.

²⁶ Amended Mining Law, art. 10 (CLA-5); *see also* Memorial, para., 475; First Williams Expert Report at 28.

²⁷ [the] Holder the exclusive faculty to execute mining activities, to localize the deposits of the mineral substances for which the License has been granted, within the limits of the area given and at an indefinite depth -5). On the other hand, Article 10 distinguishes between metallic mineral deposits and non-metallic mineral deposits, confirming that non-metallic mineral deposits are not the land in which they are found. In this regard, *see* First Williams Expert Report at 27; Second Williams Expert Report at 8-11.

²⁸ *See* Memorial, paras. 473-75; First Williams Expert Report at 26-27.

²⁹ Counter-Memorial, para. 47.

³⁰ *Id.*, para. 48.

both exploitation concessions of metallic minerals *as well as* exploration licenses of metallic minerals.³¹

39. Furthermore, and importantly, the Amended Mining Law of El Salvador is not

As Professor Fernandois explains in his Second Expert Report, legislators frequently confuse the terminology used to characterize the different categories of administrative

³² Therefore, contrary to what is alleged in the Ayala/Fratti Report,³³

the administrative authorization to carry out exploration for subsoil metallic minerals does not support

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40. As Professor Fernandois explains, the exploration license described in the Amended Mining Law is an authorization related to the use of a property in the public domain,

³¹ Amended Mining Law, art. 15 (CLA-5). As Mr. Williams pointed out in his First Expert Report, the substantive rights and obligations for titleholders of exploration licenses of metallic minerals and exploitation concessions of metallic minerals are set forth in the same chapter of the Amended Mining Law, and there are no separate eligibility requirements for one versus the other. First Williams Expert Report at 29.

³² Second Fernandois Expert Report at 9, n.2 (quoting the authoritative legal commentators García de Enterría and Fernández, *Curso de Derecho Administrativo* [Course on Administrative Law], Volume II, Thompson Reuters, 13th Edition, Navarra, 2013, pp. 137 138 (**AF-14**)); *see also* at 14, 18 (quoting GARCÍA DE ENTERRÍA, Eduardo and FERNÁNDEZ, Tomás Ramón, *supra* note, Volume II, p. 157 (**AF-14**)); *see also* difference between the term used by the law (*nomenclature*) and its true nature is not unusual in laws, as has been explained. Consider, for example, a similar situation in Spain. Analyzing the treatment of *with respect to them, there is an explicit and deliberate legal intent to exclude the system of private ownership, with some degree of [government] intervention, in order to establish a use of the same based on a public distribution in favor of those who demonstrate willingness to carry out an effective exploitation and to ensure the latter, under the legal device of a mining concession (even though the Mining Law erroneously speaks of “authorization” in those cases; we already have sufficient references to be able to conclude that it is not an exact qualification.*

³³ Ayala Fratti Expert Report at 11.

³⁴ Second Fernandois Expert Report at 8.

i.e., the subsoil.³⁵ Consequently, for purposes of public law, there are only two possibilities: the exploration license will either be consi , alternatively, as a

36

distinction, in practice, between the categories of titles of use [of property in the public domain] th license that is granted under the Amended Mining Law.³⁷

41. These criteria include: (1) the stability and degree of intensity that the license confers³⁸; (2) the magnitude of the investments associated with it³⁹; and (3) the presence of an expressly defined term for its existence.⁴⁰ An application of each of these criteria to the exploration license conferred under the Amended Mining Law unequivocally confirms that the li 41

42. customary and general method whereby the Government grants occupation titles on public 42 Conversely, the - economic- *e.g.*, a permit to occupy a public road with temporary construction works.⁴³ In this sense, the tenuous legal nature of an occupation permit (which is revocable) is

³⁵ Second Fernandois Expert Report at 9-12; at 19-21; *see also* Amended Mining Law, arts. 19, 20 -5).

³⁶ Second Fernandois Expert Report at 13.

³⁷ *Id.* at 14.

³⁸ *Id.* at 15.

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 16.

⁴¹ *Id.*

⁴² *Id.* at 17 (quoting MONTT OYARZÚN, Santiago, *The domain...*, *supra* note, p. 320. (AF-37)).

⁴³ *Id.* at 13 (quoting MONTT OYARZÚN, Santiago, *El dominio público. Estudio de su régimen especial de protección y utilización* [Public Domain. Study on its special system of protection and use], Legal Publishing, 2nd Edition, Santiago, 2009, p. 308 (AF-36)).

fundamentally incompatible with the important public interest associated with mining activity under the terms of the relevant El Salvadoran laws, including the Amended Mining Law itself.⁴⁴

43. _____ es of public law, it is undoubtedly subject to ownership and amounts to a real property right in favor of the licenseholder.⁴⁵ Professor Fermandois explains this conclusion in the following terms:

In sum, the granting of an exploration license causes a new right to arise for its titleholder, which was not previously possessed, consisting of the exclusive use of the subsoil to explore for mineral substances. This **right is real in nature**, as it assumes a direct subject-thing relationship, whose respect is enforceable to any person, and belongs to the category of administrative rights *in rem* due to the special public nature of the property to which it applies.

_____ recognized by the language of the mining legislation (which addresses acquisition and obtainment in Articles 8 and 9), and the treatment that it gives in terms of transfer *inter vivos* and transferability *mortis causa* (Art. 14).⁴⁶

44. _____ e of the exploration license as a concession which confers real property rights on the holder are also confirmed by the

[M]ining rights, amongst them the right derived from the exploration license, are true administrative rights in rem over the public domain, which grant a power over the thing and are enforceable against everyone.

In our Mining Law, it is thus established that the exploration license creates a right that can be transferred, gives rise to the obligation to register acts that have this as their object or relate thereto, permits the establishment of liens over the right to exploit,

⁴⁴ See *id.* at 17.

⁴⁵ See Ayala/Fratti Expert Report at 18 (acknowledging

see also Amended

Mining Law, art. 10 (CLA-5).

⁴⁶ Second Fermandois Expert Report at 21 (emphasis in original); *see generally*, at 18-21.

and creates easements. It is clear that these regulations can only attach to a right and, *specifically, to rights of an in rem nature*.⁴⁷

45. Because the Exploration Licenses at issue in this case undoubtedly constituted the property of PRE under the Investment Law, regardless of whether or not Pac Rim was ever granted an exploitation concession.

46. Exploration Licenses which consisted principally of the exclusive right to explore for minerals at indefinite depth; and the exclusive right to request the respective exploitation concession that will allow the minerals to be exploited⁴⁸ can be valued in economic terms for purposes of assessing damages, since they were associated with a potential stream of future income, and were transferable *inter vivos*.⁴⁹ Pac Rim discovered minerals with economic mining potential and, being the holder of valid Exploration Licenses in relation to those minerals it presented an application to exploit the exclusive right of the exploration license holder who submits a concession application expires after a certain time,

⁴⁷

the Legal Status of the Holder of an Exploration License and Current 10- *En nuestra Ley de Minería, se establece así que la licencia de exploración crea un derecho susceptible de transferencia, origina la obligación de registrar los actos que tienen por objeto o guarden relación con la misma, permite que se establezcan gravámenes sobre el derecho a explotar y constituir servidumbres. Es evidente que tales regulaciones solo pueden recaer sobre un derecho, y específicamente, sobre derechos de naturaleza real* (C-807) (emphasis in original).

⁴⁸ Amended Mining Law, art. 19 (CLA-5).; *see also* art. 23.

⁴⁹ Second Fernandois Expert Report at 25-bridge between exploring and exploiting that makes the exploration license valuable. And we have confirmed that this bridge is solid, as the law confers *exclusivity* to the titleholder to request the concession (Art. 19), thereby eliminating any other competitor that may be interested in it. This makes the license *preferential*, in the sense that any other interested party, save the license holder, lacks exclusivity and is therefore eliminated, or at least prevented from accessing the concession. We have also stated that the only requirement on which the transformation of the right from a license into a concession hinges on

Id. at 27.

allow for the possibility that there is a private party willing to pay for a right that has not been terminated, and that has been placed in a realm of exclusivity and preference by the law to transform into a[n] [exploitation]

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3. Claimant acquired shares in PRES and DOREX

47. Aside from its indirect acquisition of the Exploration Licenses at issue in this case, Claimant also acquired a majority shareholding in the two El Salvadoran entities, PRES and DOREX. There is no question that Pac Rim is the registered owner of these shares, which a direct investments in PRES and DOREX, as well as most of its subsequent capital contributions to those entities, are registered with the El Salvadoran *Oficina Nacional de Inversiones ONI* ⁵¹

B. It Is Uncontested That Claimant Invested Tens of Millions of Dollars in Reliance on Developing a Mine at El Dorado

48. To its credit, Respondent does not seriously dispute that Pac Rim invested tens of millions of dollars in El Salvador in the expectation of developing the El Dorado Project. However, Respondent continues to insist that Pac Rim chose to commit these substantial resources despite having no legal basis on which it could reasonably expect a return. In this Section, Claimant reaffirms the reality of investment in El Salvador and describes its planned mining operations.

1. Pac Rim's Investment Was Made in Reliance on Developing Active Mining Operations in a Politically Stable and Investor-Friendly Jurisdiction

49. As set out further below, number of activities, including principally exploration, mine planning, environmental protection,

⁵⁰ *Id.* at 28-29.

⁵¹ *See, e.g.*, Pacific Rim ONI Resolution No. 368-MR acknowledging new nationality of PRC and registers of \$12,075,422.77 in foreign investment in PRES (C-12, R-105); Pacific Rim petition with ONI, dated 19 July 2005, to register \$5,665,771.42 part of its social capital and \$11,415,471.58 in loans received from Pac Rim Cayman (R-103); Pacific Rim petition with ONI, dated 2 Apr. 2008, to register \$12,075,422.77 (R-115).

and stakeholder education and relations. However, all of these activities were undertaken with a single goal: to bring a mine into development at El Dorado. Furthermore, Pac Rim would not on as an investor and mining-friendly jurisdiction with an Amended Mining Law designed to encourage and reward mineral development.

50. In the Counter-Memorial, Respondent has (somewhat obliquely) indicated that Pac Rim was only interested in exploring El Dorado, and has even argued that Pac Rim

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on this point are illogical and ignore the factual record. The overwhelming evidence in this case establishes that Pac Rim always planned to develop a mine at El Dorado; that it had a carefully-planned strategy for doing so; and that had it not been for executed that strategy.

51. decision to shift its focus from being a pure exploration company to becoming a gold-producing

⁵³ In fact, Pac Rim invested in the

of the few projects in the world that could be developed into a mine during that period of

⁵⁴ Mr. Shrake informed Ms. Gina Navas de Hernández, the Director of the *Dirección de Hidrocarburos y Minas* **Bureau of Mines** Economy, we have created a

⁵² Counter-Memorial, para. 170.

⁵³ Third Shrake Witness Statement, para. 3; *see also* Strategy Memo, dated 30 April 2001, at 5 o the market. When we make a discovery that is of value, we must consider whether we can make a better return for our shareholders by selling or developing. In some cases, a deposit may be more valuable to our shareholders as a mine -620).

⁵⁴ Third Shrake Witness Statement, para. 5.

vehicle with this merger that can adequately finance our programs through to their anticipated conclusion an operating mine ⁵⁵

52. intentions stment in El Dorado were validated

time, the company confirmed the significant potential of the property and its unique geological features.⁵⁶

The Company aspires to build and operate a mid tier

Au mine

⁵⁷ As further indicated

Our timeline is one year to drill off Eldorado and twenty eight months to be in production ⁵⁸

53. At this point, Pac Rim commenced full-scale mine planning activities, including bringing on Mr. Fred Earnest, a qualified mine manager;⁵⁹ collecting data for baselines studies;⁶⁰ and hiring some of the most highly-regarded consultants in the industry to begin preparing the technical reports that were needed to bring the mine into development.⁶¹ As Mr. Shrake

commissioned and completed expensive environmental, economic and technical studies for the project throughout 2003 and 2004 if we had not been fully committed to development during that

⁶²

⁵⁵ Letter from Thomas Shrake to Gina Navas, dated 28 May 2002 (C-665) (emphasis added).

⁵⁶ Gehlen Witness Statement, paras. 42-44, 51.

⁵⁷ Strategic Planning Workshop, Notes, 25-26 Mar. 2003, at 1 (emphasis added) (C-667).

⁵⁸ *Id.* at 6

⁵⁹ Third Shrake Witness Statement, para. 10; Gehlen Witness Statement, para. 52.

⁶⁰ Gehlen Witness Statement, para. 46.

⁶¹ *Id.*, paras. 53-54; Fuller Witness Statement, paras. 25-37.

⁶² Third Shrake Witness Statement, para. 15.

54. In January 2005, Pac Rim published its Pre-**PFS**, which confirmed exa

mined and processed employing simple, tried-and-tested mining technology; and that the mine

63

55. In September 2005, Mr. Shrake gave a presentation about the El Dorado Project at

⁶⁴ Likewise, i -stated objectives were [g] [s]elect a contractor and begin ramp

⁶⁵ In line with these goals, the company augmented its management team by bringing on Mr. Peter Neilans in the position of COO,⁶⁶ and Ms. April Hashimoto in the position of CFO.⁶⁷

56. Thus, throughout this period, was consistent and unequivocal in affirming that the company was going to develop a mine at El Dorado. This was the compan ultimate goal and stated intention, both internally and to the Government of El Salvador.⁶⁸

⁶³ *Id.*, para. 16; *see* Final Pre-**Pre-Feasibility Study** C-9).

⁶⁴ E-mail and attachment from Tom Shrake to Barbara Henderson, attaching Denver Talking Points, dated 22 Sept. 2005 (emphasis added) (C-707); *see also* Third Shrake Witness Statement, para. 22.

⁶⁵ Tom Shrake Self-Appraisal, dated 7 July 2006 (C-709); Third Shrake Witness Statement, para. 25.

⁶⁶ Tom Shrake Self-Appraisal, dated 7 July accomplished this objective [to strengthen the operational side of the management team.] Pete is a stellar -709).

⁶⁷ Press Release, Pacific Rim Mining Corp., April Hashimoto Joins Pacific Rim Mining as CFO, dated 8 Aug. 2006 (C-303).

⁶⁸ *See also* Application for Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession, dated 22 Dec. 2004 (C-181).

57. At the same time, as Claimant pointed out in its Memorial, modern exploration and mine development (such as that pursued by Pac Rim in El Salvador) is a very risky business.⁷⁰ It requires a serious commitment of upfront capital, access to modern technology, and a considerable amount of time.⁷¹ Consequently, it is extremely important that mining investors be able to rely upon stable and supportive relationships with the governments that administer the target mineral resources. Without a doubt, therefore, foreign investment and investment in mining was essential to Pac country.

58. This reality is confirmed by contemporaneous documents. As explained in Pac and market perception are critical to financing the
⁷² For that reason, Pac Rim was specifically interested in investing in Central America because [i]nvestment laws are favorable [and m]ost of these countries are desperate for foreign
⁷³

59. As Mr. Shrake attests, he was assured by Dayton and Kinross at the time of Pac the El Dorado Project that El Salvadoran Government was favorable to mining:

I knew from Mr. Myckatyn and Ms. McLeod-Seltzer that

⁶⁹ Gehlen Witness Statement, para. 65; Third Shrake Witness Statement Sec. II (Pac Rim Invested in the El Dorado Project With the Intention and Capability to Develop a Mine) (and accompanying citations); *id.* n delineation drilling or commissioned and completed expensive environmental, economic and technical studies for the project

⁷⁰ Memorial, para. 463.

⁷¹ *Id.*, para. 40; First Williams Expert Report, paras. 9, 17.

⁷² Strategy Memo, dated 30 Apr. 2001, at 2 (C-620).

⁷³ *Id.*, at 3 (C-620).

over the El Dorado Project would not expire before it could finance the development of a mine. Mr. Johansing (the Director of Kinross El Salvador, S.A. de C.V.) also informed me at the time of our investment that he personally had played a large role in defining the terms of law had favorable royalty provisions.⁷⁴

60. Mr. Shrake also specifically stressed to the Department of Mines the importance The advances under the current administration of President Francisco Flores have played a significant role in our decision to work in El Salvador. As you well know, political stability is critical in securing capital⁷⁵

61. In *Section C*, below, Claimant explains that its expectations of developing a mine in El Salvador were more than legitimate. In the following Sections, Claimant sets out in greater detail the investments that Pac Rim made in furtherance of that goal.

⁷⁴ Third Shrake Witness Statement, para. 35, n.57.

⁷⁵ *Id.*, para. 7 (emphasis added); *see also* _____ n in early 2002 how radically the political and investment climate in El Salvador would shift between the middle of 2006 and the present

2. Pac Rim conducted an extensive and highly sophisticated exploration drilling program, which resulted in a significant expansion of the mineral resources at El Dorado

62. talented exploration team devised a sophisticated and costly drilling program in order to expand the mineral value to the El Dorado Project⁷⁷ value that El Salvador has now acquired for its own benefit.

63. The Pac Rim team that led this exploration program came to the task with a long record of success. Shrake, Gehlen and Ernst) have worked together for nearly two decades, successfully locating and developing valuable mineral deposits.⁷⁸ team, with each [] contributing different strengths to⁷⁹:

⁷⁶ PRMC was obligated to produce studies that comported with specific and demanding regulatory criteria in Canada, the National Instrument 43-101 **NI 43-101 Standards** -101 Standards are regarded as the highest international disclosure standards. In turn, the NI 43-101 Standards required Pacific Rim Mining Corp. to adhere to the Canadian -101 Standards and CIM

mineral resource

mineral reserve

the economically mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study See Canadian Institute of Mining, Metallurgy and Petroleum, CIM Standards on Mineral Resources and Reserves: Definitions and Guidelines (adopted 20 Aug. 2000) (emphasis added) (CLA-215).

⁷⁷ See Memorial, Sec. II.D.1 (Pac Rim Commences its Exploration Program in El Salvador), Sec. ment in Exploration Activities), Sec. II.G.5 (Pac Rim Continues to Increase its Investment in Exploration and Development Activities Through 2006-2007).

⁷⁸ First Shrake Witness Statement, para. 38; Second Shrake Witness Statement, para. 35; Gehlen Witness Statement, para. 10; Press Release, Pacific Rim Mining Corp. Appoints David Ernst as Chief Geologist and Bill Gehlen as Exploration Manager, dated 17 March 1997 (C-665).

⁷⁹ Second Shrake Witness Statement, para. 35.

- **Tom Shrake:**⁸⁰ President and CEO has a Master s degree in Economic Geology. Mr. Shrake holds
- **Bill Gehlen:**⁸¹ Pac Vice-President of Exploration is a certified Professional -101. As Mr. Shrake describes, Mr. Gehlen is skilled at managing exploration programs and mentoring younger geologists.⁸²
- **Dave Ernst:**⁸³ -101. Like Mr. Shrake, Mr. Ernst is a proven mine⁸⁴ and led the campaigns throughout the Americas.

64. All three men have specialized knowledge and expertise in hydrothermal alterations such as those that comprise the El Dorado system and can identify these alterations by sight.⁸⁵

⁸⁰ First McLeod-Seltzer Witness Statement, paras. 22-
Second McLeod-Seltzer Witness Statement, 38-

; Gehlen Witness Statement, paras.

9-

making sure the El Dorado Project was developed to the
-576).

⁸¹ Gehlen Witness Statement, paras. 1, 4-7; Second Shrake Witness Statement, paras. 34-35; Pacific Rim Mining Corp., National Instrument 43-101 Information (C-337); Fuller Witness Statement, para. 21

importance of the many moving, interrelated pieces of developing a mining project and gives each of the
- Pac

fortune of hiring Mr. William

⁸² Second Shrake Witness Statement, para. 35.

⁸³ Pacific Rim Mining Corp., National Instrument 43-101 Information (C-337); Second Shrake Witness Statement, paras. 26, 34-

identify incredibly subtle geologic features. Mr. Earnst is a proven mine finder and has a tireless drive to
- I was so
impressed by Mr. Ernst that I also hired him as a consultant at one of my other companies to consult on
exploration and development projects for pot

⁸⁴ Second Shrake Witness Statement, para. 26.

⁸⁵

able to

(Continued...)

65. Messrs. Shrake, Gehlen, and Ernst also enjoyed a long-standing working relationship with several talented younger geologists, including Messrs. Juan Carlos Varela, Rafael Chavarría and Julio Olivares, whom they first worked with at Gibraltar Mines and later at Pac Rim.⁸⁶ As Mr. Shrake inform

⁸⁷ And indeed, these established relationships among skilled colleagues ultimately enabled the company to design successful exploration programs and to significantly increase the mineral resource estimates at El Dorado.

66. exploration team conducted due diligence to learn more about the geological features of the El Dorado Project.⁸⁸ They discovered that El Dorado was a high-grade epithermal vein system with low sulfide content, which, as discussed throughout these proceedings, is a uniquely valuable type of ore deposit.⁸⁹ They also discovered that further exploration and definition drilling was required in order to achieve the reserve classification needed to finance initial mine development.⁹⁰ The exploration database for the property had not been significantly updated

identify each type of rock and hydrothermal alteration, but he was also able to tell the employer exactly which mine, and where within the vein system several of the rock specimens came from. Needless to say, tement, para. 15.

⁸⁶ Gehlen Witness Statement, paras. 10, 41.

⁸⁷

Workshop, Notes, 25-26 March 2003, at 9- People and personalities matter especially as we move to The quality of the hearts and minds matter greatly. The whole is greater than the sum -620); Strategic Planning -667).

⁸⁸ Second Shrake Witness Statement, paras. 54-66; Gehlen Witness Statement, para. 21.

⁸⁹

of this type tend to be less costly to mine. Moreover, the low-sulfidation nature of these deposits enables

113, 117; *see also* Gehlen Witness Statement, para. 27; First Shrake Witness Statement, para. 44; Second Shrake Witness Statement, para. 56; *see also* Leia Michele Toovey, *An Overview of Epithermal Gold Deposits* (2002).

⁹⁰ *See* Second Shrake Witness Statement, para. 55; Gehlen Witness Statement, para. 34; Letter from Tom Shrake to Gina Navas de Hernandez, dated 28 May 2002 (C-665); Pacific Rim Mining Corp., Annual and Transitional Report (Form 20F), dated 26 Aug. 2002 a

including the El Dorado Property, have known ore reserves on the properties and all work programs are exploratory searches for or -66).

since 1995. Mr. Gehlen explains that:

drilling had been too costly to

91

67. In addition, exploration team with its specialized knowledge about hydrothermal alterations suspected that prior exploration programs had not drilled deeply enough to find the bulk of the high-

⁹² Mr. Shrake was impressed with what he saw:

knew that the El Dorado deposit likely contained *far* more gold than the 300,000 ounces

93

perspective to the available data

exploration program that would allow [them] to rapidly increase the ounces associated with the

⁹⁴

mine at El Dorado.⁹⁵

68. As noted previously, Dayton had been unable to invest in significant drilling programs due to financial limitations. However, the merger with Pac Rim breathed new life into

⁹¹ Gehlen Witness Statement, para. 36.

⁹² Second Shrake Witness Statement, para. 55 (citing R- A majority of the roughly 200 drill e project were shallow holes that did not test the Productive Interval [or area where most of the resource is located]]); Gehlen Witness Statement, para. 35 (emphasis added).

⁹³ Second Shrake Witness Statement, para. 55 (emphasis in original); *see also* First Shrake Witness -based geological team had better experience

⁹⁴ Gehlen Witness Statement, para. 22; *see also id.* -

may well have ended up spending the rest of my career in El Salvad

⁹⁵ Gehlen Witness Statement, paras. 28, 64- -cost project that we could develop through to the production stage, and we believed from the outset that El Dorado would be that project. I can say without reservation that from the time Pac Rim acquired El Dorado, it was our full intention to develop a mine on the property. Furthermore, it is abundantly clear that Pac Rim did not pursue a strategy of positioning the company for sell-off or takeover in relation to El

; *see also* Memorandum from Tom

Shrake to Pacific Rim Mining Corp. Board of -620).

P.Eng., a mine manager from the former Dayton staff, took responsibility for the non-geological

100

71. In mid-2003, Pac Rim commissioned Mr. Peter Ronning, P.Eng., to undertake an independent t disclosure.¹⁰¹

¹⁰² By late 2003, the

¹⁰³ The new

resources were publicly confirmed by Mine Development Associates 2003, along with the NI 43-101 compliant resources the company had delineated for to nearby structures known as Coyotera and Nueva Esperanza.¹⁰⁴ In its technical report, MDA noted that,

More

above the industry norm ¹⁰⁵

¹⁰⁰ Gehlen Witness Statement, para. 44; *see also* Memorial, para. 138.

¹⁰¹

-632); Gehlen Witness Statement, para. 43.

¹⁰²

Ronning Repo continued exploration. The exploration currently under way, designed and implemented by Pacific Rim management, is intended to continue. The writer concurs with the general approach of the present -632).

¹⁰³

Press Release, El Dorado Resource Grows to 821,000 Ounces of Gold, Including 67% Increase in Minita Resource, dated 27 Oct. 2003 (C-235); *see also* Memorial, paras. 138-39 (and accompanying citations); Technical Report on the El Dorado Project Gold and Silver Resources prepared by Mine -5 (R-46).

¹⁰⁴

Press Release, El Dorado Resource Grows to 821,000 Ounces of Gold, Including 67% Increase in Minita Resource, dated 27 Oct. 2003 (C-235); Memorial, para. 139.

¹⁰⁵

MDA 2003 Technical Report at 105 (emphasis added) (R-46); Ristoricelli Witness Statement, limited to geologic mapping, good sample quality, data collection and recording. This makes the data *see also* has informed me that he uses the Pac Rim exploration database as a model of good industry practice for

72. In January 2004, Pac Rim added a third drill rig to its exploration program in order to expedite development of the Project.¹⁰⁶ This investment was rewarded with the discovery of two a high grade deposits in May 2004.¹⁰⁷ One, approximately 500 meters to the south of the Minita deposit was called the The other deposit was called Nance Dulce.¹⁰⁸ Notably, the South Minita deposit has no surface expression. Therefore, it was only located through the skillful exploration efforts o team. These discovery of these deposits were a promising development; one that had the capability of expanding the life of a mine at El Dorado.

73. By the end of 2004, Pac Rim had classified 832,900 ounces of measured and indicated mineral resources on the property, and achieved classification of 535,586 ounces in economically mineable mineral reserves for the Minita deposit, as defined by the NI 43-101 standards.¹⁰⁹ This critical determination would not have been possible without the substantial their drilling program:

[A]t the end of 2004, we had drilled 151 holes on the property (as compared to the 202 total drill holes made on the property by Kinross and its various owners in the eight years between 1993 and 2001). As I said previously, drilling is expensive and is a c shareholders. On the other hand, drilling is absolutely

¹⁰⁶ Press Release, Pacific Rim Adds Third Drill Rig to El Dorado Gold Project, dated 20 Jan. 2004 (C-243); *see also* Press Release, Pacific Rim Mining Corp. Announces Third Quarter Results, dated 15

[z]ant of the potential 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 is concurrently conducting additional exploration drilling in the search for new chutes of mineralization.

365); Memorial, para. 159.

¹⁰⁷ Press Release, New High Grade Vein Intercepts Encountered in South Minita and Nance Dulce Drilling, dated 25 May 2004 (C-367); Gehlen Witness Statement, para. 58.

¹⁰⁸ Press Release, New High Grade Vein Intercepts Encountered in South Minita and Nance Dulce Drilling, dated 25 May 2004 (C-367); Gehlen Witness Statement, para. 58.

¹⁰⁹ Gehlen Witness Statement, para. 60 (citing MDA 2003 Technical Report at 4).

critical to the effective development of any mining project.¹¹⁰

74. On 21 January 2005 the final version of the El Dorado PFS that accompanied Pac Concession Application was completed.¹¹¹ The PFS focused on the Minita deposit alone, and (defined by NI 43-101 to constitute that portion of resources that have *proven economic viability*).¹¹² In other words, the fact that a mineral reserve had been classified for the Minita deposit meant that a mine could be developed.

75. By July 2006, exploration team had attained a resource classification for the South Minita deposit, consisting of 330,800 ounces in the Indicated category and 67,000 ounces in the Inferred category.¹¹³ The company also classified 88,300 ounces of Inferred Resources for the Nance Dulce deposit.¹¹⁴ As Mr. Gehlen explains, the discovery and delineation of the South Minita deposit had the potential to significantly expand the life of a mine at El Dorado:

The resources that we classified for South Minita were placed into the Indicated or Inferred category by MDA because the structural complexity of the deposit makes it very difficult to drill out fully from the surface.¹¹⁵

I believe that South Minita is likely to have

¹¹⁰ Gehlen Witness Statement, para. 73 (citing MDA 2003 Technical Report at 3) (R-46)).

¹¹¹ Pre-Feasibility Study (C-9).

¹¹² A reserve is defined for purposes of NI 43-101 sta

CIM Standards on Mineral Resources and Reserves: Definitions and Guidelines Aug. 2000) (CLA-33).

¹¹³ Gehlen Witness Statement, para. 146; Mine Development Associates 2006 Technical Report -681); Press Release, Pacific Rim Mining Corp., El Dorado Resource Estimate Increased with Addition of Nance -431).

¹¹⁴ Gehlen Witness Statement, para. 146 (emphasis added); MDA 2006 Technical Report at Table E11 (Nance Dulce Inferred Resource) at 277 (C-681); Press Release, Pacific Rim Mining Corp., El 006 (C-431)).

¹¹⁵ See MDA 2006 Technical Report at Table E11 (Nance Dulce Inferred Resource) at 277 (C-681); PRMC Press Release, El Dorado Resource Estimate Increased with Nance Dulce Deposit (C-431).

more ounces in it than Minita. The Minita deposit has surface exposure and well-behaved (structurally consistent) veins, and had been the subject of seven years of modern drilling before we invested in the El Dorado Project.¹¹⁶

To put achievement at South Minita into context: they discovered and delineated roughly the same number of ounces in the blind South Minita deposit in less than two years than previous exploration programs had accomplished in seven years at the Minita deposit (even though the latter deposit had surface exposure and was less structurally complex from an

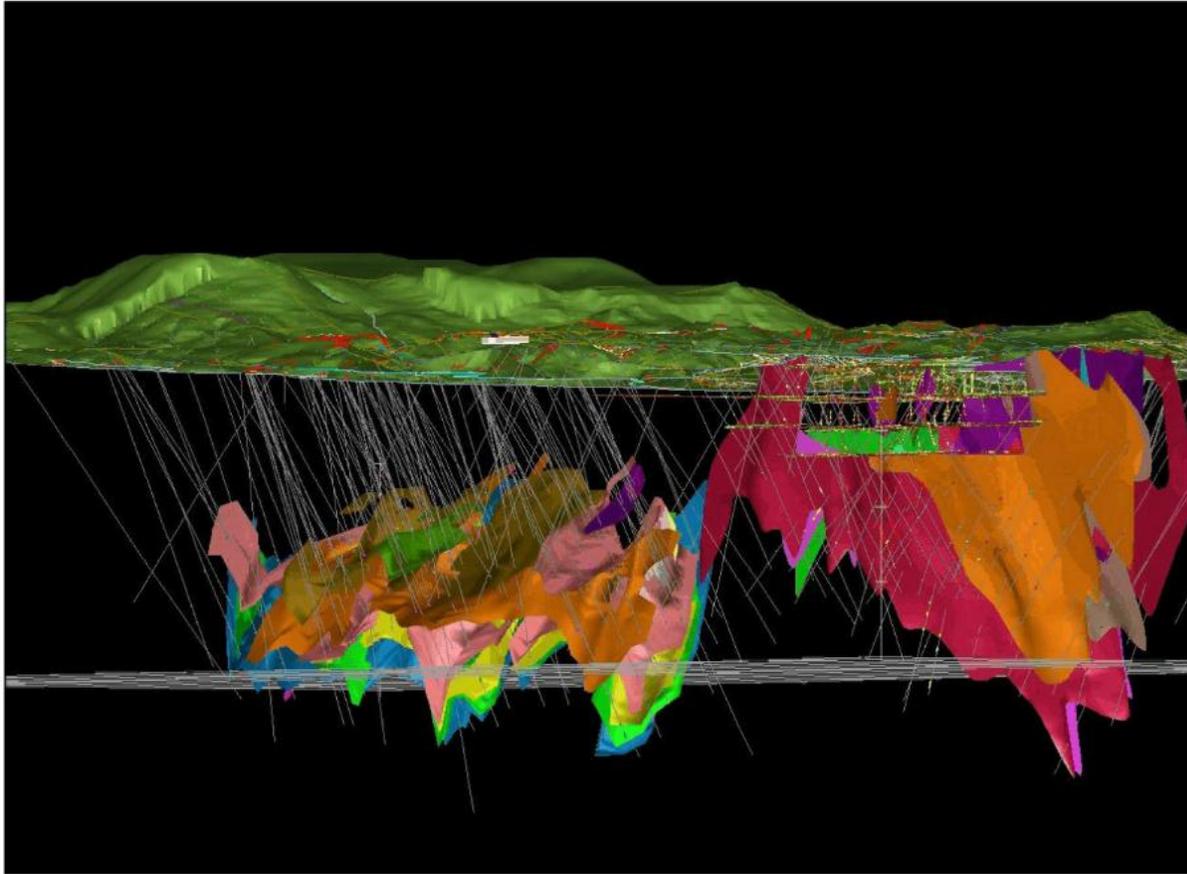
Dorado.¹¹⁷ (Mr. Shrake notes that Pac Rim spent approximately \$33,000 *per drill hole* during its multi-year exploration program at El Dorado.¹¹⁸)

76. Below is an image of the 3-D modeling of the South Minita deposit, in relation to the Minita deposit, looking South-Southwest Minita deposit..

¹¹⁶ Gehlen Witness Statement, para. 147 (emphasis added).

¹¹⁷ In my view, the extent of the increase in the resource base during the three years following publication of the PFS economic viability of the El Dorado Project, and its strategy of implementing the Project as quickly as possible after the SRK PFS was published in January 2005. With the grant of the Environmental Permit and Exploitation Concession not forthcoming in a timely manner, Pac Rim funded its continued surface exploration efforts by accessing the Capital Markets in 2006 and raising a further **CAD16.7M**, commitment to the El Dorado Project and indeed to El Salvador. Subsequent events demonstrate that such a commitment was not reciprocated by El Salvador.

¹¹⁸ Third Shrake Witness Statement, n.29.



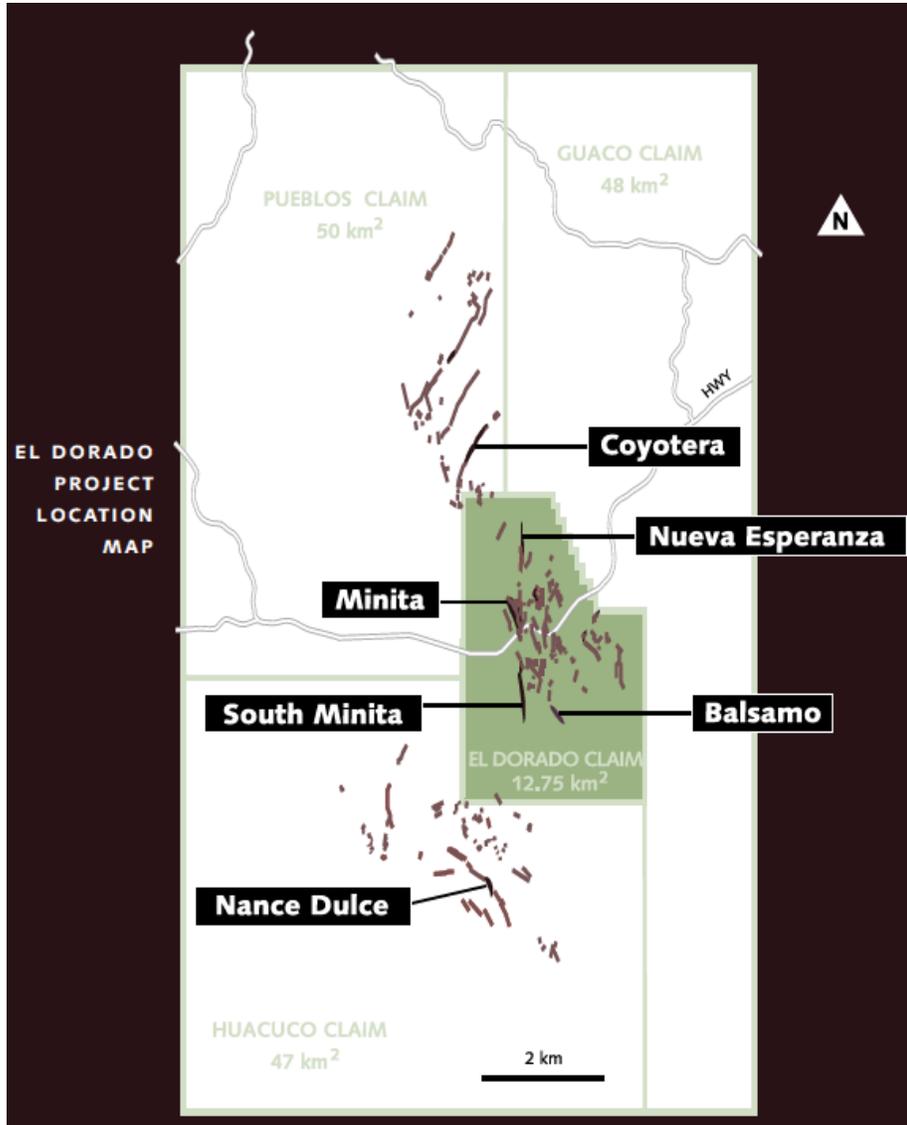
77. Throughout 2007, as Pac Rim prepared for the various events that would be set in motion by the approval of the Exploitation Concession, the company continued to invest heavily in exploration activities.¹¹⁹ accomplishments were two exciting new discoveries: the Balsamo deposit and the Cerro Alto deposit.¹²⁰ As with the South be investigated through a program of diamond drilling for purposes of estimating their economic potential.¹²¹

¹¹⁹ Memorial, para. 365 (and accompanying citations).

¹²⁰ Press Release, Pacific Rim Mining High Grade Balsamo Gold Discovery Continues to Grow, dated 6 Mar. 2007 (C-Gold Deposit Delineation Nearing Completion; Another Gold-Bearing Vein Discovered, dated 2 Aug. 2007 (C-50).

¹²¹ Gehlen Witness Statement, para. 153.

78. The location of the various deposit systems within the License areas can be seen on the map below (note that Cerro Alto, which is not separately designated on the map, is a parallel structure to Balsamo):¹²²



79. Pac Rim contracted MDA to prepare a mineral resource estimate for the Balsamo and Cerro Alto veins, which was completed in March 2008. The new mineral resource calculation added 196,400 ounces of measured and indicated mineral resources, and 72,200

¹²² Pacific Rim Mining Corp. 2008 Annual Report at Table of Contents (C-33).

ounces of inferred resources for these deposits.¹²³

estimates, this means that in just six years of exploration, Pac Rim brought the total measured and indicated resources for the El Dorado Project up to 1,226,700 ounces, with an inferred resource of 237,300 ounces.¹²⁴

80. As the foregoing demonstrates, Pac Rim committed significant personnel and financial resources to developing and expanding the mineral resources of the El Dorado Project. These efforts had the sole aim of operating a world-class mine at El Dorado and could not have been achieved without a skilled geology team and a company willing to fund their activities.

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value to El Dorado by extending the life of the mine and the attendant socioeconomic benefits that this entailed for both the national and the local communities. Pac Rim undertook this investment with the good faith expectation that it would be able to glean the benefits of this investment.

3. Pac Rim worked with the most highly qualified professionals in the international mining industry to develop the planned El Dorado mine

81. As described by Messrs. Shrake and Gehlen in their witness statements, Pac Rim hand-picked the best experts and consultants in the industry to carry out each individual aspect of the technical work that was required to demonstrate the economic and environmental feasibility of the mine.¹²⁶

¹²³

-98).

¹²⁴ MDA 2008 Technical Report at 153 (R-98).

¹²⁵ Counter-Memorial, para. 164.

¹²⁶

get

you need to accomplish is good fieldwork, whether geologic, hydrologic, or environmental. That is where a good study starts and where mistakes are often made. Pac Rim wanted only the best people doing our fieldwork and that is why we actively participated in collecting the data and hand-picked the team

paras. 74-

own geology and engineering skills) was being able to identify and work with the best minds in the business to develop the El Salvador Project. Our goal was for the El Dorado mine to conform to or (Continued...)

82. s ability to retain these individuals demonstrates that the Pac Rim professional team had extensive knowledge of and contacts in the mining industry, and that the company was invested in developing the best and highest-quality project possible rather than just obtaining a quick return. These experts included:

- **SRK Consulting**, which served as the lead author of the Pre-Feasibility Study. SRK is a leading independent preparer of mining feasibility studies, employing over 1,600 professionals internationally on six continents.¹²⁷ It is regarded as a top-tier mining consulting company with world-leading expertise.¹²⁸ Mr. Bill Tanaka, Principal Mining Engineer with SRK, served as the Qualified Person for the estimation and public reporting of Reserves in the PFS, and is recognized as one of the top professionals in his field.¹²⁹ letterhead as the lead author, the Pre-Feasibility Study was a compilation of work performed by other industry-leading firms which had been individually selected by Pac Rim.¹³⁰ This high level of involvement by Pac Rim in choosing the experts to be involved in the study is unusual and exceeds industry standards.¹³¹
- **McLelland Laboratories**, a Reno, Nevada firm that performed all of the necessary metallurgical testing and prepared the Metallurgical Testing and Review study and the Process Plant Operating Cost Estimate.¹³² Gene McClelland has 40 years of experience in the leaching business, with elite expertise in metallurgy.¹³³
- **Mine & Mill Engineering**, based out of Salt Lake City, Utah, which helped to -ground facilities and is known as a top-tier service

exceed rst
Shrake Witness Statement, paras. 63-65; Gehlen Witness Statement, paras. 80-81; Memorial, paras. 182-85.

¹²⁷ Gehlen Witness Statement, para. 81; Fuller Witness Statement, para. 29.

¹²⁸ Fuller Witness Statement, para. 29.

¹²⁹ Rigby Expert Report, para. 60.

¹³⁰ *Id.*, para. 58.

¹³¹ Third Shrake Witness Statement, n.20; Gehlen Witness Statement, para. 81.

¹³² First Shrake Witness Statement, para. 65; Gehlen Witness Statement, para. 80.

¹³³ Third Shrake Witness Statement, n.20; Rigby Expert Report, para. 58; Fuller Witness Statement, para. 30.

provider in the mining industry.¹³⁴ Mine & Mill prepared the Process Plant Flowsheet Development, as well as the Plant Design & Capital Cost Estimate.¹³⁵

- **McIntosh Engineering**, based in Tempe, Arizona, which helped to design the underground mine. McIntosh is known as one of the premier underground mine and tunnel developers in the United States and around the world.¹³⁶ It prepared the Capital/Operating Cost Estimate and Mineable Reserve Estimate, as well as the NI 43-101 Compliant Conceptual Underground Mine Design for the Pre-Feasibility Study.¹³⁷
- **Call & Nicholas**, a highly regarded Geotechnical Engineering firm based in Tucson, Arizona, with expertise in rock mechanics and stability testing.¹³⁸ Call & Nicholas prepared the Geotechnical and Design Parameters for the Pre-Feasibility Study.¹³⁹
- **Steven Ristorcelli & Peter Ronning**, of Mine Development Associates Inc, who are specialists in Economic Geology and who prepared the NI 43-101 Compliant Geologic Resource Estimate for the PFS.¹⁴⁰
- **Lee “Pat” Gochnour** consultant and has extensive expertise in the preparation of environmental impact assessments.¹⁴¹ Mr. Gochnour is one of the most highly sought-after environmental permitting experts in the mining industry.¹⁴²
- **Vector Colorado**, which performed the hydro-geologic work regarding aquifers, prepared the Pre-Feasibility Tailings Impoundment Design and Capital Cost Estimate, and took the lead in preparing the EIS in conjunction with CTA Guatemala.¹⁴³

¹³⁴ First Shrake Witness Statement, para. 65; Fuller Witness Statement, para. 30.

¹³⁵ Rigby Expert Report, para. 58; Gehlen Witness Statement, para. 80.

¹³⁶ First Shrake Witness Statement, para. 65; Fuller Witness Statement, para. 30.

¹³⁷ First Shrake Witness Statement, para. 65; Rigby Expert Report, para. 58; Gehlen Witness Statement, para. 80.

¹³⁸ First Shrake Witness Statement, para. 65; Second Mudder & Hutchison Expert Report at 22; Fuller Witness Statement, para. 30.

¹³⁹ First Shrake Witness Statement, para. 65; Rigby Expert Report, paras. 58; 78; Gehlen Witness Statement, para. 80.

¹⁴⁰ Gehlen Witness Statement, para. 80.

¹⁴¹ Fuller Witness Statement, para. 26; Gehlen Witness Statement, para. 80.

¹⁴² Fuller Witness Statement, para. 26.

¹⁴³ First Shrake Witness Statement, para. 65; Rigby Expert Report, para. 58.

- The Pre-Feasibility Tailings Impoundment Design and Capital Cost Estimate was led by Matthew Fuller of Vector Colorado, an NI 43-101 Qualified Person in Tailings and Geotechnics, with over 30 years of experience in the industry.
- The **EIS**, also led by Mr. Fuller, involved collaboration with three other well regarded industry professionals: Dr. Adrián Juárez, of CTA, has expertise in environmental science and community consultation procedures, and previously served as head of the Guatemalan Environmental Protection Agency;¹⁴⁴ Susan Joyce, a consultant engaged by Vector Colorado, is a well-regarded expert in social aspects of the mining sector and indigenous rights and was one of the first social specialists at the IFC;¹⁴⁵ and Patricia Acker, an expert in environmental assessments, environmental due diligence, and the Equator Principles.¹⁴⁶

83. Although Claimant will address the studies produced by these experts further below in **Part III** of this Reply, it should be emphasized here that each of them met or exceeded best international mining practices for the time at which they were completed. As Mr. Gehlen of the individuals and companies that worked on the El Dorado mine project simply are not subject to question by anyone who is familiar with the mining industry. I have been told on countless occasions by numerous mining industry professionals and I concur with their views that we went above and beyond the industry

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84. In short, these were not the kind of studies that would be produced by a small acquire the legal right to develop. To the contrary, these are the kind of studies that are produced by serious international mining companies that are expecting to move into active mine development in the short-term. The fact that Pac Rim was a serious company with a high-quality project backed up by substantial studies is further confirmed by the testimony of Mr. Peter

¹⁴⁴ Gehlen Witness Statement, para. 80; Fuller Witness Statement, para. 33.

¹⁴⁵ Gehlen Witness Statement, para. 80; Fuller Witness Statement, para. 35.

¹⁴⁶ Fuller Witness Statement, para. 34.

¹⁴⁷ Gehlen Witness Statement, para. 81.

Brown, one of the top mine financiers in the business, who has attested that investors were

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4. Pac Rim invested in securing the support of the relevant Salvadoran stakeholders

85. As described below, Pac Rim proactively invested in securing the support of

connection with its development of the El Dorado Project.¹⁵² In fact, what Respondent has openly suggested – albeit without any evidentiary basis – is that these expenditures reflect an effort by the company to buy its way into permits to which it was not entitled, while withholding information from the population and the Government, or otherwise failing to address their concerns about its development of the El Dorado Project.¹⁵³ Respondent has even gone so far as to recklessly suggest – again, without any basis – somehow linked to acts of violence and murder carried out in the Department of Cabañas.¹⁵⁴

89. _____ s, who have spent years developing positive relations with the communities in which the company operates; and educating stakeholders at all levels about the responsible mining practices that the company planned to implement at El Dorado.¹⁵⁵ As explained further in this section, Pac Rim has engaged in these efforts on its own initiative, with the sole aim of maximizing the benefits of the El Dorado Project to all the stakeholders.

90. As both parties have agreed, El Salvador did not have substantial experience with _____ to this lack of experience that El Salvador enacted the 1995 Minerals Law and its 2001 Amendment, with the specific aim of attracting experienced foreign investors to assist in its

¹⁵² Redfern Schedule, Documents Requested from Pac Rim Cayman and affiliated companies, dated 31 Jan. 2014 (Request Nos. 1 and 2).

¹⁵³ See, e.g., Counter-Memorial, paras. 212-45; *id* _____ authorizations, could not obtain them, and decided to pursue other means to demand the concession _____ affiliated companies, dated 31 Jan. 2014 (Request No. 2); *see also* _____ risks were inadequately disseminated to citizens, who scarcely participated in mine planning and

¹⁵⁴ Counter-Memorial, paras. 239-42 (Respondent implies that the deaths of four environmental _____ ions spending in 2007 and _____ 2008); *see also* Goodland Opinion, para. 28.

¹⁵⁵

Garcia Witness Statement

_____ the deaths of activists, what they are really saying is that I and my co-workers were involved in murdering people. I

development of that industry.¹⁵⁶

negative

campaigns are implausible.¹⁵⁷ Indeed, investing in these activities is exactly what any
should have done

experts.¹⁵⁸

investment in El Salvador by, *inter alia*, hiring locally; supporting local community development efforts; and raising the environmental standards and royalties applicable to its operations.¹⁵⁹

91. As discussed below, anti-mining sentiment in El Salvador did not arise until years

¹⁶⁰ In this regard, it is important to recall that the mining industry has faced political opposition at one time or another in countries all over the world, across different systems of government and varying levels of economic development.¹⁶¹ The reasons for the opposition may vary, but they tend to reflect a simple truth: mining, if done

¹⁵⁶

ion of the El Dorado Project); Decreto No. 475 adopted on 18 July 2001, published in the Diario Oficial, Tomo 352 on 31 July 2001 (CLA-212); Mining Law Debates, dated 11 Dec. 1995 (C-274) (emphasis added)

gold out of our hands, _____
pour large amounts of money into it. Mining is not a factory that opens after a
case of us giving away 2%.

¹⁵⁷ See, e.g., Counter-

¹⁵⁸

); Goodland, Annex 3 (Ten Principles of Responsible Mining) (discussing the importance of stakeholder involvement throughout the planning particularly wit

¹⁵⁹ Pacific Rim Mining Corp. Social and Environmental Responsibility (C-59).

¹⁶⁰ Pre-Feasibility Study at 135- Opposition from international anti-mining or environmental NGOs has not occurred. Although some opposition is expected, given the local support for the project, it

¹⁶¹ See Second McLeod-Seltzer Witness Statement, para. 68 (citing *Critical Minute – Mining for a Public Relations Strategy* (14 June 2013) - 579); see also *Kinross calls for industry to trumpet benefits footprint*, MINING WEEKLY (2 Dec. 2013) (C-580); Rigby Expert Report, para. 111.

improperly as it has undoubtedly been done in some cases in the past can impose tremendous costs on the surrounding environment, as well as on local communities. On the other hand, however, it is equally true that when done responsibly and in appropriate circumstances, mining can bring tremendous economic benefits both to local communities and national treasuries, with minimal associated environmental risks.¹⁶² Consequently, conflicts over mining rarely (if ever)

or less acceptable to all stakeholders, the mining industry adjusts and moves forward, as it has all over the world for hundreds of centuries.

92. In view of the foregoing, and as set out in greater detail in the following sections, to secure stakeholder support for its operations reflected reasonable and responsible practices that were appropriate for the prevailing factual circumstances in El and and later, as they changed in the face of new and unexpected political tides in the country.

93. Furthermore, as explained in *Part III, infra*, the Tribunal cannot accept and consequently should bear 100% of the risk that the Executive Branch would ultimately reverse its declared policy and openly flout the official law of the land by imposing a *de facto* ban on all metallic mining activity.¹⁶³ To accept such a suggestion would deprive the Investment Law and the Constitution of El Salvador of any effective meaning; and would reward the Respondent for its own wrongful

¹⁶² Expert Statement of John Williams, dated 25 March (emphasis added).

Williams Expert Statement

impact on the local communities near which mines are located is often dramatic. In many poorer countries, minerals exploration and mining are often among the first sectors to attract significant investment. Moreover, mines tend to be developed in remote and relatively poor regions with little pre-existing infrastructure, a weak governmental presence and few government services. The development of a mining project in such areas tends to involve transformative change in the local opportunities for employment, training, entrepreneurship, education, health services and travel.

¹⁶³ Counter-Memorial, paras. 5, 106, 177.

conduct while punishing Pac Rim for its good-faith efforts to avoid a dispute and achieve a win-win scenario.

a. Education, consultation and community relations activities: 2003-2006

94.

soon as the company began active operations in the country. As indicated above, there was no known opposition to mining in El Salvador at that time.¹⁶⁴ However, there was a lack of knowledge about modern mining practices, both among the citizens living in the area (naturally), a lack of knowledge about Pac Rim itself. Thus, Pac Rim set out to provide the local communities and government agencies with salient information about its exploration and planned mining operations, and to establish itself as a good neighbor and an active participant in the social life of San Isidro, Sensuntepeque, and the other towns closest to its base of operations.

(i) *General public awareness and community development activities*

95. As both a matter of internal company policy and responsible corporate practice, Pac Rim sought to earn the trust and confidence of the local communities by maintaining an . The company therefore proactively communicated and plans to local stakeholders and sought their input as it carried out these activities.¹⁶⁵

96.

communities led to the hiring of a local Director of Public Relations, Ms. Cristina Elizabeth García Cabezas.¹⁶⁶ As detailed in her witness statement and summarized below, Ms.

¹⁶⁴ Silvio A. Ticay Aguirre, Development and Perspectives of Mining Activity in El Salvador, dated Feb. 1998 (C-622); Pre-Feasibility Study at 135- Opposition from international anti-mining or environmental NGOs has not occurred. Although some opposition is expected, given the local support for -9).

¹⁶⁵ Garcia Witness Statement, para. 41; *see also* First Shrake Witness Statement, paras. 30, 69; Second Shrake Witness Statement, paras. 41, 85-93; Second McLeod-Seltzer Witness Statement, para. 68.

¹⁶⁶ Even prior to hiring Ms. Garcia, the company was committed to educating the local communities about its activities. *See* Denver/El Dorado Trip Report from Fred Earnest to Tom Shrake, dated 14 Aug.

(Continued...)

Garcia and her colleagues at Pac Rim have spent the last decade ensuring that the communities near the El Dorado Project were provided with copious amounts of information about Pac Rim as a company, its exploration activities, and its plans for the El Dorado Project.¹⁶⁷

97. One of the primary ways that Pac Rim disseminated information to local stakeholders was by hosting informal community gatherings.¹⁶⁸ Ms. Garcia notes that over the f community meetings and events¹⁶⁹ where,

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Ms. Garcia was often joined by company geologists and/or an engineer, such as Ms. Colindres.¹⁷¹ At these meetings, Ms. Garcia, Ms. Colindres, and other Pac Rim employees explained about the stages of mineral exploration and mine development, as well as what the underground mine would look like after it was constructed.¹⁷² They also provided specific information about the controlled use of cyanide in the extraction process and the many security measures that would be taken to avoid any danger to the environment or to the health and safety

-272); Memorandum from Jorge Brito and William Gehlen to Tom Shrake, dated 31 Oct. 2003 (C-698).

¹⁶⁷

was not a mining expert about how mines are developed and operated, so that this person would then be able to talk to people in the local communities, government officials, and other interested stakeholders
econd Shrake

Witness Statement, para. 87; *see also* Fuller Witness Statement, para. 24.

¹⁶⁸ Garcia Witness Statement, paras. 26-39, 41-50, 56; Second Shrake Witness Statement, para. 86; First Colindres Witness Statement, paras. 62, 70, 117; Second Colindres Witness Statement, paras. 78, 85; Pacific Rim Mining Corp. 2007 Annual Report at 27 (C-32); Photograph, Community Meetings 1 (C-448); Photograph, Community Meetings 2 (C-449); Photograph, Community Meetings 3 (C-450); Photograph, Community Meetings 4, Ericka Colindres presentation (C-451); Photograph, Community Meetings 5, Ericka Colindres presentation (C-452); Photograph, Community Meetings 6 (C-453); Photograph, Community Meetings 7 (C-454).

¹⁶⁹ Garcia Witness Statement para. 42.

¹⁷⁰ Garcia Witness Statement, para. 43; *see also* Second Shrake Witness Statement, para. 86.

¹⁷¹ Garcia Witness Statement, para. 42; First Colindres Witness Statement, paras. 70, 117; Second Colindres Witness Statement, paras. 78, 85.

¹⁷² Garcia Witness Statement, para. 43; First Colindres Witness Statement, paras. 70, 117 Second Colindres Witness Statement, paras. 78, 85.

of the workers and the local communities.¹⁷³ Providing the communities with information about cyanide (which has been used safely for decades by modern mining operations throughout the Americas and around the world) was particularly important, because, as Ms. Garcia observes:

Often, the term cyanide makes people in El Salvador think about the activities carried out in the Nazi gas chambers. They do not understand that cyanide is delivered in a solid form, or that it quickly breaks down in the environment. The idea of cyanide contaminating the local water supply inspires a great deal of fear, and people opposed to mining activities have tried to capitalize on this fear. However, when we presented people with the scientific facts about the chemical processes involved in mining, their fears were usually calmed. In addition, government officials also assured the people that our proposals would not bring them harm.¹⁷⁴

98.

she made personal visits to hundreds of homes in the local communities to discuss the Project.¹⁷⁵ In addition, she visited over 200 local schools to explain minerals exploration and exploitation to students, teachers, and parents.¹⁷⁶ At these presentations, Ms. Garcia used age-appropriate informational tools, such as posters, to facilitate conversations and to answer common questions about mining.¹⁷⁷

¹⁷³ Garcia Witness Statement, para. 44; First Colindres Witness Statement, paras. 70, 117 Second Colindres Witness Statement, paras. 78, 85.

¹⁷⁴ Garcia Witness Statement, para. 44 (emphasis added) (citing *Foreign Companies Looking for Gold in El Salvador*

recognizes that any project of this sort has an impact, but _____
explains that with the method to be used (Merrill Crowe), the effects of cyanide are minimized because it

and Hydrocarbons of the _____
cyanide and miners live with low concentrations. It is not so dangerous _____ (-457)).

¹⁷⁵

(C-478); Monthly Report: Public Relations, dated 30 Sept. 2005 (C-479); Monthly Report: Public Relations, dated 31 Jan. 2006 (C-490).

¹⁷⁶ Garcia Witness Statement, para. 48; List of schools visited (C-473); see Summary of the Report of Social Outreach carried out by Pacific Rim: Community Projects and Activities, dated 2011 at 3 (C-210).

¹⁷⁷ Garcia Witness Statement, para. 48; Poster, Exploring Natural Resources and Their Uses (C-468); Poster, From the Mine to My Home (C-469); Poster, From Mountains to Metals: the History of Rocks, (Continued...)

99. Another avenue by which Ms. Garcia and her colleagues disseminated information about Pac Rim and the Project was to meet with local community leaders, such as¹⁷⁸ to discuss the impact of mining on the local communities.¹⁷⁹ Ms. Garcia explains that these meetings with community leader

¹⁸⁰ At nearly all of the aforementioned meetings with communities, their leaders, and visits to the El Dorado site, the company utilized PowerPoint presentations with photos of working mines in the U.S. and Chile,¹⁸¹ and played an animated 3-D video

Vector

operating the mine and what the area would look like *after* the mining operations had ended **El Dorado Lifecycle Video**.¹⁸² Ms. Garcia also handed out thousands of brochures and other materials to help address and respond to questions and concerns raised by community

Minerals and the Mining Industry (C-470); Poster, Rocks and Minerals in our Surroundings (C-471); Poster, Mining Reclamation: Responsible Reuse of Lands Through Planning, Management and Technology (C-472).

¹⁷⁸ Garcia Witness Statement registered legal entities which are constituted by members of a community for the purpose of stimulating in the relevant community by advocating for and managing community development projects, using donations from the local community and/or by applying for support or funding from governmental or non-governmental

¹⁷⁹ Garcia Witness Statement, paras. 41, 49-50, 56; *see also* Second Shrake Witness Statement, para.101; Summary of the Report of Social Outreach carried out by Pacific Rim: Community Projects and Activities, dated 2011 at 2 (C-210); Monthly Report: Public Relations, dated 30 Jan. 2004 (C-474); Monthly Report Public Relations, dated 7 Apr. 2004 (C-475); Monthly Report, dated 31 Dec. 2004 (C-476); *see* Letters from Betty García to Various Community Organizations, Groups and Institutions, dated 2005 (C-477); Monthly Report: Public Relations, dated 30 Sept. 2005 (C-479); Monthly Report: Public Relations, dated 31 Dec. 2005 (C-480); Monthly Report: Public Relations, dated 31 Jan. 2006 (C-490).

¹⁸⁰ Garcia Witness Statement, para. 49.

¹⁸¹ *See, e.g.*, Powerpoint, El Dorado Project (C-460); Powerpoint, El Dorado Mine (C-461).

¹⁸² Video, Lifecycle of the El Dorado Mine by Vector Colorado (El Dorado Lifecycle Video) (C- information to people in an easy to understand manner, and inspired confidence that Pac Rim was a

members.¹⁸³

, social development programs, and the different classes and training that Pac Rim was offering its workers.¹⁸⁴

100.

access to the entire spectrum of information that allows them to make decisions that impact their

¹⁸⁵ The aforementioned activities demonstrate that Pac Rim did not just give lip service to this core value but rather proactively sought to disseminate information about its activities to the local communities.

(ii) *Formal community consultations*

101. In addition to the many informal avenues of communication the company fostered with local stakeholders, Pac Rim also conducted two rounds of formal public consultations with local communities, Government officials, and NGOs.

102. These consultations were held in conjunction with the comprehensive EIS

ED Mining Permit .¹⁸⁶ Pac Rim hosted these public consultations in compliance with the IFC **IFC** which were *more robust*

¹⁸³ Garcia Witness Statement, para. 41; *see, e.g.*, Information Bulletin: Mining and Environment, dated Aug. 2003 (Mining and Environment Bulletin) (C-462); 60 Frequently Asked Questions about Pacific Rim and the Minerals Industry, dated 2007 (60 Frequent Questions) (C-463); Notice 1, International Environmental Day, dated 2007 (C-464); Notice 2, International Environmental Day, dated 2007 (C-465); Notice 3, International Environmental Day, dated 2007 (C-466); Brochure, Facts and Figures about Pacific Rim, dated 2007 (Facts & Figures about Pac Rim) (C-467).

¹⁸⁴ Garcia Witness Statement, para. 52; (citing Newsletter, Literacy Campaigns in Communities, dated Mar. 2004 (C-481); Newsletter, Environmental Impact Study, dated Mar. 2004 (C-482); Newsletter, Surface Water Quality, dated Mar. 2004 (C-483); Newsletter, Wells San Isidro and Llano de la Hacienda, dated Mar. 2004 (C-484); Newsletter, El Dorado Foundation, dated May 2005 (C-485); Newsletter, Training in the Prevention of Fires, dated May 2005 (C-486); Newsletter, Air Quality, dated May 2005 (C-487); Newsletter, El Dorado Nursery, dated May 2005 (C-488); Newsletter, Wall Construction, dated 12 Sept. 2005 (C-489)).

¹⁸⁵ Pacific Rim Mining Corp. 2007 Annual Report at 27 (C-32).

¹⁸⁶ The EIS is discussed further below in *Part III*.

103. The purpose of these public consultations was to ensure that the stakeholders in the Project particularly the local communities planning and development of the Project.¹⁸⁹ Thus, the first round of formal public consultation was held at the very outset of the Environmental Impact Assessment, in February 2004.¹⁹⁰

104. Above all, Pac Rim wanted to foster and maintain open avenues of communication so that the resultant EIS would reflect the needs and concerns of the communities.¹⁹¹ Thus, the communities were presented with information about Pac Rim, its

¹⁸⁷ EIS at 7-147 to 7-148 (C-8B); The Environmental Law, enacted in *Decreto* N° 233, adopted on March 2, 1998, published in the *Diario Oficial* N° 79, *Tomo* **Environmental Law** -213); Fuller Witness Statement, para. 49; Pacific Rim Mining Corp., Social and Environmental Responsibility S process, but was conducted by the Company specifically to be open and transparent about the environmental impact of -59); Second Mudder & Hutchison Expert Report at 22-24.

¹⁸⁸ Behre Dolbear Report, para. 130. Claimant notes that Behre Dolbear misleadingly implies that Pac Rim failed to comply with *international consultation standards* because *MARN* acting in accordance with Salvadoran law provided a copy of the EIS at its offices for a period of one month. Clearly the functions of Salvadoran Ministries following their national laws are not within the control of Pac Rim.

¹⁸⁹ Fuller Witness Statement, para. 49; CTA and Vector Report on the First Round of the Public Consultation at 1-1 (Objectives of the First Round of Public Consultations) (C-118); EIS at 7-150-51 (C-8B).

¹⁹⁰ Fuller Witness Statement, para. 49; Pacific Rim Mining Corp., Social and Environmental Responsibility

-59).

¹⁹¹ Garcia Witness Statement, paras. 31-32; Fuller Witness Statement, para. 60; Report on the First Round of Public Consultation at 1-1 (C-118); Pacific Rim Mining Corp., Social and Environmental Responsibility for local community members to contact the Company, including a dedicated community relations person [Ms. Garcia]. Senior personnel in country and onsite are equally available to discuss the project with local citizens, media, government and other organizations. Pacific Rim takes every concern seriously and looks for ways to address or mitigate the -59).

activities, and the mining process.¹⁹² These presentations specifically addressed key issues, such as water supply, the use of cyanide in the mining process, and methods for safeguarding the environment.¹⁹³ The local communities were also informed about the Environmental Impact Assessment process, how the EIS would be prepared, and the standards and guidelines that applied to that process.¹⁹⁴ Participants were given the opportunity to ask questions, which were

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105. After the first round of public consultation, the EIS team recommended that Pac Rim undertake specific actions with respect to the broad categories of concerns raised by the community members.¹⁹⁶ As discussed above, Pac Rim promptly sought to address these concerns by hosting informal community meetings, handing out information, conducting house by house visits, and meeting with community leaders.¹⁹⁷

106. Following the submission of the El Dorado EIS to MARN, a second round of public consultation was held shortly thereafter, from 4 – 8 October 2004. The purpose of this

¹⁹² CTA and Vector Report on the First Round of the Public Consultation at 2-6, Annex 4-7 (Fred Earnest PowerPoint presentation) (C-118); Fuller Witness Statement, paras. 58-60; Garcia Witness Statement, para. 30; EIS at 7-151(C-8B).

¹⁹³ Consultoría y Tecnología Ambiental, S.A. and Vector Colorado, LLC, Report on the First Round of the Public Consultation on the Environmental Impact Assessment of the El Dorado Mining Project, dated Apr. 2004, Annex 4-7 (Fred Earnest PowerPoint presentation) (C-118).

¹⁹⁴ Consultoría y Tecnología Ambiental, S.A. and Vector Colorado, LLC, Report on the First Round of the Public Consultation on the Environmental Impact Assessment of the El Dorado Mining Project, dated Apr. 2004, Annex 4-8 (Adrián Juárez PowerPoint presentation) (C-118).

¹⁹⁵ Importantly, the consultation process remained open following the first round of public meetings.

her personally, drop boxes were placed in each community to allow people to submit written questions or comments, and community leaders served as avenues of information, alerting the company to the questions and concerns of their communities. Consultoría y Tecnología Ambiental, S.A. and Vector Colorado, LLC, Report on the First Round of the Public Consultation on the Environmental Impact Assessment of the El Dorado Mining Project, dated Apr. 2004

(C-118); Garcia

Witness Statement, para. 32; Fuller Witness Statement, para. 60.

¹⁹⁶ EIS at 7-156 to 7-158, Table 7.6-1 (Summary of Concerns and Expectations Collected during the First Round of Public Consultations) (C-8B).

¹⁹⁷ *See also* Garcia Witness Statement, sec. V (My Efforts to Inform the Communities About Pac

second round of consultation was to present the results of the EIS to the local communities and to get public input on mitigation measures.¹⁹⁸ Pac Rim and the EIS team again hosted 11 meetings with local communities, government officials, and NGOs. Officials from MARN and MINEC were again invited to attend and participate in these meetings.¹⁹⁹

107. At this second round of formal public consultations, the EIS team gave a detailed presentation regarding the contents of the EIS.²⁰⁰ In addition, the communities were presented with a description of how the community concerns expressed during the first round of public consultations had been addressed in the EIS.²⁰¹ Participants were also shown photographs of working mines in other countries and the El Dorado Lifecycle Video that Mr. Fuller had created.²⁰² As Mr. Fuller recalls:

Pac Rim did not view the public consultation process as simply a box to check off on its way to completing the El Dorado EIS. Instead, the company showed genuine commitment to maintaining a constant, transparent dialogue with the local communities. I was and remain impressed with the professionalism and commitment Pac Rim displayed in this regard.²⁰³

(iii) *Government collaboration and capacity-building programs*

108. In addition to investing significantly in community outreach and participation, Pac Rim also engaged in sustained government awareness efforts in relation to its activities at the El Dorado Project. These efforts focused on maintaining open lines of communication and fostering constructive relationships with the relevant government agencies (MARN and

¹⁹⁸ Fuller Witness Statement, para. 128; Pacific Rim Mining Corp., Social and Environmental Responsibility (C-59); EIS at 7-159 (C-8B).

¹⁹⁹ Fuller Witness Statement, para. 53; Letter from Fred Earnest to Luis Trejo, dated 28 September 2004 (C-128); Letter from Fred Earnest to Gina Navas de Hernández, dated 28 Sept. 2004 (C-129).

²⁰⁰ PowerPoint, Second Round of Public Comments: El Dorado Project, dated 4-8 Oct. 2004, -445); Garcia Witness Statement, para. 37; Fuller Witness Statement, para. 128.

²⁰¹ Fuller Witness Statement, para. 128; PowerPoint, Second Round of Public Comments: El Dorado Project, dated 4- -445); Garcia Witness Statement, para. 37.

²⁰² Video, Lifecycle of the El Dorado Mine by Vector Colorado (C-446).

²⁰³ Fuller Witness Statement, para. 47 (emphasis added).

MINEC). Beyond official means of communication (*e.g.*, written Ministry correspondence)²⁰⁴, Pac Rim personnel also frequently spoke more informally with Ministry officials, seeking

Salvador. Pac Rim was transparent in its activities, offering the Ministries unfettered access to

²⁰⁵ Consistent wi

responsible mining industry, the company also sought to assist the agencies in obtaining access to capacity-building in the administrative process,

²⁰⁶

These relationships were mutually beneficial, giving Pac Rim a greater understanding of the

activities and reassurance that it was acting in a responsible manner.

109. As Mr. Shrake describes, both prior to and upon investment, Pac Rim understood that it was acting in a responsible manner.

110. Thus, it was within this context that Pac Rim began planning the mine at El Dorado and preparing the necessary underlying studies, including the PFS and the EIS. As described in the Memorial and supported by contemporaneous documents, and employees spoke frequently with officials at MARN and MINEC as they developed these progress and expectations.²¹⁰

111. its activities and plans, company officials and the EIS team (including Fred Earnest and Matt Fuller) met with MARN officials at the very outset of the process, on 14 January 2004, to discuss the methodology for the EIS.²¹¹ The notes from this meeting refl sincere desire to collaborate with MARN officials and to seek their input. For example, MARN officials were consulted about the methodology for preparing the EIS and how MARN preferred the public consultation to be conducted.²¹² In both instances, MARN officials indicated that they preferred to leave the selection of the methodology in the hands of the EIS team but noted a ²¹³ Mr. Earnest assured MARN officials of t -

Month Ending 31 Aug. 2004 (C-280); *see also* Second Shrake Witness Statement, paras. 94-101, 105, 108; First Shrake Witness Statement, paras. 52, 90-92, 94, 101; First McLeod-Seltzer Witness Statement, para. 32;

Memo from Pat Gochnour (noting that the Minister of Economy and then-

-619).

²⁰⁹ Government Communications Summary, dated 12 May 2005 Mr. Earnest also had the expressed their support for the project and willingness to help as needed (C-396).

²¹⁰ *See, e.g.*, Memorial, paras. 360-85.

²¹¹ Memorandum from Adrián Juárez to Pacific Rim Mining Corp., dated 12 Jan. 2004, commented on by Matt Fuller on 14 Jan. 2004 (C-105).

²¹² Memorandum from Adrián Juárez to Pacific Rim Mining Corp., dated 12 Jan. 2004, commented on by Matt Fuller on 14 Jan. 2004 at 2 (C-105).

²¹³ *Id.*

will be prepared to comply with MARN requirements, but in some aspects could go far beyond

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112. In the Counter-Memorial, Respondent presents a warped version of this meeting,

and would prepare the engine

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claim is directly contradicted by the document from which it selectively quotes.²¹⁶ *In fact, both this document and the meeting itself – held mere weeks after the EIS team was selected – prove that the company was proactively and sincerely seeking MARN’s guidance.*

113.

personnel were understandably unfamiliar with the Project and recommended that Pac Rim

²¹⁷ Thus, shortly after this meeting, Mr. Earnest wrote to MARN and MINEC offering to send several technicians from each agency to visit working mines in the United States in order to view first-hand the technology being proposed for the El Dorado mine.²¹⁸ Mr. Earnest further offered to sponsor a 2-

the procedures and practices regarding mineral extraction in an underground mine, the recovery of metals in the processing plant and protection of the environment through all phases of the

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²¹⁴ *Id.*

²¹⁵ Counter-Memorial, para. 212 (citing C-105).

²¹⁶ Memorandum from Adrián Juárez to Pacific Rim Mining Corp., dated 12 Jan. 2004, commented on by Matt Fuller on 14 Jan. 2004 (C-105).

²¹⁷ *Id.*

²¹⁸ Letter from Fred Earnest to Walter Jockish, dated 6 Feb. 2004 (Mr. Earnest further noted that officials from Chile had attended a similar trip and had found it to be quite informative. Mr. Earnest comments that, in his experience, when government officials are able to participate in site visits and when everyone shares the same knowledge of the matter at hand, that the best decisions with regard to that matter may be made.) (C-247); Letter from Fred Earnest to Miguel Lacayo, dated 6 Feb. 2004 (C-248).

²¹⁹ Letter from Fred Earnest to Walter Jockish, dated 6 Feb. 2004 (C-115); Letter from Fred Earnest to Miguel Lacayo, dated 6 Feb. 2004 (C-248).

any condition for our company
training visits

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114. Although Salvadoran officials expressed interest in visiting a working mine,²²¹ MARN ultimately decided that it would be preferable to conduct the proposed two-day technical training prior to sending its specialists to visit an operational mine.²²² Pac Rim was happy to es
with the technology and practices of [the mining] industry prior to the presentation of the
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115. Pac Rim contracted with the firms of Dorey & Associates and Vector to host the two-day training seminar.²²⁴ The seminar agenda included, *inter alia*, topics such as the mine life cycle; differences between underground and open pit mining; the gold extraction process; issues pertaining to water resource management; the controlled use of cyanide and the related environmental protection measures; and environmental impacts and mitigation measures.²²⁵ A detailed PowerPoint presentation covering each of these topics was presented at the training. In addition, participants were shown El Dorado Lifecycle Video that Mr. Fuller had developed to provide a progressive visual simulation of the physical features of the Project and the measures taken to assure that the El Dorado Project would provide a sustainable environment and

²²⁰ Letter from Fred Earnest to Walter Jockish, dated 6 Feb. 2004 (C-115); Letter from Fred Earnest to Miguel Lacayo, dated 6 Feb. 2004 (C-248).

²²¹ Email from Carlos Serrano to Fred Earnest, dated 1 Mar. 2004 (C-772).

²²² E-
phone call from Mr. Orlando Altamirano, Advisor to the Minister of the Environment, in which he mentioned the meeting we had last week, when you proposed to him the invitation to visit several mines in the USA and the two-day training, here in the country, on the technical aspects of work in the mining industry and the proper use of the chemicals used. He proposed to me, **First**, that the Training be carried out. **Second**
(emphasis in original) (C-803).

²²³ El Dorado Monthly Report for the Month Ending 31 Mar. 2004 (C-804).

²²⁴ Memorandum from Dorey and Associates to Fred Earnest, dated 23 July 2004 (C-279).

²²⁵ Training Agenda, dated Aug. 2004 (C-595).

community, after mining was completed, the project site decommissioned, closed, and reclaimed.²²⁶

116. Officials from MARN, MINEC, the Governor of the Department of Cabañas, the mayors of San Isidro, Sensuntepeque and Guacotecti, the Director of the National Hospital of Sensuntepeque, the Director of the Department of Education in Sensuntepeque, representatives of local churches, and NGOs were invited to participate in the training, which was held on 19-20 August 2004.²²⁷ In all, over 30 government officials and other community leaders attended the seminar.²²⁸ Ms. Ericka Colindres, who at the time was still an official with MARN, testifies that she first became acquainted with both Pac Rim and the El Dorado Project through her participation in this seminar.²²⁹ She professionalism and goodwill shown by the company in offering us [government officials] a

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117. Throughout the following years, Pac Rim officials maintained near-constant communication with the Ministry staff at MARN and MINEC regarding the submission of the El Dorado EIS and the concession application that Pac Rim submitted on 22 December 2004.

²²⁶ Video, Lifecycle of the El Dorado Mine by Vector Colorado (C-446).

²²⁷ List of Seminar Attendees (C-125); Letter from Fred Earnest to Luis Armando Trejo, dated 15 July 2004 (C-116); Letter from Fred Earnest to Gina Navas de Hernandez, dated 22 July 2004 (C-117); *See* Letter from Fred Earnest to Engineer Jesús Edgar Bonilla, Governor (Department of Cabañas) (C-805A); Letter from Fred Earnest to Teresa del Carmen Flores, Director (National Hospital Sensuntepeque) (C-805B); Letter from Fred Earnest to Ana Maria Rivera, Director (Department of Education) (C-805C); Letter from Fred Earnest to Ricardo Navarro (Friends of the Earth) (C-805D); Letter from Fred Earnest to Gina Navas de Hernández, Director (Ministry of Economy) (C-805E); Letter from Fred Earnest to José Maria Morataya, President (EDYTRA- El Salvadoran Education and Work Foundation) (C-805F); Letter from Fred Earnest to Víctor Manuel Bolaños, Commander (Military Detachment No. 2) (C-805G); Letter from Fred Earnest to Medardo Méndez, Mayor (City of Guacotecti) (C-805H); Letter from Fred Earnest to Adán Ramos, Priest (Calvary Church) (C-805I); Letter from Fred Earnest to Norberto José Marroquín, Priest (Santa Barbara Church) (C-805J); Letter from Fred Earnest to Mauricio Retana (C-805K); Letter from Fred Earnest to Jose Roberto Castillo, President (El Salvadoran Ecological Foundation) (C-805L); Letter from Fred Earnest to José Ignacio Bautista, Mayor (City of San Isidro) (C-805M); Letter from Fred Earnest to Rene Oswaldo Rodríguez, Mayor (City of Sensuntepeque) (C-805N); Email from Fred Earnest to Luis Trejo, dated 10 Aug. 2004 (C-278).

²²⁸ El Dorado Project Report for the Month Ending 31 Aug. 2004 (C-280).

²²⁹ First Colindres Witness Statement, para. 68.

²³⁰ *Id.*

Although many of these contacts were in person,²³¹ the tenor of the written exchanges among Pac Rim personnel and the Ministries is illuminating as to the collaborative nature of the relationship the company enjoyed with the Government agencies regulating the Project.²³²

118. Likewise, Governmen

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stakeholders in a collaborative dialogue about the El Dorado Project were longstanding, having been initiated as soon as the company began undertaking active operations in El Salvador. However, as it began to appear that mining was becoming politicized in El Salvador in or around mid-2006, the company realized that it needed to expand these efforts to include more proactive engagement with political appointees, elected officials and the national population. At the same time, Pac Rim continued to develop and maintain positive relations with the relevant local communities and government bureaucrats.

121. Later, and only *after* political appointees in the Executive Branch of Government began issuing public anti-mining statements in mid-2006, was Pac Rim obliged to engage in pro-mining campaigns at the national level.²³⁵ The fact that Pac Rim attempted to respond to the anti-mining rhetoric that began circulating in El Salvador in or around 2006 does not mean that the company believed at that time that the anti-mining sentiments of a few NGOs or even of one or two Executive Branch officials would stymie its Project.²³⁶ Contrary to what Respondent has repeatedly suggested in this arbitration, no serious mining company with a major investment in a high-quality project like El Dorado would have considered taking the drastic step of invoking international arbitration against the Government of El Salvador under the fluid circumstances that prevailed in 2006 and 2007.

- (i) *Continued efforts to educate the public and bolster political support for legal action on Pac Rim's applications*

122. In 2006, in addition to continuing the engagement activities with stakeholders described above, the company also began to participate in the national conversation about

²³⁵ Third Shrake Witness Statement, para. 29.

²³⁶ See First Shrake Witness Statement, paras. 75, 89-104; *id.*, para. 93 personally with Mr. Barrera himself, who downplayed the remarks that were reported in the press and said they did not represent official policy ; Second Shrake Witness Statement, paras. 114-32; *id.*, paras. 118- and support of the El Dorado Project, Vice President Escobar attended my meeting with Minister Barrera. Mr. Barrera downpla assured me that his remarks did not represent official Government policy and that if we addressed a few minor issues with our permit

mining. As discussed below in mining law reform became a politicized issue. Therefore, Mr.

the company decided to hire a local lobbyist to assist it in participating in the legislative

²³⁷ In order to locate a qualified lobbyist, Mr. Shrake contacted Mr. Francisco de Sola to seek his advice on the matter.²³⁸ Mr. de Sola was a prominent businessman in El Salvador who

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123. Mr. de Sola recommended that Mr. Shrake reach out to Mr. Fidel Chavez, a former President of the Organization of American States and a well-known political consultant in El Salvador.²⁴⁰ Messrs. Shrake and Earnest reached out to Mr. Chavez in late July 2006 and

²⁴¹ Mr. Chavez was retained to help the company participate in the national debate about mining reform. It was hoped that he could open doors to stakeholders in Congress and the Administration so that the company could have the opportunity to explain the mining industry and the proposed El Dorado Project and its attendant benefits while the legislative reforms were being debated.²⁴²

124. In keeping with this goal, in November 2006, Mr. Chavez assisted the company in coordinating a trip for members of the *Asamblea* along with local mayors from Cabañas to visit the Midas Mine (an epithermal system and operating underground gold mine similar to the proposed El Dorado Project) in Nevada, U.S.A., so that they could observe how modern and environmentally sound mining operations could be effectively developed and regulated. Recall

²³⁷ Third Shrake Witness Statement, para. 39.

²³⁸ *Id.*

²³⁹ Third Shrake Witness Statement, para. 39, n.68 (citing E-mail from Francisco de Sola to Fred Earnest, dated 21 July 2005 (C-724); Email from Francisco R.R. de Sola to Fred Earnest, dated 10 Aug. 2005 (C-284); E-mail from William Gehlen to Fred Earnest *et. al.*, dated 12 Jul. 2005 (noting that Mr. de -725)). [IS]

²⁴⁰ Third Shrake Witness Statement, para. 39.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ During the trip, a representative from Newmont Mining (the owner and operator of the Midas Mine) gave presentations to the El Salvadoran delegation to inform them about the environmental protections that were incorporated into the mining operations, and allowed them to view the operating underground mine and its skilled U.S. workforce.²⁴⁴

125. Concurrent with its efforts to engage with stakeholders in Congress and the Administration, Pac Rim also hired *Estratégica*, a public relations firm in San Salvador, to assist the company in designing a national communications campaign. As described by Ms. Garcia and Mr. Shrake, throughout 2006, Pac Rim was facing a constant barrage of misinformation and fear-mongering disseminated by anti-mining NGOs, many of them led and funded by Oxfam.²⁴⁵ As Ms. Garcia describes, local NGOs were claiming, *inter alia*:²⁴⁶

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- Pac Rim planned use two tons of cyanide daily, leading to acid rock drainage;²⁴⁸
- The only way in which mining is going to bring people out of poverty is because²⁴⁹

²⁴³ Letter from Fred Earnest to Walter Jockish, MARN, dated 6 Feb. 2004 (C-247); *see also* Letter from Fred Earnest to Miguel Lacayo, MINEC, dated 6 Feb. 2004 (C-248).

²⁴⁴ Third Shrake Witness Statement, para. 40.

²⁴⁵ Garcia Witness Statement, paras. 70-80; Third Shrake Witness Statement, para. 41; Radio Victoria, dated 9 Mar. 2007 (C-438A-V); *See, e.g., Metals mining: a national threat*, DIARIO COLATINO (17 Jan. 2008) (C-535) (The National Roundtable Against Metals Mining erroneously claims that Pac

S clearly demonstrates that this is not true.); *A killer mine*, ADITAL (25 Oct. 2011) (C-536); Andres McKinley, *Considerations about Metals Mining in El Salvador* (1 Jan. 2007) (C-726); *Controversy over Mining Development*, EL DARIO DE HOY (11 June 2006) (C-534); El Dorado Project Report for the Month Ending 28 Feb. 2005 (noting an antimining forum sponsored and conducted by Oxfam America, Centro Humboldt and ADES) (C-397).

²⁴⁶ Garcia Witness Statement, para. 74 (citing C-438A-V).

²⁴⁷ Radio Victoria, dated 9 Mar. 2007 (C-438A).

²⁴⁸ Radio Victoria, dated 13 June 2007 (C-438F); *see also* Radio Victoria, dated various (C-438B; C-438O; C-438Q).

- exploitation; the people will be left as when they dropped the first atomic bomb²⁵⁰
- Women would be infertile;²⁵¹
- 252
- ey
- 253
- People would get skin diseases;²⁵⁴
- taxes they will have to pay the State;²⁵⁵

In light of this misinformation campaign, the primary mandate of Estratégica was to help the company more effectively coordinate a national message that would combat this propaganda. The goal of the campaign was to inform people about responsible mining and the benefits the industry could bring to El Salvador.²⁵⁶

126. As Mr. Shrake describes in his Third Witness Statement, throughout late 2006 and 2007, Pac Rim engaged in a nationwide campaign to disseminate accurate information about Project and about the mining industry, working with additional advisors, including Mr. Francisco

²⁵⁰ Radio Victoria, dated 10 July 2007 (C-438I).

²⁵¹ Radio Victoria, dated 30 Apr. 2008 (C-438V).

²⁵² Radio Victoria, dated 25 July 2007 (C-438J).

²⁵³ Radio Victoria, dated 22 Aug 2007 (C-438M).

²⁵⁴ *Id. But see* Skin Diseases in the Valle de Siria and their Relation to the Entre Mares Mine, Elmer Lopez Lutz, et.al., dated 2004 (C-441).

²⁵⁵ Radio Victoria, dated 25 July 2007 (C-438J).

²⁵⁶ Third Shrake Witness Statement, para. 41; *see also* Garcia Witness Statement, para. 55 (citing Lies and Truths of Mines, ch. 6 (C-493); Lies and Truths of Mines, ch. 7 (C-494); Lies and Truths of Mines, ch.8 (C-495); Lies and Truths of Mines, ch.11 (C-496); Lies and Truths of Mines, ch.12 (C-497); 60 Frequent Questions (C-463); Facts & Figures about Pac Rim (C-467)).

Escobar and Mr. Manuel Hinds,²⁵⁷ to assist the company in coordinating its political and public messaging.²⁵⁸

127. In October 2007, Mr. Fidel Chavez helped the company to arrange another trip for several El Salvadoran congressmen (members of the Environmental Committee and the Economic Committee) to visit the Mina Florida in Central Chile. Mr. Shrake and Ms. Colindres attended this trip as well. As Mr. Shrake describes:

Mina Florida is an underground mine built in the middle of a forest reserve, and I was hoping to demonstrate to the El Salvadoran congressmen how modern, underground mining can and does co-exist with high standards of environmental protection. I also hoped to reinforce the role that the mining industry can play in economic development, as it has done in Chile.²⁵⁹

128. As can be seen from the foregoing, far from a cynical attempt to buy its way into legal rights, *accurate* information about the Project in the post-2006 context reflected a reasonable effort to *safeguard* its existing legal rights in the face of new and unexpected political tides.²⁶⁰ By engaging in these

²⁵⁷ Mr. Shrake notes that Manuel Hinds is former Minister of the Treasury of El Salvador. Francisco Escobar is a chemical engineer and prominent businessman whose family owned the Montecristo Mine in the town of Divisadero. Third Shrake Witness Statement, para. 43.

²⁵⁸ The company prepared and disseminated a number of articles and presentations during this time period, most of which were aimed at demonstrating the geological and economic potential of gold mining in El Salvador, and the methods under which the mining could be carried out in a safe and modern manner. *See, e.g.*, The Minerals Industry: Outlook for Development in El Salvador, dated Oct. 2006 (C-729); The Geology and Gold Potential of El Salvador, dated 31 May 2007 (C-730); Press Invitation, Geology and Gold Potential of El Salvador, dated 4 July 2007 [Hotel Princess, Salon Victoria] (C-731); Manuel E. Hinds, The Economic Benefits of Gold Mining in El Salvador, dated Aug. 2007 (C-732); Why Is There Gold in El Salvador?, dated 30 July 2007 (C-733); E-mail from Rodrigo Chavez to Tom Shrake, dated 22 May 2007 (C-734); E-mail from Peter Neilans to Manuel Hinds, dated 24 May 2007 (C-761); Luis Armando Trejo Castillo, Environmental Valuation of Gold Mining in El Salvador, undated (C-735); Powerpoint Presentation, Gold Mining in El Salvador: Myths & Realities, dated Aug. 2007 (C-736); Pacific Rim Operations in El Salvador, dated October 2007 (C-737); El Dorado Project: Development for El Salvador, dated Jan. 2008 (C-738)).

²⁵⁹ Third Shrake Witness Statement, para. 46.

²⁶⁰ Third Shrake Witness Statement, paras. 36-47.

efforts, Pac Rim did not behave differently from any other responsible international mining company with a duty to preserve value for its shareholders.²⁶¹ As Dr. Rigby has explained:

communication between a company and local communities are
²⁶² While I generally agree with this, there is much more that mining companies must do. This is why modern mining companies around the world, such as Pac Rim, in seeking to advance mining projects typically spend millions of dollars on: (1) community development and relations activities; (2) public relations activities to combat anti-mining misinformation spread by Non-Governmental Organizations; (3) government relations activities to educate government officials about the economic benefits of mining and how adverse impacts can be regulated and mitigated; and (4) capacity building within government ministries and institutions to ensure that proper Project Evaluation and Approval processes are effectively followed. Pac Rim did all of these things in advancing the El Dorado Project and this plan and proposed Project was deficient. Quite to the contrary, Pac Rim was proud of the El Dorado Project and what it had achieved in El Salvador.²⁶³

(ii) *Continued community relations and support*

129. As described in the previous section, Pac Rim embarked upon a campaign to disseminate accurate information about the company and the Project on both national and local levels. Thus, with the assistance of the public relations firm Mediática, Pac Rim personnel, including Ms. Garcia and Ms. Colindres, conducted media interviews with radio, television, and print news outlets,²⁶⁴ and also produced additional informational materials for local

²⁶¹ See, e.g., Second McLeod-Seltzer Witness Statement, paras. 68-75; <http://www.forbes.com/sites/csr/2012/02/23/why-the-future-of-mining-depends-on-social-change/> The business value of solving social problems goes beyond local communities. It can also help mining

<http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/articles/corporate-social-responsibility-in-mining-sector-CSR.pdf>; First McLeod-Seltzer Witness Statement, paras. 24-26; First Shrake Witness Statement, paras. 30-31; Second Shrake Witness Statement, paras. 68-70, 85-93; Third Shrake Witness Statement, paras. 36-47.

²⁶² Behre Dolbear Report, para. 126.

²⁶³ Rigby Expert Report, para.111 (emphasis added).

²⁶⁴ Garcia Witness Statement, para. 54.

mining as well as the economic investments made by Pac Rim in El Salvador and the measures to be taken to ensure environmental safety.²⁶⁵ Ms. Garci

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130. As Ms. Garcia describes in her witness statement, through her various meetings with community members and their leaders, she came to realize that the local population would
²⁶⁷ Thus, in 2006, Pac Rim initiated a series of community visits to the El Dorado site, arranging transportation for people from any community that was interested in participating.²⁶⁸ During these visits, community members were shown the El Dorado Lifecycle Video, a PowerPoint presentation about the El Dorado mine proposal, given a tour of the old installations remaining from the 1950s mining operation, and taken to the exploration sites to see what the drills looked like and how they operated.²⁶⁹ Pac Rim personnel also showed the community members the drill core and talked about the com
-
mining activists (rebutting, for example, the rumors that Pac Rim was already using cyanide during its exploration activities, or that the people who lived in the area suffered from deformities and skin diseases).²⁷⁰ Finally, the community members were taken on a tour of the tree nursery and reforestation program to see that the company had already planted thousands of

²⁶⁵ *Id.*, para. 55; 60 Frequent Questions (C-463); Facts & Figures about Pac Rim (C-467).

²⁶⁶ Garcia Witness Statement, para. 55.

²⁶⁷ *Id.*, para. 58.

²⁶⁸ *Id.*, para. 59.

²⁶⁹ *Id.*, para. 59 (citing Powerpoint, Community Projects, slide 18 (C-499); Photograph, Drilling (C-500); Photograph, Extracting the rock core from the drill tube (C-501); Photograph, Drilling rigs (C-502)).

²⁷⁰ Garcia Witness Statement, para. 59 (citing Photograph, Community visits to site 1, with Ericka Colindres (C-503); Photograph, Community visits to site 2 (C-504); Photograph, Community visits to site 3, with Betty García (C-505); Photograph, Community visits to site 4, with Ericka Colindres (C-506); Photograph, Community visits to site 5 (C-507)).

trees to ensure that the San Francisco river would have a significant ecological reserve to increase water flow and improve the environment.²⁷¹

131. In all, over 2,700 members of the local communities participated in these site visits.²⁷² Ms. Garcia explains the significance of these visits:

I believe these site visits were very important because they gave people the opportunity to express their concerns and have their doubts addressed by the experts right there at the Project site, which gave them more confidence in the truth of what the company was saying. In this way, people could see that Pac Rim wanted to be an integral part of the community and that its activities were not harmful.²⁷³

132. Thus, as described above, beginning in 2003, Pac Rim engaged in numerous activities dedicated to disseminating information about Pac Rim and its proposed activities. The evidence speaks for itself as to the good-faith nature of these efforts.

5. Pac Rim invested in community health and safety, educational, and environmental protection and monitoring programs

133. investment in exploration and drilling. The company recognized that establishing and maintaining an operational mine project would require a sustained investment in the local community. Thus, in addition to fostering an open, collaborative relationship with the local communities and government officials, Pac Rim was committed to investing in sustainable development programs that would have long-lasting benefits for the local communities. As

beyond the present, to providing long term, sustainable

²⁷¹ Garcia Witness Statement, para. 59 (citing Powerpoint, Social Work, slide 4 (C-498); Summary of Social Outreach, at 10-15, 21-26, 38 (C-210); Photograph, Nursery (Nursery Photo) (C-508)).

²⁷² Garcia Witness Statement, para. 60.

²⁷³ *Id.*, para. 61 (emphasis added).

benefits to the communities in which it operates and to sharing its success with local stakeholders.²⁷⁴

134. In an effort to extend the benefits of its activities with the local communities, Pac Rim sought to sponsor programs that benefitted the maximum number of people,²⁷⁵ focusing primarily on three categories of development programs: (1) environmental protection and monitoring; (2) health and safety; and (3) education.

the company 276

Instead, as noted previously, the company viewed its CRS efforts as being a core value and too seriously its responsibilities to the local communities.

135. model corporate citizen and set[] very high standards for itself, often exceeding legal and ²⁷⁷ The company invested significant amounts in promoting environmental sustainability, above and beyond any mitigation measures associated with its mining activities.

136. For example, contemporaneous with its initial investment in El Salvador, Pac Rim hired to conduct environmental audits of the project site and to advise the company as to how best to improve its environmental protection practices.²⁷⁸ Mr. Gochnour is one of the most

²⁷⁴ Pacific Rim Mining Corp., Social and Environmental Responsibility (C-59); Pacific Rim Mining Corp. 2006 Annual Report at 23 (C-31).

²⁷⁵ Garcia Wit *whole*
El Dorado Project
community
Report for the month ending 31 Aug. 2005
-288).

²⁷⁶ *See, e.g.*, Counter-
not obtain them, and decided to pursue other means to demand the concession without complying with the

²⁷⁷ Pacific Rim Mining Corp. 2007 Annual Report at. 27 (C-32).

²⁷⁸
(updated 1 Apr. 2014), available at <http://www.cyanidecode.org/sites/default/files/pdf/AuditorList.pdf>

sought-after environmental consultants in the industry.²⁷⁹ During this same timeframe, the company also put into place a policy on environmental pro

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137. In January 2006, in order to better manage and ensure implementation of the
Ericka Colindres as its local
Superintendente de Protección del Medio Ambiente (Superintendent of Environmental

SPMA

description, the function of the SPMA is to ensure
environmental protection standards and guidelines, and to promote sustainable development.²⁸¹
In that capacity, Ms. Colindres has overseen the continued implementation of many of the
as developing new initiatives of her own.²⁸²

138.

nursery and reforestation program, which has resulted in nearly 70,000 trees being planted on
communities.²⁸³ This annual program has increased

²⁷⁹ Fuller Witness Statement, para. 26.

²⁸⁰ Environmental Policy of the Mining Company Pacific Rim El Salvador, S.A. de C.V., implemented by Fred Earnest, dated Jan. 2004 (C-209).

²⁸¹ First Colindres Witness Statement, paras. 106, 189; *Descripción de Trabajo* (Work Description), Supervisor of Environmental Protection, dated Dec. 2005 (C-155).

²⁸² First Colindres Witness Statement, para. 184-189; *see also* Pacific Rim El Salvador, *Informe Mensual de la Superintendencia de Protección del Medio Ambiente* (Monthly Report of the Supervisory Bureau of Environmental Protection -157); Pacific Rim El Salvador, Monthly Report of the SPMA, February 2006 (C-158); Pacific Rim El Salvador, Monthly Report of the SPMA, March 2006 (C-162); Monthly Report of the SPMA, April 2006 (C-164); Pacific Rim El Salvador, Monthly Report of the SPMA, May 2006 (C-167); Pacific Rim El Salvador, Monthly Report of the SPMA, June 2006 (C-168); Pacific Rim Mining Corp., Monthly Report of the SPMA, August 2006 (C-189); Pacific Rim El Salvador, Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011 (C-210); Email from Ericka Colindres to Antonio Arenas, dated 21 Feb. 2006 (C-211); Letter from Ericka Colindres to Deisy López dated 31 Mar. 2006 (C-212); Letter from Fred Earnest to Deisy López, dated 7 July 2006 (C-213); Letter from Scott Wood to Minister Hugo Barrera, dated 16 Nov. 2006 (C-214); Letter from Scott Wood to Elda Vásquez de Godoy dated 3 Jan. 2007 (C-215); Second Colindres Witness Statement, para. 101-111.

²⁸³ First Colindres Witness Statement, paras. 185-86; Second Colindres Witness Statement, paras. 41-42, 110; Pacific Rim Photo Album, slide 8 (C-465); Nursery Photo (C-508)).

environmental consciousness among local communities, in particular regarding the importance of reforestation to the sustainable development of the Northern Region.

139. Ms. Colindres oversaw other successful environmental initiatives, including:

- Collaboration with ACOAGUA (Communal Water Association) in the monitoring, measuring, and chlorination of the spring administered by Los Jobitos for the benefit of multiple communities;²⁸⁴
- Financing the preparation of several hydrogeological studies for the Sensuntepeque municipality, San Isidro, and other communities;²⁸⁵
- Collaborating on the contracting of drilling services at a test well at the Sports Complex in San Isidro;²⁸⁶
- Providing technical advice to the communities of El Cacahuatal and El Palmito on best management practices for their natural springs;²⁸⁷ and
- Collaborating with the San Isidro health center to sponsor house-by-house fumigation campaigns to prevent the proliferation of dengue-transmitting mosquitos, treating hundreds of homes and benefitting over 2500 residents.²⁸⁸

140. In addition, Ms. Colindres put into place new policies and programs for trash collection and recycling, including building a site for the storage of recyclable materials in 2006, and initiating an annual cleanup campaign resulting in the collection of more than 15 tons of trash and more than a ton of recyclables.²⁸⁹

141. Comple

enhancement activities were the numerous social development programs overseen by Ms. Garcia. As Ms. Garcia explains:

trusting relationship with the people living near the mine so that they would feel comfortable

²⁸⁴ Second Colindres Witness Statement, para. 104.

²⁸⁵ *Id.*, para. 102.

²⁸⁶ *Id.*

²⁸⁷ *Id.*, para. 104.

²⁸⁸ Summary of Social Outreach, at 24, 40 (C-210); Second Colindres Witness Statement, para. 111.

²⁸⁹ First Colindres Witness Statement, para. 187.

s even before mining activities began and so that

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142. The social development programs sponsored by Pac Rim for the benefit of the witness statement, but a few examples of these programs are as follows:

- Initiation of an adult literacy program in conjunction with the Ministry of Education.²⁹¹
- Organization of visual health campaign where a visual exam and corrective lenses were provided free of cost. Approximately 10,000 people were seen.²⁹²
- Delivery of agricultural packages benefitting over 1,500 farmers in the sectors of San Francisco El Dorado, San Isidro, Hacienda Vieja, El Palmito, and Los Jobitos.²⁹³
- Distribution of over 1,600 school kits including notebooks, pencils and bags to low-income children.²⁹⁴
- Construction of safety walls,²⁹⁵ classrooms,²⁹⁶ and other necessary school infrastructure²⁹⁷ for the local grade schools, benefitting thousands of students over the years.

²⁹⁰ Garcia Witness Statement, para. 65.

²⁹¹ *Id.*, para. 66 (citing Summary of Social Outreach, at 1, 31 (C-210); *see also* Certificates of Scholastic Performance of First, Second and Third Level Adult Education, dated 20 Mar. 2009 (C-513); Powerpoint, Community Projects, slide 5 (C-499); Pacific Rim Photo Album, slide 7 (C-456)); El Dorado Project Report for the Month Ending 28 Feb. 2005 (C-397); El Dorado Project Report for the month ending 30 Apr. 2005 (C-290); El Dorado Project Report for the month ending 31 Aug. 2005 (C-288); Pacific Rim Mining Corp. 2007 Annual Report at 28 (C-32).

²⁹² Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 27 (C-210); Powerpoint, Social Work, slide 7 (C-498); Photograph, Eye clinic 1 (C-514); Photograph, Eye clinic 2 (C-515)); Pacific Rim Mining Corp. 2007 Annual Report at 28 (C-32).

²⁹³ Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 29 (C-210); Photograph, Distribution of agricultural products 1 (C-516); Photograph, Distribution of agricultural products 2 (C-517)).

²⁹⁴ Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 3-4 (C-210); Photograph, School kits (C-518); Photograph, Bill Gehlen distributes School Kits (C-519)).

²⁹⁵ Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 3 (C-210); Award given to Pacific Rim for their support in the repair of classrooms and construction of perimeter fence, (Continued...))

- Organization of a general health campaign that gave free medical screenings to over 400 children in rural areas.²⁹⁸
- Organization of an oral health campaign for children in rural areas, held in Sensuntepeque.²⁹⁹

143. These wide-ranging activities were undertaken for a specific reason. As Ms. McLeod-
social responsibility and CSR programs is a core company philosophy. It stems not just from the personal conviction
, but also from a recognition that a comprehensive and well-defined CSR program creates and protects long-term value for shareholders.³⁰⁰ Moreover, these programs are industry practice as they help to create mutually beneficial relationships with the communities in which mining companies operate.³⁰¹
substantial investment in community health, safety, educational and environmental protection programs reflected its commitment to meeting the highest industry standards on CSR.

C. Claimant Has Demonstrated That Its Expectations in Relation to the El Dorado Project Were Reasonable and Legitimate

144. As set out in the preceding *Section B*, it is undisputed that Pac Rim invested tens of millions of dollars in advancing the El Dorado Project towards production, including in

dated 14 Nov. 2007 (Award for classrooms and perimeter fence) (C-520)); El Dorado Project Report for the Month Ending 28 Feb. 2005 (C-397); El Dorado Project Report for the month ending 30 Apr. 2005 (C-290); El Dorado Project Report for the month ending 31 Aug. 2005 (C-288).

²⁹⁶ Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 3-4 (C-210); Award given to Pacific Rim for the construction of classrooms, dated 4 Dec. 2007 (Award for classroom construction) (C-521)).

²⁹⁷ Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 4-5, 32 (C-210); Newsletter, Wall Construction, dated 12 Sept. 2005 (C-489); Powerpoint, Community Projects, slides 3, 6, 8 (C-499); Award for classrooms and perimeter fence (C-520); Award for classroom construction (C-521)); Pacific Rim Mining Corp. 2007 Annual Report at 28 (C-32).

²⁹⁸ Garcia Witness Statement, para. 66 (citing Summary of Social Outreach, at 28 (C-210)).

²⁹⁹ *Id.*, para. 66 (citing Summary of Social Outreach, at 27; Photograph, Oral health (C-522)).

³⁰⁰ Firs

Statement, paras. 41, 85-93; Second McLeod-Seltzer Witness Statement, para. 68. Letter from Fred Earnest to Rene Oswaldo Rodríguez, Mayor (City of Sensuntepeque) (C-805N).

³⁰¹ Second McLeod-Seltzer Witness Statement, para. 68.

winning stakeholder support for the Project and ensuring that it would comply with the highest possible environmental standards and guidelines. Nevertheless, Respondent asks the Tribunal to accept the assumption that Pac Rim carried out all of these activities without having any legitimate reason to believe that its investment would eventually bear fruit.³⁰² This assumption not only defies common sense, but it is also overwhelmingly contradicted by the extensive evidentiary record before the Tribunal. As set out below, Pac Rim had more than ample reason to believe at least up until 2008 that it would eventually bring the El Dorado Project into production.

1. El Salvador consistently supported the mining industry and the development of the El Dorado Project by foreign investors

145. In its Counter-Memorial, Respondent portrays Pac Rim as an opportunistic Government to allow the company to develop a mine at El Dorado, against the will of the local community and that of the Government itself.³⁰³ by any evidence and bears no relation to reality. The record clearly demonstrates that the Government of El Salvador consistently welcomed and encouraged mining investment in general, and particularly foreign investment in the El Dorado Project.

a. MINEC actively sought mining investment in El Salvador

146. Contrary to what one might assume based on the revisionist version of history set forth in the Counter-Memorial, Pac Rim is not the first company to develop mining operations at El Dorado in the past, most recently during the 1940s and 1950s (the **Rosario Mine** ³⁰⁴

³⁰² Counter-Memorial, para. 12.

³⁰³ See, e.g., *id.*, paras. 1- accepting the consequences of its decisions, the company started this arbitration to try to force the Government to

³⁰⁴ See Memorial, para. 21.

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restart mining operations on the site, but was not able to do so due to the outbreak of civil war.³⁰⁵

147. When the civil war ended, mining investment recommenced at El Dorado almost immediately: by May 1993, MINEC had issued mining concessions over El Dorado to **Kinross** company under the ownership and control of Canadian company Mirage Resources Corp. **Mirage**³⁰⁶

148. As foreign investment in the El Dorado Project was ramping up, the Executive Branch engaged in numerous efforts to investigate and promote further investment in the
initiated an institutional capacity-building

According to these reports:

The political stability of the country and the notable improvement in the economy, as well as the mining potential that has been demonstrated in this document, in and of themselves promote the interest that could be awakened in mining companies that know
currently in the process of modernizing the mining code in order to make it more competitive with other countries that are actively developing mining.³⁰⁷

149. These efforts were recognized abroad: in 1995, the U.S. Geological Survey noted the Government of El

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150. In early 1998, a geologist from the Department of Mines presented a report to MARN aimed at studying the development of the mining industry in El Salvador in light of the

³⁰⁵ See *id.*, para. 23.

³⁰⁶ *Id.*, paras. 32-33.

³⁰⁷ Enrique Levy, Institutional Strengthening Project of the Ministry of the Economy, dated 21 Nov. 1994, at 125 (C-621).

³⁰⁸ 1995 U.S. Geological Survey (C-809).

153. In a press release discussing this study, the Director of the Department of Mines affirmed t

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154. information to serve 314
designated the districts of mining interest in the country, including the El Dorado district.³¹⁵
According to the information provided by the Department of Hydrocarbons and Mines:

The most notable economic and social benefits of mining development will be seen when the exploration projects for metallic minerals are in the exploitation phase, and the holders of the mining concessions pay the respective compensation to the State and the Municipal Mayors for the exploitation and use of the minerals.³¹⁶

155.

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156. In anticipation of an increase in mining activity, the Department of Mines also carried out joint capacity-building and training programs with Kinross, including in relation to

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³¹³ José Luis Henríquez, *Thirteen companies interested in mining exploitation: Gold fever in El Salvador*, LA PRENSA GRÁFICA, dated 30 Apr. 1998 (C-810).

³¹⁴ MINEC Atlas of El Salvador, dated 2000, Introduction (C-613).

³¹⁵ *Id.*, Mining Potential in El Salvador.

³¹⁶ *Id.*, Mining Resources at 7.

³¹⁷ *Id.*, Mining Resources at 9.

³¹⁸ Exploration and Development of the El Dorado District and Environmental Considerations in the Mining Sector in El Salvador, dated 20 Oct. 1999 (agenda) (C-811); Letter from Department of Mines to Robert Johansing, dated 8 Nov. 2000 (C-812).

- b. The *Asamblea Legislativa* repeatedly affirmed the importance of the El Dorado Project and the interests of foreign investors

157.

investment in El Salvador was not confined to the Executive Branch of Government. To the contrary, the *Asamblea Legislativa* of El Salvador *specifically considered the El Dorado Project* on no less than three occasions between 1995 and 2001. In each case, the *Asamblea* took into account the interests of the operator of the El Dorado Project which were fully aligned with those of MINEC and took the action that was suggested as being most conducive to facilitating the development of a mine at El Dorado.

158. In late 1994

at El Dorado and commenced preparation of a feasibility study intended to pave the way for the activities were well-known to the members of the *Asamblea Legislativa*, who mentioned the El Dorado Project repeatedly during the legislative debates over the enactment of the 1995 Mining Law.³¹⁹ These elected representatives placed great importance upon the protection and encouragement of foreign mining investment in the El Dorado Project, concluding that if Mirage this would cause huge damage for the Department of Cabañas and huge damage to the country³²⁰

159. A review of the historical record demonstrates that the Salvadoran *Asamblea* took up the initiative of enacting a modern mining law in 1995 in recognition that full-scale mining was likely to recommence in El Salvador very soon. In June 1995, *La Prensa Gráfica* reported that:

Although to some people it seems incredible, there is gold and silver in many places in El Salvador, which has led several foreign companies to carry out exploration.

The possibility that these companies will build their plants and start to exploit Salvadoran gold is great, since, as reported by the

³¹⁹ See generally Mining Law Debates, dated 11 December 1995 (C-274).

³²⁰ *Id.* at 54 (C-274); see also Memorial, paras. 34-35.

160. Although the Government repeatedly recognized that foreign investment was absolutely necessary to expl³²² it lamented the fact that the 1922 Mining Code did not provide for any royalties to accrue to the State from these renewed mining activities:

What does the country obtain from [mineral] exploitation?

El Salvador does not have the capacity to finance mineral exploitation, due to the economic costs and the sophisticated machinery that would be used. That is why foreign companies are permitted to carry out this work.

the companies, as well as the source of employment that the exploitation generates from the extraction of gold and other metals.

The Director of Mines and Hydrocarbons, Gina Navas de Salvador

the ones that make all the investment. The State may have the gold

³²¹ *El Salvador Without Royalties: 11 Companies Look for Gold*, LA PRENSA GRÁFICA (20 June 1995) (emphasis added) (C-813); *see also Mining: multiple risks*, EL DIARIO DE HOY (23

mining companies and this will increase when the exploitation phase commences added) (C-814).

³²² *See, e.g., Locura dorada*, LA PRENSA GRÁFICA that we possess not been taken advantage of? The Central Bank would be happier. An ounce currently has a market value of 385 dollars. The answer is simple: El Salvador does not have sufficient machinery, nor sufficient capital, nor sufficient capacity, to carry out a mining exploitation project added) (C-815); *Mining: multiple risks*, EL DIARIO DE HOY (23 Feb. The State, which is the owner of the subsoil, cannot afford the luxury of making an investment with so much risk, explained the Director of the Department of Energy, Mines and Hydrocarbons, Eng. Gina Navas de Hernández, who has granted 14 explorati

it requires a lot of investment, and it is considered completely risk capital. Because it is not known if anything will be found -814).

buried in the ground for thousands of years, but the investments are

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161. In light of the possibility that the State could miss out on valuable revenues from the soon-to-be-developed mining activity, the *Asamblea* took up the initiative to enact a new law which would, among other things, establish a royalty from mining operations owed to the State. During its deliberations, the legislative committee charged with reviewing the bill for the new mining law decided to establish a 5% royalty, which was objected to by Kinross on grounds that it would discourage further mining investment in El Dorado.³²⁴

concerns, the *Asamblea* changed the proposed royalty from 5% to 3%, as previously discussed in

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162. Notably, the Department of Mines publicly affirmed its support for the 3% royalty, explaining the reasonability of the 3% rate in terms that were essentially identical to the ones used by Kinross in its own explanation of the issue:

hat 3% and the reason to
establish that percentage was that we had to evaluate our level of

investments in the mining sector, precisely because the royalties
are very high and the requirements are too many. Which stops
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hand they generate employment and, on the other, the state collects
more municipal and national taxes³²⁶

³²³ *El Salvador Without Royalties: 11 Companies Look for Gold*, LA PRENSA GRÁFICA (20 June 1995) (C-813); *see also Mining: multiple risks*, EL DIARIO DE HOY [of royalties], Eng. Gina Navas de Hernández and her team have the priority of updating the Code that

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-814).

³²⁴ *See* Letter from Kinross El Salvador to Members of the Economic and Agricultural Committee of the Legislative Assembly of the Republic of El Salvador, dated 12 Dec. 1995 (C-816).

³²⁵ *See* Memorial, paras. 34-38.

³²⁶ *3% royalty was correct*, EL DIARIO DE HOY (24 Dec. 1995) (emphasis added) (C-817). *Compare* Letter from Kinross El Salvador to Members of the Economic and Agricultural Committee of the Legislative Assembly of the Republic of El Salvador (24 Dec. 1995) (C-817). Royalty proposed by the Committee will cause a negative effect on mining operations in the country. (Continued...)

163. *Asamblea* was well-aware of the other benefits that development of a mine would bring to Cabañas, aside from just the new royalties due to the State. In particular, the congressmen focused on how a mine would result in new opportunities for direct employment, creation of new businesses, and an increase in municipal taxes, among other benefits.³²⁷

164. In spite of having the full support of El Salvador, Mirage was not able to move the El Dorado Project forward into production during the following years, due to low gold prices production were repeatedly communicated to the Department of Mines, where, as noted in the Memorial, they were met with a sympathetic ear.³²⁸ In 1999, the Department of Mines prepared a draft mining law reform bill intended to assist Kinross in its development efforts by extending the term of the com works be commenced within one year of signing the concession contract.³²⁹

165. In 2000, while this reform proposal was pending, Mirage completed a merger with Dayton, and Dayton immediately commenced preparation of a new feasibility study and environmental impact study for the El Dorado Project.³³⁰ At the same time, Dayton established contact with the relevant government authorities in El Salvador, seeking their assurances that

Only Guatemala has Royalties like those proposed in El Salvador. Guatemala does not have mining -816).

³²⁷ Mining Law Debates, dated 11 Dec. 1995 at 54 (C-274); Memorial, para. 35.

³²⁸ Letter from Robert Johansing to Gina Navas de Hernández, dated 24 July 1998 (C-327); Letter from Robert Johansing to Gina Navas de Hernández, dated 8 Oct. 1998 (C-328); Letter from Gina Navas to Robert Johansing, dated 22 Oct. 1998 (C-270); Memorial, paras. 65-71.

³²⁹ Letter from Gina Navas de Hernández to Roberto Johansing, dated 26 Aug. 1999 (C-293); Memorial, para. 71.

³³⁰ Letter from Mr. Francisco Perdomo Lino to Mr. Robert Johansing, dated 14 Dec. 2000 (C-332); Press Release, Pacific Rim Mining Corp., Dayton Mining Corporation Announces Operating and Financial Results for the Year Ending December 31, 2001, dated 22 Feb. 2002 (C-333); Press Release, Pacific Rim Mining Corp., Improved Financial Results for the First Quarter of 2001, dated 28 May 2001 (C-334); Press Release, Pacific Rim Mining Corp., Second Quarter Financial Results, dated 15 Aug. 2001(C-335); Memorial, para. 72.

ghts over the El Dorado property would not expire and providing input on the legislative reform:

lobby for a longer time frame to start construction, based on

with El Salvador as a place to work and with the government's

³³¹

166. In April 2000, Mr. Bill Myckatyn met with Vice-President Carlos Quintanilla development plan for El Dorado. Mr. Myckatyn was assured by these government officials that the government was fully supportive of this project and would work with us on its development ³³²

the strength of this positive level of interest by said officials that we [Dayton] proceeded with the

³³³

167. In September 2000, the Vice-Minister of Commerce and Industry wrote to Mr. Myckatyn personally apologizing for being unable to meet with him during his recent visit to El exploration licenses, and letting him know that the legislative reform to extend the licenses would soon be sent to the President of the Republic and then to the *Asamblea Legislativa*.³³⁴

168. By mid-2001, Dayton had not been able to attract financing or make a decision to develop the very small mine that would have resulted from the mineral resources that had been delineated for the project as of that time. Fortunately, the *Asamblea Legislativa* took decisive

³³¹ Press Release, Dayton Advances El Dorado Exploration, dated 2 June 2000 (C-818).

³³² Letter from Mr. Bill Myckatyn to Mr. Robert Johansing, dated 18 Sept. 2000 (emphasis added) (C-819).

³³³ Letter from Mr. Bill Myckatyn to Mr. Robert Johansing, dated 18 Sept. 2000 (C-819).

³³⁴ Letter from Blanca Imelda de Magaña to William Myckatyn, dated 29 Sept. 2000 (C-820); *see also* Letter from Dayton Mining Corporation to Vice-Minister of Commerce and Industry, dated 16 Nov. 2000 (thanking the Vice-Minister for informing Dayton that the reforms to the Mining Law had been approved by her office, and asking for further information about the timeline for approval of the reforms) (C-821).

rights over the El Dorado Project would not expire before it had a chance to verify the economic mining potential of the property.³³⁵ As noted by the *Asamblea*

would cause them [the mining companies] significant harm³³⁶

169. Shortly thereafter, the *Asamblea Legislativa* enacted Decree No. 475, whereby it amended the 1995 Mining Law to establish a longer term for exploration licenses; modify the

1%.³³⁷ The record shows that Kinross/Dayton provided input into each of these amendments,³³⁸ as also confirmed by Ms. Catherine McLeod-

hand in helping the government draft [the mining laws] so that El Salvador would be open and

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170. Ms. McLeod-Myckatyn:

With the passage of these most important modifications it is clear that the Salvadoran government is eager to support the development of its natural resources in a responsible manner, broaden the foundation of its economic reforms and modernization, and act in a way that will attract additional foreign investment. Dayton's President and CEO, Bill Myckatyn stated:

³³⁵ *Decreto* No. 456, adopted on 28 June 2001, published in the *Diario Oficial*, Tomo 352, on 31 July **Decree No. 456** -211); *see also* Memorial, paras. 73-75.

³³⁶ Decree No. 456 (CLA 211).

³³⁷ *Decreto* No. 475, adopted on 18 July 2001, published in the *Diario Oficial*, Tomo 352, on 31 July 2001, arts. 8, 11, 27 (CLA-212).

³³⁸ *See, e.g.*, Letter from Robert Johansing to Minister Miguel Lacayo, dated 12 May 2000 (regarding royalties) (C-822); Letter from Robert Johansing to Gina Navas, dated 11 Oct. 2000 (regarding commencement of exploitation works) (C-823).

³³⁹ The Wall Street Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 (C-336).

important to the mining industry in El Salvador, and especially to Dayton. They not only reflect the realities of today's commodity and financial markets but show a clear appreciation by the people of El Salvador of the ultimate benefits that will accrue from the

³⁴⁰

171. The 2001 reform was also characterized in similar terms by the Department of Mines:

With the approval by the El Salvador Legislative Assembly of a package of 30 amendments to the Mining Act, the Ministry of

explained that _____
initiative to modernize the sector and encourage more foreign and domestic investment in mining

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³⁴⁰ Press Release, Pacific Rim Mining Corp., Changes to Salvadorian Mining Law, dated 23 Aug. 2001 (C-225) (emphasis added).

³⁴¹ Business News Americas, *New Law Strengthens the Mining Sector – El Salvador*, 16 July 2001 (C-228) (emphasis added).

- c. The Government of El Salvador repeatedly recognized the significant risks that are taken on by mining companies, and their
-

172. As indicated in the preceding sections, Pac Rim made its investment in El Salvador in the context of a relationship of support and collaboration between the Government and the operator of the El Dorado Project. This is a crucial fact and one which is completely ignored (or misconstrued) by Respondent in the Counter-Memorial. As mentioned above and in company: it requires a serious commitment of upfront capital, access to modern technology, and a considerable amount of time.³⁴² Consequently, it is extremely important that mining investors be able to rely upon stable and supportive relationships with the governments that are empowered to administer the target mineral resources.

173. Notably, the risks of mining investment and the need to provide incentives for foreign companies to invest in these activities were well-known and recognized by the Executive and the Legislative Branches of Government:

- believe
have it and because you have to invest and pour large amounts of money into it.

one of the riskiest businesses there is³⁴³
- But there are people who know more than us of the existence of these minerals, and they deem it necessary to establish the rules of the game for their exploitation. To me this seems logical and undeniable....Here in our country there is no scientific development or technological development that allows us Salvadorians to adequately know the resources we have.³⁴⁴

³⁴² Memorial, para. 40; First Williams Expert Report, at 9, 17.

³⁴³ Mining Law Debates, dated 11 Dec. 1995 at 50-51 (emphasis added) (C-274).

³⁴⁴ *Id.* at 52-53 (emphasis added).

- The State, which is the owner of the subsoil, cannot afford the luxury of making³⁴⁵
- It benefits the State for them to carry out this exploration, because the State does investment, and it is considered completely risk capital. Because it is not known³⁴⁶
- [T]he aforementioned companies have invested millions of dollars in carrying out these [exploration] activities; consequently [the expiration of their exploration licenses]...would cause them significant harm ...³⁴⁷

174. The experience of Kinross in relation to the 1995 Mining Law (with regard to the royalty rate) and in relation to the 2001 Amendment (with regard to the term of exploration license, royalty rate, exploitation work commitment, and others) confirm that both MINEC and the *Asamblea Legislativa* were aware of the difficulties facing the fledgling mining industry in

d. El Salvador was pro-foreign investment

175. Aside from its commitment to mining in particular, El Salvador was also striving investment. In 1996, El Salvador was given one of the highest credit ratings in Latin America, e country enjoys sustainable economic stability and that could³⁴⁸ In 1999, El Salvador enacted the Investment Law, which provides for a range of investment protections, including the right for foreign investors to submit disputes to resolution by ICSID.³⁴⁹ In 2000, El Salvador was ranked 11th

³⁴⁵ *Mining: multiple risks*, EL DIARIO DE HOY 23 Feb. 1995 (C-814).

³⁴⁶ *Id.*

³⁴⁷ Decree No. 456, Preamble, para. III (CLA-211).

³⁴⁸ *El Salvador qualifies as one of the best countries in the world to invest* (27 Aug. 1996) (C-824).

³⁴⁹ *See* Legislative Decree No. 732 published in the Official Journal 345, 11 Nov. 1999 (CLA-4); Memorial, paras. 60-62.

globally in the Heritage Foundation Index of Economic Freedom, which fell just below the United States (4th) and was on par with Canada (11th) and Chile (11th).³⁵⁰

176. Moreover, as Claimant pointed out in its Memorial, the 1996 Mining Law reflected of r Salvadorans, promoting the Economic and Social Development of the regions in which the minerals are found, allowing the State to collect the revenues that are so necessary for the fulfillment of its objectives.³⁵¹

2. Pac Rim unquestionably fulfilled the key requirement of the Amended Mining Law: the verification of economic mining potential on the El Dorado Property

177. Although Respondent has repeatedly alleged that Pac Rim did not have a legal right to exploit minerals at El Dorado, it has never seriously questioned the fact that Pac Rim met the key requirement of the Amended Mining Law to obtain an exploitation concession: namely, Norte and El Dorado Sur Exploration Licenses.³⁵²

178. In the Counter-Memorial, Respondent alleges that Pac Rim only proved economic mining potential with respect to the Minita deposit, and therefore that it could only be entitled to a concession covering that specific deposit.³⁵³ However, this allegation is disproved by the

179. As Mr. Gehlen explains, Pac Rim believed at the end of 2004 that it had sufficient geological justification to request that most of the area of the El Dorado Norte and El Dorado Sur Exploration Licenses be converted into a mining concession. Between mid-2002 and the end of 2004, Pac Rim drilled 151 drill holes on the El Dorado property (as compared to the 202 total

³⁵⁰ Heritage Foundation, 2013 INDEX OF ECONOMIC FREEDOM (C-222).

³⁵¹ 1996 Mining Law, Preamble, para. III (emphasis added) (CLA-210); *see also* Memorial, para. 90.

³⁵² Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 23 (CLA-5).

³⁵³ Counter-Memorial, paras. 37, 342, 344.

drill holes made on the property by Kinross and its various owners in the eight years between 1993 and 2001).³⁵⁴ Nearly every one of these drill holes discovered new mineralization on the site.³⁵⁵ As noted by MDA in their 2003 Technical Rep

bleasing for Pacific Rim in that any one of those veins could host deposits similar to the El Dorado mine area on one hand, but on the other hand, each one deserves to be explored to some

³⁵⁶ Importantly, these discoveries allowed the Pac Rim team to gain a significant new understanding of the geological system at El Dorado, which in turn further increased their chances of success in future drilling, as well as their chances to classify further resources, and eventually incorporate further reserves into the mine project.³⁵⁷

180. As Mr. Gehlen explains,³⁵⁸ and Mr. Shrake affirms,³⁵⁹ the company was following best industry practice in exploration by seeking to expand the resources in the area around the known mineral deposits, thereby enhancing its ability to attract financing to develop the mine; extending the mine life; and increasing the value of the Project for all the stakeholders.

ion
³⁶⁰ even as it repeatedly affirms that the minerals in the subsoil of El Salvador belong to the country.³⁶¹ Respondent seems to conveniently forget that, like all mineral exploration companies that invest significant time and capital in modern mineral exploration, Pac Rim was taking a risk on behalf of the people of El Salvador.³⁶²

³⁵⁴ Gehlen Witness Statement, para. 73.

³⁵⁵ See Target Map (C-653).

³⁵⁶ MDA 2003 Technical Report at 3 (R-46).

³⁵⁷ Gehlen Witness Statement, paras. 73, 99.

³⁵⁸ *Id.*, para. 74, 94.

³⁵⁹ Third Shrake Witness Statement, para. 17.

³⁶⁰ Counter-Memorial, para. 225

³⁶¹ *Id.*, paras. 16, 42, 92-93, 108, 297, 307.

³⁶² See First Williams Expert Report at 6 (The risks involved in metals mining include geological risk, technical risk, market risk and political risk, as just the major categories of risk. The high risk nature of exploration for metallic minerals, and the fundamental importance of exploration to the sustainability of the mining industry, has led most governments to conclude that in order to develop the natural resource (Continued...)

181. While Respondent may wish to forget this fact for purposes of the present arbitration, it was well-aware of it previously. As indicated above, the El Salvadoran Government has repeatedly and publicly confirmed the importance of private investment in mineral exploration, due to the high- discover and extract the mineral wealth³⁶³ that leads to: the creation of new job opportunities for Salvadorans, the promotion of Economic and Social Development in the regions where the minerals are located, and collection of the revenues that are so necessary for the fulfillment of

³⁶⁴.

182. Furthermore, Respondent also conveniently ignores the fact that Pac Rim was extraordinarily successful in its exploration efforts, both at Minita and beyond. By the end of esources associated with the Minita deposit; the classification of new resources at La Coyotera and Nueva Esperanza; and the discovery of significant new mineralized structures at South Minita and Nance Dulce.³⁶⁵ In addition, the results of scientific research carried out by Pac Rim demonstrated that the mineralization at El Dorado was associated with a different geological era than had previously been thought, thus opening up new zones of increased potential within the license area.³⁶⁶

183. Based on this record of mine project from a broad portion of the license area during the thirty-year term of the request that most of the area of the Exploration Licenses be converted to a concession.³⁶⁷

endowment of their State or Province, they must establish conditions that are conducive to private investment in minerals exploration and exploitation on a sustainable basis *see generally* at 5-10.

³⁶³ See Mining Law Debates, dated 11 Dec. 1995 at 50-51 (C-274); *Id.* at 52-53; *Mining: multiple risks*, EL DIARIO DE HOY 23 Feb. 1995 (C-814); Decree No. 456, Preamble, para. III (CLA-211).

³⁶⁴ See Mining Law Debates, dated 11 Dec. 1995 at 50-51 (C-274); *Id.* at 52-53; *Mining: multiple risks*, EL DIARIO DE HOY 23 Feb. 1995 (C-814); Decree No. 456, Preamble, para. III (CLA-211).

³⁶⁵ El Dorado North and South 2004 Annual Report (C-679); Gehlen Witness Statement, paras. 58-59, 101; Third Shrake Witness Statement, paras. 14-15.

³⁶⁶ Gehlen Witness Statement, paras. 100-02.

³⁶⁷ *Id.*, para. 102.

Virtually no mine on earth maintains 30 years of reserves at any given time (much less prior to commencement of production), and this would be even more unusual for an epithermal gold mine, where the veins are deep in the ground and surface drilling is extraordinarily costly.³⁶⁸ Pac Rim therefore planned to follow standard industry practice by operating on a few years of reserves at any given time, thus maximizing the mine life and increasing the overall revenue stream.³⁶⁹ As Mr. Gehlen notes:

[I]t would not make very much sense in my view for the Government to grant Pac Rim a thirty-year mining concession to open a mine that would only operate for six years, when we were likely to double the existing reserves for the project well within that six-year period. Extending the mine life enhances the benefits of the mine for everyone involved because it results in more profits over a longer period, all of which are shared with the Government (through taxes and royalties) and also serve to benefit the through mine payrolls and expenditures.

At the same time, the greatest potential environmental impacts of the mine tend to be associated with the initial construction and development phase, which does not need to be fully repeated in order to incorporate new reserves into the operation. I would add that in the case of El Dorado, substantial mineral reserves could be added into the mining project described in the PFS without changing the surface footprint of the mine. The tailings impoundment and dam (by far the largest surface component of the mining operation) was designed by Vector to accommodate a significant increase in production from that contemplated in the PFS, and would not have been altered or enlarged as the result of such an increase.³⁷⁰

184. In keeping with its confirmation of the geological potential of the license area, Pac Rim requested an area of 62 square kilometers for the concession in December 2004.³⁷¹

³⁶⁸ *Id.*, para. 94; Third Shrake Witness Statement, para. 19.

³⁶⁹ Gehlen Witness Statement, paras. 102, 123-28; Third Shrake Witness Statement, para. 19.

³⁷⁰ Gehlen Witness Statement, paras. 126-27.

³⁷¹ *Solicitud de Conversión de Licencias El Dorado Norte y El Dorado Sur a Concesión de Explotación El Dorado* (Request to Convert the El Dorado Norte and El Dorado Sur Licenses into an El Dorado Exploitation Concession), dated 22 December 2004 (C-181); Final Pre-Feasibility Study -
-9); Letter from Minister of Economy to Secretary for Legislative

(Continued...)

However, in or around March 2005, Pac Rim was notified by the Department of Mines that it considered the requested concession area to be too large, partially because it did not fit within the area studied in the EIS.³⁷² The Department advised Mr. Earnest that Pac Rim should reduce the area of the requested concession and incorporate a new company to obtain exploration licenses covering the remainder of the original area of the El Dorado Norte and El Dorado Sur Exploration Licenses.³⁷³

185. Pac Rim agreed to this request and Mr. Earnest instructed Mr. Gehlen to create a new map outlining a reduced concession boundary, as well as new exploration license boundaries. These new boundaries were agreed with the Department of Mines, and Pac Rim proceeded to incorporate DOREX and to present applications for the Pueblos, Guaco and to reduce the requested area from 62 square kilometers to 12.75 square kilometers, and to provide new maps and a new geological justification corresponding to the reduced area.³⁷⁴ In

and Legal Affairs, May 25, 2005 with attached Memorandum, "Interpretación Ley de Minería", May 5, 2005 (R-30); Gehlen Witness Statement, paras. 97-104.

³⁷² Gehlen Witness Statement, para. 106; Memorandum from Fred Earnest, dated 10 May 2005 (C-825).

³⁷³ E-mail from Fred Earnest to Tom Shrake, dated 18 Mar. 2005 (C-713).

³⁷⁴ Gehlen Witness Statement, paras. 107-18; *see also* E-mail from William Gehlen to Fred Earnest, dated 1 June 2005 (C-656); El Dorado Exploitation Concession Map, dated June 2005 (C-657); El Guaco Exploration Map (C-658); Pueblos Exploration Map (C-659); Huacuco Exploration Map (C-670); Incorporation of Dorado Exploraciones S.A. de C.V., 1 Jun. 2005 (C-671); DOREX Request for -398); DOREX Request for Exploration License

Aug. 2005 (C-413); Notice from MINEC, Guaco, dated 12 Sept. 2005 (C-672); Notice from MINEC, Pueblos, dated 12 Sept. 2005 (C-673); Notice from MINEC, Huacuco, dated 12 Sept. 2005 (C-674); MINEC Resolution No. 205, dated 28 Sept. 2005 (C-43); MINEC Resolution No. 208, dated 29 Sept. 2005 (C-44); MINEC Resolution No. 211, dated 29 Sept. 2005 (C-45); Request to Convert the El Dorado Norte and El Dorado Sur Licenses into an El Dorado Exploitation Concession, dated 22 Dec. 2004 (C-181); Map 1, Location of Concession, Concession Application (R-24); Map 2, Location of Concession, Concession Application (R-25); Map 3, Limits of Exploration Area, Concession Application (R-26); Map 4, Limits of Requested Concession Area, Concession Application (R-27); Map 5, Lands Purchased or in Process and Location of Infrastructure, Concession Application (R-28); Request to Convert the El Dorado Norte and El Dorado Sur Licenses into an El Dorado Exploitation Concession, dated 22 Dec. 2004 at 5 (C-181); El Dorado South and North 2004 Annual Report, Conclusions (R-101); El Dorado Report for the month ending 31 Aug. 2005 (C- sequence with the drilling program, an extensive campaign of geological mapping was scheduled in the southernmost part of the o and for this
(Continued...)

September 2005, the Department of Mines carried out inspections of the requested Pueblos, Guaco and Huacuco Exploration Licenses areas, and proceeded to issue the licenses.³⁷⁵

186. As Mr. Gehlen observes:

The fact that the Department issued the three new exploration licenses shortly [after this series of events], based on these same coordinates, makes it clear to me that the Department agreed and accepted that we had provided sufficient geological justification for the 12.75 square kilometer concession area.³⁷⁶

187.

correspondence.³⁷⁷ Following the issuance of the Pueblos, Guaco and Huacuco Exploration Licenses, Pac Rim was never informed that the Department believed it should further reduce the area being requested for the concession.³⁷⁸ To the contrary, and as set out further below in Part III, the Department of Mines accepted the 12.75 square kilometer area as the appropriate area

there was collaboration with Dorado Exploraciones S.A. de C.V. to obtain a new exploration license in the area -102); Letter from Fred Earnest to Francisco Perdomo Lino, dated 28 Sept. 2005 (C-675); Modification to Concession Area, dated 28 Sept. 2005 (C-676); Letter from Fred Earnest to Francisco Perdomo Lino, dated 29 Sept. 2005 (C-677); Letter from Fred Earnest to the Ministry of Environment and Natural Resources, dated 30 Sept. 2005 (C-678).

³⁷⁵ Gehlen Witness Statement, para. 112; Incorporation of Dorado Exploraciones S.A. de C.V., 1 Jun. 2005 (C-671); DOREX Request for Exploration License -398); DOREX Request for License -414); DOREX Request for License -413); Notice from MINEC, Guaco, dated 12 Sept. 2005 (C-672); Notice from MINEC, Pueblos, dated 12 Sept. 2005 (C-673); Notice from MINEC, Huacuco, dated 12 Sept. 2005 (C-674); MINEC Resolution No. 205, dated 28 Sept. 2005 (C-43); MINEC Resolution No. 208, dated 29 Sept. 2005 (C-44); MINEC Resolution No. 211, dated 29 Sept. 2005 (C-45).

³⁷⁶ Gehlen Witness Statement, para. 115 (emphasis in original); *see also* 2005 Annual Report for El Dorado Sur License area, in the sectors of and for this there was collaboration with Dorado Exploraciones S.A. de C.V. to obtain a new exploration license in the area -102).

³⁷⁷ E-mail from Fred Earnest to Tom Shrake, dated 18 Mar. 2005 (C-713); El Dorado Report for the month ending 31 Aug. 2005 (C-288); Letter from Fred Earnest to Francisco Perdomo Lino, dated 28 Sept. 2005 (C-675); Modification to Concession Area, dated 28 Sept. 2005 (C-676); Letter from Fred Earnest to Francisco Perdomo Lino, dated 29 Sept. 2005 (C-677); Letter from Fred Earnest to the Ministry of Environment and Natural Resources, dated 30 Sept. 2005 (C-678).

³⁷⁸ Gehlen Witness Statement, para. 122.

within which Pac Rim could continue to carry out drilling activities while its concession application was pending.

188. In sum, given that the Government of El Salvador accepted that Pac Rim had proved sufficient economic mining potential over the 12.75 square kilometer area in which the company has been carrying out drilling activities since 2005, it is estopped from attempting to argue to the contrary in this arbitration. Pac Rim was led to believe by the Government that 12.75 square kilometers was an acceptable area for the concession, and it acted in reliance on that belief by continuing to invest in delineating resources within that area that could be incorporated into the El Dorado mine once the concession was granted.

189. the El Dorado area since January 2005 have unequivocally confirmed the economic mining potential of the requested concession area.³⁷⁹

3. Pac Rim Had the Technical and Economic Capacity to Bring a Mine Into Production

190. As described above, Pac Rim had a strong exploration team that was uniquely qualified to bring added value to the El Dorado Project.³⁸⁰ Although this team of skilled as Respondent and its experts have that Pac Rim was simply an exploration company that lacked the capability to develop a mine.³⁸¹

Directors and and a group of corporate officers who were among some of the most experienced individuals in the mining industry globally. Every step that Pac Rim took toward developing the know-how to bring the project to fruition.³⁸²

³⁷⁹ Mine Development Associates 2006 Technical Report, dated 31 July 2006 (C-681); Mine Development Associates Technical Report Update, dated 3 Mar. 2008 (R-98).

³⁸⁰ Memorial, paras. 103-10.

³⁸¹ Behre Dolbear Report, para. 68; Counter-Memorial, para. 166.

³⁸² Memorial, paras. 133-40, 158-61, 256-59, 323-35, 360-67.

191. Behre Dolbear opines that Pac Rim did put the Project into operation because it alleges that neither Mr. Shrake nor Ms. McLeod-Seltzer are noted for their ability to construct or operate mines.³⁸³ Not only is this statement incorrect, but it is misleadingly premised on the notion that Ms. McLeod-Seltzer and Mr. Shrake were the only two people who comprised Pac Rim. Instead, as Ms. McLeod-Seltzer responds:

[O]ur Board and Senior Management boasted decades of operating experience, honed at some of the largest companies and mines in the world. Other members of our team including myself brought serious financing expertise to the table. While still other members of our team were expert explorers. assertions regarding my and Mr. Shrake misleading and ignore the fact that we surrounded ourselves with a brilliant team of mining professionals.³⁸⁴

Indeed, as described in the witness statements of Ms. McLeod-Seltzer and Mr. Shrake, Pac Rim has employed numerous geologists, geophysicists, and/or mining engineers who had opened and operated dozens of mines around the world:³⁸⁵

- **Ms. Catherine McLeod-Seltzer**³⁸⁶ has nearly 30 years of experience in the mining industry. She has been recognized by her peers in the industry with prestigious a reputation for building lucrative mining companies by teaming up with successful mine finders, such as Mr. Shrake.

³⁸³ Behre Dolbear Report, paras. 72, 67.

³⁸⁴ Second McLeod-Seltzer Witness Statement, para. 50.

³⁸⁵ Second Shrake Witness Statement, paras. 43-47; Second McLeod-Seltzer Witness Statement, paras. 24-37.

³⁸⁶ Second McLeod-Seltzer Witness Statement, paras. 7-21, 62-64 (citing Witness Statement of Peter Brown, dated 26 Mar. 2013, paras. 7-8; Vivian Danielson, *The Northern Miner's 1999 "Mining Man of the Year" David Lowell and Catherine McLeod-Seltzer: Duo's Pierina Discovery Epitomizes New Generation of Low-Cost Mines* (31 Dec. 2008) (C-562); *Interview of Catherine McLeod-Seltzer* (27 May 2002) (C-566); Brochure, 100 Global Inspirational Women in Mining (2013) (C-567)); First McLeod-Seltzer Witness Statement, paras. 7-20; see also Gehlen Witness Statement, para. 16; Second McLeod-Seltzer has an incomparable reputation in the mining

- **Mr. William Myckatyn**³⁸⁷ was certified as a Professional Engineer until his recent retirement, and has over 40 years of experience in mine finance, development and operations. Mr. Myckatyn has been General Manager of several mines, and has been CEO, Chairman, Vice Chairman, Director, and Lead Director at a number of successful mining companies. He has been involved in developing and operating mines all over the world. He has experience at all levels of bringing a mine into operation including feasibility studies, mine financing, mine construction, and corporate transactions including the purchase and sale of companies and debt restructuring.

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- **Mr. Anthony ("Tony") Petrina** is a Mining Engineer who has been involved in the exploration and operation of numerous mines over the 40 years of his career wealth 389

served as President, CEO, and Vice-Chairman until his retirement in 1992. Before it was acquired by Barrick Gold in 2006, Placer Dome was one of the largest gold producers in the world, with exploration projects and operational mines around the world.

- **Mr. David Fagin**³⁹⁰ is a registered Engineer who has 46 years of mine operations experience in gold, silver, copper, lead, zinc, uranium, and industrial minerals from mines in North, South, and Central America, as well as in Australia, New Zealand, and Africa. Mr. Fagin was President, CEO, and Board Member of Homestake Mining Company, which was the largest gold producer in the U.S. for most of the 20th Century. He also served as President and CEO of Rosario

Manager during the start-up phase of the Pueblo Viejo Mine in the Dominican Republic, one of the largest gold mines in the Americas.

- **Mr. Paul Sweeney**³⁹¹ has over 30 years of experience in mine-related financing, accounting, and strategic planning. es 23 years

³⁸⁷ Second McLeod-Seltzer Witness Statement, paras. 25-27 (citing Bloomberg, William Harry Myckatyn Executive Profile (C-568); Press Release, Pacific Rim Appoints Anthony Petrina and William Myckatyn to Board of Directors, dated 3 June 1997 (C-569)); *see also* Second Shrake Witness Statement, para. 45.

³⁸⁸ Second McLeod-Seltzer Witness Statement, paras. 28-29 (citing Anthony Petrina Profile (C-570); Director Profile: Anthony Julian Petrina (C-571); *Interview of Catherine McL31 0.Cath*

with Placer Dome primarily in the finance area, where he participated in the project financing of numerous international mining developments. He has served as CFO of numerous companies with operational mines, including Canico Resource Corp., Sutton Resources; Princeton Mining; Gibraltar; and Placer Pacific Ltd. He is currently an Independent Director of Tahoe Resources Inc., which in 2013 achieved commercial production of the large Escobal silver mine in Guatemala.

192. In addition to the guidance company hired highly-qualified mining engineers to head up its mine development and planned operations, as well as an experienced CFO. They included:

- **Fred Earnest**,³⁹² who holds a Bachelor of Science degree in Mining Engineering and has over 25 years of experience in new project design, development, construction, commissioning, mine management, and mine operation. Prior to Mr. Earnest was the General Manager and Legal subsidiary. In this capacity, Mr. Earnest was responsible for operations, safety, and government and community relations. He worked with local community leaders and regional/national government and regulatory personnel on many issues including, mining law issues and operating permits in Chile. Following President of PRES, where he remained until September 2006.
- **Peter Neilans**³⁹³ is an engineer by training and has held a variety of roles at mine operations throughout his career, primarily for Placer Dome. He has extensive experience in the management of complex environmental programs in coordination with government authorities and indigenous local populations; management and supervision of numerous mines from feasibility planning into design, construction, and operation; and as Mine General Manager of large mining operations in Nevada and Papua New Guinea. Prior to being hired as Pacific subsidiary, which was a larger mining operation than those of most other gold mining companies in the world.

³⁹² Second McLeod-Seltzer Witness Statement, paras. 43-44 (citing Bloomberg, Frederick H. Earnest Executive Profile (C-577)); First Shrake Witness Statement, para. 62; Fuller Witness Statement, para. 22.

³⁹³ Second McLeod-Seltzer Witness Statement, paras. 45-46 (citing Press Release, Pete Neilans Joins Pacific Rim as Chief Operating Officer, dated 16 June 2006 (C-302); 2006 Pacific Rim Annual Report at 5 (C-31)); Second Shrake Witness Statement, para. 122.

- **April Hashimoto**,³⁹⁴ who has over 24 years of experience in the accounting and University, and has held senior positions with several successful mining companies CFO, Strategic Development and Project Development for Placer Dome, where she was responsible for financial controls and reporting for its global exploration, design and construction, and research and technology projects.

193.

construct and/or operate a mine lacks credibility. Moreover, it is a reality within the industry that mining companies expand and contract depending on the needs of the company at a given point in time. Given the many expe
 team, it is unquestionable that the company could have attracted any additional talent needed to bring the El Dorado mine into operation.³⁹⁵ It is why, in 2006 when Pac Rim was told its permits were forthcoming, the company hired the additional officers it would need to shepherd the
 Mr. Neilans and Ms. Hashimoto.³⁹⁶ Additional officers and employees certainly could and would have been hired when the company received its permits. As Ms. McLeod-Seltzer explains:

[W]hile it would be fair to say that one person cannot build a project, each member of our team had personal contacts with some of the foremost industry professionals who would have been very excited to participate in a project with the potential of Pacific Rim's El Dorado Project. There was never a doubt that we could attract any additional talent that we needed as evidenced by our

³⁹⁴ Second McLeod-Seltzer Witness Statement, para. 47; Second Shrake Witness Statement, para. 123; Press Release, April Hashimoto Joins Pacific Rim Mining as CFO, dated 8 Aug. 2006 (C-303). [sg]

³⁹⁵ Second McLeod-
 it was time for us to commence full-scale mine-planning, we knew that we would need to recruit additional technical assistance on the non-

³⁹⁶ Press Release, April Hashimoto Joins Pacific Rim Mining as CFO, dated 8 Aug. 2006 (C-303); 2006 Pacific Rim Annual Report at 5 (emphasis added) (C-31); Press Release, Pete Neilans Joins Pacific Rim as Chief Operating Officer, dated 16 June 2006 (C-
 anticipating the grant of an Exploitation Concession from El Salvador Pac Rim recruited a number of seasoned professionals who had demonstrated project execution experience most notable with Placer

ability to recruit a top flight Board and highly experienced officers and personnel.³⁹⁷

194.

Mining. In April 2004

Project Mr. Myckatyn took Quadra Mining public, raising approximately \$145 million in order to purchase and re-start the Robinson Mine, in Ely, Nevada. In just six months, Mr. Myckatyn grew the company from a two-man operation, putting together a management and operating team of over 400 people and had the Robinson Mine operating and generating revenue by October 2004.³⁹⁸

195. Behre Dolbear has also opined that Pac Rim lacked the ability to finance the El Dorado Project.³⁹⁹ This is not credible given the proven track record of success enjoyed by

- **Ms. Catherine McLeod-Seltzer:** has raised more than \$600 million in working capital for mining exploration to date, and and has been directly involved in more than \$4 billion in corporate transactions in the mining industry.⁴⁰⁰ As Peter Brown, the Chairman of Cannacord Capital, Inc. and Cannacord Genuity Corp.,
in addition to her industry-wide reputation, any project on which she works and endorses is certainly financeable. To put it more simply, Catherine is
_____ ⁴⁰¹
- **Mr. William Myckatyn:** From 1993 to 2012, Mr. Myckatyn was involved in raising nearly \$700 million in equity; was involved in corporate transactions

³⁹⁷ Second McLeod-Seltzer Witness Statement, para. 51.

³⁹⁸ *Id.*, para. 26.

³⁹⁹ Behre Dolbear Report, paras. 91-93.

⁴⁰⁰ Second McLeod-Seltzer Witness Statement, para. 62.

⁴⁰¹ Brown Witness Statement, para. 5 (emphasis added); *see also* permitted in 2008, and allowed to move to production, financing this project with Catherine at the helm would h

totaling approximately \$5.522 billion; and raised \$1.688 billion in project and corporate debt transactions.⁴⁰²

- **Mr. David Fagin:** has been a key executive involved in many mining property transactions, public listings and offerings, and other corporate fund raising projects for many years and has raised over \$500 million during his career.⁴⁰³
- **Mr. Paul Sweeney:** Over Mr financing for mines with debt arranged in excess of \$1 billion and a multiple of this amount in the equity markets.⁴⁰⁴

196. All to *\$14 billion dollars* in financing.⁴⁰⁵

Given their reputations within the markets, their financial connections, and their proven track records, it is unreasonable to suggest that they could not have raised the funds needed to bring the El Dorado Project into operation.⁴⁰⁶ As Mr. Rigby observes in his expert report, Pac Rim

raise funds based on a combination of the track record of key members of the management team

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197.

erated

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companies and had, in fact, operated mines together:

⁴⁰² Second McLeod-Seltzer Witness Statement, paras. 25-27 (citing Bloomberg, William Harry Myckatyn Executive Profile (C-568); Press Release, Pacific Rim Appoints Anthony Petrina and William Myckatyn to Board of Directors, dated 3 June 1997 (C-569)).

⁴⁰³ Second McLeod-Seltzer Witness Statement, paras. 30-33 (citing Forbes, David Fagin Profile (C-574)).

⁴⁰⁴ *Id.*, paras. 34-35 (citing Bloomberg, Paul B. Sweeney Executive Profile (C-575)).

⁴⁰⁵ *Id.*, para. 66.

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⁴⁰⁷ Rigby Expert Report, para. 107.

⁴⁰⁸ Behre Dolbear Report, para. 89.

- Mr. Sweeney served at Placer Dome during the same time that Mr. Petrina served as President, and Messrs. Shrake and Neilans were officers.⁴⁰⁹
- Messrs. Myckatyn, Shrake, Gehlen, and Ernst and have worked together almost continuously since 1993, first at Gibraltar and later at Pac Rim. Moreover, while at Gibraltar, Messrs. Myckatyn, Shrake, Gehlen, and Ernst worked alongside Messrs. Sweeney and Neilans. Significantly, they represent a significant subset of⁴¹⁰
- Messrs. Myckatyn and Sweeney have a history of financing and operating mineral and Princeton.⁴¹¹ respectively, CEO and CFO at Gibraltar
- Ms. McLeod-Seltzer worked with Messrs. Myckatyn and Fagin as Directors of Dayton Mining, from 1998 to 2002, prior to the amalgamation with PRMC.⁴¹²
- Ms. McLeod-Seltzer and Mr. Petrina have worked together on Boards for 20 years, including PRMC, Arequipa, Miramar, and Bear Creek.⁴¹³

198.

amount of continuity, acquiring almost a decade of experience working together as a team. Thus, as Ms. McLeod-Seltzer concludes:

strangers to one another and had worked together extensively throughout our careers. So

people in Pac Rim had indeed worked together for many years. I continue to believe that Mr. Shrake and I had assembled a formidable team with a wealth of technical knowledge and operational experience who would have been able to take the El Dorado project forward into production.⁴¹⁴

⁴⁰⁹ Second McLeod-Seltzer Witness Statement, para. 60.

⁴¹⁰ *Id.*, para. 58; Second Shrake Witness Statement, paras. 25-

⁴¹¹ Second McLeod-Seltzer Witness Statement, para. 59.

⁴¹² *Id.*, para. 56.

⁴¹³ *Id.*, para. 57.

⁴¹⁴ *Id.*, para. 61.

199.

and financial expertise needed to bring the El Dorado Project into operation, and that it could have augmented its team of professionals at will once El Salvador issued the necessary permits to bring the El Dorado mine into operation. Assertions to the contrary are baseless.

4. Pac Rim Produced High Quality Studies that Addressed the Feasibility of the Project

a. The El Dorado EIS Demonstrated the Environmental Feasibility of the El Dorado Project

200. As mentioned above, Pac Rim retained the firm of Vector Colorado to serve as the principal author of the comprehensive Environmental Impact Study (previously defined as **EIS**

application.⁴¹⁵ Vector in turn worked with a highly qualified team of well-known international and regional experts, certified by MARN, with extensive experience in environmental permitting.⁴¹⁶

201. The primary purpose of the El Dorado EIS which is comprised of nearly 1,400 pages of detailed analysis, technical data, and other supporting documentation was to assess the potential environmental and socioeconomic impacts of the El Dorado Project and to determine how any impacts could be mitigated.⁴¹⁷ The Study reviewed a wide range of potential environmental and social impacts of the El Dorado Project, looking at the potential impacts from three different points in time (construction, operation, and post-closure) and addressing the varying impacts on three different geographic regions (areas of direct influence, municipal influence, and national influence). As Mr. Fuller, the Project Manager of the EIS explains:

⁴¹⁵ See also Memorial, para. 163.

⁴¹⁶ EIS at 1-3 (C- a team of experienced and well known professionals certified by the El Salvadorian Government to work in the country in accordance with the Environmental Law. The team was comprised of individuals and team of cross-discipline experts (along with their support staffs) perfectly complemented one another, providing thorough and comprehensive coverage of every aspect of the Pre-Feasibility Study and the EIS. In 2004, one could not have compiled a stronger more competent team (emphasis added).

⁴¹⁷ EIS at 1-30 (C-8A).

This all sounds somewhat complicated, but what it really means is that the El Dorado EIS team looked at the Project from every angle, taking into account how potential Project impacts might vary throughout the Project lifecycle in different geographic locations.⁴¹⁸

202.

professional engineers, geologists,

the Project, as it has been designed, can be constructed, operated and closed without causing long-term negative impacts on the environment.⁴¹⁹

203. Based upon an extensive review of the EIS and its supporting appendices, Experts Drs. Hutchison and Mudder reach the same conclusion. Dr. Ian Hutchison is a highly experienced civil engineer who has worked on environmental design and management aspects of mining projects around the world, and Dr. Terry Mudder is an environmental scientist focusing on water quality in connection with mining projects.⁴²⁰

204. Drs. Hutchison and Mudder also note that the Project did not present unusual or novel technologies or designs. Specifically, the proposed El D - sized conventional underground gold mine of the type similar to those operated for decades in
⁴²¹ environmental impacts of this type of operation are well known and understood, and the methods to successfully mitigate those impacts are well established.⁴²²

205. Drs. Hutchison and Mudder point to the quality of the team that prepared the EIS
Pac Rim met all of the conditions set forth

⁴¹⁸ Fuller Witness Statement, para. 75.

⁴¹⁹ EIS at 1-30 to 1-31 (emphasis added) (C-8A).

⁴²⁰ First Mudder & Hutchison Expert Report at 3-7; Second Mudder & Hutchison Expert Report at 1.

⁴²¹ Second Mudder & Hutchison Expert Report at 1; *see also* EIS at 1-30 (noting conducted for the Project did not identify anomalous negative impacts or challenging impacts that could not be mitigated using currently available technology -8A).

⁴²² Second Mudder & Hutchison Expert Report at 1 (emphasis added).

note that

referenced therein) and fulfilled the intent of the international guidelines of the World Bank, IFC,

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The EIA was completed relying upon the most widely accepted international guidelines and standards at the time based on a combination of North American experience, the World Bank Group protocols, International Finance Corporation (IFC) guidelines, the Equator Principles, and the International Cyanide Management Code. Chapter 3.0 of the EIA presents a summary of the numerous applicable El Salvadorian laws, regulations, standards and guidelines. The World Bank protocols took into account considerations of other international organizations including the World Health Organization (WHO) and the United Nations Environmental Programme (UNEP).⁴²⁵

206. Ms. Colindres, a former Environmental Assessment Technician at MARN who reviewed the EIS while at MARN, confirms that the EIS complied with the TOR issued by MARN:

all the Technicians involved in assessing the study were agreed that the El Dorado EIS was one of the most complete studies that had ever been delivered to the MARN. Having been subject to detailed preparation by highly qualified professionals in the field of environmental assessment, the initial version of the El Dorado EIS was, in my opinion, fully in keeping with the characteristics of the Terms of Reference.⁴²⁶

207. In sum, and as discussed in further detail below, the El Dorado EIS fully demonstrated the environmental feasibility of the Project, confirming that the Project would not have long-term negative impacts for the environment.

⁴²³ *Id.* at 2.

⁴²⁴ Second Mudder & Hutchison Expert Report at 5; EIS at 1-1 to 1-2, 3-1 *et seq.* (C-8A); *see also* Fuller Witness Statement, para. 44.

⁴²⁵ Second Mudder & Hutchison Expert Report at 2 (emphasis added).

⁴²⁶ First Colindres Witness Statement, para. 76 (emphasis added).

b. The PFS Demonstrated the Technical and Economic Feasibility of the El Dorado Project

208.

2005 was a comprehensive technical evaluation of all economic aspects of the El Dorado Mine.⁴²⁷ It was the result of the combined work of a team of high-quality professionals who, as noted above, are recognized as leading experts in their respective fields.

209. Recall that Pac Rim specifically hand-selected each of the consultants who prepared the engineering reports supporting the PFS, based their experience and reputation.⁴²⁸ These consultants ultimately produced seven separate technical reports and studies considering all aspects of a proposed operation at the Minita deposit, including an underground mine plan, metallurgy and processing, tailings impoundment, environmental matters, and capital and operating costs, and offered an economic evaluation of the Minita reserves.⁴²⁹ Together these reports comprised the PFS. These constituent reports and their authors are listed below:

- NI-43-101 Compliant Geologic Resource Estimate Mine Development Associates, (November 2003);
- Process Plant Flowsheet Development, Plant Design & Capital Cost Estimate Mine & Mill Engineering, Inc., (September 2004);
- Metallurgical Testing, Review and Operating Cost Estimate McClelland Laboratories, Inc., (July 2004);
- Geotechnical Design Parameters Call & Nicholas, Inc., (March 2004);

⁴²⁷ Memorial, paras. 195-197; *see generally* Pre-Feasibility Study (C-9).

⁴²⁸ Typically what another junior mining company would do is just drop the data off at SRK and come back and get a feasibility study; the company would provide some input at most. When we did the PFS, on the other hand, we asked SRK to lead the study but told them that we would select individuals or companies that we Pac Rim wanted only the best people doing our fieldwork and that is why we actively participated in collecting the data and hand-picked the team of consultants that would prepare the related (emphasis in original).

⁴²⁹ Press Release, Pacific Rim Mining Corp., Low Operating Costs Cited in Positive Minita Gold Deposit Pre- Feasibility; Definition Drilling Continues at South Minita, dated 27 Jan. 2005 (C-250).

- NI-43-101 Compliant Conceptual Underground Mine Design, Capital/Operating Cost Estimate and Mineable Reserve Estimate McIntosh Engineering Inc., (January 2005);
- Pre-feasibility Tailings Impoundment Design and Capital Cost Estimate Vector Colorado LLC, (August 2004); and
- Environmental Impact Study Vector Colorado LLC (in conjunction with CTA Guatemala), (September 2004).⁴³⁰

210. The PFS focused on the Minita deposit alone, and converted a substantial portion *proven economic viability*).⁴³¹ Even more significantly, the PFS indicated that the operating costs for the Minita deposit would be within the *lowest quartile on a worldwide basis*.⁴³²

211. As Dr. Rigby explains, a PFS is a fundamental requirement under all International Resource and Reserve Re

⁴³³ Dr. Rigby examined in detail

Dorado Project contained all of the necessary technical and economic material needed to demonstrate the existence of mineral reserves that are economically mineable and was fit for the

The PFS established in concrete terms all the major components of the mine plan.⁴³⁵ These proposals were reasonable, and there is no basis to claim that the PFS was in any way deficient.⁴³⁶ As Dr. Rig

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5. Pac Rim Maintained Positive Relationships With the Local Community

213. engage and educate the local communities around the El Dorado mine allowed Pac Rim to maintain excellent relationships with all local stakeholders, including the surface property owners within the proposed concession area.

214. As Ms. Garcia explains in her Witn [anti-mining activists], the truth is that the majority of the people living in the communities near ⁴³⁸ As evidence of this, Ms. Garcia cites numerous public letters of support from local community members.⁴³⁹ In September

⁴³⁵ See Rigby Expert Report, para. 9.

⁴³⁶

-Feasibility Study it prepared in 2005 was anything more than a preliminary study; indeed, SRK estimated that it would cost about half a million -Memorial, para. 128. The fact that there would be an additional cost of \$474,100 for SRK to complete a Feasibility Study for El Dorado cannot be taken to imply that the PFS was somehow insubstantial. See Proposal for El Dorado Project Feasibility Study (C- April 2006, Pac Rim expended some

⁴³⁷ Rigby Expert Report, para. 83.

⁴³⁸ Garcia Witness Statement, para. 81.

⁴³⁹ See Public Letters of Support for Pacific Rim (May 2011) (C-553); Letter from the Governor of

occasion to reiterate to you my complete support and look forward to being able to realize good inter-institutional relations, always with the objective of strengthening development of the Department of

- Patron Festivities of the San Antonio neighborhood, I report to you that we consider allowing a company like [Pac Rim] to have their permit for green mining in Cabañas will generate development and -533); Letter from the Armed

Forces of El Salvador to Fred Earnest, dated 1 Apr. 2006 (In a letter directed to Fred Earnest, President

strengthen the bonds of friendship found in people with a high spirit of service, but that principally I had -554).

2009, the various communities of Cabañas sent a letter to President Funes attaching thousands of signatures and attesting to the need to keep Pac Rim as an operating business in the community.⁴⁴⁰ Likewise, in response to a request for comments by the Minister of the Economy in 2011, other community members wrote letters of support requesting the Government allow the El Dorado Project to move forward.⁴⁴¹ These letters confirmed the first-hand experience of Ms. Garcia acquired through her numerous community meetings and house-by-house visits. I can say truthfully that over the past decade I have personally met with thousands of people to discuss Pac Rim and the proposed El Dorado mining project. I do not believe that anyone else can make such a claim the majority of people in the local communities supported

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215. Mr. Juan Isidro Hernandez, the Pastor of the Evangelical Church of San Francisco

mine.⁴⁴³ Likewise, Mr. Gilberto Vasquez, a Member of the Municipal Council of San Isidro and

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H

⁴⁴⁵ With regard to the people most impacted by the mine the communities within and neighboring the concession area

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express to you that Pacific Rim has been a company that promotes, facilitates, and collaborates for the realization of multiple activities to the benefit of health and education, it is respectful of national laws and, as those who are knowledgeable of its social spirit, we humbly ask you to analyze our petition (see Exhibit 556).

⁴⁴¹ Garcia Witness Statement, para. 83.

⁴⁴² *Id.*, para. 86 (emphasis added).

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the majority are in favor of the

⁴⁴⁴ Vasquez Witness Statement, para. 7.

⁴⁴⁵ *Id.*, para. 11.

Pac Rim has established and maintained positive relationships throughout the period in question.⁴⁴⁶

216.

obtaining permission from landowners to carry out surface works on the area of the requested
⁴⁴⁷

Pac Rim to delay constructing a certain drill pad until the corn had been harvested on a particular plot of land, something Pac Rim was pleased to oblige.⁴⁴⁸

217.

practice with regard to exploration activities was to use very simple documents to record the
t from the company for damages to their

⁴⁴⁹

productive and collaborative. Whenever an issue did arise, Pac Rim engaged with the individuals or landowners who were affected and reached mutually agreeable solutions.

6. Conversion of an Exploration License to an Exploitation Concession Is a Regulated Procedure

218. In the Counter-Memorial, Respondent indicates that there were three main
lity to exercise its right to a concession was subject: first, a

⁴⁵⁰ Claimant does not

disagree

required to do by the law, none of these conditions could have prevented Pac Rim from obtaining a mining concession for El Dorado. That is why Claimant indicated in its Me

⁴⁴⁶

hamlets closest to the exploitation project of the El Dorado mine, the opposition movement is insipient and the apocalyptic message has not stuck because, according to the locals, the benefits of the project can already
-534).

⁴⁴⁷ Gehlen Witness Statement, para. 193.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*, para. 192.

⁴⁵⁰ Counter-Memorial, para. 61.

Rim filed its Concession Application with the reasonable understanding that the application procedure was a formality⁴⁵¹

219. As Claimant has pointed out in its past submissions, Article 23 of the Amended Mining Law identifies the primary substantive requirement for conversion of an exploration license to an exploitation concession the verification of economic mining potential and uses mandatory language to describe the conversion process:

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 30 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 the⁴⁵²

220. In contrast to the language used to describe the conversion of an exploration license to an exploitation concession, the text of Article 23 uses permissive language in respect of the possibility of an extension to the initial 30-year term of t may be extended

221. The structure of Article 23 makes it clear that the concession applicant who has he authorized be granted upon verification of the objective legal requirements. To construe the provision otherwise would violate the principle of legal certainty (*seguridad jurídica*), which is a cardinal principle of Government action, enshrined in Article 1 of the Constitution of El Salvador.⁴⁵³

⁴⁵¹ *Id.*, para. 163.

⁴⁵² *Id.*, para. 61 (quoting CLA-5, art. 23).

⁴⁵³ Constitution of the Republic of El Salvador, art. 1 (CLA-1); Supreme Court of El Salvador, Constitutional Law Division, judgment in case No. 305-99, dated 19 Mar. 2001 (CLA-249); First Fernandois Expert Report at 26; Memorial, paras. 421-423.

222. As Claimant explained in the Memorial, Article 23 marks the middle of the continuum between the two activities described in Chapter III of the Amended Mining Law: exploration for metallic minerals and exploitation of metallic minerals. These two activities are successive in nature, and the structure of the Amended Mining Law confirms that the transition between the two phases is intended to be seamless.⁴⁵⁴

223.

In this context we maintain that an interpretation that would involve alleging that obtaining an exploration license does not give rise to any right for the holder with respect to the exploitation concession, would directly impact legal certainty by creating a disincentive for investment.⁴⁵⁵

224.

experts in this arbitration, Professor Fernandois⁴⁵⁶ and Mr. John Williams.⁴⁵⁷ In his Second Expert Report, Professor Fernandois explains that:

exploitation concession is the natural consequence of the mining system enshrined under Salvadoran legislation, which incentivizes investment in the sector through two separate phases of operation: exploration and exploitation. In fact, and as we have previously noted, to deny the substance itself of the right to the concession would render this system meaningless, as there would be no reason at all for a private party to opt to invest time and resources into exploration work whose outcome is uncertain and unpredictable⁴⁵⁸

⁴⁵⁴ Memorial, paras. 469-486.

⁴⁵⁵ Email from Karla Fratti to Luis Medina, dated 16 July 2009 *En este marco sostenemos que una interpretación que conlleve a establecer que la obtención de la licencia de exploración no genera ningún derecho en el destinatario respecto a la concesión, incidiría frontalmente en la seguridad jurídica, propiciando un desincentivo a la inversión* (C-807).

⁴⁵⁶ First Fernandois Expert Report at 61-68.

⁴⁵⁷ First Williams Expert Report at 28-30.

⁴⁵⁸ Second Fernandois Expert Report at 33 (emphasis added).

225. The exploration license holder that invests substantial time and resources in order to discover economic mining potential has a legal right to the concession; nevertheless, the license-holder must comply with the other requirements of the law in order to effectively exercise its right. In this regard, Professor Fernandois explains that:

[T]hese requirements can, from a legal standpoint, only be *formal* in nature. This means that they are aimed exclusively at verifying whether the conditions the Law establishes for safe and efficient development of mining activity are or can be met.⁴⁵⁹

226. Pro

Naturally, in order to initiate exploitation, it will be necessary to verify before the competent authority that all legal requirements have been met, but the foregoing does not imply that under the right *in rem* there is no clear expectation regarding the right to obtain the exploitation concession. We are looking at *successive phases*⁴⁶⁰

227.

Regulations is the provision that is specifically relevant to the evaluation of an application for a mining exploitation concession.⁴⁶¹ According to that provision, the primary requirement is the

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

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⁴⁵⁹ Second Fernandois Expert Report at 34.

⁴⁶⁰ Email from Karla Fratti of 16 July 2009, at 1 *Naturalmente, para el inicio de la explotación será necesario comprobar ante la autoridad competente el cumplimiento de los requisitos legales, pero lo anterior no implica que no exista, bajo el derecho real, una clara expectativa de derecho a obtener la concesión de explotación. Nos encontramos ante fases sucesivas -807).*

⁴⁶¹ First Fernandois Expert Report at 64-65.

⁴⁶² Investment Law, art. 18 (RL-8).

228. With regard to the public comment process, Professor Fernandois has previously explained that this process i

the exclusive right, but rather is meant to serve as a formal control of licenses and technical requirements of the applicant, in the exercise of the right to petition, or to protect another kind of right that is specifically recognized under the law and that may potentially conflict with the

⁴⁶³ The only apparent example of a conflicting right would be an existing mining right previously granted to another party over the same area.⁴⁶⁴

229.

arises under Article 15 of the Mining Regulations,⁴⁶⁵ Professor Fernandois explains that this power is greatly diminished once an exploration license has been issued:

[A]lthough Article 15 of the Regulations makes reference to the requirements that are generally applicable to the grant of licenses and concessions, with no distinction, it cannot be overlooked that this is a standard that should be framed within the two-phase system we have described above: exploration-exploitation. When viewing this system in two stages, it makes sense that an in-depth and extensive assessment of the national interest would be carried out when awarding the exploration license, as that would involve the resulting exploitation of any minerals discovered if exploration is successful. Thus, in making the decision to grant the license, the administrative authority should weigh any considerations of national interest that are at stake in the decision whether to initiate mining activities that will logically result in exploitation in the event the existence of minerals in the areas is verified. It is at this time when the judgment concerning national interest can be most actively exercised, because this is when a definitive determination is made regarding whether to open a certain location to the mining industry, first through mining exploration and then eventually through exploitation.⁴⁶⁶

230. Mr. John Williams confirms that the Amended Mining Law and Regulation cannot be interpreted in such a way as to consider that the Minister has discretion, based on

⁴⁶³ First Fernandois Expert Report at 67-68.

⁴⁶⁴ Memorial, para. 490.

⁴⁶⁵ See First Fernandois Expert Report at 64-65.

⁴⁶⁶ Second Fernandois Expert Report at 35-36.

interest in the same:

The Minister cannot deny the grant of a concession on grounds not provided for in the law. Neither can the Minister overrule a favorable internal technical report on the application without cause. Otherwise the process would be open to corruption, would be antithetical to the essential concept of security of tenure, and would be at odds with the stated objectives of the law.⁴⁶⁷

231. In summary, the conversion *procedure* established under the Amended Mining Law is a formal one. There was no reason for Pac Rim to believe that, after having proved the existence of economic mining potential on the area of the Licenses, and having more than ample technical and financial capacity to develop those minerals, its investment would be halted or stymied by this application procedure. It does not appear that the Government ever thought so, either. Indeed, in January 2005, Ms. Navas was cited by the *Diario de Hoy* as having

mining company is still waiting for another permit from

⁴⁶⁸ As described in greater detail in Part

III, *infra*

rights to a mining concession for El Dorado.

D. Respondent has admitted that the Executive Branch of Government Has Implemented a De Facto Ban on Metallic Mining in El Salvador

232. Respondent acknowledges in the Counter-Memorial that the Government of El Salvador

acknowledged by Respondent establish that this measure cannot be fairly characterized as anything other than what it is: a *de facto* ban. Specifically:

⁴⁶⁷ Second Williams Expert Report at 34.

⁴⁶⁸ Jose Alberto Barrera, *Canadian Firm Invests in Cabanas Gold Mine*, EL DIARIO DE HOY (7 Jan. 2005) (C-394).

- Respondent has made it clear that this is an indefinite measure. No time period⁴⁶⁹
 - No legal actions have been or apparently are being taken to implement the⁴⁷⁰
 -
- protracted, and have not resulted in the establishment of clear decision-making criteria, much less in an actual decision,⁴⁷¹
- Notably, Respondent never clarifies in its submissions when exactly this⁴⁷² Its inability to do so confirms that the
- a measure that has no identifiable
beginning and no specified end is in reality merely an illegal and arbitrary act, which has been implemented -- and can be revoked or perpetuated -- at the personal whims of the President. ⁴⁷³

⁴⁶⁹ See, e.g., Counter-

the time to study the situation and the potential impacts before it could decide how and when to move

⁴⁷⁰ See, e.g., Navas Witness Statement, paras. 86-
hold while the Strategic Environmental Assessment was being completed, and this is where the
Moratorium Law comes into play. The Ministry of Environment and Natural Resources prepared a draft

⁴⁷¹ See, e.g., Counter-
steps toward realizing the Strategic Environmental Assessment, nothing was underway by the time he left
implemented, only be lifted when a number of vague and open- -reaching
been met) (R-140).

⁴⁷² See, e.g., Counter- ughout this period, El Salvador reasonably

⁴⁷³ Claimant recalls that Respondent previously accused Claimant of bad faith and abuse of process during the jurisdictional phase of this arbitration for allegedly being unable to identify when the *de facto* ban began.

E. The *De Facto* Ban is a Manifest Abuse of Authority

233. Notwithstanding the patent illegality of the *de facto* ban, discussed at length in ⁴⁷⁴ Respondent and its expert, Dr. Tinetti, have attempted to argue that the *de facto* ban is justifiable under the Constitution of El Salvador in a healthy env 475

234. Notably, however, Respondent does not attempt to identify any actual legal basis for the actions taken by the Executive Branch of Government in relation to the ban. Apparently, by Executive fiat a potential public interest in order to justify its ongoing disregard for the existing law. Obviously, nal legal order, as well as with its obligations to Claimant. Legality is a cardinal principle of any Constitutional State subject to the Rule of Law.

235. Pursuant to this principle, enshrined in Article 86 of the Constitution of El Civil servants are the representatives of the people and have no authority beyond that ⁴⁷⁶ public servants may only exercise their authority up to the precise limit defined by the lawmaker. The phrase illegally extending or prolonging their authority, even if they claim to do so for reasons such as those described above *i.e.*, based on a need to protect some public interest.⁴⁷⁷

⁴⁷⁴ First Fernandois Expert Report, Section VII.

⁴⁷⁵ Counter-Memorial, para. 255.

⁴⁷⁶ Constitution of the Republic of El Salvador, art. 86 (CLA-1).

⁴⁷⁷ Second Fernandois Expert Report at 68.

236. The *only* legal tool available to the Executive Branch to justify disregard for the

Constitution of El Salvador.⁴⁷⁸ This provision states that:

In cases of war, invasion of the country, rebellion, uprising, catastrophe, epidemic or other general calamity, or serious disturbances of public order, the guarantees established by Articles 5, 6, paragraph one, 7 paragraph one and 24 of this Constitution may be suspended, except for meetings or associations conducted for religious, cultural, economic or sports purposes. Said suspension may affect all or a portion of the territory of the Republic, and will take place by means of a decree issued by the Legislative or Executive Branch, as the case may be.

The guarantees contained in Articles 12, paragraph two and 13 paragraph two of this Constitution may also be suspended when so resolved by the Legislature, with a vote in favor by three quarters of the elected congressmen; with administrative detention not to exceed fifteen days.

237. Evidently, the purpose of Article 29 is to establish and regulate the circumstances under which the Executive Branch may disregard or exceed the law. The State of Emergency is *de facto* ban; and indeed it has never been invoked by the Respondent in relation to that measure.

Arguments put forward by El Salvador

⁴⁷⁹ As set out

es.

1. Respondent's Alleged Lack of Capacity Does Not Provide a Basis for the *De Facto* Ban

238.

Branch of Government needed to implement this moratorium due to its own lack of capacity to

⁴⁷⁸ Constitution of the Republic of El Salvador, art. 29 (CLA-1).

⁴⁷⁹ Second Ferandois Expert Report at 70.

enforce and carry out the laws.⁴⁸⁰

a. Alleged Lack of Capacity Is Not an Excuse for Illegal Conduct

239. *de facto* ban on metallic mining in the country is an arbitrary and illegal measure, in plain violation of the Amended Mining Law and the Constitution of El Salvador. Respondent cannot excuse its own wrongful conduct by relying on an alleged lack of capacity. As noted by the arbitrator in *Pantechniki*, this would have the perverse effect of disincentivizing States from improving their standards; and would allow them to rely on a relativistic and essentially self-judging standard to escape legal liability.⁴⁸¹

240. Nowhere are these perverse incentives more on display than in the present case,

Executive Branch t

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b. It Any Event, Respondent Does Not Lack Capacity to Regulate the El Dorado Project

241. Aside from the fact that lack of capacity does not provide a legal justification for oversee the implementation of a number of large-scale, potentially highly-contaminating projects, including hydroelectric dams, gas-fired power plants, sugar mills, tanneries, collaborated on many initiatives to work with the industries that are active in El Salvador in order to ⁴⁸³ Ms. Colindres

⁴⁸⁰ Counter-Memorial, paras. 201-211; see also Expert Report of Dr. Goodland; Expert Report of Dr. Bebbington.

⁴⁸¹ *Pantechniki v. Albania*, Award (July 2009), para. 76; see also, e.g., *GAMI v. Mexico*, NAFTA, Award (November 2004) para. 94.

⁴⁸² Rosa Chavez article (C-746

⁴⁸³ Second Witness Statement of Ericka Colindres, para. 91.

cites several examples of such collaboration, including a program to increase environmental
sugar mills serving

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242. Furthermore, mining activities very similar to those to be carried out at the El Dorado Project have been carried out on the same site before under less environmentally secure conditions and have left no observable environmental impact. Consequently, there is no evidence to support the notion that mining of the kind that Pac Rim planned to undertake at El Dorado is inherently risky or difficult to regulate in comparison with any other industrial activity. Respondent cannot simply single out one industry for which it allegedly has insufficient regulatory capacity, while continuing to regulate all others. Respondent cannot simply decide to stop enforcing the law based on its own alleged inability to carry out the duties with which it has been legally entrusted.

2. Respondent Never Invoked the “Precautionary Principle” Until This Arbitration

243. Remarkably, despite the years of interactions between Pac Rim and the Government in relation to Pac R

-Memorial.⁴⁸⁵ Even this attempt at revisionist history was made almost in passing, and completely without citation.⁴⁸⁶ Although Respondent now would not be approved in May 2007 due to the implementation of the precautionary principle,⁴⁸⁷ the Tribunal would look in vain through the record to find a document or other piece of contemporary evidence that supports such an assertion.

244. This is not surprising, however, when one considers the actual events: Respondent through MARN had engaged in a detailed evaluation of the El Dorado EIS, and had accepted the technical sufficiency of that Study, as evidenced by its publication for public

⁴⁸⁴ Second Witness Statement of Ericka Colindres, para. 93. *See generally* paras. 90-100.

⁴⁸⁵ Counter-Memorial paras. 249, 342, 448.

⁴⁸⁶ *Id.*

⁴⁸⁷ Counter-Memorial paras. 342, 448.

comment.⁴⁸⁸ In other words, MARN technicians had evaluated the El Dorado Project specifically, and had determined that the Project would not result in serious, irreversible harm.⁴⁸⁹ Moreover, MARN extensively evaluated the Study *again* in 2006, and still did not identify any specific risks associated with the project.⁴⁹⁰ In short, there is no scientific uncertainty about the ⁴⁹¹, As set
pt to invoke the principle in the context of the present
arbitration rather than in the context of any legitimate administrative process cannot be
accepted by this Tribunal.

- a. MARN possibly could have invoked the precautionary principle in the context of the permitting process but it failed to do so

245. If El Salvador was indeed considering precautionary measures as it now alleges, it should have followed a legitimate legal process and conducted further study specifically or the ED Mining Environmental Permit. In the event that MARN had not already accepted the technical conclusions of the EIS, then it would have been obligated to conduct further studies pertaining to the Project, which it did not do. It is axiomatic that the administrative nature of a decision based on the precautionary principle must be legitimate, appropriate and justified in accordance with the law of public administration.⁴⁹²

246. in
the abstract. For example, the legislature might hve chosen to rely upon the precautionary principle and elected to not enact the Amended Mining Law. But El Salvador must respect due

⁴⁸⁸ First Colindres Witness Statement, para. 102; *See* Rio Declaration on Environment and Development, Annex 1, princ. 15 U.N. Doc.A/Conf. 151/5/Rev.1 (1992) (CLA-311).

⁴⁸⁹ *See* Rio Declaration on Environment and Development, Annex 1, princ. 15 U.N. Doc.A/Conf. 151/5/Rev.1 (1992) (CLA-311).

⁴⁹⁰ *See, e.g.*, First Colindres Witness Statement, paras. 124-31.

⁴⁹¹ *See* Rio Declaration on Environment and Development, Annex 1, princ. 15 U.N. Doc.A/Conf. 151/5/Rev.1 (1992) (CLA-311).

⁴⁹² Elizabeth Fisher and Ronnie Harding, *The Precautionary Principle in Administrative Constitutionalism: the development of frameworks for applying the precautionary principle in Implementing the Precautionary Principle*, at 113, 116 (Fisher, Jones, and von Schomberg, 2006) (CLA-312).

process, existing laws and regulations, and legitimate expectations that flowed from its own actions. For precautionary measures to be legitimate, regulators must explain their analysis; point to the areas of uncertainty and make clear how those uncertainties can be addressed; and they must justify their decisions.⁴⁹³

247. Respondent followed no such process here. El Salvador never specifically El Salvador never studied the additional information that it asked Pac Rim to provide to it in 2006, nor did it ask the international experts that it contracted to carry out an assessment of ⁴⁹⁴ (In fact, Pac Rim attempted on numerous occasions to provide further information to MARN officials and other members of Government, as well as to the independent experts from TAU, but the information was ignored).⁴⁹⁵ Ultimately, the reason that El Salvador never undertook any of these measures is because it was not motivated by any real concern regarding the environmental

248. This glaring omission should not be ignored: the agency charged with implementing the administrative process for environmental permitting in El Salvador never

⁴⁹³ See Elizabeth Fisher and Ronnie Harding, *The Precautionary Principle in Administrative Constitutionalism: the development of frameworks for applying the precautionary principle in Implementing the Precautionary Principle*, at 113, 115 (Fisher, Jones, and von Schomberg, 2006) (CLA-312).

⁴⁹⁴ As Ms. Colindres and Mr. Gehlen have indicated, Pac Rim freely shared information about the El of these consultants evaluated or made use of this information.

⁴⁹⁵ See, e.g., First Colindres Witness Statement, para. 1 attended a meeting with the new Minister of the MARN, Carlos José Guerrero, and the *Comisión Nacional de Medio Ambiente* (National Commission for Environment CONAMA), in which I presented the technical and environmental features of the El Dorado Mine Project. Despite the fact that I invited them to put any questions to me, the Minister asked none and in truth seemed to not be interested in the least in what I was explaining to them. For example, all he did was check his cell phone instead of

Executive Director of the Ame

see generally Second Colindres Witness Statement, paras. 77-83 (and accompanying citations).

identified an

remove any scientific uncertainty about the potential causes of any perceived (but not expressed) environmental harm , as one would expect if the agency had been considering implementing

249. Notably, MARN has invoked the precautionary principle in the past, and it has done so in the context of an appropriate administrative procedure. In that case, the Supreme Court of El Salvador determined that in order to substantiate invocation of the precautionary principle, MARN needed to provide evidence of a scientific link between the risk of a harmful effect and the activity in question. In *Telefonica Moviles El Salvador S.A. de C.V. v. MARN*, MARN defended its refusal to issue environmental permits based on the argument that telephone

applications.⁴⁹⁶

ough

MARN went through the appropriate process, it still failed to prove that the alleged harm was of

the impacted parties.⁴⁹⁷ Thus, MARN failed to develop the necessary evidence to link the alleged cause with any harmful, irreversible effect, and its attempt to rely on the precautionary principle was rejected on that basis.

250. In this case, if MARN had been so inclined to implement the precautionary principle in develop scientific evidence of a causal link between those activities and some specific,

⁴⁹⁶ Supreme Court of El Salvador, Administrative Law Division, Judgment in case no. 66-2007, *Telefonica Moviles El Salvador S.A. de C.V. v. Mat 3* (CLA-313); see also Report of the Appellate Body, *Measures Concerning Meat and Meat Products*, WT/DS48/AB/R, 16 Jan. 1998, para 183, 199-200 (The WTO Panel and Appellate board found that the European Communities data in support of its measures to ban meat imported from the United States and Canada was not based on the hormones at issue per se, but rather on hormones generally. Thus, the data was not sufficiently specific to the case at hand. The Panel and Appellate body required that the European Communities provide scientific evidence that sufficiently identified the adverse effects that would arise from the specific hormones and that the European communities also evaluate the likelihood of harm.) (CLA-314).

⁴⁹⁷ Supreme Court of El Salvador, Administrative Law Division, Judgment in case no. 66-2007, *Telefonica Moviles El Salvador S.A. de C.V. v. Mat 10* (CLA-313).

irreversible harm that would (allegedly) be caused by them.⁴⁹⁸ However, El Salvador has not provided scientific evidence regarding the likelihood of those adverse effects..

b. The Legislative Assembly could have invoked the precautionary principle to justify a temporary moratorium but it refused to do so

251. As noted above, MARN failed to follow any administrative process consistent with implementing the precautionary principle in respect of the El Dorado Project in this case. On the other hand, it is important to point out that the *Asamblea Legislativa* has never expressed its will to ban mining in the country as a general matter, either. To the contrary, the *Asamblea* has steadfastly refused to pass legislation that establishes either a moratorium or a ban on metallic mining, despite the fact that various bills to that effect *have been pending before it for several years*.

252. Instead, the democratic will of the country with respect to metallic mining continues to be expressed in the Amended Mining Law.. Acting in reliance on that legislative framework which does not just allow, but actively encourages metallic mining -- Pac Rim committed to its long-term investment in the country.⁴⁹⁹

3. Respondent Has Failed to Identify Any Legitimate Environmental Concerns about the El Dorado Project, Even in the Context of This Arbitration

253. In the Counter-
using rhetoric rather than actual evidence -- that the El Dorado Project was somehow

⁴⁹⁸ See Supreme Court of El Salvador, Administrative Law Division, Judgment in case no. 66-2007, *Telefonica Moviles El Salvador S.A. de C.V. v. Mat 10* (CLA-313).

⁴⁹⁹

out saying that a pending bill, one that has been pending in one form or another for years, is not an expression of government will. Instead, it may be reasonably inferred by the passage of time that the opposite is true the *Asamblea Legislativa* is not willing to retreat from the current pro-mining legal framework.

alleged need to block mining projects the late Dr. Goodland and Dr. Bebbington has given any opinion on the El Dorado Project. On the other hand, the report presented by Behre Dolbear consists of vague and/or misleading allegations concerning the alleged insufficiency of the baseline studies in the EIS, potential impacts associated with cyanide use, water resource issues, and social implications.⁵⁰⁰

a. Neither Respondent nor Its Experts Has Identified Any Potential Risks of the El Dorado Project that were Not Fully Addressed in the EIS

254. Respondent and its experts have unsuccessfully attempted to paint the El Dorado EIS as being somehow techn
serious concerns about metallic mining in El Salvador in general, the Ministry [of the
process.⁵⁰¹ However, the contemporaneous factual record demonstrates that the El Dorado EIS
for public comment in 2005.⁵⁰² Moreover, after publication of the Study, Pac Rim committed to
implementing even *more* environmental protections which were not necessary to ensure
adequate prevention and mitigation of all potential risks associated with the Project to ensure

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⁵⁰⁰ Behre Dolbear Report, Section 11 (Evaluation of the Environmental Impact Assessment for the El Dorado Concession Application).

⁵⁰¹ Counter-Memorial, para. 212.

⁵⁰² First Colindres Witness Statement, paras. 102-104.

⁵⁰³ First Colindres Witness Statement, para. 104; Second Colindres Witness Statement, paras. 20-
somehow be faulted for making commitments intended to allay stakeholder concerns over the Project,

environmental consultants firmly believed that all the environmental risks of the project described in the EIS had been appropriately identified and mitigated. Nevertheless, we did not take lightly any of the concerns expressed to us about the project over the course of 2006. To the contrary, we took them very seriously and we did our utmost to address them fully and carefully, even when we did not believe that it was necessary for us to do so in order to control the environmental impacts of the project, which had been considered in the project design and already had the respective environmental measure

255. In their reports and witness statements submitted in conjunction with this Reply, Drs. Hutchison and Mudder, Mr. Fuller (the Project Manager of the EIS) and Ms. Colindres (a former Environmental Assessment Technician at MARN and Environmental Manager for Pac Rim) each identify and discuss in detail the technical deficiencies of the Behre Dolbear Report and its attempted criticisms of the EIS are technically unfounded and/or reflect an inadequate review of the entire wealth of documentation available in the EIS and its appendices.⁵⁰⁴

256. While each of the rebuttal points raised by Drs. Hutchison and Mudder, Mr. misrepresentations and errors is discussed below.

(i) *The El Dorado EIS Satisfied the Equator Principles*

257. Behre Dolbear expresses doubt as to the sufficiency of the El Dorado EIS because⁵⁰⁵ However, Behre

was to promote responsible environmental and social development by⁵⁰⁶

Study was, in fact, compliant with the intent of the international guidelines of the World Bank, IFC, and Equator Principles, in addition to El Salvadoran law and regulations.⁵⁰⁷

(ii) *Behre Dolbear's Criticisms Pertaining to Water Issues are Unfounded and Based Upon Obvious Errors*

⁵⁰⁴ Second Mudder & Hutchison Expert Report at 19; *see also* Fuller Witness Statement, paras. 212; entirely of its own choosing. Pac Rim has provided this information to the Government in the past (*see* request.

⁵⁰⁵ Second Mudder & Hutchison Expert Report at 47; *see also* Fuller Witness Statement, paras. 149-57.

⁵⁰⁶ Second Mudder & Hutchison Expert Report at 7; *see also* Fuller Witness Statement, paras. 149-57.

⁵⁰⁷ Second Mudder & Hutchison Expert Report at 5; *see also* Fuller Witness Statement, paras. 149-57.

258. Behre Dolbear contends that the water quality baseline studies presented in the EIS allegedly were inadequate for purposes of rendering an opinion regarding potential impacts, and further claims that certain key information is lacking from the EIS.⁵⁰⁸ As Drs. Hutchison review of the contents and annexes of the EIS.⁵⁰⁹

259. For instance ⁵¹⁰ the site map and data demonstrating where water samples were taken *is in fact easily identifiable in the EIS*:

Tables 5.2.9 and 5.2.10 within the EIA provide a description of the surface sampling sites along with the criteria for site selection, the frequency of sampling and the list of constituents of concern. The location of the surface water sampling stations is shown on Figure 5.2-17 within the EIA. The location and results of sampling of surface waters related to aquatic life are presented on Figures 5.3-2 and 5.3-3 within the EIA.⁵¹¹

⁵¹²

260. ⁵¹³ iency of the baseline data are similarly unfounded. In their Expert Report, Drs. Hutchison and Mudder affirm the sufficiency study of water quality and flow data from potentially affected surface waters is considered

⁵¹³ As they indicate:

⁵⁰⁸ Behre Dolbear Report, paras. 109-110.

⁵⁰⁹ Second Mudder & Hutchison Expert Report at 10; *see also* Fuller Witness Statement, paras. 158 *et seq.*

⁵¹⁰ Behre Dolbear Report, para. 110.

⁵¹¹ Second Mudder & Hutchison Expert Report at 11.

⁵¹² Fuller Witness Statement, para. 158.

⁵¹³ Second Mudder & Hutchison Expert Report at 11; *see also* Fuller Witness Statement, paras. 171-77 (quoting World Bank, Environmental Assessment Sourcebook: Chapter 1, Annex D (The (Continued...))

Again, Pac Rim employed the widely accepted best practices approach in collection, preservation and analysis of the surface water samples. Comparison of the water quality data from the 1990s with that of 2003-2004 presented in Annex 5.1 indicated no significant patterns or differences. Therefore the combined database was representative of local surface waters and accepted for use in mine planning and permitting.⁵¹⁴

261. Drs. Hutchison and Mudder further affirm the sufficiency of the data pertaining to the availability of water for mining operations and the quality of any water discharge.⁵¹⁵

(iii) *Behre Dolbear's Criticisms of the Tailings Impoundment Design & Management Are Inaccurate*

262. Behre Dolbear makes the general comment that the design of the Tailings Storage **TSF** 516

In his witness statement, Mr. Fuller for their design of the TSF.⁵¹⁷

263. Behre Dolbear further claims that the following supporting technical documents relevant to design of the TSF were not included in the EIS:⁵¹⁸

- Engineering trade-off studies
- Baseline studies including hydrology and geology
- Field investigations

264. documentation was available in the January 2005 PFS and, more importantly, in the 2004 Vector Tailings Impoundment Engineering Pre-feasibility Study Report. The Vector Report is an annex

Environmental Review Process) (1999), para. 7 (C-610)); World Bank Update 22, Environmental Assessment of Mining Projects at 2 (C-606)).

⁵¹⁴ Second Mudder & Hutchison Expert Report at 13 (emphasis added).

⁵¹⁵ Second Mudder & Hutchison Expert Report at 13.

⁵¹⁶ Behre Dolbear Report, para. 116.

⁵¹⁷ Fuller Witness Statement, para. 180 *et seq.*

⁵¹⁸ Behre Dolbear Report, paras. 112-17.

to design for seismic loadings and were in the process of doing so, as well as the highly respected consulting firm of Call and Nichols [sic], which provided a supplemental technical

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265. Moreover, extensive baseline data was available to prepare the designs for the tailings impoundment. This data included rainfall statistics and runoff characteristics used to calculate storm volumes and flood peaks for sizing the capacity of the tailings impoundment and the perimeter ditches used for diverting natural storm runoff from around it.⁵²¹

266. In view of the foregoing, Drs. Hutchison and Mudder firmly concluded that the than adequate for providing a succinct engineering estimate of the capital and operating costs for

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(iv) *The El Dorado EIS Pertained to A Single Project, Rendering a Cumulative Impacts Analysis Unnecessary*

267. The Behre Dolbear report contains the further assertion that Pac Rim should have included the *possible* with potential satellite ore deposits.⁵²³ This contention was made despite the fact that Pac Rim explicitly informed the Government that it was attempting to permit a very specific Project:

The area of the planned mine and the processing area were included in the concession area. The Nueva Esperanza vein to the

⁵¹⁹ Second Mudder & Hutchison Expert Report at 20 (citing EIA, Annex 4.3 Tailings Dam Design (C-8C, C-8D)); *see also* Fuller Witness Statement, paras. 180 *et seq.*

⁵²⁰ Second Mudder & Hutchison Expert Report at 22.

⁵²¹ Second Mudder & Hutchison Expert Report at 20; Fuller Witness Statement, paras. 181, *et seq.* First Colindres Witness Statement, paras. 18-19.

⁵²² Second Mudder & Hutchison Expert Report at 21. Note that the late Dr. Goodland, an (Goodland Opinion at 16). However, he did not indicate in a quantitative manner any risk of failure that was unique to the El Dorado Project or specific deficiencies in the tailings impoundment design that would lead to such a failure.

⁵²³ Behre Dolbear Report, paras. 118-23.

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.⁵²⁴

268. As noted, Pac Rim planned to submit a new EIS before mining activities beyond the applied-for Project could proceed.⁵²⁵

of final reserve calculations and development of a new mine plan for these satellite deposits, it would have been speculative and contrary to acceptable best practices to attempt to quantify cumulative impacts in any meaningful way before further mine development plans were

⁵²⁶

El Salvadorian Government and MARN

did not raise the issue of the need for any cumulative impact assessment to be included in any documentation submitted during the time frame when the EIA and mine application were pending.⁵²⁷ Thus, the cumulative impacts issue

Respondent in this case is merely a *post hoc* conduct.

(v) *Behre Dolbear's Critiques Pertaining to Public Consultations and Sustainability Projects Are Contradicted by the Contemporaneous Record*

269.

alleged insufficiency of the public consultation process.⁵²⁸ These insinuations are flatly contradicted by the contemporaneous record. As described in **Part II** and supported by contemporaneous evidence, stakeholder engagement and community involvement was an

⁵²⁴ Second Mudder &

(C-181)) (emphasis added).

⁵²⁵ See also Second Colindres Witness Statement, para. 58.

⁵²⁶ Second Mudder & Hutchison Expert Report at 30.

⁵²⁷ Second Mudder & Hutchison Expert Report at 30 (emphasis added).

⁵²⁸ scarcely participated in mine plann

integral and fundamental component of the EIS process.⁵²⁹ For this reason, Drs. Hutchison and Mudder conclude: _____
stakeholder meetings, ministry presentations and workshops, and multiple ongoing community sustainability projects.⁵³⁰

270. _____ he El Salvadorian legal requirements for public consultation and complied with the more stringent IFC guidelines, which
⁵³¹ The first round of public consultations was held shortly after preparations began for the EIS, so that the scope of the Study could take into consideration local knowledge as well as local concerns about project impacts. The second stage of consultation was conducted when following the submission of the EIS to MARN, in order to disseminate information about the findings of the EIS.⁵³² In light of the foregoing, Drs.
process that met or exceeded international best practices and El Salvadorian requireme⁵³³

(vi) *The Environmental Management & Closure Plans Were Adequate*

271. Behre Dolbear has claimed that the proposed individual environmental management plans for the project (intended to ensure that the Project complied with the mitigations and commitments described in the EIS) should have been more fully developed than those presented in the EIS.⁵³⁴ However, in the extensive experience of Drs. Hutchison and Dr.
al

⁵²⁹ See Garcia Witness Statement, para. 26-39 (and accompanying citations); Fuller Witness Statement, paras. 46-60, 127-28 (and accompanying citations).

⁵³⁰ Second Mudder & Hutchison Expert Report at 22 (emphasis added).

⁵³¹ Second Mudder & Hutchison Expert Report at 23 (citing EIA, p. 7-147 to 7-148 (C-8B)).

⁵³² Second Mudder & Hutchison Expert Report at 23 (citing EIA, pp. 7-150 to 7-158; Vector Colorado Report (C-118)); Fuller Witness Statement, paras. 46-60 (and accompanying citations); Fuller Witness Statement, paras. 127-28 (and accompanying citations).

⁵³³ Second Mudder & Hutchison Expert Report at 24.

⁵³⁴ Second Mudder & Hutchison Expert Report at 26; Behre Dolbear Report, paras. 132-33.

Project design as specific components would need various levels of revision and modification as

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inadequate.⁵³⁶ However, Drs. Hutchison and Mudder note that a closure plan was outlined in the PFS and elements of the closure cost estimates were provided in Exhibit 7.2 of that Study.⁵³⁷ Closure details were provided describing the closure of the underground workings, removal of surface civil works and process facilities, the landfill and the covering and re-vegetation of the tailings impoundment, as well as post-closure monitoring plans.⁵³⁸ Notably, the lack of Acid

ARD

technical issue

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decommissioning and closure activities in lieu of a traditional assurance bond, which was a

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(vii) *Cyanide Transportation Risks Were Addressed and Mitigated*

274. Finally, Behre Dolbear alleges that the EIS insufficiently considered the risks associated with the potential adverse environmental impacts of using cyanide, in particular producer to the Project.⁵⁴¹ This assertion is, again, incorrect. Recall that Dr. Mudder is the

⁵³⁵ Second Mudder & Hutchison Expert Report at 27; Fuller Witness Statement, paras. 195-98.

⁵³⁶ Behre Dolbear Report, para. 133.

⁵³⁷ Second Mudder & Hutchison Expert Report at 27 (citing PFS, pp. 145-148 (C-9)); Fuller Witness Statement, paras. 199-201.

⁵³⁸ Second Mudder & Hutchison Expert Report at 27 (citing EIA, Sec. 7.4 (Closure and Reclamation Plan), pp. 7-111 to 7-124 (C-8B)).

⁵³⁹ Second Mudder & Hutchison Expert Report at 27.

⁵⁴⁰ Second Mudder & Hutchison Expert Report at 27 (citing International Cyanide Management Code, dated July 2005, p. 4 (C-614)).

⁵⁴¹ Behre Dolbear Report, para. 137.

to cyanide issues:

Considering the time at which the EIA was developed, the Authors consider it to be exceptional that a stand-alone Cyanide Management Plan was proposed in the EIA. Such an inclusion provided further confidence the environmental management of the Project would be conducted in full compliance with best international practices.⁵⁴³

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with respect to cyanide transportation are unfounded and contradicted by the contents of the El Dorado EIA.⁵⁴⁴ Drs. Mudder and Hutchison further note that Behre Dolbear, in reaching this

discussion in the EIA detailing the management of cyanide, including its transportation to the Project, presented in Section 7.3.6 entitled the Cyanide Management Plan, and the extensive discussion of the packaging protocols and transportation routes for cyanide presented in Section 7.3.6.4 of the EIA, including photographs and a risk assessment Apparently, Behre Dolbear did not review this particularly lengthy and

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276. In sum, Behre Dolbear has failed to identify *any* risks that were not fully addressed in the EIS. Drs. Mudder and Hutchison, Mr. Fuller, and Ms. Colindres are unanimous in their conclusions: each of the criticisms leveled by Behre Dolbear is objectively disproven by the record.

⁵⁴² CV of Terry Mudder, First Mudder & Hutchison Expert Report at 5.

⁵⁴³ Second Mudder & Hutchison Expert Report at 17.

⁵⁴⁴ Second Mudder & Hutchison Expert Report at 19 (emphasis added); *id*

⁵⁴⁵ Second Mudder & Hutchison Expert Report at 17 (emphasis added); Fuller Witness Statement, As Behre Dolbear should know from its review of the EIS, a detailed transportation study was performed to select a safe and efficient cyanide transportation route for the El Dorado Project. The EIS clearly describes the 135 kilometer cyanide transportation route from the port of Ajacutla where the cyanide will enter El Salvador to the Project site, including 15 photographs of key intersections along the EIS, pp. 7-39 to 7-45 (Cyanide Transportation, Storage and Management) (emphasis added) (C-8B)).

b. The Only Potential Environmental Harm Respondent Has Alleged
Project

277. Instead specifically, Respondent has instead attempted to substantiate its post-recautionary Dorado Project. The reports of Dr. Pulgar, the Tau Commission, and Drs. Goodland and Bebbington describe a litany of broad and nonscientific issues which certainly cannot excuse Respondent for violating its legal obligations to Pac Rim. Ranging from presumed social unrest,⁵⁴⁶ to *unplanned* urban planning,⁵⁴⁷ ⁵⁴⁸ none of these studies identifies any potential project.

278. Moreover, in the rare instances where these studies and reports address potential environmental harms of any kind, they settle for generalities without even attempting to consider how the they would have seen that the issues they identify were irrelevant to the El Dorado Project, and *positive* eff environment and water situation.⁵⁴⁹

⁵⁴⁶ Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 at 37 (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 21 (R-130); Bebbington Opinion, para 11.

⁵⁴⁷ Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 76 (R-130).

⁵⁴⁸ Bebbington Opinion, paras. 11, 16; Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 at 14 (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 75 (R-130); Goodland Opinion at 10.

⁵⁴⁹ EIA at 1-21(C-8A); EIA at 6-41, 6-45 to 6-48, 6-88 (C-8B); *id.* at 7-19 to 7-22 (C-8B).

279. For example, both the Pulgar and Tau reports discuss open pit mines,⁵⁵⁰ acid mine drainage,⁵⁵¹ leachate heaps,⁵⁵² and ground water issues.⁵⁵³ However, these issues are not relevant to the El Dorado Project, as confirmed at length by Ms. Ericka Colindres.⁵⁵⁴ All the consultants evaluate the use of water in the El Dorado Project. As set out in detail in the EIS,⁵⁵⁵ in the ⁵⁵⁶ in the further responses submitted to MARN in October⁵⁵⁷ and December 2006,⁵⁵⁸ and in the witness

⁵⁵⁰ Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 at 12 (1.1.2) (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 52, 53, 54 (R-130).

⁵⁵¹ Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 at 12 (1.1.2) (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 47, 51, 52 (R-130).

⁵⁵² Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 at 12 (1.1.2) (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 50, 51 (R-130).

⁵⁵³ Manuel Pulgar-Vidal, Consulting Report: Mining Activity, Overview of Development, Environment, and Social Relations in El Salvador, dated 11. Aug. 2006 at 12 (1.1.2) (R-129); TAU, Consultancy Services for Strategic Environment Evaluation of the Metallic Mining Sector of El Salvador: Final Report, dated 8 Sept. 2011 at 50, 51, 54 (R-130); Goodland, p. 8-9.

⁵⁵⁴ Second Colindres Witness Statement, para 8-9 (In regards to acid rock drainage Colindres these assertions. However, the *scientific data* that PRES submitted to the relevant government agencies in El Salvador *proves that these claims are false with regard to the El Dorado Project* *Id* as part of the additional information provided to the GOES at its request, the El Dorado Project site receives almost 2,000 millimeters of rainfall annually, which is on par with areas classified as rainforests. Therefore, the El Dorado Project would not compete for water use with any other local stakeholder, since its water use needs are expected to be satisfied using captured rainwater and recycled process water from *Id.* groundwater

⁵⁵⁵ EIS (C-8).

⁵⁵⁶ Letter from William Gehlen to Hugo Barrera dated September 12 2006, enclosing the *Informe de Respuesta* Report on the Technical Review of the El Dorado Mine Project (C-170)..

⁵⁵⁷ Letter from Scott Wood to Hugo Barrera, dated 25 October 2006, enclosing Response Report to the Observations Presented by the Technicians of the DGGA-MARN in Meeting on July 14 2006, dated October, 2006 (C-171).

281. In short, none of the reports now relied upon by Respondent to justify its *de facto* ban on metallic mining including the reports of Drs. Pulgar, Goodland, Bebbington, Behre Dolbear or the Tau Group concludes that the El Dorado Project should be halted or that it would lead to any irreversible environmental harm. As noted above, the Government itself never came to any such conclusion, either, despite having had *years* comprehensive EIS.⁵⁶¹

4. Historical Mining Activities at the El Dorado Site Did Not Result in Any Serious Irreversible Environmental Harm

282. with the El Dorado Project is predictable, given that similar metallic mining activities have already been carried out at the El Dorado site, without resulting in any lasting environmental harm.⁵⁶² As was described in the Pac Rim EIS previously submitted to Respondent:

The El Dorado mine has been regularly exploited since the colonial Spanish period. There are plenty of old mine facilities and waste deposits in the area. However, no significant environmental impacts such as damage to the surrounding vegetation in connection with the acid drainage of the mine have been identified.⁵⁶³

283. ⁵⁶⁴ again reflects an over-generalization and willful failure to acknowledge more specific contrary evidence about the potential environmental impacts *of the El Dorado Project*.

5. There Was No Risk of Serious Social Conflict Associated with Pac Rim's Development of the Project

⁵⁶¹ was made available to the GOES with regard to the El Dorado Project, and yet it appears that the GOES ignored the

⁵⁶² Second Mudder & Hutchison Expert Report, at 32; Second Colindres Witness Statement, paras. 30, 44-45.

⁵⁶³ EIS at 5-73 (C-8A).

⁵⁶⁴ Bebbington Opinion, para. 6.

284. The record is also clear that the *de facto* ban on metallic minerals mining put in place by the GOES is not justified by the risk of serious social conflict. While Respondent attempts to paint a picture of a popular revolt against mining by broad swathes of Salvadoran citizens, the truth is quite different.

285. While there was and is indeed a small and vocal group of anti-mining activists opposed to Pac Rim and the El Dorado Project, witness testimony and contemporaneous documents provide essential context about the nature of this opposition and its relationship to the local communities.

286. In particular, the anti-mining activists that Respondent seeks to characterize as representing the views of the people that would not live in the communities immediately surrounding the El Dorado Project,⁵⁶⁵ and most come from far afield.⁵⁶⁶

287. These outside activists do *not* represent the views of the people who would be most impacted by the Project, as affirmed by Ms. Garcia, and by Messrs. Vasquez and Hernández.⁵⁶⁷ Those who actually lived in the surrounding communities were the people who knew the Project best in large part.

⁵⁶⁵

most of the participants have to be brought by the organizers in buses from San Salvador and Santa Marta. This was true of any protest that I saw: It was always the same group of people and they were not from the communities near the El Dorado Project. It is ironic that

see also id. paras. 70-
Representative of the Local Communities

-Mining Organizations in El Salvador Are Not

⁵⁶⁶

of mining activity, the first thing to be said is that these groups are made up principally of people who live

⁵⁶⁷

-mining organizations who have tried to make it seem as though they speak for all of El Salvador when they voice

team to engage and educate local citizens.⁵⁶⁸ . Significantly, these communities *supported* Pac
.⁵⁶⁹

288. Furthermore, public polling in 2008 co
supported by a majority of people at the national level, as well.⁵⁷⁰ As the *Wall Street Journal*⁵⁷¹
government, almost 34% of those surveyed said they believe Salvador should allow unlimited
572

289.

conflict.

568

Colindres 1st
mentioned that the people who live in the communities in the vicinity of the project in other words,
are mostly supportive of the

569
above all: First, PRES has informed the communities about the project via a number of various
been ca

that are near it. We live adjacent to the mining operations and co-exist on a daily basis with the
consequences, whether negative or positive. My experience is that most of the people of San Isidro

Witness S
truth is that the majority of the people living in the communities near the proposed mine are supportive of
but see Garcia Witness *local*
inhabitants who are opposed to the activities of Pac Rim, I think in many cases they do so because they

570 MEP Methodology and Results, dated July 2008 (C-747).

571 The Counter-

See Counter-Memorial, paras.

113 and 235 (noting that Ms
attended a dinner with Mr. Shrake, a U.S. lobbyist, and several government officials). Respondent does
not provide any support for this theory, because none exists. The Tribunal should disregard this baseless
and fanciful allegation.

572 *The Politics of Latin American Poverty*, WALL STREET JOURNAL (25
Aug. 2008) (C- 829).

6. The *De Facto* Ban Is Clearly Based on Political Expedience, as Repeatedly Acknowledged by Respondent's Own Officials

290. When President Sacá publicly announced in March 2008 that he would not sanction the Project until the completion of a strategic study, the company was understandably surprised.⁵⁷³ Given that President Sacá did not accomplish this mining ban through legitimate regulatory means, but simply declared his personal opposition to issuing mining permits,⁵⁷⁴ ase has been to legitimize this clearly illegitimate act. However,

veiled effort of providing political cover for the Government. The clear bias of the individuals

pretext. Two of *Respondent's own officials* have admitted as much.

- a. Contemporaneous events demonstrate that the issuance of environmental permits for mining hinges on the whims of the President

291. The record demonstrates that President Sacá took a personal interest in the El Dorado Project from the outset. Initially, this interest was interpreted as a positive sign of the
⁵⁷⁵ Only later, as it became
clear th ⁵⁷⁶ did it
become apparent that Pac Rim faced only one challenge
proceed. Until this blessing was received, the officials at MARN and MINEC were held in limbo unable to perform their ministerial functions:

⁵⁷³ Third Shrake Witness Statement, paras. 53-54.

⁵⁷⁴ *Presidente de El Salvador pide cautela ante proyectos de explotación minera*, INVERTIA, 11 Mar. 2008 (C-1).

⁵⁷⁵ Government Communications Summary, dated 12 May 2005 meeting with the Vice President and has been introduced to the President of the Republic. Both -396).

⁵⁷⁶ y, ordered me to withdraw the second warning letter because she told me she had spoken to the President of the

- **February 2006**
instructions to present the project [mining law reform] after March 12th for reasons of election strategy, to not stir up opposition to the reform project.⁵⁷⁷
- **July 2006**
politica⁵⁷⁸ It is clear that the issue is not technical but
- **December 2006:** Reporting a meeting with the Minister of Economy and noting She is still waiting for instructions from her superiors⁵⁷⁹
- **April 2007:** MARN and MINEC announced that they were going to undertake an Understanding that this was⁵⁸⁰
Neither MARN nor Yolanda de Gavidia will take any decision regarding permits, until they received instructions from the president⁵⁸¹
- **May 2007**
and his chief political advisor to meet with us to discuss a pro-mining⁵⁸²
- **May 2007:** Regardin anti-mining but worried about the social conflict that could arise.⁵⁸³
- **July 2007** As discussed, the mining law will be introduced when the President is on board⁵⁸⁴
- **July 2007** e understand that the PCN party has been negotiating with President Sacca over a variety of political issues and has gotten

⁵⁷⁷ Email from Fred Earnest to Tom Shrake, dated 15 February 2006 (brackets in original) (emphasis added) (C-295).

⁵⁷⁸ Tom Shrake Self-Appraisal, dated 7 July 2006 (emphasis added) (C-709).

⁵⁷⁹ E-mail from Rodrigo Chavez to Tom Shrake, dated 18 Dec. 2006 (emphasis added) (C-727).

⁵⁸⁰ E-mail from Rodrigo Chavez to Tom Shrake, dated 30 Apr. (C-802).

⁵⁸¹ E-mail from Rodrigo Chavez to Tom Shrake, dated 30 Apr. 2007 (emphasis added) (C-802).

⁵⁸² Email from Barbara Henderson to Tom Shrake and Catherine McLeod-Seltzer, dated 3 May 2007 (C-305).

⁵⁸³ E-mail from Rodrigo Chavez to Pete Neilans and Tom Shrake, dated 5 May 2007 (C-739).

⁵⁸⁴ E-mail from Pete Neilans to Tom Shrake, dated 18 July 2007 (emphasis added) (C-740).

the okay from the administration to proceed with the introduction of the mining law reform in July⁵⁸⁵

- **July 2007** high level meetings with key advisors to the President. They are almost ready to go and have laid out their interests, which is foreign direct investment, on the part of Pacific Rim, and a significant investment in social projects⁵⁸⁶
- **August 2007** that the president has agreed to move forward on mining and our permit. We have received the same news from President Sacca, who has appointed his cousin,⁵⁸⁷

b. The Group Picked to Oversee the Strategic Assessment Was
-Mining Bias

292. Respondent claims that the multi-year *de facto* ban (*i.e.*, indefinite moratorium) on mining is justified for the Government of El Salvador by a consulting firm known as the TAU Group in 2011, while this arbitration was pending.⁵⁸⁸ In the absence of any enacted legislation to justify the multi-year *de facto* ban on metallic mining, Respondent relies upon the TAU Report of 2011 and the associated

⁵⁸⁵ Memorandum from Tom Shrake to Board of Directors, dated 5 July 2007 (emphasis added) (C-564).

⁵⁸⁶ Email from Rodrigo Chavez to Tom Shrake, dated 22 July 2007 (C-718).

⁵⁸⁷ Email from Tom Shrake, dated 14 August 2007 (C-307) (emphasis added).

⁵⁸⁸ Counter-Memorial, paras 246-256; Guidelines for the Strategic Environmental Assessment (*EvaluaciOn Ambiental Estrategica* ("EAE")) for the Mining Sector, from MARN, dated 18 Dec. 2007 (C-830); Letter dated 3 Mar. 2008 from the Minister of Economy to the Minister of Foreign Affairs requesting international cooperation funds for the EAE (C-831); Letter dated 4 Apr. 2008 from the Ministry of Foreign Affairs to the Minister of Economy regarding funding for the EAE (C-832); Cooperative financing agreement for the EAE dated 24 Apr. 2008 (C-833); Key points for the EAE Terms of Reference, prepared by the Ministry of Economy, dated 21 Aug. 2008 (C-834); Terms of Reference for the EAE from MARN dated 13 Nov. 2008 (C-835); Letter dated 21 Nov. 2008 from the Minister of Environment requesting an extension to use the funds for the EAE project (C-836); Letter dated 23 Dec. 2008 from the Ministry of Foreign Affairs approving requested extension (C-837); Undated document describing steps of the EAE process taken during 2008 (C-838); Memorandum dated 5 Jan. 2009 from the Bureau of Mines to the Minister of Economy requesting authorization to hire an expert to help with the EAE (C-839); Comments from the Legal Adviser to the President to the Minister of the Environment, dated 24 Jul. 2007 (C-840); Unsigned memorandum with comments from the Technical Advisor to the President to the Legal Adviser to the President, dated 15 Aug. 2007 (C-841).

Observations

three members of the so-
as experts for Respondent in this arbitration), who admittedly worked to influence the TAU
Report and have advised the Government of El Salvador on these matters since their appointment
in 2010.

293. In 2011 confidence
blue ribbon commission he hand-picked
i.e., that mining could not be justified in El Salvador.⁵⁸⁹

294. The late Robert Goodland, one of the experts for Respondent in this arbitration,
was one member of the Blue Ribbon Commission, together with a current expert for the
Respondent, Dr. Anthony Bebbington, along with Dr. Ann Maest, the only member of the
Commission with a background as a geochemist.⁵⁹⁰

295.
review of environmental issues associated with mining, each member of the commission has a
demonstrated anti-mining bias.⁵⁹¹ t reveals that the Blue Ribbon
ground truth
eventual approval
arbitration was pending:

This committee met several times in El Salvador throughout 2010

⁵⁸⁹ Emily Achtenberg, *A Mining Ban in El Salvador?*, NACLA Report on the Americas (Sep./Oct. 2011), at 4 (C-746).

⁵⁹⁰ Bebbington Report at 1.

⁵⁹¹ Yet, Dr. Ann Maest has a long history of opposing mineral development in the United States and elsewhere. *Chevron Corp. v. Donziger, et al.*, ___ F. Supp.2d ___ (S.D.N.Y. 2014) (As revealed in the March 4, 2014 decision by United States federal judge Lewi

Chevron, the judicial system of Ecuador, and the public) (CLA-); *see also* Paper co-authored by Dr. Bebbington and Denise Humphreys Bebbington entitled, *Extraction, Territory, and Inequalities: Gas in the Bolivian Chaco*, CANADIAN JOURNAL OF DEVELOPMENT STUDIES (2010) (C-842) (expressing anti-mining biases).

sites, and listen to government officials, mining corporations, potentially impacted people, academics and civil society. The most important drafts before they were submitted to the Government as a form of screening for quality control. This resulted in the eventual

296. *Observations* reflect a keen awareness that their work was influenced by political statements from the Presidents of El Salvador in 2008 and 2011

Political Statements Against Mining

It is important to heed and consider high-level political statements on metal mining in El Salvador. On July 10th 2011 President some jobs and income for the government through taxes, the cost of the environmental impact and the damage to public health is -

The implication is that, if the goal is to govern mining in ways that are consistent with democratic expression, then it is hard to justify proceeding with metal mining at this time.⁵⁹²

297. Given -
-ordained.

c. The Government Failed to Provide TAU With Any Legitimate Policy Options to Consider

298. According to the Tau Report itself, that document *does not fit the definition* of a

At this time, an alternative for a new metallic mining policy has not yet been formally proposed, so the EAE is not intending the assessment of possible options at this stage, but rather the preparation of recommendations that help building such options. In terms of scope of the EAE, this implies a notable difference with

⁵⁹² Bebbington Report at 8 (emphasis added).

regard to usual procedures in which the EAE is applied to policy proposals already made or in the making process.⁵⁹³

299. In a related footnote, the Tau Report clarifies that the reason it was not because MARN had not formulated a policy proposal

FN3 It should be noted that this circumstance regarding the time in which the evaluation is being made, prior to the presentation of a policy proposal, may have implications on the application of current legislation concerning the strategic environmental evaluation: A proposal has not yet been formally evaluated, so it should be considered that, at this evaluation stage, the provisions of the ENVIRONMENTAL LAW do not apply see considerations regarding the possible implications of this circumstance on the policy formulation and evaluation process at p. 79.⁵⁹⁴

300. It is self-evident that if MARN had indeed been serious about conducting a in order to benefit from the conclusions and assessment of the Tau group.

d. _____

Environmental Concerns

301. Finally

⁵⁹³ TAU Report (Spanish Original at 2 En este momento no está planteada todavía, formalmente, ninguna alternativa de nueva política minero metálica, con lo que la EAE no tiene como objetivo, en esta fase, la valoración de opciones posibles, sino la elaboración de recomendaciones que ayuden a la construcción de dichas opciones. En términos de alcance de la EAE, esto implica una notable diferencia respecto a procedimientos habituales en los que la EAE se aplica a propuestas de política ya elaboradas o en proceso de elaboración) (R-130).

⁵⁹⁴ TAU Report (Spanish Original at 79 Debe hacerse notar que esta circunstancia del momento en el que se realiza la evaluación, previo al de formulación de una propuesta de política, puede asimismo tener implicaciones en la aplicación de la legislación vigente en materia de evaluación ambiental estratégica: Formalmente no se está evaluando todavía una propuesta de política, por lo que debe considerarse que en esta fase de evaluación no aplica lo previsto en la LEY DEL MEDIO AMBIENTE ver una reflexión sobre las posibles implicaciones de esta circunstancia en el proceso de formulación y evaluación de la política .) (R-130).

announcement of the *de facto* we
need the assessment for political cover. ⁵⁹⁵

302. In 2011
a major goal [of the Strategic Study] is to insulate the Funes government from legal challenges by Pacific Rim and other mining transnationals ⁵⁹⁶

303. A few years later, in August 2012, Rosa Chávez, was interviewed by El Faro, an
Rosa Chávez explain why anyone should believe that advocating suspension of company applications is a better option than directly introducing a law to ban metal mining, if it is so
⁵⁹⁷ **if the Government had chosen the latter option, any company with open explorations in the country could sue the State for taking away their economic rights without demonstrating that mining is not viable.** ⁵⁹⁸

* * *

304. In view of all the foregoing, it is clear that the delay Claimant faced with respect
g alleged technical deficiencies in the El Dorado EIS and PFS, or assertions that El Salvador is unable to regulate and monitor a mining industry are simply *post hoc* justifications that are disproven by the

F. The *De Facto* Ban Breaches Respondent's Obligations to Pac Rim

305. As set out above, it is clear that the *de facto* ban is a wrongful measure: it is wrongful within the legal order of El Salvador and it is also wrongful for purposes of

⁵⁹⁵ Memorandum from Tom Shrake to Files, dated 14 July 2008 (emphasis added) (C-758).

⁵⁹⁶ *nacla Report on the Americas* pp. 3-4 (September/October 2011); C-746.
alternative scenarios, ranging from selectively promoting certain types of mining to a partial or complete ban. We are the government now, he explains. We have to play by the formal rules

⁵⁹⁷ Gabriel Aragon Labrador, *There are no conditions for the development of metal mining with environmental safeguards*, EL FARO, 20 Aug. 2012 (C-208).

⁵⁹⁸ *Id.* (emphasis added).

international law. Respondent does not put forward a serious defense of the legitimacy of the ban, but instead attempts to ignore or exclude the application of the legal standards against which the ban should be judged.⁵⁹⁹ Respondent's efforts in this regard are diverse, to say the least, although most seem focused on: (1) various attempts to resuscitate the Calvo Clause;⁶⁰⁰ and (2) attempts to mischaracterize or ignore the claims that Pac Rim is raising before the Tribunal.⁶⁰¹ Claimant will be brief in responding to these issues.

1. Pac Rim's claims are not limited to claims for "expropriation"

306. Respondent's claims for arbitration [] are all grounded in El Salvadoran law.⁶⁰² The basis for this allegation is not clear. In fact, Pac Rim has raised claims based on El Salvadoran law and international law, including for breaches of the Investment Law: Arts. 4,⁶⁰³ 5,⁶⁰⁴ 6,⁶⁰⁵ 8,⁶⁰⁶ and 13;⁶⁰⁷ Respondent's claims for arbitration are grounded in El Salvadoran law.⁶⁰⁸

2. This Tribunal Is an Instrument of International Jurisdiction

307. Respondent's claim for arbitration by reference to El Salvadoran law (which it most of the time applies incorrectly, in any event).⁶⁰⁹ This Tribunal is not an instrument of El Salvadoran law, but rather of international law. An agreement to submit to ICSID arbitration is an *international* agreement, and Respondent cannot invoke provisions of its internal law to avoid or limit that agreement. Furthermore, the Tribunal must determine the law applicable to this dispute based on Article 42 of the ICSID Convention,

⁵⁹⁹ Counter-Memorial, paras. 257-333.

⁶⁰⁰ See, e.g., Counter-Memorial, paras. 267-271, 283-88.

⁶⁰¹ See, e.g., Counter-Memorial, paras. 257; 292-302; 303.

⁶⁰² Counter-Memorial, para. 257.

⁶⁰³ Memorial, para. 446.

⁶⁰⁴ Memorial, para. 425.

⁶⁰⁵ Memorial, para. 425.

⁶⁰⁶ Memorial, para. 439.

⁶⁰⁷ Memorial, para. 435.

⁶⁰⁸ Memorial, para. 404.

⁶⁰⁹ See, e.g., Counter-Memorial, paras. 263-291.

and not upon the provisions of the Salvadoran Civil Code or Investment Law, or based upon what a court in El Salvador could or could not do.⁶¹⁰

3. Articles 5 and 6 of the Investment Law proscribe the application of arbitrary measures to the making, use or enjoyment of Pac Rim's investment

308. Respondent suggests (without offering any explanation whatsoever) that Articles 5 and 6 of the Investment Law only apply in the event that Respondent has treated Pac Rim less favorably than a domestic investor in like circumstances.⁶¹¹

property rights under Article 13 of the Investment Law,⁶¹⁵ and under general principles of international law.

5. The purpose of Article 7 of the Investment Law is to avoid the presumption that investors do not have to comply with the conditions set by the Amended Mining Law

311. Respondent alleges that Article 7(b)

exclusive jurisdiction of the courts of El Salvador.⁶¹⁶ This is not a legitimate interpretation of the provision. Article 15 of the Investment Law does not establish any limitation on the subject matter of the disputes that can be submitted for arbitration under that provision, so long as they

⁶¹⁷ As Professor Fernandois has previously explained, the purpose of Article 7 of the Investment Law is merely to ensure that an exceptional regime is not created whereby the investor does not need to comply with the relevant mining law and regulations:

Thus, by expressly stating that mining operations are governed by a regime granting concessions, pursuant to the provisions of the Constitution and the secondary laws, the Investment Law includes those special regulations in the foreign investment regime. Thus, the foreign investment regime will provide full certainty that in order to obtain access to the mining market and obtain the respective concession, an investor will have to comply with the sectoral regulations in effect.⁶¹⁸

312. On the other hand, this provision does not impose any limitation upon the administer its mining rights, but rather to determine whether it has been subject to arbitrary or unfair treatment in its capacity as a foreign investor, or suffered damage to its investments.

6. Claimant had a protected investment in El Salvador

⁶¹⁵ See also First Expert Report of Arturo Fernandois, p. 80.

⁶¹⁶ Counter-Memorial, para. 301.

⁶¹⁷ Investment Law, art. 15.

⁶¹⁸ First Expert Report of Arturo Fernandois, p. 55.

313.

Salvador.⁶¹⁹ This is frivolous claim. As described at the outset of this Reply, Pac Rim held Licenses and through its ownership of PRES and DOREX. Moreover, as also described above, he existence or protection

7. Claimant’s enjoyment of its property has been effectively “neutralized”

314.

any question that it has been triggered in this case. Claimant will never be able to make further use of its mining rights, which was the sole intended purpose of its longstanding investment in El Salvador.⁶²⁰

8. Claimant had substantial, investment-backed expectations

315. Respondent alleges that Claimant could have had no expectation that the State 621

There are dozens if no hundreds of documents in the record of this arbitration evidencing specific assurances made to Pac Rim by members of the Government at all levels. Respondent has largely ignored this evidence in its submissions. However, that does not mean that the evidence is not there. Pac Rim had substantial, legitimate, investment-backed expectations associated with the El Dorado Project, as set out at length in the Memorial and in this Reply.

9. The de facto ban does not represent a “bona fide regulatory” measure or the exercise of a “legitimate non-discriminatory police power”

⁶¹⁹ See, e.g., Counter-Memorial, paras. 305-310.

⁶²⁰ See, e.g., *Tecmed v. Mexico*, paras. 88-89, 96.

⁶²¹ Counter-Memorial, paras. 322-326.

316. Respondent alleges that the *de facto* ban could not be expropriatory because it is
a bona fide ⁶²² -discriminatory police

⁶²³ However, the *de facto* ban is patently illegal, which precludes it from being considered as a bona fide measure, whether under El Salvadoran or international law.

III. RESPONDENT'S DEFENSES VIOLATE THE PRINCIPLE OF GOOD FAITH AND ARE OF LIMITED RELEVANCE TO THIS DISPUTE

317. As demonstrated at length above, Claimant has proven its affirmative case. Pac Rim made an investment in El Salvador through its acquisition of property rights in the Exploration Licenses and in the shares of PRES and DOREX. It committed tens of millions of dollars to the responsible advancement of that investment, all with the legitimate expectation of
br
come to fruition, Respondent implemented an illegal and unjustified ban on metallic mining. There can be no question that the ban is wrongful under both Salvadoran and international law, and there can be no question that the ban prevents metallic mining activities from going forward in the country of El Salvador. Finally, it is undeniable that Pac Rim has been substantially deprived of the use and enjoyment of its investment.

318. Respondent does not seriously call into question any of these conclusions. Rather, theoretically have been raised by MINEC in the context of the El Salvadoran permitting process, but which never were. In addition, Respondent asks the Tribunal to hold Pac Rim accountable for what Respondent now characterizes as its own illegal conduct. Finally, Respondent advances
ction. As set out below, these defenses are misguided and of limited relevance to the dispute before the Tribunal.

A. Respondent Is Estopped from Arguing that Pac Rim Had No Legal Right to the Concession

⁶²² Counter-Memorial, paras. 327-333.

⁶²³ Counter-Memorial, para. 316.

319.

⁶²⁴ However, Respondent itself never denied Pac the issue of whether or not it *could have been* denied, as a matter of El Salvadoran law, has never been resolved (and, as explained above, does not need to be resolved by this Tribunal).

320. Respondent consistently confirmed that Claimant *was* entitled to the concession. In reliance on this conduct, Pac Rim expended millions of dollars delineating substantial additional mineral resources on the El Dorado property, and investing in social and environmental programs, all accruing to the direct legal rights in the El Dorado Project is contrary to the general principle of good faith and must be rejected by the Tribunal.⁶²⁵

1. Respondent Consistently Ratified Pac Rim's Rights to the El Dorado Concession Area

321. Respondent alleges in its Counter-

land
⁶²⁶ However, Concession Application since December 2004, the Department of Mines never rejected that application on the basis of a failure to comply with either of these requirements (or any other requirement, for that matter). Furthermore, while
⁶²⁷ the record

⁶²⁴ Counter-Memorial, para. 37.

⁶²⁵ *See, e.g., Duke Energy Int'l Investments No. 1, Ltd. v. Republic of Peru*, ICSID Casr No. estoppel, the State assumes the risk for the acts of its organs or officials which, *by their nature*, may reasonably *induce reliance* in third parties. As such, what is relevant for estoppel is that there has been a declaration, representation, or conduct which has in fact induced reasonable reliance by a third party, which means that the State, even if -16).

⁶²⁶ Counter-Memorial, para. 65.

⁶²⁷ *Id.*, para. 78.

demonstrates that the Department of Mines in fact reviewed the application and communicated

Esperanza deposits were being included in the reduced concession area because of their potential

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325. As Mr. Gehlen recounts, the South Minita and Nance Dulce deposits were two most promising targets for inclusion in the mine plan at that time.⁶³² However, the company did not include the Nance Dulce deposit in the reduced concession area decision that the concession area needed to fit within the boundaries of the EIS area.⁶³³ At the delineate mineral resources at Nance Dulce, and therefore agreed that Pac Rim should obtain a new exploration license that would cover this deposit in the meantime.⁶³⁴

⁶³¹ Application for Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession, dated 22 Dec. 2004 at 3 (C-5).

⁶³² Gehlen Witness Statement, paras. 101, 103; 2004 Annual Report of Exploration Work Done by Pacific Rim continue with the exploration of the abovementioned sites (Minita Sur and Nance Dulce) with geophysics out by MDA in 2003 which are still current as of this year and which in the future will surely change with the addition of the latest results of exploration in South Minita and Nance Dulce the license it can be assumed that recent discoveries in the areas of Minita Sur and Nance Dulce can be added to the aforementioned calculated reserves -101).

⁶³³ Gehlen Witness Statement, paras. 114, 119. Recall that Ms. Navas had previously instructed Pac even where outside the EIS area. Email from Fred Earnest to Gina Navas de Hernandez, dated 25 Nov. 2004 (C-393); *see also* Email from Fred Earnest to Tom Shrake, dated 8 Nov. 2004 (C-392).

⁶³⁴ *See, e.g.*, Email from Fred Earnest to Tom Shrake, dated 8 Nov. 2004 (C-392); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 Nov. 2004 part of the area of the permits. After the date we started collecting and preparing the data [for] the EIA, we have focused on a portion of the exploration activities in the area of Nance Dulce (El Dorado Sur), where we have found very good results. At your office, we spoke about two options for the conversion:

- 1) request all parts of the permits that we consider prudent, classifying them as area of imminent development and area of conservation (or future growth); and
- 2) request the area incorporated in the EIA and request new exploration permits for the areas outside the EIA area.

Your recommendation was the first of those two, but you said you would confirm. Before we begin the -393).

326.

concession size is evidenced in numerous contemporaneous documents, including the memoranda and correspondence of Mr. Fred Earnest;⁶³⁵ with MARN during the same time period;⁶³⁶ and in the concession application itself.⁶³⁷ It is also unequivocally confirmed by the fact that in September 2005, the Department of Mines issued the three new exploration licenses Pueblos, Guaco, and Huacuco based on the coordinates of the new concession boundaries drawn up by Mr. Gehlen in the Summer of 2005.⁶³⁸ Thereafter, no one in the Government ever suggested that the size -for concession should be further reduced; to the contrary, and as discussed below, Government officials repeatedly

b. The Requirement of Article 37.2(b)

⁶³⁵ El Dorado Project Report for the Month Ending 28 Feb. 2005 (C-397); El Dorado Project Report for the month ending 30 Apr. 2005 (C-290); El Dorado Project Report for the month ending 31 Aug. 2005 ation licenses in the name of DorEx, new documents were presented for the conversion of the El Dorado North and South exploration licenses to the El Dorado Exploitation Concession. The area of the concession is now 12.75km and is contiguous to the limits of the three new exploration licenses. At the time that the new documents were presented, the Direccion de Minas requested: a copy of the January 2005 Pre-Feasibility Study, a copy of the final version of the EIS, a new development and production schedule th - Feasibility Study, and certified copies of the documents that demonstrate ownership of the surface property in the area of the old El Dorado mine. Everything except the final version of the EIS will be delivered to the Dir. -288).

⁶³⁶ Letter from Fred Earnest to Francisco Perdomo Lino, dated 28 Sept. 2005 (C-675); Modification to Concession Area, dated 28 Sep. 2005 (C-676).

⁶³⁷ As Mr. Gehlen points out, the concession application that was produced by Respondent in this arbitration includes maps dated *August 2005*, notwithstanding that the original date of the application was *December 2004*. See Gehlen Witness Statement, para. 113; Map 1, Location of Concession (R-24); Map 2, Location of Concession (R-25). In addition, the geological justification included in the application produced by Respondent was clearly written in 2005 in relation to the reduced concession area, and *not* in 2004 in relation to the originally-requested area. Gehlen Witness Statement, para. 114. The fact that these documents form part of the El Dorado concession application as maintained in the official files of the Department of Mines unequivocally demonstrates their acceptance by Respondent.

⁶³⁸ 26 Aug. 2005 (C- (C-414); -413); Notice from MINEC, Guaco, dated 12 Sept. 2005 (C-672); Notice from MINEC, Pueblos, dated 12 Sept. 2005 (C-673); Notice from MINEC, Huacuco, dated 12 Sept. 2005 (C-674); MINEC Resolution No. 205, dated 28 Sept. 2005 (C-43); MINEC Resolution No. 208, dated 29 Sept. 2005 (C-44); MINEC Resolution No. 211, dated 29 Sept. 2005 (C-45).

327. During the same period in which Pac Rim was working to resolve the issue of the what surface rights it was expected to obtain in connection with its mining activities. As some individuals at the Department of Mines had expressed the view in March 2005 that the Amended Mining Law required Pac Rim to present documents demonstrating ownership or authorization of the entire requested concession area. Pac Rim disagreed with this view. As Mr. Earnest indicated at the time:

I have spent part of the day studying the El Salvadoran mining law and have discovered the following (presented in the form of a legal argument):

1. Art. 2 of the law says all sub-surface mineral deposits within the boundaries of the Republic are the property of the state and its dominion over the same is inalienable
2. Art. 10 of the law says the mineral deposits to which the law refers are immovable assets (or property) distinct from the property which constitutes surface land; the same is not true of quarries which form an integral part of the surface
3. Art. 23 defines the right to request a mining exploitation concession and makes no reference to property ownership or legal authorization of the land owners.
4. Art. 30 defines the right to request a quarrying exploitation concession and it explicitly says the property in which the quarry is found must be the property of the person requesting the concession or he must have legal authorization of the land owner.
5. Art. 37 defines the requirements for requesting an exploitation concession, HOWEVER; it lumps mines and quarries together!!!! THE LAW IS VERY CLEAR THAT MINES AND QUARRIES ARE TWO SEPARATE TYPES OF OPERATIONS, YET IT MISTAKENLY LUMPS THE TWO TOGETHER AND DISTRIBUTES THE PREVIOUSLY DEFINED REQUIREMENTS FOR ONE (IE. QUARRIES) TO INCLUDE THE OTHER THIS IS NOT RIGHT!!! I THINK THERE IS A SOLID ARGUMENT [sic] TO PRESS THE DIRECCION DE MINAS FOR A FAVORABLE INTERPRETATION OF THE LAW.

I will try and get an appointment with Gina and their lawyer tomorrow if not next Thursday.

328. However, despite the fact that Pac Rim disagreed that mines and quarries could be it believed that this issue would be resolved, as clearly evidenced in contemporaneous documents.⁶³⁹ And, indeed, the Department of Mines worked collaboratively with Pac Rim to

⁶³⁹ EIS and Exploitation Concesión Status Memorandum, dated 10 May 2005 PacRim ES expects that this issue can be resolved, but is committed to seeking a change in the wording of the law if required (Continued...)

resolve it (again, as evidenced by numerous contemporaneous documents),⁶⁴⁰ just as the Department had worked with Kinross and Dayton to resolve such issues in the past.⁶⁴¹

329.

[surface

⁶⁴² Mr.

⁶⁴³ Certainly, there is no evidence that the Department of Mines ever expressed such a view to Pac Rim. In fact, the evidence is all to the contrary. In August 2005, at the same time that Pac Rim presented the documents related to the amended concession size, the Department of Mines requested that the company present a copy of the January 2005 Pre-F

demonstrate ownership of the surface property in the area of the old El Dorado mine ⁶⁴⁴ No reference was made at this time to the documents demonstrating ownership or authorization for the entire area of the concession.

330. At the same time, Mr. Earnest affirmed that:

concession is dependent on the approval of the EIS. In the matter of the interpretation of the law regarding the need to obtain the authorization of the surface owners, **the “Ministra de Economía” has acknowledged that something needs to be done** ⁶⁴⁵

Concession pending environmental permit & change of mining law (Plan A) **or** ⁶⁴⁵ -712); Project f Exploration License to Exploitation -711).

⁶⁴⁰ See Memorial, paras. 213-30 (and accompanying citations). Although the parties corresponded about the issue over several months, no official agency action or authentic interpretation was ever issued with regard to the requirement set out in Article 37.2(b).

⁶⁴¹ See section II above.

⁶⁴² Gehlen Witness Statement, para. 182.

⁶⁴³ Third Shrake Witness Statement, para. 33.

⁶⁴⁴ El Dorado Project Report for the month ending 31 Aug. 2005 at. 2 (emphasis added) (C-288).

⁶⁴⁵ *Id.*

331. Thereafter, MINEC proceeded to prepare a draft bill to reform the Amended Mining Law and clarify the requirement of Article 37.2(b), and this bill was shared with and commented upon by Pac Rim.⁶⁴⁶ Unfortunately, the bill was not presented in 2005 because President Sacca perso

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332. Nevertheless, the fact remains that as of October 2005, Pac Rim had clearly reached an agreement with MINEC that the requirement of Article 37.2(b) would not be used as concession.⁶⁴⁸ The Department of Mines never subsequently took any action that could have called that agreement into question. In fact, as described further below, the Department confirmed in December 2006 that Pac Rim had met the requirement.

c. The Technical-Economic Feasibility Study Requirement

333. Particularly in view of the interactions between Pac Rim and the Department of Mines described above, it is disingenuous for Respondent to now allege in the arbitration that the move forward with its Concession Application.⁶⁴⁹ In fact, the Department of Mines was
Concession Application: it informed Pac Rim of these issues, and Pac Rim and the Department worked together to resolve

⁶⁴⁶ Proposed New Mining Law of El Salvador, Oct. 2005.(C-14); Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, Bill Gehlen, dated 25 Oct.2005 (C-400); Email from Fred Earnest to Lorena Aceto, dated 3 Nov. 2005 (C-294).

⁶⁴⁷ See, e.g., Email from Fred Earnest to Tom Shrake, dated 15 Feb. 2006 (C-295); Shrake Third, para. 33; Shrake Second Witness Statement, para. 114; Memorial, para. 308.

⁶⁴⁸ This agreement was consistent with the opinion of the legal counsel of the Office of the Vice-President, Mr. Ricardo Suarez. Mr. Suarez opined that Article 37.2(b) required surface landowners to authorize subsurface mining; however, he also indicated that the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil

[Ar
Sept. 2005 (C-289).

Email from Ricardo Suarez to Luis Medina, dated 23

⁶⁴⁹ Counter-Memorial, para. 105.

them.⁶⁵⁰ *post-hoc*
as misguided⁶⁵¹ as it is inaccurate.

334.

otably, there is not a single
document anywhere in the record of this arbitration indicating that the Department of Mines ever
had been pending for over three years at the time that President Saca publicly announced that he

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related to the application, as discussed above. As Mr. Gehle
the quantity of the feasibility study work that we presented in relation to the El Dorado project
was ever
Moreover, the factual record demonstrates that if any such issue had ever been communicated to

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⁶⁵⁰ *In this regard, see also, e.g.,* via
told me about the error that was found in the coordinates and the area of the Huacuco license. I have
reviewed it with our people in Sensuntepeque and we agree
such, I am attaching the relevant pages with -826).

⁶⁵¹ Notably, the Administration does have a legal duty to act transparently and non-arbitrarily, and to
ensure respect for the rights of private parties in administrative proceedings. The notion (constantly
perpetuated by Respondent throughout its submissions) that the Administration should be expected to
antithetical to the general principles of law applicable to administrative procedures in El Salvador,
including the principles of good faith, due process, efficiency, and semi-formalism. It is also contrary to
the Investment Law of El Salvador and particularly to Articles 4 and 5 thereof. *See* Investment Law
(CLA-4); *see also* Memorial, paras. 416-26, 441-46 (and accompanying citations).

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-Feasibility Study under review are evident on its face Counter-

why Respondent did not identify them at some point within the *three years* that the application was
pending.

⁶⁵³ Gehlen Witness Statement, para. 82 (emphasis added); *see also*
with the Department of Mines frequently over the four years preceding the issuance of the Notice and, to
the best of my knowledge, at no point in any of these interactions had it ever been suggested that either
our feasibility study or our exploitation program was deficient for purposes of granting Pac Rim the
concession. I am certain that the Department would have brought this to our attention had this been the
case, whether formally or inf

Pac Rim, the company would have worked with the Department of Mines to resolve it. Respondent cannot in good faith request this Tribunal to now deny Claimant the protection of its legal rights in the company.⁶⁵⁴

d. Respondent Acknowledged that Pac Rim Had Met All the Requirements for the Concession Except for the Environmental Permit

336. ⁶⁵⁵ the Department of Mines notified Pac Rim

duly recorded official transcripts of the property sales agreements or legally executed authorizations from the landowner

field, which must contain the methodology for calculating mineable mineral reserves and also include

337. **Notice**

was physically handed over to Mr. Juan Carlos Varela, a Pac Rim Senior Geologist, by the ⁶⁵⁷ Mr. Varela report [he told

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338. -mail confirms the memoranda of Mr. Earnest, as well as the

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Rim and the Department of Mines on numerous occasions and it was never suggested that the study was deficient or inappropriate. *See* Memorial, paras. 191, 193; Email from Fred Earnest to Tom Shrake, dated 8 Nov. 2004 (C-392); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 Nov. 2004 (C-393); El Dorado Project Report for the month ending 31 Aug. 2005 (C-288).

⁶⁵⁵ Memorial, paras. 315-21.

⁶⁵⁶ Letter from the Bureau of Mines to Pacific Rim El Salvador, dated 2 Oct. 2006 (R-4).

⁶⁵⁷ Gehlen Witness Statement, para. 170.

⁶⁵⁸ E-mail from William Gehlen to Tom Shrake *et. al*, dated 10 October 2006 (C-693) (emphasis added); *see also* Gehlen Witness Statement, para. 170.

company] was the issue of the still-

⁶⁵⁹ At the time that the company received this Notice, it had just submitted its responses to MARN in relation to the public comments on the EIS,⁶⁶⁰ and Ms. Colindres and Mr. Wood were in the process of finalizing responses to some additional questions about the project that had been raised by Mr. Hugo Barrera, the Minister of MARN, in July 2006.⁶⁶¹ As Ms. Colindres has attested, the company believed that it was answering these questions to provide personal reassurance (beyond that already provided in the comprehensive EIS) to Minister Barrera about the environmental viability of the project, and that once they had demonstrated this, he would agree to issue the permit.⁶⁶²

339. However, the company did not believe that it would be possible to get the environmental permit prior to the expiration of the 30-day period stipulated for it to provide its responses to the Department of Mines.⁶⁶³ Therefore, Messrs. Gehlen and Neilans sought advice from their legal counsel in El Salvador as to how the company should respond in regard to this Notice.⁶⁶⁴ Their counsel advised them that the company could not lose its legal rights over the

⁶⁵⁹ Gehlen Witness Statement, para. 171; Second Shrake Witness Statement, para. 102 *et seq.*; El Dorado Project Report for the month ending 31 Aug. 2005 exploration licenses to a -288).

⁶⁶⁰ Letter from William Gehlen to Hugo Barrera dated 12 Sept. 2006, enclosing the *Informe de Respuesta* Report on the Technical Review of the El Dorado Mine Project (C-170) (resubmitted with full annexes).

⁶⁶¹ See First Colindres Witness Statement, paras. 133-41; Letter from Scott Wood to Hugo Barrera, dated 25 Oct. 2006, enclosing Response Report to the Observations Presented by the Technicians of the DGGA-MARN in Meeting on 14 July 2006, dated 25 Oct. 2006 (C-171) (resubmitted with full annexes). [sg]

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law, and these activities are permitted under the law as long as they are shown to be environmentally

⁶⁶³ Gehlen Witness Statement, para. 172.

⁶⁶⁴ *Id.*, para. 173. As Mr. Gehlen notes, the Notice was handed over to the company during a period in which the *Asamblea Legislativa* was holding a debate over mining, and the head of MINEC, Minister de Gavidia, was being called to testify. Gehlen Witness Statement, para. 175; see also Agenda for the Visit of the Commission on Health and the Environment of the Legislative Assembly, dated 18 Sept. 2006 (C-509); Leonel Herrera, *Congressmen will ask for the opinion of the Executive about metallic mining*, DIARIO COLATINO, dated 19 Oct. 2006 (C-694); Press Release, Pacific Rim Mining Corp., Santa Rita Gold Project Drill Program Underway; El Dorado Project Update, dated 9 Nov. 2006 (C-309); E-mail from Bill Gehlen to Luis Medina, dated 21 Oct. 2006 (C-698); Lya Ayala, *Study of Mining Law Will* (Continued...)

requested that he prepare a response to the Department of Mines that would make it clear that the documents had to be preserved until such time as MARN acted on the environmental permit application.⁶⁶⁵

340. In the meantime, Mr. Gehlen coordinated the collection of the remaining submission to the Department of Mines. As Mr. Gehlen attests:

With regard to these other documents, I did not interpret the Notice as implying anything about the sufficiency of the materials that we had previously submitted. From my reading, the Notice was just ordering us to resubmit *all* the documents that had been attached to the original concession application, together with some additional materials. For example, it asked us to submit the Environmental Impact Study which we had already presented previously

modifications to the EIS in 2005/2006 as part of the review process before MARN). The Notice also said that we should present the Technical Economic Feasibility Study which we had also already presented previously but specified that the design plans related to and stamped by an authorized Architect or Engineer and in digital

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341. In addition, although they were not specifically requested, the company decided to submit all the technical reports that were associated with the PFS, to the extent not already included in the EIS and its annexes and modifications. Pac Rim had invited the Department of Mines to view these studies in December 2004:

Continue, EL DIARO DE HOY (7 Nov. 2006)

Economy affirmed in the Treasury Commission that their agencies simply adhere to statutory regulations in the application of the Mining Act. Minister of Economy Yolanda de Gavidia and Minister of the Environment Hugo Barrera affirmed that the law is weak and must be strengthened, considering the country (172).

⁶⁶⁵ Gehlen Witness Statement, para. 173-74.

⁶⁶⁶ *Id.*, para. 178.

converting the exploration licenses into an exploitation concession, including:

- Engineering and design of the processing plant (1,000 tpd) March,
- Geotechnical design for the mine March,
- Engineering and design of the mine (1,000 tpd) June,
- Modification I to the design of the mine (750 tpd) July,
- Modification II to the design of the mine July
- Metallurgical tests July,
- Engineering and design of the tailings dam August,
- Engineering and design of the processing plant (750 tpd) August,
- Environmental Impact Study submitted to MARN on 8 September,
 - Preparation of an animated video, showing the development, operation, and closing of the project September,
 - Public Meetings (11 in total) to inform the community of the results of the environmental impact study October,
 - Modification III to the design of the mine October,
 - Preliminary Feasibility Study November,
 - Mining Plan (engineering and design) in progress, and
 - Feasibility Study for publication in progress.

If it is considered prudent to review the data, studies, or reports, verify the existence of the cores or rejects, or make other checks on the exploration program, **you are most welcome to visit our offices in Sensuntepeque.**⁶⁶⁷

342. We were never informed by MINEC (either then or at any time thereafter) that they wished⁶⁶⁸ although the company provided several of them to the Department of Mines in any event, as they also formed part of the EIS (namely, the geotechnical design parameters for the mine (Call & Nicholas);⁶⁶⁹

⁶⁶⁷ Letter from Fred Earnest to Gina Navas de Hernandez, dated 10 Dec. 2004 (received by MINEC on 13 Dec. 2004) (emphasis added) (C-630); *see also* Gehlen Witness Statement, para. 84.

⁶⁶⁸ Gehlen Witness Statement, para. 85.

⁶⁶⁹ EIS, Annex 4.2 (Geotechnical Design Parameters for the El Dorado Mine) (C-8C).

and the tailings impoundment design and geotechnical investigation (Vector)),⁶⁷⁰ which was submitted to the Department of Mines on 22 December 2004.⁶⁷¹

343. I decided to also provide the Department of Mines with the McIntosh mine plans, thus ensuring that the Department would have all the technical information associated with the project (whether specifically requested or not).⁶⁷² In addition, Mr. Gehlen extracted the requested design plans for the project from the various technical reports and had them printed to scale and -staff engineer, Mr. Carlos Serrano.⁶⁷³

344. In relation to the documentation of ownership of land or authorizations from the landowners in the area requested for the concession, as noted above, the parties had agreed in late 2005 that a reform should be made to the mining law to avoid any further potential confusion about this issue.⁶⁷⁴ However, President Sacca asked them to wait to present the reform until after the next elections, which they agreed to do.⁶⁷⁵ When Pac Rim raised the issue of legislative reform again in mid-2006, Mr. Shrake also suggested that the mining law should

⁶⁷⁰ EIS, Appendix 4.3(Tailings Dam Design) (C-8C-D).

⁶⁷¹ Application for Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession, dated 22 Dec. 2004 (C-5).

⁶⁷² Gehlen Witness Statement, paras. 87-89; *see also* E-mail from Bill Gehlen to Fred Earnest, dated 7 Nov. 2006 (C-652); McIntosh Engineering Conceptual Underground Mine Design & Cost Estimate, dated 26 Jan. 2005 (C-588).

⁶⁷³ Gehlen Witness Statement, para. 180; *see also* Tailings Impoundment Plan (C-695); Impoundment Overdrain Plan and Liner Details (C-696); 750 MTPD Flow Sheet #1 (C-697).

⁶⁷⁴ Although Respondent now alleges that there was no confusion about this issue, the

f the Vice-President indicated in September 2005 that: is not consistent with the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil is Email from Ricardo Suarez to Luis Medina, dated 23 Sept. 2005 (C-289) (emphasis added). Claimant can hardly be required to have expected that the State would decide to act in a manner that was stem. In any event, *the State did not do so*. Instead, it agreed that a reform should be enacted so as to resolve the issue.

⁶⁷⁵ Email from Fred Earnest to Tom Shrake, dated 15 Feb. 2006 (C-295); Third Shrake Witness Statement, para. 33.

or instructions of the Department of Mines would ultimately be. One way or another, we were willing to work cooperatively with the Government, as we always had, and to let the Department

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346. Furthermore, as Mr. Gehlen also confirms:

The company has never had any problems obtaining authorization from the local landowners to carry out surface works in the El Dorado project area, and I had no reason to doubt that we would be reasonably be expected to obtain. In the meantime, we simply submitted to the Department all the deeds and contracts that we had in relation to our surface rights.⁶⁸¹

347. On 8 November 2006, the company presented its response to the Department of Mines, including the explanation from its legal counsel as to the preservation of its rights.⁶⁸² In response, the Department of Mines sent a letter to the company on 4 December 2006 indicating that the company had existence of a just impediment with regard to the environmental permit; and indicating that, in view of the favorable change of circumstances at MARN, the company should submit the environmental permit within 30 days.

348. The full text of the letter is set out below:

Having received on the eighth of November, two thousand six the document and attachments whereby Mr. William Thomas Gehlen, Legal Representative of the Company **Pacific Rim El Salvador, S.A. de C.V.,** partially complies with the warning notice dated the second of October, two thousand six, and also requests that the deadline for the presentation of the documentation relating to the environmental permit be suspended and that the company be granted three days from the delivery of the permit by the corresponding Authority to submit it in turn to this Bureau.

⁶⁸⁰ *Id.*, para. 181-82.

⁶⁸¹ Gehlen Witness Statement, para. 183; *see also* paras. 193-94.

⁶⁸² Letter from PRES to MINEC, dated 7 Nov. 2006 (C-11).

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

through its Legal Representative that it is to present, within a period of thirty business days from the date following notification of this decision, a notarized copy of the Environmental Permit issued by the competent authority, and a copy of the environmental impact study duly approved by the Ministry of the Environment and Natural Resources, and is also to indicate the place and persons designated for service of process. NOTIFY.⁶⁸³

349. witnesses and experts allege that this letter does not address the remainder of the documents submitted by PRES on 8 November 2006, but rather only addresses the environmental permit.⁶⁸⁴ However, that interpretation is contrary to the plain terms of the document, which states that Mr. Gehlen had presented documents on 8 November 2006, Pac Rim addressed to the missing environmental permit, which was awaiting action by MARN. In view of the plain text of this letter, Professor Fernandois confirms that:

The only legitimate interpretation, in the presence of a Government whose actions must abide by the law and the principles of efficiency, effectiveness, and officiality, is [to consider that the missing document is the environmental permit only]. In fact, [to understand that other documents were missing, which are not named or listed in any way], would not be admissible, as it generates a situation of uncertainty for the citizen, and an unnecessary lengthening of the proceeding. Thus, the question immediately arises as to which documents were pending,

⁶⁸³ Letter from the Bureau of Mines to Pacific Rim El Salvador, dated 4 Dec. 2006 (R-6) (emphasis omitted; emphasis added).

⁶⁸⁴ *See, e.g.*

2006 the Bureau did not state whether it considered that the required documents had been submitted or take any position on the effect of this letter in its pleadings.

request.

a precedent in its relationship with PRES in the proceeding. If the Bureau had previously provided a list of the documents to be attached, the minimum that could be expected of it, upon receipt of the respective response, is that it would indicate whether other documents were still missing, and which documents those were, specifically.

Not only is the efficiency and effectiveness of the proceeding at trust the citizen has placed in the proceeding. At this point it is appropriate to consider the thoughts of Spanish Law Professor González Pérez, who explains that the validity of the principle of good faith “*will allow the citizen to regain the confidence that the Government is not going to require of him more than what is strictly necessary for the realization of the public purposes it is seeking in each particular case (...). Confidence, in short, that the procedure for issuing the decision that will give rise to the relationship between the Government and the citizen will not involve any confusing or ambiguous conduct that might later make it possible to evade or distort its obligations...*”. Precisely the only way to interpret this administrative decision in a way that is not confusing or ambiguous is to consider it as an expression of approval on the part of the Government of the documentation filed by PRES.⁶⁸⁵

350. In addition to recognizing that PRES had submitted the other documents requested in the Notice, the 4 December 2006 letter from MINEC also acknowledges that Pac Rim had demonstrated the existence of a just impediment with regard to the environmental permit. Although the notice orders PRES to submit the permit within 30 days, it does so under *i.e.*, the impediment to presentation of the permit was being lifted. On the other hand, if there were to be no actual contrary), then the effect of the 4 December 2006 letter is that PRES must be legally recognized

⁶⁸⁵ Second Fernandois Expert Reportat 76-77 (quoting González Pérez, Jesús, *El principio general de la buena fe en el derecho administrativo*, [The principle of good faith in administrative law] Editorial Thomson Reuters, Fifth Edition, Navarra, 2009, p. 134 (AF-47)) (emphasis in original).

as continuing to be in a state of just impediment with regard to the environmental permit until such time as MARN were to act upon its application (which, of course, never happened).

351. This conclusion is affirmed by Professor Fermandois:

Thus, legal reasoning is a part of an administrative act. In this case, it is precisely the legal reasoning that gives meaning to the

with the request [for the environmental permit].

But beyond said specific decision, the legal reasoning in this case represents, in and of itself, a legal advantage for the citizen, as it contains an express acknowledgment of the temporary

Specifically, let us recall that the letter expressly states that PRES established the existence of a just impediment to obtaining the environmental permit. This means that, in the judgment of the administrative authority, the reasons given by PRES were sufficiently convincing to show the existence of said insurmountable obstacle.

It is interesting to note that the legal effect of the just impediment is the suspension of an existing time period, which, logically, will only begin to run again once the impediment no longer exists. This is the opinion held by the Constitutional Division of the Salvadoran Supreme Court, which explained in this regard that

procedural deadlines may be suspended due to the existence of a just impediment; and the allotted time period shall once again begin to run after said impediment has been surmounted. *As such, the proper moment in the proceeding to raise said justification shall be established on a case by case basis depending on when the impediment ceases to exist.*"

If the authority considers that the just impediment has been
established

legal manner

it cannot later contradict said statement, imposing prejudicial consequences on the citizen for failing to do what it had been prevented from doing. A contradiction of this nature would

indicate arbitrary, willful administrative conduct based more on whim than on logical and legal grounds.⁶⁸⁶

352. Because the 4 December 2006 letter constitutes a favorable administrative act, which creates rights in favor of PRES, it can only be revoked by the Administration through the *procedimiento de lesividad* (adverse effects proceeding).⁶⁸⁷ In any event, Respondent acknowledges in this case that the favorable act was never revoked.⁶⁸⁸ Consequently, it must be considered that as of 4 December 2006, PRES had submitted all the documents required to be submitted under the Amended Mining Law in connection with its concession application, except for the environmental permit. With regard to the environmental permit, due to the lack of any impediment, which would be lifted only when the impediment ceased to exist.

353. _____ has also ratified this conclusion in the following terms:

Said decision clearly had the following implications:

1. It acknowledged that the remaining requirements had been met, as instructed
2. It considered the reason the environmental permit had not been obtained to be a just cause, but it did not feel it could suspend the time allotted for submission.

From the perspective of estoppel, all subsequent arguments by the State to the effect that the requirements had not been met, contrary to what is set forth, is a violation of the doctrine of estoppel and legal certainty.⁶⁸⁹

⁶⁸⁶ *Id.* at 80-82 (quoting Judgment of December 24, 2012, reference 48-2012, of the Administrative Law Division of the Supreme Court of Justice of El Salvador. (CLA-297)).

⁶⁸⁷ *Id.* at 86.

⁶⁸⁸ Navas Witness Statement, para. 76.

354. Moreover, Respondent itself further reaffirmed that this was its understanding of
o El Dorado in December 2008, when the Government
advised another mining company that had been unable to obtain an environmental permit for its

include this letter and a copy of the EIA of [] when replying to the Minería

⁶⁹⁰ According to the advice of the Department of Mines:

documents] it will
protect [] from [the] application to go to the files, and the danger

cause the term to answer a petition form [sic] Minería does not
expire, and the area is protected. Repeat, in other words, [] does
not lose the concession and the area is protected. When MARN
grants the permit, the request for extension is renewed, and the
extension WILL BE GRANTED.⁶⁹¹

355. In view of all the foregoing, it is clear that both parties to this arbitration always
issuance of the environmental permit by MARN. Furthermore, as discussed below, this
understanding was repeatedly ratified by other actions taken by the Government between 2005
and 2008.

2. Respondent Consistently Ratified Pac Rim's Continued Activities on the El Dorado Property Between 2005 and 2008

356. In its Counter-Memorial, Respondent has asserted that all the work that Pac Rim

*claramente las siguientes implicaciones: 1. Daba por cumplidos los restantes requisitos, y términos de la
prevención 2. Valoraba la justa causa en relación a la obtención del permiso ambiental, pero
consideraba que no podía suspenderse el término de su presentación. Desde la perspectiva de los actos
propios, toda ulterior alegación del Estado, tendiente a establecer que no se habían cumplido los
requisitos, contrario a lo expuesto, atenta contra los actos propios y la seguridad jurídica.” (C-844)
(emphasis added).*

⁶⁹⁰ Memo from [] to William Gehlen, dated 11 Dec. 2008 (emphasis added) (C-699).

⁶⁹¹ *Id.*; see also Gehlen Witness Statement, paras. 184-85.

the State for its unauthoriz

357. Although Claimant aims to be measured in its submissions, it is compelled to note that such assertions on the part of Respondent embody the antithesis of good faith. The Government of El Salvador repeatedly and consistently accepted and encouraged Pac Rim to continue working on the El Dorado property following the submission of its concession application in December 2004, and all the way up until mid-2008, when President Saca himself s drill rigs or lay off hundreds of El Salvadoran workers.⁶⁹⁴

358. December 2004, it communicated with the Department of Mines about that application on numerous occasions, informi highlighting that underground drilling would be carried out on South Minita and Nance Dulce deposits in the near future, with the express purpose of including those deposits into reserves for the mine.⁶⁹⁵ As already explained above, the Department of Mines ultimately decided not to issue a concession covering Nance Dulce because that deposit was outside the area of the EIS; instead, the Department issued the Huacuco Exploration License to DOREX so that Pac Rim could maintain the rights to that deposit.

⁶⁹² Counter-Memorial, para. 177.

⁶⁹³ *Id.*

⁶⁹⁴ Memorandum from Tom Shrake to Board of Directors, dated 27 June 2008 (C-742); *see also* Third Shrake Witness Statement, para. 60.

⁶⁹⁵ *See, e.g.*, Email from Fred Earnest to Tom Shrake, dated 8 Nov. 2004 (C-392); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 Nov. 2004 (C-393); 2004 Annual Report of the Exploration Work Done by Pacific Rim El Salvador in El Dorado, dated 13 Dec. 2004, Calculation of

⁷⁰¹ In March 2008, the new mineral resource calculation was published, bringing the total mineral resources for the property up to 1,226,700 ounces, with an inferred resource of 237,300 ounces.⁷⁰² As Mr. Ristorcelli of MDA has noted in his witness statement for this arbitration:

[T]hat represents an increase of 96% and 104% for Measured and Indicated Resources for gold and silver ounces, respectively; and 98% and 146% for Inferred Resources for gold and silver ounces, respectively for the same time periods (see previous item for table). Those increases reflect serious, dedicated and successful mineral exploration work on the part of the Company. In summary, through the efforts and expenditures of Pac Rim over the span of six years, the mineral resources at the El Dorado Project were doubled. All of the resources identified since the preparation of the Pre-Feasibility Study, as reflected in the 2008 Technical Report Update on the El Dorado Project Gold and Silver Resources (R-98), are available for potential conversion into Proven and Probable Reserves.⁷⁰³

362. As Mr. Ristorcelli notes, all of the new mineral resources that Pac Rim classified

⁷⁰⁴ In other words, with some limited additional metallurgical, engineering and costing work, these valuable mineral which is the reason that Pac Rim spent substantial amounts of money carrying out delineation drilling on the deposits, all of which was fully informed to the Government.

363. Aside from annual reports submitted to the Department of Mines,⁷⁰⁵ the Government also had extensive

⁷⁰¹ El Dorado South and North 2007 Annual Report, sec. 3.1.1.a (Balsamo Vein Perforations), sec. 3.1.1.b (Cerro Alto Vein Perforations) (C-351); *see also* Gehlen Witness Statement, paras. 151-53.

⁷⁰² MDA 2008 Technical Report Update at 153 (R-98); *see also* Gehlen Witness Statement, para. 154.

⁷⁰³ Ristorcelli Witness Statement, para. 16.

⁷⁰⁴ *Id.*

⁷⁰⁵ As Mr. Gehlen notes in his Witness Statement, the information provided to the Government in these annual reports was voluminous, comprising *thousands of pages* of annexes in addition to the summary reports. *See* Gehlen Witness Statement, para. 158.

contact with Pac Rim in relation to its drilling activities during the 2005 to 2008 period. Although Claimant will not discuss here all the *hundreds* of interactions that it had with the Government during this timeframe, some examples include:

- Frequent in-person meetings and telephone conversations between Department of and administrators;⁷⁰⁶
- agencies up until mid-2008, in which drilling activities on the property were specifically observed and commented upon;⁷⁰⁷
- Numerous meetings with high-ranking government officials in relation to the Dorado.⁷⁰⁸

⁷⁰⁶ *Id.*, para. 157.

⁷⁰⁷ See, e.g., Memorandum from Carlos Serrano to Frederick Earnest, dated 4 May 2005 (C-682); E-mail from Juan Carlos Varela to The visit consisted to look over the rigs that are working inside the exploitation concession solely -683) (emphasis added); At the time of inspection, a diamond drill hole with core recovery was being drilled

of El Dorado. The current drilling is being carried out with the purpose of defining the direction and depth of the veins, as well as the grade of the minerals. The company currently employs seventy-five workers in the construction of drill pads and thirty in the administrative offices, and also has eleven

(emphasis added) (C-684); see also Letter from Francisco Cruz Brizuela to Scott Wood, 17 Apr. 2008 (C-685); Notes on Community Meeting in El Palmito, dated 4 Apr. 2008 (C-686); Notes on Meeting to Improve Water Supply in El Palmito, dated 22 May 2008 (C-687); Letter from Scott Wood to Francisco Rene Cruz, dated 9 Jun. 2008 (C-688); see also Gehlen Witness Statement, paras. 159-61.

⁷⁰⁸ See, e.g.

C-712); E-mail from Luis Medina to Fred Earnest, dated 6 July 2006 (C-714); E-mail from Fred Earnest to Tom Shrake dated 8 July 2006 (C-716); El Dorado Project Weekly Summary for week ending 7 July 2006 (C-717); Email from Rodrigo Chavez to Tom Shrake, dated 22 July 2007 (C-718); E-mail from Rodrigo Chavez to Tom Shrake, dated 18 Dec. 2006 (C-727); E-mail from Tom Shrake to Paul Rollinson, dated 24 May 2007 (C-728); E-mail from Rodrigo Chavez to Pete Neilans and Tom Shrake, dated 5 May 2007 (C-739); Memorandum from Tom Shrake to Board of Directors, dated 27 June 2008 (C-742); Memorandum from Tom Shrake to Files, dated 14 July 2008 (C-758); Memorandum from Adrián Juárez to Pacific Rim Mining Corp., dated January 12, 2004, commented on by Matt Fuller on 14 January 2004 (C-105); El Dorado Project Report for the month ending 31 August 2004 (C-280); Memo from Fred Earnest to Tom Shrake, dated 28 June 2005 (C-291); Memo from Fred Earnest to Tom Shrake, dated 28 June 2005 (C-296); Email from Yolanda de Gavidia to Tom Shrake, dated 7 July 2006 (C-298); Email from Fred Earnest to Jose Mario, dated 12 July 2006 (C-299); Email from Tom Shrake to Mark Klugmann, dated 18 May 2007 (C-306).

364.

of the subsoil in the area of the El Dorado concession application was of the Amended Mining Law, as it now claims in this arbitration.⁷⁰⁹

Respondent would have been under a legal obligation to impose sanctions upon the company.⁷¹⁰ Far from imposing any continued drilling.⁷¹¹

was j

legal situation during this time period:

The successive relationship [between exploration and exploitation] thus supposes the existence of a link of continuity between the actions it covers, which persist over time.

In light of this background, we maintain with respect to this point that ***there is a clear successive relationship between the mining exploration and exploitation phases.***”

[C]onsidering the character of the successive phases or continuous relationship that exists between the phases of exploration and exploitation, upon expiration of the license, the subject of administrative law already has identified the discovery of mining potential, which gives it the right to request the concession.

Naturally, in order to preserve its right, while the procedure of the same is being concluded, works to conserve and maintain the resource must be carried out.

In other words, we affirm that our legislation recognizes the continuity between the phases of exploration and exploitation, that is, the structure of successive phases, which entails that in the interim between them, the licenseholder is empowered to carry out the necessary conservation activities.

⁷⁰⁹ Counter-Memorial, para. 177.

⁷¹⁰ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001) , art. 69-70 (CLA-5).

⁷¹¹ Department of Mines Inspection Record, dated 12 Mar. 2008 (C-684).

dated
12 March 2008 [C-684], it is recorded that the Department of
Textually, the minute indicates that the delegates have gathered
Company
Pacific Rim El Salvador, S.A. de C.V. is carrying out in the area of
the mining project in reference.

The foregoing was carried out as a result of the function of
administrative verification and supervision charged to that
authority, actions which entailed consent for what was done, **which
supports the successive character between both phases.**⁷¹²

This pronouncement has signified a validation of those works and
represents in and of itself an act of consent by the referenced
authority. The foregoing is based on the doctrine of tacit
administrative acts, which is recognized in the jurisprudence of El
Salvador.

The foregoing means that from 2005 to 2008 the Administration
has manifested its will and has consented to the conservation
activities carried out by PRES over those years, which entailed **a
tacit consent for those actions.**

365. Evidently, throughout the time that the Government was
actions in relation to the El Dorado property, it was also well-aware of the benefits that Pac Rim
was generating for El Salvador.⁷¹³ In mid-2008, when Pac Rim informed President Saca that the
company was pulling its drill rigs insisted that [Mr. Shrake] not
do this to which [Mr. Shrake] responded that [he] had no choice⁷¹⁴ Later, when Mr. Shrake
tried to settle the present dispute, he was informed that a resolution could be forthcoming, but

⁷¹² E-mail from Karla Fratti of 16 July 2009 at 15-21 (emphasis added) (C-___).

⁷¹³ E-
advisors] are almost ready to go and have laid out their interests, which is foreign direct investment, on
the part of Pacific Rim, and a significant investment in social projects. (C-718) (emphasis added).

⁷¹⁴ Memorandum from Tom Shrake to Board of Directors, dated 27 June 2008 (emphasis added) (C-
742).

only

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366. In short, the *overwhelming* factual record in this case demonstrates that the Project from 2005 to 2008, and that the Government in turn ratified these investments and their ultimate end: for Pac Rim to bring a mine into production at El Dorado. As indicated at the Tribunal to embrace a fantasy in which few if any of the relevant events at issue in this arbitration had taken place. But, no matter how much Respondent would now like to shift all the risk of its unlawful conduct onto Pac Rim, it cannot be plausibly denied that all of these events *did* take place, and they cannot be ignored by the Tribunal. The unavoidable conclusion is

716

3. Respondent's Attempted Reliance on the Doctrine of "Administrative Silence" Lacks Even *Prima Facie* Credibility

367.

⁷¹⁵ Memorandum from Tom Shrake to Board of Directors, dated 11 July 2008 (C-748).

⁷¹⁶ Counter-Memorial, para. 178. Claimant would note that it matters not to this conclusion whether

State cannot avoid its liability for creating legitimate trust in an investor by invoking the alleged illegality or *ultra vires* nature of its own conduct. See, e.g., *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 (Decision on Jurisdiction dated 6 July 2007), paras. 193-94 (CLA-22); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Award dated 20 May 1992), para. 81 (RL-166); see also *Duke Energy Investments v. Peru*, paras. 433-36 (CLA-16); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Award dated 16 Aug. 2007), Dissent of Cremades, paras. 30-31); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 143 (1953) (citing *Case of the U.S.*, Part II, Point II (*Shufeldt Claim*, USGPO, 1932, pp. 57 *et seq.*; and PCIJ: *Serbian Loans Case* (1929), A. 20/21, 99. 38-39. *Aguiar-Amory and Royal Bank of Canada (Tinoco) Case* (1923), 1 UNRIAA, p. 369, at pp. 383-4) (CLA-__).

will never make the technical and legal evaluation, through the competent entities, that would result in a decision on whether the concession should be granted and on the limits it should

⁷¹⁷ In addition, these experts opine that Pac Rim cannot bring a claim for expropriation

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368.

expertise in public law into question, given that their views are unsupported and indeed, are contradicted by the unanimous and overwhelming weight of doctrine and jurisprudence. The

benefit the subjects of administrative law; not

to impose a *burden* upon them. As confirmed by the Supreme Court of El Salvador, the doctrine

as a guarantee

for private citizens against delay on the part

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369. Given that

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which is only intended to serve as a guarantee or benefit for the private citizen, it cannot be used as a basis to revoke or deny protection to the legal rights of the subject of administrative law. As Professor Fermandois confirms in his Second Expert Report:

Given that it [presumptive denial] is a benefit, the citizen is free to exercise it or not, as he sees fit in each case. Therefore, a citizen may legitimately opt to pursue the administrative matter, waiting for a final decision to be If the decision is left up to the citizen, and administrative silence serves as a guarantee, then it

⁷¹⁷ Ayala/Fratti Expert Report at 45.

⁷¹⁸ Tinetti Expert Report at 11.

⁷¹⁹ See Second Fermandois Expert Report at 52 (citing Judgment of October 23, 2003, reference 178-A-2000, of the Administrative Law Division of the Supreme Court of Justice of El Salvador (CLA-288)) (emphasis added).

⁷²⁰ *Id.* at 53.

confounds the logic of this institution to punish a citizen for having exercised the legitimate option granted to him by the law. And this is precisely what may be inferred from

of the claim filed in this Case, claiming the alleged acceptance of the the citizen.⁷²¹

370.

own inactivity and not that of the Government of El Salvador that has prevented a resolution of its applications,⁷²² is patently and fundamentally incorrect. As Professor Fermandois explains in his Second Expert Report, the effects of presumptive denial do not release the Government from its obligation to issue the corresponding decision: The Government has the duty, in all cases, to issue a decision on administrative proceedings, as this is a matter of exercising its public duty, which is not discretionary, but rather binding on its holder⁷²³

371. Professor

the Supreme Court of Justice of
does not obviate

⁷²⁴

372.

agrees with Professor Fermandois, and with the unanimous Salvadoran case law and doctrine, regarding the nature and legal effects of negative administrative silence. In a legal opinion provided to Claimant on 5 May 2010, Professor Fratti stated the following:

The lack of response on the part of the Administration results in the violation of a constitutional guarantee: the

⁷²¹ *Id.* at 54 (emphasis added); *see generally* at 54-55 (quoting Sánchez Morón; Parejo Alfonso; and García de Enterría and Fernández).

⁷²² Ayala/Fratti Expert Report at 45.

⁷²³ *See* Second Fermandois Expert Report at 51 (emphasis added); *see also* at 53. As noted in subject to protection in El Salvador by virtue of Article 18 of the Constitution (CLA-1). *See also* Memorial, paras. 615-17 (and accompanying citations).

⁷²⁴ Second Fermandois Expert Report at 51 (quoting the Judgment of December 16, 2002, reference 61-V-2000, of the Administrative Law Division of the Supreme Court of Justice of El Salvador) (emphasis added by Fermandois).

violation of the right to petition and receive a response. The exercise of this right entails the obligation of public servants to *respond to or answer the requests they receive*.⁷²⁵

[N]egative silence does not relieve the Government of its duty to issue the corresponding administrative decision, since we repeat, the goal is to allow the citizen to obtain the protection of the administrative court.⁷²⁶

373.

cannot be construed as any sort of

Pac Rim from seeking relief for the loss of its investment before this Tribunal.⁷²⁷

B. To the Extent Relevant to This Dispute, Claimant Has Demonstrated That Its Concession Application Met All the Requirements Established in the Amended Mining Law

374. As set out above, Respondent unequivocally accepted and ratified (over a period of years) that Pac Rim had a legal right to an exploitation concession over 12.75 square kilometers of the original El Dorado Norte and El Dorado Sur Exploration Licenses; and that it would be entitled to exercise that right upon its receipt of the corresponding environmental

⁷²⁵

Efectos del Silencio Administrativo La falta de respuesta de la Administración deriva en una violación de rango constitucional: vulneración al derecho de petición y respuesta. El ejercicio de este derecho conlleva como correlativa obligación la de los funcionarios estatales de responder o contestar las solicitudes que se le eleven (original) (C-827).

⁷²⁶ *Id.* (“[E]l silencio negativo no hace desaparecer el deber de la Administración de dictar el correspondiente acto administrativo, ya que se insiste, persigue permitir que el administrado pueda obtener la protección judicial que le brinda la jurisdicción contencioso administrativa. (C-807).

⁷²⁷ Second Fernandois Expert Report at 55-56; Cf. Email from Karla Fratti to Luis Medina, dated 5 *Efectos del Silencio*

Administrativo

words, further motions may be filed or clarifications requested and a new answer will give rise to a new
-827).

permit. In turn, Pac Rim acted in reliance on that acceptance, expending tens of millions of dollars and generating massive economic and social benefits for El Salvador.

375. that Pac Rim did not comply with other application requirements for the concession is barred by the principle of estoppel and does not need to be considered by the Tribunal. Even if the Tribunal does consider this

Preliminary Objections,

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376. In the following sections, Claimant nevertheless Article 37.2(b) and 37.2(d) of the Amended Mining Law, demonstrating that Pac Rim met both requirements.

1. Respondent Could Not Reject Pac Rim's Application on the Basis of Article 37.2.b

377.

counsel has previously

⁷³⁰ These statements amount to admissions by the Respondent, and should be taken into account by the Tribunal when assessing

378. As set out below, had Respondent applied its current proposed interpretation of which it did not it would have violated the terms of the Amended Mining Law, as well as the Constitution of El Salvador.

⁷²⁸ Decision on Preliminary Objections, dated 2 Aug. 2010, para. 246.

⁷²⁹ *Id.*

⁷³⁰ Email from Ricardo Suarez to Luis Medina, dated 23 Sept. 2005 (C-289).

a. Article 37.2(b) Does Not Apply (or Applies Only Permissively) to Applications for Metallic Mineral Concessions

379.

Law in April 2005, they came to the conclusion that:

Art. 37 defines the requirements for requesting an exploitation concession, HOWEVER; it lumps mines and quarries together!!!! THE LAW IS VERY CLEAR THAT MINES AND QUARRIES ARE TWO SEPARATE TYPES OF OPERATIONS, YET IT MISTAKENLY LUMPS THE TWO TOGETHER AND DISTRIBUTES THE PREVIOUSLY DEFINED REQUIREMENTS FOR ONE (IE. QUARRIES) TO INCLUDE THE OTHER THIS IS NOT RIGHT!!!! I THINK THERE IS A SOLID ARGUMENT TO PRESS THE DIRRECCION [sic] DE MINAS FOR A FAVORABLE INTERPRETATION OF THE LAW.⁷³¹

380. As Mr. Earnest noted at the time, the substantive requirements of the Amended Mining Law are different with respect to mines (defined in Article 2 o minerals) and quarries (de -)⁷³²:

Art. 23 defines the right to request a mining exploitation concession and makes no reference to property ownership or legal authorization of the land owners. [] Article 30 defines the right to request a quarrying exploitation

quarry is found must be the property of the person requesting the concession or he must have legal⁷³³

381.

authorization is a requirement for one type of concession (quarries), but not for the other (metallic minerals or mines). Article 30 of the Amended Mining Law provides with respect to

⁷³¹ Email from Fred Earnest to Tom Shrake, dated 14 Apr. 2005 (C-286).

⁷³² See Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001) , art. 2 (CLA-5).

⁷³³ Email from Fred Earnest to Tom Shrake, dated 14 Apr. 2005 (emphasis added) (C-286).

f the person
that solicits the Concession or have authorization from the owner or authorized holder in legal
⁷³⁴ Notably, there is no such substantive requirement in Article 23, which deals with
mines.⁷³⁵

382. There is a sound reason for the distinction between Article 30 and Article 23,
which is further reflected in Article 10 of the Amended Mini *MINES [AS]*
IMMOVABLE PROPERTY

The deposits to which this law refers are immovable property distinct from the real estate that constitutes the superficial land, not thus the quarries that form an integral part of the land in which they are found, whenever they are revealed as outcroppings; as a result, the concession is a real and immovable property right transferable by legal act between living parties, subject to the prior authorization of the Ministry of the Economy; and accordingly, said concession can serve as a guarantee in mining operations.⁷³⁶

383. Article 10 is clear that all subsoil minerals constitute immovable property that is distinct from the surface estate. However, the situation is different with respect to non-metallic minerals (quarries), which do *not* constitute separate immovable property whenever they are
⁷³⁷ As Mr. Williams has explained, the Amended Mining Law
-metallic minerals are revealed by
surface outcroppings, because there is no exploration License for non-⁷³⁸ This

⁷³⁴ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 30 (CLA-5). NB: Claimant uses Mr. William Mining Law on which he has opined in his two Expert Reports.

⁷³⁵ As Claimant has previously noted, the only substantive requirement established in Article 23 of the Amended Mining Law is

⁷³⁶ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 10 (CLA-5); *see also* Second Williams Expert Report at 8.

⁷³⁷ *See* Second Williams Expert Report at 9.

⁷³⁸ *Id.*

presumption is in turn reflected in Article 30, which requires that the applicant for a quarrying concession be the owner or have legal authorization from the landowner on which the quarry is situated.⁷³⁹

384.

previously noted by Mr. Earnest, in distinguishing between mines and quarries.⁷⁴⁰ On the other hand, what is *not* clear is the *heading of Article 37.2*, which falls under Chapter VI **PROCEDURE** FOR THE PRESENTATION OF APPLICATIONS AND ANNEXED DOCUMENTS⁷⁴¹ and even though different *substantive* requirements apply to each one. As Mr. Earnest noted, he ambiguous heading in respect of the procedure for obtaining a concession.⁷⁴²

385. Given that Respondent has felt at liberty to raise entirely new arguments in this and particularly since no official interpretation or application of the requirement established in Article 37.2(b) has ever been rendered Claimant asked Mr. John Williams, an internationally-recognized mining law expert and primary drafter of the Latin American Model Mining Law, to provide his opinion as to the proper interpretation of this provision.

386.

suggested interpretation of Article 37.2 was the correct one: namely, that Article 37.2(b) cannot and does not apply to applicants for metallic mining concessions.⁷⁴³ In his Second Expert Report,

⁷³⁹ *Id.*

⁷⁴⁰ Email from Fred Earnest to Tom Shrake, dated 14 Apr. 2005 (C-286).

⁷⁴¹ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), Chapter VI, heading (emphasis added) (CLA-5).

⁷⁴² -mail disproves Res

requirement to obtain ownership or authorization of surface rights was not relevant to an applicant for an exploitation concession of metallic minerals. Email from Fred Earnest to Tom Shrake, dated 14 Apr. 2005 (C-286); *see also* Counter-Memorial, para. 67.

⁷⁴³ First Williams Expert Report at 37. .

Mr. Williams unequivocally confirms this conclusion, definitively rebutting the notion that the requirement in Article 37.2(b) could have been applied by the Department of Mines as a basis to

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387.

upon: **(1)** its assertion that the heading of Article 37.2 is clear and unambiguous in requiring land ownership or authorization from applicants for exploitation concessions of quarries *and* from applicants for exploitation concessions of metallic minerals;⁷⁴⁵ and **(2)** a complete disregard for: (a) all the other provisions of the Amended Mining Law; (b) the purpose of that law; and (c) the general legal order in El Salvador.⁷⁴⁶

388. Respondent

not clear and unambiguous in requiring ownership or authorization of all the surface landowners in the entire area being requested by the applicant for a concession of metallic minerals.⁷⁴⁷ The

PARA CONCESION DE EXPLOTACION DE MINAS Y CANTERAS

Law. To the co

chapter of the Amended Mining Law⁷⁴⁸ from that which addresses the exploration license and

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ion

⁷⁵⁰ and it must therefore be

⁷⁴⁴ Second Williams Expert Report at 2-21.

⁷⁴⁵ *Id.* at 4-6, 35.

⁷⁴⁶ *Id.* at 6-7.

⁷⁴⁷ *Id.* at 4-6.

⁷⁴⁸ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), Chapter IV (CLA-5).

⁷⁴⁹ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), Chapter III (CLA-5).

⁷⁵⁰ Second Williams Expert Report at 5.

interpreted through application of the relevant rules of statutory interpretation, as acknowledged

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389. Second, application of the relevant rules of statutory interpretation requires reference to the context in which the provision appears (systematic interpretation), as well as to the intent or spirit of the law (teleological interpretation).⁷⁵² Reference to the context of the provision

reasons:

- Land ownership or authorization is a substantive requirement for concessions of quarries, as well as for licenses to exploit surface minerals deposits; but is *not* a substantive requirement for concessions for exploitation of mines, and is similarly not a requirement for exploration licenses of metallic minerals;⁷⁵³
- The State can grant concessions for the exploitation of mines to eligible and qualified persons who are not the owners of the surface estate, in accordance with Article 103 of the Constitution and Article 10 of the Amended Mining Law; the same is not true for concessions of quarries, which are presumed to be inseparable from the surface estate.⁷⁵⁴
- right to grant concessions for the exploitation of mines to eligible and qualified persons who are not the owners of the surface estate, regardless of the authorization of these landowners, is expressly reflected in the Amended Mining Law easement provisions, which confirm that the subsoil is the dominant estate with respect to the surface estate.⁷⁵⁵ These provisions allow for ⁷⁵⁶ including easements on the surface land for the benefit of underground mining works.⁷⁵⁷

⁷⁵¹ *Id.* at 6-7; *see also* Ayala/Fratti Expert Report at 31.

⁷⁵² Second Williams Expert Report at 6-7.

⁷⁵³ *See id.* at 8- 13.

⁷⁵⁴ *See id.* at 14-15.

⁷⁵⁵ *See id.* at 15-17.

⁷⁵⁶ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 54 (CLA-5).

⁷⁵⁷ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 58 (referring

(Continued...)

- This is also consistent with the fact that Article 37.1 does *not* require the applicant for an exploration license for metallic minerals to submit any documentation of ownership or authorization of the surface property overlying its exploration concession, even though exploration will undoubtedly require surface works.

exploration includes property of third parties and the works will be carried out on the surface of the ground, the permission of the property owner will be necessary, [and] will be the responsibility of the License-holder.⁷⁵⁸

- In turn, the legal easements established in Chapter VIII of the Amended Mining Law are available to exploration license-holders: the implication is that the license-holders will obtain these easements, if necessary, *after* the granting of the exploration license. The same implication should apply in respect of concessions for exploitation of metallic minerals, to the extent that such easements are necessary for the same.

390. Notably, neither Respondent nor its experts even *mention* the legal easement provisions of the Amended Mining Law anywhere in their analyses of Article 37.2(b), nor do they mention the difference in the substantive requirements for mines and quarries. Actually, Respondent disregards the existence of the easement provisions completely when it incorrectly property could be excavated and removed without so much as consultation with that owner.⁷⁵⁹;

minerals without considerin

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391. In fact, the Amended Mining Law establishes a procedure for consultation with surface owners in regard to any disturbance to their properties as a result of mining activities, whereby their interests will be taken into account: this is the purpose of the procedures for

h the surface [for the sole purpose] of
-5); *see also* Second Williams Expert Report at 16.

⁷⁵⁸ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 21 (CLA-5). As indicated in Article 45 and 46 of the Mining Regulation (RL-8), the legal easements established in Chapter VIII of the Amended Mining Law (assuming the parties do not reach a voluntary agreement regarding the same) are to be constituted through a Court Decision issued in a Summary Judgment proceeding under common law. In turn, the standards for compensation to be paid to the affected landowner are established in Article 57 of the Amended Mining Law and Article 46 of the Regulation.

⁷⁵⁹ Counter-Memorial, para. 89.

⁷⁶⁰ *Id.*, para. 95.

constitution of easements. In this regard, the solution given preference under the Amended Mining Law is that the mining rights holder and the landowner will come to a voluntary , and mutually satisfactory compensation will be paid.⁷⁶¹ (In fact, Pac Rim pursued and achieved this optimum solution in the case at hand). However, if the landowner does not agree, then the mining rights-holder will be entitled to file a claim before the courts under common law, in a summary proceeding, to constitute the easement and fix the amount of compensation,⁷⁶² which must be based upon the

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392. In addition to being inconsistent with a systematic interpretation of the Amended interpretation of Article 37.2(b) because:

- It would allow one or more private landowners to prevent the grant by the State of a concession to exploit mineral resources in the subsoil owned by the State, in exploration and exploitation of mining resources⁷⁶⁴ interpretation of Article 37.2(b) would make comply with the provision.⁷⁶⁵ This hardly reflects an interpretation that furthers the purpose of the law.

393. Moreover, aspects of the El Salvadoran legal order, including the following:

- Private property rights are not unlimit⁷⁶⁶

⁷⁶¹ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 53. (CLA-5)

⁷⁶² Regulations of the Mining Law of El Salvador, Legislative Decree No. 47, dated 20 June 2003, art. 45 (RL-8).

⁷⁶³ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 57 (CLA-5).

⁷⁶⁴ *Id.*, Preamble (CLA-5).

⁷⁶⁵ Counter-Memorial, para. 100.

⁷⁶⁶ Constitution of the Republic of El Salvador, art. 103 (CLA-1).

- The mining of metallic minerals has been declared as an activity in the public interest in El Salvador since 1922 (whereas the exploitation of quarries has never been declared as an activity in the public interest).⁷⁶⁷

394. Finally

would also render it inconsistent with every other mining law with which he is familiar, including the mining laws of all the Central American countries as in effect in 1995 and as currently in effect, in addition to the mining laws of Peru, Mexico and Chile.⁷⁶⁸

b. Pac Rim Owned or Leased All the Surface Properties on Which It Would Carry Out Its Activities, and It Presented Documentation In Relation to All These Properties to the Department of Mines

395. In view of the analysis set out above, Mr. Williams concludes that Article 37.2(b) does not apply to applicants for metallic mining concessions. Without prejudice to this conclusion, it is clear that to the extent that Article 37.2(b) *could* apply, it nevertheless could not

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referenced in Article 37.2(b) does not refer to the entire requested area of the concession. On the

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referred to in

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396. In this case, Pac Rim already owned or had authorization to use all the surface properties on which its activities would be carried out at the time it submitted its concession application and therefore, to the extent that Article 37.2(b) applied, Pac Rim complied with it.

⁷⁶⁷ *Codigo de Minería*, adopted by unnumbered Decree on 17 May 1922, published in the *Diario Oficial* No. 183, Tomo 93, of 17 Aug. 1922, arts. 1, 12, 13, 17 (CLA-207); Legislative Decree No. 33 published in the Official Journal No. 174, Vol. 127, 25 July 1939 (amended by Legislative Decree No. 467 published in the Official Journal No. 212, Vol. 341, 13 Nov. 1998), art. 2 (CLA-45); *see also* Second Williams Expert Report at 17-19.

⁷⁶⁸ Second Williams Expert Report at 20-21.

⁷⁶⁹ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 37.2(a) (CLA-5).

⁷⁷⁰ *See* Second Williams Expert Report at 12.

397.

inmueble

is also supported by the statements of the Department of Mines at the time. As Claimant pointed out in its Memorial, Mr. Earnest asked Ms. Navas in June 2005 what kind of authorization was required by Article 37.2(b):

Near the close of the meeting, I asked what kind of authorization was required, suggesting something along the

to grant an Exploitation Concession to Pacific Rim El

This was immediately rejected with the argument that the

concession. **Gina then indicated that it was an authorization for us to use the land,** to which I replied that we already have all of the authorization for the land that would be occupied by the project. She became very reflective (almost as though she was beginning to see the point), but offered no further suggestion.⁷⁷¹

398.

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inmueble *used* by the applicant for its mining activities. When it was drawn to her attention that Pac Rim would not be using or occupying the surface lands overlying the concession and for which the company did not already have ownership or authorization, Ms. Navas was unable to offer any further suggestion as to the type of authorization that could be required from these surface owners.

c.

would violate the constitutional principle of proportionality

399.

Article 37.2(b) is illogical in the abstract, it would also have resulted in a violation of the constitutional principle of proportionality had it been applied to Pac Rim under the relevant circumstances here. As affirmed by the Supreme Court of El Salvador:

It is possible to formulate proportionality as a just criterion for [establishing] an appropriate relationship between

⁷⁷¹ Memo from Fred Earnest to Tom Shrake, dated 28 June 2005 (emphasis added) (C-291).

means and ends in the event of alleged infringement of fundamental rights by the authorities; in other words, for it to serve as a yardstick by which to control any excessive decision by comparing motive with consequences. It is therefore a barrier against interference by the authority in the exercise of fundamental rights by citizens. But it also constitutes a limit on the exercise of rights when in the scope of the same there is the potential to undermine or injure other constitutional rights, principles or values.⁷⁷²

400.

tion of Article 37.2(b) of the Amended Mining Law would *in all cases* be consistent with the principle of proportionality, since there may always be some remote risk that surface owners would suffer disturbance as a result of mining activities, which should therefore require their consent. However, Professor Tinetti like Respondent and its other experts, does not analyze Article 37 in the context of any other provisions of the Amended Mining Law.⁷⁷³

401.

light of the surrounding

proposed mining activities were declared to be in the public interest, and the Amended Mining Law recognizes this by establishing legal easements in its favor;⁷⁷⁴ (2) Pac Rim had obtained ownership or lease rights over all the surface areas where its activities would create a disturbance; and (3) Pac Rim had an exclusive right to convert its exploration license to an exploitation concession, as established in Article 23 of the Amended Mining Law. As Professor Fernandois concludes:

In sum, from all of the foregoing and in the specific situation produced by the PRES case, I conclude that an interpretation of Article 37, paragraph three [sic], item b) of the Mining Law that holds that the State of El Salvador is

⁷⁷² Judgment of 14 Dec. 2004, reference 42-2003, of the Supreme Court of Justice of El Salvador (CLA-290).

⁷⁷³ Tinetti Expert Report at 9-10, 19-23.

⁷⁷⁴ As Professo is one that is created solely by action of law, and in which the corresponding encumbrance is forcibly applied on the servient estate, in this case in nd Fernandois Expert Report at 62.

prevented from issuing a decision on an application for an exploitation concession on the sole ground that some of the authorizations of owners of the surface property are missing is not consistent with the Constitution, because in this particular case this would entail an excessive sacrifice of one of the rights in conflict economic freedom without simultaneously producing an improvement to the general common good or to the degree of satisfaction of the correlative right (ownership);

Lastly, I also conclude that, aside from it being mandatory for the State of El Salvador to issue a decision on the application for exploitation concession in the case under review, **it must grant said application**, provided the applicant complies with the remaining legal requirements, especially in the case of the titleholder of an exploration license who demonstrates the discovery of minerals and

23), in which case this applicant has the right to be granted the exploitation concession.⁷⁷⁵

402.

that the Amended Mining Law requires the mining company to post a bond prior to issuance of t losses or damages caused to the State or third parties, as a consequence of the performance of the mining operations.⁷⁷⁶ Notably, the amount of the bond is to be established taking into account circumstances that cover the potential risks

magnitude method
fluvial streams and bodies of water etc.⁷⁷⁷

⁷⁷⁵ *Id.* at 64-65.

⁷⁷⁶ Regulations of the Mining Law of El Salvador, Legislative Decree No. 47, dated 20 June 2003, art. 14 (RL-8).

⁷⁷⁷ *Id.* In this regard, *compare*

should be taken into account when the regulator sets the required bond, thereby ensuring that potentially

- d. There is no evidence that Pac Rim could not have obtained
of what was required from it in this regard

403. Although it is clear from all the foregoing that Respondent could not legally have all the surface owners in the area of the concession, the fact remains that Respondent never advised Pac Rim and did not seem to understand itself company should have obtained.

404. As Mr. Gehlen explains, Pac Rim has carried out surface works (*e.g.*, sampling, trenching, construction of roads and drill pads, and drilling) on almost every corner of the 12.75 square kilometer concession application area, and it has *never* had any difficulty obtaining authorization from the surface owners in the area to carry out these works.⁷⁷⁸ Given that these property owners have had no problem providing authorization for Pac Rim to carry out activities that actually disturb their properties, it is difficult to imagine that they would refuse to give such authorization in the case of activities that *would not* disturb them.

405. In view of all the foregoing, it is clear that Respondent *could not* have rejected assuming that there was any indication that Respondent *would* do so which, as discussed further above, there was not.

**2. Respondent Could Not Reject Pac Rim's Application on the Basis of
Article 37.2(d)**

406.

this point
are misleading and contrived.

⁷⁷⁸ Gehlen Witness Statement, paras. 183, 193-94. In fact, the company has obtained over 200 authorizations for surface works from local landowners since the time of its investment. *See* Gehlen Witness Statement, n. 202.

a. The Amended Mining Law does not establish the required contents

407. Respondent repeatedly alleges in the Counter-
a pre-feasibility st 779
SRK Consulting knew the difference between pre-feasibility and feasibility studies and
specifically contracted for a pre- 780 -
F 781

408. -mining
interests, and, in some cases, even mining professionals. Because of the great amount of
confusion, mineral industry reporting codes have been developed that govern the definition of
782 Behre Dolbear then goes on to name *three different* international

783

-feasibility

784

n context. This flatly contradicts the notion that there is a
clear industry standard in regard to this issue.

409. Furthermore, and importantly, Article 37.2(d) of the Amended Mining Law does
not contain either of the two specific terms - that
Respondent and its experts continually attempt to contrast in their submissions. The study that is

779 Counter-Memorial, para. 157.

780 *Id.*, para. 123.

781 *Id.*, para. 124.

782 Behre Dolbear Report, para. 20 (emphasis added).

783 *Id.*, para. 20.

784 Otto Expert Opinion at 36 *et seq.*

the term Technical Economic Feasibility Study is a technical term that is not defined or even referenced elsewhere in the Amended 1996 Mining Law or in the Mining Regulation.⁷⁸⁶ In fact, this term refers to a generic type of study that is not [even] unique to the mining industry.⁷⁸⁷ Certainly, there is nothing in the Amended Mining Law which indicates that the required study should meet any of the *various* that are referenced by Respondent and its experts.

- b. Even if the Amended Mining Law were concerned with NI 43-101 reporting standards (which it obviously is not), the PFS is a type of

410. In light of the foregoing, it is clear that the Amended Mining Law does not intend to require s -101 regulations to which Pac Rim was subject for purposes of public reporting, and to which Behre Dolbear refers in its expert report.⁷⁸⁸ It would be illogical in the extreme to think that the requirement of Article 37.2(b) refers to such regulations, given that mining companies operating in El Salvador cannot all be expected to be trading on the Toronto Stock Exchange, and may not be publicly traded at all.

411. -Feasibility Study regulations set out in NI 43-101 such as the El Dorado PFS *is a type of "Feasibility Study*. As indicated in the Toronto Stock Exchange (TSX) Mining Disclosure Standards:

Feasibility Studies (including Pre-Feasibility Studies) are undertaken for the purpose of determining whether or not a mineral deposit can be developed into a viable operating mine. Such a

⁷⁸⁵ Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001), art. 37.2(d) (CLA-5).

⁷⁸⁶ Second Williams Expert Report at 24.

⁷⁸⁷ *Id.* at 25.

⁷⁸⁸ Behre Dolbear Report, para. 23.

study is necessary to establish the presence of reserves on a property.⁷⁸⁹

412. Thus, as Claimant pointed out both for purposes of how that term is generally understood outside the context of public disclosure requirements, as well as for purposes of how it is understood under NI 43-101.⁷⁹⁰ This conclusion is confirmed by Dr. Neal Rigby, a mining engineer with approximately 40 years of experience in the international mining industry.⁷⁹¹ As Dr. Rigby points out in his Expert Report:

413. Behre Dolbear adopted the incorrect and indeed in my view the ill-conceived position that a PFS is not a Feasibility Study (FS) and therefore this cannot be used to support an application for the Exploration Licenses to be converted to an Exploitation Concession⁷⁹². This is simply incorrect. _____[I]t is a fundamental requirement as stipulated by all International Resource and Reserve Reporting Codes to have as a minimum
n economically mineable, and a PFS must contain a

⁷⁸⁹ Canadian TSX Mining Disclosure Standards at 4 (June 2004) (C-828).

⁷⁹⁰ *Dictionary of Mining, Mineral and Related Terms*, 1167 (2d ed. 1996), as published by the American Geological Institute in cooperation with the Society of Mining, Metallurgy, and Exploration (SME) and the U.S. Department of the Interior Studies gathering together the information that is required for decision whether and how to proceed further. A study of this kind may vary from a preliminary estimate of mill cost to a very complete survey that may include a market analysis, mining plan with ore grade and mining cost, metallurgical testing, process development, plans for the mill, cash -218).

⁷⁹¹ Dr. Rigby began working for SRK Consulting, Inc. (SRK) starting in 1978 and served as the SRK Global Group Chairman for 15 years (1995-2010). SRK comprises over 1,600 professionals internationally in 50 permanent staffed offices in 23 countries on six continents, offering expertise in a wide range of mineral resource and engineering disciplines. Dr. Rigby undertook a three day in-country visit to El Salvador and visited the El Dorado Project Site on February 11, 2014, led by Mr. William Gehlen, in-country manager for Pac Rim and a seasoned exploration geologist who gave an overview of the El Dorado Project. Dr. Rigby inspected drill core in the extensive core sheds and undertook an inspection of the site, including the area where the processing plant and other surface facilities were to be located and the area of the proposed Tailings Stor *See Rigby Expert Report at 1.*

⁷⁹² Behre Dolbear Report, paras. 18a-e.

detailed engineering and economic analysis to demonstrate that identified mineral resources can be converted to and reported as reserves.⁷⁹³

c.

on whether it complied with the substantive requirements of the
Amended Mining Law

414. As noted above, there is no indication in the Amended Mining Law of what should be the required content of the study mentioned in Article 37.2(d). However, Respondent itself has pointed out in the Counter- 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

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purpose of the Article 37.2(d) requirement is to demonstrate that a particular mine plan is technically and economically feasible, which accords with the plain language of the relevant provision.

415. carried
out ⁷⁹⁵
purposes of NI 43-101, whi
has the highest degree of confidence
relevant CIM standards:

- **Proven mineral reserve is the economically mineable part of a measured mineral resource demonstrated by at least a Preliminary Feasibility Study.** This Study must include adequate information on mining, processing, metallurgical, economic and other relevant factors that demonstrate, at the time of reporting, that economic extraction is justified.
- **Application of the proven mineral reserve category implies that the qualified person has the highest degree of confidence** in the estimate with the consequent expectation in the minds of the readers of the report. The term should be restricted to that part of the deposit where production planning is taking place **and**

⁷⁹³ Rigby Expert Report at 2 (emphasis added).

⁷⁹⁴ Counter-Memorial, para. 55 (emphasis added).

⁷⁹⁵ -843).

for which any variation in the estimate would not significantly affect potential economic viability.⁷⁹⁶

- As clearly demonstrated by this definition, the PFS does not just show that

area;⁷⁹⁹ and Article 18 of the Regulation, which provides that: ... the demonstration of the deposit(s) to which Article 23 of the Law refers will be done with documents that are consistent or in agreement with the activities and studies that were performed during the validity of that License and the final report to which the preceding Article refers.⁸⁰⁰

418. As Mr. Williams correctly emphasizes, Pac Rim was entitled to have its concession application judged on the basis of whether it complied with the objective requirements of the law.⁸⁰¹ Yet, even in the context of this arbitration, neither Respondent nor its experts have attempted to argue that the PFS failed to meet any of the legal requirements mentioned above.

419. Instead, Behre Dolbear has attempted to challenge the content of the PFS based is clear that the PFS *met* those criteria. Behre Dolbear was only able to conclude differently because it did not actually review all of the relevant information, which presumably was not provided to it by Respondent. As Mr. Rigby notes:

420. The McIntosh Engineering Conceptual Underground Mine Design & Cost Estimate (herein referred to as McIntosh Report) addresses in quite considerable detail essentially all of the items that Behre Dolbear identifies as being material omissions from the not have access to the McIntosh report, which is indeed unfortunate. If Behre Dolbear had

⁷⁹⁹ Second Williams Expert Report at 27.

⁸⁰⁰ Second Williams Expert Report at 27.

⁸⁰¹ Second Williams Expert Report at 30 (When the requirement of Article 37.2(d) to submit a Technical Economic Feasibility Study is considered in the light of the objectives of the Amended 1996 Mining Law - including the stated necessity of establishing standards that are up to date, that promote the exploration and exploitation of mineral resources, that are convenient for investors and that facilitate new job opportunities³⁹ - it is apparent that the Article must be interpreted to require reasonable compliance with the above mentioned substantive requirements, but no more.

undertaken a detailed review of this report then they could not possibly make and defend the many statements of material deficiency that they did make in relation to the PFS.⁸⁰²

421. Furthermore, Dr. Rigby himself carried out a detailed review of the PFS and the most fundamental elements of a mining project had been frozen or fixed for purposes of the PFS: (a) the Mineral Resource, (b) the Mine Plan, (c) the Metallurgical Process, (d) the Ore Reserves, (e) the TSF and (f)⁸⁰³ Consequently, and in light of the substantial detail included in each of these aspects of the design work, the PFS provided a sufficient basis to make a decision to move forward with the project, and *indeed Pac Rim itself made that decision at the time.*⁸⁰⁴

422. Mr. Rigby reached the following conclusions with regard to the alleged deficiencies in the PFS identified by Behre Dolbear:

- **General Mine Design**. The Behre Dolbear report states when referring to the general mine design described in the McIntosh Report that specific yearly production from the veins by level and location, which would be⁸⁰⁵ This statement is incorrect. Dr. -1 of the McIntosh Report clearly shows the development advance and stopping by level on a detailed monthly basis, color coded for Production Year 1. Figure 7-2 shows the same on an annual basis for the Life-of-⁸⁰⁶
- **Technical Studies** s such as labor rates, engineering trade off studies, baseline studies such as hydrology, and field work data to support the various technical projects, ventilation/electrical reticulation plans and their design bases are not included in the pre-feasibility

⁸⁰² Pre-Feasibility Study (C-9). In fact, as Mr. Gehlen has explained in detail in his witness statement, all of the technical reports associated with the PFS were provided to Respondent and were also made available to Behre Dolbear upon request.

⁸⁰³ Rigby Expert Report, para. 9.

⁸⁰⁴ See Third Shrake Witness Statement, para. 2.

⁸⁰⁵ Behre Dolbear Report, para. 31.

⁸⁰⁶ Rigby Expert Report, para. 63 (citing McIntosh Report, Conceptual Underground Mine Design & Cost Estimate, dated 26 Jan 2005, pg. 7-3, Figure 7-1: Production Schedule Year 1 (C-588), and McIntosh Report, Conceptual Underground Mine Design & Cost Estimate, dated 26 Jan 2005, pg. 7-4, Figure 7-2: Annual Production Schedule Life-of-Mine (C-588)).

study⁸⁰⁷
hydrogeological assessment was carried out by Vector Engineering, which formed⁸⁰⁸

- **Capital and Operating Costs.** The Behre Dolbear report claims that details supporting the estimation of capital and operating costs are not included in the

items mentioned by Behre Dolbear were all included in the McIntosh Report,⁸⁰⁹

Mines could have had no basis to reject that study, even if the arbitrary and post-hoc criteria relied upon by Behre Dolbear could have been relevant to its determination. As set out at greater length above, the PFS was prepared by a highly-qualified and hand-selected team of industry profession consider[ed] **all aspects** of a proposed operation at the Minita deposit, including an underground mine plan, metallurgy and processing, tailings impoundment, environmental matters, and capital and operating costs, [as well as] offer[ing] an economic evaluation of the Minita reserves⁸¹⁰

e. The number of deposits studied in the PFS

423. Respondent has repeatedly alleged that Pac Rim did not comply with the

2008;811

area of the concession.⁸¹² These allegations are irrelevant and misleading. First, as set out at length above, Respondent agreed in August 2005 that Claimant had provided sufficient proof of economic mining potential on the 12.75 square kilometer application area to justify a concession

⁸⁰⁷ Behre Dolbear Report, para. 32.

⁸⁰⁸ Rigby Expert Report, para. 65 (citing SRK Consulting Prefeasibility Study, El Dorado Project, El Salvador, January, 2005 (C-9); Vector Colorado Tito Tailings Storage Facility Pre-Feasibility Study (Aug. 2004) (C-590)).

⁸⁰⁹ Rigby Expert Report, para. 68.

⁸¹⁰ Press Release, Pacific Rim Mining Corp., Low Operating Costs Cited in Positive Minita Gold Deposit Pre- Feasibility; Definition Drilling Continues at South Minita, dated 27 Jan. 2005 (C-250).

⁸¹¹ Counter-Memorial, para. 121.

⁸¹² *Id.*, para. 118.

of that size. The question of whether the PFS studied every deposit within that area is simply irrelevant to the technical or economic sufficiency of the study, as well as to the question of whether it met the requirement of Article 37.2(b).

424.

and Annual Reports and other communications submitted to the Department of Mines, the company discovered the South Minita deposit in 2004 and, given its high grades and proximity to Minita, wanted to include that deposit in the mine project. Consequently, the company carried out definition drilling on the deposit, prepared a resource calculation and, in 2006, began preparing a feasibility study that would cover the expanded project. In 2007, Pac Rim discovered the Balsamo and Cerro Alto deposits, which were also in close proximity to Minita and South Minita, and also of high grade. Therefore, the company again prepared a resource calculation for these deposits and began to prepare a new feasibility study that would cover their inclusion in the mine project.

425. As Messrs. Shrake and Gehlen have explained at length in their witness finish, due to the fact that the project was never permitted), was simply irrelevant to the conclusions that were reached in the PFS.⁸¹³ The PFS determined that the Minita deposit was economically mineable with a high degree of confidence, and that the operating costs for the mine would be in the lowest quartile worldwide.⁸¹⁴ The fact that Pac Rim classified *more* mineral resources on the project site after the date of publication of the PFS only indicates the efforts. Notably, Pac Rim was required to take undertake these efforts in order to maintain its market capitalization and be prepared to put the mine into development in a timely fashion (as required under the Amended Mining Law) once the permits were issued. Moreover, the inclusion of new reserves into the mine project (through completion of new feasibility studies) would have increased the value of the project at the development stage, thereby decreasing the chance of a

⁸¹³ Third Shrake Witness Statement, para. 15; Gehlen Witness Statement, paras. 136-142.

⁸¹⁴ Press Release, Pacific Rim Mining Corp., Low Operating Costs Cited in Positive Minita Gold Deposit Pre- Feasibility; Definition Drilling Continues at South Minita, dated 27 Jan. 2005 (C-250).

extended the life of the mine.⁸¹⁵

426. Furthermore, as Pac Rim clearly informed the Department of Mines in 2004 (and
The studies related to a mining project are largely iterative and
change according to the costs, metal prices, operating upgrades, available technology and
exploration program results⁸¹⁶ Thus, even if Pac Rim had not discovered new deposits between
2004 and 2007 that could have been incorporated into its mine project, it would nevertheless
have needed to update the costing information in the PFS prior to commencement of
concession.⁸¹⁷ Respondent certainly cannot attempt to place blame on Pac Rim for continuing to
update the feasibility information for the project while the permits were pending, as this merely
reflected responsible industry practice
project. On the other hand, Respondent fails to explain how it could have had any impact
whatsoever on the question of whether or not Pac Rim met the requirement of Article 37.2(d).

**C. Respondent Is Barred From Arguing That Pac Rim Had No Rights to
Deposits Located in the Pueblos, Guaco, Huacuco and Santa Rita
Exploration License Areas**

427. claims based on deposits
area and the El Dorado concession application area.⁸¹⁸ Respondent also claims that Claimant
⁸¹⁹ Once again,
faith, and must be rejected.

⁸¹⁵ Third Shrake Witness Statement, para. 20.

⁸¹⁶ Request to Convert the El Dorado Norte and El Dorado Sur Licenses into an El Dorado Exploitation Concession, dated 22 Dec. 2004 (C-181).

⁸¹⁷ Third Shrake Witness Statement, n.39.

⁸¹⁸ Counter-Memorial, para. 183.

⁸¹⁹ *Id.*, para. 191.

1. Pac Rim Applied for the Pueblos, Guaco and Huacuco Exploration Licenses at the Suggestion of the Department of Mines, and the Licenses Were Duly Granted and Never Revoked

428. As indicated above, Pac Rim incorporated DOREX and applied for the Pueblos, Guaco and Huacuco Exploration Licenses at the suggestion of the Department of Mines, and specifically because the Department considered after having initially opined to the contrary that the entire requested concession area needed to be within the area of the EIS.⁸²⁰ On the other because Pac Rim had repeatedly informed them that the company was very interested in continuing to drill the Nance Dulce deposit, where it had recently made a significant discovery that it believed had potential to be included in the mine plan in the near future.⁸²¹ Therefore, the Department suggested that a new exploration license could be sought to allow Pac Rim to continue to develop this deposit.⁸²² Furthermore, the Department of Mines inspected the properties; granted the Pueblos, Guaco and Huacuco Exploration Licenses;⁸²³ a of surface canons in relation to the licenses every year thereafter.

⁸²⁰ Email from Fred Earnest to Tom Shrake, dated 8 Nov. 2004 (C-392); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 Nov. 2004 (C-393); El Dorado Project Report for the Month Ending 28 Feb. 2005 (C-397); El Dorado Project Report for the month ending 30 Apr. 2005 (C-290); E-mail from Fred Earnest to Tom Shrake, dated 18 Mar. 2005 (C-713); Letter from Fred Earnest to Francisco Perdomo Lino, dated 28 Sept. 2005 (C-675); Letter from Fred Earnest to Francisco Perdomo Lino, dated 29 Sept. 2005 (C-677).

⁸²¹ 2004 Annual Report of the Exploration Work Done by Pacific Rim El Salvador in El Dorado, the abovementioned sites (Minita Sur and Nance Dulce - 101); Email from Fred Earnest to Tom Shrake, dated 8 Nov.2004 can convert the area outside of the EIS study area, but within the license area. This presents two options -392); *see also* Gehlen Witness Statement, para. 114.

⁸²² Email from Fred Earnest to Tom Shrake, dated 8 November 2004 (C-392); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 Nov. 2004 (C-393); El Dorado Project Report for the Month Ending 28 Feb. 2005 (C-397); El Dorado Project Report for the month ending 30 Apr. 2005 (C-290); E-mail from Fred Earnest to Tom Shrake, dated 18 Mar. 2005 (C-713); Letter from Fred Earnest to Francisco Perdomo Lino, dated 28 Sept. 2005 (C-675); Letter from Fred Earnest to Francisco Perdomo Lino, dated 29 Sept. 2005 (C-677).

⁸²³ Notice from MINEC, Guaco, dated 12 Sept. 2005 (C-672); Notice from MINEC, Pueblos, dated 12 Sept. 2005 (C-673); Notice from MINEC, Huacuco, dated 12 Sept. 2005 (C-674). MINEC Resolution (Continued...)

429. Had Respondent ever believed that these Exploration Licenses were issued illegally (which Claimant submits that it evidently did not), the Administration would have and (2) pursue a *procedimiento de lesividad* Administrative Jurisdiction Law in order to request their nullification by the appropriate administrative court. Being acts issued in the exercise of governmental authority, and creating rights in favor of DOREX, these Exploration Licenses cannot be unilaterally revoked or denied effect by the Administration, even as a matter of Salvadoran administrative law, and independently of the civil obligations that it owes to Pac Rim under the Investment Law and international law.⁸²⁴

430. As Professor Fernandois concludes:

The foregoing means that the administrative acts are fully final, valid and cause all their legal effects, and it is not possible for the Government to seek to reverse them. Consequently, El Salvador cannot, on its own, declare or consider the exploration permits granted to DOREX as null and void. The only way to challenge this type of administrative act is via the adverse effects proceeding, which the Government failed to exercise or file in a timely manner, as it ought to have done if the alleged defects it now claims actually existed.⁸²⁵

431. In view of the foregoing, and in light of the general principle of good faith,⁸²⁶ Respondent is clearly barred from now claiming that Pac Rim has no legal rights in these license areas based on its made-for-arbitration argument that the licenses were issued illegally.⁸²⁷

No. 205, dated 28 Sept. 2005 (C-43); MINEC Resolution No. 208, dated 29 Sept. 2005 (C-44); MINEC Resolution No. 211, dated 29 Sept. 2005 (C-45).

⁸²⁴ See Second Fernandois Expert Report at 85-90.

⁸²⁵ *Id.* at 90.

⁸²⁶ See, e.g., *Kardassopoulos v. Georgia*, paras. 193-94 (CLA-274); *Southern Pacific Properties*, paras. 81-85 (RL-166).

⁸²⁷ Furthermore, Claimant notes for the record that it is doubtful that Respondent would have succeeded in nullifying these Exploration Licenses before a Salvadoran administrative court, even had it attempted to do so. Respondent offers no support for its claim that the licenses could not be issued to

(Continued...)

2. Pac Rim's Loss of Rights over Santa Rita Is a Result of Respondent's Wrongful Conduct

432. Finally, Respondent argues that Claimant cannot make any claims in respect of
⁸²⁸ Respondent bases

⁸²⁹ This premise is obviously
false since, in fact, President Saca publicly announced

⁸³⁴ Once it became clear that those instructions would not be forthcoming, what had in the past appeared to be inaction by the Administration pending presidential approval, turned into a *decision* (albeit an illegal one) by the Administration *not to act*: in short, a ban on metallic mining activities.

434.

the present dispute and indeed, believed for some time that a resolution would be forthcoming⁸³⁵ but was ultimately unable to do so. Consequently, by the time that the Santa arbitration proceeding. The fact that Respondent refused to renew the license at that time has no bearing whatsoever on the validity of the rights that Pac Rim held in the license prior to the dispute between the parties.

D. Respondent's Third Set of Jurisdictional Objections Are Frivolous

435. Respondent raises the following additional jurisdictional objections, neither of which merits serious consideration:

1. The Claims Are Not Time-Barred

436. -barred rests on two premises, both of which are false. ***First***, Respondent mistakenly alleges (as it did throughout the

-issuance of the environmental permit within the timeframe established by the Environmental Law, *i.e.*, 60 days.⁸³⁶ Claimant has a very hard time believing that El Salvador would expect to be subject to claims before an ICSID Tribunal every time that one of its administrative agencies was unable to rule on the application of a foreign invested entity within 60 days, particularly given that as of December 2004 the date on which the 60-day period for

⁸³⁴ E-mail from Rodrigo Chavez to Tom Shrake, dated 30 Apr. 2007 (C-802).

⁸³⁵ *See, e.g.*, Third Shrake Witness Statement, para. 54, n.102; *see also* paras. 57-62.

⁸³⁶ Counter-Memorial, para. 439.

review of the El Dorado environmental permit expired MARN was facing a backlog of literally *thousands* of applications.⁸³⁷

437. In any event, it is abundantly clear based on the hundreds of documents and ample witness testimony put into the record by Claimant, that the dispute between the parties in

allow the relevant administrative agencies to permit mining projects in the country. Moreover, Claimant notes that MARN was in any event still corresponding with PRES in relation to its application for an environmental permit in December 2008, indicating that the permit had never been denied and

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438. ***Second***, Respon presumption that the statute of limitations established in widely accepted that domestic law statutes of limitations do not apply to claims raised before international tribunals, including ICSID tribunals.⁸³⁹ Moreover, the fact that Claimant has invoked the arbitration provision in the Investment Law (rather than an arbitration provision contained in a treaty, for example), does not change the international character of this proceeding, nor does it constrain this Tribunal to the application of domestic law rules when

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2. The Claims at Issue Do Not Arise under the Amended Mining Law

⁸³⁷ Memorial, para. 272, n. 505 (citing World Bank, *Republic of El Salvador Country Environmental Analysis: Improving Environmental Management to Address Trade Liberalization and Infrastructure Expansion*, Report No. 35226-SV, (20 March 2006)).

⁸³⁸ Letter from Ernesto Javier Figueroa Ruiz to Frederick Earnest, dated 4 Dec. 2008 (C-76); Letter from William Gehlen to Ernesto Javier Figueroa Ruiz, dated 8 December 2008, transmitting *Informe de Respuesta a Nota MARN... Planta de Tratamiento de Aguas* (C-180).

⁸³⁹ See, e.g., *Wena v. Egypt*, para. 106-07 (CLA-235); *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Decision on Rectification of the Award dated 31 Jan. 2001) (CLA-310).

⁸⁴⁰ See, e.g., *Duke Energy Int'l Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28 (Decision on Jurisdiction dated 1 Feb. 2006) (CLA-199).

439. Respondent jurisdictional

⁸⁴¹ This objection is based on the mistaken assertion that Claimant is raising claims before this Tribunal for breach of a mining concession contract, or to request the issuance of a license or concession or obtain some other form of administrative relief.⁸⁴² This is plainly not true. As noted above, it is *Respondent* who is asking this Tribunal to stand in the shoes of a Salvadoran administrative agency or court, and to issue decisions that *could theoretically* have been (but never were) issued by those agencies or courts with regard to the mining rights of PRES and DOREX.

440. Claimant, on the other hand, is asking this Tribunal to award it damages for the Law. There is a clear and well-recognized difference between claims based on administrative entitlements, including concession contracts such as the ones expressly mentioned in Article 7 of foreign investors and their investments.

441. disputes or differences arise among local and foreign investors and the State, regarding the investments made by them ⁸⁴³ se disputes under the ICSID Convention amounts to an international legal obligation. Pursuant to that obligation, Respondent cannot attempt to revoke its consent by relying on provisions of its own domestic law.

E. Respondent's *Ad Hominem* Attacks on Pac Rim Are Gratuitous and Have No Basis in Reality

⁸⁴¹ Counter-Memorial, para. 425.

⁸⁴² Respondent relies heavily upon the language of Article 7(b) of the Investment Law in support of

Claimant is not asking this Tribunal to grant it a concession. Investment Law (CLA-4).

⁸⁴³ Investment Law, art. 15 (CLA-4).

442. Throughout its Counter-Memorial, Respondent engaged in repeated in gratuitous *ad hominem* attacks on Pac Rim and its officers and directors. These diatribes generally fall into two broad categories: (1) unnecessary and unwarranted hyperbole and invective; and (2) mischaracterization or misrepresentation of the factual record. The former appears designed only to obscure and distract from the legitimate claims at issue in this arbitration. The latter appears to be aimed at creating a false impression for the Tribunal about the true state of affairs as it existed at the time.

443. Below are some of the more egregious examples appearing in the Counter-Memorial:

- Salvador failed long before any alleged acts of the Government in 2008: Claimant⁸⁴⁴
- 845
- duty t 846
- 847
- *post hoc* excuses for its⁸⁴⁸
deliberate choice to ignore the
- The Government was very accommodating to Pac Rim for a number of years, and Claimant decided that it could take advantage of that supportive relationship⁸⁴⁹

⁸⁴⁴ Counter-Memorial, para. 225.

⁸⁴⁵ *Id.*, paras. 240-41.

⁸⁴⁶ *Id.*, para. 225.

⁸⁴⁷ *Id.*, para 7.

⁸⁴⁸ *Id.*, para. 102.

⁸⁴⁹ *Id.*, para. 164 (emphasis in original).

•

I requirements, Pac Rim tried

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 requirements⁸⁵⁰

444.

argument in this forum. More importantly, however, Respondent in which Pac Rim sought to pressure and bully the Government and the people of the affected communities to bend to its will has no basis in reality, as amply demonstrated by the evidentiary record set forth above.

F. Pac Rim Did Not Need To Change the Amended Mining Law

445. As noted previously, a -Memorial and expert reports is the unsupported allegation that Pac Rim did not have any rights under the laws of El Salvador, and that the company therefo

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⁸⁵² In fact, as discussed below and supported by contemporaneous evidence,

upon the suggestion of or in collaboration with the Government. Notably, Executive officials never told Pac Rim that it would only get its permits when all the requirements established under

would get our permits when it was politically convenient ,

⁸⁵⁰ *Id.*, para. 164 (emphasis in original).

⁸⁵¹ *See, e.g., Id.*, paras. 106, 120, 164. In yet *another* instance of Respondent misconstruing an otherwise clear statement, Respondent claims in its Counter-Memorial (para. 112) that Claimant

However, a plain reading of the excerpt Respondent quotes plainly demonstrates that Pac Rim was simply acknowledging that the proposed Mining Law had introduced uncertainty into the timing of its permitting ocess however it is uncertain whether the El Dorado Exploitation Concessil will be granted prior to the forthcoming reformation of the El

⁸⁵² Third Shrake Witness Statement, para. 31.

446. The question of mining law reform first arose following the submission of Pac Statements of Mr. Shrake and Mr. Gehlen, Pac Rim worked with the Bureau of Mines regarding the size of the requested concession as well as the interpretation of the surface ownership requirements under the Amended Mining Law.⁸⁵⁴ Recall that with respect to the first matter, that of the concession size, Pac Rim sought the advice of Ms. Navas, who advised the company to reduce the area of the requested concession to fit within the EIS area, and to form a new company to obtain new exploration licenses which would cover the remainder of the originally requested area.⁸⁵⁵ Pursuant to these discussions, the company agreed to reduce the requested concession area to 12.75 square kilometers⁸⁵⁶ and formed Dorado Exploraciones, S.A. de C.V. **DOREX** exploration licenses.⁸⁵⁷ Shortly thereafter, the Department of Mines issued DOREX three exploration licenses (Pueblos, Guaco and Huacuco) covering the remainder of the area of the original El Dorado Norte and El Dorado Sur Licenses.⁸⁵⁸

447. With respect to the latter issue that of surface ownership the company and its Shrake explains, Pac Rim understood that it could reach a workable solution to the matter, just as

⁸⁵³ *Id.*, para. 31 (emphasis partly in original).

⁸⁵⁴ *Id.*, paras. 32-35.

⁸⁵⁵ *Id.*, para. 34 (citing El Dorado Project Report for the Month Ending 28 Feb. 2005 (C-397); El Dorado Project Report for the month ending 30 Apr. 2005 (C-290); E-mail from Fred Earnest to Tom Shrake, dated 18 Mar. 2005 (C-713)).

⁸⁵⁶ Letter from Fred Earnest to Francisco Perdomo Lino, dated 28 Sept. 2005 (C-675); Letter from Fred Earnest to Francisco Perdomo Lino, dated 29 Sept. 2005 (C-677).

⁸⁵⁷ Incorporation of Dorado Exploraciones S.A. de C.V., dated 1 June 2005 (C-671).

⁸⁵⁸ Notice from MINEC, Guaco, dated 12 Sept. 2005 (C-672); Notice from MINEC, Pueblos, dated 12 Sept. 2005 (C-673); Notice from MINEC, Huacuco, dated 12 Sept. 2005 (C-674); MINEC Resolution No. 205, dated 28 Sept. 2005 (C-43); MINEC Resolution No. 211, dated 29 Sept. 2005 (C-45); MINEC Resolution No. 208, dated 29 Sept. 2005 (C-44).

had be

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448. In October 2005, the Department of Mines proposed a legislative amendment to clarify the law and resolve the issue.⁸⁶⁰ However, the Minister of Economy advised the company that, *at President Saca's instruction*, the reform proposal should not be introduced before the *Asamblea* until after the next elections.⁸⁶¹ er the elections in 2006.⁸⁶² Mr. Shrake notes that while the company did not view reform as a necessary step, there were improvements that could be made to strengthen the existing laws:

At that time, we were unsure whether any reform of the mining law would even be necessary to resolve the surface rights issue, but we nevertheless proposed to the Minister of Economy and to the Vice-President that the mining law be reformed for the express purpose of strengthening the relevant environmental protections.⁸⁶³

449. As and above, the *Asemblea* had acted in furtherance of the El Dorado Project on prior occasions and that the operator of the Project had *always*⁸⁶⁴ However, on 1 July

⁸⁵⁹ Third Shrake Witness Statement, para. 33 (citing Email from Marjorie Chavez to Fred Earnest, dated 18 Oct. 2005 (C-292); EIS and Exploitation Concesión Status Memorandu - PacRim ES expects that this issue can be resolved, but is committed to seeking a change in the wording of the law if required to remove the possibility for an improper interpreta

⁸⁶⁰ Letter from Bureau of Mines Director to Eli Valle with Proposed Amendments to the Mining Law, dated 13 Sept. 2005 (R-35); Proposed New Mining Law of El Salvador, Oct. 2005 (C-14); Email from Fred Earnest to Lorena Aceto, dated 3 Nov. 2005 (C-294).

⁸⁶¹ Third Shrake Witness Statement, para. 33 (citing Email from Fred Earnest to Tom Shrake, dated 15 Feb. 2006 (C-295)).

⁸⁶² Third Shrake Witness Statement, para. 33 (citing Project Development Activities, dated May -711)); Memorandum from Tom Shrake to Board of Directors, dated 27 June 2008 (C-742); E-mail from Rodrigo Chavez to Pete Neilans and Tom Shrake, dated 5 May 2007 (C-739).

⁸⁶³ Third Shrake Witness Statement, para. 35 (citing El Dorado Project Weekly Summary for the week ending 2 June 2006 (C- Exploration License to Exploitation Concession pending environmental permit & change of mining law (Plan A) or -711)).

⁸⁶⁴ Memorial, paras. 30-88; Mining Law Debates, dated 11 Dec. 1995 (C-274); Letter from Gina Navas to Robert Johansing, dated 22 Oct. 1998 (C-270); Letter from Robert Johansing to Gina Navas de (Continued...)

2006, MARN Minister Barrera made a public statement opposing mining.⁸⁶⁵ Immediately thereafter, Mr. Shrake flew to El Salvador to meet with various Executive officials, including Minister de Gavidia, Vice President Escobar, and Minister Barrera.⁸⁶⁶ At these meetings, the Salvadoran officials including Minister Barerra unequivocally assured Mr. Shrake that Administration remained supportive of the El Dorado Project.⁸⁶⁷ In particular, Vice President

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450. Shortly thereafter, Minister Barrera and Minister de Gavidia publicly resiled from allow mining and that an administrative agency cannot impede what the law permits:

In a 180-degree turnaround from what he said days ago, Minister of the Environment, Hugo Barrera, along with the Minister of Economy, Yolanda de Gavidia, reached out to mining companies seeking precious materials in the country to allow them to carry
Barrera made it clear that
in the country there is no express prohibition of mining projects,
only a regulation that dictates the conditions on how these
companies must operate.⁸⁶⁹

Hernández, dated 26 July 1999 (C-331); Letter from Gina Navas de Hernández to Roberto Johansing, dated 26 August 1999 (C-293); *Decreto* No. 456, adopted on June 28, 2001, published in the *Diario Oficial*, Tomo 352, on 31 July 2001 (CLA-211); *Decreto* No. 475, adopted on July 18, 2001, published in the *Diario Oficial*, Tomo 352, on July 31, 2001 at pp. 20-34, amended the 1995 Mining Law (CLA-212).

⁸⁶⁵ Memorial, para. 273.

⁸⁶⁶ Second Shrake Witness Statement, paras. 117-

Escobar attende

we were surprised to arrive at the office of [Minister] Barerra [to] find the Vice-President there for our meeting. The meeting was very productive -
299).

⁸⁶⁷ Second Shrake Witness Statement, paras. 117-19.

⁸⁶⁸ Email from Fred Earnest to Jose Mario, dated 12 July 2006 (Mr. Earnest noted that the Vice couple of people from MARN to visit [a -299).

⁸⁶⁹ See, e.g., A. Dimas and K. Urquilla, *Hugo Barrera opens the door to mining*, EL DIARIO DE HOY (23 July 2006) (emphasis added) (C-300); Rodrigo Quezada, *Mining Exploitation: The Conflict Over Gold*, EL FARO (19 June 2006) We are not here to ban, but

to regulate
(Continued...)

451. Shortly after indicated that MINEC would be bringing in a consultant, Mr. Manuel Pulgar, to conduct a process.⁸⁷¹ g the legal reform new exploration licenses

⁸⁷² Pac Rim did not understand this ing process, and Pac Rim was supportive of

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452. Indeed, Pac Rim and other mining company representatives participated in a meeting with Mr. Pulgar in the summer of 2006. Following this meeting, Mr. Earnest wrote to Mr. Pulgar to ask him for a copy of the report that Mr. Pulgar was preparing for the Government environmentally responsible mining industry:

The big question we have is what can we do to make positive changes that will facilitate the development in the country of a new industry that is accountable?

[

-395);
Rodrigo Quezada, *I believe that the communities can benefit from developing a mine*, EL FARO (19 June 2006) (C-410); Ricardo Valencia, *Mining Law to be Reformed*, LA PRENSA GRAFICA (23 July 2006) (C-409); *They will seek reform of the Mining Act*, EL DIARIO DE HOY (24 July 2006) (C-301).

⁸⁷⁰ Second Shrake Witness acknowledgment of the record, the Counter-

(Counter-Memorial, para. 209). However, absent from the Counter-

Minister Barerra, and Vice President Escobar.

⁸⁷¹ Third Shrake Witness Statement, para. 45; *see also Reform Law on Hold*, LA PRENSA GRÁFICA dated 14 June 2007 (C-741).

⁸⁷² E-mail from Fred Earnest to Tom Shrake, dated 8 July 2006 (emphasis added) (C-716).

⁸⁷³ Third Shrake Witness Statement, para. 45.

Pacific Rim has proposed more regulation of the mining industry. It is normal and we are accustomed to higher standards and the corresponding government oversight. Indeed, we want to see standards rise so that all companies have to operate at a level closer to our standards. We are willing to work with the Government in the development of a new mining law that guarantees this result. Please let me know of anything we can do to assist and facilitate the achievement of this goal.

I do not know if it is possible or not, but I would like a copy of your report to the Government or at least a copy of the executive summary. I look forward to the opportunity to talk more on your next visit to El Salvador.⁸⁷⁴

453. As the contemporaneous record demonstrates, over the following months, the company worked collaboratively with MINEC *at the Government's request* in seeking a reform to the Amended Mining Law.⁸⁷⁵ However, contrary to what Respondent has consistently alleged,⁸⁷⁶ the reform supported by Pac Rim was aimed primarily at *increasing* and not decreasing the obligations of the private sector, as well as at *increasing* capacity to regulate the sector.⁸⁷⁷ At the same time, anti-mining NGOs promoted a bill to ban mining altogether, which was ultimately championed by far-left members of the FMLN.⁸⁷⁸

⁸⁷⁴ Letter from Fred Earnest to Manuel Pulgar, with copy to Tom Shrake, dated 25 July 2006 (C-719) (emphasis added).

⁸⁷⁵ See, e.g., Memorandum from Tom Shrake to Pacific Rim Mining Board of Directors, dated 22 The government continues to work on changes to the mining law and has openly sought our input -720); E-mail from Pete Neilans to Sandra Orihuela, dated 7 Nov. 2006 Pacific Rim has established a good working relation with the government and as such has been (C-721).

⁸⁷⁶ See, e.g., Counter-
tried to change the law to lessen the requirements and remove the Bureau of Mines and landowners from

⁸⁷⁷ See, e.g., Email from Tom Shrake to Yolanda de Gavidia, dated 14 July 2006 laws to protect the environment. I have suggested changes to the mining law that help accomplish these -435); Memorandum from Tom Shrake to Pacific Rim Mining Board of Directors, dated 22

reducing the permit burden for exploration projects. These changes are all in an effort to initiate environmentally sound minin -720); Pacific Rim Mining Corp. 2008 Annual Report at 7- (Continued...)

454. Throughout 2006 and 2007, the company continued to engage with the Saca Administration particularly with MINEC and Vice President Escobar, who continued to indicate that they supported legal reform of the Amended Mining Law, while also affirming that they were responsible for upholding the existing laws.⁸⁷⁹ Mr. Shrake explains that Pac Rim came to understand that legal reform was going to be a necessary step due to political considerations:

By this time, it appeared that a full-scale legal reform had become a necessary step before our project could go forward: however, this was not because of legal obstacles facing us under the existing mining law, but because of (1) political challenges which the Administration believed they would face if they granted us a permit without showing that the legal framework had been strengthened,⁸⁸⁰ and (2) a general consensus among stakeholders that the mining regime was not ideal and indeed should be updated and strengthened. Pac Rim was one of the leading stakeholders, and, as I have already indicated, we were fully on board with the idea of making comprehensive reforms to the law in line with

law that will strengthen regulation of the industry, requiring stricter environmental standards and -33).

⁸⁷⁸ See, e.g., *They will seek reform of the Mining Act*, EL DIARIO DE HOY (24 July 2006) (C-301); *Congress considers ban on mining while reform under debate – El Salvador* (17 Oct. 2006) (C-710); E-mail from Barbara Henderson to Tom Shrake *et. al*, dated 19 Oct. 2006 (C-722).

⁸⁷⁹ Third Shrake Witness Statement, para. 42; Edgardo Rivera, *Unauthorized Mines Investigated*, EL MUNDO (7 Nov. 2006) rred to the legislative decree recommending that the Executive Branch prohibit mining exploration. since there are current laws that allow exploration concession -206); E-mail from Ro

had, regarding the changes in the mining law. She only stressed that 1% of the royalties be used for the closure of the mine. Additionally, she wants to eliminate the prerogative that the current law has of -

727); E-suppose[d] to be a half- -728).

⁸⁸⁰ See, e.g., Email from Fred Earnest to Jose Mario, dated 12 July 2006 expressed her general optimism that this will all work out for us and El Salvador, however, she reiterated that we must stay off the radar screen as much as possible and not do anything to jeopardize the -299); E-mail from Pete Neilans to Sandra Orihuela, dated 7 Nov. 2006

-721); Email from Tom Shrake to Mark Klugmann, dated 18 May 2007 (C-306); Email from Fred Earnest to Tom Shrake, dated 15 Feb. 2006 (C-295).

those that we understood to be desired by MINEC, MARN, and the general population.⁸⁸¹

455. In view of the foregoing, and as discussed above, Pac Rim also consulted with several prominent political and public relations consultants to help the company participate in the legislative reform and to engage in a nationwide campaign to disseminate information about Project and mining industry.⁸⁸²

⁸⁸³ which would in turn depend upon our ability to

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456. On 22 November 2007, the PCN party (Partido de Concertación Nacional) presented a mining law reform bill to the *Asamblea*.⁸⁸⁵ Although company officials did not participate directly in discussions with the PCN about the bill, the draft did contain input from

⁸⁸⁶ While this bill was working its way through the *Asemblea*, President Saca reneged on his earlier statements of support to Pac Rim and its

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Vice-President indicated that the government understands the importance of the project and is pleased with the strength that the Pacific Rim team brings to the country. Tom proposed that the mining law need[s] to be improved to provide stronger environmental requirements. A task force will be formed with Yolanda Gavidia as the chair -296); Letter from Fred Earnest to Manuel Pulgar, with copy to Tom Shrake, dated 25 July 2006 (C-719); Letter from Tom Shrake to Yolanda de Gavidia, dated 13 June 2006 (C-15)).

⁸⁸² See also Third Shrake Witness Statement, para. 38-43.

⁸⁸³ E- Neither MARN nor Yolanda de Gavidia will take any decision regarding permits, until they received instructions from the president (emphasis added) (C-802); E-

it is clear that her margin of man[e]uver is not very big. She is still waiting for instructions of her superiors added) (C-727).

⁸⁸⁴ See, e.g., E-mail from Rodrigo Chavez to Pete Neilans and Tom Shrake, dated 5 May 2007 -mining but worried about the socia -739); E-mail from Pete Neilans to Tom Shrake, dated 18 As discussed, the mining law will be introduced when the President is on board. The most recent date for introduction, next week, will likely pass (again) as we have not been summoned to present -740); Email from Tom Shrake, dated 14 Aug. 2007 (C-307).

⁸⁸⁵ Motion of the Members of the PCN to Issue a Mining Law, dated 22 Nov. 2007 (C-743).

⁸⁸⁶ Third Shrake Witness Statement, para. 47.

advisors publicly announced that he personally opposed granting mining permits.⁸⁸⁷ The

after is demonstrated to me through studies from the Ministry of the Environment, and if the Minister of Economy shows me that gold can be

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457. As testified by Mr. Shrake in his Third Witness Statement and confirmed by the Expert Reports of John Williams and Arturo Fernandois, Pac Rim had rights under the substantive legal framework irrespective of any legal reform undertaken by El Salvador.⁸⁸⁹

d strengthen its mining law

and cooperate with the Government which it viewed to be a partner in its efforts to develop a mine at El Dorado one that would be

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IV. DAMAGES AND QUANTUM

458. Claimant submits that Respondent is liable for \$284 million in damages (including prejudgment interest) for breach of its obligations under the Investment Law. This valuation is based on two expert reports prepared by FTI Consulting applying well accepted industry approaches (the income and market-based methods) for determining the value of gold mines such as the El Dorado project.

459. valuation expert, Navigant

legal issues.⁸⁹¹

on the First FTI Expert Report, Navigant has

⁸⁸⁷ *President of El Salvador Urges Caution Before Mining Exploitation Projects* (11 Mar. 2008) (C-1).

⁸⁸⁸ *The Executive Continues to Study Mining Issue*, ELSALVADOR.COM (12 Mar. 2008) (R-125).

⁸⁸⁹ Third Shrake Witness Statement, para. 31; Second Williams Expert Report at 7.

⁸⁹⁰ Letter from Fred Earnest to Manuel Pulgar, with copy to Tom Shrake, dated 25 July 2006 (C-719).

⁸⁹¹ Navigant Expert Report, para. 192.

do by Claimants.⁸⁹²

Navigant does not provide a reasoned conclusion as to the value of the Project.

460. T
a circular argument made by it and Respondent that, because Claimant allegedly did not meet its burden to establish liability, there can be no compensation.⁸⁹³ Despite the facile and obvious damages issue.⁸⁹⁴ In particular, Respondent cloaks this repetitive argument in the allegation of lack of causality (as addressed in **Section A** below). However, if one were to assume that the it is the objective of this part of the Reply to assess the damages owed to Claimant. To reiterate merits arguments in this portion of the Reply is simply repetitive and confuses the issues on which the Tribunal must decide to determine the correct damages.

461. As discussed below in **Section B**, there remains a disagreement between the parties concerning the applicable law in relation to the damages standard. In addition, even though there is agreement that Salvadoran law is relevant, the parties disagree on what standard should be applied under Salvadoran law. The standards proposed by Respondent (that damages are limited to either 125% of the declared tax value, or the amount of investment registered with the National Investment Office (ONI)) are completely rejected by Professor Fermandois as being incorrect readings of Salvadoran law. If one correctly accepts that the Investment Law should be

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Report

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First FTI Expert

para. 5.

See Navigant Expert Report,

⁸⁹⁴ In fact, Respondent and Navigant spend a significant part of the Counter-Memorial and its report repeating the merits defenses of Respondent. *See* Counter-Memorial, paras. 334-45, 351-53, 358, 361, 367, 368, 375, 414-15; Navigant Expert Report, paras. 65-93, 184-92. In one part of its argument, Navigant actually makes factual allegations of security fraud (related to matters that have only come into that of an independent expert valuing damages. *See* Navigant Expert Report, paras. 184-92.

interpreted consistently with international law, the customary international law standard (as embodied in the *Chorzów Factory Case* and the ILC Articles) remains the correct standard for the Tribunal to apply to determine the fair market value of the El Dorado Project.

462. The quantum of damages is determined by FTI using two well-accepted methodologies as reviewed in **Section C** methodology, FTI has valued the Minita Reserves to be in a range between \$56.2 million and \$70.9 million. To value the resource deposits, FTI has based its valuation on two methods. First, it has created an integ and second, it has refined its application of the Comparable Trading Approach (based on the Cerro Negro property comparable). Based on a 75/25 weighting, respectively, FTI estimates that the value of the El Dorado Resources falls within a range between \$182.9 million and \$205 million.

463. FTI has also reviewed additional evidence of the significant value of the El the valuation date, a private placement in 2008, and an independent report prepared by ScotiaCapital in October 2007. Even though these valuations are shown by FTI to not be an appropriate base on which to value El Dorado, they certainly put paid to Respon

Section D sets out the appropriate prejudgment interest

A. El Salvador's Unlawful Conduct Plainly Caused the Damages Claimed

464.

of its investment. The causation of damages could not be any clearer. Claimant does not dispute

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s not proven

⁸⁹⁵ Counter-Memorial, paras. 336-41.

⁸⁹⁶ is demonstrably

acts (and failures to act) and the damages it has incurred.⁸⁹⁷ Moreover, Respondent has not supported its position by arguing, as is typically done, that the injury is indirect or too remote.⁸⁹⁸ Respondent has simply not provided any contrary evidence to rebut the conclusion that [redacted] (with respect to the EIS and the Exploitation Concession) [redacted] *de facto* ban in March 2008, and thus resulted in the losses for which Claimant is now seeking compensation.

465. [redacted] position when it alleges that

2007.⁸⁹⁹ [redacted] ⁹⁰⁰ demonstrate the undeniable fact that the *de facto* illegal ban by the President occurred in March 2008 and represented the ultimate barrier to the possibility of Claimant being properly granted the Exploitation Concession. It was the 2008 moratorium that resulted in the complete diminution of the value of the El Dorado project that is the subject of Claimant's [redacted] ⁹⁰¹

466. Claimant reasonably expected, based on the conduct and representations of Respondent up to March 2008, that PRES would be granted the Exploitation Concession if it acted in conformity with the law.⁹⁰² What Respondent would like the Tribunal to conclude is

⁸⁹⁶ *Id.*, para. 337.

⁸⁹⁷ Memorial, para. 644.

⁸⁹⁸ Counter-Memorial, para. 338.

⁸⁹⁹ Counter-Memorial, paras. 342, 361 (bullet 2). Respondent also seems to be remaking its jurisdictional arguments on this point and ignoring the determinations of the Tribunal in its Decision on Jurisdiction, at para. 3.44.

⁹⁰⁰ *See* Memorial, sec. II(I) .

⁹⁰¹ Although neither Claimant nor FTI are not relying on a stock valuation, the devaluation of PRMC stock was dramatic after the announcement, confirming that the market understood the dire effect of the statements had an extr

para. 55; Shrake Second Witness Statement, para. 136.

⁹⁰² Memorial, paras. 618, 628; First Colindres Witness Statement, para. 123.

that Claimant should not be permitted to rely on Salvadoran Law in forming its expectations.

causality should accordingly be rejected as unsubstantiated.

467. Furthermore, other examples of issues which Respondent offers as defenses to damages, after making the same arguments as defenses to liability, include (and have already been addressed fully above):

- Respondent alleges that Pac Rim lacked valid mining rights unrelated to any alleged act of El Salvador. And in particular, Respondent alleges that:⁹⁰³
 - The Exploitation Concession was not granted due to Law, including the requirements to acquire an environmental permit;
 - The PFS only addressed the Minita deposit;
 - Claimant had no right to exploit

market value determination is predicated *i.e.*, what was the fair market value of El Dorado but for the illegal actions of El Salvador.⁹⁰⁵ credibility and should be rejected.

B. Principles of Damages Applicable in this Arbitration

469. The parties plainly disagree on the applicable law of this arbitration,⁹⁰⁶ and these arguments will not be repeated in this section of the Reply. As applicable to damages, the

Investment Law and the Constitution of El Salvador and that these laws are consistent with international law. Thus, the parties appear to agree to the extent that the Investment Law and Salvadoran law should be applied. Again, their disagreement is focused on what is the substantive content of Salvadoran law, and in particular what are the correct principles of damages under that law.

470. Thus, with respect to the standard under Salvadoran law, while it concedes that the Investment Law and the Constitution of El Salvador are consistent with international law, it then erroneously points to the Salvadoran Law of Expropriation and Occupation of Properties as placing a cap of compensation at 125% of the value declared to the tax authorities, and then relies on the Investment Law alleging that only the investments registered with the National Investment Office (ONI) may be recovered.⁹⁰⁷ Professor Fernandois has reviewed the

⁹⁰⁵ Counter-Memorial, para. 344.

⁹⁰⁶ See Memorial, Sec. III; Counter-Memorial, Sec. IV(B). In particular, Respondent has objected (Counter-Memorial, paras. 357-61) that international law (such as the standard relating to damages) should apply in the absence of a specific Salvadoran law (paras. 405, 407, 426), ICSID Convention Article 42(1) indicates that, at minimum, international law standards will apply where there are no applicable national law standards, and thus will assure that Salvadoran law standards are consistent with international law.

⁹⁰⁷ Counter-Memorial, paras. 350-53. Although its position is difficult to follow, it appears that Respondent and its Salvadoran Law expert do not disagree that

Respondent then states (at para. 352; Tercero Export Report, para. 62) that Pac Rim would be identified. (Continued...)

Ayala/Fratti de Vega and Tercero expert reports on these matters and concluded that they have simply a

Expropriation and Occupation of Properties, in rejecting the 125% limitation proposed by Respondent Professor Fernandois states that:

of liability of the Government due to illegal action such as the one in question sectoral legislation specifically applicable to expropriation, in the Salvadoran case the Law of Expropriation and Occupation of Properties by the Government does not apply. Indeed, the rules of such law only apply in cases of formal expropriation in accordance with its own provisions.⁹⁰⁸

471.

limited by the amount it reported to ONI. In reviewing the Ter issue, Professor Fernandois concludes that:

A simple reading of these laws shows that the legal quality of the investment is not subject to the requirement of recordation. There is no mention of such a circumstance. The criterion that defines the concept is actually the materiality, the realization of the investment.

In sum, a literal interpretation of the law reveals that prior registration is not required in order for investments to be protected by the law.

A logical conclusion derived from the foregoing is that registration cannot serve as the exclusive parameter for determining the value of an investment. If the law allows investments to remain unregistered, then it would logically reject registration as a means of limiting calculation of the value of a certain investment. We have already sufficiently explained that the legal criterion is that of materiality, such that, in the event of a controversy, it is pertinent to *specifically* verify the amount of the actual investment and the damage sustained by the investor, without said registration having the substantive effect of limiting said material concept.⁹⁰⁹

recover the amounts legitimately invested that Pac Rim could prove and that were registered

⁹⁰⁸ Second Fernandois Expert Report, at 99.

⁹⁰⁹ Second Fernandois Expert Report, at 108-10 (italics in original; emphasis added).

472. Although Respondent does not concede that international law plays any role in determining the principles of damages to be applied,⁹¹⁰ Respondent has not rebutted or responded to the conclusion, evident on its face, that the Investment Law is specifically intended to be interpreted in a manner consistent with international law.⁹¹¹ Even assuming that international law has a role to play, Respondent makes the erroneous statement that neither the ILC Draft Articles nor the *Chorzów Factory Case* 912

First, the assertion that the ILC Articles and *Chorzów Factory Case* only apply to disputes between states is simply incorrect in light of both the practice before ICSID tribunals, and the fact that El Salvador, through its acceptance of the Investment Law and the ICSID Convention, ication in Salvadoran law. As stated in the Preamble to the Investment Law:

In order to increase the level of foreign investment in the country, it is necessary to establish an appropriate legal framework that contains clear and precise rules, in accordance with best practices in this area, that enable us to compete internationally in an effort to attract new investment.⁹¹³

473. Thus, in drafting the Investment Law, it was intended to reflect, and should be international foreign investment law. This would certainly include those international practices and standards in relation to damages and compensation.

474. Secondly, and contrary to the apparent position of Respondent, it is widely accepted that both the famous dictum of the *Chorzów Factory Case*⁹¹⁴ and ILC Articles⁹¹⁵ are

⁹¹⁰ Counter-Memorial, paras. 346, 357; *see also* para. 354 (where Respondent makes the unsupported

⁹¹¹ *See* Memorial, para. 407-11; *see also* 370.

⁹¹² Counter-Memorial, para. 354.

⁹¹³ Legislative Decree No. 732, published in the Official Journal, Vol. 345, 11 Nov. 1999 -4).

⁹¹⁴ *Chorzów Factory* decision is the authority most frequently cited by international tribunals in investor-state disputes involving matters of compensation. The dicta of the PCIJ SERGEY

(Continued...)

reflective of the customary international law standard for the assessment of damages. Accordingly, they can be safely viewed as an important element of the international standards with which El Salvador through its Investment Law seeks to act consistently.⁹¹⁶

475. In sum, whether one looks to Salvadoran Law or international law, the Tribunal unlawful actions, and thus return Claimant to the position it would have enjoyed but for these illegal actions.

476. Respondent begins in its Counter-Memorial argument on valuation stating that the
⁹¹⁷ This

RIPINSKY AND KEVIN WILLIAMS, DAMAGES IN INT L INVESTMENT LAW 35 (2008) (CLA-226); *see also ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Final Award dispatched 2 Oct. 2006), paras. 484-99 (for a detailed discussion of the application of the case) (RL-104). As noted by the

resulting from *an unlawful act* is set out in the decision of the PCIJ in the *Chorzów Factory* case at page
ded).

⁹¹⁵

Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, concluded in 2001, expressly rely on and closely follow *Chorzów Factory* *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act* *The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory at Chorzów case*' and then quotes the identical passage quoted by the International Court of Justice in all of the cases cited above (and set forth in paragraph 484 above). The Commission continues in Article 35 of the Draft Articles to conclude that restitution in kind is the preferred remedy for an internationally wrongful act, providing in Article 36 that only where restitution

⁹¹⁶ Respondent erroneously argues (Counter-Memorial, para. 356, n.518) that the *Chorzów Factory Case*

conclusion is based on three arguments, to which Claimant responds as follows. In its first argument, Respondent returns to its circular conclusion that FTI should not assume liability because, according to Respondent, Claimant should lose its liability arguments.⁹¹⁸ This argument also shows a clear misapprehension by Respondent regarding the proper application of

Chorzów Factory Case dictum seeks to put Claimant back in its position before the expropriation (which is, as the Tribunal will recognize, the test for a lawful expropriation). Rather, the proper application of *Chorzów Factory* is to identify the

the value of the project have been if Respondent had followed its own law and granted the Exploitation Concession in a timely manner as it was required to do, and had not announced the *de facto* and extra-legal moratorium?⁹¹⁹

477. Secondly, Respondent then continues to re-argue its merits and jurisdictional case by proposing that the proper valuation date should be May 7, 2007 because allegedly Claimant⁹²⁰ that this is the correct valuation date. Claimant has not changed its position regarding the appropriate valuation date nor does it concede that the date should be set at an earlier time. This issue has been substantially addressed by the parties before the Tribunal and Respondent makes no new arguments that have not been dealt with, and rejected, by the Tribunal. Claimant refers the Tribunal to its earlier submission on the appropriate valuation date⁹²¹ and maintains that it is March 10, 2008.

478.

Respondent concerns the use of the fair market value (FMV) standard.⁹²² Again, Respondent is under the impression that valuation experts are lawyers and that FTI should have an opinion on

⁹¹⁸ *Id.*, para. 361 (bullet 1).

⁹¹⁹ Respondent cites to Navigant (Counter-Memorial, n.525, citing Navigant Expert Report, para. 93) in support of its argument but it is clear that Navigant is also confused about its role as a valuation expert as opposed to legal counsel advocating on the merits of the case. If Navigant had been properly instructed, it would have restricted its opinion to valuation issues based on the assumption that Respondent had breached its obligations and that the project had moved forward to production. [sg]

⁹²⁰ Counter-Memorial, paras. 342, 361(bullet 2).

⁹²¹ Memorial, paras. 663-67.

⁹²² Counter-Memorial, para. 361 (bullet 3).

content of the applicable law. While Respondent and its expert advocate for a standard of compensation based on 125% of the value declared by tax authorities,⁹²³ FTI has been instructed to assume for the purpose of its opinion that Salvadoran Law is consistent with international law standards, including the application of the FMV standard.

479. Despite the fact that Respondent has taken this erroneous view of the appropriate damages standard, and despite the fact that the information necessary to support such a valuation should be in the possession of Respondent, neither Respondent nor its experts have provided a valuation based on that alleged standard in its Counter-Memorial.⁹²⁴ Accordingly, Claimant reserves the right to provide its full response if and when Respondent and its expert decide to meet their burden to provide the evidence supporting their position on this issue. Otherwise, based on their submissions, neither Respondent nor its experts have provided a genuine valuation in the section following).

C. Respondent is liable for US\$284 Million in Damages to Claimant

⁹²³ *Id.*, paras. 350-53, 367.

⁹²⁴ Navigant Expert Report, paras. 88-
did not

is incorrect for at least four reasons: First, Claimant has in fact provided detailed evidence supporting the fact it made a substantial investment in the El Dorado Project. Krause Witness Statement, paras. 26-27; Pacific Rim Mining Corp., Unconsolidated Financial Statements (C-PROTECTED-1). However, this is

identifying detailed evidence (Behre Dolbear Report, para. 71-72, Table 10.2), although the conclusion it arrived at is clearly understated (Second FTI Expert Report, Section 10), and even Respondent does not
-Memorial. Thirdly, and perhaps most importantly, Respondent is clearly in possession and control of the information necessary to arrive at a valuation based on the alleged standard for example, the tax value of the property declared to tax authorities is
-Memorial, paras. 350-52). Respondent also

that were registered as investments with the National Investment Office (ONI) pursuant to Article 17 of
-Memorial, para. 352). Again, an amount registered with the ONI is entirely within the power of Respondent to identify and provide to its expert to support its conclusion on valuation. One can only assume that both Respondent and its expert are in possession of this information and will provide it to Claimant in its Rejoinder only when Claimant is in a position where it cannot readily and fully respond. Fourthly, and finally, if Respondent and its expert had genuinely wished to support its position, and it did not possess the necessary information, they had the opportunity to make a directed document request, and failed to do so.

project has effectively answered such concerns and makes the project perfectly suited to a DCF analysis, and is not speculative in any material way.

482. The cases cited by Respondent, such as *Metalclad*, *Biloune*, *SPP*, *Wena*, *Arif*, *AAPL* and *Autopista*⁹²⁹ can clearly be distinguished from the current case. These cases plainly do not involve the type of natural resources project in which a high level of economic analysis, including the scientific determination of the gold reserves and resources, plus costing and planning through a detailed, industry standard feasibility study, have been undertaken. Neither the waste facility in *Metalclad*, nor the hotel resort complexes in *Biloune*, *SPP* and *Wena*, nor the airport duty free stores in *Arif*, nor the shrimp processing facility in *AAPL*, nor the toll road in *Autopista* had the necessary economic data on which the tribunals could rely. None of the claimants were able to meet the exacting industry mandated analysis and data found in the National Instrument 43-101 reports on which the El Dorado gold reserves and resources were

Canadian mining regulators and the Toronto Stock Exchange to respond to the exact type of concerns about reliability of information for investors that the tribunals found lacking in each of those arbitrations.

483. ⁹³⁰ El Dorado was fully developed and ready to enter the pre-production phase. There are a number of factors that make the El Dorado project perfectly suited for the correct application of the income-based approach. Firstly, because of the high quality reserves and resources identified for El Dorado, this was a development project on the verge of moving to production. The only impediment was the final approval of the EIS and the Exploitation Concession. The DCF approach is recognized and recommended in the industry CIMVAL Guidelines for a project at that level of development. FTI has followed those industry standards in its valuation.

⁹²⁹ *Id.*, paras. 371-78.

⁹³⁰ *Id.*, para. 375.

484. Second, the criticisms made by Behre Dolbear, that El Dorado was a speculative project, are entirely groundless and serve only to show the questionable nature of the analysis, not the uncertain nature of the El Dorado Project. In particular:

- **Production Infrastructure** -

criticism is based on the allegation that the Dornod Project was not at the production stage⁹³¹ a fact that is not denied by Claimant (for example, that there was no production facilities is not at issue that impedes a full assessment of value based on a DCF approach under well accepted mining industry standards). However, the fact that El Dorado was not *in production* does not exclude the fact that substantial investments and resources had been expended and already contributed to the production infrastructure, and that the building of production infrastructure was not an impediment when the permits were issued. As noted by Mr. Rigby, the PFS includes a comprehensive discussion of infrastructure and site

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- **Quality of the PFS** Contrary to the statements of Respondent and Behre Dolbear denigrating the quality of the PFS,⁹³³ Mr. Rigby has confirmed that the proposed mining process and costs, and mine plan had indeed been studied to a⁹³⁴

Both Behre Dolbear and Navigant suggest that an accuracy of +/- 25% leads to⁹³⁵ This is clearly incorrect because, as concluded by -25% in terms of the estimation of capital and operating costs, ***it is my opinion that a number of the most important cost items had been estimated in the SRK PFS for El Dorado with an accuracy for better than +/-25%***⁹³⁶ In addition, FTI notes that difference between +/- 10-15% of a feasibility study, versus the +/- 25% of a PFS

⁹³¹ Counter-Memorial, para. 375 (bullets 1, 2, 3, 6).

⁹³² Rigby Expert Report, para. 74.

⁹³³ Counter-Memorial, paras. 375 (bullets 4 and 5), 378; Behre Dolbear Report, paras. 18(a), 21-23, 32-33.

⁹³⁴ t remained to be optimized at the time of submission, ***I do not believe that ANY aspect of the El Dorado Project design would have changed materially as a result of further optimization work. Thus, the scope and design of the Project was essentially fixed.*** Consequently, the PFS for the El Dorado Project contained all of the necessary technical and economic material needed to demonstrate the existence of mineral reserves that are economically mineable and was fit for the purpose of evaluation and the grant of an Exploitation

⁹³⁵ Navigant Expert Report, para. 164; Behre Dolbear Report, para. 33, n.12.

⁹³⁶ Rigby Expert Report, para. 96.(emphasis added)

for which a pre-feasibility study has been completed as demonstrated in the FTI
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- **Environmental** - environmental risks had not been adequately studied by Claimant,⁹³⁸ the quality and the scope of the environmental assessment of the El Dorado project was very thorough and complete.⁹³⁹ Moreover, the latest expert report submitted by Respondent from Dr. Bebbington does not even address or take issue with any aspect of the El Dorado Project and its EIA. Furthermore, the so called Blue Ribbon Commission, of which Drs. Goodland and Bebbington were a part, did not review and critique any aspect of the El Dorado Project in their 2011 Report.
- **Financing** Respondent argued that El Dorado was not fully developed because financing arrangements had not been finalized.⁹⁴⁰ Again, Respondent and Behre Dolbear wish to apply a standard to El Dorado that would properly apply only to a project in production. Financing is not placed until exploitation permits are in place. The fact that there was a line-professionals, like Peter Brown of Canaccord,⁹⁴¹ and Macquarie,⁹⁴² speaks volumes about the high quality of the project, and easily supports the conclusion Concession, this project would have been funded and gone into operation.⁹⁴³

485. After applying various unsupported assumptions, Respondent and Navigant argue that a purported pre-FTI 12% discount rate from 2008 to the PFS Model of 2005)⁹⁴⁴ compares unfavorably to the DCF after-

⁹³⁷ Second FTI Expert Report, para. 7.3.

⁹³⁸ Counter-Memorial, paras. 212, 375 (bullet 7); Behre Dolbear Report, para. 18(e) and Section 11.

⁹³⁹ *See generally*, Second Report of Mudder and Hutchison, and Witness Statement of Matthew Fuller.

⁹⁴⁰ Counter-Memorial, para. 375 (bullet 8); Behre Dolbear Report, para. 90-93.

⁹⁴¹ *See generally* Peter Brown Witness Statement.

⁹⁴² Draft Macquarie Feasibility Study Financing Term Sheet, 14 Nov. 2007 (FTI 29); Second McLeod-Seltzer Witness Statement, para. 65.

⁹⁴³ *See also* Rigby Expert Report, paras. 12-14, 17, 95-96. Mr Rigby similarly concludes at para. 12:

additional equity as they had successfully done many times before. Particularly so, given the many positive and encouraging research analyses produced and published by Canaccord on Pac Rim and the El

⁹⁴⁴ Counter-Memorial, para. 380; Navigant Expert Report, paras. 165-166.

Minita reserves. This allows Navigant to use the rhetorical power of comparing large unrelated numbers to argue that there has been a seven fold increase in three years.⁹⁴⁵ FTI concludes that

2008 discount rate, it is based on a selective mixture of data from various dates whose conclusions are manufactured to provide shock, but otherwise lack sound economic

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486.

⁹⁴⁷ to which FTI has now responded in its second report, as follows:

- **Depreciation and Income tax** FTI concedes that Navigant correctly identified⁹⁴⁸ a clerical error in the calculation of depreciation, thus resulting in a reduction to the Minita reserves value of \$10.4 million and \$12 million.⁹⁴⁹
- **Commencement of Mine Development** Navigant proposes the need for a 12 month delay to commence mine development, resulting in 13% reduction in the value of the Minita reserves.⁹⁵⁰ In response, Mr. Rigby has confirmed that, due to the advance nature of the PFS, the commencement of construction of the mine ramp would have begun immediately after permitting was approved, and thus the two-year pre-production period would not have been delayed.⁹⁵¹ FTI has⁹⁵²
- **WACC Calculation** Navigant argues that FTI made errors in the Weighted Average Cost of Capital (WACC) rate of 12%.⁹⁵³ comments, FTI responds that: (1) rounding of WACC as a composite rate is

⁹⁴⁵ Navigant Expert Report, para. 167.

⁹⁴⁶ Second FTI Expert Report, paras. 7.10.

⁹⁴⁷ Counter-Memorial, paras. 396-97; Navigant Expert Report, paras. 171-79.

⁹⁴⁸ Navigant Expert Report, para. 171; Counter-Memorial, para. 396.

⁹⁴⁹ Second FTI Expert Report, paras. 7.11.

⁹⁵⁰ Navigant Expert Report, para. 172; Counter-Memorial, para. 396.

⁹⁵¹ Expert Report of Neal Rigby, paras. 12, 83, 96. Also see Third Shrake Witness Statement, paras. 22-24.

⁹⁵² Second FTI Expert Report, paras. 7.12-7.14.

⁹⁵³ Navigant Expert Report, paras. 173-75; Counter-Memorial, para. 396.

entirely appropriate,⁹⁵⁴ (2) the cost of debt estimate from the Macquarie report is the best evidence available,⁹⁵⁵ (3) the debt-equity ratio should include debt financing (and not be equity only as Navigant argues) because a mixture of debt and equity was intended by Claimant, (4) the arguments of Navigant that junior mining companies are unable to secure debt are unsupported,⁹⁵⁶ and, (5) an added risk premium is inappropriate because the PFS is more than sufficiently detailed to support a DCF analysis.⁹⁵⁷

- **Forecast Gold and Silver Prices** suggestion that FTI overstated gold prices by relying on the wrong futures contract price,⁹⁵⁸ FTI accepts the criticism by making a partial decrease in the value of the Minita Reserve of \$1.7 million.⁹⁵⁹
- **PFS financial model** Navigant identified an error in the SRK financial model with respect to working capital that would result in an increase in the value of the Minita reserve of \$2.4 million,⁹⁶⁰ which FTI accepts.⁹⁶¹
- **Inflation** to sufficiently account for inflation in bringing the PFS model current to the Valuation Date.⁹⁶² FTI disagrees with Navigant responding that the inflation and

⁹⁵⁴ With respect to the first comment, we typically round our WACC estimates to the nearest full percentage so to not imply that an estimated WACC rate is determined with any further level of precision. The capital asset pricing model-based approach employed in the FTI Consulting Report is informed by multiple public financial and non-financial factors that are synthesized based on our professional judgment. Therefore we do not believe that it is appropriate to leave the WACC rate unrounded at 12.4% as suggested by Navigant. The rounding of a composite rate such as

⁹⁵⁵ *Id.*, para. 7.17.

⁹⁵⁶ *Id.*, paras. 7.18-7.21. In fact, both the Credit Suisse Chart (presented by Navigant, at 52), and the fact that the Macquarie facility (a hybrid debt and equity instrument) was designed to fund the definitive feasibility study, supports the debt option for Claimant.

⁹⁵⁷ *Id.*, para. 7.22. Not only does Navigant *not* provide a basis for such a risk premium, the evidence of Mr. Rigby shows the PFS to be highly reliable. For the conclusion of Mr. Rigby re the sufficiency of the PFS, *see* Rigby Expert Report, paras. 11, 96, and Section 5.

⁹⁵⁸ Navigant Expert Report, para. 176; Counter-Memorial, para. 396.

⁹⁵⁹ Second FTI Expert Report, paras. 7.23-7.27.

⁹⁶⁰ Navigant Expert Report, para. 177; Counter-Memorial, para. 396.

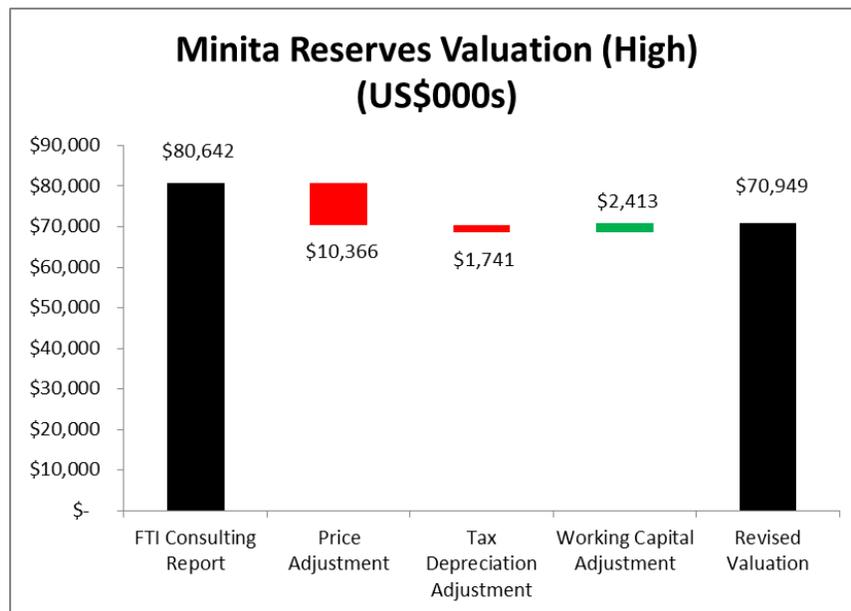
⁹⁶¹ Second FTI Expert Report, para. 7.29.

⁹⁶² Navigant Expert Report, para. 179; Counter-Memorial, para. 396.

WACC assumptions in the first FTI Report are appropriate and that no adjustment is warranted.⁹⁶³

487.

decrease in the low and high valuations, respectively of the Minita reserves by FTI. Accordingly, using the income-based DCF approach, FTI estimates the value of the Minita reserves to be in a range between \$56.2 million and \$70.9 million. The adjustments to the high Minita Reserves valuation is summarized in the following chart.⁹⁶⁴



2. Valuation of the El Dorado Resources and Exploration Properties

488. In its first report, FTI employed two separate methods in assigning the market Reserves)⁹⁶⁵ the Comparable Transactions Approach (using seven comparable transactions) and the Comparable Trading Approach (based on the Cerro Negro property comparable). In calculating the FMV for the Mineral Properties under the market approach, FTI assigned a

⁹⁶³ Second FTI Expert Report, paras. 7.30-7.37.

⁹⁶⁴ *Id.*, Second FTI Expert Report, Figure 19.

⁹⁶⁵ As described in the First FTI Expert Report, para. 6.71.

weighting of 10% to the price ratio derived under the Comparable Trading Approach and a weighting of 90% for the price ratios derived under the Comparable Transaction Approach.⁹⁶⁶

489. In response to the Navigant Report and as a result of a further refinement of its analysis, FTI has revised its valuation of the El Dorado Mineral Properties by substituting its

⁹⁶⁷ In creating this model, FTI reviewed the PFS model created by SRK and adjusted pr

level (equivalent to approximately 150,000 ounces per year) could be achieved. The FTI Consulting Model was designed to forecast the integration of the El Dorado Project resources into its cash flows and estimate the value per ounce of the project as a whole. The FTI Consulting Model estimates that the combined value of the Minita reserves and the El Dorado resources falls within a range of \$204.2 million and \$232.2 million.⁹⁶⁸

490. FTI has maintained its position that the Cerro Negro property is an appropriate

of
value for low-⁹⁶⁹

comparable transactions from their previous report, the companies suggested in the Navigant Report, and discussions with witnesses and SRK Consulting, FTI has increased the weighting derived under the Comparable Trading approach from 10.0% to 25.0%, with 75% of the weighting now based on the FTI Consulting Model.⁹⁷⁰ Based on this weighting, FTI estimates that the value of the El Dorado Mineral Properties falls within a range of \$182.9 million and \$205 million.

3. Integrated Reserves and Resources DCF model – FTI Consulting Model

⁹⁶⁶ First FTI Expert Report, para. 6.120 and Fig. 13.

⁹⁶⁷ Second FTI Expert Report, Section 8.

⁹⁶⁸ *Id.*, para. 8.7.

⁹⁶⁹ *Id.*, para. 9.8.

⁹⁷⁰ *Id.*, para. 9.9.

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that Claimant intended to approximately double annual gold production to a level equivalent to approximately 150,000 ounces of gold per year in order to achieve production levels comparable to intermediate gold mining companies.⁹⁷¹ On this basis, FTI reviewed the PFS model and adjusted production levels under the assumption that ma level could be achieved.

492. In creating the FTI Consulting Model, FTI made a number of additional assumptions that support the Model, including that: (i) **Conversion of resources:** FTI has converted non-inferred resources into reserves at a 1:1 ratio; (ii) **Gold equivalent ounces:** the FTI Consulting Model increases total produced gold equivalent ounces from 507.6 thousand to 1.5 million. These figures compare to 554.2 thousand gold equivalent ounces of reserves and 1.6 million total gold equivalent ounces of reserves and resources as at the Valuation Date;⁹⁷² (iii) **Life of mine:** As a result of the increased reserves and annual production levels discussed above, om approximately 6.2 years to 8.8 years;⁹⁷³ (iv) **Operating expenses:** FTI has assumed that all operating expenses have been variable in nature and track closely with the level of payable metal production;⁹⁷⁴ (v) **Capital expenditures:** To account for the greater level of production, FTI has also increased capital expenditures;⁹⁷⁵ and, (vi) **Mine closure cost timing:** As a result of the extended life of mine, mine closure costs have been shifted by FTI from year seven to year nine.⁹⁷⁶

493. After applying a 12.0% discount rate to the model (consistent the discount rate applied by FTI in its income approach), the FTI Consulting Model estimates that the combined

⁹⁷¹ *Id.*, para. 8.2; *see also* Third Shrake Witness Statement at 11. FTI made a similar assumption regarding silver production (*id.*, para. 8.4(iii)).

⁹⁷² *Id.*, para. 8.4(iv).

⁹⁷³ *Id.*, para. 8.4(v).

⁹⁷⁴ *Id.*, para. 8.4(vi).

⁹⁷⁵ *Id.*, para. 8.4(vii).

⁹⁷⁶ *Id.*, para. 8.4(viii).

value of the Minita reserves and the El Dorado resources falls within a range of \$204.2 million and \$232.2 million.⁹⁷⁷

4. Comparable Trading Multiples Approach

494. In its first report, FTI applied a trading multiples approach and identified a high grade, gold/silver project in Latin America (the Cerro Negro project, owned by Andean Resources) as closely comparable to El Dorado.⁹⁷⁸ D

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outlier that should be rejected. FTI responds to these criticisms in its second report to demonstrate the high comparability of Cerro Negro with the El Dorado Project, as follows:

- **High Grade Deposit** - First, Navigant argued that at the valuation date, Cerro Negro was not a high grade deposit.⁹⁸⁰ In response, FTI shows that the Cerro Negro project was understood to be a high grade project by the market at large. FTI continues to hold that it is appropriate to refer to Cerro Negro as a high grade deposit as at the Valuation Date.⁹⁸¹ Navigant also criticized FTI for not including the Pinos Altos project as comparable when it had a similar grade to El Dorado. FTI distinguishes Pinos Altos as not comparable.⁹⁸²
- **Announcement of drilling program** Navigant further argued that the FTI valuation was skewed because there was an announcement by Andean of drilling results for Cerro Negro just prior to the valuation date.⁹⁸³ FTI examined the analyst report relied upon by Navigant and concluded that that the most appropriate resource estimate at the Valuation Date is based on the October 2007

⁹⁷⁷ *Id.*, paras. 8.5-8.7.

⁹⁷⁸ First FTI Expert Report, paras. 6.110-6.128.

⁹⁷⁹ Second FTI Expert Report, paras. 6.40, 6.55.

⁹⁸⁰ Navigant Expert Report, para. 152.

⁹⁸¹ Second FTI Expert Report, para. 6.44.

⁹⁸² *Id.*, para. 6.45.

⁹⁸³ Navigant Expert Report, para. 155.

resource estimate published by Andean Resources, and not the report of analyst report based in the positive drilling results.⁹⁸⁴

- **Status of PFS** Navigant also argued that the fact Cerro Negro had a PFS in progress cannot be compared to El Dorado which had a completed PFS.⁹⁸⁵ As FTI notes, the fact that El Dorado had a high quality completed PFS, and Cerro did not, would suggest that El Dorado was in fact at a more advanced stage, and thus a higher value could be attributed. The fact that only part of Minita was classified as reserves does not undermine this fact.⁹⁸⁶
- **Control Premium** control premium,⁹⁸⁷ FTI confirms that a premium of approximately 30.0% is supported by the materials cited previously.⁹⁸⁸

496. Finally, Navigant additionally suggested two possible comparables that are lower Dorado.⁹⁸⁹ FTI reviewed the two proposed comparables and found them to be very different than the El Dorado project, for reasons that include the fact that Fire Creek is a high sulfur deposit and New Polaris can be accessed only by aircraft.⁹⁹⁰

5. Exploration Properties

497. Respondent identifies a third valuation approach that can be applied to exploration properties - the cost-based approach listed as an option under the CIMVAL standards. Respondent criticizes FTI for rejecting the approach, but then does not provide a valuation based on the approach.⁹⁹¹ Although Respondent did not rely on the CIMVAL

⁹⁸⁴ Second FTI Expert Report, paras. 6.46-6.47.

⁹⁸⁵ Navigant Expert Report, para. 156.

⁹⁸⁶ Second FTI Expert Report, paras. 6.50-6.51.

⁹⁸⁷ Navigant Expert Report, paras. 157, 109-13.

⁹⁸⁸ Second FTI Expert Report, paras. 6.52-6.54.

⁹⁸⁹ Navigant Expert Report, paras. 158-59.

⁹⁹⁰ Second FTI Expert Report, 6.29-6.38.

⁹⁹¹ Counter-Memorial, paras. 363-67, 408-410; First FTI Expert Report, paras. 6.15, 6.20; CIMVAL

standard,⁹⁹² it argued that FTI has mis-classified the proper valuation method for the stage of development of deposits in the El Dorado Project. What cannot be denied, based on the CIMVAL standards, is the following: first, with regard to the Minita reserves, which are classified as being development properties, a cost approach is simply not appropriate. The income approach used by FTI is indicated as the primary method. Second, the CIMVAL standards explicitly indicate that the market approach is entirely appropriate for the valuation of all properties – development, mineral resource and exploration, and thus all the deposits valued by FTI. Third, although CIMVAL indicates that a cost-

requirement (contrary to the implication of Respondent) to apply a cost approach.⁹⁹³ As noted by FTI, this is clearly a matter of professional judgment and FTI judged the approach it took to be reasonable.⁹⁹⁴

D. Other Evidence of Fair Market Value

498. Respondent notes that FTI analyzed and rejected the use of two additional sources of evidence of the value of the mineral deposits and the early exploration areas: (1) the adjusted public trading price of PRMC in the 30 days before the valuation date (which Navigant calculated as indicating a value of \$88 million), and (2) a private placement of PRMC shares in February 2008 (which Navigant calculated as indicating a value of \$86.7 million).⁹⁹⁵ In

⁹⁹² Counter-Memorial, n.539.

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the cost approach ***should be used to value exploration*** (Counter-Memorial, para. 365) (emphasis added).

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er hectare, Santa Rita was valued at \$0.5 million and Zamora/ Cerro Colorado was valued at \$1.3 million or \$1.8 million combined. Applying only the high and low values per hectare of \$143 and \$68, respectively, results in valuations of \$2.5 million and \$1.2 million, respectively. We consider this to be a reasonable range of value and

⁹⁹⁵ Counter-Memorial, para. 411; Navigant Expert Report, para. 104.

private placement and share price valuations owing to an overstatement in the va

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499. Even though FTI does not adopt these two additional sources of valuation in its latest report, the method employed by Navigant, when corrected, is shown to yield valuations of \$120.8 million for the adjusted public trading price of PRMC,⁹⁹⁷ and of \$112.6 million for the value of the private placement of PRMC shares in February 2008.⁹⁹⁸

500. Finally, both Respondent and Navigant were critical of the fact that FTI used a contemporaneous October 2007 valuation conducted by Scotia Capital in support its valuation of El Dorado.⁹⁹⁹

analysis does not rely upon the Scotia Capital valuation, but does refer to it. We trust that the assumptions made by Scotia Capital reflect their earnest expectations at the time of the issuance of the presentation and their considerable experience providing advisory services in the mining industry. Navigant takes the reserves-only observation found in the Scotia Capital presentation, removes the context of comments made therein, and uses this to arrive at an erroneous

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E. Pre- and Post-Judgment Interest

501. Claimant seeks an award of pre- and post-judgment interest, compounded annually, from the valuation date to the date of the payment of the award, based on average 12-month LIBOR rates, in the amount of \$21,859,628.¹⁰⁰¹

- The payment of interest is consistent with the well accepted practice in investment arbitration. It is in fact quite surprising that Respondent would propose that no interest be paid. This is surprising because it would be clear, in the case of a

⁹⁹⁶ Second FTI Expert Report, para. 4.4.

⁹⁹⁷ *Id.*, para. 4.30.

⁹⁹⁸ *Id.*, para. 4.32.

⁹⁹⁹ Counter-Memorial, para. 412; Navigant Expert Report, paras. 119-22.

¹⁰⁰⁰ Second FTI Expert Report, para. 5.13.

¹⁰⁰¹ Second FTI Expert Report, Figure 26.

to ensure full reparation of Claimant

2008 to the date of the payment of the award. If such an interest payment was not made, Respondent would be unjustly enriched with the benefit of holding the damages amount awarded over that period. Moreover, to suggest that Claimant would have alternatively invested the awarded monies in a non-interest bearing (or even a simple interest bearing) account cannot be reasonably concluded.

- In 2012-13, all eleven tribunals awarding damages made awards of interest, and eight of the eleven tribunals awarded compound interest.¹⁰⁰² The tribunal in *OEPC* this practice has changed and, in fact, most recent awards provide for compound interest. This practice accords with the *Chorzów Factory* principle as an award of¹⁰⁰³
- In the three awards where compounding was not awarded, simple interest was used based on the particularities of the facts in each case: in *White Industries*, the tribunal followed the basis of the interest awarded in the unpaid ICC award,¹⁰⁰⁴ in *SGS v. Paraguay* interest the claimant typically charged for unpaid invoices, and in the *Arif v. Moldova* case, the tribunal noted that the award of simple interest was made because of the nature of the damages not being related to loss of future profits. The trend is clearly away from simple interest in investment arbitration, despite

¹⁰⁰² (1) *White Industries Australia Ltd v. India*, Ad hoc UNCITRAL Final Award dated 30 November 2011 (CLA-315); (2) *SGS Société Générale de Surveillance SA v. Paraguay*, ICSID Case No. ARB/07/29 (Award on Merits dated 10 February 2012) (CLA-316); (3) *Unghlaube and Unghlaube v. Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20 (Award dated 16 May 2012) (CLA-317); (4) *EDF International SA and ors v. Argentina*, ICSID Case No. ARB/03/23 (Final Award dated 11 June 2012) (CLA-318); (5) *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARB/07/23 (Award dated 29 June 2012) (CLA-319); (6) *Swisslion Doo Skorpe v. Macedonia*, ICSID Case No. ARB/09/16 (Final Award dated 6 July 2012) (CLA-320); (7) *Quasar de Valores SICA SA and ors v. Russian Federation*, SCC Case No 24/2007 (Award dated 20 July 2012) (CLA-321); (8) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11 (Award dated 24 September 2012) (CLA-322); (9) *Teco Guatemala Holdings LLC v. Guatemala*, ICSID Case No ARB/10/17, IIC 623 (2013), (Award dated 19 December 2013) (CLA-323).

the cost of borrowing money in the United States, the Arbitral Tribunal evidence that the proper interest should be based on the US Prime rate of interest plus a 2 percent ; (10) *Micula v. Romania*, ICSID Case No ARB/05/20, IIC 621 (2013) (Award and separate opinion dated 11 December 2013) (CLA-324); (11) *Arif v. Moldova*, ICSID Case No ARB/11/23, IIC 585 (2013) (Award dated 8 April 2013) (CLA-325).

¹⁰⁰³ *OEPC v. Ecuador* (CLA-326).

¹⁰⁰⁴ *White Industries Australia Ltd v India*, para. 16.1.1 (CLA-315).

that state-to-state arbitration may still favor simple interest.¹⁰⁰⁵ Certainly, the cases relied upon by Respondents in support of simple interest are now the exception¹⁰⁰⁶ to the clear and accepted practice in investment arbitration in favor of compound interest. The *Micula v. Romania* tribunal provides an apt summary of the current state of practice in investment arbitration:

- The overwhelming trend among investment tribunals is to award compound rather than simple interest. The reason is that an award of damages (including interest) must place the claimant in the position it would have been had it never been injured. As noted by the Wena tribunal,

have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only

Respondent relies to object to compound interest, does not reflect the recent tribunal practice, with which the Tribunal agrees.¹⁰⁰⁷

/s/

R. Timothy McCrum
George D. Ruttinger
Ian A. Laird
Kassi D. Tallent
Ashley R. Riveira
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(1) 202 624 2500 (tel.)
(1) 202 628 5116 (fax)
rmccrum@crowell.com
gruttinger@crowell.com
ilaird@crowell.com
ktallent@crowell.com
ariveira@crowell.com
Counsel for Claimant

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¹⁰⁰⁵ As argued by Respondent (Counter-Memorial, para. 420 (the ILC Articles on State Responsibility)).

¹⁰⁰⁶ Counter-Memorial, para. 418, n.624. Notably all the international cases cited are from before 1990.

¹⁰⁰⁷ *Micula v. Romania*, para. 1266 (CLA-324).