INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

THE REPUBLIC OF EL SALVADOR'S REJOINDER ON THE MERITS

Fiscalía General de la República de El Salvador

Foley Hoag LLP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LAWS

CASES

OTHER AUTHORITIES

I. INTRODUCTION

1. Under the Investment Law of El Salvador, a foreign investor must comply with all the provisions of the laws of El Salvador. In particular, investments related to minerals located in the subsoil are governed by the Mining Law.

2. According to Article 35 of the Mining Law, minerals located in the subsoil belong to the State until they are extracted pursuant to a mining exploitation concession. It is undisputed that Claimant never received a concession to exploit the minerals in the ground. Therefore, the State was and remains the owner of those minerals.

3. Claimant alleged at the beginning of this arbitration that it had a "perfected right" to an exploitation concession, *i.e.*, that it had met all the requirements to obtain the concession except for the environmental permit, which it claimed El Salvador had unjustifiably failed to grant. During the preliminary objections phase, Claimant promised that, if this proceeding were to reach the merits phase, it would present expert and factual evidence proving to the Tribunal that it had indeed met all the legal requirements to obtain the concession.

4. Yet more than four years after making that promise, Claimant has failed to prove that it had a "perfected right" to such a concession. On the contrary, Claimant has been forced to admit that it neither owned nor had the required authorization for the land in the area requested for the concession. Claimant has also been forced to admit that it never completed the required Feasibility Study. Having admitted that it did not satisfy the legal requirements to have a "perfected right" to a concession, Claimant now asserts in its Reply that this Tribunal does not need to decide whether Claimant actually met the requirements for the concession.

5. The question the Tribunal must answer with regard to the El Dorado Concession is simple: is Claimant entitled to compensation, and in particular compensation for what

Claimant alleges is the fair market value of the minerals still located in the subsoil (which therefore belong to the State), when a) Claimant did not have a mining exploitation concession, b) Claimant has admitted that it did not comply with the legal requirements for a concession, and c) the objective evidence that has emerged during this arbitration confirms that Claimant in fact did not meet the legal requirements for a concession?

6. With regard to the mineral deposits outside of the requested concession, the Tribunal must determine whether Claimant is entitled to compensation, and in particular compensation for what Claimant alleges is the fair market value of the (State-owned) minerals still located in the subsoil, when a) those mineral deposits have never been included in an application for an exploitation concession, and b) those mineral deposits were incompletely explored under exploration licenses that expired on January 1, 2005. Although a related company received new exploration licenses covering the deposits in the area of the expired licenses, the granting of those licenses was in contravention of the Mining Law and Regulations, and, in any event, those licenses expired without the company ever receiving the environmental permit to continue exploration.

7. Finally, with regard to the early exploration areas, there is nothing for the Tribunal to decide because Claimant has not even shown it has any rights to these areas, much less alleged that El Salvador did anything to impact those (non-existent) rights.

8. As El Salvador has consistently argued in this arbitration, Claimant's losses in El Salvador are not due to anything El Salvador did or failed to do. The alleged losses have been caused by Claimant's conscious assumption of risk in trying to stake too much land for future exploration when Claimant arrived in El Salvador with less than three years to complete exploration. After failing to complete enough exploration during the allotted exploration period

to complete an application for the large project it wanted, Pac Rim refused to request a smaller exploitation concession limited to what was needed for the project for which it might have been able to meet the legal requirements. Instead, Claimant insisted on its right to develop a huge 12.75 km^2 area and put all its bets on lobbying to change the Mining Law and eliminate the requirements it could not meet. But these facts do not support arbitration claims: 1) El Salvador did not have a duty to change its laws to accommodate Pac Rim, and 2) Claimant alone is responsible for any harm it allegedly suffered.

9. In this Rejoinder El Salvador will provide its final response to the new set of ever-changing and equally absurd arguments Claimant has put forward in its Reply. El Salvador's arguments have remained consistent throughout this arbitration. Claimant's arguments, on the other hand, have been in constant flux. For example, in the Reply, Claimant alleges that El Salvador is actually pro-mining and that it is preparing to grant the El Dorado concession to someone else. That is simply false. No one is in line to continue the required work to be able to develop El Dorado, nor has El Salvador granted any metallic mining exploration licenses to anyone, anywhere, in the past few years.

10. Almost five years after El Salvador submitted its Preliminary Objection under the CAFTA expedited procedure, the issues before the Tribunal remain surprisingly the same: Claimant is demanding compensation for rights it never had, and Claimant has utterly failed to carry its burden of proof to sustain claims under the Salvadoran Investment Law. In this Rejoinder, El Salvador will confirm that Claimant did not have any rights on which to base its claims, El Salvador did not breach any obligations to Claimant or cause Claimant any harm, and Claimant is not entitled to any compensation from El Salvador. Disregarding the facts and the law, Claimant has taken two big gambles: 1) by demanding a concession from El Salvador (by

political pressure and lobbying after its failure to comply with the relevant legal provisions); and 2) by demanding a windfall award of about $300 million from this Tribunal for its failed investment and prolonging this arbitration with ever-changing arguments and its lack of candor about its "perfected right" and the timing of the dispute. Throughout this Rejoinder, El Salvador will show and confirm that Claimant's case lacks merit and its claims must be entirely dismissed.

II. STATEMENT OF FACTS

11. El Salvador and Claimant agree that following the peaceful resolution of a long civil war in the early 1990s, El Salvador focused on economic development and hoped to stimulate investment.[1] As Claimant describes in its Memorial, the country's economy was "decimated" by the civil war.[2] Therefore, the Government was looking for opportunities to foster foreign investment and create jobs. As Claimant describes, "[w]hen the civil war ended, mining investment recommenced at El Dorado almost immediately;" the exploration rights transferred to Kinross El Salvador (and later to Pac Rim)[3] were first granted in May 1993.[4] El Salvador and Claimant also agree that the Government supported a potential mining project at El Dorado in the 1990s and worked closely with Kinross to "meet a dual goal of economic growth and sustainable development."[5]

12. According to Pac Rim, this openness to mining in the 1990s means that El Salvador had to accommodate Claimant (and ignore Salvadoran law) a decade later to grant Pac

---

[1] Claimant Pac Rim Cayman LLC's Reply on the Merits and Quantum, Apr. 11, 2014 ("Reply"), para. 4.

[2] Claimant Pac Rim Cayman LLC's Memorial on the Merits and Quantum, Mar. 29, 2013 ("Memorial"), para. 24.

[3] For ease of reference, we will continue to use "Claimant" and "Pac Rim" throughout the Rejoinder to refer to the companies, even though it was the Canadian parent, Pacific Rim Mining Corp., acting in El Salvador and not Pac Rim Cayman (which was and remains a shell company with no employees, no office, and no bank account, thus incapable of engaging in any mining activities).

[4] Reply, para. 147.

[5] Reply, para. 150.

Rim a huge exploitation concession even though it did not fulfill the legal requirements. El Salvador disagrees. Even though the Bureau of Mines worked with Pac Rim and its predecessors for many years to try to develop a responsible mining project at El Dorado,[6] El Salvador's cooperation did not magically create mining rights for Claimant. By 2008, Claimant had no mining rights in El Dorado because its exploration rights had expired on January 1, 2005 and it had not completed its application for an exploitation concession. Claimant's failure to comply with the law (both with regard to the exploitation concession application and the additional exploration licenses) means it does not have the rights on which it attempts to base its claims in this arbitration.

13. As Claimant has highlighted in its pleadings, El Salvador's desire to foster development in the 1990s resulted in "extraordinary signs of good will" towards Kinross, including the issuance of interim legislation to extend exploration licenses while amendments to the Mining Law beneficial to the mining companies were debated and passed in 2001.[7] The changes to benefit the mining companies included an extension of the exploration period to eight years from the original five-year period under the 1995 Mining Law. Kinross had advocated for a longer period on the basis that five years did not "give [them] enough time to be successful."[8]

14. These accommodations by the Government in 2001 were vital to Kinross. Without the extension of the maximum exploration period in the Mining Law from five to eight years, Kinross' exploration licenses in El Dorado would have expired in 2001, at a time when Kinross was not in a position to apply for an exploitation concession. Therefore, without the

---

[6] Witness Statement of Wiliam ("Bill") Thomas Gehlen, Mar. 31, 2014 ("Gehlen Witness Statement"), para. 164 (stating his view that the Bureau of Mines acted "only with the intention of creating a responsible mining industry").

[7] Memorial, para. 628.

[8] Memorial, para. 70.

2001 amendment to the Mining Law, Kinross' investment in El Dorado would have been lost. Its only way to recover part of that investment would have been to sell the results of its exploration and any land it owned to another, unrelated mining company that could have applied for new exploration licenses covering that same area.

15. That was not all. The Government also lowered the royalties that the mining companies would have to pay to just 1% in 2001 (from the 3% established in 1995). In 1996, Kinross had advocated for the 3% royalty instead of the 5% proposed by the legislature,[9] and then again in 2001, Kinross influenced the decision to lower the royalty to 1%.[10] Thus, there is no dispute that El Salvador accommodated the companies for many years.

16. However, the companies that had been granted exploration rights since 1993 and had enjoyed extraordinary good will from the Government were not ready to develop El Dorado nine years later, when Pac Rim entered the picture in 2002.

17. Instead of allowing the current exploration licenses to expire and applying for new exploration licenses as a new mining company unrelated to Dayton, Pac Rim chose to acquire the exploration licenses in 2002 by merging with Dayton (who had acquired Kinross through a merger in 2000), when there were less than three years remaining in the new extended exploration license period.

---

[9] Reply, para. 161. *See also* Letter from Kinross El Salvador to Members of the Economic and Agricultural Committee of the Legislative Assembly, Dec. 12, 1996, at 4 (C-816) ("Es muy lamentable que el nuevo Código de Minas y sus Regalías excesivas están en contra de las políticas del gobierno para la atracción de nuevos inversionistas extranjeros.") ["It is very unfortunate that the new Mining Code and its excessive Royalties are contrary to the government's policies to attract new foreign investors."].

[10] Reply, para. 169. *See also* Letter from Robert Johansing to Minister Miguel Lacayo, May 12, 2000, at 10 (C-822) ("El análisis que se ha presentado indica que a los actuales precios del oro y niveles de regalías, este Proyecto no es factible. . . . [L]os niveles de reducción de costos no podrán superar el impacto negativo de la estructura de regalías actual en El Salvador.") ["The analysis presented indicates that at current gold prices and with the existing royalties, this Project is not feasible. . . . [C]ost reductions could not overcome the negative impacts of the current royalty system in El Salvador."].

18. By January 1, 2005, when the extended eight-year term of the exploration licenses finally expired, Pac Rim was still not ready to develop El Dorado. Indeed, Pac Rim wanted more extraordinary accommodations from the Government. Pac Rim requested a concession over almost the entire exploration area, offering to build a small mine to extract gold from one deposit over a period of six years. It planned to continue to explore the area and determine the feasibility of a larger project after obtaining the exploitation concession. This was not what the law provided for.

19. The Bureau of Mines quickly informed Pac Rim, based on a preliminary review, that it could not obtain a 62 km^2 concession "for various reasons."[11] Pac Rim, without otherwise changing its application materials (*i.e.*, relying on the same Pre-Feasibility Study), reduced its request to 12.75 km^2. Pac Rim's application, however, did not comply with the requirements of the Mining Law to receive the requested concession over this still very large area.

20. As El Salvador explained in its Counter-Memorial, the Government told Pac Rim that its application did not comply with the Mining Law and could not be granted.[12] There is no dispute that Pac Rim did not file a new application. Pac Rim accepts that it could have "chang[ed] the concession size" or tried "to obtain ownership or authorization to use more surface land," but that it "chose" instead to wait and see if the law would be changed in its favor.[13]

---

[11] Letter from PRES to MARN, Sept. 28, 2005, at 1 (C-675) ("por varias razones.").

[12] Counter-Memorial, paras. 73-75.

[13] Claimant Pac Rim Cayman LLC's Rejoinder on Respondent's Preliminary Objection, May 12, 2010 ("Rejoinder (Preliminary Objections)"), para. 49 ("Claimant could have revised the application (*e.g.*, by changing the concession size; by seeking to obtain ownership or authorization to use more surface land; by seeking to have the Government expropriate any land that private owners were not willing to sell to Claimant or authorize Claimant to use, *etc.*); or Claimant could have proceeded with the application, hoping that the Bureau of Mines would ultimately resolve its apparent uncertainty on this issue in Claimant's favor. Claimant chose the latter course.").

21. According to Pac Rim, it had a right to assume that the law would be changed to its benefit, or inconvenient legal requirements would simply be ignored, because of the Government's interest in supporting development. Thus, Pac Rim admitted in its Memorial that it viewed "the application procedure [as] a formality" because of "the long history of Government interest in development of the El Dorado Project and the open working relationship that prevailed between Pac Rim and the Bureau of Mines."[14] In other words, Pac Rim felt entitled to have the law changed or ignored because the Government had previously shown interest in developing El Dorado and had accommodated Pac Rim's predecessors by changing the Mining Law to give them an additional three years to complete exploration. But, of course, the Government never had a legal obligation to perpetually change its laws to accommodate investors and it certainly had no obligation to simply ignore its Mining and Environmental Laws to accommodate Pac Rim. Pac Rim could not expect that the laws would change as it desired or that officials would ignore the existing laws.

22. Thus, Pac Rim's assumption was wrong. Pac Rim could not develop its project however it wanted with disregard for the Mining Law just because the Government had shown extraordinary signs of good will in the past. El Salvador will describe Pac Rim's ill-advised strategy and its resulting failure to obtain an exploitation concession in the following subsections.

[14] Memorial, para. 454.

A. Pac Rim took on a project with limited time left for exploration

23. Pac Rim knew that time for exploration was running out when it acquired the El Dorado exploration licenses. As highlighted in William Gehlen's due diligence notes:

> IMPORTANT ISSUES THAT NEED TO BE REVIEWED IMMEDIATELY!
>
> . . .
>
> Exploitation needs to go forward in 3 years or loose [sic] concession at El Dorado (under new mining law and regulations, 3 years out of 8 years remain).[15]

24. Thus, Pac Rim knowingly took on the challenge of completing exploration and designing an exploitation project in the "short time allotted,"[16] *i.e.*, the remaining three years of the extended exploration term. Pac Rim's April 2001 strategy memo indicates why it took on this challenge: it saw Central America as an opportunity for "vulturing."

> Several factors must be considered when deciding where to look. . . . My opinion regarding exploration in the U.S. and Canada has not changed. . . . Although the Bush administration is more amenable to development, the permitting laws are already on the books and unlikely to change as the heat is already on the Bush administration regarding environmental policy. The poles [sic] clearly show that the American people put the environment above all else. . . .
>
> If Peru falls from favor, Central America could very well become the focus of the market. Investment laws are favorable. Most of these countries are desperate for foreign investment and have targeted mining as a vehicle. . . .

[15] William Gehlen Notes from Due Diligence Trip to El Salvador ("Gehlen Due Diligence Notes") at 2 (C-618).

[16] Gehlen Due Diligence Notes at 3 (C-618).

> Our strategy to date has been to look for large deposits that offer a premium when sold to large operating companies. We look for low cost deposits that have a margin that we can sell to an operating company. That can not change. . . .
>
> By design, Pacific Rim is a company that finds assets and sells them to a customer, an operating gold mining company. . . .
>
> While you must drill to be successful, with some exception, this is not the time to drill. There is little reward for drilling success at this point in time. This is the time to set the company up for better gold prices. That means we do all of the cost effective work that leads up to drilling. The first step is generating prospects. The second step is to advance those prospects to the drill stage. If the price has not moved, we wait. Again, we must put the company in a position of longevity and set the company up for the next run by stockpiling quality assets. . . .
>
> Vulturing consists of evaluating prospects that have been previously identified and explored to some degree or another. In this approach, we use our expertise to identify opportunity.[17]

25. Pac Rim's 2002 merger with Dayton was in line with this strategic plan. One year after circulating the above-cited memo, on the date shareholders approved the merger, Catherine McLeod-Seltzer told shareholders: "Achieving the extraordinary profits that we seek is best accomplished by delivering a high grade underground deposit of sufficient size to attract the attention of the market."[18] Thus, Pac Rim took a risk acquiring the El Dorado exploration licenses without much time left for their exploration, because it considered El Salvador "desperate for foreign investment" with less stringent environmental policy than the United States and Canada, and Pac Rim hoped to set itself up for "better gold prices" by using its mine-

[17] Memorandum from Tom Shrake to Pacific Rim Mining Corp. Board of Directors, Apr. 30, 2001, at 2-4, 6 (C-620) (emphasis added).

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

finding and exploration expertise to be able to turn El Dorado into a project "of sufficient size to attract the attention of the market."

B. When the exploration licenses expired, Pac Rim wanted to keep exploring

26. It is clear from Pac Rim's strategy that it never intended to mine one small deposit at El Dorado for six years. But by the end of 2004, Pac Rim only had a Pre-Feasibility Study "based on mining the Minita deposit alone."[19] Knowing that developing only the small mine proposed in the Pre-Feasibility Study would not help it obtain the extraordinary profits it sought, Pac Rim decided to request a large area for continued exploration, ignoring the Mining Law provisions contrary to its plan.

27. Pac Rim recognizes that Dayton's failure to move the project forward was a result of the small resource it had been able to define as of 2001: "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."[20] Pac Rim similarly did not want to develop the small mine that would result from the reserves it had identified by the end of 2004, but it was not going to let incomplete exploration derail its dream of extraordinary profits. Rather, Pac Rim, knowing the Government had shown good will to Kinross and Dayton and believing that the country was "desperate for foreign investment,"[21] assumed that the Government would accommodate its request to obtain an exploitation concession for continued exploration.

---

[19] Pacific Rim Mining Corp., "El Dorado," www.pacrim-mining.com at 2 (R-45).

[20] Reply, para. 168 (emphasis added).

[21] Memorandum from Tom Shrake to Pacific Rim Mining Corp. Board of Directors, Apr. 30, 2001, at 3 (C-620).

28. Pac Rim paid no attention to the Mining Law's stipulation that the surface area of an exploitation concession "shall be granted based on the magnitude of the deposit or deposits, and the technical justifications given by the Concession Holder."[22] Even though it proposed to mine just one deposit under less than 0.1 km^2 of surface land and could have realized the proposed project with a 1.6 km^2 concession,[23] Pac Rim decided to apply for a much larger concession for further exploration. In a September 2004 email to the company's board members, Mr. Shrake explained that Pac Rim was in "no hurry" to develop a small operation at El Dorado:

> The strategy of not immediately developing El Dorado was presented after the merger. Here's a rehash of the logic. We were in no hurry to develop the 50K ounce per year operation envisioned. At the time, the multiples for such an operation produced a valuation for PMU that was about the same as the trading value as an exploration company. This, in conjunction with the fact that I had, and still have, a very strong opinion that El Dorado is a much larger gold system than our resource calculations show, are the reasons we did not immediately proceed with development.[24]

29. Thus, even though it knew from its due diligence review that it had just three years to move the project to exploitation,[25] Pac Rim, based on its calculation of "the trading

---

[22] Mining Law of El Salvador, Legislative Decree No. 544, Dec. 14, 1995, published in the Official Gazette No. 16, Book 330 of Jan. 24, 1996, amended by Legislative Decree No. 475, July 11,2001, published in the Official Gazette No. 144, Book 352 of July 31, 2001 ("Mining Law"), Art. 24 (RL-7(bis)) ("será otorgada en función de la magnitud del o los yacimientos y de las justificaciones técnicas del titular.").

[23] Environmental Impact Assessment "El Dorado Mine Project," Sept. 2005 ("2005 EIA") at 4-10 (C-8) (reporting the surface area of the underground mine as 95,340 m^2); First Expert Report of Behre Dolbear Minerals Industry Advisors, El Dorado Concession Application and Related Exploration Areas, Jan. 6, 2014 ("First Behre Dolbear Expert Report"), para. 44 ("Behre Dolbear considers the El Dorado Project as proposed in the Pre-Feasibility Study would require approximately 1.60 square kilometers to safely execute the mine plan for the Minita deposit within the concession boundaries.").

[24] Email from Tom Shrake to David Fagin, et. al, Sept. 14, 2004, at 1(C-708) (emphasis added).

[25] Gehlen Due Diligence Notes at 2 (C-618) ("Exploitation needs to go forward in 3 years or loose [sic] concession at El Dorado (under new mining law and regulations, 3 years out of 8 years remain)").

value" of the company (PMU was the stock symbol for Pacific Rim Mining Corp.), made the strategic choice to not "proceed with development" of the area it could study in those three years. Instead of trying to comply with the law, Pac Rim pursued a two-track strategy from the beginning, dedicating some resources to studying Minita and, at the same time, focusing on new exploration targets.[26]

30. Indeed, Pac Rim argued in its December 2004 exploitation concession application that it would not be "reasonable" to limit its request to the area that it had studied and proposed to exploit:

> As indicated in the Feasibility Study attached to this application, the investment in the development of the mine and construction of the plant and related facilities totals 56 million US dollars. This study clearly shows that, due to the favorable operating costs, high capital costs and very low internal rate of return (IRR), anything that extends the life of the operation will be beneficial to the project and therefore the workers, the municipalities that will receive the royalties stipulated in the Mining Law, the Department of Cabañas, the Republic of El Salvador and the investors. Based on the above, we do not think it reasonable to request only the areas of the Minita and Minita 3 veins, plant and tailings dam, but also other nearby areas containing mineralized veins and geological zones identified as having potential as the Concession area.[27]

---

[26] Memorial, para. 161; First Witness Statement of Ericka Colindres, Mar. 22, 2013, para. 59 (explaining that in 2004, "the company at no time wished to suspend the exploration program since its results were continually increasing the value of the project" / "la empresa no quería suspender el programa de exploración en ningún momento, ya que los resultados del mismo seguían cada vez más aumentando el valor del proyecto.").

[27] Application: Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession, Dec. 22, 2004 ("Concession Application") at 11 (R-2) ("Como se presenta en el Estudio de Factibilidad adjunto a esta solicitud, la inversión en el desarrollo de la mina y construcción de ia pianta e instalaciones relacionadas asciende a la suma de 56 millones de dólares de los EEUU. Este estudio muestra ciaramente, que debido a los buenos costos operacionales, grandes costos capitales y tasa interna de retorno (TIR) muy baja, que cualquier cosa que extienda la vida de la operación será favorable al proyecto, y por ende a los trabajadores, las municipalidades que recibirán las regalías estipuladas en la ley minera, el Departamento de Cabañas, la República de El Salvador, y a las inversionistas. Basado en esto, no nos parece razonable solicitar solamente el área de las vetas Minita y Minita 3, área de la planta y presa de colas, sino que también las otras áreas cercanas donde se encuentran vetas mineralizadas y zonas geológicamente identificadas como zonas con potencial, como área de Concesión.") (emphasis added).

31. Pac Rim insisted that "the right to evaluate and develop the El Dorado district to its maximum potential legally belongs to Pacific Rim" because of the project's "great potential for future mining development" and the "investments made up to the moment."[28] Pac Rim asserted this alleged right, based on what it considered "reasonable," (*i.e.*, what would maximize its profits) without any basis in the Mining Law and regardless of the fact that the exploration period had ended and Pac Rim could only propose a plan to mine one small deposit.

C. Pac Rim failed to comply with the legal requirements for an exploitation concession application

1. The surface land requirement

32. Shortly after submitting its application for an exploitation concession, Pac Rim was alerted to its failure to comply with the surface land ownership or authorization requirement. As Claimant described in the Preliminary Objections phase,

> Following the submission of the application, in March 2005, Ms. Gina Navas de Hernández, the Director of the Bureau of Mines, informed PRES that several persons in MINEC were of the view that the Mining Law required PRES to acquire ownership of, or authorization to use, the entire land surface overlaying the concession.[29]

33. With its Reply, Pac Rim includes an email from March 2005 in which Fred Earnest told Tom Shrake about his conversation with the Director of Mines:

> Gina informed me that we are going to have to get the authorization of all the surface owners within the area of the concession. I told her that this was absolutely wrong. I agree with the interpretation that in cases of surface impact, ownership, leasing or legal authorization is required, but in non-impacted areas it is dead wrong. It gives "Juan Embra" the final say as to whether

---

[28] Concession Application at 11 (R-2) ("el derecho de evaluar y desarrollar el distrito El Dorado, a su potencial máximo, le pertenece legalmente a Pacific Rim;""gran potencial para el futuro desarollo minero;" and "inversiones hechas hasta el momento . . .").

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

> the state minerals can be developed or not. She said that she would discuss the matter with the lawyers to see "IF" a solution was possible. I told her that there was no IF. There has to be a way, otherwise this country is not really in favor of developing its resources.[30]

34. This statement by Mr. Earnest is the best summary of Pac Rim's attitude for the laws of El Salvador. It did not matter to Pac Rim what the law was. The only thing that mattered was what Pac Rim wanted.

35. The Government has consistently affirmed the same interpretation it told Pac Rim in March 2005, when reviewing Pac Rim's application and throughout this arbitration.[31] In 2005, for example, both the legal advisor to the Minister of Economy and the legal advisor to the President of El Salvador confirmed this interpretation of the requirement.[32] So the Director of the Bureau of Mines was not "absolutely wrong" in 2005. Mr. Earnest, nonetheless, immediately began consulting with Pac Rim's local counsel to challenge the law.[33]

36. Pac Rim, in the Reply, insists that it was always confident that this issue could be (or was) resolved in its favor after it submitted its arguments about the interpretation of Article 37.2.b) in May 2005. But, in fact, the Government firmly rejected Pac Rim's arguments in 2005. With its Memorial, Pac Rim submitted a one-page memo from Fred Earnest to Tom Shrake with regard to the "Surface Owner Authorization Issue." Although this memo ends with a subheading

---

[30] Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713) (emphasis added).

[31] *See, e.g.*, Pac Rim Internal Memo re Surface Owner Authorization, June 28, 2005 (C-291); The Republic of El Salvador's Preliminary Objections, Jan. 4, 2010 ("Memorial (Preliminary Objections)"), para. 60.

[32] Legal Opinion from Dr. Marta Angélica Méndez for Bureau of Mines Director, May 31, 2005 (R-32); Response from Secretary for Legislative and Legal Affairs to Minister of Economy, June 20, 2005, at 4 (R-33) ("Esta Secretaría es de la opinión que, de acuerdo con todas las disposiciones antes citadas, cuando las mismas aluden 'al inmueble', sólo pueden referirse al inmueble que comprende la superficie para la que se otorgará la concesión.") ["This Secretariat is of the opinion that, according to all the provisions cited above, when the word 'property' is used, it can only refer to the property of the surface area for which the concession will be granted."].

[33] Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713).

("Meeting with [local counsel] Luis Medina") suggesting that there was more information in it, Pac Rim insists that it is a one-page document.[34] According to the part of this internal memo from June 2005 that has been put on the record, after Pac Rim submitted its arguments about how the law should be interpreted, the Director of Mines informed Mr. Earnest "that the office of the Secretariat for Legislative and Judicial Affairs had reviewed the mining law and was in agreement with the interpretation of the Ministry of Economy and the Division of Mines."[35]

37. Pac Rim's 2005 email shows that it knew that the very people in the Government responsible for reviewing its concession application (the Bureau of Mines and the Ministry of Economy), as well as those responsible for advising the executive branch on any proposed legislation or amendments (the Secretariat for Legislative and Legal Affairs), all agreed that the law required an applicant for an exploitation concession to demonstrate ownership or authorization for the entire land surface subject to the concession. The significance of this information was clear to Pac Rim. Mr. Earnest emphasized: "There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and the authorization of the land owners."[36]

38. Pac Rim has identified only one person in the Government it considered sympathetic to its arguments about the interpretation of Article 37.2.b). According to Pac Rim, Ricardo Suarez, legal counsel to then-Vice President Ana Vilma de Escobar, showed "confusion about this issue."[37] As El Salvador pointed out in its Counter-Memorial, this is not true. Mr.

---

[34] El Salvador's Redfern Schedule, Documents Requested from Pac Rim Cayman and affiliated companies, Jan. 31, 2014, at 16 (**Exhibit R-143**).

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

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

[37] Reply, para. 344, n.674.

Suarez unequivocally told Pac Rim that the surface land requirement was the law and as such, it had to be complied with: "that is the current legal text, and the one that must be observed."[38]

39. Mr. Suarez, after explicitly telling Pac Rim that the requirement of Article 37.2.b) had to be complied with, went on to explain to Pac Rim's counsel that its proposed authentic interpretation could not be considered an "interpretation," as it would completely change the text's meaning:

> Regarding how to reconcile that text with State ownership, and specifically as relates to the "authentic interpretation" proposal that you have prepared, it appears to us that in contrasting the current text of [Article] 37 with the text of the proposed interpretation, rather than clarifying an opaque passage of the law, you would be changing its meaning, assigning a different scope—although logical and desirable—to the text.
>
> This would mean that rather than an interpretation, we are dealing with a reform of the text under the guise of an interpretation, something allowed for neither in our legal system, nor in the doctrine that inspires it.[39]

40. Thus, Mr. Suarez, the one person in the Government that Pac Rim repeatedly invokes as supporting its arguments, in fact rejected Pac Rim's proposed reinterpretation of the law. Mr. Suarez's email was clear: Pac Rim had to comply with the law or change the law.[40] This was in accordance with Pac Rim's own assessment in May 2005; Pac Rim itself had noted

---

[38] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005, at 1 (C-289) ("ese el texto legal actual, y es el que debe ser observado.").

[39] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005, at 1 (C-289) (additional emphasis added) ("En cuanto a las formas de armonizar dicho texto con la calidad de propietario del Estado, y específicamente en lo relativo a la propuesta de interpretación auténtica que has preparado, nos parecería, al contrastar el texto actual del Art. 37 vis-a-vis el texto de interpretación propuesto, que más que aclarar un pasaje oscuro de la ley, se estaría cambiando su sentido, dándole un alcance distinto - aunque lógico y deseable- a su texto. Ello implicaría que, más que una interpretación, estaríamos en presencia de una reforma del texto, con aparente ropaje de interpretación, lo cual no permite ni nuestro ordenamiento legal ni la doctrina que lo inspira.").

[40] For avoidance of doubt, El Salvador also notes that neither Mr. Suarez nor the Vice President had any role or authority whatsoever in the concession application and approval process. That process was entirely under the authority and responsibility of the Bureau of Mines and the Minister of Economy.

that if it could not change the Government's interpretation of Article 37.2.b), it would have to "seek[] a change in the wording of the law."[41]

41. El Salvador notes that Pac Rim's knowledge that it had to acquire authorizations for the entire requested area or change the law preceded Pac Rim's efforts to obtain the additional exploration license areas on which it bases its claims in this arbitration. The internal memo noting that the Bureau of Mines, the Ministry of Economy, and the Secretariat for Legislative and Legal Affairs all agreed that the law required an applicant for an exploitation concession to demonstrate ownership or authorization for the entire land surface subject to the concession is dated June 28, 2005.[42] Pac Rim received the Santa Rita license in July 2005 and requested the EIA for exploration in January 2006. Pac Rim requested the Guaco, Huacuco, and Pueblos licenses on August 26, 2005, received the licenses in late September 2005, and submitted the exploration EIAs for these areas in 2006 and 2007.[43] Thus, the issues with the concession application had been identified before Pac Rim pursued the additional exploration areas. Nothing changed with regard to this requirement and Pac Rim's failure to comply with it after Pac Rim obtained the additional exploration areas. Pac Rim cannot claim that the situation with regard to its incomplete concession application suddenly changed after it had acquired the additional license areas and continued its exploration activities.

42. In May 2006, Pac Rim affirmed in a presentation titled "Project Development Activities" that it needed to either change the law or obtain authorizations from all surface owners to obtain an exploitation concession. Pac Rim's PowerPoint slide is shown below:

---

[41] Pacific Rim El Salvador, EIS and Exploitation Concesión Status Memorandum, May 10, 2005, at 3 (C-712).

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

[43] Memorial, paras. 209, 210, 341, 350.

[44]

43. This slide confirms that Pac Rim knew all along that it had to either change the law or obtain authorizations from surface landowners. There would be no reason to order a cadastral survey of "surface properties overlying the underground operations" unless Pac Rim still thought it would need to obtain authorizations from surface landowners if it failed to change the law.

44. Later in 2006, having apparently given up on obtaining the required authorizations, Pac Rim further acknowledged that Mining Law reform was necessary for its application to move forward.[45] In June 2007, Mr. Shrake told the Board: "Momentum continues to build for the mining law reform which will precede the issuance of our permit."[46] A few months later, Pacific Rim Mining Corp. admitted in its Annual Report for the Canadian

[44] Pacific Rim Mining Corp. Presentation: Project Development Activities, May 2006, at 3 (C-711).

[45] Pacific Rim Mining Corp., News Release, *El Dorado Project Update*, Nov. 9, 2006, at 1 (C-309) ("it is uncertain whether the El Dorado Exploitation Concession will be granted prior to the forthcoming reformation of the El Salvadoran Mining Law.").

[46] Email from Tom Shrake to Pacific Rim Board of Directors, July 5, 2007, at 1 (C-564) (emphasis added).

regulatory authorities that it was "unlikely that a mining permit [would] be granted prior to the expected reformation of the El Salvadoran mining law."[47]

45. Finally, it is important to note that the existence of this requirement—and the fact that it applies to the entire surface area of the requested concession—was not new in 2005, and it was known, or should have been known, by Pac Rim even before it decided to make its investment in El Salvador in 2002. In fact, this requirement was explained in the 1998 study of mining potential in El Salvador that Claimant submitted with its Reply as evidence that the Government of El Salvador was welcoming investment in the mining sector. This 1998 study, authored by a geologist with the Bureau of Mines of the Ministry of Economy, clearly stated what the requirement was and laid out the reasons for that requirement. Under the 1995 Mining Law, the applicant for an exploitation concession could not rely on expropriation as a tool to obtain land rights for a concession; the applicant had to have those rights as a pre-requisite to even apply for the concession. The 1998 document lays it down very clearly:

> The repealed Mining Code [of 1922] established that the mining industry was in the public interest; therefore the owners of mining properties had the right to expropriate under the circumstances and conditions specified in the code.
>
> The current Mining Law [of 1995], unlike the repealed Code, does not consider the mining industry to be of public interest, and therefore this Law does not contemplate the concept of expropriation. Thus, any person who requests a mining concession must, prior to its approval, prove the availability of the property that will be subject to the concession, which must be done by means of a deed of ownership for the property or legally granted authorization from the owner.[48]

---

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

[48] Silvio A. Ticay Aguirre, Development and Perspectives of Mining Activity in El Salvador, Feb. 1998 (C-622) ("El Código de Minería ya derogado establecía que la industria minería era de utilidad pública: en consecuencia los dueños de fundos mineros tenían derecho de expropiar en los casos y condiciones que señalaba el código. En la Ley

46. Thus, Pac Rim knowingly failed to comply with the surface land requirement for concession applications, a requirement clear from the text of the 1995 Mining Law that has consistently been interpreted by the Government as applying to the entire surface land subject to the requested concession. In the end, Pac Rim accomplished neither its Plan A nor Plan B: the law was not changed and the company did not obtain the required authorizations.

2. The feasibility study requirement

47. The problem with Pac Rim's pre-feasibility study is the same as the problem with surface land authorization: Pac Rim wanted more than it could qualify for. Pac Rim wanted a large concession, but it had only done incomplete work with respect to a very small area. Thus, for its December 2004 application, Pac Rim only completed a Pre-Feasibility Study, and that Pre-Feasibility Study was based on a "Conceptual Underground Mine Design" for the Minita deposit alone. So there were at least two independent problems with compliance with this requirement: 1) Pac Rim did not submit a feasibility study as required by the Salvadoran Mining Law, and 2) the Pre-Feasibility Study Pac Rim did submit was limited to one mine to develop one small deposit in the large concession area for which Pac Rim applied.

48. As described above, Pac Rim did not want to mine just the Minita deposit.[49] As Mr. Shrake describes in his third witness statement: "we knew that the project had tremendous upside beyond the value of the mine project described in the PFS."[50]

---

de Minería vigente a diferencia del Código derogado, no se considera la Industria Minera como de utilidad pública, por lo que en esta Ley no se contempla la figura de la Expropiación, es así como toda persona que solicite una concesión minera, previo al otorgamiento de la misma deberá comprobar la disponibilidad del inmueble sobre la cual recaerá la concesión, lo cual se hará media escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario . . .") (El Salvador resubmits Claimant's original exhibit C-622 with a corrected translation of these two paragraphs on page 23).

[49] Email from Tom Shrake to David Fagin, et. al, Sept. 14, 2004, at 1 (C-708) ("The strategy of not immediately developing El Dorado was presented after the merger. Here's a rehash of the logic. We were in no hurry to develop the 50K ounce per year operation envisioned. At the time, the multiples for such an operation produced a valuation for PMU that was about the same as the trading value as an exploration company. This, in conjunction with the fact

49. Pac Rim, of course, also knew that a feasibility study is required to develop a mine and that a pre-feasibility study is insufficient. Pac Rim knew that the Mining Law set specific time limits on the exploration period and thus a specific deadline for submitting the concession application and that the law required that a feasibility study (not a pre-feasibility study) be submitted with the concession application.

50. But Pac Rim was not anywhere near prepared to submit a feasibility study for the concession area for which it wanted to apply. It did not even have a feasibility study for the very small area that might have been the subject of such a study. Therefore, Pac Rim submitted only a Pre-Feasibility Study for only one of the mines it wanted to develop with its exploitation concession application. The rest of the area it applied for was not in fact for exploitation, but for further exploration, with the hope that sometime in the future Pac Rim might develop enough information to prepare a feasibility study.

51. In fact, Pac Rim knew that its Pre-Feasibility Study was incomplete, insufficient, and premature even before the Bureau of Mines sent it a letter in October 2006 warning that it had failed to file a feasibility study. In September 2005, around the time that Pac Rim was reducing its request from 62 to 12.75 km^2, Mr. Shrake reported that the Pre-Feasibility Study submitted with its application was extinct:

---

that I had, and still have, a very strong opinion that El Dorado is a much larger gold system than our resource calculations show, are the reasons we did not immediately proceed with development.") (emphasis added).

[50] Third Witness Statement of Thomas C. Shrake, Apr. 11, 2014 ("Third Shrake Witness Statement"), para. 17.

> In January we published a pre-feasibility study based soley [sic] on the half-million ounce reserve at Minita. This study considered an underground mine that would produce 80,000 ounces per year at a cash operating cost of $163/oz. It's an attractive return at 18% but we've already rendered it extinct with the new drilling discoveries we've made this year. . . .[51]

52. Again, Pac Rim had found itself unable to comply with the law and hoped to ignore the law or have it changed to eliminate the requirements it could not meet. Thus, after submitting its concession application and Pre-Feasibility Study, Pac Rim began working on a full feasibility study, incorporating additional resources. From 2005-2009, Pac Rim often discussed the Feasibility Study it was working on and indicated that it would present it to the Government. In 2005, Pac Rim said it would soon "amend the Minita pre-feasibility study to take into consideration the new ounces defined by the South Minita resource estimate, which will provide an economic analysis of a proposed operation that involves mining Minita and South Minita simultaneously."[52] In its 2008 Annual Report to the Government, Pac Rim explained that it would soon complete the feasibility study, which would include several new and revised technical studies, including "Revised Tailings Dam Study; Revised Underground Mine and Processing Plant Study; [and] New calculation of mining resource."[53]

53. In this arbitration, Claimant admitted that the Feasibility Study it was working on and delayed and then eventually suspended is the document required by Salvadoran Mining Law:

---

[51] Third Shrake Witness Statement, para 22; Email from Tom Shrake to Barbara Henderson and Catherine McLeod-Seltzer with attached Denver Talking Points, Sept. 22, 2005, at 2 (C-707) (emphasis added).

[52] Pacific Rim Mining Corp., News Release, *South Minita Gold Zone Continues to Evolve as a Key Component of Pacific Rim's Exploration Strategy*, Sept. 9, 2005, at 1 (C-253) (emphasis added).

[53] 2008 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession, Feb. 2009 ("2008 Annual Report"), § 7 (R-3) ("Revisión del Estudio de Presa para Pila de Colas; Revisión del Estudio de Mina Subterránea y Planta de Proceso; Nuevo cálculo de recurso minero.").

> Claimant is not "suggest[ing] that the feasibility study on hold is different from the feasibility study required by the Salvadoran Mining Law," as asserted by Respondent in its Reply. They are the same document.[54]

54. It is an undisputed fact that Pac Rim never submitted the Feasibility Study it was working on after submitting the Pre-Feasibility Study in January 2005, despite having recognized in 2005 that the submitted Pre-Feasibility Study was extinct and incomplete.

3. The environmental permit

55. Pac Rim admits that its concession application was missing an environmental permit, but argues that it did not receive the permit for purely "political reasons" that "had nothing to do with credible or objective scientific concerns about the environmental dangers of Pac Rim's project."[55] The record and El Salvador's witnesses thoroughly refute these allegations.

56. First, El Salvador notes that Pac Rim's Environmental Impact Study, like its Pre-Feasibility Study, related to a proposal to mine one small deposit within the much larger requested concession area. Thus, the "Project Description," referred to "6 years of operation" and two veins "to be exploited (Minita vein and Minita 3 vein)."[56] As a result, even if this study had been approved (which it was not), the resulting environmental permit (for a project that would occupy **0.47 km^2** of surface area with installations and involve a mine under **0.095 km^2** of surface area)[57] could not have supported an application for a **12.75 km^2** concession. This means that even if Pac Rim had obtained the environmental permit it has made the center of this case

---

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

[55] Reply, para. 24.

[56] 2005 EIA at 1-1, 1-2 (C-8).

[57] 2005 EIA at 4-10 (C-8).

(and it had met the other requirements it failed to meet), the Ministry of Economy could not have granted the requested concession because the environmental permit would have covered only a small percentage of the area of the concession.

57. Second, there were, and are, legitimate concerns about metallic mining in El Salvador that Pac Rim continues to ignore. Pac Rim has made every effort to deny the legitimacy of these concerns. For instance, former MARN technician Ericka Colindres who went to work for Pac Rim in January 2006, claims that "other metallic mines developed in El Salvador have not generated any negative impacts."[58] This assertion is false. The only company that has received an exploitation concession in El Salvador in recent decades, Commerce Group, had its environmental permits revoked in 2006 because of its failure to implement measures to correct and mitigate extensive environmental damage from earlier operations.[59]

58. The Salvadoran population was aware of the potential negative environmental impact of metallic mining. An international consultant contracted to advise the Government about the suitability of mining exploitation in El Salvador noted heightened concerns among the Salvadoran population due to the risk of contaminating the Lempa River basin, the country's most important water source, and the fact that "the country's experience shows that the little activity that has been carried out has been done irresponsibly."[60] In this 2006 study, Dr. Pulgar, who currently serves as Peru's Minister of Environment, also noted that groups opposed to

---

[58] Second Witness Statement of Ericka Colindres, Apr. 11, 2014 ("Second Colidres Witness Statement"), para. 45 ("se han desarrollado otras minas metálicas en El Salvador que no han generado impactos negativos.").

[59] Witness Statement of Hugo César Barrera Guerrero, June 26, 2014 ("Barrera Witness Statement"), para. 5; Counter-Memorial, para. 207.

[60] Counter-Memorial, para. 206 (citing Manuel Pulgar-Vidal, Final Report: Mining activity, overview of development, environment, and social relations, Aug. 11, 2006 ("Pulgar Final Report") at 11-15 (R-129)).

mining in the country considered that MARN lacked capacity to ensure that mining activity would not harm the environment:

> The groups recognize that the Ministry of Environment is not equipped to effectively assume a strong environmental policy regarding mining activity. This is not only due to the issue of its expertise on a subject with which it has no previous experience, but also to its own lack of sufficient personnel to take on the numerous tasks assigned to the Ministry under the Environmental Law and other legislation.[61]

59. Dr. Pulgar considered that El Salvador was not ready to move forward with mining and recommended dialogue, consensus-building, and seeking comprehensive solutions:

> [T]he current situation, with opposing views not just in relation to the law and policy, can result in any future performance of the activity being carried out in an environment of growing conflict.
>
> In response to this, to think or attempt to conclude that all of this responds to political ends, limited information, or possible radicalism of organizations will not bring about a solution, and will instead impact the fundamental elements of what generates polarization and will be reflected in even more conflictive situations. International experience shows that these positions should be channeled through dialogue, creating forums for consensus-building, and by incorporating mechanisms that build credibility among the parties. . . .[62]

---

[61] Pulgar Final Report at 13 (R-129) ("Los grupos reconocen que el Ministerio del Ambiente no se encuentra en capacidad de asumir eficazmente una política ambiental sólida en relación a la actividad minera. No sólo por una cuestión de especialidad en un tema sobre el cual no tiene experiencia previa, sino a su vez por la propia carencia de personal suficiente para hacerse cargo de las numerosas tareas que la Ley del Medio Ambiente y otras leyes le encarga.").

[62] Manuel Pulgar-Vidal, Recommendations:Mining activity, overview of development, environment, and social relations, Aug. 11, 2006 ("Pulgar Recommendations") at 5 (R-132) ("la situación actual, con posiciones encontradas no sólo en relación a la ley y la política, puede generar que cualquier desarrollo de la actividad en el futuro se haga en condiciones de creciente conflicto. Frente a ello pensar o intentar interpretar que todo esto responde a fines políticos, poca información o eventual radicalismo de las organizaciones, no generará solución alguna y más bien incidirá en las bases de lo que genera la polarización y se reflejará en situaciones aún más conflictivas. Las experiencias internacionales demuestran que estas posiciones deben canalizarse a través del diálogo, la generación de espacios de construcción de consensos y la incorporación de mecanismos que generen credibilidad entre las partes. . . .").

60. The same factors noted by civil society also concerned then-Minister of Environment, Hugo Barrera, in 2006. He testifies: "Once I had taken office as Minister, I began hearing of the concerns of the population of the Department of Cabañas and other parts of the country with respect to the damaging effects that metallic mining could cause."[63] An October 2006 newspaper account confirms Minister Barrera's recollection:

> Hugo Barrera believes that these projects are not appropriate, because of damage to the ecosystem. The population density, the limited territory and the proximity of water resources are, for Hugo Barrera, factors [that make] these projects unfeasible.[64]

61. As then-Minister Barrera describes in his witness statement, he heard from the local communities that did not want the Government to grant a concession to Pac Rim. He describes attending a forum at the Universidad Centroamericana "José Simeón Cañas" (UCA) in June 2006 with about 500 people, most of whom were opposed to metallic mining. He concludes: "on the basis of this personal experience . . ., I can confirm that it is not true that all or even a majority of the inhabitants of the areas in the vicinity of Pacific Rim's project supported it, much less that they would be prepared to sell their land or grant legal authorization with their consent to Pacific Rim, which was necessary for Pacific Rim to obtain the subsequent authorizations from other State entities."[65]

62. Also in October 2006, the FMLN political party said that complaints and objections from local communities motivated its proposal to suspend mining activities:

---

[63] Barrera Witness Statement, para. 5.

[64] Leonel Herrera, *Congressmen Will Ask for the Opinion of the Executive About Metallic Mining*, Diario Co Latino, Oct. 19, 2006 (C-694) ("Hugo Barrera considera que estos proyectos no son convenientes, debido a los daños al ecosistema. La densidad poblacional, la estrechez del territorio y la cercanía de los recursos hídricos son, para Hugo Barrera, factores que hayan inviables estos proyectos.") (translation by El Salvador).

[65] Barrera Witness Statement, paras. 21-24.

> "We are suggesting a temporary decree for an indefinite period of time since there have been several complaints, studies and objections from resident communities in the zones where mining exploration is taking place," FMLN congresswoman Lourdes Palacios told BNamericas.[66]

63. Thus, several factors, none of them political, and all of them based on legitimate concerns (environmental harm caused by Commerce Group's activities, MARN's lack of capacity to supervise and ensure compliance with protective measures, and conditions leading toward water stress) led the Ministry to demand more information from Pac Rim before it could receive an environmental permit for a 30-year exploitation concession.

64. In its Memorial on the Merits, Pac Rim admitted that it was told, at a meeting with the Minister of Environment and the Minister of Economy on May 7, 2007, that the review of applications for environmental permits for all metallic mining activities in the country would be halted until a strategic environmental evaluation of the mining industry was conducted. After that meeting, the Salvadoran Government began the process to complete the Strategic Environmental Evaluation (EAE). As demonstrated by exhibits on the record and described below in Section IV, the Government took several steps beginning in 2007 to obtain financing and develop guidelines for the EAE process.[67] Thus, Pac Rim did not receive an environmental

---

[66] Harvey Beltrán, *Congress considers ban on mining while reform under debate – El Salvador*, Oct. 17, 2006 (C-710).

[67] *See, e.g.*, Response from Secretary for Legislative and Legal Affairs to Minister of Environment re: draft legislative decree suspending Articles 8 and 9 of the Mining Law, July 24, 2007, at 4 (C-840) (attaching a draft moratorium decree that stated: "With the aim of ensuring balance between economic development and the environment, mining activity in our country must be strategically assessed in order to guarantee that this industry contributes to the sustainable development of El Salvador" / "Que con el objeto de asegurar el equilibrio entre desarrollo económico y medio ambiente, es necesario evaluar estratégicamente la actividad minera en nuestro país, a efecto de garantizar la contribución de esa industria al desarrollo sostenible de El Salvador."); Letter from Carlos Guerrero Contreras to Yolanda de Gavidia, Dec. 18, 2007 with attached Guidelines for the Strategic Environmental Evaluation for the Mining Sector (C-830); Letter from the Yolanda de Gavidia to Marisol Argueta de Barillas, Mar. 3, 2008 (C-831); Key points for the EAE Terms of Reference, prepared by the Ministry of Economy, Aug. 21, 2008 (C-834); Terms of Reference for the EAE from MARN, Nov. 13, 2008 (C-835). Claimant submitted these exhibits without translation; El Salvador submits these five documents with translations as **Exhibits R-144, R-145, R-146, R-147,** and **R-148**, respectively.

permit for three primary reasons: the Ministry was under a lot of pressure from the communities to protect the environment; there were concerns about the potential impacts of metallic mining given conditions in El Salvador; and Pac Rim did not convince the Ministry that it would develop El Dorado without harming the environment.

* * *

65. These events—all the communication about the surface land ownership or authorization requirement, Pac Rim rendering its Pre-Feasibility Study extinct and working on a new, complete feasibility study, and El Salvador recognizing the need to realize an EAE and taking steps to begin the EAE process—occurred 1) before Pac Rim was moved from the Cayman Islands to the United States in December 2007; and 2) before then-President Saca confirmed in 2008 that mining had to be studied before exploitation could be allowed. Pac Rim, through no fault of El Salvador, submitted an incomplete, deficient application for an exploitation concession and chose not to fix the omissions. It was Pac Rim's failure to meet the requirements from 2004-2006, not a newspaper article in 2008, that prevented Pac Rim from being able to obtain a concession.

D. Pac Rim decided to focus on lobbying for public and government support for its project and changing the law

66. As described above, Pac Rim's application for an exploitation concession did not comply with the Salvadoran Mining Law. Pac Rim's application lacked three independent requirements: documentation of ownership or authorization for the requested surface area, a feasibility study, and an environmental permit. During the Preliminary Objection phase of this arbitration, Pac Rim admitted that, instead of changing its application to comply with the law, it decided to wait and hope the law would be changed in its favor:

> Claimant could have revised the application (for example, by changing the concession size; by seeking to obtain ownership or authorization to use more surface land; by seeking to have the Government expropriate any land that private owners were not willing to sell to Claimant or authorize Claimant to use, *etc*.); or Claimant could have proceeded with the application, hoping that the Bureau of Mines would ultimately resolve its apparent uncertainty on this issue in Claimant's favor. Claimant chose the latter course.[68]

67. Thus, Pac Rim, wanting to exploit much more than just the Minita deposit, refused to study and request a concession area for which it might have been able to meet the legal requirements. Instead, after failing to convince the Government to amend or re-interpret the Mining Law, Pac Rim devoted its resources to lobbying the public and the Government to give it the concession despite its failure to comply with the legal requirements.

68. In its Reply, Pac Rim says that it "adopted a policy of following the Government's lead."[69] This is nonsense. To the contrary, Pac Rim spent significant time and resources to try to influence the Government to grant the concession even though Pac Rim had not complied with the law.[70] And the Government tried to accommodate Pac Rim. There are several examples of such efforts on the record:

- First, the Minister of Economy, even after having received the legal opinion of its own legal adviser and of the Director of the Bureau of Mines stating unequivocally that the Mining Law required ownership or authorization for all the surface area requested for a concession, presented

---

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

[69] Reply, para. 8. *See also* Reply, para. 114 ("Pac Rim was happy to follow the Government's lead"); para. 345 ("One way or another, we were willing to work cooperatively with the Government, as we always had, and to let the Department of Mines take the lead in suggesting the way forward on this issue.").

[70] *See, e.g.*, Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713) ("Gina informed me that we are going to have to get the authorization of all the surface owners within the area of the concession. I told her that this was absolutely wrong. . . . She said that she would discuss the matter with the lawyers to see "IF" a solution was possible. I told her that there was no IF."); Presentation Pacific Rim Operations in El Salvador, Oct. 2007, at 7 (C-737) ("Strategy: Obtain support from key stakeholders to obtain a change in policy regarding Pacific Rim.").

the issue to the legal adviser to the President and attached the legal opinion by Pacific Rim's counsel.[71]

- Second, the Ministry of Economy considered seeking an "authentic interpretation" of the surface land ownership or authorization requirement that would change the meaning as Pac Rim advocated.[72]

- Third, the Ministry of Economy considered amending the Mining Law to get rid of the surface land ownership or authorization requirement for underground mines, so that Pac Rim would not need to obtain authorization from all the surface land owners in the area of its requested concession.[73]

- Fourth, the Bureau of Mines held off on formally requesting the missing items from Pac Rim's application for almost two years because it was "sympathetic" to Pac Rim. As Fred Earnest described in 2005, Pac Rim appreciated the Bureau's allowance: "this buys us time."[74]

69. When efforts to amend or re-interpret the law failed and the Bureau of Mines remained firm about the proper application of Article 37.2.b) of the Mining Law, Pac Rim began spending significant sums on public relations and government relations. In fact, Claimant's President and CEO, Tom Shrake, now asserts that he was "not aware" of any suggestion that Pac Rim needed to comply with the law to get the permits. Instead, he says, "we were repeatedly reassured that we would get our permits when it was politically convenient for us to do so."[75] This is contrary to what Mr. Shrake said at the Hearing on Jurisdiction:

---

[71] Response from Secretary for Legislative and Legal Affairs to Minister of Economy, June 20, 2005 (R-33).

[72] Email from Luis Medina to Ricardo Suarez, Sept. 20, 2005, at 1 (C-289) ("te adjunto un borrador de lo que sería la interpretación auténtica que necesitamos para que el proyecto de minería salga adelante.") ["I'm enclosing a draft of the kind of authentic interpretation that we need for the mining project to move forward."]; Response from Secretary for Legislative and Legal Affairs to Minister of Economy re: "Authentic Interpretation," Oct. 6, 2005 (R-34).

[73] Letter from Bureau of Mines Director to Elí Valle with Proposed Amendments to the Mining Law of El Salvador, Sept. 13, 2005 ("Letter to Elí Valle with Proposed Amendments to the Mining Law") (R-35); Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, and Bill Gehlen, Oct. 25, 2005 (C-400) (describing the proposed amendment that for underground operations the company would only need authorizations for where surface installations would be constructed as "exactly what we need.").

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

[75] Third Shrake Witness Statement, para. 31 (emphasis in original).

> Q: So, part of what Salvadoran officials were assuring you in your meetings was that they would comply with the laws of El Salvador; is that correct?
>
> A. Yes.
>
> Q. Did you ever receive any assurances that your Concession application would be approved if it did not comply with the existing law?
>
> A. No.[76]

70. Thus, Mr. Shrake's latest testimony that the project would be authorized when it was politically convenient is not what Pac Rim was told, but rather what Pac Rim hoped. Therefore, as documents produced by Pac Rim in response to El Salvador's document requests show, Pac Rim focused its efforts on lobbying to receive the concession without complying with the law, including the following:

- Starting in 2006, Pac Rim entered several agreements with public relations consultants and lobbyists to, *inter alia*, provide "connections to people of influence in government;" provide political advice for securing the necessary permits "whether by administrative, legislative, judicial or other legitimate mechanisms and procedures;" and design a communications strategy. Some of these agreements included payment in stock options in the company in addition to monetary compensation.[77]

- Pac Rim told contacts at Scotia Capital in 2007: "we may be asking a favor at some point. My strategic group's initial idea is to wait until after the law and use your influences for the next phase of arm bending, the permit."[78]

- Pac Rim spent around $2 million annually in 2007 and 2008 on public relations.[79]

---

[76] Transcript, Hearing on Jurisdiction, Day 2, 473:1-8.

[77] Pac Rim's Production Documents 2-1 (Pacific Rim Mining Corp. Consulting Agreement, Nov. 1, 2008) at 2 (**Exhibit R-149**); 2-3 (Pacific Rim Mining Corp. Consulting Agreement, Feb. 1, 2007) at 11 (**Exhibit R-150**); 2-11 (Pacific Rim El Salvador Strategic Communication Services Contract, Mar. 2, 2007) (**Exhibit R-151**).

[78] Email from Tom Shrake to Paul Rollinson and George Brach, May 24, 2007 (C-728).

[79] Pac Rim's Production Document 1-1 (Certified Public Relations Expenditures from 2002-2013) at 3 (**Exhibit R-152**).

- Pac Rim spent about $328,000 in 2008; $200,000 in 2011; $319,000 in 2012; and $229,000 in 2013 on lobbying in the United States and El Salvador.[80]

71. A key aspect of Pac Rim's lobbying efforts in 2007 was an initiative to replace the Mining Law to eliminate the requirements that Pac Rim was unable to meet. As Mr. Shrake describes:

> On 22 November 2007, the PCN party (*Partido de Concertación Nacional*) presented a mining law reform bill to the *Asamblea*. This bill was prepared with input from my advisors, and with indirect input from Pac Rim.[81]

72. As El Salvador has highlighted in previous pleadings, the proposed new mining law included several provisions that would specifically benefit Pac Rim. Unconvincingly, Pac Rim now argues that the new law was necessary for political reasons and "not because of legal obstacles facing us under the existing mining law."[82] But, in fact, the proposed law directly addressed the legal obstacles Pac Rim's application faced: it would require ownership or authorization only for the land on which the company would locate mining infrastructure and it provided for continued processing of any pending application that demonstrated mining potential pursuant to the submission of only a "pre-feasibility study."[83] Contrary to what Pac Rim says now,[84] and as it previously admitted, Pac Rim needed to change the law to move forward.[85] Tom

---

[80] Pac Rim's Production Document 3-1 (Certified Government Relations Expenditures from 2002-2013) at 2 (**Exhibit R-153**).

[81] Third Shrake Witness Statement, para. 47.

[82] Reply, para. 454 (citing Third Shrake Witness Statement, para. 42) (emphasis in original).

[83] Proposed New Mining Law of El Salvador, Nov. 2007, Arts. 34, 35, 38, 52, 54, 98 (R-36).

[84] Reply, para. 457 ("the company's collaboration with El Salvador to improve and strengthen its mining law was not driven by need.").

[85] Email from Luis Medina to Ricardo Suarez, Sept. 20, 2005, at 1 (C-289) ("te adjunto un borrador de lo que sería la interpretación auténtica que necesitamos para que el proyecto de minería salga adelante.") ["I'm enclosing a draft of the kind of authentic interpretation that we need for the mining project to move forward."] (emphasis added).

Shrake describes one of the "main goals" of the proposed new law as protecting Pac Rim's self-asserted "right to be granted the concession."[86]

73. According to a newspaper article submitted by Pac Rim, some legislators opposed the proposed new law supported by the company with provisions that would solely benefit Pac Rim, complaining of the "'political pressure' being exerted" to pass the law.[87] These legislators criticized the "urgency the ARENA, PDC, and PCN parties are attempting to impose"[88] on passing the mining law reform pushed by Pac Rim while the Minister of Economy was calling for a Strategic Environmental Evaluation. Indeed, the materials presented to the legislature with the PCN's motion to pass a new mining law include an October 2007 letter from the Minister of Economy advising the legislature to wait for the results of the EAE, considered to be "critical" to any reform of the existing Mining Law.[89]

74. Around the time that the proposed new mining law was submitted to the legislature in 2007, Pacific Rim Mining Corp. hired its international arbitration counsel, Crowell & Moring, and their U.S. lobbying affiliate, C&M Capitolink, to work on this case.[90] In

---

Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, and Bill Gehlen, Oct. 25, 2005 (C-400) (describing a proposed amendment to the law requiring only authorizations for where surface installations would be constructed for underground operations as "exactly what we need") (emphasis added).

[86] Third Shrake Witness Statement, para. 47.

[87] Gloria Silvia Orellana, *FMLN Denounces Multinationals' Interest in Mining Law*, Diario Co Latino, Jan. 9, 2008, at 1 (Claimant submitted this document as C-753 without translation; El Salvador submits the document with translation as **Exhibit R-154**) ("la 'presión política', que están ejerciendo . . .").

[88] Gloria Silvia Orellana, *FMLN Denounces Multinationals' Interest in Mining Law*, Diario Co Latino, Jan. 9, 2008, at 2 (R-154) ("la urgencia que pretenden imprimir las fracciones de ARENA, PDC y PCN . . .").

[89] Letter from Yolanda Mayora de Gavidia to Mario Marroquín Mejía, Oct. 18, 2007, at 18 (Claimant submitted this document as C-743 without translation; El Salvador submits a partial translation at 18 as **Exhibit R-155**) ("primordial importancia . . .").

[90] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011, at 1 (R-128) ("Crowell & Moring LLP's affiliate C&M Capitolink became a registered lobbyist for Pacific Rim Mining Corp. effective 24 October 2007 . . . An attorney-client relationship between Crowell & Moring and Pacific Rim Mining Corp. and its subsidiaries . . . commenced on or around the same date.").

December 2007, Pacific Rim Mining Corp. de-registered Pac Rim Cayman in the Cayman Islands and registered this holding company in the United States.[91] Then Pac Rim began preparing to file a CAFTA arbitration—by April 2008, Tom Shrake advised the Board of Directors: "We are in the final stages of preparing the CAFTA filing for arbitration."[92]

75. Thus, when the proposed law did not move forward, Pac Rim began threatening CAFTA arbitration, but it did not abandon its other efforts to influence the Salvadoran Government and force anyone who raised concerns about mining in El Salvador to back down:

> The Catholic Church has softened their stance in a statement made this week. The archbishop stated that he was not [o]pposed to mining, he just wants to be sure of environmental protection. This is the result of our demonstrations at mass the past seven weeks. . . The archbishop is in his final year before mandatory retirement and wants his final year to be special-without people protesting his mass. We will maintain these weekly protests, find an opportunity to surprise him in some other forum and increase the numbers.
>
> While in Washington I met with the former US Ambassador to the Vatican. We discussed the possibility of getting to the Pope with our issue. The Pope is anti-liberation theology and the statements by the ES archbishop contradict the statements of the Pope made in January. We are identifying for the right person in the Vatican for help. We also continue to pressure the Bush administration to intervene. We won't know if they do.[93]

76. Nevertheless, despite Claimant's best efforts and significant spending on lobbying—including its substantial spending on public and government relations as well as its efforts to pressure El Salvador through the Pope or the U.S. President—the Salvadoran Mining Law was never amended, interpreted, or replaced. The requirements that Pac Rim failed to

---

[91] Cayman Islands Gazette, Issue No. 01/2008, Jan. 7, 2008, at 2 (R-68); Articles of Domestication, Pac Rim Cayman LLC, Office of the Secretary of State, Nevada, Dec. 13, 2007 (R-69).

[92] Email from Tom Shrake to Pacific Rim Board of Directors, Apr. 24, 2008, at 2 (C-755).

[93] Email from Tom Shrake to Pacific Rim Board of Directors, Apr. 24, 2008, at 2 (C-755) (emphasis added).

comply with remain in effect today. And, in spite of its past "extraordinary signs of good will," El Salvador never acquired a legal obligation to change its law.

77. In sum, Pac Rim was not harmed by a newspaper article reporting alleged statements by then-President Saca in March of 2008. Pac Rim failed to meet the legal requirements for obtaining an exploitation concession under Salvadoran law in 2004 and then failed in its efforts to pressure the Government to ignore the law or to change the law. Any injury to Pac Rim occurred before March 2008 and was not attributable to any breach of a legal obligation by El Salvador.

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

A. Pac Rim has not shown that it had a right to an exploitation concession

1. Pac Rim could obtain a concession only by complying with the Mining Law

78. In the Preliminary Objection phase, Pac Rim accepted that it had no "automatic right" to a concession.[94] Pac Rim acknowledged that an exploration rights holder applying for a concession could only receive the concession "when it otherwise complies with all other requirements of the law."[95] In its Memorial, however, Pac Rim relied on old mining codes to support its argument regarding "the right of a discoverer of a mineral deposit to receive the corresponding concession."[96] Even though Pac Rim now says it "never based the existence of

[94] Response (Preliminary Objections), para. 130.

[95] Response (Preliminary Objections), para. 133.

[96] Memorial, paras. 466-468.

the legal rights at issue in this case upon the provisions of El Salvador's 'old [mining] codes,'"[97] Pac Rim specifically argued in the Memorial:

> These provisions of [the 1881 and 1922 Mining Codes] do not leave room for doubt as to the right of a discoverer of a mineral deposit to receive the corresponding concession. As explained further in the following subsections, it would be absurd to consider that El Salvador intended to do away with this right when it modernized its mining laws in 1996.[98]

79. After El Salvador's Counter-Memorial clearly established that the repealed mining codes cannot create rights, Pac Rim again pays lip service to the notion that it must comply with the law to obtain a concession,[99] but attempts to limit which provisions of the law it has to comply with by dismissing certain requirements as "formal" and implying that it does not have to comply with obligations that it considers mere formalities. For example, according to Pac Rim, the public comment process is "formal" and "is not sufficient grounds [to] eliminate the exclusive right."[100] Likewise, Pac Rim insists that Article 15 of the Regulations, which states that—for granting both concessions and licenses—the Bureau of Mines and the Ministry shall consider other factors like the national interest and the technical and financial capabilities of the applicant, really only applies to licenses.[101] Thus, according to Pac Rim, granting an exploration license entails a positive finding of the national interest of any mine in that area, regardless of the

---

[97] Reply, para. 30.

[98] Memorial, para. 468.

[99] Reply, para. 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.").

[100] Reply, para. 228.

[101] Reply, para. 229.

mine plan and the environmental impact assessment. This cannot be sustained.[102] Moreover, as will be discussed further below, Pac Rim argues that its lack of compliance with the requirements of Article 37.2 should not prevent it from obtaining a concession. So, Pac Rim has accepted that there is no so-called "automatic right" to a concession, only to insist that no legal requirement should be applied to prevent an exploration rights holder who has discovered a deposit from proceeding automatically to an exploitation concession. Pac Rim follows this tortured path because it has to insist that it had a perfected right to an exploitation concession in order to maintain its claims.

80. Pac Rim, however, cannot pick and choose which provisions of the Mining Law apply and it cannot escape the fact that the holder of an exploration license does not have a right to an exploitation concession upon the mere discovery of minerals. As El Salvador explained in the Counter-Memorial, an exploration rights holder does not have the right to demand an exploitation concession from the State. Claimant continues to base its arguments on false premises about the Mining Law, but its arguments fail under the plain language of the law.

a) Exploration licenses do not amount to real property rights in subsurface minerals

81. Pac Rim's main false premise is that exploration licenses amount to real property rights under Article 10 of the Mining Law.[103] In its Reply, Pac Rim mentions, but barely

[102] Second Expert Report of José María Ayala Muñoz and Karla Fratti de Vega on Administrative Law, June 20, 2014 ("Second Ayala/Fratti de Vega Expert Report") at 28 ("No puede decirse que en el momento del otorgamiento del permiso de exploración tenga la Administración que comprobar el cumplimiento de los requisitos que la ley establece para la concesión de la explotación. No es cierto que cuando se autoriza la exploración de un área de cualquier extensión se esté ya decidiendo sobre la explotación de un ignorado yacimiento de ignorada importancia, ubicación, extensión y contenido.") ["It cannot be said that, at the time of granting the exploration license, the Administration must verify compliance with the requirements established in the Law for the exploitation concession. It is not true that authorization to explore an area of any size entails a decision already being made with respect to the exploitation of an unknown deposit of unknown significance, location, extent and content."].

[103] Reply, para. 31.

responds to, two arguments from the Counter-Memorial: that the subsoil is property of the State and that Article 10 refers to concessions and not licenses.

82. Regarding the first point, Pac Rim devotes only one sentence to its response: "With regard to the State's ownership of 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."[104] This begs the question: if State ownership of the subsoil is undisputed, how can Pac Rim be claiming compensation for the value of (State-owned) deposits in the ground under exploration licenses it had? If Claimant accepts that minerals in the ground belong to the State, it must follow that one only could have "property rights in relation to subsoil minerals" if one has extracted the mineral from the ground pursuant to a validly granted exploitation concession. As provided in Article 35 of the Mining Law: "The Concession Holder shall be the owner of the extracted minerals, and as such, may freely commercialize them inside or outside the country, provided the regulations issued by the Ministry are met . . ."[105] Unless and until minerals are extracted from the ground pursuant to a validly granted concession, the State owns the minerals. Claimant has no concession and no property rights to El Salvador's minerals in the ground.

83. Regarding the second point, the Salvadoran Mining Law uses "license" and "concession" for clear and distinct purposes. Article 13, titled "Mining Rights Authorization" specifically identifies distinct authorizations: 1) "Licenses to explore" and 2) "concessions for the

---

[104] Reply, para. 33.

[105] Mining Law Art. 35 (RL-7(bis)) ("El Titular de la concesión será dueño de los minerales extraídos, y como tal, podrá comercializarlos libremente, ya sea dentro o fuera del país, siempre que cumpla con las regulaciones que dicte el Ministerio. . . .").

exploitation of mines and quarries."[106] As El Salvador's mining legislation expert James Otto described in his first report:

> It is evident from reading all the provisions in the Mining Law that care was taken in drafting the Mining Law to clearly identify which provisions apply to licenses, which provisions apply to concessions, and which provisions apply to both licenses and concessions (around 17 articles).[107]

84. Claimant seeks to disregard this clear distinction evidenced in 17 provisions by mentioning one article of the Mining Law about "Areas Not Compatible with Concessions" that refers to areas incompatible with "mining activities" or exploitation of quarries.[108] Of course, this reference to "mining activities" does not change the meaning of the word "concession," which is clear and confirmed in all the other provisions of the law. The article does not even evidence a confusion of the terms "license" and "concession." As James Otto confirms in his second report:

> As the Tribunal will see from the extracts, in all the articles that appear in the Mining Law where the authors intend a provision to apply to a concession for extraction they use the word "concession", where they intend a provision to apply to exploration they use the term "license" and where they intend it to apply to both, they use both the term "concession" and the term "license." It is clear from the text of the Mining Law that an exploration license is not a concession. This is an important fact because if an exploration license is not a concession, then Article 10 does not apply, and the exploration license is not to be considered as creating a compensable property right.[109]

---

[106] Mining Law, Art. 13 (RL-7(bis)) ("Las Licencias de exploración . . . las concesiones para la explotación de minas y canteras . . .").

[107] First Expert Report of James M. Otto on Eight Mining Law Questions, Dec. 19, 2013 ("First Otto Expert Report") at 10.

[108] Reply, para. 38; Mining Law, Art. 15 (RL-7(bis)) ("Zonas No Compatibles Con Concesiones").

[109] Second Expert Report of James M. Otto on Selected Mining Law Questions, June 24, 2014 ("Second Otto Expert Report") at 23.

85. Because the terms are used distinctly in the Mining Law, there is no need to look to "public law," as Claimant attempts to do, to redefine the term "concession."[110] Moreover, Claimant's assertion that legislators in other countries "confuse the terminology" is completely irrelevant.[111] As El Salvador's experts confirm, the Salvadoran law clearly distinguishes the two concepts:

> It is clear that the Mining Law differentiates between the terms "license," which refers to exploration, and "concession," which refers to exploitation. In this way, in accordance with the Mining Law of El Salvador, the authorization to explore the subsoil is the license and that to exploit a deposit is the concession, it being clear that the legal concept and nature of concession and license are different. The Mining Law does not refer in any of its articles to the authorization for exploration as a "concession," but rather it always speaks of the exploration "license."[112]

86. Thus, Claimant has failed to demonstrate that Article 10's references to "mines" and "concessions" apply to exploration license holders.[113] In fact, as El Salvador explained in the Counter-Memorial, Article 10 states that an exploitation concession is a real property right (the right to extract the State's minerals from the ground) and confers no such right on exploration license holders.[114]

---

[110] Reply, para. 34.

[111] Reply, para. 39.

[112] Second Ayala/Fratti de Vega Expert Report at 21 ("Es claro que la Ley de Minería diferencia entre los términos 'licencia', referida a la exploración y 'concesión', referida a explotación. De este modo, para la Ley de Minería de El Salvador, el título habilitante para explorar el subsuelo es la licencia y para explotar un yacimiento es la concesión, siendo claro que el concepto y naturaleza jurídica de concesión y de licencia es distinto. En ningún artículo se refiere la Ley de Minería a la exploración diciendo que el título habilitante para ello sea una 'concesión', sino que siempre habla de 'licencia' de exploración.").

[113] *See* Second Ayala/Fratti de Vega Expert Report at 26 ("En definitiva, no puede considerarse que la licencia de exploración sea un derecho de propiedad sobre los yacimientos, ni que sea asimilable a la concesión. El hecho de que la licencia sea un título transmisible o susceptible de ser otorgado en garantía no lo convierte en un derecho de propiedad sobre los yacimientos.") ["In short, the exploration license cannot be considered as giving a right of ownership over the deposits, nor as equivalent to the concession. The fact that the license is a transferable title or can be granted in guarantee does not convert it into a property right over the deposits."].

[114] Counter-Memorial, paras. 48-51.

87. Even Pac Rim recognizes that "the rights conferred under Pac Rim's Exploration Licenses . . . 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 exploited."[115] Pac Rim had and exercised these rights with respect to the El Dorado exploration licenses that expired on January 1, 2005.

b) Exploration rights holders are not entitled to exploitation concessions

88. It is worth noting that Pac Rim has not found Salvadoran experts or Salvadoran authorities to support its arguments. Instead, Pac Rim has relied on an American expert, John Williams, a major advocate of incorporating the concept of a unified authorization to both explore and exploit in national mining laws,[116] and an expert from Chile, one of the few jurisdictions that have adopted a unified approach, to argue that "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 unpredictable."[117] Thus, Claimant seeks to convince the Tribunal that no company would explore for gold if the right to a concession was not certain.

89. However, the vast majority of national mining laws, including that of El Salvador, do not follow the unified approach. Most countries require a two-step system: the grant of

---

[115] Reply, para. 46 (emphasis added). *See also* Second Ayala/Fratti de Vega Expert Report at 19-20.

[116] John P. Williams, *The Latin American Mining Law Model in* International and Comparative Mineral Law and Policy: Trends and Prospects 741 (E. Bastida et al. eds., 2005) (**Authority RL-190**).

[117] Reply, para. 224 (citing Second Expert Report of Arturo Fermandois Vöhringer on the Constitutionality and Legality of the Delay in the Processing of the Environmental Permits Required for the Awarding of a Mining Exploitation Concession to the Company Pacific Rim El Salvador and for the Use of Exploration Concessions Owned by the Company Dorado Exploraciones, by the Republic of El Salvador, Apr. 2014 ("Second Fermandois Expert Report") at 33) (emphasis omitted).

exploration rights, followed by the grant of extraction rights upon the applicant meeting mandatory substantive and procedural requirements. As James Otto explains:

> The Tribunal should be aware that the approach laid out in the El Salvador Mining Law whereby the government is not required to grant a mining concession after an exploration licensee discovers a deposit is quite common worldwide. In fact, I believe that this is the most common regulatory approach used by governments. While the Claimant's experts would have the Tribunal believe that the concept that the discoverer of a deposit entitles the holder of an exploration license to a mining concession is the only logical approach, that practice is in fact very rare worldwide. Exploration companies invest in many countries where there is a weak linkage between the authorization to do exploration and a subsequently granted authorization to mine minerals.[118]

90. Thus, rather than faithfully interpreting the text of the Salvadoran Mining Law with its clear distinction between exploration licenses and exploitation concessions and the requirements to obtain each, Claimant's experts are imposing their preferred approach as their "interpretation" of the Salvadoran Mining Law. John Williams thinks legislation ideally should "enable[] the transformation of inalienable sovereign mineral rights into transferable real property rights that can be owned by private parties virtually in perpetuity."[119] Thus, he promotes what he calls the "Latin American Mining Law Model," which he describes as providing security of right by either granting a unified exploration and exploitation concession or providing for "the exclusive right of an exploration concession holder to obtain an exploitation concession without prior review by the granting authority of proof of the existence of a commercial deposit or the applicant's technical and financial qualifications to develop it."[120]

---

[118] Second Otto Expert Report at 5 (emphasis in original).

[119] John P. Williams, *The Latin American Mining Law Model* at 746 (RL-190).

[120] John P. Williams, *The Latin American Mining Law Model* at 742 (RL-190).

91. Even Claimant's expert has to admit, however, that the Model he promotes "has not been enthusiastically embraced everywhere."[121] He names only three countries where mining legislation was "in part inspired" by the Model, all of which are countries where he led the drafting process.[122]

92. Thus, in El Salvador, like most countries, explorers are not guaranteed a concession. As El Salvador explained in the Counter-Memorial and James Otto reiterates in his Second Expert Report, there is an entire process set out in the Salvadoran Mining Law for reviewing and reaching a decision on a complete application for an exploitation concession.[123] An applicant not only has to submit a complete application (which Pac Rim failed to do), but the application must be adjudicated on its merits, is subject to a public comment period and then a discretionary final decision by the Minister, considering the national interest, the financial and technical capacity of the applicant, and the characteristics of the proposed mine.[124]

93. Therefore, Claimant's continued insistence that it was owed a concession just for discovering deposits is unsupportable. Claimant, like any exploration rights holder, could only obtain a concession by complying with the Mining Law, including submitting all of the materials required for a complete exploitation concession under Article 37.2, and then having its application considered and granted by the Minister.

---

[121] John P. Williams, *The Latin American Mining Law Model* at 744 (RL-190).

[122] John P. Williams, *The Latin American Mining Law Model* at 744 (RL-190); Curriculum Vitae of John P. Williams (JPW-1).

[123] Second Otto Expert Report at 13.

[124] Mining Law, Arts. 40-43 (RL-7(bis)); Regulations of the Mining Law of El Salvador and its Amendments, Legislative Decree No. 47, June 20, 2003, published in the Official Gazette No. 125, Book 359 of July 8, 2003 ("Mining Regulations"), Art. 15 (RL-8(bis)); Second Otto Expert Report at 14.

2. Pac Rim has grossly misrepresented the context of answers El Salvador's administrative law expert provided to Pac Rim's local counsel in 2009-2010

94. Claimant misleadingly cites Professor Fratti de Vega's answers to requests from Pac Rim's local counsel, Luis Medina, for help supporting arguments he wanted to make. According to Pac Rim, its arguments about its rights as an exploration license holder are "confirmed by the past opinions of . . . Professor Fratti."[125] But Pac Rim's attempt to pick quotes out of certain emails as contradicting Professor Fratti de Vega's expert opinion is misleading and disingenuous. The biggest problem is that Claimant is misrepresenting the very nature of the selective quotes attributed to Professor Fratti de Vega. This is because Mr. Medina did not ask for Professor Fratti de Vega's expert opinion. He asked her to suggest arguments to support conclusions he had already reached. As Professor Fratti de Vega explains:

> it is important to clarify that the referenced quotes brought up by Pacific Rim in its Reply were the product of requests made directly to the expert Fratti de Vega by attorney Luis Medina, and not by Pacific Rim. Attorney Luis Medina requested them as inputs to support opinions which he himself would prepare. That is, attorney Luis Medina did not ask expert Fratti de Vega for a legal opinion in any way equivalent to an expert opinion, but rather for inputs which he would use to support his own opinion for his client, based on the conclusions which he had already decided to transmit to his client.[126]

95. Pac Rim takes some quotes from Professor Fratti de Vega's responses to Mr. Medina out of context and misrepresents them to argue that they support Pac Rim's erroneous conclusions:

---

[125] Reply, para. 44.

[126] Second Ayala/Fratti de Vega Expert Report at 4 ("Que es importante aclarar que las referidas citas retomadas por Pacific Rim en su escrito de Réplica fueron producto de solicitudes formuladas directamente a la suscrita por el abogado Luis Medina y no por Pacific Rim; el referido profesional las solicitó como insumos para sustentar opiniones que él mismo elaboraría. Es decir, el abogado Luis Medina no me solicitó una opinión legal equiparable en forma alguna a un dictamen, sino, insumos que el referido profesional utilizaría para sustentar su propia opinión para su cliente, partiendo de las conclusiones que él ya había decidido transmitir a su cliente.").

> the majority of the quotes have been taken out of context and in a partial manner, in an attempt to misconstrue them and to support alleged conclusions which do not correspond to the reality or the context under which they were provided.[127]

96. Claimant's table of alleged contradictions, based on quotes taken out of context from information Claimant's local counsel requested to support his arguments for the company, do not detract from the fully informed and considered legal opinions of two experts, Professor Fratti de Vega and Professor Ayala, provided in two expert reports to this Tribunal.

97. It is noteworthy that Pac Rim has not presented any expert testimony from Salvadoran legal experts in this arbitration. In fact, Pac Rim's local counsel asked Professor Fratti de Vega to provide an expert report, but she refused because she did not believe in the company's legal arguments.[128] Claimant, therefore, has failed to counter the well-supported, textual arguments of El Salvador and its experts demonstrating that Claimant did not acquire rights to the deposits in the ground by virtue of its exploration licenses and Claimant never had a right to a concession because of its own failure to meet the legal requirements.

3. Pac Rim did not comply with the requirement of Article 37.2.b)

98. Under Article 37.2 of the Mining Law, an applicant for a concession must submit several documents, including: "The ownership deed of the property or the authorization legally

---

[127] Second Ayala/Fratti de Vega Expert Report at 5 ("la mayoría de las citas han sido tomadas fuera de contexto y de forma parcial, tendiente a pretender derivar de las mismas una concepción errónea y sostener presuntas conclusiones que no corresponden a la realidad ni al contexto en que fueron brindadas.").

[128] Second Ayala/Fratti de Vega Expert Report at 5-6 ("debo manifestar que, precisamente, por no compartir la totalidad de criterios jurídicos que pretendían sustentarse por el referido profesional en sus opiniones -tal como se refleja claramente en el dictamen pericial conjunto de 2013 y en la presente ampliación- la suscrita no aceptó la solicitud del abogado Luis Medina de actuar como perito para Pacific Rim, como consta en el cruce de correos presentados por el referido profesional en este proceso arbitral.") ["[expert Fratti de Vega] would like to state that, precisely because [she] did not agree with all the legal criteria which attorney Luis Medina sought to uphold in his opinions−as is clearly reflected in the 2013 joint expert report and in this supplement−she did not accept his request to act as an expert for Pacific Rim, as shown by the exchange of emails submitted by Luis Medina in this arbitration proceeding."].

granted by the owner."[129] As described in the Statement of Facts, Pac Rim knew about this legal requirement for an application for an exploitation concession and knew that its application did not comply with the requirement.[130] It is undisputed that Pac Rim only showed ownership or authorization for about 1.6 km^2 of the 12.75 km^2 area it requested.[131] Therefore, as El Salvador has consistently argued since 2010, Pac Rim did not comply with this requirement and could not have received the exploitation concession. As former Bureau of Mines technician Silvio Ticay confirms in his witness statement: "neither myself nor anybody else at the Bureau of Hydrocarbons and Mines who reviewed the Pacific Rim concession application had any doubt whatsoever that the Pacific Rim application failed to comply with this requirement."[132]

99. The Tribunal will recall that Pac Rim survived the Preliminary Objections phase by asserting that it would present evidence in the merits phase to combat the factual allegation that it had failed to comply with the surface ownership or authorization requirement. Pac Rim promised: "When we get to the merits . . . we intend to and are confident that we will be able to rebut all of the factual allegations presented to you."[133]

---

[129] Mining Law, Art. 37.2.b) (RL-7(bis)) ("Escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario").

[130] Section II, *supra*. *See also* Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713) ("Gina informed me that we are going to have to get the authorization of all the surface owners within the area of the concession."); Pac Rim Internal Memo re Surface Owner Authorization, June 28, 2005 (C-291) ("There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and the authorization of the land owners. . . . the latter is a nearly (if not totally) impossible task."); Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 at 1 (C-289) ("la exigencia legal consistente en que los propietarios de los terrenos superficiales ortorguen autorización para exlpotaciones que ocurran en el subsuela . . . ese el texto legal actual, y es el que debe ser observado") ["the legal requirement that surface landowners authorize subsurface mining . . . is the current legal text, and the one that must be observed."].

[131] Counter-Memorial, para. 72; Concession Application at 4 (R-2); Figure 14, Property of Pacific Rim El Salvador, 2008 (from Annual Report of Exploration Work (Feb. 2009), Exhibit R-3) (R-29).

[132] Witness Statement of Silvio Ticay, June 13, 2014 ("Ticay Witness Statement"), para. 6 ("ni yo ni nadie de la Dirección de Hidrocarburos y Minas que revisamos la solicitud de concesión de Pacific Rim, tuvimos ninguna duda de que la solicitud de Pacific Rim no cumplía con ese requisito.").

[133] Transcript of Hearing on Preliminary Objections, May 31, 2010, at 153:13-17.

100. In this phase, however, Pac Rim has not rebutted El Salvador's factual allegations regarding ownership or authorization of the surface land. Indeed, Pac Rim accepts that it did not provide authorizations for the entire land surface. Pac Rim now says it was "unwilling to go through the process of obtaining 'authorization'" from the hundreds of people with surface rights in the area of its requested concession.[134]

101. Instead of rebutting the facts, Pac Rim now seeks to excuse its blatant failure to comply with the Article 37.2.b) requirement with ever-changing arguments: 1) that the requirement only applied to areas that would be impacted on the surface; 2) that the requirement does not apply to metallic mines at all; and most recently 3) that there was an agreement that Pac Rim's lack of compliance with this requirement would not prevent Pac Rim from obtaining a concession.[135] Each of these arguments must be rejected; none can excuse Claimant's lack of compliance with the mandatory legal requirement.

a) Article 37.2.b) applies to the entire area of the concession

102. El Salvador fully responded to the first argument in the Counter-Memorial,[136] demonstrating that the requirement of Article 37.2.b) applies to "the property" of the concession without any qualification. Claimant now unconvincingly argues:

> [T]he property or "*inmueble*" referenced in Article 37.2(b) does not refer to the entire requested area of the concession. . . . Article 37.2(a) uses the term property or "*inmueble*," to refer to the property "in which the activities will be carried out." The logical implication is that the "*inmueble*" referred to in Article 37.2(b) also refers to the property where "the activities will be carried out."[137]

---

[134] Gehlen Witness Statement, para. 190.

[135] Reply, paras. 332, 344.

[136] Counter-Memorial, paras. 79-84.

[137] Reply, para. 395.

103. As El Salvador explained in the Counter-Memorial, this is not "logical."[138] First, Article 37.2.b) refers simply to "the property": there is no basis for importing language from another provision about "where the activities will be carried out." Second, even if one did import the language from the other provision, there would be no basis for limiting "activities" to "activities that impact the surface." If that is what the drafters had intended, they would have used words to that effect.

104. Moreover, an analysis of this provision shortly after it was passed and before Pac Rim even came to El Salvador confirmed that the requirement relates to "the property that will be subject to the concession."[139] This 1998 study (submitted by Claimant as an exhibit with its Reply) leaves no doubt that Article 37.2.b) is not limited to the property impacted by surface activities.

105. But the clearest evidence that Claimant's "interpretation" of Article 37.2.b) is unsustainable is that it was considered by various people in the Government in 2005, and they—people interested in showing the company extraordinary good will—had to tell Pac Rim that it was wrong.[140] In fact, the very person in the Government that Claimant repeatedly quotes as sympathetic to its argument, Ricardo Suarez, told Claimant that its proposed authentic interpretation of the provision was "a reform of the text under the guise of an interpretation."[141]

---

[138] Counter-Memorial, paras. 81-82.

[139] Silvio A. Ticay Aguirre, Development and Perspectives of Mining Activity in El Salvador, Feb. 1998, at 23(C-622) ("del inmueble sobre la cual recaerá la concesión.") (translation by El Salvador).

[140] Pac Rim Internal Memo re Surface Owner Authorization (C-291) ("Gina informed me that the office of the Secretariat for Legislative and Judicial Affairs had reviewed the mining law and was in agreement with the interpretation of the Ministry of Economy and the Division of Mines.").

[141] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 (C-289) ("una reforma del texto, con aparente ropaje de interpretación, lo cual no permite ni nuestro ordenamiento legal ni la doctrina que lo inspira.") (emphasis added).

106. Because Mr. Suarez made one comment sympathetic to Pac Rim's arguments, Pac Rim repeatedly quotes and misrepresents an email from Mr. Suarez. Claimant selectively quoted Mr. Suarez's email three times in its Memorial and another three times in its Reply, describing Mr. Suarez as "Respondent's own legal counsel."[142] According to Claimant, this one email supports all of the following assertions:

- That "even those Government officials who thought the language did not unambiguously support the Companies' position agreed that a requirement to obtain ownership or authorization for the entire land surface made no sense and was inconsistent with the Salvadoran legal framework."[143]
- That "Pac Rim had clearly reached an agreement with MINEC that the requirement of Article 37.2(b) would not be used as a basis to prevent the conversion of Pac Rim's exploration licenses into an exploitation concession."[144]
- That "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."[145]
- That, because of this email, "Claimant can hardly be required to have expected that the State would decide to act in a manner that was 'not consistent' with its own legal system."[146]
- That "Respondent's own legal counsel has previously indicated that Respondent's proposed interpretation of this provision is, 'not consistent with the ownership practice enshrined in our legal system;' and has confirmed the 'advisability of making it consistent with the Constitution.'"[147]

---

[142] Reply, para. 377. Mr. Suarez was legal counsel to then-Vice President Ana Vilma de Escobar, not El Salvador's counsel. Neither Mr. Suarez nor the Vice President had any role or authority whatsoever in the concession application and approval process, which was and remains under the authority and responsibility of the Bureau of Mines and the Minister of Economy.

[143] Memorial, para. 214.

[144] Reply, para. 332.

[145] Reply, para. 344.

[146] Reply, para. 344, n.674.

[147] Reply, para. 377.

- That Claimant's spin of an email from legal counsel to the Vice-President amounts to "admissions by the Respondent, [that] should be taken into account by the Tribunal when assessing the credibility of Respondent's current arguments with regard to this provision."[148]

107. But Claimant's exaggerated assertions are unsupported. As El Salvador pointed out in its Counter-Memorial, Mr. Suarez, legal counsel to then-Vice President Ana Vilma de Escobar, told Pac Rim that the surface land requirement was the law and as such, it had to be complied with:

> We share your opinion that the legal requirement that surface landowners authorize subsurface mining is not consistent with the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil is the State. . . .
>
> However, that is the current legal text, and the one that must be observed.[149]

108. Mr. Suarez, after explicitly telling Pac Rim that the requirement of Article 37.2.b) had to be complied with, went on to explain to Pac Rim's counsel that its proposed interpretation (which would require authorization from landowners only for surface works) could not be considered an "interpretation," as it would completely change the text's meaning:

> Regarding how to reconcile that text with State ownership, and specifically as relates to the "authentic interpretation" proposal that you have prepared, it appears to us that in contrasting the current text of [Article] 37 with the text of the proposed interpretation, rather than clarifying an opaque passage of the law, you would be changing its meaning, assigning a different scope—although logical and desirable—to the text.

---

[148] Reply, para. 377.

[149] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 (C-289) (emphasis added) ("Compartimos contigo que la exigencia legal consistente en que los propietarios de los terrenos superficiales otorguen autorización para explotaciones que ocurran en el subsuelo no resulta congruente con el régimen de propiedad consagrado en nuestro ordenamiento jurídico, puesto que según este el propietario del subsuelo es el Estado. . . . Sin embargo, ese el texto legal actual, y es el que debe ser observado.").

> This would mean that rather than an interpretation, we are dealing with a reform of the text under the guise of an interpretation, something allowed for neither in our legal system, nor in the doctrine that inspires it.[150]

109. Thus, the one person in the Government that Pac Rim repeatedly invokes as showing "confusion about this issue"[151] in fact clearly rejected Pac Rim's proposed interpretation of the law. This email is entirely consistent with the opinion of the Secretary for Legislative and Legal Affairs sent to the Ministry in October 2005, which concluded that the proposed authentic interpretation was actually an "amendment" of the law.[152] The exhibit Pac Rim provided only confirms that Mr. Suarez 1) agreed with the Government's interpretation: it "is the current legal text, and the one that must be observed"; 2) rejected Pac Rim's interpretation: "you would be changing its meaning, assigning a different scope . . . to the text"; and 3) recognized that Pac Rim could only obtain the result it desired by changing the law. Far from supporting Pac Rim's assertions that Mr. Suarez indicated that Pac Rim could ignore the law, Mr. Suarez's email only shows that he, legal counsel to then-Vice President Ana Vilma de Escobar, agreed with Pac Rim's counsel that changing the law would be desirable for Pac Rim.

110. Indeed, as El Salvador demonstrated in the Preliminary Objections phase, Pac Rim understood "property in which the activities will be carried out" under Article 37.2a) to

---

[150] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005 (C-289) ("En cuanto a las formas de armonizar dicho texto con la calidad de propietario del Estado, y específicamente en lo relativo a la propuesta de interpretación autentica que has preparado, nos parecería, al contrastar el texto actual del Art. 37 vis-a-vis el texto de interpretación propuesto, que mas [sic] que aclarar un pasaje oscuro de la ley, se estaría cambiando su sentido, dándole un alcance distinto - aunque lógico y deseable- a su texto. Ello implicaría que, más que una interpretación, estaríamos en presencia de una reforma del texto, con aparente ropaje de interpretación, lo cual no permite ni nuestro ordenamiento legal ni la doctrina que lo inspira.") (emphasis in original).

[151] Reply, para. 344, n.674.

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

mean the entire area of the requested concession.[153] In its concession application, where it had to provide information about the "property" referred to in Article 37.2a), Pac Rim provided information and maps of the entire area of the requested concession.[154]

111. There is no support, therefore, for reading "property" in article 37.2.b) restrictively to mean only "property directly impacted by surface activities." This Tribunal—like the Bureau of Mines, the Ministry of Economy, the Secretary for Legislative and Legal Affairs, and Mr. Suarez—should reject Claimant's attempt to interpret the law in a way that "would be changing its meaning."[155]

b) Article 37.2.b) applies to applications for mines and quarries

112. Article 37.2 lists the requirements for concession applications for mines and quarries.[156] There is no support for Claimant's argument that each of the requirements of Article 37.2 may apply to only mines, only quarries, or both. As El Salvador concluded in the Counter-Memorial, Claimant's new argument for the merits phase "that a concession applicant should conduct a 'systematic review' of the Mining Law in light of the Constitution, to determine whether each requirement, a) through f), applies to its application is absurd and unworkable."[157]

113. Claimant's response is no more convincing. El Salvador disagrees with Claimant's American expert that "PARA CONCESION DE EXPLOTACION DE MINAS Y

---

[153] The Republic of El Salvador's Reply on Preliminary Objections, Jan. 4, 2010 ("Reply (Preliminary Objections)"), paras. 103-105.

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

[155] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005, at 1 (C-289) ("se estaría cambiando su sentido").

[156] *See* Counter-Memorial, paras. 85-97. *See also* Ticay Witness Statement, para. 6 ("Quedó claro que la Ley de Minería de El Salvador establece este requisito sin ninguna distinción, por lo que aplica para todo tipo de minas y canteras.") ["It was clear that the El Salvador Mining Law establishes this requirement, without distinction of any kind, making it applicable to any type of mine and quarry project."].

[157] Counter-Memorial, para. 86.

CANTERAS" is a title that "refers to a concession that does not exist."[158] This is a clear title referring to what is required to apply for an exploitation concession for mines and quarries. No reasonable reader of the Mining Law would assume that the title refers to one concession for mines and quarries. As a result, Claimant's alleged confusion about what the title refers to as a justification to resort to statutory interpretation is unwarranted.[159]

114. Moreover, Claimant's proposed statutory interpretation is flawed. According to Claimant, Article 37.2.b) must not apply to mines because concession holders can obtain legal easements. Claimant argues that this fact counters El Salvador's argument that failure to apply Article 37.2.b) would require the State to grant rights to underground minerals without considering anyone else's interests.[160] Claimant fails to note the dramatic difference between being consulted before a concession is granted and being compensated for an easement after the concession is a done deal. In the first instance, the surface owners can protect their property rights and interests by having a say in the project design and whether or not mining is allowed on or under their land. In the second, the surface owners have no say—concession holders "shall enjoy" various easements described in Chapter VIII of the Mining Law. Thus, the existence of easements for concession holders, absent any need for prior authorization, would do exactly what El Salvador said: it would have the State grant rights to mining companies to use and impact a surface owner's land without that surface owner having any say.

115. As El Salvador's administrative law experts explain:

---

[158] Reply, para. 388 (citing Second Expert Report of John P. Williams on Mining Law, Apr. 4, 2014 ("Second Williams Expert Report") at 5).

[159] Reply, para. 388 ("Because the heading 'refers to a concession that does not exist, the literal meaning of the heading is not clear;' and it must therefore be interpreted through application of the relevant rules of statutory interpretation . . .").

[160] Reply, para. 390.

> [T]he difference lies in the fact that, for concession applicants, the requirement of Article 37.2.b) is a prior and a *sine qua non* condition for the application to be admitted, for the concession to be granted, and for the easement regulated by Articles 53 and subsequent provisions, to be created. Therefore, the requirement set forth in Article 37.2.b) is necessary for the granting of the concession, i.e., to become the holder of the concession, while the easements regulated by Articles 53 and subsequent provisions may exist or be an entitlement for those who are already concession holders.[161]

116. The same 1998 study of Salvadoran mining legislation submitted by Claimant that explains the Article 37.2.b) requirement as applying to the entire area subject to the concession notes that the 1995 Mining Law maintains the use of easements. The study notes that easements are temporary agreements established between the concession holder and the landowner, entirely separate from the requirement of proving ownership or authorization of the land as part of the application process for a concession.[162] It is clear that under the law one must satisfy Article 37.2.b) before obtaining a concession and thereby becoming entitled to easements necessary for the mine project.

117. Claimant's argument about easements is also incongruent with Pac Rim's practice. Although there is a ventilation easement,[163] Pac Rim acquired and submitted documentation for the land it would need for a ventilation shaft.[164] Pac Rim, therefore, recognized that

---

[161] Second Ayala/Fratti de Vega Expert Report at 34 ("[L]a diferencia radica en que, para los solicitantes de una concesión, el requisito del art. 37.2.b es previo y condición sine qua non para que pueda admitirse la solicitud, otorgarse la concesión y para que pueda producirse la servidumbre que regulan los artículos 53 y siguientes. Pues el requisito del art. 37.2.b es necesario para el otorgamiento de la concesión, esto es, para llegar a ser titular de la concesión, mientras que las servidumbres que regulan los artículos 53 y siguientes son las que pueden constituir o tienen derecho a exigir, los que, en este caso, ya son titulares de la concesión.").

[162] Silvio A. Ticay Aguirre, Development and Perspectives of Mining Activity in El Salvador, Feb. 1998, at 23 (C-622) (translation by El Salvador).

[163] Mining Law, Art. 59 (RL-7(bis)).

[164] Concession Application at 7 (R-2).

authorization before obtaining a concession is different than the easements to which a concession-holder is entitled.

118. For all of these reasons, as well as those discussed in the Counter-Memorial and James Otto's expert reports, Claimant's argument that Article 37.2.b) should not apply for metallic mines, based on the word "and" between the words "mines" and "quarries" in the title of the provision, must be rejected.

c) There was no agreement not to apply Article 37.2.b) to Pac Rim

119. Pac Rim's newest assertion in the Reply is 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 a basis to prevent the conversion of Pac Rim's exploration licenses into an exploitation concession."[165] Thus, having admitted that it did not provide the required authorizations, Pac Rim for the first time alleges that there was an agreement not to apply the law to its application. Pac Rim provides no evidence of such an agreement, which would, of course, have been illegal.

120. There was no such agreement. In fact, at the hearing on jurisdiction, Tom Shrake confirmed that there was no such agreement:

> Q. Did you ever receive any assurances that your Concession application would be approved if it did not comply with the existing law?
>
> A. No.[166]

121. Pac Rim's only support for its allegation is that the alleged agreement "was consistent with the opinion of the legal counsel of the Office of the Vice-President, Mr. Ricardo

[165] Reply, para. 332.

[166] Transcript, Hearing on Jurisdiction, Day 2, 473:1-8.

Suarez."[167] Aside from having no probative value as to the existence of an agreement, this statement is not true. An agreement to not apply Article 37.2.b) to Pac Rim would have been flatly contradictory to Mr. Suarez's opinion. The email does not suggest that there was any agreement by anyone in the Government that Pac Rim could ignore the requirement of Article 37.2.b) and still expect to receive a concession. To the contrary, as described above, Mr. Suarez expressly commented that Article 37.2.b) is the law and "must be observed."[168]

122. As explained by El Salvador's administrative law experts, Claimant's argument contradicts its own arguments about legal certainty:

> It is a contradiction to argue for legal certainty, that is argue that the applicant or citizen must be guaranteed that the decision by the Administration will be governed by the provisions set forth in the law (that the citizen or applicant relied on the fact that the Administration was going to decide in the manner set forth by law) and, at the same time, argue that the provisions set forth in the law must be understood to have been modified or made inapplicable so as to exclude the requirements established by law, based on the text of a statement by an Administration official.[169]

123. Claimant, in other words, cannot argue for legal certainty and, at the same time, argue that the law could change or become inapplicable depending on Pac Rim's reading of an email.[170] As Pac Rim knows, there are clear procedures for amending, replacing, or challenging

---

[167] Reply, para. 332, n.648.

[168] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005, at 1 (C-289) ("[E]se el texto legal actual, y es el que debe ser observado.") ["[T]hat is the current legal text, and the one that must be observed."].

[169] Second Ayala/Fratti de Vega Expert Report at 36 ("Es una contradicción defender la seguridad jurídica, esto es, defender que al administrado o ciudadano ha de garantizársele que la decisión de la Administración se regirá por lo previsto en la ley (que el ciudadano o administrado confió en que la Administración iba a decidir en la forma en que la ley se pronuncia) y, a la vez, defender que lo previsto en la ley ha de entenderse modificado, no aplicable, o excluidos los requisitos que la ley establezca, en base a la redacción de una declaración de un funcionario de la Administración.").

[170] Second Expert Report of José Albino Tinetti on Salvadoran Constitutional Law, June 20, 2013 ("Second Tinetti Expert Report"), para. 15 ("[C]oncluyo que en El Salvador si una persona particular estima que es inconstitucional un requisito que le impone una disposición de una ley formal para obtener un resultado pretendido, esa mera estimación no la exime del cumplimiento del mismo.") ["I conclude that in El Salvador, if a private individual

the constitutionality of Salvadoran law. Unless and until such procedures are followed and the law is changed or replaced, everyone must comply with the existing law.[171]

124. In fact, Pac Rim presents new evidence that further contradicts its own assertion that there was an agreement in 2005 that it would not need to comply with the land ownership or authorization requirement. In a report from May 2006, under the category "Legal", Pac Rim describes two pending issues affecting its ability to obtain an exploitation concession: 1) the environmental permit; and 2) "change of mining law (Plan A) or 'authorization' of surface land owners (Plan B)."[172] Pac Rim's PowerPoint slide is shown below:

---

considers that a requirement imposed by a provision of a formal law to obtain a result being sought is unconstitutional, this simple opinion does not exempt that individual from complying with that law."].

[171] *See*, *e.g.*, Second Tinetti Expert Report, paras. 4-10 (first noting that: "If a law, in the strict sense, has formal validity and imposes a requirement to obtain a specific result, the person who seeks that result must, without question, comply with the requirement, even when, in its opinion, the provision establishing such requirement is unconstitutional. Until that requirement is modified or eliminated by means of another law, it is an obligation for anyone seeking to obtain that result" / "Si una ley en sentido estricto cuenta con validez formal e impone un requisito para obtener un determinado resultado, la persona que lo pretenda, inexorablemente, tiene que cumplirlo aunque a su juicio la disposición que lo establece sea inconstitucional. En tanto ese requisito no se reforme o elimine mediante otra ley, constituye una carga que debe asumirse si se pretende obtener aquel resultado" and then describing options for challenging the law).

[172] Pacific Rim Mining Corp. Presentation: Project Development Activities, May 2006, at 3 (C-711) (emphasis added).

[173]

125. Thus, in 2006 (after the alleged agreement), Pac Rim knew it had to either change the law or obtain authorizations. The cadastral survey of "surface properties overlying the underground operations and properties affected by surface installations" that Pac Rim had ordered would be a first step in realizing its "Plan B", *i.e.*, obtaining authorizations from surface landowners.

126. It is undisputed that Pac Rim did not realize either Plan A or Plan B: the law was not changed and Pac Rim was either "unwilling"[174] or unable[175] to get authorizations for all of the land subject to the concession. Thus, Pac Rim's own exhibits and its earlier testimony disprove its latest assertion allegedly explaining why it did not need to comply with Article 37.2.b) of the Mining Law.

---

[173] Pacific Rim Mining Corp. Presentation: Project Development Activities, May 2006, at 3 (C-711).

[174] Gehlen Witness Statement, para. 190 ("We were therefore unwilling to go through the process of obtaining 'authorization' from all of these people without knowing exactly what it was that we were hoping to achieve through this process.").

[175] Pac Rim Internal Memo re Surface Owner Authorization (C-291) ("There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and the authorization of the land owners. . . . the latter is a nearly (if not totally) impossible task.").

d) The requirement is reasonable

127. When drafting the Mining Law, El Salvador made a reasonable attempt to account for surface owners. As El Salvador mentioned in the Counter-Memorial, a primary drafter of the Salvadoran Mining Law, Dr. Marta Méndez, explained in her 2005 legal opinion for the Bureau of Mines that this requirement was necessary to protect landowners' Constitutional right that the State take appropriate preventative measures to protect their property.[176] She explained that:

> From the moment that the Constitution establishes that a concession is required for underground mining, the secondary law regulating a certain type of concession - in this case for mines and quarries - must bear in mind respect for people's fundamental rights, such as the right to own property and the right to security. Therefore, the fact that the subsoil belongs to the State does not mean that that the State will permit excavation under private property without the owner's authorization.[177]

128. The land surface requirement was purposefully added to the Salvadoran Mining Law in 1995 and has not been changed since. As explained in the 1998 study of mining potential in El Salvador that Claimant submitted with its Reply, the requirement was added because the declaration of mining as in the public interest in the old law was removed in the 1995 law and this had consequences for the possibility of expropriation. The land surface ownership or

---

[176] Counter-Memorial, para. 92 (quoting Legal Opinion from Dr. Marta Angélica Méndez for Bureau of Mines Director, May 31, 2005 (R-32): "the fact that the subsoil minerals belong to the State does not mean that the State will permit excavation under private property without the owner's authorization" / "el hecho de que el subsuelo pertenezca al Estado, no significa que va a permitir que se excave subterráneamente las propiedades de particulares sin su autorización."). *See also* Constitution of the Republic of El Salvador, Legislative Decree No. 38, Dec. 16, 1983, published in the Official Gazette No. 281, Book 234 ("Constitution"), Art. 2 (RL-121) ("Toda persona tiene derecho a la vida, a la integridad física y moral, a la libertad, a la seguridad, al trabajo, a la propiedad y posesión, y a ser protegida en la conservación y defensa de los mismos.") [Every person has the right to life, physical and moral integrity, liberty, security, work, property and possession, and to be protected in conservation and defense of the same.].

[177] Legal Opinion from Dr. Marta Angélica Méndez for Bureau of Mines Director, May 31, 2005, para. 7 (R-32) ("Desde el momento en que la Constitución prescribe que para la explotación del subsuelo se requiere de concesión, la ley secundaria que regule una determinada clase de concesión _ en este caso de las minas y canteras _ debe tener presente el respeto a los derechos fundamentales de las personas, como son el de *propiedad* y el de *seguridad*, de manera que el hecho de que el subsuelo pertenezca al Estado, no significa que se va a permitir que se excave subterráneamente las propiedades de particulares sin su autorización.") (emphasis in original).

authorization requirement became necessary to ensure that the concession holder would have access to the land in the concession area. The 1998 study explained:

> The repealed Mining Code established that the mining industry was in the public interest; therefore the owners of mining properties had the right to expropriate under the circumstances and conditions specified in the code.
>
> The current Mining Law, unlike the repealed Code, does not consider the mining industry to be of public interest, and therefore this Law does not contemplate the concept of expropriation. Thus, any person who requests a mining concession must, prior to its approval, prove the availability of the property that will be subject to the concession, which must be done by means of a deed of ownership for the property or legally granted authorization from the owner.[178]

129. El Salvador's expert, Dr. Tinetti confirms that the 1995 Mining Law represents a deliberate change from the previous Mining Code. The 1922 Code provided:

> The mining industry is in the public interest; and as such the owners of mining claims have the right to expropriate property in the cases and in the situations set forth in this Code.[179]

130. In accordance with the old Mining Code, the Expropriation Law of 1939 listed the "Mining Industry (Art. 17 of the Mining Law)" as in the public interest.[180] It further provided

---

[178] Silvio A. Ticay Aguirre, Development and Perspectives of Mining Activity in El Salvador, Feb. 1998, at 23 (C-622) (translation by El Salvador) (emphasis added) ("El Código de Minería ya derogado establecía que la industria minera era de utilidad pública: en consecuencia los dueños de fundos mineros tenían derecho de expropiar en los casos y condiciones que señalaba el código. En la Ley de Minería vigente a diferencia del Código derogado, no se considera la Industria Minera como de utilidad pública, por lo que no esta Ley no se contempla la figura de la expropiación, es así como toda persona que solicite una concesión minera, previo al otorgamiento de la misma deberá comprobar la disponibilidad del inmueble sobre la cual recaerá la concesión, lo cual se hará mediante escrirura de propiedad del inmueble o autorización otorgada en legal forma por el propietario . . .").

[179] Mining Code of El Salvador, Unnumbered Legislative Decree, May 17, 1922, published in the Official Journal No. 183, Book 93 ("1922 Mining Code"), Art. 17 (Tinetti Appendix 11) ("La industria minera es de utilidad pública; en consecuencia los dueños de fundos mineros tienen derecho de expropiar en los casos y condiciones que señala este Código.") (Claimant submitted the 1922 Mining Code as CL-207 with a full translation; El Salvador submits a corrected the translation of the cited Article).

[180] Expropriation Law of El Salvador, Legislative Decree No. 33, July 25, 1939, published in the Official Journal No. 174, Book 127 of Aug. 17, 1939 *amended by* Legislative Decree No. 467, Oct. 29, 1998, published in the Official Journal No. 212, Book 341 of Nov. 13, 1998, ("Expropriation Law of El Salvador") Art. 2 (Tinetti Appendix 12).

that: "When the expropriation was due to mining industry needs, the provisions set forth in the Mining Code shall be applicable."[181] Therefore, as Dr. Tinetti explains, where the 1995 Mining Law does not state that mining is in the public interest or provide for expropriation," the provisions regarding the Expropriation and State Occupation of Property Law currently lack grounds to be effective."[182]

131. As a result, expropriation is not a given under the new Mining Law and it cannot be assumed as a way to meet the requirement of Article 37.2b). If the State chose, in its discretion, to expropriate land for mining, it would have to affirmatively recognize that such land was necessary for a particular project that it deemed in the public interest. The State can expropriate, but there is no obligation on the State to expropriate whenever and wherever a company wants a concession. Article 37.2b) is a prerequisite that an applicant must comply with when submitting its application. Thus, any expropriation would have to be exercised before applying for a concession (or before the application could be admitted if the case was made for it being necessary and in the public interest), so that the land could be made available to the applicant to meet the requirement of Article 37.2.b). On the other hand, an applicant cannot ignore the requirement and assume that the State will expropriate the land it requests:

> Within the new regulatory framework, the party seeking a concession and who does not reach an agreement with the interested parties does not have the expectation of obtaining the expropriation of the property necessary to carry out mining activities. In accordance with the provisions set forth in art. 37.2.b) of the Mining Law, as a necessary and enforceable requirement prior to an application being admissible, the applicant must submit a deed of ownership of the property on which the

[181] Expropriation Law of El Salvador, Art. 56 (Tinetti Appendix 12) ("Cuando la expropiación fuere motivada por necesidades de la Industria minera, se estará a lo que sobre el particular dispone el Código de Minería.").

[182] Second Tinetti Expert Report, para. 24 ("las disposiciones relacionadas de la Ley de Expropiación y de Ocupación de Bienes por el Estado carecen actualmente de sustento para ser eficaces.").

> activities will be carried out or, otherwise, the authorization legally granted by the owner.[183]

132. Claimant's expert, John Williams, claims to have reviewed other laws in Central America and found none with a similar requirement:

> I have reviewed the mining laws and, where necessary, the mining regulations of all of the other civil law countries of Central America as in effect in 1995 and as currently in effect. None of them requires the applicant for a mine exploitation concession to either own the land within the proposed concession area or present proof of formal authorization from the owners of that land.[184]

133. But Claimant's expert's assertion is incorrect. Indeed, the Guatemalan Mining Law in effect in 1995, which the Salvadoran Mining Law drafters consulted and used as a model,[185] included the same requirement. Article 38 of the 1993 Guatemalan Mining Law provided that an applicant for mining rights must provide documentation of ownership or authorization for the land subject to the application:

> The application shall be accompanied by: . . .
>
> In the event the applicant is the owner or holder of the designated land, certified copy of the document evidencing the ownership or possession of the land; otherwise, original or certified copy of the

---

[183] Second Tinetti Expert Report, para. 25 ("En el nuevo marco normativo, quien pretenda una concesión y no llegue a un acuerdo con dichos interesados, ya no cuenta con la expectativa de obtener la expropiación de los inmuebles necesarios para el ejercicio de actividades mineras. De conformidad a lo prescrito por el Art. 37.2.b) de la Ley de Minería, como requisito necesario y exigible antes que la solicitud sea admitida, el solicitante debe presentar escritura de propiedad del inmueble en que se realizarán las actividades o en su defecto, autorización otorgada en legal forma por el propietario.")

[184] Second Williams Expert Report at 20.

[185] Witness Statement of Gina Mercedes Navas de Hernández, Dec. 16, 2013 ("Navas de Hernández Witness Statement"), para. 8 ("Lo que decidimos hacer para redactar el anteproyecto de la nueva ley de minería fue tomar en cuenta los principios que incorporaran las mejores prácticas en materia de legislación minera vigente de varios países del continente americana en general y de Centroamérica en particular, incluyendo la ley de Guatemala.") ["What we decided to do in writing the draft of the new mining law was to take into account principles that included the best practices in the mining legislation in force in several counties in the Americas in general, and in Central America in particular, including the Guatemalan law."].

> document containing authorization or consent of the owner or holder of the land subject to the application.[186]

134. This was changed in the 1997 Guatemalan Mining Law in an effort to accommodate the mining companies and make the law simpler to stimulate investment.[187] The Guatemalan law passed in 1997 has been described as a "historic low" in going too far to accommodate investors:

> Drafted in 1997, it has been widely criticized for going too far in creating incentives for investment without assurances that the country itself will reap substantial dividends. For example, the law reverses previous prohibitions on 100 percent foreign-owned mining operations and establishes the lowest royalty rates in the country's history. It also implements a series of tax exemptions for mining companies, which add up to a minimal tax burden for mining corporations.
>
> At the same time, the present law continues a tradition of weak and unenforceable protections for the environment and public health, without mechanisms for community participation in decision making.[188]

---

[186] Mining Law of Guatemalan, Legislative Decree No. 41-93, Nov. 21, 1993, published in the Journal of Central America No. 89, Book 247 of Dec. 21, 1993 ("1993 Guatemalan Mining Law") (**Exhibit R-156**) ("A la solicitud deberá acompañarse: . . . En caso que el solicitante sea propietario o poseedor del terreno afecto, fotocopia legalizada del documento que acredite la propiedad o posesión del terreno, en caso contrario documento original o copia legalizada que contenga autorización o consentimiento del propietario o poseedor del terreno afecto a la solicitud.").

[187] *See, e.g.*, Luis Solano, Guatemala petroleo y mineria en las entrañas del poder (2005) at 39, 87, 138 (**Authority RL-191**) (noting that "Jorge Asencio, who in 2005 had acted as legal advisor to the mining company Montana Exploradora, participated directly in the drafting of the law;" "During the government of Álvaro Arzú (1996-2000), one of the greatest campaigns in the history of the country to attract foreign investment in oil fields and mining took place;" and "The hydrocarbon and mining codes extensively benefit foreign companies, and given the good international prices existing on the market, both situations combine to create an enormous incentive for foreign companies and their local partners." / "En la redacción de la ley participó directamente quien en el 2005 se desempeñaba como asesor legal de la minera Montana Exploradora, Jorge Asencio;" "Durante el gobierno de Álvaro Arzú. (1996-2000) tuvo lugar una de las mayores campañas de la historia del país pata atraer inversión extranjera en los campos petroleros y mineros;" and "Los códigos de hidrocarburos y minería benefician extensivamente a las compañías extranjeras y, dados los buenos precios internacionales existentes en el mercado, ambas situaciones se conjugan para crear un enorme incentivo para las compañías extranjeras y sus socios locales.").

[188] Amanda M. Fulmer et. al., *Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine in* Latin American Politics and Society 91, 98 (2008) (Bebbington Appendix 15).

135. El Salvador notes that the legislators who pushed for a change to the Guatemalan Mining Law in 1997 also argued that the surface land requirement was unconstitutional.[189] El Salvador disagrees with the reasoning relied upon in Guatemala because the legislators promoting the change failed to consider expropriation by the State. They argued "*if the State is unable to make use of the country's mining wealth because this is contingent on one person's willingness, private interests take precedence over the public interest.*"[190] But, of course, if a landowner was preventing the State from being able to grant a concession the State wanted to grant for the extraction of subsurface minerals, the State could expropriate the necessary land. The requirement to have ownership or authorization from landowners was, therefore, not unconstitutional. But, in any event, the example of Guatemala shows that the companies could not simply ignore the law and then argue that it was unconstitutional. Instead, they had to support changes requiring the passage of a new mining law eliminating this requirement.

136. Thus, in El Salvador, in accordance with the Constitution, the Mining Law protects landowners' rights to their property and security by requiring that concession applicants obtain ownership or authorization of the land area included in an application for an exploitation concession. Guatemala had the same requirement and changed it (under pressure from the mining companies), but El Salvador purposefully included this requirement in its 1995 Mining Law which does not declare mining to be in the public interest, and El Salvador has maintained

---

[189] Commission of Energy and Mines of the National Congress of Guatemala, Statement of Reasons ("*Exposición de Motivos*") for changes to the 1993 Guatemalan Mining Law, Apr. 18, 1997 ("Statement of Reasons for changes to the 1997 Guatemalan Mining Law") (**Exhibit R-157**).

[190] Statement of Reasons for changes to the 1993 Guatemalan Mining Law (R-157) ("si el Estado no puede disponer de la riqueza minera del país porque para ello depende de la voluntad de una persona, el interés particular estará por encima del interés colectivo.").

this requirement since then. Absent a change to the law, concession applicants, including Claimant, have to comply with Article 37.2.b).

e) Pac Rim found it impossible to comply with the requirement for the concession size it desired

137. In its Reply, Pac Rim suggests that it would have had no problem getting the required authorizations for all of the surface land of the requested concession. Pac Rim relies on a new witness, Mr. Gehlen, who admittedly was not involved in the discussions with the Bureau of Mines on this issue,[191] to question the Director of the Bureau of Mines' statement that Pac Rim was unable to get the required authorizations. According to Mr. Gehlen, "I am particularly confused by how Ms. Navas could possibly know whether the surface owners within the concession area would have given Pac Rim permission to carry out mining beneath their properties or, even more, how much money they would have asked for."[192] Mr. Gehlen's confusion is unfounded: Ms. Navas' statement is confirmed by documents on the record.

138. In fact, it was Pac Rim, not El Salvador, who described compliance with the law as impossible. In 2005, Fred Earnest wrote to Tom Shrake regarding a conversation with Ms. Navas, the Director of the Bureau of Mines, and he explained:

> There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and the authorization of the land owners. The environmental permit process is clearly out of our hands and the latter is a nearly (if not totally) impossible task.[193]

[191] Gehlen Witness Statement, paras. 105-108 (stating that he was "primarily occupied with managing ongoing drilling" during 2005 and indicating that he only knew about communications with the Bureau from what he was told by Fred Earnest).

[192] Gehlen Witness Statement, para. 189.

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

139. Pac Rim's recognition in its internal memo that compliance with the legal requirement of obtaining all the authorizations for the 12.75 km^2 area would be nearly or totally impossible was in accordance with what Pac Rim had told the Minister of Economy. In a letter to the legal advisor to the President as part of her efforts to accommodate the company, the Minister of Economy noted that "they believe that it is impossible to obtain all the permissions because there are many owners."[194]

140. Mr. Gehlen and Pac Rim ignore this contemporaneous evidence and argue that Pac Rim could have obtained authorizations, but simply was not willing to. Pac Rim now says that it "never had any problems obtaining authorization from the local landowners" and would have been "able [to] obtain whatever additional 'authorizations' that we could reasonably be expected to obtain."[195] Pac Rim's new witness states:

> As the Government has pointed out in its Counter-Memorial, there are hundreds (actually more than a thousand by my estimate) people with surface rights of some kind within the concession area. Many of them do not have their lands registered, and many cannot read or write. We were therefore unwilling to go through the process of obtaining "authorization" from all of these people without knowing exactly what it was that we were hoping to achieve through this process.[196]

141. Pac Rim makes no effort to reconcile this testimony with what Mr. Gehlen's predecessor, Fred Earnest, said in 2005 when the company should have obtained the required authorizations. The Tribunal will note that Pac Rim has not presented Fred Earnest to testify. Mr. Gehlen's testimony in 2014 is simply not credible to rewrite the factual record of what Mr.

---

[194] Letter from Minister of Economy to Secretary for Legislative and Legal Affairs, May 25, 2005 with attached Memorandum, "Interpretación Ley de Minería," May 5, 2005, at 1 (R-30) ("consideran que es imposible conseguir todos los permisos ya que los propietarios son muchos") (emphasis added).

[195] Reply, para. 346 (citing Gehlen Witness Statement, para. 183).

[196] Gehlen Witness Statement, para. 190 (emphasis added).

Earnest, Pacific Rim El Salvador's then-President, said and thought about the requirement at the relevant time. In 2005, Pac Rim knew authorization from the surface owners was one of the main items lacking from its concession application and that it would be nearly, if not totally, impossible to obtain the required authorizations.

142. As described in the Statement of Facts, the contemporaneous comments of Mr. Earnest and Pac Rim's representatives at the Ministry of Economy are confirmed by then-Minister of Environment Barrera's and Father Tojeira's recollections of a forum at the Universidad Centroamericana in San Salvador in 2006 with local landowners who were opposed to Pac Rim's project.[197]

143. In any event, Mr. Gehlen does not dispute the determinative fact: Pac Rim did not obtain ownership or authorization for the surface land of the concession it requested. It does not really matter whether it failed to do so because it was "impossible" or because Pac Rim was "unwilling to go through the process of obtaining 'authorization' from all of these people without knowing exactly what it was that we were hoping to achieve through this process."[198] Pac Rim simply did not obtain the required ownership or authorization.

144. In a twist, Pac Rim attempts to argue that "Respondent's own case . . . that its interpretation of Article 37.2(b) would make it 'nearly impossible' for Pac Rim to comply with the provision . . . hardly reflects an interpretation that furthers the purpose of the law."[199] This argument is flawed. Pac Rim is not only arguing against its own words, but also ignoring that the problem was the size of the requested concession, not the legal requirement. In this case, Pac

---

[197] Barrera Witness Statement, paras. 21-22; Witness Statement of José María Tojeira, S.J., June 3, 2014 ("Tojeira Witness Statement"), paras. 6-10.

[198] Gehlen Witness Statement, para. 190.

[199] Reply, para. 392.

Rim made obtaining the required authorizations impossible by requesting such a huge concession. A one or two square kilometer concession (all that would have been necessary for the only mine Pac Rim proposed)[200] would involve far fewer owners. Indeed, the law originally contemplated a maximum five square kilometer concession area. Thus, Pac Rim's argument that preventing it from acquiring such a huge concession is somehow contrary to the purpose of the law makes no sense. Pac Rim may have been able to comply if it chose a more reasonably sized concession. There is, therefore, no support for Pac Rim's suggestion that the "purpose of the law" requires it to be granted a 12.75 km^2 concession: an area more than two and a half times greater than the previous maximum under the law and six times larger than what it needed for its proposed project.

f) The law did not change

145. According to Pac Rim, El Salvador's arguments about Pac Rim's failure to comply with the law perpetuate the idea "that the Administration should be expected to 'hide the ball' or 'erect an insurmountable obstacle course.'"[201] But, in fact, the opposite is true: nothing was hidden or sprung on Claimant. El Salvador's interpretation and application of the law has been consistent since before Pac Rim made its investment in El Salvador and throughout the interactions between Pac Rim and Salvadoran officials.

146. As highlighted in the Statement of Facts, the land ownership or authorization requirement was explained in a 1998 diagnostic of mining activity in El Salvador:

> any person who requests a mining concession must, prior to its approval, prove the availability of the property that will be subject

---

[200] First Behre Dolbear Expert Report, para. 44 ("Behre Dolbear considers the El Dorado Project as proposed in the Pre-Feasibility Study would require approximately 1.60 square kilometers to safely execute the mine plan for the Minita deposit within the concession boundaries.").

[201] Reply, para. 333, n.651.

> to the concession, which must be done by means of a deed of ownership for the property or legally granted authorization from the owner.[202]

147. As also described in the Statement of Facts, the Bureau of Mines reminded Pac Rim of this requirement shortly after it submitted its application,[203] gave Pac Rim extra time to comply after confirming that Pac Rim's proposed alternative interpretation of the law was wrong,[204] and then, finally—after nearly two years—invoked the procedure under Article 38 of the Mining Law, notifying Pac Rim that proof of land ownership or authorization was among the items missing from its application and giving Pac Rim 30 days to provide it along with the other missing items.[205]

148. Pac Rim did not comply with the law. It never provided the missing requirements, including documentation of ownership or authorization for the land in the concession area it was requesting. As Article 38 of the Mining Law provides, if an application is incomplete, *i.e.*, missing the legal requirements, the applicant shall be given 30 days to provide

---

[202] Silvio A. Ticay Aguirre, Development and Perspectives of Mining Activity in El Salvador, Feb. 1998, at 23 (C-622) ("toda persona que solicite una concesión minera, previo al otorgamiento de la misma deberá comprobar la disponibilidad del inmueble sobre la cual recaerá la concesión, lo cual se hará mediante escrirura de propiedad del inmueble o autorización otorgada en legal forma por el propietario . . .") (translation by El Salvador).

[203] Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713) ("Gina informed me that we are going to have to get the authorization of all the surface owners within the area of the concession.").

[204] Pac Rim Internal Memo re Surface Owner Authorization (C-291) ("Gina informed me that the office of the Secretariat for Legislative and Judicial Affairs had reviewed the mining law and was in agreement with the interpretation of the Ministry of Economy and the Division of Mines. . . . Pushing for a formal declaration would start a 30-day clock, requiring the presentation of the environmental permit and the authorizations. Given that the Division of Mines is sympathetic to our status in regards to the environmental permit, this buys us time.").

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

the missing items or have the application rejected.[206] The law does not grant the Bureau of Mines any discretion. If the application is incomplete, it "shall be rejected."[207]

149. Given the mandatory nature of Articles 37 and 38 of the Mining Law, Claimant's new "proportionality" argument is baseless.[208] An applicant cannot ignore the legal requirements. The need to comply with the requirements of the law does not vary depending on any specific facts of the case. An incomplete application must be rejected, regardless of whether or not the applicant considers that a failure to grant its concession would "entail an excessive sacrifice of . . . economic freedom."[209] In any event, Claimant alone is responsible for submitting an incomplete application and any resulting impacts on Claimant's economic freedom.

150. As Claimant was told by a Government official sympathetic to its arguments, the surface land ownership or authorization requirement "is the current legal text, and the one that must be observed."[210] Claimant's decision not to comply with the law, therefore, had nothing to do with the Government "hid[ing] the ball." The result of Claimant's decision—not being entitled to a concession—is mandated by the law and not subject to a discretionary decision.

---

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

[207] Mining Law, Art. 38 (RL-7(bis)) ("se declarará sin lugar la solicitud") (emphasis added).

[208] Reply, Section III.B.1.c.

[209] Reply, para. 401 (quoting Second Fermandois Expert Report at 64-65).

[210] Email from Ricardo Suarez to Luis Medina, Sept. 23, 2005, at 1 (C-289) ("ese el texto legal actual, y es el que debe ser observado.").

4. Pac Rim did not comply with the requirement of Article 37.2.d)

151. Article 37.2.d) requires applicants for an exploitation concession to submit a "Technical-Economic Feasibility Study." This is a second, independent legal requirement with which Pac Rim failed to comply. As with the Article 37.2.b) requirement, Pac Rim's failure to comply was caused in part by its desire to acquire rights over too large an area.

152. In its Reply, Pac Rim continues to argue that the only requirement it had to meet to obtain a concession was "the verification of economic mining potential on the El Dorado Property."[211] This is simply wishful thinking, with no basis in fact or the law. Under Article 37.2, Pac Rim was required, but failed, to provide a Feasibility Study.

a) Pac Rim never submitted the required Feasibility Study

153. Pac Rim submitted a preliminary Pre-Feasibility Study with is application for an exploitation concession in December 2004 and the "final" version of the Pre-Feasibility Study one month later in January 2005. Despite the clear requirement in the law to submit the feasibility study with the concession application, as described in the Statement of Facts, Pac Rim immediately began working on a feasibility study that would include other resources after it submitted the concession application. Pac Rim even recognized in September 2005 that the submitted Pre-Feasibility Study had been rendered "extinct." Nevertheless, it is undisputed that Pac Rim never submitted the Feasibility Study it was working on after submitting the Pre-Feasibility Study in January 2005.

154. From 2005-2009, Pac Rim often discussed the Feasibility Study it was working on and indicated that it would present it to the Government. Examples of these comments include:

---

[211] Reply, Section II.C.2.

- September 2005: "Pacific Rim's exploration strategy is to continue to drill test South Minita . . . until the Company is satisfied that the target has been adequately delineated, and then commission a resource estimate for this gold zone. The Company will then amend the Minita pre-feasibility study to take into consideration the new ounces defined by the South Minita resource estimate, which will provide an economic analysis of a proposed operation that involves mining Minita and South Minita simultaneously."[212]

- December 2006: "drilling for the purposes of collecting geotechnical data was completed during the current quarter. The information from the geotechnical drilling is required to complete certain components of the El Dorado feasibility study that is currently underway."[213]

- 2008 Annual Report: "In 2006, the Final Feasibility Study for the El Dorado Project was delayed in order to reorganize the data obtained in past drilling campaigns conducted by PACRIM. After a progress report on the revised calculation of reserves in July 2006, technical work began to resume and complete the final feasibility study in early 2008. The data obtained from holes drilled in 2007 and other technical studies along with the existing information on the project will result in a Feasibility Study in early 2009 that is more complete than those presented in past years. The new study includes technical studies such as: Metallurgical studies on new mineralized bodies and the extraction process; Structural and geotechnical studies; Final Hydrogeological Study for the El Dorado Project; Detailed cost study for mine development and operation; Revised Tailings Dam Study; Revised Underground Mine and Processing Plant Study; New calculation of mining resource. As mentioned above, all these data will be included in an updated Feasibility Study in 2009."[214]

---

[212] Pacific Rim Mining Corp., News Release, South Minita Gold Zone Continues to Evolve as a Key Component of Pacific Rim's Exploration Strategy, Sept. 9, 2005, at 1 (C-253) (emphasis added).

[213] Pacific Rim Mining Corp., News Release, *Pacific Rim Announces Fiscal 2007 Second Quarter Results*, Dec. 15, 2006, at 2 (C-427) (emphasis added).

[214] 2008 Annual Report, § 7 (R-3) (emphasis added) ("Durante el año 2006 el Estudio de Factibilidad Final para el proyecto El Dorado fue detenido para reorganizar los datos obtenidos en campañas pasadas de perforación a cargo de PACRIM. Luego de un informe de avance en la revisión del cálculo de reservas en Julio de 2006, se empezaron los trabajos técnicos para retomar y completar el estudio final de factibilidad a principios de 2008. Los datos obtenidos de las perforaciones hechas en 2007 y otros estudios técnicos con la información existente en el proyecto van a dar como resultado a principios de 2009, un Estudio de Factibilidad más completo que el presentado en años pasados. Este nuevo estudio incluye estudios técnicos tales como: Estudios metalúrgicos en nuevos cuerpos mineralizados y el proceso de extracción; Estudios estructurales y geotécnicos; Estudio Hidrogeológico Final Proyecto El Dorado; Estudio detallado de costos para el desarrollo y operación de mina; Revisión del Estudio de Presa para Pila de Colas; Revisión del Estudio de Mina Subterránea y Planta de Proceso; Nuevo cálculo de recurso minero. Como se mencionó anteriormente, todos estos datos serán incorporados en un actualizado Estudio de Factibilidad en 2009.").

155. In this arbitration, Claimant admitted that the Feasibility Study it was working on and delayed and then eventually suspended is the document required by Salvadoran Mining Law:

> Claimant is not "suggest[ing] that the feasibility study on hold is different from the feasibility study required by the Salvadoran Mining Law," as asserted by Respondent in its Reply. They are the same document.[215]

156. Pac Rim never submitted the feasibility study it worked on after rendering the Pre-Feasibility Study extinct in 2005. Thus, it is surprising for Pac Rim to argue in this arbitration that its "extinct" Pre-Feasibility Study must have been sufficient because the Government "[n]ever raised any issue" regarding it.[216] It would not have made any sense for the Government to review the "extinct" study and identify its deficiencies for Pac Rim. As the Bureau of Mines was admittedly giving Pac Rim extra time to complete its application,[217] it only made sense for the Government to wait and evaluate Pac Rim's new plan when it presented a complete application including a Feasibility Study.

157. There was, therefore, no Feasibility Study for the Government to evaluate.[218] Pac Rim never completed its application.

---

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

[216] Reply, para. 334.

[217] Pac Rim Internal Memo re Surface Owner Authorization (C-291) (noting that the Bureau of Mines had agreed to hold off on issuing a formal notice that would start a 30-day clock to cure omissions in the application).

[218] Ticay Witness Statement, para. 7 ("Lo que entregó Pacific Rim no era un estudio de factibilidad.") ["What was submitted by Pacific Rim was not a feasibility study."].

b) Pac Rim's argument that its Pre-Feasibility Study was sufficient to meet the requirement of Article 37.2.d) is absurd

158. Pac Rim's assertion that it had complied with Article 37.2.d) based on its (admittedly extinct and incomplete) Pre-Feasibility Study is meritless.[219] Even if the study was at the feasibility study level (which it was not), Pac Rim failed to provide the required technical and economic information specific to the 12.75 km^2 area requested.

159. The Salvadoran Mining Law contemplates two distinct phases with two distinct authorizations: 1) exploration licenses for up to a maximum of eight years, followed, if justified, by 2) an exploitation concession. Under the law, the deposit or deposits to be exploited should be identified during the exploration phase and the plan to mine that deposit or deposits must be designed and studied before applying for a concession. Thus, the concession application must include the feasibility study and the environmental permit based on an approved environmental impact study for the proposed exploitation project. Pac Rim, however, wanted to go backwards. Pac Rim wanted to be granted a 30-year exploitation concession and then expand the resource, decide which deposits to mine, and finalize its mine plans.[220]

160. Surprisingly, in the Reply, Pac Rim states that the allegation that it could only have obtained a concession for the Minita deposit because it had only defined reserves at Minita is "disproved by the factual record."[221] But Article 24 of the Mining Law, titled, "Determination

---

[219] *See* Section II.C.2 above.

[220] Email from Tom Shrake to Barbara Henderson and Catherine McLeod-Seltzer with attached Denver Talking Points, Sept. 22, 2005, at 4-5 (C-707) ("Pacific Rim has a clear path to reach our goal of low-cost, intermediate-level production. We've discovered two new deposits at El Dorado, we're increasing the size of our resource with delineation drilling, we've found new outcropping veins at El Dorado that were previously unknown . . . We will drill, calculate a resource, amend the pre-feasibility study to show how robust the deposit is when throughput is doubled and then build a mine that will move us in the elite and small group of companies that have substantial margins per ounce and who reap huge rewards in the market receiving cash flow multiples of 30, or more.").

[221] Reply, para. 178.

of the Area to Be Exploited," provides that the surface area of the concession to "exploit the previously determined minerals" shall be "based on the magnitude of the deposit or deposits and the technical justifications given by the Holder."[222] Thus, the surface area of the concession must relate to a specific deposit or deposits to be exploited and the corresponding technical justifications provided by the applicant. In other words, a concession should cover the area required to realize a proposed project, not an area more than six times larger.

161. But that did not fit with Pac Rim's plan. Pac Rim insists that the Tribunal should accept its outlandish plan (to obtain the concession to exploit natural resources before defining the resources and finalizing a mine plan) because of the number of drill holes it had drilled from 2002-2004, its "increased . . . chances of success in future drilling," and the fact that it was taking a risk investing in exploration "on behalf of the people of El Salvador."[223] These assertions are irrelevant with respect to whether or not Pac Rim could have been granted a concession.

162. The number of holes drilled, prospects for future success after expiration of the period for exploration, and whatever risks Pac Rim took as a gold exploration company are irrelevant to the question of Pac Rim's legal entitlement (or lack thereof) to a concession. None of these allegations has anything to do with the size of the concession Pac Rim could or should have requested. Moreover, as an exploration company, Pac Rim took the risk of exploring in hopes of striking gold and earning extraordinary profits. And Pac Rim's risk was greater because it entered the process late, when only three years of the maximum eight-year exploration period remained. Pac Rim was <u>never</u> acting altruistically on behalf of the people of El Salvador—and it

---

[222] Mining Law, Art. 24 (RL-7(bis)) ("Determinación del area a explotar;" "la explotación de los minerales previamente determinados;" and "otorgada en función de la magnitud del o los yacimientos y de las justificaciones técnicas del titular.").

[223] Reply, paras. 179-180 (emphasis omitted).

still is not.[224] Quite simply, Pac Rim's desire to increase its profitability by continuing exploration after the time limit for exploration had ended does not mean that the law can or should be ignored.

163. Several provisions of the Mining Law confirm that Pac Rim failed to meet the legal requirement to provide technical and economic information for the concession area it requested for its proposed exploitation. Far from encouraging continued exploration, the Mining Law provides for concession holders to quickly begin exploitation after receiving a concession. Article 23, titled "Concession for the Exploitation of Mines," provides for requesting a concession "[u]pon conclusion of the exploration and proof of the existence of the mining economic potential in the authorized area."[225] The 1995 Mining Law provided that a concession holder would have to begin exploitation work within one year of receiving the concession contract or the contract would be canceled.[226] Pac Rim's predecessors had a hand in making Article 23 more lenient with the 2001 Amendment requiring that only preparatory work for exploitation begin within the first year.[227] Thus, the provision now requires that at least "preparatory work for the exploitation of the deposit" be started within one year. Before and after the change, however, the Article clearly indicates that an exploitation concession is granted to exploit an already identified and studied deposit, not to continue exploring.

---

[224] Pac Rim started this arbitration, knowing that it "would damage Salvador and her people," for the sake of its investors. Email from Tom Shrake to Pacific Rim Board of Directors, Apr. 24, 2008, at 3 (C-755).

[225] Mining Law, Art. 23 (RL-7(bis)) ("Concesión para la explotación de minas . . . Concluida la exploración y comprobada la existencia del potencial minero económico en el área autorizada.").

[226] Mining Law of El Salvador, Legislative Decree No. 544, Dec. 14, 1995, published in the Official Gazette No. 16, Book 330 of Jan. 24, 1996 ("1996 Mining Law"), Art. 23 (before Amendment) (CL-210).

[227] Mining Law, Art. 23 (RL-7(bis)).

164. Article 18 of the Mining Regulations confirms that the deposits to be exploited are to be studied during the period of exploration. This Article explains that, when an application for an exploitation concession is preceded by an exploration license, "the existence of the deposit or deposits referred to in Art. 23 of the Law shall be proven with the documents that are consistent or in accordance with the activities and studies that were performed during the effective term of such License and the final [exploration] report."[228]

165. Thus, Pac Rim's insistence that it should have been granted a concession with the intention of "eventually incorporat[ing] further reserves into the mine project"[229] is contrary to the Mining Law and Regulations. The law provides that the concession area must be the area necessary to mine a specific deposit or deposits and that those deposits must be identified and studied during the exploration period.

166. Pac Rim had only studied and proposed a mine for the Minita deposit when it requested an exploitation concession in December 2004. As a result, Pac Rim's Pre-Feasibility Study—even if it were at the level of a feasibility study (which it was not)—could not fulfill the requirement of Article 37.2.d) of the Mining Law for an application for a 12.75 km^2 area.

c) The Government never accepted that Pac Rim had provided sufficient justification for the 12.75 km^2 area

167. In its Reply, Pac Rim describes El Salvador's argument that Pac Rim did not comply with Article 37.2.d) because it did not submit a study covering the requested area as "irrelevant and misleading."[230] According to Pac Rim, granting the three exploration licenses in

---

[228] Mining Regulations, Art. 18 (RL-8(bis)) ("la existencia del o de los yacimientos a que se refiere el Art.23 de la Ley, se hará con documentos que sean congruentes o acordes con las actividades y estudios que fueron ejecutados durante la vigencia de esa Licencia y el informe final . . .") (emphasis added).

[229] Reply, para. 179.

[230] Reply, para. 423.

2005 based on the coordinates requested by Pac Rim shows that the Bureau of Mines agreed that the 12.75 km^2 requested concession area was justified.[231]

168. Similar to its new allegation that there was an agreement not to apply Article 37.2.b) to its application, Pac Rim submits no evidence that the Bureau of Mines "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 of that size."[232] Claimant has offered no such evidence because there obviously was no such agreement. As described by Bureau of Mines technician Silvio Ticay, the pre-feasibility study was never evaluated in depth because Pac Rim never completed its application and the application was never admitted.[233] As a result, the Bureau could not have determined that a 12.75 km^2 area was justified. Granting new licenses for the coordinates requested by Pac Rim says nothing about the requested concession area—the alleged justification for that area would not have been (and was not) reviewed in the process of granting DOREX's applications for exploration licenses.

169. Pac Rim further insists that its plan to increase reserves through new feasibility studies after receiving the permit is unrelated to evaluating its compliance with Article 37.2.d). But Pac Rim misses the point: Pac Rim submitted a pre-feasibility level study of one deposit and requested a 12.75 km^2 concession. If it wanted to submit a new request for a larger concession area or new concession application altogether based on new reserves ("through completion of new feasibility studies"), its arguments about its "extraordinary commitment" to the project may be relevant.[234] But that is not what happened. Having requested a 12.75 km^2 concession, Pac

---

[231] Reply, paras. 186-187.

[232] Reply, para. 423.

[233] Ticay Witness Statement, paras. 7-8.

[234] Reply, paras. 425-426.

Rim had to submit the required technical and economic information to justify needing a concession over that entire area with its application. Its plan to obtain the concession before expanding the resource and completing the required feasibility study demonstrates its failure to comply with Article 37.2.d) for the concession area it requested.

170. Pac Rim's suggestion that it should have received a 30-year, 12.75 km^2 concession based on a conceptual mine plan to mine one deposit, and then had free rein to develop other mines in the area however and whenever it wanted is absurd. As unbelievable as that sounds, Pac Rim apparently thought it had applied for "the one and only mining permit required in the jurisdiction."[235] Pac Rim states that it would need additional environmental impact studies and environmental permits to build other mines, but apparently thought it should receive the required concession first ("the one and only mining permit required"), before even proposing the mines.[236]

171. Indeed, PRES President William Gehlen argues that the Government should have welcomed Pac Rim's plans to expand operations after receiving the concession: "it 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."[237] This, yet again, is not an issue with the Salvadoran Mining Law, but rather a problem of Pac Rim's own making. Pac Rim is solely responsible for requesting a 12.75 km^2 concession based on a six-year mine plan. Pac

---

[235] Email from Tom Shrake to Barbara Henderson and Catherine McLeod-Seltzer with attached Denver Talking Points, Sept. 22, 2005, at 2, 4 (C-707) ("The footprint or area of the district is actually bigger than this map but don't bother running out and applying for the surrounding ground because we've already applied for it. . . . About a year ago we filed an EIS to get the one and only mining permit required in the jurisdiction.").

[236] *See, e.g.*, Reply, para. 420 (discussing plans to increase reserves after permits were issued and thereby "extend[] the life of the mine").

[237] Gehlen Witness Statement, para. 126.

Rim had not done the exploration and engineering work necessary to submit plans to mine several deposits over 30 years and use the 12.75 km^2 area it requested. Pac Rim could have avoided this problem by completing a feasibility study for the much smaller area it needed to mine the Minita deposit and submitting a complete concession application for that area.[238] It chose not to.

172. The law did not permit Pac Rim to do what it insisted on doing: submit an incomplete, soon-to-be-extinct Pre-Feasibility Study for one small deposit and receive a 30-year, 12.75 km^2 exploitation concession for yet-to-be-defined mines. Pac Rim's justification that its Pre-Feasibility Study was good enough because the area was so promising for future exploration,[239] has nothing to do with the Mining Law. The Government could not, and did not, agree that Pac Rim had provided sufficient information to justify a 12.75 km^2 concession.

173. Similar to Article 37.2.b), Pac Rim simply ignored Article 37.2.d) and other provisions of the Mining Law to try to secure a larger concession than it could qualify for. Failure to comply with Article 37.2.d) is an independent and sufficient reason for which Pac Rim was not entitled to a concession.

5. El Salvador is not "estopped" from arguing that Pac Rim had no right to a concession

174. Claimant presents the novel argument in its Reply that El Salvador is "estopped" from arguing that Pac Rim was not entitled to the concession that it never received:

> Respondent's primary defense in this arbitration is that Pac Rim's claims must fail because the company's concession application was

[238] El Salvador considers that if Pac Rim had focused less on expanding reserves and more on its concession application, it may have been able to submit a reasonable and complete application for a smaller area. Contrary to Mr. Gehlen's response that "the resources that Pac Rim devoted to properties outside of El Salvador since 2002 were nonmaterial," (Gehlen Witness Statement, para. 66), El Salvador's contention is that Pac Rim spread itself too thin in El Salvador.

[239] Gehlen Witness Statement, para. 125; Reply, para. 179.

> "inadmissible and the requested concession could therefore not be granted under the law." However, Respondent itself never denied Pac Rim's application. Therefore, 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).
>
> On the other hand, Respondent's conduct between 2004 and 2008 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 benefit of Respondent. Consequently, Respondent's newfound assertion that Claimant had no legal rights in the El Dorado Project is contrary to the general principle of good faith and must be rejected by the Tribunal.[240]

175. Claimant's argument demonstrates its misunderstanding of the principle of estoppel under international law. Indeed, Claimant makes no attempt to explain the legal norm it claims defeats El Salvador's primary defense. The doctrine of estoppel under international law operates to prevent a party to a dispute from asserting before a tribunal or court a situation contrary to "a clear and unequivocal representation previously made by it" to the other party to the dispute, on which representation the latter party was entitled to rely and in fact did rely, and as a result that party has been prejudiced or the party making the representation has secured some benefit for itself.[241] The effect of estoppel is that the party that made the prior representation is

---

[240] Reply, paras. 319-320 (emphasis in original).

[241] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June, Dissenting Opinion of Sir Percy Spender, 1962 I.C.J. Reports 101, 143-144 (**Authority RL-192**). Judge Spender's characterization of estoppel has been adopted by the International Court of Justice, arbitration tribunals and international scholars. *See, e.g.*, Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening), Application by Nicaragua for Permission to Intervene, Judgment of 13 September, 1990 I.C.J. Reports 92, 118 (**Authority RL-193**); *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, Mar. 1, 2010, paras. 350-351 (CL-176); and Thomas Cottier & Jörg Paul Müller, *Estoppel*, Max Planck Encyclopedia of Public International Law, Apr. 2007 ("Cottier & Müller "), para. 1 (**Authority RL-194**).

barred (*i.e.*, estopped) from successfully adopting the subsequent statement that is different from the prior statement.[242]

176. As Judge Spender of the International Court of Justice emphasized, the principle of estoppel is a "powerful instrument of substantive international law" that "should be applied with caution" because it "substitutes relative truth for the judicial search for the truth."[243] In the same vein, the *Chevron v. Ecuador I* tribunal noted that the doctrine of estoppel is subject to "a high threshold."[244] Professor Ian Brownlie's esteemed treatise, Principles of Public International Law, specifies the three "essential" elements for estoppel:

> (1) a *statement of fact* which is *clear and unambiguous*; (2) this statement must be *voluntary, unconditional, and authorized*; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[245]

177. Falling far short of what is required to satisfy the high threshold of estoppel, Claimant makes no mention of the elements of the principle and fails to demonstrate that each

---

[242] Cottier & Müller, para. 1 (RL-194).

[243] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June, Dissenting Opinion of Sir Percy Spender, 1962 I.C.J. Reports 101, 143 (RL-192).

[244] *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, Interim Award, Dec. 1, 2008, para. 143 (CL-75).

[245] Ian Brownlie, Principles of Public International Law (6th ed. 2003) at 615 (emphasis added) (RL-136(bis)). *See also Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, para. 160 (RL-77); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, June 26, 2000, para. 111 (RL-141) (both quoting Professor Brownlie's essential elements for the application of estoppel). Another respected international authority, the Max Planck Encyclopedia of International Law explains the reasons for the prevailing stringent and restrictive stand of estoppel under international law: "A rule or principle which would easily prohibit any modification of conduct, statement, or representation vastly overestimates the potentials of law. This is neither suitable nor desirable in effectively promoting protection of good faith, reliance, and confidence in international relations between sovereign nations. Predictability of law can be achieved, if at all, only under a concept of reasonably precise rules of restrictive estoppel, such as those prevailing today." Cottier & Müller (RL-194).

has been satisfied. Indeed, the facts leave little doubt that the principle has no place in this arbitration.

178. Ever since Pac Rim started this arbitration insisting on its right to a concession, El Salvador has explained that Claimant had no right to a concession. There is nothing "newfound" about this argument. Indeed, rather than showing that El Salvador made a "clear and unambiguous" statement of fact that Claimant had acquired the rights to the exploitation concession—the first of three requirements for estoppel under international law—Claimant is left to admit that El Salvador made no clear and unambiguous statement conferring the exploitation concession to Claimant because El Salvador never even admitted Claimant's application for the concession. Claimant instead seeks to invoke estoppel by arguing that El Salvador's conduct consistently confirmed that Claimant was entitled to the exploitation concession. But the elements for estoppel do not include conduct, and the factual record shows that El Salvador made no "clear and unambiguous" statement granting Claimant the exploitation concession, much less a "voluntary, unconditional, and authorized" statement.

179. Moreover, the record flatly contradicts Claimant's assertion that El Salvador "consistently confirmed that Claimant *was* entitled to the concession."[246] Indeed, several events between 2004 and 2008 show that El Salvador did not confirm that Claimant was entitled to the concession, including:

- The Director of the Bureau of Mines told Pac Rim in March 2005 that the company needed to submit authorizations for all of the surface land for the requested concession;
- The Director of the Bureau of Mines confirmed to Pac Rim in June 2005 that its application was incomplete and one of the main things missing was the land surface authorizations;

[246] Reply, para. 320 (emphasis in original).

- After holding off, *i.e.*, "buying [Pac Rim] time" to complete its application, for nearly two years, the Bureau of Mines invoked Article 38 of the Mining Law in October 2006, listing five items, including land surface authorizations and a feasibility study, that Pac Rim had to submit within 30 days;

- The Mining Law clearly and unequivocally provides that an application shall be rejected if missing items are not submitted within the 30-day period;

- Pac Rim did not submit ownership or authorization documents for the entire area and did not submit a Feasibility Study; and

- After the period for submission of the missing materials had ended, Pac Rim tried to change the law in 2007, admitting to its shareholders that legal reform was needed before it could be granted the concession.[247]

180. Pac Rim argues that the second letter from the Bureau of Mines in December 2006, granting Pac Rim an extra 30 days to submit the environmental permit because of its argument about just impediment, "recognize[es] that PRES had submitted the other documents requested in [October 2006]."[248] In the October 2006 warning letter, consistent with El Salvador's assertions in this arbitration, the Bureau of Mines informed Claimant that a concession could not be granted without Claimant's submission of proof of land ownership or authorization, a feasibility study, and an environmental permit.[249] Pac Rim's argument is based solely on one phrase of the December 2006 letter that says that PRES "partially complied" with the requests in the October 2006 warning letter. Pac Rim's argument is meritless because, as detailed in the previous sections, it is indisputable that PRES did not provide the missing documents. In any case, the letter simply referred to the fact that Pac Rim had submitted some materials in response to the other requests (without commenting on, or even having judged, the

---

[247] *See* Section II above.

[248] Reply, para. 350.

[249] Warning Letter From Bureau of Mines, Oct. 2006 (R-4).

sufficiency of those materials). The letter only singled out the lacking environmental permit because PRES had argued about a just impediment for only this requirement. The December 2006 letter makes no mention of whether Claimant had complied, partially or otherwise, with "all the requirements for the concession." It also gives no indication as to whether Claimant was entitled to receive the concession. Thus, there simply is no clear, unambiguous, voluntary, unconditional, and authorized statement by El Salvador informing Claimant that it is entitled to receive the concession or "unequivocally demonstrat[ing] the Respondent's recognition of Pac Rim's legal right to eventually obtain the concession."[250]

181. As the Salvadoran Administrative Law experts explain, one cannot interpret the letter from the Bureau of Mines to do away with a legal requirement:

> The acts of the Administration can never be understood as changing the law or its requirements; nor can such act by the Administration contrary to the law (by not requiring a legal requirement, or by requiring something that is not legally required) be considered as valid and having the effect of modifying the law or the requirements established by the law for granting a specific right.[251]

182. The experts explain that the letter can have no impact on Pac Rim's need to comply with the law. The letter does not change the fact that Pac Rim did not comply, *i.e.*, it did not submit ownership or authorization for the vast majority of the surface land included in its requested concession or a Feasibility Study for the area requested.

> The fact that, after having required specific documentation in the October 2006 letter, the December 2006 letter does not repeat that such documentation has not been provided, cannot be understood

---

[250] Reply, para. 322.

[251] Second Ayala/Fratti de Vega Expert Report at 36 ("Lo que nunca puede entenderse es que la actuación de la Administración modificó la ley o sus requerimientos y que tal actuación de la Administración contraria a la ley (por no exigir un requisito legalmente exigible, o por exigir un requisito que no sea legalmente exigible) sea válida y produzca el efecto de modificar la ley o los requisitos que la ley establezca para el otorgamiento de un determinado derecho.").

> by the interested party to mean that such documentation is not necessary, since this is documentation required by law, documentation that has been requested of it, and documentation that the interested party knows it has not provided, ergo it remains pending. . . . The poor drafting of a letter (if it is understood to be poor) would never have the effect of rendering a law or the requirements set forth in a law inapplicable.[252]

183. Thus, Claimant's estoppel argument is baseless. Claimant has admitted that El Salvador never said it could obtain the concession without complying with the law,[253] and with each submission Claimant presents more evidence that it knew it had not complied with the law. El Salvador did not confirm that Pac Rim was "entitled" to a concession. In fact, El Salvador repeatedly indicated that Pac Rim's application was incomplete and, for that reason, never admitted Pac Rim's application. As a result, Claimant was not entitled to a concession.[254]

6. Pac Rim's application was never admitted

184. Another one of Claimant's surprising new arguments is that its application for a concession was admitted. Claimant misquotes El Salvador and argues: "while Respondent now alleges that Pac Rim's application was never 'accepted,' the record demonstrates that the Department of Mines in fact reviewed the application and communicated with the company

---

[252] Second Ayala/Fratti de Vega Expert Report at 37 ("El hecho de que tras requerir una determinada documentación en la comunicación de octubre de 2006, no se vuelva a decir en diciembre de 2006 que esa documentación no se ha aportado no puede entenderse por el interesado como que tal documentación no es necesaria, pues se trata de una documentación que exige la ley, de una documentación que se le ha requerido y de una documentación que el interesado sabe que no ha aportado, ergo está pendiente. . . . La mala redacción de una comunicación (si es que se entendiera que es mala) nunca produciría el efecto de volver inaplicable la ley ni los requisitos que la ley exige.").

[253] Transcript, Hearing on Jurisdiction, Day 2, 473:1-8.

[254] *See* Second Ayala/Fratti de Vega Expert Report at 39-40 ("In fact, if specific documents required for an application to be admitted are not submitted (among them the environmental permit or documents relating to ownership or authorization of landowners), it becomes irrelevant whether or not mining plans or geological and other studies have been submitted, since the application will not be admitted due to the lacking documents. Therefore, the Minister will not render a decision . . ." / "En efecto, si no se presentan determinados documentos exigidos por la ley para la admisión de la solicitud (entre ellos el permiso ambiental o los documentos relativos a la propiedad o autorización de los propietarios del suelo) resulta irrelevante si se han aportado o no plano smineros, estudios geológicos y otros, pues la solicitud no será admitida por falta de aquellos documentos y por tanto, no se producirá la resolución del Señor Ministro . . .").

about it on numerous occasions."[255] El Salvador actually said that Claimant's application was incomplete and could not be "admitted."[256] Mining Law, Article 38, provides for an application to be "admitted" if the Bureau of Mines finds that it meets all the legal requirements and gives it a favorable review. Only after being admitted will an application be published for public comment and considered by the Minister.[257] There is no dispute that Pac Rim's application never got past the Bureau of Mines. In other words, it was never admitted. Communications from the Bureau of Mines do not change that fact. Rather, the communications confirm that the Bureau of Mines was reviewing whether Pac Rim had satisfied the legal requirements and that the Bureau found the application to be deficient. Admission of the application would have required a resolution by the Bureau of Mines.[258]

185. Claimant, however, takes this bizarre argument one step further. According to Claimant, "[t]hese communications, along with the Department's ratification of Pac Rim's continued drilling activities on the requested El Dorado concession area, unequivocally demonstrate the Respondent's recognition of Pac Rim's legal right to eventually obtain the concession."[259] As highlighted throughout El Salvador's submissions, communications from the Bureau of Mines (including those telling Pac Rim that it had not complied with Article 37.2.b),[260] telling Pac Rim that its application was incomplete,[261] and invoking the procedure

---

[255] Reply, para. 321.

[256] Counter-Memorial, para. 78.

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

[258] Mining Law, Art. 39 (RL-7(bis)).

[259] Reply, para. 322.

[260] Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713) ("Gina informed me that we are going to have to get the authorization of all the surface owners within the area of the concession.").

under the law for Pac Rim to submit the missing components of its application within 30 days or have the application rejected[262]) do not demonstrate recognition of a right to receive the concession.

186. The Bureau's communications demonstrate that the Bureau was very interested in working with Pac Rim to complete its application and was trying to help the company. In fact, the Bureau held the application in limbo (and did not stop Pac Rim's continued exploration in the requested area)—instead of rejecting the application as it should have—so that the company could benefit if it succeeded in changing the law. As Gina Navas explained in her witness statement, the Bureau accommodated the company "for the purpose of allowing Pacific Rim to be able to benefit in the event that a new regulation were approved that would retroactively modify the legal situation surrounding that application."[263] Claimant recognizes that the Bureau of Mines acted in good faith to help the company succeed. Claimant's witness Mr. Gehlen confirms: "I have never felt that the Department of Mines staff acted with political motives in relation to our project (irrespective of orders they may have received from their superiors), but only with the intention of creating a responsible mining industry."[264]

187. Pac Rim now seeks compensation for its unauthorized exploration activities in the area of the requested concession after January 1, 2005.[265] But Pac Rim's claims lack legal basis.

---

[261] Pac Rim Internal Memo re Surface Owner Authorization (C-291) (reporting the outcome of a conversation with the Director of the Bureau of Mines: "There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and the authorization of the land owners.").

[262] Warning Letter From Bureau of Mines, Oct. 2006 (R-4).

[263] Navas de Hernández Witness Statement, para. 78 ("con el propósito de permitir que Pacific Rim se pudiera beneficiar, en caso que se dictara alguna regulación que modificara retroactivamente la situación legal de esa solicitud.").

[264] Gehlen Witness Statement, para. 164.

[265] Reply, Section III.A.2.

From 2005 into 2008 Pac Rim explored and greatly increased its resource estimates from what it reported in the Pre-Feasibility Study.[266] This was Pac Rim's choice, and it was done at Pac Rim's own risk. Some Bureau of Mines officials, in good faith, hoping that Pac Rim would complete its application and obtain a concession did not order Pac Rim to refrain from continuing exploration activities in the area of the requested concession. Pac Rim, however, did not complete its concession application or succeed in changing the Mining Law and instead has brought claims against El Salvador for $300 million in this international arbitration. As a result, Pac Rim's relationship with El Salvador is now entirely different. The fact that some officials allowed Pac Rim to continue exploring when they thought the end result would be an exploitation concession did not create rights for Pac Rim in spite of its failure to comply with the law. Pac Rim still had to and never did submit a complete concession application. It cannot be compensated for a right it never had. Pac Rim's right to explore in the area of the El Dorado licenses definitively expired on January 1, 2005.

188. Contrary to Claimant's allegations,[267] El Salvador has not benefitted from this outcome. No one else is going to exploit the El Dorado area. Pac Rim still has its land and its studies.

189. In the end, the law was never changed and Pac Rim's incomplete application was never admitted. Despite the Bureau's efforts to help the company, Pac Rim never was able to complete its application or change the legal requirements. As a result, Pac Rim could not be

---

[266] Reply, paras. 359-362.

[267] Reply, para. 62 ("this drilling program was extremely successful in expanding the mineral resource estimates and adding significant value to the El Dorado Project – value that El Salvador has now acquired for its own benefit."); Third Shrake Witness Statement, para. 70.

granted the requested concession.[268] This means Pac Rim has no rights to the deposits in the requested concession area: Balsamo, Minita, South Minita, and Nueva Esperanza.

7. The Tribunal can and must decide whether Pac Rim met the legal requirements to obtain the concession for which it now claims damages

190. Pac Rim makes the remarkable argument that this Tribunal can and should decide this case in Pac Rim's favor without examining and deciding whether Pac Rim actually met the requirements to receive the concession. Pac Rim alleges that because the Bureau of Mines never denied Pac Rim's application, "the issue of whether or not it *could have been* denied, as a matter of El Salvadoran law, has never been resolved (and . . . does not need to be resolved by this Tribunal)."[269] But contrary to Pac Rim's baseless assertion, if and to the extent the Tribunal determines it has jurisdiction to decide this dispute, the Tribunal not only can, but must decide whether Pac Rim acquired the right to a concession that Pac Rim claims was expropriated. Since Pac Rim asserts that it had the right to the exploitation concession even though El Salvador never granted it the concession, the Tribunal must decide whether Pac Rim's application complied with the legal requirements under El Salvador's Mining Law to obtain the concession.

191. The Tribunal has a duty to make a determination on this key issue if it reaches the merits of this dispute. As the *Biwater Gauff* tribunal described, part of an ICSID tribunal's own mandate is "to determine the truth of the conflicting claims of the parties before it."[270] Thus,

---

[268] *See* Second Ayala/Fratti de Vega Expert Report at 40 ("Esto es, mientras no haya reforma legislativa la Administración debe actuar conforme a lo establecido en la legislación vigente. Y el ciudadano no puede alegar su expectativa de que se va a producir una reforma legal en el futuro, para pretender que se le aplique la supuesta e hipotética ley que espera que se apruebe y para así eludir la aplicación de la ley vigente.") ["Thus, while there is no legislative reform, the Administration must act in accordance with the current law. And a citizen cannot rely on her or his expectation of a future change to the law to insist that the alleged and hypothetical law that he or she expects to be approved should apply to him or her and thereby, avoid application of the current law."].

[269] Reply, para. 319.

[270] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 ("*Biwater Gauff v. Tanzania*"), para. 473 (RL-35). *See also Southern Pacific Properties (Middle East) Limited*

every ICSID tribunal exercising jurisdiction to decide a dispute has a duty to determine the facts of its own case.

192. For example, in El Salvador's first ICSID arbitration, *Inceysa Vallisoletana v. El Salvador* (a case Pac Rim relied on to argue that there was jurisdiction under the Investment Law), the claimant had already received a concession for vehicle inspections from the Ministry of Environment. In a challenge regarding the bidding and adjudication process before the Supreme Court of El Salvador, the Supreme Court held that the processes had been legal. In the ICSID arbitration initiated by Inceysa regarding that concession, El Salvador argued as a jurisdictional matter that there was no protection under the relevant BIT or under the Investment Law of El Salvador for an investment made through fraud, in violation of the laws of El Salvador. Inceysa tried to keep the tribunal in that case from examining the allegations of fraud and non-compliance with the law by alleging that the Salvadoran Supreme Court had already decided that the bidding and adjudication processes had been legal, that those decisions by the Supreme Court were *res judicata*, and that El Salvador's allegations were "irrelevant."[271] Notwithstanding Inceysa's arguments, the ICSID tribunal in the *Inceysa* arbitration found it "indispensable" to refer to the alleged fraud to determine its own jurisdiction.[272] The tribunal stated very clearly that the determination of the legality of the investment could only be made by

---

v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, Apr. 14 1988, 3 ICSID Rep. 131, paras. 120-121 (RL-89) (emphasizing that Rule 47 of the ICSID Arbitration Rules "requires that ICSID tribunals make their own findings of fact", and rejecting a claimant's suggestion that the tribunal adopt as its own findings of fact made by another tribunal because such an approach would be an abdication of the tribunal's fact finding function and would be inconsistent with "the basic function of evidence in the judicial process, which is to enable the tribunal to determine the truth concerning the conflicting claims of the parties before it."); Christoph Schreuer et al., The ICSID Convention: A Commentary (2nd ed. 2009) at 90, 641 (RL-110(bis)) (stating that "it is clear that points of fact that are incidental to the legal questions to be decided must be clarified by the commission or tribunal", and noting that fact-finding is an "indispensable task" incidental to the judicial function of a tribunal).

[271] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006 ("*Inceysa v. El Salvador*") paras. 63, 67 (RL-30).

[272] *Inceysa v. El Salvador*, para. 101 (RL-30).

that ICSID tribunal itself, notwithstanding any other decisions by other courts.[273] The tribunal therefore made its own findings of fact and decided the legal consequences of those facts under the applicable law based on the evidence submitted by the parties during the arbitration.[274]

193. Just as in the *Inceysa* case, Pac Rim is trying to hide from the facts and from the law by saying that they are "irrelevant" and that this Tribunal does not need to decide whether Pac Rim complied with the Mining Law requirements to receive a concession. Here, Pac Rim does not even have a prior Supreme Court decision to invoke, but rather it seeks to rely on the fact that the Bureau of Mines did not officially deny its application. Thus, even more so than in the *Inceysa* case, this Tribunal must reject Pac Rim's attempt to keep the Tribunal from deciding an issue fundamental to its claims—whether or not it complied with the legal requirements to obtain a concession.

B. Pac Rim has not shown that it had a right to the other exploration licenses included in its claims

1. Zamora/Cerro Colorado

194. In the Counter-Memorial, El Salvador explained that Claimant had presented no arguments about these areas in its Memorial. Claimant's website at the time stated: "The Company has not yet received confirmation that the licences it staked in the Zamora -- Cerro Colorado project area have been formally granted."[275] El Salvador further confirmed that Pac Rim had no—and had never held—exploration rights to these areas according to the Bureau of Mines.[276] In its Reply, Claimant provides no response to these statements in the Counter-

---

[273] *Inceysa v. El Salvador*, paras 209, 212 (RL-30).

[274] *Inceysa v. El Salvador*, paras. 102-128; 234-239; 242-244, 250-252; 255-257, 262-264 (RL-30).

[275] Counter-Memorial, para. 194 (citing Pacific Rim Mining Corp., "Projects: Zamora/Cerro Colorado, El Salvador" (C-425)).

[276] Counter-Memorial, para. 195.

Memorial. Thus, Claimant has presented no claims related to these areas and its damages claims based on them must be summarily rejected.

2. Guaco, Huacuco, Pueblos

195. In the Counter-Memorial, El Salvador argued that Pac Rim had no right to apply for and receive the Guaco, Huacuco, and Pueblos exploration licenses that overlap substantial parts of the expired El Dorado exploration licenses.[277] The Mining Regulations specifically provide: "Once the term of the Exploration License or its extension has expired, the Holder may not obtain directly, or through another person, another exploration license over all or part of what the expired License covered."[278] The Coyotera and Nance Dulce deposits included in Claimant's damages claims are in the area of the expired licenses, and Claimant, therefore, had no legitimate right to these deposits.

196. In its Reply, Claimant responded that the Guaco, Huacuco, and Pueblos licenses were granted by the Bureau of Mines and cannot be unilaterally revoked or denied effect by the Government.[279] Claimant's point is irrelevant—the Government is not trying to revoke the licenses in this arbitration. The licenses expired without Claimant having been able to explore under them because it never obtained the necessary environmental permits for exploration.

197. Claimant seeks to be compensated in this international arbitration for having staked claims to these areas after the original El Dorado licenses expired. There is simply no basis on which to compensate Claimant. Claimant's exhibits, once again, show that Claimant

---

[277] Counter-Memorial, Section II.B.1.

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

[279] Reply, paras. 428-429.

knew the law at the time. Claimant submits an email from PRES President Fred Earnest to Tom Shrake stating:

> We are going to have to form a subsidiary company to obtain new exploration licenses. It would be better if the new company didn't have Pacific Rim in its name - any ideas? Perhaps El Dorado Desarrollo, Exploraciones El Salvador, ESABATM Exploraciones or ???[280]

198. Thus, in March 2005, Pac Rim knew that a new company to obtain exploration licenses over the areas of the expired El Dorado licenses needed to have an entirely different name (*i.e.*, not be obviously related to Pacific Rim). Claimant, however, has not presented Fred Earnest to fully explain what Pac Rim knew and how it decided to create DOREX. It is clear, nonetheless, that Pac Rim should not have received the licenses (it was prohibited from doing so under Article 17 of the Mining Regulations, which enforces the limited term for exploration established by Article 19 of the Mining Law).[281] As a result, Claimant did not lose anything by not receiving the environmental permit to explore improperly granted exploration license areas for which the maximum term for exploration had already expired. Any rights Claimant had to Coyotera and Nance Dulce expired on January 1, 2005 when the original El Dorado licenses expired and Claimant did not request an exploitation concession for these deposits.

3. Santa Rita

199. As El Salvador explained in the Counter-Memorial, nothing El Salvador did or did not do in 2008 affected Claimant's early exploration rights in the Santa Rita license area. Claimant states that this "is obviously false since, in fact, President Saca publicly announced in 2008 that he would not allow mining to go forward under the current law, nor would he permit

---

[280] Email from Fred Earnest to Tom Shrake, Mar. 18, 2005 (C-713).

[281] Second Ayala/Fratti de Vega Expert Report at 45.

any reforms to be made to that law, until he was 'personally' convinced that it would be good for the country."[282]

200. Pac Rim's response with regard to Santa Rita completely ignores El Salvador's arguments about this license area. In the Counter-Memorial, El Salvador explained:

- Claimant received the exploration license and the environmental permit to explore Santa Rita in 2006;
- During the pendency of the license, there was no allegation of El Salvador interfering with Claimant's exploration rights;
- Pac Rim suspended exploration activities at Santa Rita from late 2006 through late 2007 because of local opposition;[283]
- Pac Rim's activities at Santa Rita were suspended because of local opposition on May 7, 2007, when the mining companies were told by the Ministers of Environment and Economy that all mining activity would be halted until the EAE was conducted;
- Pac Rim decided to suspend activities at Santa Rita again in July 2008 "until the Government signals its willingness to . . . fully permit the El Dorado operation";[284]
- The license expired in 2009 and Claimant missed the deadline to request an extension;
- Claimant's late request for an extension was properly denied and Claimant's attempt to obtain a new license through another subsidiary after this arbitration was underway was unsuccessful; this was the right result under the law, as granting a new license would have been in violation of Article 17 of the Mining Regulations.[285]

201. Thus, President Saca's statement in 2008 that exploitation would not be permitted until the issue had been studied in depth had no impact on Claimant's exploration rights in Santa

---

[282] Reply, para. 432.

[283] Counter-Memorial, para. 188.

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

[285] Counter-Memorial, paras. 187-191.

Rita. Pac Rim was unable to complete exploration during the period of the license because of local opposition, decided to suspend activity in 2008 while pressuring the Government to grant it the El Dorado concession, and then allowed the license to lapse without being renewed. Consequently, through no fault of the Government, Claimant does not have any rights in Santa Rita upon which to base any claims in this arbitration.

IV. PAC RIM HAS NOT SHOWN THAT IT WAS ENTITLED TO AN ENVIRONMENTAL PERMIT

202. As described in the previous section, 1) Pac Rim's failure to meet other legal requirements for a concession application means that Pac Rim had no right to a concession and has no claim with respect to its failure to obtain the requested concession; 2) Pac Rim had no right to obtain the Guaco, Huacuco, and Pueblos exploration licenses that cover areas of the expired El Dorado exploration licenses; 3) Pac Rim, through no fault of the Government, did not complete exploration during the period it held the Santa Rita license and then allowed the license to expire without being renewed; and 4) Pac Rim never had any rights to the Zamora/Cerro Colorado exploration areas and has made no claims regarding these areas in this proceeding. As a result, any *de facto* moratorium and the lack of decision on the application for an environmental permit for El Dorado did not harm Pac Rim. Nevertheless, in this section, El Salvador will respond to Claimant's arguments about the Ministry of Environment and the *de facto* moratorium.

A. El Salvador had legitimate concerns about metallic mining

203. El Salvador, as a sovereign State considering its options for development and its obligation to safeguard the environment and the health and well-being of its population,[286]

[286] *See* Counter-Memorial, paras. 202-203.

rightfully had to consider the potential risks and benefits as it learned more about possible metallic mining projects in the country.

204. Claimant recognizes that governments and local populations around the world have legitimate concerns about metallic mining. As Catherine McLeod-Seltzer testifies, "It is a simple fact that nearly every mining-related development project will face some level of opposition."[287] She cites a public relations strategy document that further explains:

> The mining industry doesn't operate without protest. Both national and global mining accidents, which claim the lives of thousands of miners worldwide each year, drive increased safety measures. Environmental groups, battling against the depletion and spoiling of natural resources, also pose a threat to domestic operations.[288]

205. Yet, even having recognized that accidents and environmental impacts contribute to opposition to mining worldwide, in this case Pac Rim insists that any opposition to its project in El Salvador was based on "misinformation and fear-mongering," and mostly "funded by Oxfam."[289] Pac Rim fails to see the disconnect: on the one hand, Pac Rim can recognize that other mining projects in other places may be the subject of legitimate concerns; but on the other hand, Pac Rim rejects any concerns about mining in El Salvador as ignorant or solely for financial gain.

206. However, as explained in El Salvador's Counter-Memorial and the expert reports of Drs. Goodland and Bebbington, it was not ignorance or ulterior motives but concerns about metallic mining and circumstances in El Salvador that motivated the Salvadoran Government's decision to suspend permitting while evaluating the risks of going forward with metallic mining

---

[287] Second Witness Statement of Catherine McLeod-Seltzer, Mar. 31, 2014, para. 68.

[288] *Critical Minute – Mining for a Public Relations Strategy*, June 14, 2013 (C-579).

[289] Reply, para. 125.

in the country. Indeed, a World Bank report submitted as an exhibit to Claimant's expert report notes the importance for extractive industry projects to be "evaluated to ensure that their expected benefits . . . are sufficiently higher than their estimated costs, including environmental and social costs."[290] Thus, El Salvador's decision to undertake such an evaluation was a foreseeable, legitimate, and reasonable step.

1. Lack of capacity

207. As El Salvador described in the Counter-Memorial, around the time that MARN was considering Pac Rim's EIA, it realized that it lacked the capacity to sufficiently evaluate the impacts of proposed metallic mining projects and to monitor and enforce compliance with environmental norms during operations. Lack of experience and expertise on the subject, lack of personnel, and an insufficient budget all contributed to the lack of capacity.[291]

208. In 2006, Dr. Pulgar noted that those opposed to mining in El Salvador "recognized that the country has seen considerable progress in regulations under the Environmental Law, particularly with regard to the Environmental Impact Assessment," but were concerned that, "in addition to the lack of capacity in technical or financial resources and insufficient human resources, the effectiveness of this instrument cannot be guaranteed."[292] He further noted concerns about the "the lack of monitoring and auditing mechanisms" and the risk of long-term liability where "the country lacks the tools to ensure that . . . [metallic mining's] environmental impact can be appropriately dealt with and to prevent the operator from evading

---

[290] Striking a Better Balance, Vol. 1, The World Bank Group and Extractive Industries, The Final Report of the Extractive Industries Review, Dec. 2003, at 4 (JPW-4).

[291] Counter-Memorial, para. 204 (citing Manuel Pulgar-Vidal, Final Report: Mining activity, overview of development, environment, and social relations, Aug. 11, 2006 ("Pulgar Final Report") at 13 (R-129)).

[292] Pulgar Final Report at 13 (R-129) ("además de no existir la capacidad en recursos técnicos o financieros y por la insuficiencia en recursos humanos, no se puede garantizar la eficacia de este instrumento.").

compliance with its obligations."[293] The Tau Group's Report in 2010 highlighted similar concerns; its analysis of public institutions' capacity to supervise and monitor mining activity revealed four major themes: "Institutional weakness," "Limited allocation of resources," "Lack of technical ability and resources in environmental and social management of metallic mining," and "Insufficient participation mechanisms."[294]

209. Claimant, in fact, has recognized the Government's, and specifically MARN's, lack of capacity with regard to permitting and overseeing metallic mining. In its Memorial, Pac Rim noted that "the delays Claimant experienced at MARN did not seem particularly surprising" because "El Salvador's Amended Mining Law and Environmental Law were both relatively new."[295] Pac Rim recognized that "[t]here had been almost no gold mining activities in the country for many years" and "that the officials at MARN were overseeing an industry that was new to them."[296] In late 2006, in an email seeking assistance with lobbying efforts to change the Mining Law, Pac Rim's COO Pete Neilans described:

> El Salvador has had no recent mining and thus has at best antiquated capacity for handling any requests associated with this industry. The government recognizes that the mining law is very much out of date and their bureaucracy incapable of understanding what needs to be done to permit a restart to this industry. This

---

[293] Pulgar Final Report at 14 (R-129) ("carencia de mecanismos de monitoreo y fiscalización . . . el país carece de herramientas para asegurar que este impacto ambiental [causado por la minería metálica] puede ser adecuadamente cubierto y para evitar que el operador se excluya del cumplimiento de sus obligaciones.").

[294] Tau Group, Final Report: Strategic Environmental Assessment of the Metallic Mining Sector of El Salvador, Ministry of Economy of El Salvador Foreign Cooperation Unit, Sept. 8, 2011 ("Tau Final Report") at 65 (R-130) ("Debilidad institucional," "Limitada asignación de recursos," "Falta de capacidad técnica y recursos en la gestión ambiental y social de la minería metálica," "Insuficiencia de los mecanismos de participación."). *See also* First Expert Report of Anthony Bebbington on the Government of El Salvador's Moratorium on Metallic Mining, Mar. 1, 2014 ("First Bebbington Expert Report"), para. 16 (noting that Dr. Pulgar, the Tau Group, and the Blue Ribbon Commission all "note serious deficiencies in the capacities of the Government of El Salvador to regulate mining in ways that would reduce environmental and social risk, and increase synergies with local development.").

[295] Memorial, para. 255.

[296] Memorial, para. 255.

> inherent lack of capacity, along with the mounting anti-mining political pressure, and the needed reforms to the law have effectively stopped the government processes from moving forward and increased the political heat on the Minister of the Economy.[297]

210. Nevertheless, Pac Rim now tries to deny the very lack of capacity it expressly recognized at the time its environmental permit was under consideration, referring to the "alleged 'lack of capacity.'"[298] As with Pac Rim's failure to obtain surface land ownership or authorization and its failure to submit a feasibility study, Pac Rim attempts yet again to contradict a fact it recognized in pre-arbitration internal communications because the fact is inconsistent with its latest arguments. But facts do not change for the convenience of a party's arguments. The reality is that MARN suffered from a lack of capacity, which both parties to this arbitration recognized in 2006. Neither the fact of MARN's lack of capacity nor Pac Rim's acceptance of this fact can be change by labeling it "alleged" in Pac Rim's 2014 Reply.

211. Pac Rim also argues, based on *Pantechniki v. Albania*, that allowing El Salvador to cite MARN's lack of capacity as a reason for the *de facto* moratorium and the EAE "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."[299] First, Pac Rim's argument is illogical. No country is going to intentionally stop developing its human and technological capacity because a lack of capacity might someday be of benefit in international arbitration. El Salvador did not create a lack of capacity in MARN so it could prevail in this arbitration. MARN lacked capacity because El Salvador is a small

---

[297] Email from Pete Neilans to Sandra Orihuela, Nov. 7, 2006 (C-721) (emphasis added).

[298] Reply, para. 238 (emphasis added).

[299] Reply, para. 239 (citing *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 ("*Pantechniki v. Albania*"), para. 76 (CL-328)).

developing country with severe budget constraints that had no metallic mining industry. In all events, this Tribunal is not charged with social engineering, it is charged with deciding whether Claimant has met its burden of establishing that El Salvador is legally responsible to pay compensation for losses Claimant incurred on investments in a high-risk industry. The fact that there was a lack of capacity is relevant in this regard because it demonstrates that the Minister of the Environment had legitimate reasons to delay a decision on whether to permit potentially hazardous metallic mining within the watershed of the most important water source in his country. Hypothetical incentives and disincentives for "improving standards" are irrelevant.

212. Second, Pac Rim's argument finds no support in the *Pantechniki* award. The sole arbitrator in that case rejected a relativistic standard only for denial of justice claims, and recognized that "[t]o apply the same reasoning with respect to the duty of protection and security would be parlous."[300] According to the arbitrator: "There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places."[301] Thus, for standards other than denial of justice, the arbitrator determined that a claimant must exercise due diligence regarding the State's level of development and governance in forming its expectations.[302] There is not a one-size-fits-all approach to expectations of a State's ability to manage and supervise metallic mining projects. Here, Pac Rim was fully aware of the situation

---

[300] *Pantechniki v. Albania*, paras. 76-77 (CL-328).

[301] *Pantechniki v. Albania*, para. 77 (CL-328).

[302] *Pantechniki v. Albania*, paras. 81-82 (CL-328).

in El Salvador when it made its investment and had an obligation to set its expectations accordingly.

213. The *Pantechniki* award, therefore, does not support Claimant's illogical argument that considering MARN's newness and lack of capacity in evaluating its decision to implement a *de facto* moratorium while studying the risks and benefits of metallic mining would "disincentiviz[e]" El Salvador "from improving [its] standards." El Salvador's actions were specifically aimed at improving the situation and making informed policy decisions to protect its people and environment. In this case, Pac Rim entered El Salvador knowing about the country's vulnerability coming out of the civil war, knowing that the Environmental Law and the Ministry of Environment were relatively new and inexperienced, and recognizing an "inherent lack of capacity" with regard to the mining industry.[303] Thus, there is no basis to fault the Government for taking reasonable steps to study the issue before moving forward, on the advice of international expert, Dr. Manuel Pulgar, now Peru's Minister of Environment, who advised that "the current situation, with opposing views not just in relation to the law and policy, can result in any future performance of [mining] activity being carried out in an environment of growing conflict."[304]

214. In addition to trying to question the "inherent lack of capacity" that it recognized at the time its permit was under consideration, Pac Rim argues in its Reply that El Salvador "cannot simply single out one industry for which it allegedly has insufficient regulatory capacity,

---

[303] Email from Pete Neilans to Sandra Orihuela, Nov. 7, 2006 (C-721).

[304] Pulgar Recommendations at 5 (R-132) ("la situación actual, con posiciones encontradas no sólo en relación a la ley y la política, puede generar que cualquier desarrollo de la actividad en el futuro se haga en condiciones de creciente conflicto.").

while continuing to regulate all others."[305] But the opinion of Claimant's witness, Ms. Colindres, of how MARN has been able to work with other, unrelated industries, like sugar mills and tanneries,[306] is not relevant to El Salvador's policy regarding metallic mining. The policy for each of these very different industries will be influenced by a variety of factors, resulting in different cost-benefit analyses, and the State must regulate each accordingly. For example, there is no suggestion that sugar mills and tanneries have the short operating lives of mines or that these industries have shown the potential to cause social conflict that has accompanied the debate about metallic mining in El Salvador and elsewhere.

215. In any event, even if regulation of other industries was relevant, Ms. Colindres' testimony about MARN's alleged ability to cause a major tannery to "finally [be] able to adapt to MARN guidelines" after discharging waste "for years . . . into the river without any sort of treatment,"[307] supports El Salvador's case. It would be a disaster to allow metallic mining companies to operate for years without meeting designated standards while MARN and the companies collaborated to improve practices and increase the companies' ability to meet the standards.[308]

216. Indeed, MARN's recognition that it could not monitor metallic mining projects and ensure compliance from the outset was a major factor in the decision to suspend permitting while evaluating the risks and benefits. Of course, a sovereign State can, and indeed must, proceed with caution with regard to an industry that can cause "accidents, which claim the lives

---

[305] Reply, paras. 241-242.

[306] Reply, para. 241; Second Colindres Witness Statement, paras. 93-94.

[307] Second Colindres Witness Statement, para. 94 ("durante años tuvo que verter sus aguas residuales al río sin ningún tipo de tratamiento . . . finalmente logró adaptarse a los lineamientos del MARN.").

[308] Second Colindres Witness Statement, para. 95.

of thousands of miners worldwide each year," and "the depletion and spoiling of natural resources,"[309] especially where that State has an "inherent lack of capacity"[310] to deal with the potential issues and has historically had trouble enforcing its environmental standards.

2. Social movement against mining

217. At the same time that the Ministry was considering Pac Rim's EIA, a social movement against mining was gaining momentum in El Salvador.[311] In fact, according to a news article submitted by Claimant, the Salvadoran legislature was considering a moratorium on mining in 2006 because of complaints of local residents where exploration was taking place:

> "We are suggesting a temporary decree for an indefinite period of time since there have been several complaints, studies and objections from resident communities in the zones where mining exploration is taking place," FMLN congresswoman Lourdes Palacios told BNamericas.
>
> Palacios, who presented the initiative to the legislative assembly, believes this is the best measure to take while the law is in debate and allows for an in-depth analysis of mining's impact on health, society and the environment.[312]

218. Moreover, according to the same article, then-Minister of Environment Barrera supported reform "because of the danger involved in developing mining projects in a small country with such a dense population."[313] Another 2006 article submitted by Claimant reiterates

---

[309] *Critical Minute – Mining for a Public Relations Strategy*, June 14, 2013 (C-579).

[310] Email from Pete Neilans to Sandra Orihuela, Nov. 7, 2006 (C-721).

[311] Counter-Memorial, para. 208.

[312] Harvey Beltrán, "Congress considers ban on mining while reform under debate – El Salvador," Oct. 17, 2006 (C-710) (emphasis added).

[313] Harvey Beltrán, "Congress considers ban on mining while reform under debate – El Salvador," Oct. 17, 2006 (C-710).

that then-Minister Barrera was concerned that mining projects are not workable in El Salvador because of the population density, small territory, and proximity to water resources.[314]

219. El Salvador's witnesses confirm that the Salvadoran population, and those in Cabañas specifically, were very concerned about the potential negative impacts of metallic mining for the environment and their communities. Father José María Tojeira, then-president of the Universidad Centroamericana "José Simeón Cañas" (UCA), published an opinion piece in the newspaper in June 2006 explaining that Salvadorans had many legitimate concerns about metallic mining based on what they knew of other mining projects and circumstances in El Salvador:

> the reasons to view these projects with sensitivity and suspicion abound. First and foremost, there is a history of mistrust. To date, it remains unheard of for a mining company operating from a developed country to have brought so-called development to a developing country. Colonial era mining experiences in general have been complete failures for our countries. Our neighbor Honduras, the most mined country in all of Central America, has a bitter history from both the colonial era and the present of a mining presence that has only left behind a legacy of pockmarked mountains, poverty, and broken communities. With a mining wealth much greater than that of El Salvador, and significant exploitation of that wealth by foreign companies, it is currently facing levels of poverty that surpass our own.
>
> There is also environmentally-driven mistrust. For all the claims by mining companies that they have resolved environmental problems, the reality is that mining-related environmental problems are all too prevalent. And in a country like ours, the risks are perceived as greater for very different reasons. The first being high population density. Mining in sparsely populated areas

---

[314] *Leonel Herrera, Congressmen Will Ask for the Opinion of the Executive About Metallic Mining,* Diario Co Latino, Oct. 19, 2006, 2006 (C-694) ("Hugo Barerra . . . considera que estos proyectos no son convenientes, debido a los daños al ecosistema. La densidad poblacional, la estrechez del territorio y la cercanía de los recursos hídricos son, para Hugo Barrera, factores que hacen inviables estos proyectos.") ["Hugo Barrera believes that these projects are not appropriate, because of damage to the ecosystem. The population density, the limited territory and the proximity of water resources are, for Hugo Barrera, factors that make these projects unfeasible."] (translation by El Salvador).

> is not the same as mining where there are significant concentrations of human beings. El Salvador, in addition to being overpopulated, is a small country with a single main river, whose watershed covers almost half, if not more, of the territory. Mining within this watershed carries greater risk. Any possible pollution of the Lempa [river] would become a national tragedy. The weakness of our institutions, existing corruption, and inadequate legal framework increase not only risks but also mistrust, and we thus encounter what we could call social mistrust. . . .[315]

220. Yanira Cortez, the Deputy Human Rights Ombudswoman for the Environment in El Salvador since 2004, further explains:

> Since 2004, I have learned of, and accompanied environmental organizations in demanding solutions to, the serious environmental problems suffered by Salvadoran society related to severe environmental deterioration and exacerbated by the effects of climate change. Since 2006, one of the topics complained of as a grave threat to the environment, and which is of concern to the affected communities, is the possibility of developing extractive industries projects in the country.[316]

---

[315] Jose M. Tojeira, *Mining and Development*, Diario Co Latino, June 13, 2006, at 1 (Tojeira Appendix 1) ("las razones para mirar con susceptibilidad y desconfianza estos proyectos son abundantes. Hay en primer lugar desconfianzas históricas. Hasta ahora no se sabe de ninguna compañía minera que operando desde un país desarrollado haya llevado lo que se dice desarrollo a un país en vías del mismo. Las experiencias mineras coloniales en general fueron un soberano fracaso para nuestros países. Nuestra vecina Honduras, el país más minero de toda la región centroamericana, tanto en tiempo de la colonia como en la actualidad, tiene la amarga experiencia de una presencia minera que sólo ha dejado como herencia montañas horadadas, pobreza y comunidades rotas. Con mucha más riqueza minera que El Salvador, y una fuerte explotación de la misma por compañías extranjeras, está en estos tiempos con índices de pobreza superiores a los nuestros. Hay también desconfianzas ecológicas. Por más que las mineras nos digan que tienen resueltos todos los problemas ecológicos, lo cierto es que abundan demasiado los problemas ecológicos relacionados con laminería. Y en un país como el nuestro los riesgos se perciben mayores por muy diversas razones. En primer lugar por la alta densidad de población. No es lo mismo minería en zonas de escasa población, que donde hay concentraciones humanas importantes. El Salvador, además de superpoblado, es un país pequeño y de un solo río importante, cuya cuenca cubre prácticamente la mitad o más del territorio. Minería ubicada en esa cuenca implica un riesgo mayor. Una posible contaminación del [río] Lempa se convertiría en una tragedia nacional. La debilidad de nuestras instituciones, la corrupción existente, el marco legal insuficiente, aumentan no sólo los riesgos sino también las desconfianzas.").

[316] Witness Statement of Yanira del Carmen Cortez, June 26, 2014 ("Cortez Witness Statement"), para. 4 ("Desde el año 2004, he conocido y acompañado a las organizaciones sociales y ambientales en la exigencia de solución a las graves problemáticas ambientales que aquejan a la sociedad salvadoreña, relacionados con el grave deterioro ambiental e incrementado con los efectos del cambio climático. Desde el año 2006, una de las temáticas denunciadas, como una grave amenaza al medio ambiente y que es una preocupación de las comunidades afectadas, es la posibilidad que en el país se desarrolle proyectos relacionados con las industrias extractivas.").

221. In August 2006, Dr. Manuel Pulgar, the international consultant hired by the Government, now Peru's Minister of Environment, submitted his report on the situation regarding mining, environment, and social relations in El Salvador. He concluded that El Salvador was not ready for metallic mining and recommended a Strategic Environmental Evaluation to identify and evaluate potential environmental impacts of any mining policy in El Salvador.[317] Following the EAE, Dr. Pulgar envisioned a series of discussions based on the information gathered to 1) address the current conflict and opposing views to begin building a consensus vision on mining and 2) develop "the country's vision and . . . determine whether carrying out mining activity falls within that vision."[318]

222. Thus, as explained by El Salvador's experts and in the Counter-Memorial, these circumstances in 2006—including the Ministry's awareness of its own lack of capacity and increased pressure from civil society to protect the environment—led the Government to follow Dr. Pulgar's recommendation and begin a Strategic Environmental Evaluation in 2007.

B. The EAE process was not political and its conclusions were not "pre-ordained"

1. The EAE process began in 2007

223. According to Claimant,

> Remarkably, despite the years of interactions between Pac Rim and the Government in relation to Pac Rim's proposed mining project, El Salvador's first reference to the "precautionary principle" surfaced in its Counter-Memorial. Even this attempt at revisionist history was made almost in passing, and completely without citation.[319]

---

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

[318] Pulgar Recommendations at 12 (R-132) ("una visión de país y . . . definir si en ella cabe la ejecución de actividades mineras.").

[319] Reply, para. 243.

224. This is simply wrong. As mentioned in the Counter-Memorial, the Salvadoran Environmental Law, in force since 1998, expressly provides that: "The principle of prevention and precaution shall prevail in the management of environmental protection."[320] Thus, the Ministry of Environment's adherence to the precautionary principle was mandated by law and is not "an attempt at revisionist history."

225. Based on Dr. Pulgar's recommendations in 2006, the Government immediately took steps to initiate the EAE process. Indeed, Pac Rim and all other mining companies in El Salvador attended a meeting on May 7, 2007 with Minister Guerrero and Minister de Gavidia and, as Claimant itself stated in its Memorial, "[a]t this meeting, the mining companies were informed that all mining activity in the country would be halted until such time as an *Evaluación Ambiental Estratégica* . . . of the mining industry was conducted."[321] Thus, it is clear that following Dr. Pulgar's 2006 report, the Government planned to suspend mining activities while it conducted an EAE and that this decision was communicated to the mining companies by May 2007. Documents on the record show that by July 2007, the Government was considering a draft decree to suspend processing of mining activity authorizations for three years to give the country time to evaluate potential mining activity in the country and ensure the proper balance between economic development and protecting the environment.[322] Specifically, Article 3 of the 2007 draft decree provided:

---

[320] Environmental Law of El Salvador, Legislative Decree No. 233, published in Official Gazette No. 79, Book 339 of Apr. 5, 1998 *amended by* Legislative Decree No. 237, published in Official Gazette No. 47, Book 374 of Mar. 9, 2007 ("Environmental Law"), Art. 2.e) (CL-2) ("En la gestión de protección del medio ambiente, prevalecerá el principio de prevención y precaución.").

[321] Memorial, para. 298.

[322] Response from Secretary for Legislative and Legal Affairs to Minister of Environment re the draft legislative decree suspending Articles 8 and 9 of the Mining Law, July 24, 2007 (R-147).

> During the suspension period, the Ministry of Economy, in accordance with the provisions of Art. 17 of the Environmental Law, shall proceed to strategically evaluate mining activity in the country, taking into consideration all technical elements concerning this industry, its impacts on the environment, its socioeconomic implications, and the fulfilment of international commitments, by ensuring that it is consistent with the National Policy on Environmental Management.[323]

226. Also in 2007, the Ministry of Environment drafted terms of reference for the Strategic Environmental Evaluation.[324] In early 2008, the Ministry of Economy coordinated foreign funding for the EAE through the Ministry of Foreign Affairs.[325] On March 3, 2008, the Minister of Economy formalized the request for funding to conduct an EAE of the mining sector, noting the important goals of the evaluation:

> As I have expressed to you, this Ministry has prioritized development of this project, the primary objective of which is to determine the impact of mining activity in the country, so that it may serve as a basis for decision-making and the subsequent development of public policies about the mining sector in our country.[326]

---

[323] Response from Secretary for Legislative and Legal Affairs to Minister of Environment re the draft legislative decree suspending Articles 8 and 9 of the Mining Law, July 24, 2007, at 5 (R-147) ("Durante el período de la suspensión, el Ministerio de Economía, en cumplimiento a lo establecido por el Art. 17 de la Ley del Medio Ambiente, procederá a evaluar estratégicamente la actividad minera en el territorio nacional, tomando en consideración todos los elementos técnicos relativos a esa industria, sus impactos ambientales, sus implicaciones socioeconómicas y el cumplimiento de los compromisos internacionales, asegurando que sea consistente con la Política Nacional de Gestión del Medio Ambiente.").

[324] Letter from Carlos Guerrero Contreras to Yolanda de Gavidia, Dec. 18, 2007 with attached Guidelines for the Strategic Environmental Evaluation for the Mining Sector (R-148).

[325] Letter from the Yolanda de Gavidia to Marisol Argueta de Barillas, Mar. 3, 2008, at 1 (R-146).

[326] Letter from the Yolanda de Gavidia to Marisol Argueta de Barillas, Mar. 3, 2008 (R-146) ("Tal como le expresé, para este Ministerio es prioritario desarrollar este proyecto cuyo objetivo principal es determinar el impacto de la actividad minera en el país, de manera que sirva de base para la toma de decisiones y la posterior elaboración de políticas públicas alrededor del sector minero en el territorio nacional.").

227. In July 2008, the first public tender process to select a firm to conduct the EAE was announced.[327] Two bids were received, but the process was declared unsuccessful because neither bidder submitted sufficient information to meet the minimum technical requirements.[328]

228. In 2010, following the change in government in mid-2009, El Salvador contracted the Tau Group to study and evaluate issues related to metallic mining in El Salvador and appointed a technical committee of international experts, the so-called *Comité Técnico* or Blue Ribbon Commission, to review the Tau Group's work. The Tau Group reached similar conclusions as Dr. Pulgar had reached in 2006, finding that El Salvador was not then ready to allow metallic mining and safeguard the environment:

> El Salvador is a country facing significant challenges. The country's environmental vulnerability is particularly elevated due to a high population density—the highest in Central America—with institutions frequently having limited capabilities and resources for effectively carrying out their duties and priorities, and often lacking in credibility according to Salvadoran citizens, with significant levels of pollution and degradation in most of its natural resources—also entailing health risks—and with a large part of its territory subjected to a greater risk of suffering natural disasters . . . . These conditions of vulnerability present a significant obstacle to the possibility of the country being able to guarantee effective metallic mining through controlling its environmental and social risks and impacts, and in making an overall positive contribution to the country's social and economic development.[329]

---

[327] Strategic Environmental Evaluation (EAE) of Metallic Mining in El Salvador Presentation. Claimant submitted this exhibit as C-838 without translation; El Salvador submits a new translation as **Exhibit R-158**.

[328] Strategic Environmental Evaluation (EAE) of Metallic Mining in El Salvador Presentation at 2 (R-158) ("desierto").

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

229. The Tau Final Report, therefore, recommended either prohibiting metallic mining or allowing metallic mining in the mid to long-term, once certain economic, social, and environmental guarantees could be met.[330] Following the completion of the Tau Final Report, the Government proposed a moratorium law in July 2012, which has been left pending in the legislature.

230. It is unclear why the draft moratorium decree did not move forward in 2007 or more recently. The competing legislation introduced in November 2007 to facilitate Pac Rim being able to obtain a permit may have had an impact. In its Reply, Pac Rim describes:

> On 22 November 2007, the PCN party (Partido de Concertación Nacional) presented a mining law reform bill to the *Asamblea*. Although company officials did not participate directly in discussions with the PCN about the bill, the draft did contain input from several of the company's consultants.[331]

231. In internal correspondence, Pac Rim referred to the PCN political party as "[o]ur champions."[332] Pac Rim's lobbying efforts to get its project permitted in 2007—not suspended—did not stop with the PCN. According to an internal communication in early 2008, Pac Rim also held "weekly protests" and looked for other ways "to surprise" the archbishop to pressure the Catholic Church to not oppose mining in El Salvador. Pac Rim considered "getting to the Pope with our issue" and was "continu[ing] to pressure the [then-U.S. President] Bush administration to intervene."[333]

---

riesgos e impactos ambientales y sociales, y en realizar una contribución neta positiva al desarrollo social y económico del país.").

[330] Tau Final Report at 78-79 (R-130).

[331] Reply, para. 456.

[332] Email from Tom Shrake to Pacific Rim Board of Directors, Apr. 24, 2008, at 2 (C-755).

[333] Email from Tom Shrake to Pacific Rim Board of Directors, Apr. 24, 2008, at 2 (C-755).

232. Given Pac Rim's significant public and government relations efforts in favor of mining, Pac Rim's arguments that the Salvadoran legislature favors mining based on the legislature's failure to pass legislation establishing the moratorium,[334] something Pac Rim has spent significant sums of money and exercised its influence to prevent, is nonsense. El Salvador's expert Dr. Bebbington explains that Claimant makes "heroic and unsubstantiated assumptions" to reach its conclusion about why the law has not passed.[335] He notes that the explanation may actually be the opposite of what Claimant assumes—the majority party in the legislature is under pressure to outright ban mining, not just pass a moratorium while the issues are studied.[336]

233. This Tribunal, however, does not need to determine why the legislation has not been passed by the Salvadoran legislature. In evaluating Claimant's story about the EAE being a *post hoc* excuse to "provide political cover," the relevant fact, clearly demonstrated on the record, is that El Salvador took concrete steps to begin the EAE process in 2007 following the recommendation in Dr. Pulgar's August 2006 report. This action was not political and not aimed at Pac Rim, but rather was motivated by widespread concerns about the environmental impact of metallic mining.

2. Pac Rim misquotes two Ministers of the Environment

234. According to Claimant, two Ministers of the Environment "have confirmed that the 'Strategic Assessment' was not intended to address legitimate environmental concerns."[337]

---

[334] Reply, paras. 251-252.

[335] Second Expert Report of Anthony Bebbington on Responses to Pacific Rim's Reply to GoES Counter-Memorial, June 17, 2014 ("Second Bebbington Expert Report"), para. 13.

[336] Second Bebbington Expert Report, para. 13.

[337] Reply, Section II.E.6.d.

This assertion is simply a misrepresentation of how other people characterized alleged statements by the Ministers long after the Government decided to pursue the EAE.

235. First, Pac Rim relies on Mr. Shrake's description of the Minister's "tune" in a discussion in 2008 in which Mr. Shrake was threatening CAFTA arbitration. In the Reply, Pac Rim says that "then MARN Minister Guerrero admitted to Mr. Shrake: 'we need the assessment for political cover.'"[338] One has to find the exhibit to see that this is not, in fact, a quote from the Minister, but rather Mr. Shrake's description of the Minister's "tune":

> I explained to the minister that I am backed into a corner and that I would have no choice to file a CAFTA action. He again fell back on the national environmental assessment as a legal requirement. I turned the discussion over to my attorney, Roberto ? who explained that this assessment was NOT a legal requirement for the company's permit and had never been considered an instrument for such a decision under the law. After the Minister lost his temper for a while and the discussion cooled to more civil tones, the Minister changed his tune to one of "we need the assessment for political cover."[339]

Obviously, Mr. Shrake's recollection of the Minister's "tune" in a discussion where Mr. Shrake was threatening CAFTA arbitration says nothing about why the Government prioritized undertaking a Strategic Environmental Evaluation of the mining industry a year earlier.

236. Second, Pac Rim misattributes what someone on a delegation summarized Minister Rosa Chávez as saying in an entirely different context. According to the Reply, "In 2011, Minister Guerrero's successor, Minister Rosa Chávez, announced that: '**a major goal [of the Strategic Study] is to insulate the Funes government from legal challenges by Pacific Rim and other mining transnationals**.'"[340] Pac Rim bolded and highlighted the alleged

---

[338] Reply, para. 301 (emphasis in original).

[339] Letter from Tom Shrake to Files, July 14, 2008, at 1-2 (C-758).

[340] Reply, para. 302 (emphasis in original).

"announcement," which came several years after the Government's decision to pursue a Strategic Environmental Evaluation. But, again, one must look at the exhibit to see what was actually said, by whom, and in what context. The exhibit, an article by someone who went on a Sister-Cities delegation to El Salvador, described the social movement against mining (stating, "Pacific Rim targets funds for scholarships, schools, and other benefits to municipalities (and mayors) not directly impacted by mining, creating friction with those communities that are affected"[341]) and described a meeting with Minister Rosa Chávez, the Sister Cities Delegation, and members of the National Roundtable Against Mining where the Minister described the EAE as "a critical tool in formulating the administration's new mining policy and legislative proposal."[342]

237. According to the author's account of the meeting, someone from the National Roundtable Against Mining argued that the EAE was a waste of money and, in that context, in 2011, the Minister explained that a goal of the study was "to insulate the Funes government from legal challenges by Pacific Rim and other mining transnationals. . . . The study will also help to build consensus within the government, including the legislature, which has diverse views on mining."[343] It makes perfect sense that in 2011 the country would want to avoid additional arbitrations like those initiated by Commerce Group and Pac Rim in 2009 and that the Minister would seek to highlight a benefit of the EAE when talking to a group upset about the government spending resources on the EAE. This recollection of a meeting in 2011—not a direct quote, much less an "announcement"—says nothing about why and how the Government decided it needed such an EAE several years earlier.

---

[341] Emily Achtenberg, *A Mining Ban in El Salvador?*, NACLA Report on the Americas, Sept./Oct. 2011, at 4 (C-746).

[342] Achtenberg, *A Mining Ban in El Salvador?* at 4 (C-746).

[343] Achtenberg, *A Mining Ban in El Salvador?* at 4 (C-746).

238. Neither of these alleged statements, both reported by third parties in different contexts, says anything about the Government's decision to pursue a Strategic Environmental Evaluation. As described above, and in more detail in the Counter-Memorial, the EAE was suggested by an international consultant, Dr. Manuel Pulgar, hired to study the mining industry in El Salvador in a report issued in August of 2006. Indeed, Pac Rim was fully aware that the Government had hired Manuel Pulgar, now the Peruvian Minister of Environment, as a consultant in 2006.[344]

3. Blue Ribbon Commission

239. According to Pac Rim, the Blue Ribbon Commission of international experts selected by the Government to help with the EAE process was "hand-picked" to reach a predetermined conclusion "*i.e.*, that mining could not be justified in El Salvador."[345] This is simply not true.

240. First, the members of the commission were selected for their experience and expertise, not for any anti-mining bias. Dr. Bebbington, who actually helped select two of the commission members, explains:

> The rationale was to select people with experience and qualities that would enhance their legitimacy with the different communities involved in discussions over mining in El Salvador. In particular, people were sought who: had extensive experience in mining, development and environment; could not be characterized as either "anti-mining" or "pro-mining"; had very strong scientific credentials; and had worked and/or collaborated both with technical organizations and civil society organizations.[346]

---

[344] Reply, paras. 451-452.

[345] Reply, para. 293.

[346] Second Bebbington Expert Report, para. 3.

241. Second, the Blue Ribbon Commission reached similar conclusions in 2011 to what Dr. Pulgar had concluded in 2006: existing circumstances in El Salvador would not contribute to the development of a responsible metallic mining industry. The Blue Ribbon Commission, like Dr. Pulgar, did not reject the possibility of mining in El Salvador, but rather recommended careful planning, institutional strengthening, and considered decision-making before moving forward:

> Given the high level of violence surrounding the issue of mining in El Salvador and the current lack of institutional strength, significant changes are needed before mining could make a meaningful contribution to sustainable development in the country. El Salvador has a chance to 'do it right' by focusing on regional planning, institutional strengthening, environmental education of its citizens, and scientific rigor in environmental decision-making. Such an approach would encourage only the best actors in the mining industry to apply for permits.[347]

242. Thus, contrary to Claimant's assertions, the results of the EAE were not pre-ordained. Like Dr. Pulgar, the Tau Group and the Blue Ribbon Commission "endorsed responsible mining and the belief that there could be synergies between mining and development if appropriate conditions exist."[348]

4. The EAE was rightly focused on metallic mining in general, not on Pac Rim's project

243. Pac Rim repeatedly complains in its Reply that the EAE studies did not "even attempt[] to consider" how the identified potential environmental harms "might relate to Pac

---

[347] Anthony Bebbington et al., *Observations regarding the challenges of environmental governance and the mining sector in El Salvador: contributions for the elaboration of public policy*, Blue Ribbon Commission Report to the Government of El Salvador, Oct. 2011 ("Blue Ribbon Commission Report") at 13 (Bebbington Appendix 3) (emphasis added).

[348] Second Bebbington Expert Report, para. 6 ("The report concludes that current conditions do not allow for 'a responsible mining industry that contributes to sustainable development.' The report also concludes that such conditions could be created, and it outlines the most important of these conditions. The report, and thus its authors, endorsed responsible mining and the belief that there could be synergies between mining and development if appropriate conditions exist.").

Rim's Project."[349] But, in fact, the Government's focus on the potential industry in the entire country was in accordance with the Investment Law—the Government treated all mining investors (domestic and foreign, in El Dorado and elsewhere) equally.

244. Pac Rim asserts that "[i]t is self-evident that if MARN had indeed been serious about conducting a 'strategic assessment' it would have formulated a policy proposal at the outset, in order to benefit from the conclusions and assessment of the Tau group."[350] But MARN admittedly did not have a solution and was trying to gather information about options. As Dr. Bebbington confirms: "I am absolutely convinced that the government was trying to determine what the most appropriate mining policy should be for the country. They saw the [EAE] as a critical input into coming to that view."[351] Given that Pac Rim admits that MARN lacked experience with mining and was under a lot of pressure from different groups, including mining companies and community organizations, it cannot then fault MARN for not having an answer at the outset.

* * *

[349] Reply, para. 278. *See also* Reply, paras. 253, 279-281, 283.

[350] Reply, para. 300.

[351] Second Bebbington Expert Report, para. 8.

245. It is thus clear that despite Pac Rim's need to pin its dispute to a date after its change of nationality in December 2007, nothing changed between **July 2006**, when Minister Barrera, having heard from the population against metallic mining, said there would be no moving forward with mining unless and until environmental protection could be guaranteed,[352] and **May 2007**, when all mining companies in the country were told that all mining activity would be halted until a Strategic Environmental Evaluation of the mining industry was conducted,[353] and **March 2008**, when then-President Saca "ask[ed] for caution regarding mining exploitation projects."[354]

246. In March 2008, then-President Saca reiterated the need to study the potential impacts of mining in the country before deciding how to go forward:

> I do not agree with granting those permits. But if it is demonstrated to me through studies from the Ministry of the Environment, and if the Minister of Economy shows me that gold can be exploited to boost the economy without damaging resources such as water through the use of cyanide, I am willing to work with the National Assembly on a law to establish things properly.[355]

247. Thus, given Dr. Pulgar's study, Minister Barrera's comments, the protests in the local communities, and the May 7, 2007 announcement to all mining companies (including Pac Rim), it is far-fetched for Mr. Shrake to continue to describe then-President Saca's remarks as

---

[352] *Adiós a Las Minas*, La Prensa Gráfica, Enfoques, July 9, 2006 (Interview with Minister of the Environment) (R-120(bis)).

[353] Memorial, para. 298.

[354] *President of El Salvador asks for caution regarding mining exploitation projects*, Invertia, Mar. 11, 2008 (C-1) ("pid[ió] cautela ante proyectos de explotación minera.").

[355] Eduardo López, *The Executive Continues to Study Mining Issue*, ElSalvador.com, Mar. 12, 2008 (R-125) ("yo no estoy de acuerdo con otorgar esos permisos. Pero si se me demuestran a través de los estudios del ministerio del Medio Ambiente y la ministra de Economía me lo demuestra que se puede explotar el oro, -para- hacer crecer la economía, sin dañar un recurso como el agua, por el uso del cianuro yo estoy dispuesto a que trabajemos con la Asamblea en una ley, para establecer las cosas bien.").

"surprising."[356] There were significant concerns about allowing metallic mining in El Salvador starting at least in 2006. The opposition to metallic mining was not political—recognition of the need for caution and further study came from the Ministry of Environment and the affected communities. As indicated, the concerns about metallic mining were a matter of much public debate in El Salvador and the Government communicated the situation to Pac Rim in 2006 and 2007.[357]

248. Claimant, however, argues that a *de facto* moratorium could only be enacted if a "State of Emergency" existed under Article 29 of the Salvadoran Constitution.[358] Professor Tinetti explains that Claimant's argument is incorrect.[359] It is not necessary to declare a State of Emergency, or an exception regime, to take steps to protect the health of the population and the environment when such steps do not impact fundamental rights.[360] As confirmed by Dr. Bebbington, circumstances in El Salvador justified—and continue to confirm—the legitimacy of the need for the EAE and the *de facto* moratorium:

> Different international assessments have identified El Salvador as a highly vulnerable country – environmentally and socially. Levels of contention and conflict surrounding mining over the last decade are indicators of this vulnerability. In such a context, exercising precaution before moving ahead on mining policy was an entirely legitimate decision by the government. The government – also faced with problems of unemployment and fiscal constraints – very reasonably commissioned an [EAE] to assess the national level

---

[356] Third Shrake Witness Statement, para. 54.

[357] Minutes of Meeting between MARN and Pac Rim Representatives regarding the "El Dorado Exploitation" and "Santa Rita Exploration" Projects, Mar. 29, 2006 ("Public Consultation Meeting Minutes") (C-163, R-131); Memorial, para. 298.

[358] Reply, paras. 236-237.

[359] Second Tinetti Expert Report, paras. 16-19 (concluding that "it is not necessary to decree the exception regime in order to decree a moratorium regarding metals mining" / "no es necesario decretar el régimen de excepción para decretar una moratoria con respecto a la minería metálica.").

[360] Second Tinetti Expert Report, paras. 16-17.

> potential risks and benefits of mining, and to determine how to balance environmental, social, employment and fiscal concerns. This [EAE] was a critical means of generating information that would help the government form this view and determine policy. Given the results of the [EAE], the implementation of a de facto moratorium, initiated in the ARENA government and continued under the FMLN government, was reasonable.[361]

249. Claimant, however, seeks to deny that anyone had concerns by laying the blame for its project not going forward solely on President Saca: "Pac Rim faced only one challenge – that of obtaining Saca's blessing to proceed. Until this blessing was received, the officials at MARN and MINEC were held in limbo – unable to perform their ministerial functions."[362] Claimant fails to provide any explanation of why President Saca, a conservative party President who was considered pro-business, would suddenly have begun a personal crusade against mining. The actual origins of concern about mining and the suspension of the issuance of environmental permits set forth above are confirmed by Minister Barrera. He testifies that President Saca had absolutely nothing to do with his raising concerns about metallic mining and Pac Rim's project in 2006:

> It is totally false that President Saca could have had any influence on the decisions made by the Ministry of Environment with respect to Pacific Rim's environmental permit application. President Saca never spoke to me nor gave me instructions either directly or indirectly on this case or any other during the two and a half years I was Minister of MARN. The only influences on my decisions were the Law and the facts that I began to observe as a result of the technical evaluations performed by the responsible Departments in fulfillment of their responsibilities in the locations where the projects would be carried out. [363]

---

[361] Second Bebbington Expert Report, para. 15.

[362] Reply, para. 291.

[363] Barrera Witness Statement, para. 4 ("Es totalmente falso que el Presidente Saca hubiera tenido alguna influencia en las decisiones del Ministerio de Medio Ambiente, con respecto a la solicitud del permiso ambiental de Pacific Rim. El Presidente Saca nunca me habló ni me dio instrucciones directa o indirectamente sobre este caso, o sobre ningún otro caso, durante los dos años y medio que estuve al frente del MARN. Las únicas influencias sobre mis

250. Likewise, Yanira Cortez, the Deputy Human Rights Ombudswoman for the Environment in El Salvador, explains that the local population's concerns came from their own experience:

> In particular, one of the projects that has caused the most alarm is that related to the El Dorado Mining Project, located in Cabañas, El Salvador, being executed by the mining company Pacific Rim, and its impacts on human rights, in particular, on water and food . . . people notified the PDDH of their concern after observing that some activities in the exploration phase of the El Dorado project were causing negative impacts in areas of the Department of Cabañas. For example, it was noted that several water wells and springs that are used by the population to obtain drinking water and for other human needs were being depleted.[364]

251. It is clear from the record, therefore, that Pac Rim faced multiple challenges in obtaining an environmental permit since submitting its application in 2004. Principally, it had to respond to and assuage the concerns of the Ministry of the Environment and the local communities that could be impacted by Pac Rim's project. Their concerns came from awareness of mining impacts in other countries and/or in San Sebastian, as well as the desire to protect the environment, especially the limited water resource.[365] None of this originated with President

---

decisiones fueron: la Ley y los hechos que comencé a observar como producto de las evaluaciones técnicas que los Departamentos responsables ejecutaban, como parte de sus responsabilidades en los lugares en que supuestamente se desarrollarían los proyectos.").

[364] Cortez Witness Statement, paras. 4, 7 ("En particular, uno de los proyectos que más alarmas ha causado es el relacionado con el Proyecto Minero El Dorado, ubicado en Cabañas, El Salvador, a cargo de la empresa minera Pacific Rim y sus impactos en los derechos humanos, especialmente en el agua y la alimentación . . . [L]a PDDH recibió comunicaciones de la población en las que plateaban su preocupación por observar que algunas actividades del proyecto El Dorado, estaba causando impactos negativos, en la etapa de exploración en las zonas del Departamento de Cabañas. Por ejemplo, se advertía que varios pozos y nacimientos de agua que eran utilizados por las personas para obtener agua para beber y para otras necesidades humanas, se estaban agotando.").

[365] Cortez Witness Statement, paras. 7-9 (describing water sources drying up during Pac Rim's exploration activities and contamination of the San Sebastian River from another mining project as "the triggers which have alerted the population to the negative effects of mining and sounded the alarms for society to organize itself and initiate a strong technical-scientific information process on the matter, which led them to understand the relationship between these projects and the negative impacts on human rights" / "detonantes que alertaron a la población sobre los efectos negativos de la minería y encendió las alarmas para que la sociedad se organizara e iniciara un fuerte proceso de información técnica-científica sobre el tema, que los llevó a entender la relación entre estos proyectos y las afectaciones negativas en los derechos humanos.").

Saca. In 2008, he was simply echoing what the Ministers of Environment had been saying in response to the demands of the local population since 2006.

C. The Ministry of Environment had legitimate concerns about Pac Rim's proposed El Dorado project

252. As reiterated above, the EAE process and the *de facto* moratorium in El Salvador resulted from a reasonable regulatory action responding to legitimate concerns about metallic mining in the country.[366] The EAE was not politically motivated and it did not suddenly affect Pac Rim in 2008 after the company had changed its nationality to the United States.

253. Moreover, as explained in the Counter-Memorial, El Salvador's decisions regarding metallic mining did not have any impact on Pac Rim's investment. This is because, in addition to the environmental permit, Pac Rim failed to meet two independent requirements (provision of documentation showing ownership or authorization for the surface land of the requested concession and a Feasibility Study) for its 2004 application for an exploitation concession to be admitted for consideration. As a result, any decision about metallic mining in general or about Pac Rim's application for an environmental permit, had no effect on Pac Rim's application. The concession application would not have been admitted with or without the environmental permit because of the other lacking materials. Nevertheless, it is worth noting that the Ministry of Environment had specific concerns about Pac Rim's application for an environmental permit that Pac Rim did not adequately resolve.

1. Any environmental permit Pac Rim could have obtained based on its EIA would not have justified a 12.75 km^2 concession

254. As with its Pre-Feasibility Study, Pac Rim did not submit an EIA relevant to the 12.75 km^2 area it requested. Thus even if the environmental permit Pac Rim requested was

[366] First Bebbington Expert Report, paras. 15-19.

granted, and the other two requirements had been fulfilled (which they were not), MINEC could not have granted the requested concession application because of the failure to submit an environmental permit related to the area of the concession and the mining projects intended for that area. The requirements for a concession application listed in Article 37.2 of the Mining Law include an environmental permit with a copy of the environmental impact study.[367] The EIA and the permit, by definition, relate to the proposed exploitation project.[368] As discussed above, the law provides that the area requested for the concession must be based on the deposit(s) to be exploited and the proposed mine plan.[369] Thus, under the law, the environmental permit, which is by definition for a specific proposed project, should necessarily relate to the area requested for the concession.

255. But Pac Rim, seeking a concession for a much larger area than the area necessary for its proposed exploitation project, did not turn in an EIA for exploitation of a 12.75 km^2 area and did not, therefore, request a permit that would support its application for such an area and address the environmental impacts of projects it intended to carry out in that area. The "Project Description" in Pac Rim's EIA referred to two veins "to be exploited (Minita vein and Minita 3 vein)."[370] As a result, even if this study had been approved (which it was not), the resulting

---

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

[368] Environmental Law, Art. 5 (CL-2) (defining Environmental Impact Study as "Means of analysis, assessment, planning and control comprised of a set of technical and scientific activities carried out by a multidisciplinary team for the purpose of identifying, predicting and controlling the environmental impact, both positive and negative, of an activity, construction work or project during its entire lifecycle, together with its alternatives, presented in a technical report; and prepared in accordance with legally established criteria" / " Instrumento de diagnóstico, evaluación, planificación y control, constituido por un conjunto de actividades técnicas y científicas realizadas por un equipo multidisciplinario, destinadas a la identificación, predicción y control de los impactos ambientales, positivos y negativos, de una actividad, obra o proyecto, durante todo su ciclo vital, y sus alternativas, presentado en un informe técnico; y realizado según los criterios establecidos legalmente.") (emphasis added).

[369] Mining Law, Art. 24 (RL-7(bis)); Section III.A.4.b above.

[370] 2005 EIA at 1-1, 1-2 (C-8).

environmental permit (for a project with surface installations that would occupy **0.47 km^2** and a mine under **0.095 km^2** of surface area)[371] could not have supported an application for a **12.75 km^2** concession that included multiple yet-to-be defined projects.[372]

256. Pac Rim dismisses this fact by asserting that it "planned to submit a new EIS before mining activities beyond the applied-for Project could proceed."[373] But the law requires that a concession applicant obtain the environmental permit before the concession. Article 37.2 requires the permit to be submitted with the application.[374] Pac Rim, therefore, was required by law to request the concession only for the "applied-for Project" with the existing EIA and then, when it had approved EIAs for other activities, request any additional corresponding concessions. Pac Rim had no basis to assume that it could obtain a concession before even requesting the environmental permits for the mining activities it hoped to realize. The law requires exactly the opposite.

257. Thus, even if Pac Rim had received the environmental permit it applied for in 2004, and submitted the other requirements, its application for a 12.75 km^2 concession would still have been deficient.

2. The Ministry had concerns about cumulative impacts

258. Relatedly, a significant problem with Pac Rim's EIA is that it does not consider the cumulative impacts of the various mining activities Pac Rim hoped to realize in the requested concession area. Pac Rim, in its Reply, responds that "it was attempting to permit a very specific

---

[371] 2005 EIA at 4-10 (C-8).

[372] *See* Second Expert Report of Behre Dolbear Minerals Industry Advisors, July 9, 2014 ("Second Behre Dolbear Expert Report"), para. 38.

[373] Reply, para. 268.

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

Project" and that "the cumulative impacts issue . . . is merely a *post hoc* attempt to justify the Government's wrongful conduct."[375]

259. But, again, Pac Rim's response would only make sense if it had requested a concession for a "very specific Project." Pac Rim chose to apply for a concession far larger than the project it might have been able to justify and insisted on maintaining its request for a 12.75 km^2 area believing "that the project had tremendous upside beyond the value of the mine project described in the [Pre-Feasibility Study]."[376] Pac Rim could have requested a concession that corresponded in size to the "very specific Project" it proposed, but it "chose" not to.[377]

260. It was Pac Rim, not the Government, who acted wrongfully. Pac Rim tried to get a large concession—authorization to exploit minerals in a 12.75 km^2 area including many deposits, at least one of which it may have wanted to mine using the open-pit method[378]—having only studied the environmental impacts of one small mine. Pac Rim was prohibited by law from receiving the concession and then submitting EIAs for other mining activities within that concession.

261. Obviously, the estimated impacts of one mine, based on the amount of material to be extracted, the quantity of materials to be processed and the resulting by-products, etc., will be different from the potential impacts of mining and processing gold from multiple deposits. The Government has a right to require information on all mining activities within a requested concession area before deciding upon a concession application. Thus, the Mining Law,

---

[375] Reply, paras. 267-268.

[376] Third Shrake Witness Statement, para. 17.

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

[378] Pacific Rim Mining Corp., http://www.pacrim-mining.com/s/Eldorado.asp (R-48) (showing a chart of the 2003 resource estimate with the statement that the "*Nueva Esperanza vein resource is near surface,*[and] *potentially open-pitable*").

unchanged during the time of Pac Rim's investment, requires the environmental permit and the approved environmental impact study as part of the concession application. Pac Rim's plan to ignore the "cumulative impacts issue" until after receiving a concession covering several deposits of interest was contrary to the law and, necessarily, raised concerns during the consideration of its EIA.[379]

3. The Ministry had concerns about lacking environmental management plans

262. Pac Rim's EIA for the Minita deposit also lacked sufficient information about its Environmental Management Plan and a mine closure plan.[380] The first observations from MARN in 2005 emphasized these deficiencies:

> **ENVIRONMENTAL MANAGEMENT PROGRAM**
>
> **1. CORRECT, EXTEND AND DETAIL. The table submitted as "Environmental Management Program Summary" on page 7-11 (Table 7.2-1), (which would be the equivalent to the Environmental Management Program requested by the MARN), should be detailed (activities) for each project stage (construction, operation and closure); also, each Environmental Management Plan should include SPECIFIC ENVIRONMENTAL MEASURES AND THEIR PARTIAL COST, AS WELL AS THE TOTAL COST OF SUCH PROGRAM AND ITS IMPLEMENTATION SCHEDULE, WHICH WILL FACILITATE THE ENVIRONMENTAL BOND CALCULATION AND VERIFICATION OF COMPLIANCE IN THE ENVIRONMENTAL AUDIT.**
>
> . . .

[379] *See*, *e.g.*, Observations from MARN on the Environmental Impact Study for the El Dorado exploitation project, Feb. 1, 2005 (C-133) (requesting information on the area that the project will occupy and which veins will be exploited).

[380] Counter-Memorial, paras. 214-215.

2. The Closure stage should be included in the Project Environmental Management Program, with detailed activities, costs and an execution schedule for the environmental activities and measures.[381]

263. Pac Rim never provided the details for the Environmental Management Plan or a Closure Plan as requested. Pac Rim does not dispute these facts in its Reply. Instead, it provides more excuses why the law should not apply to it. Ms. Colindres states, "it is clear that the various environmental management plans are part of the environmental mitigation measures and they were going to be developed at each stage of construction, operation, and activity closure."[382] Claimant's experts, Terry Mudder and Ian Hutchison, likewise mention a list of plans "to be completed prior to initiation of construction."[383] Section 7 of the EIA, to which Claimant's experts refer, sets out "conceptual versions" of the plans.[384] The Surface and Ground-Water Management Plan, for example, provides: "A surface water management plan containing runoff management procedures will be developed for the site, as well as the use of good management practices (GMP) to control erosion and sediments."[385]

---

[381] Observations from MARN on the Environmental Impact Study for the El Dorado exploitation project, Feb. 1, 2005, at 2, 9 (C-133) ("CORREGIR, AMPLIAR Y DETALLAR. El cuadro presentado como "Resumen de los Planes de Manejo Ambiental", en pag. 7-11 (Cuadro 7.2-1), (que sería el equivalente al Programa de Manejo Ambiental solicitado por el MARN), **deberá ser desglosado** (actividades), por cada etapa del proyecto (construcción, operación y cierre) presentando además cada Plan de Manejo Ambiental con su RESPECTIVAS MEDIDAS AMBIENTALES, SUS COSTOS PARCIALES ASI COMO EL COSTO TOTAL DE DICHO PROGRAMA Y SU RESPECTIVO CRONOGRAMA DE EJECUCIÓN', LO QUE FACILITARÁ EL CÁLCULO DE LA FIANZA AMBIETAL Y LA VERIFICACIÓN DE SU CUMPLIMIENTO DURANTE LA AUDITORIA AMBIENTAL. . . . La etapa de Cierre, deberá ser incorporada en el Programa de Manejo Ambiental del Proyecto, con sus respectivas actividades detalladas, costos y cronograma de ejecución de las actividades y medidas ambientales.") (emphasis in original).

[382] Second Colindres Witness Statement, para. 67 ("se puede observar que los diferentes planes de manejo ambiental son parte de las medidas de mitigación ambiental, e iban a ser desarrollados en cada una de las etapas de construcción, operación y cierre de la actividad.") (emphasis added).

[383] Second Expert Report of Ian Hutchison and Terry Mudder on Environmental Strategies and Systems for the Proposed Pac Rim El Dorado Gold Mine, Apr. 6, 2014 ("Second Hutchison and Mudder Expert Report") at 26 (emphasis added).

[384] 2005 EIA at 7-8 (C-8).

[385] 2005 EIA at 7-55 (C-8) (emphasis added).

264. Regarding the Closure Plan, Claimant and its experts state 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."[386] This does not respond to the allegation that the Ministry of Environment asked for a detailed closure plan in 2005 and the resubmitted EIA still only stated: "A detailed reclamation plan will be developed during the engineering phase of the Project and based on final designs."[387] It appears, therefore, that Pac Rim's failure to complete a Feasibility Study, and its reliance on conceptual ideas in a Pre-Feasibility Study, contributed to the deficiencies in its EIA.

265. Thus, El Salvador's submission with its Counter-Material that Pac Rim did not provide adequate information about its Environmental Management Plan or a Closure Plan with its EIA stands unrebutted.

4. The Ministry had concerns about Pac Rim's failure to secure a social license to operate in the local communities

266. Pac Rim failed to obtain a social license to operate, something Claimant recognizes is "of paramount importance."[388]

267. Pac Rim admits that there was some opposition to its project in the local communities, at least at the beginning. According to Ms. García Cabezas: "in the beginning of 2005, I was sometimes met with hostile or aggressive questions at some of the community meetings."[389] Dr. Moran, who attended a forum where Pac Rim discussed the project with more

---

[386] Reply, para. 272 (citing Second Hutchison and Mudder Expert Report at 27) (emphasis added).

[387] Counter-Memorial, para. 215 (citing 2005 EIA at 7-111 (C-8)).

[388] SecondWitness Statement of Thomas C. Shrake, Mar. 21, 2013, para. 85.

[389] Witness Statement of Cristina Elizabeth (Betty) García Cabezas, Mar. 28, 2014 ("García Cabezas Witness Statement"), para. 50 ("a principios de 2005, recibía en ocasiones preguntas hostiles o agresivas en algunas de las reuniones comunitarias.").

than 500 people from the communities in October 2005, confirms that community members raised concerns:

> A significant portion of this audience voiced concerns about possible impacts to the water resources if the project became operational. They specifically voiced concerns about the drying-up of springs, the lowering of water levels in shallow wells, and water contamination that would be caused by the mining operations. It became clear to me that Pacific Rim had not *adequately* communicated such risks previously to these communities.[390]

268. Pac Rim insists, however, that any continued opposition to its projects was from far away and likely financed by NGOs like Oxfam.[391] Pac Rim refuses to accept that anyone could be opposed to mining because of concerns for the environment. Therefore, Pac Rim's witnesses attack those opposed to mining with the following allegations:

- "ADES is probably dedicated to opposition activities for profit."[392]
- "In my experience, the anti-mining activists use fear and misinformation as their primary tool and they are not concerned with the truth or learning about the truth."[393]
- "I do not believe that Mr. Pineda has even the slightest concern for the environment, as I have seen him throw trash on the ground on many occasions. In other words, he is a man who shows no scruples, and who I also believe undertakes his opposition to mining for profit and self-aggrandizement, and who seems to have no other occupation."[394]

---

[390] Witness Statement of Dr. Robert E. Moran, June 23, 2014 ("Moran Witness Statement"), para. 8.

[391] Reply, paras. 125, 286.

[392] García Cabezas Witness Statement, para. 73 ("ADES probablemente se dedica a las actividades de oposición con un fin lucrativo.").

[393] García Cabezas Witness Statement, para. 74 ("En mi experiencia, los activistas que se oponen a la minería utilizan el miedo y la desinformación como herramienta principal y no están interesados en la verdad o en conocer la verdad.").

[394] García Cabezas Witness Statement, para. 79 ("No creo que el Sr. Pineda haya siquiera tenido la menor preocupación por el medio ambiente, ya que lo he visto arrojar basura al suelo en muchas oportunidades. En otras palabras, es un hombre que no muestra tener ningún escrúpulo, y del que también creo que adopta su oposición a la minería para su beneficio y auto engrandecimiento, y que no parece tener ninguna otra ocupación.").

- "Those who are opposed to the mine are not from here. It is mainly politicians who are opposed to it, possibly because they believe that it is preferable to sacrifice votes in San Isidro in exchange for votes elsewhere in the country at a national level."[395]

- "In my opinion, people who are opposed to mining in the country are divided into two groups. The first group is made up of people who are opposed to any kind of development and, above all, when it comes from the outside. They are opposed, for example, to the port projects, the construction of the Northern Highway, the hydroelectric dams, etc. The other group is made up of people who have an economic interest in opposing mining. Within this group, I believe there are many people being paid today to organize opposition to mining who would be hoping to get a job tomorrow in a mine."[396]

269. It is noteworthy that Pac Rim would go to such extremes to discredit people in the local communities opposed to mining. Of course there are people in the local communities who oppose mining based on environmental concerns—they may have heard about disastrous impacts in other countries, they may have seen a community's water dry up during exploration, or they may know of the un-checked pollution in San Sebastian.[397] And for whatever reason, they have not been convinced by Pac Rim's presentations and assurances that its project would have absolutely no negative impact. These community members cannot all be lumped together and dismissed as "not concerned with the truth or learning about the truth," having "no scruples," or "hav[ing] an economic interest in opposing mining."

---

[395] Navas de Hernández Witness Statement, para. 7 ("La gente que se opone a la mina no es de aquí. Son principalmente los políticos los que se oponen, quizás porque piensan que es preferible sacrificarlos votos de San Isidro a cambio de los votos de otras partes del país a nivel nacional.").

[396] Witness Statement of Gilberto Vásquez, Mar. 14, 2014 ("Vázquez Witness Statement"), para. 13 ("En mi opinión las personas que se oponen a la minería en el país se dividen en dos grupos. El primer grupo está compuesto por personas que se oponen a todo tipo de desarrollo, y sobre todo, cuando viene de afuera. Ellos se oponen, por ejemplo, a los proyectos portuarios, a la construcción de la Carretera del Norte, a las presas hidroeléctricas, entre otros. El otro grupo está compuesto por personas que tienen un interés económico en oponerse a la minería. Dentro de este grupo, considero que muchas de las mismas personas que hoy reciben su sueldo para organizar oposición a la minería estarían esperando conseguir su trabajo en la mina el día de mañana.").

[397] *See*, *e.g.* Jose M. Tojeira, *Mining and Development*, Diario Co Latino, June 13, 2006 (Tojeira Appendix 1); Cortez Witness Statement, paras. 7-9; Letter from Francisco René Cruz Brizulea to Scott Wood, Apr. 17, 2008 (C-685).

270. In fact, Father Tojeira criticized the mining companies for resorting to these types of attacks in 2006. He criticized a mining company representative for claiming "that the anti-metallic mining campaigns are led by NGOs bent on living well off their use of the people's poverty as a bargaining chip."[398] According to Father Tojeira, such rhetoric only "breeds disgust and greater suspicion":

> To generalize the opposition to metallic mining in such a simplistic fashion is to repeat the conduct of former mining companies, given the abuse and disrespect of the opinions of those who think differently than them. The diocese in Chalatenango, which has directly opposed mining, is not an NGO, and has without a doubt done much more for development in Chalatenango than any mining company ever could . . . To come to El Salvador to disrespect the NGOs with such arrogance, ignorance, and disregard, is not only insulting, it is truly a bad omen. Discussing pros and cons, risks and advantages, and possible costs and benefits promised would be a sensible position. Disregarding fears, preventions, and the risks cited by sectors of the country who have been deceived so many times before, is not the best way to gain entry into our mountains.[399]

271. Moreover, in addition to insulting those opposed to metallic mining, Claimant's witnesses contradict themselves. For example, after saying that people are only opposed to mining because they are anti-development or being paid, Gilberto Vasquez admits that within the Municipality of San Isidro (the area close to the project that would be directly affected by mining

---

[398] Jose M. Tojeira, *Mining and Development*, Diario Co Latino, June 13, 2006, at 1 (Tojeira Appendix 1) ("el tal señor no se privaba de decir que las campañas contra la minería metálica están dirigidas por ONG´s que se dedican a vivir bien a base de negociar con la pobreza de la gente.").

[399] Jose M. Tojeira, *Mining and Development*, Diario Co Latino, June 13, 2006, at 2 (Tojeira Appendix 1) ("crea repulsión y mayor desconfianza en mucha personas . . . Universalizar de un modo tan simplista la oposición a la minería metálica, muestra un modo de actuar propio de las mineras antiguas, dadas al abuso y el deprecio frente al pensar de quienes no opinaban como ellos. La diócesis de Chalatenango, que se ha opuesto directamente a la minería, no es una ONG. Y ciertamente ha hecho mucho más por el desarrollo chalateco de lo que cualquier compañía minera pueda hacer . . . Venir a El Salvador a despreciar a las ONG´s con tanta prepotencia, ignorancia y desprecio no sólo es insultante, sino un verdadero mal presagio. Discutir pros y contras, riesgos y ventajas, costos posibles y beneficios prometidos es una posición racional. Despreciar los miedos, las prevenciones y los riesgos que enumeran los sectores que tantas veces han sido engañados en el país, no es el mejor camino para entrar en nuestras montañas.") (emphasis added).

at El Dorado), there is a "certain amount of fear" about "the water issue."[400] He notes that although Pac Rim has made numerous presentations to "dispel people's doubts," there are still people with fears about water. According to him, "there will always be people who do not understand in spite of the fact that it is explained to them a thousand times: Some because they can't and some because they don't want to."[401]

272. Indeed, when Minister Barrera was considering how to go forward in 2006, he heard the concerns directly from the local communities at a forum at the Universidad Centroamericana "José Simeón Cañas" (UCA) on June 13, 2006.

> The event was attended by some 500 people including the Ambassador of Canada then assigned to El Salvador. With a few exceptions, all of the people were visibly opposed to metallic mining and to the Pacific Rim project. At the start of my participation in that event, the attitude and the questions of many of those 500 people was extremely hostile to me, probably because they believed that I was in favor of metallic mining.[402]

273. Father Tojeira, who served as president of the UCA, helped organize and attended the forum where Minister Barrera spoke. He confirms Minister Barrera's recollection that the vast majority of people in attendance strongly opposed mining.[403] As he explains in his witness statement,

---

[400] Vásquez Witness Statement, para. 15 ("al tema de agua cierto miedo acerca de este tema"). *See also* Second Behre Dolbear Expert Report, para. 48 (noting community members' concerns about water).

[401] Vásquez Witness Statement, para. 15 ("desvanecer las dudas que tenía la gente. . . [S]iempre va a haber personas que no entienden a pesar de que se lo explique miles de veces: algunos porque no tienen la capacidad, y algunos porque no quieren.").

[402] Barrera Witness Statement, para. 21 ("Al evento asistieron unas 500 personas y la Embajadora de Canadá, acreditada en esa época en El Salvador. Todas ellas, menos una o dos, estaban visiblemente opuestas a la minería metálica y al proyecto de Pacific Rim. Al principio de mi participación en el evento, la actitud y las preguntas de muchas de esas 500 personas eran muy hostiles hacia mí, pues probablemente pensaban que yo estaba a favor de la minería metálica.").

[403] Tojeira Witness Statement, para. 6 (noting that "[t]here were hundreds of people opposed to mining that had travelled from rural areas of the country for that event" / "[h]abía cientos de personas opuestas a la minería que se habían trasladado desde zonas rurales del país para ese evento.").

> The animosity of the rural residents and small land owners was in large part due to the particularly arrogant and aggressive manner in which mining companies approached the land and the people. The publications in El Salvador belittling anyone who adopted a stance against metallic mining were remarkable. In some places signs had even been placed on land and mountains without consulting with the location's municipalities or residents, sparking fear and confusion among the people, especially when those signs were close to water sources. The people's fear and the companies' aggression went so far as to merit a statement from the Episcopal Conference of El Salvador in clear opposition to mining exploitation in our country . . .[404]

274. Finally, with respect to Pac Rim's statement that "there is no credible evidentiary basis for Respondent's assertion that Pac Rim's mining project would give rise to serious social conflict,"[405] El Salvador thinks that the deaths of several environmentalists and the violent threats against others in the area are more than sufficient evidence that allowing mining under existing circumstances could lead to serious social conflict.[406] Yanira Cortez, the Deputy Human Rights Ombudswoman for the Environment, notes that the conflict of interests between those opposed to mining due to environmental concerns and those who support the El Dorado project as a potential source of employment "generated a social conflict in the area, the result of which has been a series of threats and deaths of environmental advocates that instilled fear in the population . . ."[407]

---

[404] Tojeira Witness Statement, para. 10 ("La agresividad de los campesinos y pequeños propietarios de tierras en buena parte se debía al modo especialmente prepotente y agresivo con el que las compañías mineras se acercaban a terrenos y personas. Fueron impresionantes en El Salvador las publicaciones descalificando a cualquier persona que tuviera una posición contraria a la minería metálica. En algunos lugares incluso llegaban a poner señales sobre tierras y montañas sin consultar con municipalidades ni personas del lugar, despertando confusión y miedo en la gente, especialmente cuando las señales estaban cerca de las fuentes de agua. El temor de la gente y la agresividad de las compañías mereció incluso un comunicado de la Conferencia Episcopal de El Salvador adversando claramente la explotación minera en nuestro país . . . ") (emphasis added).

[405] Reply, para. 289.

[406] Counter-Memorial, paras. 241-243.

[407] Cortez Witness Statement, para. 10 ("generó una conflictividad social en la zona, que tuvo como resultados una cadena de amenazas y muertes de defensores ambientales que implantó un temor en la población . . .").

275. Claimant protests any mention of the threats and violence against environmentalists in the region as "inflammatory accusations of wrongdoing" and El Salvador's "longstanding tendency to make accusations . . . using pejoratives such as . . . 'killed' and 'murder.'"[408] Claimant's misplaced outrage that it does not "deserve[] to be accused of actions such as 'murder'"[409] is nonsense. El Salvador has not accused Claimant of murder.[410] It is not an attack on Claimant to note that several environmentalists have been threatened or murdered in the region since 2009 and the debate about mining contributed to the social conflict. As the Blue Ribbon Commission explained:

> Normally, new projects, especially extractive industries, exacerbate pre-existing conflicts because they offer new distinctions and new sets of incentives around which populations can once again divide. The point here is not to conclude that mining projects *cause* violent conflict (they may or may not), but rather that they are often *accompanied* by an increase in such conflict and that this is all the more so in post-conflict zones and countries. In El Salvador, this is reflected not only by the polarized and polarizing positions assumed during the SEA consultation process (including the murder of a young person following the consulta publica in Ilobasco) but also by the long and well documented history of murders and death threats, even to anti-mining protesters' children and priests, etc. All this suggests that current areas of mining exploration and project development in El Salvador are indeed conflict zones.[411]

276. Thus, the potential for serious social conflict near El Dorado was (and remains) very real. In fact, El Salvador's expert, Dr. Bebbington, draws a comparison to metallic mining

---

[408] Letter from Claimant to the Tribunal, Apr. 28, 2014, at 2, 23 (**Exhibit R-159**).

[409] Letter from Claimant to the Tribunal, Apr. 28, 2014, at 24 (R-159).

[410] This is clear from Claimant's own citations. Claimant cites the following sentence from El Salvador's pleadings to support its complaint that it has been accused of murder: "Claimant cites a newspaper article which quotes President Funes discussing the recent murder of a community member who had spoken out about the potential hazardous effects of mining in the community." *See* Letter from Claimant to the Tribunal, Apr. 28, 2014, at 23-24, n.97 (R-159) (citing Reply on Preliminary Objections, para. 192).

[411] Blue Ribbon Commission Report at 7 (Bebbington Appendix 3) (italics in original; underline added).

projects in Guatemala, which "have been accompanied by serious social conflict and violence . . ."[412] He concludes that the *de facto* moratorium in El Salvador has "likely . . . meant that El Salvador has experienced less social conflict than might otherwise have been the case."[413]

a) Concerns based on observations from the public consultation process

277. In its Reply, Pac Rim continues to insist that publication of the EIA for public comment means that the company had resolved any and all of MARN's concerns about the project.[414] According to Pac Rim, "MARN technicians had evaluated the El Dorado Project specifically, and had determined that the Project would not result in serious, irreversible harm."[415] That is simply not true. It is not even logical. How could the project be finally approved before hearing from and considering the comments from the public consultation period? The fact that MARN's concerns were not resolved is evidenced by the additional observations from MARN in March and July 2006.[416] In fact, as mentioned in the Counter-Memorial, more than 200 people from the local communities signed on to letters opposing Pac Rim's project during the public comment period, citing a review by Dr. Moran as technical support for their opposition.[417]

278. In its Reply, Pac Rim misrepresents and seeks to question the validity of comments it made about the public consultation period at the relevant time (similar to its about-

---

[412] Second Bebbington Expert Report, para. 16.

[413] Second Bebbington Expert Report, para. 16.

[414] Reply, para. 254.

[415] Reply, para. 244.

[416] Public Consultation Meeting Minutes (C-163; R-131); MARN, "Thirteen Observations on the Environmental Impact Study of the El Dorado Mining Exploitation Project", July 2006 (C-169).

[417] Counter-Memorial, para. 218.

face with regard to the impossibility of meeting the land authorization requirement and to MARN's lack of capacity).[418] According to Ms. Colindres, "GOES alleges that the comments generated by public consultation were *solid and very difficult to overcome*, and that PRES admitted that Dr. Morán's criticism against the EIS was *valid*."[419] She quotes the wrong page of Claimant's Response to the Public Consultation Observations (page 19, not page 17) and then claims that El Salvador's statement that Claimant recognized as "valid" one of Dr. Moran's criticisms of the EIA "has not been faithfully presented."[420] But page 17 of Claimant's Response to the Public Consultation Observations, as El Salvador noted in its Counter-Memorial, says:

> **The EIS of El Dorado unfortunately presents baseline data that is incomplete and does not allow the reader to adequately evaluate the quantity of water prior to the mine**.
>
> In a certain way, Mr. Morán's comment is valid. The dumps installed years ago in the rivers around the project were destroyed by the local habitants, and the opportunity to collect the data on the water quantity was lost. When the EIS was presented, PR ES was constructing new dumps and installing electronic measuring devices to measure the water flow. The first year of data is found in Annex 5.2 of the EIS presented. Currently, PR ES complies with the commitment required in section 5.2.4.2, page 5-27 of the EIS. PR ES will continue to collect the data on the quantity of water: before, during, and after the mining activity.[421]

---

[418] *See* Sections III.A.3.e and IV.A.1 above.

[419] Second Colindres Witness Statement, para. 75 ("alega el Gobierno que los comentarios generados por la consulta pública fueron "*sólidos y muy difíciles de superar*", y que PRES admitió que las críticas del Dr. Morán al EsIA fueron *válidas.*") (emphasis in original).

[420] Second Colindres Witness Statement, para. 75, n.110 ("no la ha caracterizado fielmente.").

[421] Response Report to the Technical Review for the El Dorado Mining Project done by Robert E. Moran and the Summary Table of the Opinions and/or Observations Created by MARN, Sept. 2006 at 17 (C-170) ("***5. El EsIA de El Dorado desafortunadamente presenta datos de línea de base que están incompletos y que no permiten al lector evaluar adecuadamente la cantidad de agua previa a la minería.*** En cierta forma, el comentario del Sr. Morán es válido. Los vertederos instalados hace años en los ríos alrededor del proyecto fueron destruidos por los habitantes locales y se perdió la oportunidad de colectar los datos de cantidad de agua. En el momento de presentar el EsIA, PR ES se encontraba construyendo nuevos vertederos e instalando dispositivos electrónicos medidores del flujo de agua. El primer año de datos se encuentra en el Anexo 5.2 del EsIA presentado. Actualmente, PR ES cumple con el compromiso adquirido en la sección 5.2.4.2, página 5-27 del

279. Thus, El Salvador's submissions were faithfully presented and based on Claimant's own words. Similarly, El Salvador did not "allege" that the public consultation comments were difficult to overcome; El Salvador quoted a contemporaneous e-mail between Claimant's officers, stating that MARN officials considered the observations from the public consultation "very strong and difficult to overcome."[422] El Salvador also noted that at the meeting between Pac Rim representatives and MARN officials to discuss these comments in March 2006, PRES President Fred Earnest mentioned Dr. Moran's report and noted that it included "acceptable comments and some comments that are being taken into account, particularly those about the method used to analyze water quantity and quality."[423]

280. In addition, Vector's 2006 Response to Dr. Moran's review, which Claimant submitted with the Reply, reconfirms that Pac Rim and its consultants recognized the validity of some of Dr. Moran's criticisms. Vector commented: "The [Moran] review makes additional comments about the adequacy of water level data and the variation of water levels over time. These data gaps have been addressed by monitoring conducted after the publication of the EIA."[424] Dr. Moran confirms in his witness statement that when he went to the Vector offices to talk about the EIA in 2005, they could not answer his questions about lacking water sampling and testing.[425]

EsIA. PR ES continuará colectado los datos de la cantidad de agua: previa, durante y posterior a la actividad minera.") (emphasis in original).

[422] Counter-Memorial, para. 218 (citing Email from Erwin Haas to Fred Earnest, Feb. 28, 2006 (C-159)).

[423] Public Consultation Meeting Minutes at 2 (C-163, R-131) ("observaciones aceptables y que algunas de las observaciones que se están tomando en cuenta especialmente sobre el método utilizado para analizar la cantidad y calidad de agua . . .").

[424] Technical Memorandum from Larry Breckenridge to Matt Fuller, Apr. 11, 2006, at 3 (C-602) (emphasis added).

[425] Moran Witness Statement, paras. 15-18.

281. Thus, Pac Rim's attempt to disassociate itself from comments already on the record fails. In 2005, Dr. Moran identified some gaps and made valid criticisms about water-related inadequacies in Pac Rim's EIA; people in the local communities cited Dr. Moran's report as support for their opposition to Pac Rim's project during the public consultation period; and the Government considered the observations from Dr. Moran and the communities to be "very strong and difficult to overcome."[426]

b) Pac Rim's dismissal of concerns is revealing

282. In addition, Pac Rim's continued insistence that no intelligent person could have any concerns about its El Dorado project and that issues identified by Drs. Pulgar, Goodland and Bebbington, as well as the Tau Group, are "irrelevant to the El Dorado Project" because the Project would "have only ***positive*** effects on El Salvador's environment and water situation"[427] are not credible.

283. Of course water scarcity, Ministry capacity for adequate supervision and monitoring, and potential social conflict are relevant to El Dorado. Concerns about water shortage or water contamination have consistently been raised with respect to El Dorado, and Pac Rim even had to provide water to a community whose water source was affected by Pac Rim's exploration activities.[428] The Ministry's ability to supervise the project and ensure

---

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

[427] Reply, paras. 277-281.

[428] *See* Letter from Francisco René Cruz Brizulea to Scott Wood, Apr. 17, 2008 (C-685) (requesting information about problems with water sources in the communities near Pac Rim's exploration drilling); Notes on community meetings regarding exploration drilling causing scarcity of water in El Palmito, Apr. 4, 2008, at 1 (Claimant submitted this document as C-686 without translation; El Salvador submits the document with translation as **Exhibit R-160**) ("Luego de discutir acerca de la problemática generada por la actividad antes relacionada, los representantes de la empresa Pacific Rim El Salvador, S.A. de C.V. manifestaron que por un error involuntario de la empresa subcontratada denominada Swiss Boring, disminuyó el afluente del manantial del cual se proveía la comunidad antes mencionada, por lo que Pacific Rim El Salvador S.A. de C.V se comprometió a: I. Continuar con el abastecimiento de agua al caserío El Palmito mientras exista la escasez del vital líquido . . . ") ["After discussing the problem generated by [exploration drilling], the representatives of Pacific Rim El Salvador, S.A. de C.V. stated that

compliance with preventative and mitigating measures was likewise relevant to the people in the local communities.[429] And, tragically, as already noted, the people of Cabañas know all too well the social conflict that can follow passionate debate about mining.[430] Saying such issues are irrelevant not does not magically make them so. How could the Government rely on Pac Rim and its commitments with regard to its mining operations if the company could not have an honest dialogue about existing issues and potential impacts?

284. In addition to the obvious issues relevant to all metallic mining in El Salvador—access to water, the Ministry's ability to supervise the project and safeguard the environment, and potential social conflict—Pac Rim complains that both Dr. Pulgar and the Tau Group "discuss open pit mines,"[431] which Pac Rim says is not relevant to El Dorado. First, both Dr. Pulgar and the Tau Group were considering the mining industry in the country as a whole, so their comments were not and were never supposed to be specifically about El Dorado. But, in fact, as El Salvador mentioned in the Counter-Memorial, Pac Rim has stated that some of the deposits

---

due to an involuntary error by the sub-contractor company, Swiss Boring, the flow from the spring serving the aforementioned community had decreased, for which reason Pacific Rim El Salvador, S.A. de C.V., undertook: I. To continue to supply water to the El Palmito community while the shortage of this vital liquid continues . . . "].

[429] Barrera Witness Statement, paras. 6-7 (noting that "News and opinion on the notorious environmental pollution caused by Commerce Group provoked concern among the population, particularly in the Department of Cabañas, which felt threatened by the Pacific Rim project. The pollution caused by Commerce Group's past activities in failing to comply with the protective measures required of them in the environmental permit confirmed our concerns at the Ministry that metallic mining was a very serious matter and that we could not depend on the new mining companies complying with the conditions required of them in the environmental permits" / "Las noticias y opiniones sobre la notoria contaminación ambiental causado por Commerce Group generó preocupación en la población, particularmente en el Departamento de Cabañas, que se sintió amenazada por el proyecto de Pacific Rim" and "La situación de la contaminación causada por las actividades pasadas de Commerce Group, al no cumplir con las medidas de protección que les exigieron en el permiso ambiental, confirmó nuestras preocupaciones en el Ministerio, de que la minería metálica era un tema muy serio y que no se debía confiar en que las nuevas empresas mineras iban a cumplir con los requisitos que se les exigían en los permisos ambientales.").

[430] Counter-Memorial, paras. 240-242.

[431] Reply, para. 279.

around El Dorado (for which it claims compensation in this arbitration) may have been open pit projects.[432]

285. Pac Rim's tactic in this arbitration of ignoring and denying inconvenient facts is similar to its tactic in its public relations campaigns in the communities. For example, a cartoon Pac Rim submitted as an example of how it tried to "inform people about responsible mining and the benefits the industry could bring to El Salvador,"[433] attacked those against Pac Rim's project as "troublemakers" motivated to keep development out of the communities so that their own organizations would continue to receive funding:

> The truth is, what the troublemakers are after is for these investment projects to stay out of the country's poorest departments, and for there not to be progress in our communities. Because if there's progress they won't get funding for their offices.[434]

286. Similarly, Pac Rim submitted a radio advertisement about "green mining" that indicates that someone who questions green mining is out of touch and can't be helped.[435] The radio announcement implies that denying that there can be green mining is the same as denying that the United Nations or other countries exist, and ends with the comment: "When facing people who are behind the times, it's better to smile and not fight."[436]

---

[432] Pacific Rim Mining Corp., http://www.pacrim-mining.com/s/Eldorado.asp at 2 (R-48) (showing a chart of the 2003 resource estimate with the statement that the "*Nueva Esperanza vein resource is near surface,*[and] *potentially open-pitable*"); Pacific RimMining Corp., Pre-Feasibility Study, El Dorado Project, Jan. 21, 2005 ("Pre-Feasibility Study") at 31 (C-9) ("La Coyotera is a significant exploration target with potential for future open-pit exploitation.").

[433] Reply, para. 125.

[434] Lies and Truths of Mines, Chapter 12, at 4 (Claimant submitted the cartoon as C-497 without translation; El Salvador submits a new translation as **Exhibit R-161**) ("La verdad es que lo que buscan los alborotadores es que estos proyectos de inversión no entren a los departamentos más pobres del país, y que no haya progreso en nuestras comunidades, porque si hay progreso no reciben fondos para sus oficinas.").

[435] Pac Rim's Green Mining Radio Announcement Transcript (Claimant submitted only an audio recording as C-492; El Salvador submits a transcription and English translation as **Exhibit R-162**).

[436] Pac Rim's Green Mining Radio Announcement Transcript (R-162) ("Frente a los desfasados, lo mejor es sonreír y no pelear.").

287. These exhibits confirm Pac Rim's approach to "informing people" about its project. Ever since people started to voice their concerns about metallic mining in El Salvador, Pac Rim has responded dismissively, calling them anti-development or ignorant, or accusing them of having been brought in from the outside for ulterior motives. These attacks did not convince the local people, and this Tribunal should disregard Pac Rim's current arguments echoing such attacks. It should be uncontroversial to recognize that some people in the area of the project had fears about potential environmental and social impacts—because they care about the health and safety of their community—and not because of nefarious ulterior motives or ignorance. Pac Rim's approach has not contributed to resolving concerns about its project or permitting metallic mining in El Salvador.

288. In the end, Pac Rim did not receive the environmental permit. This was due both to the Ministry's legitimate concerns about metallic mining in El Salvador in 2006, which led to the EAE, and to Pac Rim's failure to adequately respond to comments about its EIA—including its failure to 1) consider the cumulative impacts of the multiple mines it planned to develop; 2) submit complete Environmental Management and Closure Plans; and 3) obtain a social license to operate from the local communities. Pac Rim's obstacle was not President Saca, but rather its own disregard for the requirements of Salvadoran law, the shortcomings of its EIA, and the local people it was so quick to dismiss and belittle.

V. PAC RIM'S CLAIMS UNDER THE INVESTMENT LAW OF EL SALVADOR ARE WITHOUT MERIT

A. Claimant has not carried its burden to prove any alleged breaches of the Investment Law

289. Claimant initiated this arbitration. The arbitration remains solely under the Investment Law of El Salvador. Therefore, Claimant has the burden to prove to this Tribunal that alleged actions or inactions by El Salvador constitute a breach of certain provisions of the Investment Law. Yet, as El Salvador noted in its Counter-Memorial, Claimant only devoted a few passing references in its 333-page Memorial to the articles of the Investment Law that Claimant alleges were breached.[437] And now Claimant only devotes four paragraphs of its 241-page Reply to mention in passing five articles of the Investment Law allegedly breached by El Salvador.[438]

290. Claimant lists several articles of the Investment Law under which it allegedly "raised claims," including Article 4, but its citation to a paragraph in the Memorial mentioning Article 4 does not allege a breach of that Article.[439] The mere mention of an Article of the Investment Law is not even an allegation of breach, much less proof of a breach. Pac Rim does not claim that El Salvador failed to provide "brief and simple legal registration procedures" under Article 4 of the Investment Law.[440] In fact, El Salvador provided a simple registration process for Claimant's investment through the National Investment Office at the Ministry of Economy.

---

[437] Counter-Memorial, para. 303.

[438] Reply, paras. 306, 308-310.

[439] Reply, para. 306 (citing Memorial, para. 446).

[440] Memorial, para. 446 (quoting Investment Law, Art. 4 (RL-9(bis))).

291. In its quick reference to Article 5, Claimant misrepresents "the plain language" of this provision.[441] The text of Article 5 specifies that foreign investors shall receive equal treatment as national investors:

> Foreign investors and the commercial companies in which they participate shall have the same rights and obligations as national investors and companies, with no other exceptions save for those set forth by law, and may not be subjected to measures that are unjustified or discriminatory, which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of their investments.[442]

292. Claimant has made no allegation that El Salvador failed to grant it the same rights as national investors. As El Salvador's Salvadoran law expert, José Roberto Tercero, explains, in "its claim for violation of this guarantee, the foreign investor would have to demonstrate that the treatment of the national investor is better than the treatment it is receiving, and that the basis for this inequality is its status as foreign investor. . . ."[443] Claimant's complaint, in fact, appears to be the opposite: that it has not been treated better than national investors, *i.e.* allowed to ignore or change laws because of the country's desire to accommodate its foreign investment. Claimant, likewise, has made no claim that El Salvador has violated Article 6, which would require a showing that it had been "subjected to discriminations or differences for reasons of nationality, domicile, race, gender or religion."[444] As Mr. Tercero explains, neither of these provisions can

---

[441] Reply, para. 308.

[442] Investment Law, Art. 5 (RL-9(bis)) ("Los inversionistas extranjeros y las sociedades mercantiles en las que éstos participen, tendrán los mismos derechos y obligaciones que los inversionistas y sociedades nacionales, sin más excepciones que las señaladas por la ley, sin que puedan aplicárseles medidas injustificadas o discriminatorias que obstaculicen el establecimiento, administración, uso, usufructo, extensión, venta y liquidación de sus inversiones.") (emphasis added).

[443] Second Tercero Expert Report, para. 29 ("reclamo por infracción de esta garantía, el extranjero tendría que probar que el trato al nacional es favorablemente distinto al que se le está dando a él y que esta desigualdad tiene como fundamento su calidad de extranjero.").

[444] Investment Law, Art. 6 (RL-9(bis)) ("puedan aplicarse discriminaciones o diferencias por razones de nacionalidad, domicilio, raza, sexo o religión.").

be invoked without a comparison: "The reason for the differentiated treatment suffered by the foreigner must lie in the character of being foreign, and must be the motivation for acting in a discriminatory or arbitrary manner; that is, the national citizen is not treated nor would be treated in such a manner."[445] Claimant has made no such claim.

293. Even more remarkable, Claimant only mentions its main allegation of expropriation under Article 8 of the Investment Law once in its Reply. Claimant makes no mention of how this Article was breached, but rather notes, and does not dispute, El Salvador's statement that Article 8 is limited to claims of direct expropriation.[446] Claimant then mentions a new article allegedly breached (Article 13), but again without providing any explanation whatsoever as to how El Salvador allegedly breached that provision.[447]

294. The conspicuous absence of a discussion of the relevant articles of the Investment Law speaks volumes about the weakness of Claimant's legal and factual case. As El Salvador explained in its Counter-Memorial, Claimant has failed to carry its burden to prove that El Salvador has breached any of the legal provisions under the Investment Law.[448] This initial assessment remains unchanged after the four paragraphs Claimant included in its Reply.

---

[445] Second Tercero Expert Report, para. 31 ("La razón del trato diferenciado que sufra el extranjero tiene que encontrarse en el carácter de ser extranjero, esta debe ser la motivación del actuar discriminatorio o arbitrario; es decir, no se trata ni trataría así al nacional.").

[446] Reply, para. 310 ("Respondent alleges that Claimant cannot support a claim for breach of Article 8 of the Investment Law because this provision is limited to direct expropriation. Regardless of whether that is true or not . . .").

[447] Reply, para. 310.

[448] Counter-Memorial, paras. 304-310.

B. Even if it were applicable, Pac Rim could not sustain a claim for expropriation under international law

295. Pac Rim has apparently abandoned its main argument of expropriation under El Salvador's Investment Law,[449] and, as El Salvador explained in its Counter-Memorial, international law does not provide the substantive legal standards for this arbitration.[450] But even if it did, the facts underlying this case do not give rise to an expropriation under international law.[451]

296. In the Counter-Memorial, faithful to the guidance of respected international authority, El Salvador demonstrated that Claimant has failed to show that El Salvador expropriated any alleged right to exploit gold at El Dorado for two reasons. First, Claimant never acquired such a right. Second, El Salvador's conduct constitutes *bona fide* regulatory activity. Claimant's Reply is devoid of any discussion of international legal jurisprudence or scholarship concerning expropriation. To be sure, Claimant argues that El Salvador's conduct is not *bona fide* regulatory activity,[452] but Claimant cites no legal authorities to support its argument.

297. The only thing Claimant says about expropriation is that Pac Rim meets the "substantial deprivation" standard for expropriation because it "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."[453] Even if this were true,[454] Claimant is missing the causation

---

[449] Reply, para. 310.

[450] Counter-Memorial, paras. 263-291.

[451] Counter-Memorial, paras. 311-333.

[452] Reply, para. 316.

[453] Reply, para. 314.

element. Most of Claimant's Reply is devoted to spinning a sympathetic tale of how it invested in El Salvador and never obtained an exploitation concession, but Claimant makes no attempt to show, and could not possibly show, that El Salvador is at fault for any alleged harm it suffered. Claimant hopes to omit the causation requirement by insisting that it deserves compensation for its efforts in El Salvador. But, even if Claimant had lost its investment in El Salvador, Claimant's loss would not have been caused by any action or inaction by El Salvador. As explained in Section III above, it was Pac Rim's decisions and the risks it chose to take that caused any losses.

298. El Salvador thus ratifies in full its position as laid out in its Counter-Memorial that El Salvador has not expropriated Claimant's mining rights under international law.

---

[454] El Salvador notes that Pac Rim's statement in the Reply contradicts what Pac Rim told its investors and OceanaGold late last year when OceanaGold was considering the agreement to acquire the 80% of Pac Rim's shares it did not already own. According to an October 2013 presentation about the pending acquisition, "Key Transaction Benefits" for OceanaGold shareholders were: "Adds the high grade El Dorado gold-silver resource with significant upside potential;" "Aligns well with OceanaGold's strategy to invest in high quality, low cost opportunities and utilise its proven mine developing capabilities and experience to advance the El Dorado Project;" and "Provides a first-mover advantage opportunity into a very prospective jurisdiction for precious metals." OceanaGold, Pacific Rim Mining Acquisition Presentation, Oct. 2013, at 6 (R-141) (emphasis added).

VI. CLAIMANT IS NOT ENTITLED TO DAMAGES

A. Claimant has failed to meet its burden to prove its damages

299. In El Salvador, like many other countries, the burden of proof lies with the party making an assertion.[455] Even according to the inapplicable international legal principles on which Claimant relies, it is well-established that the burden to prove claims including losses rests firmly with the claimant.[456] Put another way, "[i]n the damages context, it is always the claimant who alleges that it has suffered a loss as a result of the respondent's conduct; therefore, the claimant bears the burden of proof in relation to the fact and the amount of loss, as well as to the causal link between the respondent's conduct and the loss."[457] Thus, a claimant's burden to provide evidence of the nature, quantification and causal link of its losses is confirmed by investment treaty case law.[458]

---

[455] *See* Civil Code of El Salvador, Un-numbered Decree, published in the Official Gazette No. 85, Book 8, Apr. 14, 1860 *amended by* Decree No. 512, published in the Official Gazette No. 236, Book 365, Dec. 17, 2004 ("Civil Code"), Art. 1569 (RL-123(bis)). *See also* Peñate Expert Report, paras. 30-35.

[456] For general discussion on the burden of proof, *see* Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (1996) at 116-117 (RL-108(bis)); Duward V. Sanidfer, Evidence Before International Tribunals (1939) at 92-93, 97 (**Authority RL-195**); Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (2006) at 327 (RL-150(bis)). For additional discussion in the damages context, *see* Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (2011) at 183 (RL-151(bis)); Sergey Ripinsky & Kevin Williams, Damages in International Investment Law (2008) ("Ripinsky & Williams") at 161-162 (RL-152(bis)); Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages and Valuation in International Investment Law*, Transnational Dispute Management, Feb. 10, 2007 ("Wälde & Sabahi") at 49 (RL-170); Hugo Perezcano Díaz, *Damages in Investor-State Arbitration: Applicable law and burden of proof in* Evaluation of Damages in International Arbitration (Y. Derains et al. eds., 2006) at 119-120 (**Authority RL-196**); Markham Ball, *Assessing Damages in Claims by Investors Against States*, 16 ICSID Rev. - For. Inv. L.J. 408, 424 (2001) (**Authority RL-197**) ("the claimant bears the burden of proof on the issue of valuation.").

[457] Ripinsky & Williams at 162 (RL-152(bis)). *See also* Meg Kinnear, *Damages in Investment Treaty Arbitration in* Arbitration under International Investment Agreements: A Guide to the Key Issues 551, 556 (Katia Yannaca-Small ed., 2010) (**Authority RL-198**) ("The investor bears the burden of proving causation, quantum and the recoverability at law of the loss claimed.").

[458] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, para. 562 (**Authority RL-199**); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, Jan. 12, 2011, para. 237 (**Authority RL-200**); *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, May 24, 2007 ("*UPS v. Canada*"), para. 38 (**Authority RL-201**); *Gemplus S.A., SLP S.A., and Gemplus Industrial S.A. de C.V. and Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, June 16, 2010 ("*Gemplus v. Mexico*"),

300. In the first place, Claimant bears the burden to establish proof of its losses. This burden may be amplified for large or complex projects. For example in the *Enka Insaat ve Sanayi A.S. case* (Enka), the UNCC Panel of Commissioners was tasked with resolving the Turkish company's lost profits claim in relation to a contract for the construction of a dam in the Bekhme Canyon of Northern Iraq. In assessing Enka's evidentiary burden, the Panel determined that the claimant must provide "clear and convincing evidence" of ongoing and expected future profitability.[459] The Panel further held that the evidentiary burden is magnified by the nature of the project.[460] Ultimately, the panel rejected Enka's claim because it had not met this high standard. Not only has Pac Rim failed to meet its duty to prove its damages, Claimant wrongfully seeks to re-assign that burden to El Salvador.

301. Claimant incorrectly asserts that El Salvador had not met its burden because it has not provided an alternate valuation.[461] However, Claimant misstates El Salvador's evidentiary burden. A State must only substantiate its position for the full or partial rejection of a claim established by the claimant for compensation.[462] Once the claimant has established its damages, "[t]he respondent has then to refute such prima facie prove [sic] by either providing sufficient contrary detail in the specific case or by pointing to the equal plausibility of another typical

---

paras. 12-56, 13-80 (**Authority RL-202**); *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003 ("*Generation Ukraine v. Ukraine*"), § 19.1 (CL-193); *John Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, Mar. 28, 2011 ("*Lemire v. Ukraine*"), para. 155 (**Authority RL-203**).

[459] *Report of the Governing Council of the United Nations Compensation Commission*, "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E3": Claims," U.N. Doc. S/AC.26/1998/13 (Dec. 17, 1998) at 37 (**Authority RL-204**).

[460] "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E3" Claims" at 38 (RL-204).

[461] Reply, para. 479.

[462] Ripinsky & Williams at 162 (RL-152(bis)). *See also* Durward V. Sandifer, Evidence Before International Tribunals (1939) at 91-93 (RL-195).

course of events."[463] El Salvador has met its case by demonstrating that Claimant has sustained no harm that bears any causal connection to State conduct. Moreover, even if El Salvador had attempted to quantify Claimant's non-existent (or at best, miniscule) losses, insufficient evidence has been provided for Navigant to calculate the registered amounts invested as per the applicable standard of compensation, discussed in **Section B**.[464]

302. By attempting to reverse its burden, Claimant hopes to distract the Tribunal from its failure to prove its damages claim. That is, Claimant has not discharged its burden to establish the fact of any loss. No credible explanation is offered as to how Claimant has sustained any losses when it still owns the land it acquired and the technical studies it completed. These rights could be sold to another company or used to block future development in this area. Moreover, nothing prevents Claimant from applying for an exploitation concession for the Minita deposit once it has acquired land rights to the entire area and completed a Feasibility Study. Similarly, there can be no loss in relation to lands that Claimant was not legally entitled to explore (Nance Dulce and Coyotera), that it never acquired (Zamora/Cerro Colorado), or for which it allowed the license to lapse (Santa Rita).

303. When faced with a similar situation, the *GAMI* tribunal rejected the investor's claim for failing to prove actual damages. GAMI claimed damages for the full value of its original investment even though it had recovered three of the five expropriated sugar mills and was in negotiations with Mexico regarding compensation for the other two. The tribunal reasoned that:

---

[463] Walde & Sabahi at 49 (RL-170).

[464] In the event, it would be a mechanical calculation to determine compensation based on the amounts registered at the ONI or 125% of the declared tax value of the investment.

> GAMI did not attempt to prove or even present a theoretical financial analysis of what the short-term decline might have been. GAMI rather proceeds on the basis that the entire value of its investment has been destroyed. This is demonstrably untrue. GAMI's shareholding in GAM remains intact. GAM's principal productive assets have either been restored to it or are the subject of negotiations to determine compensation.[465]

Here, Pac Rim (like GAMI) seeks damages on the basis of a complete destruction of its investment. However, this is not borne out by the fact that it still owns surface lands and technical studies relating to the Minita area. The Tribunal need only consider "the true effect on the value of the investment of the allegedly wrongful act"[466] to conclude that Claimant has not established the fact of damages.

304. Second, Claimant is unable to establish the causal connection between its alleged damages and any act or omission by El Salvador. While Claimant's damages claim should fail on this basis alone, Pac Rim seeks to dispense with this critical requirement by conflating liability and causation. According to Claimant, causation should be assumed for the purposes of damages.[467] This is incorrect. Causation must be proven. As the tribunal in *UPS v. Canada* noted: "a claimant must show not only that it has persuasive evidence of damage from the actions alleged to constitute breaches of NAFTA obligations but also that the damages occurred as a consequence of the breaching Party's conduct within the specific time period subject to the Tribunal's jurisdiction."[468] El Salvador will explain the absence of causation in **Section C**.[469]

---

[465] *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, Nov. 15, 2004, para. 84 (RL-40).

[466] *GAMI Investments v. Mexico*, para. 133 (RL-40).

[467] Reply, para. 460 ("However, if one were to assume that the Tribunal confirmed liability and causation, as Claimant's experts were instructed to assume, then it is the objective of this part of the Reply to assess the damages owed to Claimant.").

[468] *UPS v. Canada*, para. 38 (RL-201).

305. Third, Claimant bears the overall burden of establishing the amount of compensation. Although Claimant has submitted two expert reports by FTI Consulting purporting to quantify its losses, El Salvador's experts Navigant Consulting have shown that FTI's selection and implementation of valuation methods is seriously flawed. As the tribunal in *Gemplus* recognized, damages must be rejected if the "loss is found to be too uncertain or speculative or otherwise unproven . . . even if liability is established against the Respondent."[470] In its Counter-Memorial, El Salvador explained in detail the highly speculative nature of FTI's valuation which relied on crude assumptions for its discounted cash flow analysis of the Minita reserves, non-comparable companies and transactions for the mineral resources, and the wrong valuation method for the early exploration properties.[471]

306. As a result of Navigant's robust criticisms, FTI abandons part of its earlier valuation and adopts a radically different approach. However, FTI's revised valuation analysis is even more flawed. In **Section D**, El Salvador will explain that FTI's calculation of Pac Rim's alleged losses is internally inconsistent and contradictory and still leads to wildly speculative results concerning the revenue-generating potential of the six deposits and two exploration properties. Consequently, FTI's fantastical computation provides an unreliable basis to award compensation, to say the least.

307. Accordingly, Claimant's failure to discharge its burden of proof must bar any recovery.[472] As Sandifer writes, "[a] party who fails to come forward with adequate proof of an

---

[469] The Tribunal is also referred to El Salvador's earlier submission on causation. *See* Counter-Memorial, paras. 336-345.

[470] *Gemplus v. Mexico*, para. 12-56 (RL-202) (emphasis added).

[471] Counter-Memorial, Section V.C.2.

[472] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (2006) at 334 (RL-150(bis)).

affirmative allegation does so at his peril."[473] Several investment tribunals have declined to award damages for want of sufficient proof. For example, in the *Autopista* case, the tribunal determined that the investor had not proved all the damages alleged and found that Venezuela had cast sufficient doubt to rebut the concessionaire's evidence in respect of some of the losses allegedly incurred.[474] Similarly, the tribunal in *Generation Ukraine v. Ukraine* criticized the claimant for inadequacies in proving the nature and quantum of its expenditures.[475]

308. Naturally, no interest is owing, as discussed in **Section E**, because Claimant is not entitled to any compensation.

309. In light of the foregoing, the Tribunal must dismiss Pac Rim's damages claims due to its failure to satisfy its burden of proof or to rebut El Salvador's evidence.[476]

B. The applicable law governing damages

1. Introduction

310. With respect to the application of the Investment Law and other Salvadoran laws in this case, the parties are in agreement.[477] Given the parties' concurrence, it would be unnecessary and improper to resort to international law on matters of compensation.

311. El Salvador notes that Claimant has abandoned its absurd proposition that international law can be applied directly in place of domestic law.[478] But it falls back on its

---

[473] Duward V. Sanidfer, Evidence Before International Tribunals (1939) at 98 (RL-195). *See also* Meg Kinnear, *Damages in Investment Treaty Arbitration in* Arbitration under International Investment Agreements: A Guide to the Key Issues 551, 556 (K. Yannaca-Small ed., 2010) (RL-198).

[474] *Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, Sept. 23, 2003 ("*Aucoven v. Venezuela*, Award"), para. 268 (RL-168).

[475] *Generation Ukraine v. Ukraine*, §§ 19.4, 19.15, 19.26 (CL-193).

[476] Duward V. Sanidfer, Evidence Before International Tribunals (1939) at 91-93 (RL-195).

[477] Reply, para. 469 ("Thus, the parties appear to agree to the extent that the Investment Law and Salvadoran [law] should be applied.").

[478] Memorial, para. 658.

alternative argument that international law should apply in the absence of a specific standard under the Investment Law. However, El Salvador has already explained that no such lacunae exists and in any event, recourse to international law is unnecessary because Claimant has failed to state a claim under Articles 5 or 6 or to prove an unlawful expropriation has taken place.[479]

312. Moreover, Claimant does not dispute that Salvadoran law provides an adequate basis for compensation for its alleged losses. As Pac Rim puts it, the parties' "disagreement is focused on what is the substantive content of Salvadoran law" and "what are the correct principles of damages under the law."[480]

2. Salvadoran law governs the standard of compensation

313. Given Pac Rim's primary claim for the alleged expropriation of its investment, El Salvador's legal experts addressed the standard of compensation for government expropriations. According to Professors Ayala and Fratti, an expropriation for a public utility may be compensated up to 125% of the property's declared tax value under the Salvadoran Expropriation Law.[481] As such, Salvadoran law generously provides a 25% premium over the value of the property. However, Professors Ayala and Fratti concluded that this law does not apply because Claimant does not have a property right capable of being compensated without a concession and was not legally entitled to the value of the minerals in the subsoil.[482] Thus, Pac Rim is not entitled to compensation for an expropriation under Salvadoran law.

---

[479] Counter-Memorial, para. 357.

[480] Reply, para. 469.

[481] Counter-Memorial, para. 350 (citing to First Expert Report of José María Ayala Muñoz and Karla Fratti de Vega on Administrative Law: Analysis of Issues Related to Salvadoran Mining Law, Dec. 20, 2013, at 51).

[482] Counter-Memorial, para. 351 (citing to First Ayala/Fratti de Vega Expert Report at 50).

314. Claimant's expert challenges the applicability of the Law of Expropriation and Occupation of Properties.[483] In Professor Fermandois' opinion, this legislation only applies in cases of "formal expropriation" but not "in cases of liability of the Government due to illegal action."[484] However, Claimant has not established that any expropriation (much less an unlawful expropriation) has occurred.

315. Because Claimant has suffered no expropriation, the only plausibly relevant standard of compensation is for extra-contractual liability since Pac Rim's alleged damages do not arise from any contractual relationship.[485] For there to be extra-contractual responsibility, damages must have been caused and must be certain.[486] As El Salvador's legal expert, Mr. Peñate explains:

> In order for extra-contractual liability to exist, it is necessary for damages to have been caused and for said damage to be certain. If no right or interest has been impinged upon, there can be no claim for damages. Express provisions of the Civil Code require the existence of the damages.
>
> In order for damages to be compensable, they must be ***certain***, that is, they must positively exist: a purely potential or hypothetical loss does not qualify.[487]

316. Furthermore, the only damages that can be compensated are actual damages (*daño emergente*) and lost profits (*lucro cesante*) that are direct and certain.[488] Actual damages in the

---

[483] Reply, para. 470 (citing to Second Fermandois Expert Report at 99).

[484] Second Fermandois Expert Report at 99 ("casos de responsabilidad del Estado por actuación ilícita.").

[485] Peñate Expert Report, para. 6.

[486] Peñate Expert Report, para. 24.

[487] Peñate Expert Report, paras. 24-25 ("Para que la responsabilidad extracontractual esté comprometida, preciso es que el daño se haya causado y que este daño sea cierto. Sin derecho o interés afectado no hay acción de reclamo. Disposiciones expresas del Código Civil exigen la existencia del daño. Para que el daño dé lugar a indemnización, debe ser ***cierto***, o sea, existir positivamente: un perjuicio puramente eventual o hipotético no se considera.") (emphasis in original).

[488] Peñate Expert Report, paras. 13, 28.

case of an investor would be the amount invested. Lost profits are the earnings that would have been obtained from the investment. To establish lost profits, the claimant must show: (1) net profits or economic benefits, (2) a high probability or certainty that the financial results claimed would have been obtained and (3) historical data on yields and profits.[489]

317. In this regard, he concludes that Pac Rim's claims can be discarded for several reasons. First, Claimant's damages are hypothetical and not direct without a mining concession.[490] Second, Claimant has not proven net profits through either external historical data or internal probative data.[491] Instead, Pac Rim "resorts to a series of hypotheses—in an attempt to prove hypothetical damages—which, far from providing evidence in its favor, highlights the nonexistence of any direct link between the alleged damage and the fact it did not have a concession."[492]

318. In addition, Mr. Peñate states that some damages such as lost opportunity costs are not recognized by the Salvadoran legal system and may not be compensated:

> Some foreign legal systems provide for methods of compensation− other than actual damages and lost profits− (such as punitive damages, opportunity cost or going concern, or contingent damages), that have no basis in the Salvadoran legal system.[493]

Thus, Pac Rim's claims must fail to the extent that it seeks damages for a loss of chance.[494]

---

[489] Peñate Expert Report, para. 16.

[490] Peñate Expert Report, para. 44.

[491] Peñate Expert Report, paras. 38-39, 43.

[492] Peñate Expert Report, para. 44 ("acude a una cantidad de supuestos – para tratar de acreditar un daño hipotético-, con lo que, lejos de probar a su favor, queda evidenciada la inexistencia de una relación directa entre el supuesto daño, y el hecho de no contar con una concesión.").

[493] Peñate Expert Report, para. 36 ("Existe en ordenamientos jurídicos extranjeros otros métodos indemnizatorios − distintos al daño emergente y al lucro cesante − (como son los daños punitivos, el costo de oportunidad o el negocio en funcionamiento, o el daño contingente) que no tienen asidero en el orden jurídico salvadoreño.").

[494] Reply, para. 375.

319. Thusly, Claimant's damages would be limited to the amounts legitimately invested in the absence of proof of lost profits. To obtain compensation on this basis, Pac Rim would have to prove it registered investments with the National Investment Office (ONI) pursuant to Article 17 of the Investment Law.[495]

320. Claimant's expert, Professor Fermandois, disagrees that there is any requirement of recordation for the investment to attract the protection of the law. He argues that "[i]f 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."[496] This demonstrates a misapprehension of the Investment Law.

321. As Mr. Tercero, El Salvador's expert, clarifies, the investment regime distinguishes between a "foreign investment" and a "registered foreign investment." Only the latter enjoys the rights and guarantees set forth in the Investment Law.[497] He agrees that while there is no legal sanction for failing to register an investment, the "natural sanction" is to prevent access to the rights and guarantees under the Law.[498] He concludes that:

> the State is only obligated with respect to the *registered foreign investment*. For its part, the foreign investor may only file its claim due to non-compliance with those obligations, and any

---

[495] Investment Law of El Salvador, Legislative Decree No. 732, Oct. 14, 1999 ("Investment Law"), Art. 17 (RL-9(bis)) ("Los inversionistas extranjeros deberán registrar sus inversiones en la ONI, quien emitirá una Credencial la cual le otorgará a su titular la calidad de inversionista extranjero, con expresión de la inversión registrada.") ["Foreign investors must register their investments at the ONI, which shall issue a Credential, granting to its holder the status of foreign investor, stating the registered investment."].

[496] Reply, para. 471(citing to Second Fermandois Expert Report at 108-110).

[497] Second Expert Report of José Roberto Tercero Zamora on the El Salvador Investment Law, June 20, 2014 ("Second Tercero Expert Report"), para. 13.

[498] Second Tercero Expert Report, paras. 15-16 ("sanción natural").

> compensation that as a consequence is owed to it or to the registered portion of its investment.[499]

322. Accordingly, in the absence of an expropriation and proof of lost profits, the burden falls on Pac Rim to establish the quantum of its claim by providing evidence of the amounts invested and registered with the ONI. While Pac Rim has provided several registrations,[500] it has not shown the purpose of those expenditures in order to validate that these sums were spent on authorized exploratory activities.

3. International law cannot be used to displace Salvadoran rules on compensation

323. Claimant desperately grasps at straws trying to import international legal principles on damages into this arbitration by conflating legal arguments, inserting language into the Investment Law, and misattributing views to El Salvador. Rather than respond to El Salvador's well-founded position, Pac Rim concocts reasons to apply an entirely different standard of compensation beyond the corrective and supplemental functions of international law.

324. First, Claimant asserts that El Salvador has "confirmed the importance of international law's application in Salvadoran law" through its acceptance of the Investment Law and the ICSID Convention. Claimant's argument is both circular and incorrect. Through the re-arrangement and insertion of terms in the preamble, Claimant seeks to argue that the Investment Law was intended to reflect the "'best practices' in international foreign investment law."[501] In reality, the preamble confirms the State's intention to increase foreign investment by establishing

---

[499] Second Tercero Expert Report, para. 24 ("A todo efecto específico de la Ley, el Estado solo está obligado respecto de la *inversión extranjera registrada*. Y por su parte, el inversionista extranjero solo puede extender su reclamo por incumplimiento de esas obligaciones, y cualquier compensación que en consecuencia se le deba, a la porción registrada de su inversión.") (emphasis in original).

[500] Counter-Memorial, para. 379, n.567.

[501] Reply, para. 473.

"an appropriate legal framework . . . containing clear and precise rules, in accordance with best practices . . ."[502] One cannot reasonably infer an intention to introduce a substantial body of law with significant consequences into El Salvador's foreign investment regime based on a strained interpretation of the Law's preamble.

325. Furthermore, El Salvador's ratification of the ICSID Convention does not signify its acceptance to apply international law to disputes brought under its Investment Law. The ICSID Convention does not provide substantive rules but merely provides a procedural framework to resolve investment disputes.[503] The applicable law governing the merits of the dispute derives from the instrument that initiates the arbitration such as a bilateral investment treaty, contract, or a domestic investment law. Under Article 42(1), it is only absent party agreement that the tribunal must apply "the law of the Contracting State party to the dispute" and "such rules of international law as may be applicable." Here, both Claimant and El Salvador agree that the Salvadoran law is the applicable law to redress its claims. Thus, Claimant's backdoor attempt to introduce international law to supplant Salvadoran law must be rejected.

326. Second, Claimant misstates El Salvador's position on the application of the *Chorzów Factory case* and the *ILC Draft Articles*. Claimant asserts that El Salvador has argued that these sources are not "reflective of the customary international law standard for the assessment of damages." This constitutes a blatant mischaracterization of El Salvador's contention.[504]

---

[502] Investment Law, Preamble (RL-9(bis)) ("[D]ebe establecerse un marco legal apropiado que contenga reglas claras y precisas, de acuerdo a las mejores prácticas en esta materia . . .").

[503] Christoph H. Schreuer et al., The ICSID Convention: A Commentary (2d. ed., 2009) at 550 (RL-110(bis)) ("The Convention does not provide substantive rules for the relationship between host States and foreign investors. It is merely designed to establish a procedural framework for the settlement of investment disputes.").

[504] Counter-Memorial, para. 354 (stating "[t]hese principles, embodied in the ILC Draft Articles and the *Chorzów Factory* case, establish State responsibility to make full reparation for an internationally wrongful act.").

327. There can be no legitimate question about El Salvador's true position. Simply put, as the applicable law agreed by the parties in this arbitration, Salvadoran law governs the standard of compensation. There has been no suggestion that Salvadoran law is deficient in this respect. As such, Claimant has not justified why recourse should be made to general principles of international law.

328. Moreover, what El Salvador actually stated was that "Claimant's reliance on these legal authorities is misplaced because they apply to disputes between States."[505] Pointing to specific references in the *ILC Draft Articles*[506] and the *Chorzow Factory case*,[507] that explicitly show their applicability between States, El Salvador demonstrated that these principles did not apply to disputes between States and non-State actors. This conclusion finds support by distinguished legal commentators.[508] Notably, Claimant offers no substantive response to this evidence. Instead, Claimant insinuates that they must be applicable because they have been applied by other international tribunals in investor-state disputes. However, this analysis falls

---

[505] Counter-Memorial, para. 355.

[506] Counter-Memorial, para. 355 (citing to Article 33(1) which provides: "The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach" (emphasis added)).

[507] Counter-Memorial, para. 356 (quoting page 28 of this often cited and seldom read decision: "The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damages. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State . . ." (emphasis added)). *See also* Case Concerning the Factory at Chorzów (Indeminity) (Germany v. Poland), Merits, Judgment of September 13, 1928 P.C.I.J. (Series A) No. 17, at 28 (CL-225).

[508] Zachary Douglas, The International Law of Investment Claims (2009) at 101 (RL-25(bis)) ("This passage [of the *Chorzów Factory case*] highlights that there is a substantive difference between the reparation for wrongs done to individuals and to states and hence the Court's classic statement on restitution as the primary remedy in international law and on the measure of damages in lieu thereof must be treated with caution with respect to the investment treaty regime."). *See also* James Crawford, *Investment Arbitration and the ILC Articles on State Responsibility*, 25 ICSID Rev. - For. Inv. L.J. 127 (2010) (**Authority RL-205**) ("it is true—as confirmed by Article 33(2)—that the ILC Articles make no attempt to regulate questions of breach between a state and a private party such as a foreign investor. Those rules must be found elsewhere in the corpus of international law, to the extent they exist at all.").

short of rigor. Significantly, Claimant does not engage in any examination of whether the considerations of tribunals applying bilateral investment treaties would apply with equal force in cases conducted under domestic investment laws.[509] Thus, the applicability of full reparation in this case must not be lightly presumed.

329. Furthermore, Claimant has not established any conduct by El Salvador reaching the level of illegality that calls for the application of these principles.[510] In *ADC v. Hungary* (the only case cited by Claimant), which like *Chorzów Factory*,[511] stands for the proposition that in certain egregious circumstances, that are not applicable to this case, a tribunal may award damages as of the date of indemnification rather than the time of the wrongful act.[512] In the *ADC case*, Hungary expropriated airport terminals constructed and operated by the claimant. The tribunal found that Hungary's conduct amounted to an unlawful expropriation. In making this determination, the tribunal highlighted the project's profitability evidenced by its out-performance of business projections and the substantial increase in passenger traffic.[513] This combined with Hungary's financial windfall of $2.23 billion (resulting from a subsequent privatization) and its failure to make contractual payments to the investor caused the tribunal to

---

[509] The one case that Claimant does cite to support its position that it should be compensated for an illegal expropriation is not without controversy.

[510] Counter-Memorial, para. 316-333.

[511] In the *Chorzów case*, Poland's seizure of the factory was specifically prohibited by the Geneva Convention on Upper Silesia of 1922. Under the terms of that agreement, brokered between Germany and Poland in the aftermath of WWI, Poland had committed not to liquidate the factory. Consequently, Poland's conduct amounted to a seizure of property "which could not be expropriated even against compensation." In light of this distinction, not to mention the affront to international peace and economic life in Upper Silesia, the Permanent Court of Justice adopted a heightened standard of compensation. Claimant has not demonstrated the magnitude and severity of interests comparable to those involved in *Factory at Chorzów*, warranting the application of that standard. Case Concerning the Factory at Chorzów (Indeminity) (Germany v. Poland), Merits, Judgment of September 13, 1928 P.C.I.J. (Series A) No. 17, at 46 (CL-225).

[512] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 ("*ADC v. Hungary*") (RL-104).

[513] *ADC v. Hungary*, paras. 163, 193-194 (RL-104).

award the claimant the market value of its investment at the time of the award.[514] Against this backdrop, the tribunal characterized Hungary's conduct as a "callous disregard of the Claimant's contractual and financial rights."[515] Because Claimant is not seeking damages as of the award, and no unjust enrichment by El Salvador has occurred, the *ADC case* is inapposite.

330. Finally Claimant appears confused regarding El Salvador's explanation that even if these international law principles were applicable, they would not provide Claimant with "the remedy it seeks." In the first place, Claimant would not have obtained an exploitation concession even in the absence of the alleged March 2008 moratorium because it had not met the legal requirements for a Feasibility Study and land ownership or authorization. Second, Claimant would not be entitled to damages in relation to deposits which had no defined resources or had been discovered through unlawful exploration activities after the expiration of the original licenses. Third (and most importantly), the major flaw in Pac Rim's damages claim is that Salvadoran law does not bestow any ownership rights to mineral deposits which belong solely to the State.

331. On top of all this, Claimant's valuation is based on numerous flawed assumptions and methodological errors, as described in section D, rendering them speculative and uncertain under international law. Thus, Claimant has failed to prove that international law can be applied in this arbitration or that even if it applied, it would result in the payment of compensation.

---

[514] *ADC v. Hungary*, paras. 206, 264-266 (RL-104).

[515] *ADC v. Hungary*, para. 536 (RL-104).

C. Claimant has failed to establish causation

332. Despite Claimant's purported concurrence that "causation is an important element to support a claim of damages,"[516] it appears confused about its evidentiary burden. Claimant contends that causation should be assumed for the purposes of damages.[517] The implicit assumption in Claimant's position is that once an affirmative determination on liability has been made, the relevant question is not *whether* a claimant is entitled to damages but rather *how much* compensation the claimant should be paid. This is plainly wrong.

333. The rule could not be clearer: damages cannot be awarded without proof of causation. For compensation to be due, the onus lies on Pac Rim to show a sufficient causal connection between an actual breach of the Investment Law and its alleged losses. This is true whether one applies Salvadoran law[518] or international law.[519]

334. One cannot simply assume causation if a breach of an obligation is found.[520] Otherwise, causation would be completely devoid of any meaning and would be present in every case in which a wrongful act has occurred.[521] Attempts by investors to presume causation after a finding of liability, have been swiftly rejected by investment tribunals. For example in *Lemire v. Ukraine*, the tribunal disagreed that causation had been settled when it decided that the claimant's radio station had been denied fair and equitable treatment in the awarding of radio frequencies and licenses. The tribunal confirmed that: "injured claimants bear the burden of demonstrating

---

[516] Reply, para. 464.

[517] Reply, para. 460.

[518] *See* Civil Code, Art. 2066 (RL-123(bis)). *See also* Peñate Expert Report, paras. 24, 30-35.

[519] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, Mar. 3, 2010 ("*Ioannis Kardassopoulos v. Georgia*"), para. 453 (CL-274). *See also UPS v. Canada*, para. 38 (RL-201); *Biwater Gauff v. Tanzania*, para. 779 (RL-35).

[520] *See also* Peñate Expert Report, paras. 22(b), 24.

[521] *Biwater Gauff v. Tanzania*, para. 803 (RL-35).

that the claimed *quantum* of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close."[522]

335. In its Counter-Memorial, El Salvador explained the absence of factual causation, and by implication legal causation, in this case.[523] Factual causation was similarly the central issue in the *Biwater* case.[524] Even though Tanzania had violated its treaty obligations, the tribunal had to determine whether the State caused Biwater's losses before an award of compensation could be made. Prior to the seizure of its assets, the claimant had been unable to profitably manage and operate its water and sewer system business in Dar-es-Salaam. The tribunal found that the investment had no financial value at the expropriation date with liabilities in excess of total assets and an operating lease (its single source of income) on the verge of being terminated.[525] Accordingly, the tribunal held the requisite causal linkage was missing between the wrongful acts of Tanzania and the actual losses claimed by Biwater.

336. Likewise, Pac Rim has shown no conduct by El Salvador that has caused any losses. Indeed, there are at least two reasons why there can be no causation: (1) Claimant lacked valid mining rights with respect to the mineral deposits and exploration properties (*i.e.*, factual causation) and (2) Pac Rim's claim relies on many unsubstantiated assumptions that sever the chain of causation (*i.e.*, legal causation). Furthermore, Pac Rim's damages claims are in discordance with Salvadoran law.

337. First, the various defects in Claimant's asserted rights to the six deposits and two exploration properties were extensively described in El Salvador's Counter-Memorial. To recap,

---

[522] *Lemire v. Ukraine*, para. 155 (RL-203) (emphasis in original).

[523] Counter-Memorial, paras. 336-345.

[524] *Biwater Gauff v. Tanzania*, para. 786 (RL-35).

[525] *Biwater Gauff v. Tanzania*, paras. 795-796 (RL-35).

Pac Rim lost its right to explore the El Dorado area when its exploration licenses expired on January 1, 2005. This precluded its ability to explore the deposits at Balsamo, South Minita and Nueva Esperanza which had either not been discovered or had been insufficiently drilled by this time. Similarly, Claimant never acquired rights to exploit the Minita deposit because it filed an incomplete application (for a much larger area) in its haste to apply for a concession before the expiration of its licenses. Despite being given numerous opportunities by MINEC, Pac Rim never attempted to rectify its application by:

- completing a Feasibility Study to match the size of the concession application area;
- acquiring ownership of or permission to use the surface lands over the whole area; and
- obtaining an environmental permit (backed by an Environmental Impact Study for the entire project).

The expiration of the original licenses also legally prevented Pac Rim or a related company from acquiring exploration rights over Coyotera and Nance Dulce. Nor did Claimant obtain an environmental permit to legally drill either deposit.

338. Claimant similarly lacked valid rights to the exploration properties. For example, Claimant allowed the exploration license for Santa Rita to lapse without explanation in 2009. It also never explains how it could realize any gains for Zamora/Cerro Colorado which it never came to possess.

339. Unable to challenge this evidence, Claimant accuses El Salvador of "improperly confus[ing] causation with the hypothetical 'but-for' conditions on which the fair market value

determination is predicated—*i.e.*, what was the fair market value of El Dorado but for the illegal actions of El Salvador."[526] With all due respect, it appears the confusion rests with Claimant.

340. Causation is an essential element of the damages analysis. It requires a link between a cause (*i.e.*, the wrongful act) and an effect (*i.e.*, the loss).[527] Logically, the trier of a case must decide whether the loss would have occurred irrespective of the wrongful act. Investment tribunals have explicitly considered the but-for scenario in their determination of causation. For example, after finding a breach for undue delay in seven contract cases filed in Ecuadorian courts, the *Chevron* tribunal turned to the question of causation. It noted:

> In essence, the Claimants must prove the element of causation — i.e., that they would have received judgments in their favor as they allege "but-for" the breach by the Respondent.[528]

A similar approach was adopted by the tribunals in *LG&E v. Argentina*,[529] *SD Myers v. Canada*,[530] *Kardassopoulos v. Georgia*,[531] and *Nordzucker v. Poland*.[532]

---

[526] Reply, para. 468.

[527] *Lemire v. Ukraine*, para. 157 (RL-203).

[528] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, Mar. 30, 2010, para. 374 (CL-176).

[529] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, paras. 45-48 (**Authority RL-206**) ("The question is one of '*causation*': what did the investor lose by reason of the unlawful acts? . . . [T]he actual damage inflicted by the measures is the amount of dividends that could have been received *but for* the adoption of the measures.").

[530] *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Second Partial Award, Oct. 21, 2002 ("*S.D. Myers v. Canada*"), para. 159 (**Authority RL-207**) ("The damages recoverable are those that will put the innocent party into the position it would have been in had the interim measure not been passed. The focus is on causation . . .").

[531] *Ioannis Kardassopoulos v. Georgia*, para. 465 (CL-274) ("On the matter of causation, the Tribunal finds that there can be no real question that but for the Respondent's conduct, the Claimants would not have suffered the loss of their rights.").

[532] *Nordzucker v. The Republic of Poland*, UNCITRAL, Third Partial and Final Award, Nov. 23, 2009 ("*Nordzucker v. Poland*"), paras. 48-49 (RL-157) ("Such presentation of Nordzucker's damages assumes that Nordzucker would have acquired the two Groups but for Poland's infringement of the BIT. It also assumes that the sale of Gdańsk and Szczecin Groups to Nordzucker would have gone through in any event and that no event, other than the breach of the BIT which the Arbitral Tribunal found Poland to have committed, could have caused the sale to Nordzucker to fail.").

341. Second, El Salvador has explained that damages may not be awarded on the basis of uncertain or speculative claims.[533] For Claimant to prevail on damages, several unsubstantiated assumptions would have to be made. Pac Rim contends that losses resulted from "Respondent's continuing failure to act (with respect to the EIS and the Exploitation Concession)" which was "crystallized with the President's *de facto* ban in March 2008."[534] However, the assumptions embedded in Claimant's contention do not hold up on close scrutiny.

342. The implicit assumption that Claimant would have received both the concession and approval of its EIA is faulty. That's because Salvadoran authorities could not have approved a deficient environmental impact study or granted an exploitation concession based on an incomplete application irrespective of the alleged omissions or *de facto* moratorium on mining. Leaving aside its technical flaws, the EIA did not evaluate the environmental effects of the entire "El Dorado" project.[535] Even Pac Rim's former VP of Exploration admits that the EIA did not cover the entire area in the concession application.[536] Relatedly, the exploitation concession application was not supported by a Feasibility Study or landholdings over the entire 12.75 km^2 area.[537]

343. Nor would the alleged breaches change the status of Claimant's rights to the deposits or exploration properties. The deposits in Pueblos, Guaco, and El Dorado were all in the area of the original licenses and could not be legally held by Pac Rim or its affiliated

---

[533] Counter-Memorial, paras. 339-341, 344. *See also Nordzucker v. Poland* (RL-157); *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. 064/2008, Final Award, June 8, 2010 (RL-158).

[534] Reply, para. 464.

[535] Second Behre Dolbear Expert Report, paras. 37-40.

[536] Gehlen Witness Statement, para. 121.

[537] To the extent that Pac Rim relies on its "expectations" that it would be granted an exploitation concession, it is unreasonable to expect that El Salvador would not act in conformity with its laws. *See* Reply, para. 466.

companies. Nor did the alleged act or omission have any impact on Claimant's failure to acquire rights to Zamora/Cerro Colorado or to renew its license for Santa Rita.

344. In addition, Claimant's losses which are tied to the value of mineral deposits and properties is simply too indirect and remote.[538] Without authorization to exploit, no income could be generated even if Claimant held valid mining rights. But even if Claimant obtained an exploitation concession, the future income generating potential of these deposits and properties is far too uncertain.[539] Put another way, the "El Dorado project" would not be ready for production without significant additional work such as: conducting geotechnical and metallurgical testwork, completing mine engineering, developing cost estimates and project schedules, securing financing, hiring contractors, ordering long-lead time machinery, and constructing the processing plant and surrounding infrastructure.[540] Furthermore, there was no evidence that economic mineralization would have been found in Santa Rita and Zamora/Cerro Colorado. There are simply too many steps in the chain of causation to award damages.

345. More fundamentally, Claimant's entire theory of damages is at odds with not only actual events but also Salvadoran law. Pac Rim argues that the moratorium resulted in the complete diminution in value of the El Dorado project.[541] It is not clear how this can be the case.

---

[538] For discussion on legal causation, *see*: *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, Dec. 24, 2007, para. 428 (**Authority RL-208**) ("The damage, nonetheless, must be the consequence or proximate cause of the wrongful act. Damages that are '*too indirect, remote, and uncertain to be appraised*' are to be excluded.") (emphasis in original); *S.D. Myers v. Canada*, para. 140 (RL-207) ("harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.") (emphasis in original); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/006/3, Award, May 6, 2013, para. 287 (RL-156) ("damages, in the legal sense, must be understood as what is required to make good in monetary terms some enduring alteration for the worse in the economic, financial or commercial position of the foreign investor which can be traced, in a sufficiently direct and proximate way, to the host State's unlawful course of action, taken as a whole.").

[539] *See* Section VI.D.3.a. *See also* Peñate Expert Report, paras. 16-18.

[540] Second Behre Dolbear Expert Report, paras. 15, 17, 26, 66-75.

[541] Reply, para. 465.

After all, Pac Rim still holds rights to the land itself and its technical studies even though its mining license expired. Further, the expiration of its license only means that Claimant no longer has the exclusive right to apply for an exploitation concession. However, the loss of exclusivity is inconsequential as no development can proceed without Claimant's consent to use the surficial land. And it is open to Claimant to apply for a concession for the Minita deposit that is supported by the required landholding and a Feasibility Study.

346. Even more devastating to its claim, Claimant seeks damages based on the value of the minerals in the subsoil. This is contrary to Salvadoran law. As James Otto explained, neither the holder of an exploration license or an exploitation concession is vested with a real property right in the minerals. Rather, the ownership of minerals in the ground belong to the State under the Salvadoran Constitution and Mining Law.[542] It is only once the minerals are extracted from the subsoil that they vest in the concession holder. Thus, the right to exploit minerals, not the actual deposits constitute a property interest. But here, Claimant never acquired a concession so it never held a compensable property right. It is axiomatic that damage cannot be caused to property that was never owned or legally capable of being owned.

347. Thus, Claimant has failed to meet its burden that damages flow from any act or omission by El Salvador because it lacks valid mining interests, its losses depend on too many unsupported assumptions, and the basis for its damages violate Salvadoran law.

[542] First Otto Expert Report at 8-9.

D. FTI's valuation is irreparably flawed and totally unusable

1. Introduction

348. The gravity of its methodological flaws render FTI's valuation completely unusable. It would not be an exaggeration to characterize Claimant's valuation as chock-full of contradictions, internal inconsistencies and wildly speculative assumptions. Furthermore, Claimant's withholding of information requested by its experts severely compromises the independence of their valuation. It should then come as no surprise that FTI continues to produce calculations that are three times greater than the market value of the project.[543]

349. Most egregiously, Claimant's valuation experts adopt a radically different (and convoluted) approach for valuing its Mineral Resources that offends not only basic principles of mining valuation but conflicts with FTI's own position in its original report. In doing so, it discards one method (initially given a weighting of 90%) and increases the weighting of the other approach (initially assigned a low ranking to reflect the shortcomings of this information). Furthermore, in order to value the Mineral Resources, FTI has developed a *de novo* DCF model that uses the same mining parameters for the Minita deposit with minor adjustments for market conditions (but no adjustments for technical differences) and applies them to the five other deposits. This is unsupportable.[544] Because Pac Rim's resources account for 75% of the claim, this tactic artificially inflates Claimant's damages and produces the illogical result that mineral reserves (*i.e.,* proven to be economically viable) are less valuable than mineral resources.

---

[543] Second Navigant Expert Report, para. 86.

[544] Behre Dolbear, Comments on FTI Consulting's Valuation, July 10, 2014, para. 9 (**Exhibit R-163**) (noting that "[t]here can be no assurance in the authors' opinion that each vein at the El Dorado property will have the same conversion rate as that projected in FTI's valuation as gold and silver grades will vary, different mining methods may be used, and metallurgical differences could occur.") (emphasis added).

350. Second, FTI also perpetuates errors made in its first report with its valuation of the Minita Reserves, ignoring three out of six of Navigant's observations. Its valuation of the exploration properties remains unchanged, although this does not appear to be for want of trying. It seems that FTI sought to implement the cost approach, as suggested by the CIMVAL Standards (and Navigant) but Claimant refused to provide its own experts with the necessary information.[545] Accordingly, FTI's valuation results remain totally useless.

351. The excuse offered by FTI for its revised valuation is that it "failed to properly appreciate the unique nature and significant value afforded to the El Dorado project. . . ."[546] This is an incredible claim. If that were true, one would expect that its valuation of the mineral properties and exploration properties to have increased. Instead, its valuation has decreased.[547]

352. In this section of the Rejoinder, El Salvador will: (1) explain the threshold defects of Claimant's valuation; (2) describe the foundational flaws in FTI's valuation methods; (3) assess the problems with FTI's implementation of these incorrect methodologies; and (4) respond to FTI's rejection of other evidence of Pac Rim's value. Each one of these criticisms alone invalidates Claimant's damages quantification of $284.9 million.

2. Threshold defects in claimant's valuation

353. It is important not to lose sight of the main reasons that Pac Rim is not entitled to the damages it claims. That is, the assumptions relied upon for its valuation are unsupported by actual facts and Salvadoran law.

---

[545] Second Expert Report of Howard N. Rosen and Jennifer Vanderhart, FTI Consulting, on Damages, Apr. 11, 2014 ("Second FTI Expert Report"), para. 6.52 ("This estimate does not include any actual exploration activities at the site. We have requested, but have not yet been provided detailed cost information as of the date of this report. No such cost estimate was available for the Santa Rita exploration property."). *See also* Counter-Memorial, paras. 363-367.

[546] Second FTI Expert Report, para. 2.2.ii.

[547] Second Navigant Expert Report, para. 127.

354. First, Claimant has misconceived the but-for scenario which El Salvador amply discredited in its Counter-Memorial on the Merits.[548] Nevertheless, Claimant reasserts its position that value should be determined assuming El Salvador had "granted the Exploitation concession" and that it "had not announced the *de facto* and extra-legal moratorium."[549] But this scenario does not follow the breaches Claimant alleges. Neither El Salvador's purported *failure to act* within the prescribed time on the EIA and the exploitation concession application (which both parties did not treat as "definitive deadlines")[550] nor the alleged statement of President Saca leads to the conclusion that an environmental permit would be granted or its concession application approved. What Claimant overlooks is that El Salvador could not legally grant a concession that was not supported by either a Feasibility Study, an Environmental Impact Study, or surface land rights covering the same 12.75 km^2 area. Furthermore, finding a breach for either act or omission does not affect the legal status of rights that Claimant was not capable of possessing (Coyotera and Nance Dulce deposits), that had expired (Santa Rita property), or that it never acquired (Zamora/Cerro Colorado property).

355. It also bears mention that Claimant has valued the latest resource estimates for the various deposits.[551] Yet at the time of submitting its exploitation application, Claimant had only reported reserves and resources for the Minita deposit. All other deposits were either insufficiently drilled or discovered after January 2005. Thus, Claimant now seeks damages for deposits that it had unlawfully drilled subsequent to the expiration of the exploration license.

---

[548] Counter-Memorial, para. 361.

[549] Reply, para. 476. *See also* Memorial, para. 666.

[550] *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on Jurisdiction, para. 2.91.

[551] First Expert Report of Howard N. Rosen and Jennifer Vanderhart, FTI Consulting, on Damages, Mar. 28, 2013 (Amended Aug. 16, 2013) ("First FTI Expert Report"), n.37.

Claimant's damages claim should be denied if for no other reason than it cannot be allowed to profit from unauthorized mining activity.

356. If this were not enough, Claimant's damages for the value of the estimated amount of reserves and resources in the subsoil, is based on a premise that violates Salvadoran law. As James Otto explains, an exploration license holder does not possess a real property interest in the underground minerals.[552] Even if some date earlier than March 2008 is used, Claimant's rights would be limited to that of a bare license holder. Without any right of extraction, the value of the licenses would be virtually worthless.

357. Second, Claimant relies on a faulty interpretation of the Tribunal's decision on jurisdiction to claim damages prior to the valuation date.[553] Even though it continues to argue that El Salvador committed a breach as early as 2004, it claims that March 10, 2008 is the proper valuation date.[554] However, as El Salvador has already explained, the alleged breaches for the alleged delay in approving the EIA and granting the concession capture losses arising before the valuation date.[555] Furthermore, Claimant represented to the Tribunal during the jurisdictional hearing that it would not seek damages prior to March 2008:

> "[L]et me be very clear: with respect to our claim for damages, we are only asking for damages as a result of the breach that we became aware of and that we only could have become aware of in – as of March 2008 at the earliest . . .
>
> [L]et me just emphasize in response to the Tribunal's question as to whether the measure at issue is the same for the CAFTA claims and the Investment Law claims, it is. In both cases the measure at issue is the de facto mining ban. Also, as I said earlier, in both

---

[552] First Otto Expert Report, at 7-11.

[553] Reply, para. 477 (citing Memorial, paras. 663-667).

[554] Reply, para. 477.

[555] Counter-Memorial, para. 361. *See also* Second Navigant Expert Report, para. 113.

> cases, Claimant is alleging damages only from the period from March 2008 forward and not from any earlier period." [556]

It should not go unnoticed that Claimant has been unable to reconcile this inconsistency in its damages claim.

358. Third, Claimant maintains that the appropriate standard of compensation is fair market value.[557] It relies on international law standards that it states are consistent with Salvadoran Law. However, Pac Rim points to no domestic authority to support this critical assumption. Instead, it admonishes El Salvador for not providing an alternative valuation. Claimant is seemingly operating under the mistaken belief that the burden of proof on quantification of damages rests with El Salvador. As mentioned in **Section A** above, this burden lies squarely with Claimant.

359. Interestingly, FTI attempted to calculate losses for the amounts invested in the project in a manner similar to the Salvadoran legal standard. Recall that compensation may be paid for amounts invested in respect of foreign investments registered with the ONI.[558] It appears that such efforts have been thwarted by Claimant. FTI's report unusually states that:

> Given the summary level of information presented in the financial statements, we have requested, but have not yet been provided detailed cost information as of the date of this report. As a result, we are not able to calculate the Claimant's costs related to the El Salvador project.[559]

---

[556] *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on Jurisdiction, para. 2.108 (emphasis added).

[557] Reply, para. 478.

[558] However, the amounts invested cannot not include funds channeled towards advocacy, public relations, lobbying, or other efforts to influence either the legal status of the investments or the public sentiment towards the investments.

[559] Second FTI Expert Report, para. 10.6 (emphasis added).

If Claimant has withheld this information from its own expert, it is inconceivable that it would provide this information to El Salvador's valuation experts for them to generate an alternative damages calculation.

360. While one could stop here, El Salvador will respond to Claimant's flawed damages claim out of an abundance of caution. In the next section, El Salvador will explain the foundational flaws embedded in FTI's selection of valuation methodologies.

3. Foundational flaws in FTI's valuation methodologies

361. FTI continues to separately value: (1) the Minita reserves using the DCF Approach, (2) the mineral resources (for Nance Dulce, South Minita, Minita, Coyotera, Nueva Esperanza and Balsamo) using a combined DCF and Comparable Trading Multiples Approach, and (3) the exploration properties (Santa Rita and Zamora/Cerro Colorado) using the Comparable Transactions Approach. While its valuation methodology for the Minita reserves and the exploration properties are broadly the same relative to its first report, it conducted a *de novo* DCF valuation of the mineral resources. Consequently, El Salvador will respond to Claimant's defense of its valuation methods.

a) FTI's improper use of the discount cash flow (DCF) method to value the mineral resources

362. As El Salvador explained, "the DCF method calculates the sum of future cash flows projected to a specific period of time and then discounts them back to the present value by using a discount rate."[560] As such, the DCF model is a forward-looking valuation tool that calculates the present value of future cash flows.

[560] Counter-Memorial, para. 369.

363. In FTI's first report, the DCF method was employed to value the Minita reserves. Now, FTI uses the DCF method to value the Minita reserves and the mineral resources in the six deposits. It is important to make this distinction because Claimant seeks to value both the Minita reserves and the resources in the six deposits using the technical data contained in the Pre-Feasibility Study (PFS). However, it should be recalled that the PFS only covered the Minita reserves.

364. Indeed, FTI defended its DCF analysis for the Minita reserves precisely for this reason:

> As the Pre-Feasibility Study modelled the mining of the Reserves of the Minita deposit, we have applied an income approach in determining the FMV of such Reserves. We have applied a market approach in determining the FMV for the remaining Resources . . .[561]

Navigant confirms that it is clear from FTI's first report that they did not believe that they had sufficient information to prepare a DCF valuation of the Mineral Resources.[562]

365. El Salvador considers that the DCF method is inconsistent with the standard of compensation under domestic law.[563] Even under international law, there are too many speculative elements to support the application of the DCF approach to the Minita deposit.[564] This uncertainty is amplified by FTI's application of the DCF method to the mineral resources.

---

[561] First FTI Expert Report, para. 6.23.

[562] *See* Second Navigant Expert Report, paras. 125.

[563] Peñate Expert Report, paras. 13-18, 38-39, 43-44.

[564] *See e.g.*, *Rudloff Case (Merits)*, US-Venezuela Mixed Claims Commission, (1903-5) IX U.N.R.I.A.A. 255, at 258 (RL-160) ("Damages to be recoverable must be shown with a reasonable degree of certainty, and can not be recovered for an uncertain loss."); *Shufeldt claim (Guatemala, United States of America)*, PCA Case II U.N.R.I.A.A. 1079, Award, July 24, 1930, at 1099 (RL-161) ("lucrum cessans must be the direct fruit of the contract and not too remote or speculative."); *Amoco International Finance v. Iran*, Award of 14 July 1987, 15 Iran-US CTR 189, para. 238 (CL-228) ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damages can be awarded."); *Report of the International Law Commission on the work of its fifty-third session*, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with

366. Claimant agrees that the jurisprudence clearly establishes that the DCF method should not be used to value a business that does not have a history of earnings.[565] However, it argues El Salvador has overlooked the economic rationale underscoring this longstanding principle. That is, "fundamentally there must be a level of economic certainty in the data on which a DCF analysis is conducted. A brownfield project of the high quality of the El Dorado project has effectively answered such concerns and makes the project perfectly suited to a DCF analysis, and is not speculative in any material way."[566] What is clear from this is that Claimant neither understands the meaning of a "brownfield project"[567] nor the legal principle requiring a going concern so that future profits can be established with a reasonable degree of certainty.

367. The premise of Claimant's argument is the cases cited by El Salvador can be distinguished by the simple fact that different industries were involved:

> The cases cited by Respondent, such as *Metalclad*, *Biloune*, *SPP*, *Wena*, *Arif*, *AAPL* and *Autopista* 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.[568]

368. However, Claimant fails to cite to any legal authority for its revolutionary proposition that income-based approaches are well-suited for natural resources projects where

---

commentaries thereto" U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) ("ILC Draft Articles"), Article 36, para. 27 (RL-79(bis)) ("Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.").

[565] Reply, paras. 481-482. *See also* Counter-Memorial, paras. 368-381.

[566] Reply, para. 481.

[567] A "brownfield" investment is defined as "When a company or government entity purchases or leases existing production facilities to launch a new production activity . . ." Brownfield Investment Definition, http://www.investopedia.com/terms/b/brownfield.asp (last visited July 1, 2014) (**Exhibit R-164**). Although previous exploration activities had been conducted on part of the El Dorado site, there are no existing facilities or infrastructure in place for it to be considered a brownfield investment.

[568] Reply, para. 482.

economic analyses have been prepared. Indeed, detailed financial plans were submitted by the investors in the *Biloune* and *Autopista* cases but were rejected by both tribunals as evidence of future profits.[569] Moreover, the tribunals in *Wena Hotels v. Egypt*, *SPP v. Egypt*, and *AAPL v. Sri Lanka* rejected lost profit claims even though business operations had begun.[570] Thus, Claimant's theory does not stand up to scrutiny.

369. It is also significant that Claimant emphasizes the "exacting industry mandated analysis and data found in National Instrument 43-101 reports . . ."[571] While the PFS forms the basis of the DCF calculation, FTI's valuation relies on the National Instrument 43-101 reports (NI 43-101 reports) for the estimate of mineral resources in the deposits. That's because the PFS only covered the Minita deposit. Given these reports post-date the PFS, they are based on unlawful drilling activities following the expiration of the licenses. FTI's conflation of the NI 43-101 reports and the PFS is misleading.

370. The nature of NI 43-101 reports must also be distinguished from a PFS. An NI 43-101 report summarizes material scientific and technical information about a mineral property.[572] As such, these reports should not be confused with engineering studies such as preliminary economic studies, pre-feasibility studies or feasibility studies that contain a higher level of analysis and review. Furthermore, Claimant's reliance on these reports to establish

---

[569] *See Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana,* UNCITRAL, Award on Compensation and Costs, June 30, 1990, at 228 (RL-163); *Aucoven v. Venezuela*, Award, paras. 353-63 (RL-168). *See also* Peñate Expert Report, paras. 16, 39, 43 (noting the need for historical data on profits).

[570] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, para. 124 (RL-167); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Case No. ARB/84/3, Award on the Merits, May 20, 1992 ("*SPP v. Egypt*"), paras. 187-188 (RL-166); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, paras. 102-107 (RL-165).

[571] Reply, para. 482.

[572] Ontario Securities Commission, OSC Bulletin Vol. 34, Issue 25, June 24, 2011 at 7047 (**Exhibit R-165**).

economic certainty of the resources is misplaced. The NI 43-101 Rules and Policies make explicit that "mineral resources that are not mineral reserves do not have demonstrated economic viability."[573] And resources with low geological certainty are not normally included in project economics.[574] As Behre Dolbear points out mineral resources (as well as mineral reserves) are merely estimates, not facts.[575] However, FTI's inclusion of mineral resources in its valuation gives full economic value to Measured & Indicated Resources.

371. Moreover, Pac Rim challenges El Salvador's observation that "the El Dorado was nowhere near operational."[576] Rather it claims that El Dorado "was a development project on the verge of moving to production."[577] Without any prospect of obtaining an exploitation concession (supported by a Feasibility Study), an environmental permit (backed by an Environmental Impact Study) and surface land rights over the entire 12.75 km^2 area, it is difficult to see how this was a project on paper, much less a mine on the verge of production.

a. **Pre-production Work:** Claimant does not deny that El Dorado remains barren of processing facilities, project infrastructure (for example, tailings ponds), roads, bridges or camps. While it claims "substantial investments and resources have been expended and already contributed to the production infrastructure", no details are provided of these expenditures.[578] Instead, Pac Rim relies on Dr. Rigby's statement that "infrastructure requirements for the modest 750 tpd El Dorado Project were not

---

[573] Ontario Securities Commission, OSC Bulletin Vol. 34, Issue 25, June 24, 2011, at 7050 (R-165) (emphasis added).

[574] Second Behre Dolbear Expert Report, para. 6 (stating "[u]nder Canadian National Instrument 43-101, Resources are not normally included in project economics.") (emphasis in original).

[575] Behre Dolbear, Comments on FTI Consulting's Valuation, July 10, 2014, para. 5 (R-163) ("It is important that the Tribunal recognize that the actual amount of gold, or any mineral, recovered from a mineral property cannot be determined until mining at the property has been completed. Mineral Resource and Mineral Reserve statements are estimates, not facts.").

[576] Notably, Pac Rim does not dispute that it has never operated any mines or advanced any project to the completion of a feasibility study, let alone the construction or operating phases. *See* First Behre Dolbear Expert Report, para. 89.

[577] Reply, para. 483.

[578] Reply, para. 484.

onerous in either design or cost."[579] However, this is not the project that Claimant sought to be permitted and for which it claims damages. Claimant seeks compensation for a larger 1,500 tpd project that was never subject to any level of engineering study. Moreover, Claimant admits this expanded project would cost $90 million to $104 million to construct during the initial 2 year pre-development stage.[580]

b. **Quality of the PFS:** Relying on Dr. Rigby, Claimant claims that "the proposed mining process and costs, and mine plan had indeed been studied to a high degree of accuracy . . . and was 'essentially fixed'."[581] It also quotes Dr. Rigby's statement that "a number of the most important cost items had been estimated in the SRK PFS for El Dorado with an accuracy for [sic.] better than +/-25%."[582] To accept Dr. Rigby's opinion, one would have to disregard the fact that he has been asked to opine on a study assembled by his SRK colleagues, that the PFS only covered the Minita deposit, that SRK itself called the study a PFS, and that Pac Rim hired SRK and SNC Lavalin to complete an actual Feasibility Study to increase production to 1,500 tpd.[583] Leaving aside those issues, Behre Dolbear has identified important components of the PFS that fall below a Feasibility Study. These include:

- The McIntosh Mine Plan was assigned a contingency factor of ±25% (consistent with a PFS) and required additional studies, costing and detailed engineering to be completed to reach a feasibility level.[584]

- The processing design by Mine Mill Engineering required significant additions in order to provide a capital cost estimate commensurate with feasibility level work.[585]

- Vector Engineering and SRK noted that the geotechnical design for the tailings storage facility was preliminary and detailed engineering would be required prior to construction.[586]

- The schedule was typical for a pre-feasibility level study.[587]

---

[579] Reply, para. 484.

[580] Second FTI Expert Report, Schedules 3 and 3.1, at 106, 107.

[581] Reply, para. 484.

[582] Reply, para. 484 (emphasis omitted).

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

[584] Second Behre Dolbear Expert Report, paras. 13-16.

[585] Second Behre Dolbear Expert Report, para. 17.

[586] Second Behre Dolbear Expert Report, paras. 22, 25.

[587] Second Behre Dolbear Expert Report, paras. 27-29.

c. **Environmental Studies:** Claimant maintains that the environmental risks had been adequately studied by Claimant and that the quality and scope of the EIA was thorough and complete.[588] This is untrue. As Behre Dolbear notes: "even taking the EIA boundary as an estimate of what was needed, it is clear that PRC's requested Exploitation Concession was over *four times larger* than the project area outlined in the EIA, demonstrating that there was no justification for a 12.75 km^2 concession including other, as of yet, unstudied deposits."[589]

d. **Financing:** Unable to deny that Pac Rim had not finalized financing arrangements, Claimant contends that El Salvador and its experts "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."[590] Conversely, Behre Dolbear explains that "in almost every project financing the draw-down of both debt and equity is conditional upon the completion of [a definitive Feasibility Study] and its vetting and approval by the proposed investors."[591] Thus, financing is dependent on completing a bankable Feasibility Study, not obtaining an exploitation concession and permits.

372. Therefore, FTI's use of the PFS for the Minita reserves (*i.e.*, a tiny part of the proposed El Dorado concession) to value the resource estimates (derived from unlawful drilling activities) contained in NI 43-101 reports do not provide a sufficient economic basis to apply the DCF method. These projections are no substitute for a record of historical earnings. Furthermore, it is most surprising that FTI has implemented an income approach without even accounting for the substantially higher risk that clearly any buyer would assume given the stage of the project (through, for example, a substantially higher discount rate).

---

[588] Reply, para. 484.

[589] Second Behre Dolbear Expert Report, para. 38 (emphasis added).

[590] Reply, para. 484.

[591] Second Behre Dolbear Report, para. 69. *See also* Second Navigant Expert Report, para. 214. The CIMVAL Standards and Guidelines also indicate that debt financing traditionally follows after completion of a bankable feasibility study. (*See* CIMVAL Standards and Guidelines, Feb. 2003, S1.0 at 9 (FTI-25) (defining a Feasibility Study as "a comprehensive study of a deposit in which all geological, engineering, operating, economic and other relevant factors are considered in sufficient detail that it could reasonably serve as the basis for a final decision by a financial institution to finance the development of the deposit for mineral production." (emphasis added)).

b) FTI's comparables analysis produce unreliable results

373. In its first report, FTI valued the resources using: (1) the Comparable Trading Multiples Approach and (2) the Comparable Transactions Approach assigning each method a weight of 10% and 90%, respectively. Only the Comparable Transactions Approach was used to value the exploration properties.

374. FTI's rebuttal report significantly alters its comparables analysis for the mineral resources but makes no modification to its valuation of the exploration properties. For its valuation of the mineral resources, FTI drops the Comparable Transactions Approach (which was initially assigned a high weighting of 90%) and substitutes this method with what it calls the "Integrated Reserves and Resources DCF model" that it gives a weight of 75%. As a result, the Comparable Trading Multiples Approach, which originally had a weighting of 10% (to reflect that only one company had been identified) now receives a much higher weighting of 25% even though it still relies on the same one company. These changes are summarized in the chart below:

	FTI First Report	FTI Second Report
DCF Approach Weight	0%	75%
Comparable Transactions Approach Weight	90%	0%
Comparable Publicly Traded Company Approach Weight	10%	25%

[592]

375. Valuation based on comparables, as El Salvador explained, is only reliable if the asset being valued is sufficiently similar to the assets used as comparables and if it is feasible to adjust for the effects of differences in characteristics among the assets.[593] The comparability of

[592] Second Navigant Expert Report, at Table 2.

[593] Counter-Memorial, para. 385.

mineral properties is complicated by differences in markets, geographic locations, size, capital structure, timing, mining method, mineralization, and the quantity and quality of metals, to name just a few factors. As such, the reliability of this method depends on the choice of comparables. As Ripinsky and Williams note:

> [M]ultiples are easy to misuse or manipulate when comparable firms are used. Given that no two firms are identical, deciding which firms are comparable involves a degree of subjectivity. Consequently, a biased analyst can choose a group of comparable firms that support a valuation that he or she wishes to arrive at.[594]

376. Indeed, the CIMVAL Standards and Guidelines which FTI purports to implement describes the market approach as "based primarily on the principle of substitution."[595] CIMVAL further mentions that "[s]ome methods can be considered to be primary methods for Valuation while others are secondary methods or rules of thumb considered suitable only to check Valuations by primary methods."[596] Interestingly, the Comparable Transactions method is considered a "primary" method but comparables based on Market Capitalization (*i.e.*, Comparable Trading Multiples) are considered "secondary" methods. Thus, FTI has discarded a primary method of valuation and maintained a secondary method to value the mineral resources.

377. Finally, El Salvador demonstrated that the comparables method has been viewed with skepticism by scholars, international legal authorities, and international investment tribunals.[597] Claimant has not responded to any of these arguments. Consequently, these points remain unchallenged.

---

[594] Ripinsky & Williams at 215 (RL-152(bis)).

[595] CIMVAL Standards and Guidelines, Feb. 2003, at 21, G3.1 (FTI-25).

[596] CIMVAL Standards and Guidelines, Feb. 2003, at 22, G3.4 (FTI-25).

[597] Counter-Memorial, paras. 382-393.

c) Claimant blocked FTI's attempt to implement the cost approach

378. While the parties agree that Salvadoran law is the applicable law in this arbitration, Pac Rim refuses to quantify its alleged losses according to those standards of compensation. As El Salvador explained, the cost approach is reflected in the Investment Law (*i.e.*, only amounts invested and registered with the ONI are compensable). Instead, Claimant has instructed its valuation experts to quantify the fair market value of the deposits and exploration properties.

379. El Salvador noted previously that the CIMVAL Standards and Guidelines used by FTI indicate that the cost approach was a suggested method for valuing exploration properties and mineral resource properties but had not been implemented by Claimant's experts.[598] Furthermore, Behre Dolbear confirms that the cost approach is the appropriate method to value exploration properties according to international mining codes.[599] Claimant has responded with a series of inapposite arguments. First, it argues that the Minita reserves are classified as development properties so a cost approach is not appropriate.[600] This is inapposite because El Salvador never implied that CIMVAL requires the cost approach to value development properties.

380. Second, Claimant contends that the CIMVAL indicate that the market approach is "entirely appropriate for the valuation of all properties."[601] It is true that market-based approaches are acceptable under CIMVAL for projects at all stages of development. However, market-based approaches are rarely used in practice as the sole determinant of value. Indeed, on

---

[598] Counter-Memorial, para. 365.

[599] Behre Dolbear, Comments on FTI Consulting's Valuation, July 10, 2014, paras. 14-20 (R-163).

[600] Reply, para. 497.

[601] Reply, para. 497.

closer examination of the standards, CIMVAL recommends that "[m]ore than one approach should be used in the Valuation of each Mineral Property."[602] Thus, the implementation of a market-based approach does not imply the exclusion of other valuation methods.

381. Finally, Claimant states that:

> although CIMVAL indicates that a cost-based approach may be applied "in some cases" to mineral properties, and is permitted for exploration properties, there is by no means a requirement (contrary to the implication of Respondent) to apply a cost approach. As noted by FTI, this is clearly a matter of professional judgment and FTI judged the approach it took to be reasonable.[603]

382. El Salvador is surprised that Claimant argues that FTI deemed the cost approach unsuitable when its report suggests otherwise. At paragraphs 6.51-6.52, FTI details its attempt to implement the cost approach for the exploration properties:

> As of the date of this report, we have not been provided a detailed accounting of costs incurred for the Santa Rita and Zamora/ Cerro Colorado properties. Based on PRMC 2008 Financial Statements, we believe that the Claimant has incurred, at a minimum, $0.5 million in costs pertaining to the Cerro Colorado property . . .
>
> This estimate does not include any actual exploration activities at the site. We have requested, but have not yet been provided detailed cost information as of the date of this report. No such cost estimate was available for the Santa Rita exploration property.[604]

383. This passage suggests that Claimant has withheld information requested by its own valuation experts. The CIMVAL Standards and Guidelines clearly state that the choice of valuation methodologies is the sole responsibility of the valuator.[605] Here it would seem that

---

[602] CIMVAL Standards and Guidelines, Feb. 2003, at 16, S7.2 (FTI-25).

[603] Reply, para. 497.

[604] Second FTI Expert Report, paras. 6.51-6.52.

[605] CIMVAL Standards and Guidelines, Feb. 2003, at 4, P2.4 (FIT-25) ("CIMVAL has accepted the view that the valuator is responsible for choosing approaches and methods.").

Claimant has compromised FTI's ability to exercise its independent judgment. This along with the other foundational flaws casts serious doubts about the reliability and integrity of FTI's valuation reports.

4. FTI's implementation of the wrong valuation methods is seriously flawed

384. In the previous sections, El Salvador explained the flaws in FTI's underlying assumptions and the incorrect valuation methods used to value the six deposits and two exploration properties. In this section, El Salvador will describe the serious errors and deficiencies in FTI's implementation of these valuation methods for the Minita reserves, the mineral resources and the exploration properties.

a) The Minita Reserves

385. As in its first report, FTI values the Minita reserves using the DCF method. This time, however, FTI makes corrections for errors identified by Navigant. As a result of these modifications, FTI's revised valuation of the Minita reserves is $63.6 million, resulting in a decline of over 26%.[606]

386. In its previous report, Navigant revealed that SRK's financial model (prepared with the PFS) valued the Minita reserves at $8.7 million while FTI arrived at a value range of $67.5 million and $80.6 million (after-tax), implying a 700% increase in value. They showed that the increase in gold prices over this 3 year period did not account for this massive increase in value. Claimant and FTI criticize Navigant's preliminary reasonableness test for selectively mixing data from different dates.[607] Navigant strongly disagrees.

---

[606] Second Navigant Expert Report, paras. 23, 151.

[607] Reply, para. 485. *See also* Second FTI Expert Report, para. 7.10.

387. Ironically, FTI claims that the PFS should not be used to value the Minita reserves even though its valuation of Minita is based almost entirely on the 2005 PFS. As Navigant notes, FTI's position implies that their valuation of the Minita Reserves is useless and should be discarded.[608] Second, contrary to FTI's suggestion, Navigant's analysis accounted for commodity prices, discount rates and capital/operating costs. Indeed, the very point of this exercise was to assess the impact of market changes on the value of the Minita reserves.[609] For the same reason, FTI's third criticism on using market indices to track market changes (which FTI itself uses to measure the impact of the alleged breaches on the value of PRMC as of the valuation date) is meritless. As Navigant explains, this measures the percentage change in the value of those companies over time.[610] Fourth, FTI criticizes Navigant's use of FTI's discount rate. For the sake of argument, Navigant shows that if the WACC is recalculated for January 2005 (using FTI's methodology and sources), the discount rate increases to 14% (from 12% in March 2008) which results in a decrease in value of $5.4.[611] Thus, Navigant shows that implementing the changes suggested by FTI only magnifies the disparity in FTI's valuation of the Minita reserves.

388. Indeed, FTI's updated valuation of the Minita reserves continues to produce disproportionate results. Using the mid-point of $63.6 million, FTI's valuation implies that the value of the Minita Reserves increased by <u>over 630%</u> in just over three years. Navigant concludes that:

> Considering that the only adjustments that FTI implemented to the 2005 PFS were to incorporate changes in the market conditions (i.e., gold and silver prices, cost inflation, and the discount rate)

---

[608] Second Navigant Expert Report, para.198.

[609] Second Navigant Expert Report, paras. 202-204.

[610] Second Navigant Expert Report, para. 104.

[611] Second Navigant Expert Report, para. 191.

> and nothing specific to the Minita Reserves, this calls into question FTI's valuation conclusion that implies the Minita Reserves would have increased in value at a rate that is five times greater than the overall gold market . . .[612]

389. FTI's inflated value can be explained in part by the errors and unsound assumptions in its DCF analysis. Significantly, FTI concedes to three of the six errors identified by Navigant's First Report. Accordingly, FTI makes corrections to the model relating to metal price forecasts, income tax treatment of depreciation, and the double-counting of working capital. However, significant errors persist in FTI's DCF calculation due to its dismissal of the other three errors. Navigant responds to FTI's arguments, as follows:

- **Commencement of Mine Development:** FTI's DCF model assumes mine development would commence immediately as of the valuation date. However, this ignores the fact that the Minita reserves were still at the pre-feasibility stage and significant additional planning and engineering work needed to be complete before mine development could have commenced.[613] According to Behre Dolbear, it would take anywhere from one to three years to complete a bankable feasibility study, develop bid documents, and procure contractors needed to commence mine development. This would have the unavoidable consequence of delaying the operation of the mine.

- **Weighted Average Cost of Capital (WACC) Calculation:** The experts disagree on the discount rate (*i.e.*, the WACC). Navigant argues that the WACC is too low because it assumes debt financing and does not reflect a project-specific risk premium. First, Navigant considers that the cost of debt relied on by FTI was unreliable because it was based on the Macquarie term sheet (a hybrid debt/equity arrangement) and suggests it would be more reasonable to value the Minita reserves using a capital structure of 100% equity.[614] Astonishingly, FTI acknowledges this error but does nothing to correct it.[615] Second, Navigant suggested a project-risk

---

[612] Second Navigant Expert Report, para. 209.

[613] Second Navigant Expert Report, para. 215.

[614] Second Navigant Expert Report, para. 172.

[615] FTI contends that no modification is necessary because management intended to pursue a much higher debt to equity ratio. As Navigant points out, the intention of management is totally irrelevant to this analysis. *See* Second FTI Expert Report, para. 7.17. *See also* Second Navigant Expert Report, para. 217.

premium should be considered to account for the greater level of uncertainty associated with using a PFS to predict cash flows. FTI rejects this because, in its view, "an additional discount would be highly subjective."[616] However, Navigant notes that project-specific risk could be captured based on the increased uncertainty of the PFS cost estimates.[617]

- **Inflation-adjusted costs:** Navigant questions FTI's assumption that operating and capital costs would be constant in real terms. Historically, mining costs have increased by significantly more than US inflation and extraction costs have increased by more than inflation in periods of high commodity prices.[618] FTI disagrees claiming that costs would not increase more than inflation because gold prices are expected to decline during their forecast period. Navigant responds that between March 2008 and 2011 (when the mine becomes operational), gold prices were projected to increase in real terms and FTI's assumption that costs will be constant in real terms may be suspect in light of historical trends in mining costs.

390. In view of these remaining errors and unsound assumptions, FTI's valuation of the Minita reserves is not credible.

b) The Mineral Resources

391. FTI uses the DCF and Comparable Trading Multiple methods to value the mineral resources at Minita, Balsamo, South Minita, Nueva Esperanza, Coyotera, and Nance Dulce. Together, these resources comprise 75% of Pac Rim's damages.[619] FTI's methodology for valuing the mineral resources bears little resemblance to the methodology employed in its first report.

---

[616] Second FTI Expert Report, para. 7.22.

[617] Second Navigant Expert Report, para. 223.

[618] Second Navigant Expert Report, para. 183.

[619] Second Navigant Expert Report, paras. 11, 78, 81.

i. Integrated Reserves and Resources DCF Model

392. As a result of discussions between SRK and Pac Rim's management, FTI concluded it was appropriate to value a project based on double annual gold production to a level of 150,000 ounces of gold per year.[620] To create a model for this new scenario, FTI uses the PFS (conducted on only the Minita reserves) and makes seven significant assumptions to develop a DCF model that would forecast cash flows to be generated from the mineral resources. Based on these assumptions, FTI determined that the value of both the Minita reserves and the mineral resources combined was in a range of $204.2 million to $232.2 million.[621]

393. Significantly, these assumptions are not supported by any detailed, industry standard engineering studies that Claimant claims justifies using the DCF approach.[622] Indeed, FTI admits that "[t]hese assumptions have not been supported by a formal feasibility study and therefore are subject to estimation uncertainty."[623] Nevertheless, FTI inexplicably considers the methodology appropriate "for damages purposes."[624] In Navigant's view, the suggestion that a valuation "for damages purposes" need not be based on an analysis with the same level of rigor as valuations for other purposes is an improper distinction.[625]

394. FTI's approach also conflicts with the CIMVAL Standards and Guidelines on valuing mineral properties. According to CIMVAL, it is acceptable to use income approaches to value measured and indicated resources (subject to suitable adjustments for higher risk and

---

[620] Reply, para. 491.

[621] Second Navigant Expert Report, para. 94.

[622] Reply, para. 482.

[623] Second FTI Expert Report, para. 8.6.

[624] Second FTI Expert Report, para. 8.6.

[625] Second Navigant Expert Report, para. 107.

uncertainty) if mineral reserves are also present and mined ahead of the resources or if the resources are likely to be economically viable in the opinion of a Qualified Person.[626] Neither situation applies here. The standards also state that "the technical and related parameters used must be estimated or confirmed by one or more Qualified Persons" at a confidence level relative to a feasibility or pre-feasibility level study.[627] As FTI acknowledges, no such assessment has been performed by a Qualified Person.

395. In the case of inferred resources, CIMVAL cautions that the income approach should be used "with great care" and should not be used if inferred resources "account for all or are a dominant part of the total Mineral Resources."[628] Of the mineral resources claimed, Nance Dulce only has inferred resources and no reserves were defined in Balsamo, South Minita, Coyotera and Nueva Esperanza.[629] Thus, FTI's approach is unsupported by the valuation rules it purports to apply.

396. FTI's implementation of the DCF model is also faulty. Navigant identifies seven errors, unsound assumptions, and highly speculative estimates which causes FTI's valuation to be unreliable and highly overstated.

---

[626] CIMVAL Standards and Guidelines, Feb. 2003, at 24, G4.4-G.7 (FTI-25).

[627] CIMVAL Standards and Guidelines, Feb. 2003, at 24, G4.6 (FTI-25).

[628] CIMVAL Standards and Guidelines, Feb. 2003, at 25, G4.8 (FTI-25).

[629] Second Navigant Expert Report, para. 146.

- **Conversion ratio of Measured & Indicated Resources:** FTI assumes that measured and indicated resources will convert on a one for one basis to reserves. This assumption is contrary to industry practice. As recommended by the CIMVAL Standards, the higher risk and uncertainty of mineral resources should be reflected by some means (for example, a higher discount rate, reducing the quantum of resources, or delaying the timing of production).[630] Furthermore, FTI makes an error in applying the conversion rate by using the conversion of the Minita deposits in terms of tonnes of ore rather than ounces of gold equivalent.[631] If converted on this basis, the ratio was actually 85%.

- **Gold Production:** FTI's doubles production is based not on any mine plan or detailed assessment but rather on a self-assessment by Mr. Shrake.[632] Navigant also considers the assumption of a constant production rate is unrealistic in mining where production rates fluctuate (for example, rates are lower initially during ramp up and at the end of the mine's life when mineral reserves and resources are depleted).[633]

- **Commencement of Mine Development:** FTI assumes that construction would commence immediately on the valuation date and that production would commence by March 2010 (*i.e.*, in 2 years). Navigant notes that this is an aggressive timeline because Pac Rim had not completed a bankable feasibility study and would need to undertake significant additional detailed planning work to double production and add five other deposits to the project.[634]

- **Per Unit Operating Expenses:** FTI assumes that the per unit operating costs SRK determined for the Minita reserves would be the same across all deposits. However, extraction costs would likely vary between deposits because of differing gold grades and locations.[635] For deposits not located immediately adjacent to the Minita deposit, Pac Rim would have either needed to build new infrastructure or incur costs of transporting ore to the processing facility.

---

[630] CIMVAL Standards and Guidelines, Feb. 2003, at 24, G4.7 (FTI-25).

[631] Second Navigant Expert Report, para. 152.

[632] Second FTI Expert Report, para. 8.4.ii.

[633] Second Navigant Expert Report, para. 159.

[634] Second Navigant Expert Report, para. 161.

[635] Second Navigant Expert Report, paras. 164-168.

- **Capital Expenditure:** To forecast capital expenditures, FTI crudely estimates that these costs will be 60% greater under the expanded scenario.[636] It relies on a 1959 article written about industrial plants for this "accepted industry guideline." In Navigant's view, such an estimate is woefully inadequate to support such a significant assumption, especially since the capital expenditures are not limited to expanding just the mining operation at Minita, but instead contemplate new mining at five distinct deposits.[637] As such, FTI's approach would underestimate the costs that would have to be distinctly incurred at each of the six deposits.

- **Weighted Average Cost of Capital (WACC):** FTI uses the same WACC used to calculate the value of the Minita reserves even though the resources are less certain and more risky than the Minita reserves. Navigant concludes that this leads to an overstatement of value.[638]

- **DCF Model for Minita Reserves:** Because FTI's DCF valuation for the mineral resources is based on the same DCF model for the Minita reserves, Navigant notes that FTI repeats the same significant errors identified in their first report.[639]

397. Although FTI could have used the DCF calculation directly, it takes an unnecessary step to calculate the multiple (*i.e.*, value per ounce of gold reserves and resources) implied by the DCF valuation and then applies that multiple to value the mineral resources. Navigant observes:

> FTI's DCF valuation of all of the Mineral Deposits (including both resources and reserves) is approximately $218 million, while FTI opines (via the circular method noted above) that the Mineral Deposits have a total value of over $260 million, a premium of nearly 20 percent.[640]

Thus, FTI's convoluted approach produces a higher valuation than if it had used the DCF calculation alone.

---

[636] SRK Consulting Technical Memorandum, Apr. 10, 2014 (FTI R26).

[637] Second Navigant Expert Report, para. 173.

[638] Second Navigant Expert Report, para. 176.

[639] Second Navigant Expert Report, para. 177.

[640] Second Navigant Expert Report, para. 116.

398. This secondary calculation also results in the odd conclusion that the Minita reserves are less valuable per ounce than the Mineral Resources.[641] As Navigant notes: "This conclusion is clearly incorrect because mineral reserves have been proven to be economically viable, while mineral resources have not."[642]

399. Accordingly, FTI's Integrated DCF Model is based on highly speculative assumptions because the expanded project was not subject to any mine planning, economic analyses, or detailed engineering. Rather, the model is based on the PFS prepared by SRK for the Minita reserves. None of those technical parameters can be used to forecast the cash flow from mining the mineral resources at the six deposits. In light of these circumstances, Navigant concludes that the DCF approach cannot be used to quantify the value of the mineral resources.[643] Navigant further states:

> In our view, FTI's support and reasoning for the key assumptions described above are inadequate. Indeed, many of the assumptions are self-described "crude estimates," over simplifications, or conjecture.[644]
>
> We are surprised that Claimant is advancing a damages claim for hundreds of millions of dollars based on such an unsupported and primitive analysis.[645]

Claimant has therefore failed to discharge its duty to provide the Tribunal with a reliable quantification of the value of mineral resources.

---

[641] Second FTI Expert Report, para. 9.18.

[642] Second Navigant Expert Report, para. 117.

[643] Second Navigant Expert Report, paras. 134, 178.

[644] Second Navigant Expert Report, para. 136.

[645] Second Navigant Expert Report, para. 39.

ii. Comparable Trading Multiples Approach

400. The second valuation method employed is the Comparable Trading Multiples Approach. This was one of the market-based approaches that FTI used in its first report. The other approach, the Comparable Transactions Approach, was replaced with Integrated Reserves and Resources DCF Model. Notably, FTI now contends that the seven transactions used in its first report (and which it had assigned an initial weighting of 90%) are no longer comparable[646] and this methodology "lacks an adequate level of precision."[647]

401. In its Comparable Trading Multiples Approach (which uses the publicly traded price of a comparable company to estimate the value of another company) FTI identified just one comparable company: Andean Resources. FTI's original weighting of 10% for this methodology reflected the low reliability of the sample size and that the multiple implied may have been an outlier.[648] Despite its continued reliance on the same single company, FTI has significantly raised the weight of this approach to 25%.

402. A quarter of FTI's valuation of the mineral resources relies on Andean Resources' Cerro Negro gold deposit in Argentina. In its first report, Navigant explained that Andean Resources was not comparable because as of the valuation date: (1) Cerro Negro did not have a high gold grade; (2) a PFS had been completed for Cerro Negro but none had been done for the mineral resources; (3) favorable drilling results had been announced for Cerro Negro in the months leading up to the valuation date; and (4) FTI applied a 30% control premium.[649]

---

[646] Second FTI Expert Report, para. 2.2.

[647] Second FTI Expert Report, para. 6.14.

[648] First FTI Expert Report, paras. 6.127-6.128.

[649] First Navigant Expert Report, paras. 152-157; Second Navigant Expert Report, para. 179.

403. FTI's second report places an even greater weight on the Comparable Publicly Traded Company Approach. In this report, FTI calculates a range of multiples based on two different resource estimates to account for the market's expectation of a significant upside in Cerro Negro's resource estimate.[650] In implementing this approach, FTI comes up with a valuation multiple range of $254 – 403/oz of gold-equivalent resources for the El Dorado resources.[651] Navigant points out that this represents an extremely large range of potential values of the Mineral Resources, which in and of itself highlights the unreliability of FTI's methodology.[652]

404. As a further check, Navigant calculated resource multiples for Pac Rim and Andean Resources as of August 2006 to eliminate any possible argument regarding the effects of the alleged measures. It found that the Andean Resources multiple was almost three times higher than that of Pacific Rim, despite having a much lower average grade, even in 2006.[653] This provides clear evidence that the market was viewing the Cerro Negro project much more favorably even before it had upgraded its resource and gold grade estimates. Thus, Andean Resources was not comparable in 2006 and was even less comparable in 2008.

405. In conclusion, the bulk of Claimant's damages claim is completely unreliable. FTI's valuation of the mineral resources, comprising of 75% of its overall valuation, is based on a massive range of possible values. Under these two approaches, the mineral resources are valued at a per ounce of gold equivalent resources of between $134 (Integrated DCF Model) and

---

[650] Second FTI Expert Report, para. 6.37.

[651] Second FTI Expert Report, Figure 24.

[652] Second Navigant Expert Report, para. 184.

[653] Second Navigant Expert Report, para. 187.

$403 (Comparable Trading Multiples Approach).[654] This range of over 300% highlights the inherent unreliability in FTI's methodology.[655]

c) Exploration Properties

406. In valuing the exploration properties, FTI maintains the same approach initially adopted in its first report. Specifically, FTI identifies seven transactions using the Comparable Transaction Approach that involve allegedly comparable early exploration properties in Latin America and calculates a valuation multiple of US$ per hectare for each transaction. It then uses the mean multiple from these transactions to value Pac Rim's Early Exploration Areas at $1.8 million.

407. Navigant's first report noted that Claimant's range of comparable transactions between $68 and $1,507 reflected a spread of over 2,000%.[656] And even after the outliers were excluded the range was approximately 100%. FTI's response was that this range was reasonable "given the variability of the transactions examined."[657] Nevertheless, it appears that FTI attempted to conduct another valuation based on amounts invested in the exploration projects. However, FTI states that it has requested but has not been provided a detailed accounting of costs incurred for the Santa Rita and Zamora/Cerro Colorado projects.[658]

---

[654] Second FTI Expert Report, Figure 24.

[655] Second Navigant Expert Report, para. 118.

[656] First Navigant Expert Report, para. 161.

[657] Second FTI Expert Report, para. 6.50.

[658] Second FTI Expert Report, paras. 6.51-6.52.

408. In light of these circumstances, Navigant maintains its view that:

> [T]he Cost Approach is the only reliable basis to value the Early Exploration Areas. In our view, a range of potential values of over 100 percent is not reasonable – rather this indicates that FTI's methodology is simply not reliable.[659]

5. FTI improperly rejects other evidence of value

409. The valuation experts disagree on the relevance of market evidence of PRMC's value. The first source comes from PRMC's own publicly traded value on average over 30 days prior to the valuation date. The second data point relates to a large private placement transaction involving a 12% stake in PRMC's shares on February 29, 2008 (*i.e.*, less than two weeks before the valuation date). These establish a range of value for the mineral deposits and early exploration properties between $88 million and $86.7 million, respectively. According to Navigant, this objective market value provides evidence to show that FTI's valuation is substantially overstated.

410. Not only does FTI reject this evidence, it claims that Navigant has miscalculated PRMC's enterprise value. Navigant shows that FTI's arguments are baseless because among other things, it ignores a cash influx of $7.2 million from the private placement and uses hindsight information to establish the value of Denton-Rawhide.[660] After a minor adjustment to net debt, PRMC's market value is $88 million, slightly lower than it calculated in the first report.[661]

411. Second, FTI argues that the large gap between the market value of PRMC and its own valuation can be explained by a combination of a minority discount, the illiquidity of

---

[659] Second Navigant Expert Report, para. 234.

[660] Second Navigant Expert Report, paras. 76-85.

[661] Second Navigant Expert Report, para. 32.

PRMC's shares, and the impact of the alleged measures on Claimant's investment. Navigant shows that this is wrong:

- Navigant reviews a wide body of literature that affirms there is no basis to conclude that the publicly traded price of PRMC's shares was depressed due to a minority discount.[662]

- Navigant explains that FTI has confused illiquidity with lower trading volumes by comparing PRMC to industry leaders such as Goldcorp, Barrick Gold and Kinross Gold. In fact, the average trading volume of PRMC shares was 107,000 shares per day.[663] Moreover, Navigant points out the contradiction between FTI's acceptance of the market value of Andean Resources and rejection of PRMC's value even though it claims that both company's shares are illiquid.[664]

- Navigant demonstrates that PRMC's price per share declined from March 2007 to March 2008, in part, due to dilution of the shareholding caused by the issuance of new shares.[665] And the entire decline in share price observed by FTI was actually caused by changes in the exchange rate, not any reduction in the value of PRMC's assets.[666] Navigant further shows that the total equity value of PRMC actually increased during the same period by approximately 8%.[667]

412. Even if FTI's proposed changes were accepted, its valuation conclusion of $262.1 million would still be more than twice as high as the value that FTI admits was placed on the Mineral Deposits by the market (ranging from $112.6 million to $120.8 million).[668] Navigant therefore concludes that the only possible explanation for the huge divergence is that FTI's valuation of the mineral deposits is greatly overstated.[669]

---

[662] Second Navigant Expert Report, paras. 86-92.

[663] Second Navigant Expert Report, para. 99.

[664] Second Navigant Expert Report, para. 102.

[665] Second Navigant Expert Report, para. 106.

[666] Second Navigant Expert Report, para. 107.

[667] Second Navigant Expert Report, para. 108.

[668] Second Navigant Expert Report, para. 33.

[669] Second Navigant Expert Report, para. 67.

413. Notwithstanding, the market value of PRMC may even overstate the value of the company. As Navigant observes: "PRMC did not appear to have publicly disclosed the legal uncertainty affecting Claimant's ownership interests in the Mineral Deposits, which would have caused the market to significantly overvalue PRMC's assets."[670] Furthermore, Navigant notes that "Claimant does not appear to dispute that the general market was unaware of these potential issues."[671] It therefore reaffirms its view that based on El Salvador's factual and legal positions: "we would expect the fair market value of the Mineral Deposits to be a small fraction of the publicly traded value."[672]

414. Given FTI's error-ridden and speculative valuation, it is clear that Claimant has failed to discharge its burden to prove the quantification of its alleged damages.

E. Claimant is not entitled to interest

415. The Claimant demands an award of interest on the principal sum of damages claimed amounting to $284.9 million from the valuation date until the date of payment based on average 12-month LIBOR rates compounded annually. According to FTI's revised calculation, pre-award interest alone increases Claimant's damages claim by $21.9 million.[673]

416. El Salvador demonstrated, contrary to Claimant's assumption, that international law does not establish an automatic right to interest.[674] In its Reply, Claimant asserts "an award of interest would be necessary to ensure full reparation of Claimant's losses."[675] The only

---

[670] Second Navigant Expert Report, para. 249.

[671] Second Navigant Expert Report, para. 251.

[672] Second Navigant Expert Report, para. 254.

[673] Second FTI Expert Report, Figure 2.

[674] Counter-Memorial, para. 417. *See, e.g.*, ILC Draft Articles, Art. 38 (RL-79(bis)): "Interest on any principle sum due under this chapter shall be payable when necessary in order to ensure full reparation," (emphasis added).

[675] Reply, para. 501.

explanation offered for this necessity is that "Respondent would be unjustly enriched with the benefit of holding the damages amount awarded over the period."[676] There are several problems with this logic. In the first place, Claimant has not shown how El Salvador has financially benefited from Pac Rim's failure to develop an operating mine at El Dorado. To the contrary, the area remains untouched and there are no plans to commercially exploit these minerals. Second, the State owns the minerals in the ground so it cannot be unjustly enriched by rights it naturally possesses. Third, the purpose of interest is to compensate a claimant for its losses (*i.e.*, the harm caused by a breach), and not the respondent's purported gains. Thus, Pac Rim's claim for interest is legally unfounded and remains unproven.

417. Claimant also challenges El Salvador's position that if interest is awarded, only simple interest may be awarded. Examining investment arbitration awards from a one-year period (*i.e.*, 2012-2013), Claimant finds that three out of eleven tribunals awarded interest on a compound basis. In its view, this establishes "the clear and accepted practice in investment arbitration in favor or [sic] compound interest."[677] Not only is this assertion misleading, it is also wrong.

418. To begin, Claimant's reliance on arbitral awards decided under bilateral investment treaties to support its case (brought under El Salvador's Investment Law) is questionable, to say the least. Without any analysis of the underlying rules or facts, these decisions are of limited value. Moreover, Claimant has not established whether it would be entitled to interest under Salvadoran law, the applicable law in this case.

---

[676] Reply, para. 501.

[677] Reply, para. 501.

419. Second, El Salvador does not dispute that there are instances when compound interest has been awarded in international treaty arbitrations. However, this practice has not been as uniform as the Claimant attempts to portray. In fact, the practice of investment treaty tribunals has varied considerably.

420. This divergence in the case law was recognized in the decision of *Rosinvest v. Russia*, where the tribunal observed:

> While recent investment treaty arbitrations have awarded compound interest to claimants, the Tribunal notes that this practice is by no means unanimous. If, as above, the Tribunal finds it should award interest at a normal commercial rate, this does not mean the Tribunal is bound to award compound interest. It must consider the damage done and nature of Claimant's investment in its assessment of the interest due.[678]

Thus, the relevant inquiry is whether there are any special circumstances justifying the award of compound interest.[679]

421. The fact that some investment treaty tribunals deemed it appropriate to award compound interest is no reason to assume it should be applied in this case. Indeed, El Salvador has cited to a number of cases that applied simple interest between 1922 and 2013.[680] This

---

[678] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, Sept. 12, 2010, para. 689 (RL-183) (emphasis added).

[679] In his Third Report on State Responsibility, Professor Crawford summarized the practice of international courts and tribunals described in the preceding paragraphs and cautioned against the indiscriminate application of compound interest: "although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could results in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed." *See* ILC, Third Report on State Responsibility, James Crawford Special Rapporteur, Addendum (A/CN.4/507/Add.1), 15 June 2000, at 50 (**Authority RL-209**).

[680] *See, e.g.*, *Case of the S.S. Wimbledon*, 1923 P.C.I.J. (Series A) No. 1 (Aug. 17) at 32 (RL-174); *Norwegian Shipowners' Claims* (*Norway v. United States of America*), PCA Case I U.N.R.I.A.A. 307, Award, Oct. 13, 1922, at 341 (RL-175); *British Claims in the Spanish Zone of Morocco (Spain v. United Kingdom)*, PCA Case II U.N.R.I.A.A. 615, Award, May 1, 1925, at 650 (RL-176); *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat*, Award No. 314-24-1, 16 Iran-US Claims Tribunal Rep. 112 (1987), para. 370 (RL-177);

substantial body of case law cannot reasonably be characterized as an "exception", as Claimant now seeks to do.

422. Furthermore, one year of case law can hardly represent "an overwhelming trend among investment tribunals" to award compound interest.[681] However, close examination of Claimant's analysis of awards in 2012-13 casts serious doubts on its overall conclusion. Claimant appears to suggest that it has conducted a comprehensive review of all awards rendered during this period citing to awards between November 30, 2011 and December 19, 2013. El Salvador has found at least two publicly available cases from this period (along with another decision from 2014) in which simple interest was rendered.[682] While the reasons for Pac Rim's

---

McCollough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone, The National Iranian Oil Company and Bank Markazi, Award No. 225-89-3, 11 Iran-US Claims Tribunal Rep. 3 (1986), para. 114 (RL-178); *Sylvania Technical Systems Inc. v. The Government of the Islamic Republic of Iran*, Award No. 180-64-1, 8 Iran-US Claims Tribunal Rep. 298 (1985) at 15 (RL-179); *R.J. Reynolds Tobacco Company v. The Government of the Islamic Republic of Iran and Iranian Tobacco Company (ITC)*, Award No. 145-35-3, 7 Iran-US Claims Tribunal Rep. 181 (1984) at 8 (RL-180); *Anaconda-Iran Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Compan*y, Interlocutory Award, Award No. ITL 65-167-3, 13 Iran-US Claims Tribunal Rep. 199 (1986), para. 142 (RL-181); *International Systems & Controls Corporation v. National Iranian Gas Company, National Iranian Oil Company, the Islamic Republic of Iran*, Award No. 464-494-3, 24 Iran-US Claims Tribunal Rep. 47 (1990), para. 123 (RL-182); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, para. 633(h) (RL-164); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Final Award, Sept. 12, 2010, para. 692 (RL-183); *SAIPEM S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, June 30, 2009, para. 212 (RL-184); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008, para. 491 (RL-185); *Desert Line LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, Feb. 2008, para. 298 (RL-186); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, Nov. 21, 2007, para. 300 (RL-187); *Occidental Exploration and Production Company (OPEC) v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, para. 217 (RL-188); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, para. 647 (RL-189); *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002, para. 211 (RL-144); *Aucoven v. Venezuela*, Award, paras. 387, 397 (RL-168); *SPP v. Egypt*, para. 257 (RL-166).

[681] Reply, para. 501.

[682] *See, e.g., Abengoa S.A. v. Estados Unidos Mexicanos*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013, para. 797 (**Authority RL-210**); *AHS Niger et Menzies Middle East and Africa v. La République du Niger*, ICSID Case No. ARB/11/11, Award, June 15, 2013, paras. 157, 167(5) (**Authority RL-211**); *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. La Républic Démocratique du Congo*, ICSID Case No. 10/4, Award, Feb. 7, 2014, paras. 633, 664(iv) (**Authority RL-212**).

exclusion of these decision are unknown, El Salvador respectfully submits that its legal conclusions should be rejected.

423. Third, there is yet another good reason for this Tribunal to take a critical look at Claimant's allegation regarding the so-called trend towards awarding compound interest. Brower and Sharpe have strongly argued that this recent phenomenon is premised on inappropriate authorities that have not been adequately scrutinized by international tribunals.[683] The authors posit that if "arbitral tribunals are to grant compound interest in the face of still-enduring precedent to the contrary, however, they must fully justify this more modern approach and clearly articulate the applicable rule."[684]

424. Fourth, it is further suggested that El Salvador's position implies that "Claimant would have alternatively invested the awarded monies in a non-interest bearing [] account."[685] It is unclear how Claimant arrives at this conclusion (and indeed, it provides no cites for this proposition). More importantly, it should be noted that Claimant has not justified its suggested 12-month LIBOR rate despite recent allegations of rate-fixing by banks.[686] Claimant has not explained why this rate is appropriate (or indeed reliable) and it has suggested no alternative.

425. Thus, Claimant has failed to establish that it is necessary to award pre-judgment interest, that LIBOR is the appropriate rate, and that special circumstances justify the application of compound interest. Under these circumstances, there is no legal basis to award pre-judgment interest.

---

[683] Charles N. Brower & Jeremy K. Sharpe, "*Awards of Compound Interest in International Arbitration: The Aminoil Non-Precedent*," 3 Transnational Dispute Management 5 (2006) (**Authority RL-213**).

[684] Charles N. Brower and Jeremy K. Sharpe, "*Awards of Compound Interest in International Arbitration: The Aminoil Non-Precedent*," 3 Transnational Dispute Management 5 (2006) at 160 (RL-213).

[685] Reply, para. 501.

[686] *The LIBOR Scandal: The Rotten Heart of Finance*, The Economist, Jul. 7, 2012 (**Exhibit R-166**).

426. To the extent that Claimant seeks post-award interest, such a request is premature. Claimant has not established there is any risk of default of payment by El Salvador. Nor would such an assumption be appropriate. As the Permanent Court of International Justice observed in the *Wimbledon case*: "The Court does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency."[687]

427. Therefore, El Salvador respectfully submits that Claimant is not entitled to compensation or payment of pre- or post-judgment interest.

VII. JURISDICTION

A. Pac Rim's claims regarding mining rights belong exclusively before the Salvadoran courts

428. As El Salvador explained in its Counter-Memorial, the Tribunal has no jurisdiction to hear Claimant's claims because jurisdiction over disputes raised by the holders of mining rights is exclusively reserved for Salvadoran courts.[688] El Salvador's Investment Law—the only possible jurisdictional foundation for this arbitration—establishes that investments regarding the exploitation of the subsoil are subject to limitations imposed by the Salvadoran Constitution and the Mining Law.[689] The Mining Law, in turn, establishes that all mining license

---

[687] *Case of the S.S. Wimbledon*, PCA (1923) at 32 (RL-174) (emphasis added).

[688] Counter-Memorial, paras. 425-433.

[689] Investment Law, Art. 7 (RL-9(bis)) ("De conformidad a lo establecido en la Constitución de la República y en las leyes secundarias, serán limitadas las inversiones en las actividades y términos siguientes: . . . b) El subsuelo pertenece al Estado, el cual podrá otorgar concesiones para su explotación.") ["In accordance with the provisions of the Constitution of the Republic and secondary laws, investments will be limited in the following activities and terms: . . . (b) The subsoil belongs to the State, which may grant concessions for its exploitation."]. *See also* First Expert Report of José Roberto Tercero Zamora on the El Salvador Investment Law, Dec. 9, 2013 ("First Tercero Expert Report"), paras. 63-82; Second Tercero Expert Report, paras. 33-42. As El Salvador explained in its Counter-Memorial, the supremacy of the Mining Law over the Investment Law and other laws for matters related to mining is also established by Article 4 of the Salvadoran Civil Code and Article 72 of the Mining Law. Counter-Memorial, para. 429.

or concession holders are subject to the courts of El Salvador.[690] Thus, as shown by Salvadoran law expert José Roberto Tercero, to the extent a dispute arises under the Investment Law in relation to an exploration license or exploitation concession related to mining, that dispute is referred through Article 7.b) of the Investment Law and Article 7 of the Mining Law to the exclusive jurisdiction of the courts of El Salvador.[691] This means that any consent to international arbitration in Article 15 of the Investment Law does not extend to Claimant's disputes related to mining rights. Therefore, the requisite State consent for the Tribunal to hear Claimant's claims is absent.

429. Claimant is adamant in its Reply that this is not so, but is unable to muster a single legal authority to buttress its arguments.[692] Claimant attempts to dismiss El Salvador's jurisdictional objection on the basis that the objection "is based on the mistaken assertion that Claimant is raising claims before this Tribunal for a breach of a mining concession contract, or to request the issuance of a license or concession or [sic] obtain some other form of administrative relief. This is plainly not true."[693] Claimant adds that since it is asking the Tribunal to "award it damages for the losses it has suffered as a result of Respondent's arbitrary and illegal treatment and expropriation of Pac Rim's investments in El Salvador," its claims "do not arise under the Amended Mining Law."[694]

---

[690] Mining Law, Art. 7 ((bis)) ("Los titulares de Licencias ó concesiones Mineras, sean nacionales ó extranjeros, quedan sujetos a las leyes, Tribunales y Autoridades de la República, no pudiendo de ninguna forma recurrir a reclamaciones por la vía de protección diplomática . . .") ["The Mining License or Concession Holders, be they national or foreign, are subject to the laws, Courts and Authorities of the Republic, and are absolutely precluded from resorting to claims in the diplomatic protection venue . . ."].

[691] First Tercero Expert Report, paras. 70-82; Second Tercero Expert Report, paras. 33-42.

[692] Reply, paras. 439-441.

[693] Reply, para. 439.

[694] Reply, para. 440.

430. Thus Claimant attempts to escape the legal effect of Article 7 of the Mining Law by limiting the Salvadoran courts' exclusive jurisdiction to claims for breach of a concession contract and requests for the issuance of a license or concession. But the Mining Law itself contains no such limitation. It is drafted to create exclusive jurisdiction over all disputes involving holders of mining rights. Article 7 of the Mining Law states broadly that "Mining License or Concession Holders, be they national or foreign, are subject to the laws, Courts and Authorities of the Republic . . ."[695] Therefore, it squarely applies to Claimant and any dispute arising out of its status as a license holder.

431. Claimant is complaining of not receiving a concession to which it claims it was entitled under the Mining Law as a holder of a mining exploration license who found mineral deposits, and argues that its "right" to a concession was expropriated.[696] Because Claimant's case before this Tribunal concerns its rights and treatment as a mining exploration license holder in El Salvador, it falls squarely within the purview of Article 7 of the Mining Law, and thus the jurisdiction of Salvadoran courts.

432. The Mining Law governed the rights of mining license and concession holders in 2002, when Claimant became a mining license holder in El Salvador. At no point since then did El Salvador modify this grant of exclusive jurisdiction to Salvadoran courts for claims under the Investment Law by consenting to the jurisdiction of an international tribunal for claims raised by mining license holders. As recognized by respected international authorities, without such a modification or other manifestation of consent to arbitration, the forum elected by El Salvador

---

[695] Mining Law (RL-7(bis)) ("Los titulares de Licencias ó concesiones Mineras, sean nacionales ó extranjeros, quedan sujetos a las leyes, Tribunales y Autoridades de la República . . .").

[696] Reply, paras. 439-440.

through its Investment and Mining Laws must be given effect.[697] A recent ICSID award explained that "an arbitration agreement, such as would provide for the Centre to have jurisdiction under Article 25 of the ICSID Convention, can only come into existence through a qualifying investor's acceptance of a host state's standing offer as made (*i.e.*, under its terms and conditions)."[698]

433. In the present case, no agreement between Claimant and El Salvador nor subsequent Salvadoran law modified the forum selected for claims by mining concession holders pursuant to the Investment and Mining Laws. Since Claimant has failed to establish that El Salvador has consented to the Tribunal's jurisdiction over such claims, the Tribunal should dismiss the claims for lack of jurisdiction.

434. Contrary to what Claimant argues, El Salvador is not trying to revoke any consent that may have been expressed in the Investment Law.[699] Rather, El Salvador is requesting that this Tribunal apply a condition to consent included in Article 7.b) of the Investment Law and Article 7 of the Mining Law that existed at the time Claimant entered El Salvador and at all times since. Consent to ICSID arbitration, to the extent it may have existed in the Investment Law prior to its amendment in 2013, was necessarily limited by any conditions and limitations included in the Investment Law. Those conditions and limitations in the Investment Law were an integral part of the alleged consent.

435. There is no requirement that conditions and limitations to consent must be included in the same article allegedly expressing consent, or that they must expressly state that

---

[697] Counter-Memorial, para. 431 (citing Christopher Schreuer, *Consent to Arbitration in* The Oxford Handbook of International Investment Law 830, 831 (P. Muchlinski et al. eds., 2d ed. 2009) (CL-40)).

[698] *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, July 2, 2013, para. 6.2.1 (**Authority RL-214**) (emphasis added).

[699] Reply, para. 441.

they are conditions and limitations to consent. For example, in *Inceysa Vallisoletana v. El Salvador*, another ICSID arbitration where the claimant also invoked ICSID jurisdiction under the Investment Law of El Salvador, the tribunal found that there was no jurisdiction under article 15 where Inceysa's investment did not fulfill a condition to consent because the investment "did not meet the condition of legality necessary to fall within the scope and protection of that law."[700] The condition of legality that was not met in the *Inceysa* arbitration was not included in Article 15 of the Investment Law. It was found in the Constitution, the Foreigner's Law, and in Article 14 of the Investment Law.[701] Although there was nothing expressly stating that legality of the investment was a condition to consent, the tribunal held that it was an implied condition.

436. Likewise, Pac Rim cannot pick and choose which provisions of the Investment Law this Tribunal should apply and which ones it should ignore. Article 15 of the Investment Law must be read and understood in the light of all other applicable articles of the Investment Law, including Article 7.b), which expressly limits investments related to the subsoil by referring them to the special provisions of the Constitution and the Mining Law. The Mining Law, in turn, includes an explicit provision regarding the exclusive jurisdiction of the Salvadoran courts to resolve mining disputes such as this one. Therefore, this dispute belongs before the Salvadoran courts and there is no consent on behalf of El Salvador for this Tribunal to decide this dispute.

---

[700] *Inceysa v. El Salvador*, para. 332 (RL-30).

[701] *Inceysa v. El Salvador*, paras. 258-263 (RL-30).

B. Pac Rim's claims regarding its application for the El Dorado concession are time-barred

437. As El Salvador explained in the Counter-Memorial, Claimant's claims are subject to a three-year statute of limitations under Salvadoran law and the claims presented in this arbitration are therefore time-barred.[702] Claimant alleges that the statute of limitations imposed by Salvadoran law does not apply to this dispute because this is an international arbitration instead of a court proceeding. In addition, Claimant argues that this dispute is not about a missed MARN deadline in 2004 and thus the statute of limitations cannot refer to that event.[703] Claimant's arguments are misguided and incorrect.

438. First, Claimant cannot escape the fact that this arbitration is no longer an arbitration brought under an international treaty. It is an arbitration brought exclusively under a domestic law of El Salvador, the Investment Law, which includes an express obligation for foreign investors to comply with the laws of El Salvador.[704] Therefore, Salvadoran law is the applicable law. The fact that Claimant brought its dispute invoking Salvadoran law to an international tribunal does not change the applicable law.

439. As explained in El Salvador's Counter-Memorial, the principle of equality between domestic investors and foreign investors dictates that unless there is a specific distinction in the treatment between the two groups of investors, the conditions for foreign investors must be exactly the same as for domestic investors. All domestic investors are required to bring their claims within the statute of limitations under El Salvador's laws, and foreign investors are therefore subject to the same conditions to exercise their rights, regardless of

---

[702] Counter-Memorial, paras. 434-440.

[703] Reply, paras. 436-437.

[704] Investment Law, Art. 14 (RL-9(bis)).

whether they choose to present their claims before domestic courts or before an international tribunal.

440. In this case, the statute of limitations for extra-contractual responsibility is three years, in accordance with Article 2083 of the Salvadoran Civil Code.[705] The time limit starts from the occurrence of the alleged wrongful act and does not require actual knowledge of the alleged breach.[706] Claimant cannot evade the applicable statute of limitations by bringing its Salvadoran Investment Law claims to an ICSID tribunal.

441. Second, El Salvador is not arguing that the fact that MARN missed the first 60-day deadline is the entire dispute, but it is an action that triggered the running of the statute of limitations. As explained in paragraphs 435-440 of El Salvador's Counter-Memorial, the act that allegedly harmed Claimant—the non-issuance of the environmental permit—had occurred in December 2004. That is when Pac Rim's right to initiate a claim was born and when the three-year statute of limitations began to run.

442. As explained by El Salvador's expert Carlos Peñate, the legal effect of the application of the statute of limitations is that the would-be claimant loses the right to initiate an action, with prejudice.[707] In this case, Claimant lost the right to bring its claim in December 2007.[708] Claimant did not start this arbitration until April 2009.

---

[705] Civil Code, Art. 2083 (RL-123(bis)).

[706] Counter-Memorial, paras. 434-435. *See also* Peñate Expert Report, paras. 54-58.

[707] Peñate Expert Report, paras. 51-53.

[708] Peñate Expert Report, paras. 66.

VIII. CONCLUSION

443. Pac Rim has no valid claims under the Salvadoran Investment Law and is not entitled to any compensation.

444. In Section II, El Salvador set forth the key facts of this case that Claimant has sought to evade because they demonstrate that all of Pac Rim's alleged claims lack any basis. El Salvador described, mostly relying on Claimant's own documents, that 1) Pac Rim entered El Salvador in 2002 with hopes of making "extraordinary profits;" 2) Pac Rim acquired the El Dorado licenses knowing that they would definitively expire on January 1, 2005 and knowing the Mining Law requirements for an exploitation concession application; 3) when the licenses were set to expire, Pac Rim did not want to develop just one small mine but instead wanted the largest exploitation concession possible to continue exploring in contravention of the Mining Law; 4) Pac Rim was repeatedly told that it needed to have ownership or authorization for the entire land surface of the requested concession, but submitted documentation for only a small fraction of the requested area; 5) Pac Rim knew that its Pre-Feasibility Study, which was not the feasibility study required by Salvadoran law, related to only one small mine and was "rendered extinct" within months of being submitted, but Pac Rim did not ever submit the required feasibility study; and 6) based on the serious concerns of the Ministry of Environment and local communities about metallic mining in El Salvador discussed throughout 2006, the Government decided a Strategic Environmental Evaluation was necessary in 2007 and immediately informed all mining companies, including Pac Rim, of this.

445. The facts demonstrate that Pac Rim—because of its own decisions and not due to anything the Government did or did not do—failed to meet three independent requirements for its exploitation concession application to even be admitted. Then, instead of changing its application, Pac Rim decided to lobby the Government and wage an expensive public relations

campaign to convince the Salvadoran people and the Government to support its project despite its failure to comply with the law. All of this happened before Claimant hired Crowell & Moring in 2007 and moved a holding company on paper to the United States to gain access to ICSID arbitration under CAFTA.

446. In Section III, El Salvador confirmed that Pac Rim, having failed to meet three independent requirements for its concession application, could not receive the requested concession under the law. Claimant has not even suggested that El Salvador is in any way responsible for Claimant's failure to meet the legal requirements for the requested concession. Rather, Pac Rim argues, without legal basis, that El Salvador should have ignored or changed its laws to accommodate Pac Rim. As El Salvador had no legal obligation to change or ignore its laws for Pac Rim, Pac Rim's claims of entitlement to an exploitation concession utterly lack merit. Pac Rim's application for an exploitation concession at El Dorado was, rightfully, never admitted.

447. El Salvador further demonstrated that Pac Rim's additional claims are similarly lacking merit. With regard to Zamora/Cerro Colorado, Claimant has not even shown it ever had any rights to these areas, much less stated a claim. Claimant's claims related to the Guaco, Huacuco, and Pueblos licenses are without merit because Pac Rim was prohibited by law from obtaining those licenses that overlapped with the area of the expired El Dorado licenses. For Santa Rita, an area for which Pac Rim obtained an exploration license, failed to explore due to local protest, and then allowed the license to expire without requesting renewal, Claimant has no rights and has not made any claim of breach by El Salvador.

448. In Section IV, El Salvador explained that concerns about metallic mining in El Salvador came from the Ministry of Environment and local communities, with no political motivation. El Salvador's witnesses and experts confirm that, notwithstanding Pac Rim's baseless attacks that anyone opposed to metallic mining must be paid-off or ignorant, the concerns were significant and justified given circumstances in the country. El Salvador further described how the Government took steps beginning in 2007 to start the Strategic Environmental Evaluation, rendering Claimant's allegation that the EAE is part of a post hoc attempt to defend El Salvador's actions impossible. El Salvador also confirmed that the Ministry had specific unresolved concerns about Pac Rim's EIA, including that 1) the EIA studied the impact of one small mine in the entire requested area without considering the possible impacts of other mines Pac Rim wanted to exploit once it had the concession; 2) the EIA did not include the detailed Environmental Management Plan or Closure Plan that the Ministry requested; and 3) Pac Rim failed to obtain social license to operate in the communities that would be affected.

449. In Section V, El Salvador showed that Claimant has not met its burden of proving that alleged actions or omissions by El Salvador have been in breach of El Salvador's obligations under the Investment Law. Claimant has barely even mentioned the articles of the Investment Law on which it allegedly bases its claims. In addition, even if an international law standard for expropriation was applicable (which it is not), Claimant has not shown either that it had the rights it claims to have had or that El Salvador's bona fide regulatory conduct caused Claimant harm in violation of any allegedly applicable international standard.

450. In Section VI, El Salvador confirmed that Pac Rim is not entitled to any compensation and, in any event, its revised quantum calculation continues to be fundamentally flawed.

451. Thus, Pac Rim's claims lack any basis in fact or law. Claimant had no rights on which to base its claims, El Salvador did not breach any obligations to Claimant, and El Salvador did not cause any of Claimant's alleged losses. Claimant has not carried its burden of proving otherwise and its claims must be dismissed in their entirety.

IX. COSTS

452. In the Counter-Memorial, El Salvador demonstrated that Pac Rim's conduct in this arbitration justifies an order for Pac Rim to reimburse El Salvador for all of its legal expenses and costs.[709] Over more than five years and throughout the three phases of this arbitration, El Salvador has had to respond to Pac Rim's ever-changing story and legal arguments. In the Counter-Memorial, El Salvador highlighted just three of the more egregious examples:

- Pac Rim's "perfected right" to an exploitation concession, which led to a promise in the Preliminary Objection phase to rebut the factual allegation that it had not complied with the legal requirements. Pac Rim, far from presenting evidence and experts to testify to its legal compliance, now accepts that it did not meet the land surface ownership or authorization requirement, but alleges (without any support) that there was an agreement that its non-compliance would not prevent it from obtaining the concession.

- Pac Rim's change of nationality in December 2007 to gain access to ICSID arbitration and its insistence that no dispute with El Salvador was even foreseeable until after March 2008, which led to the promise in the Jurisdiction phase that "the relevant measure alleged by the Claimant will necessarily focus on unlawful acts or omissions under CAFTA that allegedly took place not earlier than March 2008."[710] Having made it past

---

[709] Counter-Memorial, paras. 452-470.

[710] *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on Jurisdiction, June 1, 2012, para. 3.37. El Salvador notes that Claimant was "very clear" that the timing of the alleged breach and its damages claims were the same for both its CAFTA and Investment Law claims. *Pac Rim Cayman LLC v. The Republic of El Salvador*, Decision on Jurisdiction, June 1, 2012, para. 2.108 (quoting Claimant: "let me be very clear: with respect to our claim for damages, we are only asking for damages as a result of the breach that we became aware of and that we only could have become aware of in – as of March 2008 at the earliest . . . [L]et me just emphasize in response to the Tribunal's question as to whether the measure at issue is the same for the CAFTA claims and the Investment

the objections to jurisdiction, Pac Rim now freely admits that it was very much aware of a dispute by May 2007 at the latest, when it was informed that no environmental permits would be issued until after a Strategic Environmental Evaluation was conducted.

- Pac Rim's new frivolous arguments on the merits, which include the argument that it can ignore legal requirements it labels mere formalities; the argument that Article 37.2.b) applies to quarries but not mines (or just not Pac Rim based on an agreement with the Bureau of Mines); and the argument that its Pre-Feasibility Study was the required Feasibility Study (or just that the Bureau implicitly accepted it as such).

453. Pac Rim continued to change its arguments in its Reply. Pac Rim now argues that the requirements of Mining Law Article 37.2—the very same requirements Pac Rim claimed to have complied with in its Request for Arbitration—are for a concession that does not exist.[711] Pac Rim also acknowledges in its Reply that the Salvadoran Constitution and the Salvadoran Mining Law dictate that the minerals in the subsoil belong to the State until they are extracted pursuant to a validly-granted concession, but then it dismisses this legal fact by calling it irrelevant and continues to demand compensation for inexistent breaches, using a valuation method based on the value of the (State-owned) minerals in the ground.[712] But the most striking example of Pac Rim's about-face in this arbitration is that while five years ago Pac Rim alleged that it had a "perfected right" to the concession because it had met all the legal requirements under the Salvadoran Mining Law, and that in due time it would prove so to the Tribunal, Pac

---

Law claims, it is. . . . Also, as I said earlier, in both cases, Claimant is alleging damages only from the period from March 2008 forward and not from any earlier period.").

[711] Reply, para. 388 ("The heading reads, 'PARA CONCESION DE EXPLOTACION DE MINAS Y CANTERAS' or 'FOR EXPLOITATION CONCESSION OF MINES AND QUARRIES.' However, there is no 'exploitation concession of mines and quarries' mentioned anywhere in the Amended Mining Law. . . . Because the heading 'refers to a concession that does not exist, the literal meaning of the heading is not clear.'").

[712] Reply, paras. 33, 462 (claiming "With regard to the State's ownership of 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;" and basing its claimed damages on the value of the resources in the ground).

Rim now says that the Tribunal should not examine the issue of whether Pac Rim met those requirements.[713]

454. In short, the only consistency in Pac Rim's arguments has been its penchant to change its arguments as it deems necessary to try to confuse the issues and complicate what was from the very beginning a straightforward case.

455. El Salvador therefore reaffirms its request that the Tribunal take all of Claimant's changing stories and arguments into account and, in accordance with Article 28(1) of the ICSID Arbitration Rules and Article 61(2) of the ICSID Convention, order Claimant to reimburse El Salvador's legal fees and disbursements, together with interest, and order Claimant to otherwise cover all the costs and expenses of this proceeding.

X. REQUEST FOR RELIEF

456. El Salvador reaffirms and incorporates by reference the Request for Relief set out in paragraph 471 of the Counter-Memorial dated January 10, 2014.

[713] Reply, para. 335 ("Respondent cannot in good faith request this Tribunal to now deny Claimant the protection of its legal rights based on alleged 'deficiencies' that the Government never notified to the company.").

Dated: July 11, 2014

Respectfully submitted,

Lic. Luis Antonio Martínez González
Fiscal General

Lic. Benjamín Pleités Mazzini
Secretario General

Fiscalía General de la
República de El Salvador

Derek C. Smith
Luis Parada
Erin Argueta
Christina L. Beharry
Tafadzwa Pasipanodya
Gisela Paris

Foley Hoag LLP

Mario Enrique Sáenz
Humberto Sáenz Marinero
Geraldina Mendoza Parker
Manuela de la Helguera

Sáenz & Asociados, El Salvador

ATTORNEYS FOR THE REPUBLIC OF
EL SALVADOR