

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

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

**CLAIMANT PAC RIM CAYMAN LLC'S  
RESPONSE TO THE *AMICUS CURIAE* SUBMISSION DATED 25 JULY 2014**

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1. Pursuant to the parties' agreement in the procedural teleconference held with the Tribunal on 31 July 2014, Claimant hereby responds to the *amicus curiae* brief submitted by the Center for International Environmental Law ("CIEL") on 25 July 2014 (the "*Amicus Brief*").

## I. INTRODUCTION

2. The cover letter submitted by CIEL sets out the following summary of *amici's* argument:

[T]he measures adopted by El Salvador regarding the mining project proposed by Pac Rim Cayman LLC find support on the State's international obligations on human rights and environment. In particular, human rights obligations relating to the environment require that El Salvador design and apply a legal framework to ensure the full enjoyment of fundamental rights threatened by risky activities of third parties. In the specific context of the hydric and environmental circumstances in El Salvador, mining imposes unacceptable risks to the population and the environment. Therefore, El Salvador's application of a domestic legal framework that provides effective protections to the rights of people threatened by the risk generated by activities of third parties is not a wrongful act; but rather the opposite.<sup>1</sup>

3. Contrary to what is implied by *amici*, none of the measures at issue in this case involve El Salvador's implementation or application of a "domestic legal framework." To the contrary, El Salvador's actions in relation to Pac Rim and the El Dorado Project have been taken in *disregard* for the existing legal framework in the country, which in fact contains a variety of mechanisms designed to ensure protection of the very interests that are invoked by *amici*.

4. Furthermore, *amici's* sweeping contention that, "mining imposes unacceptable risks to the population and the environment," is unsupported by any scientific evidence and is contrary not only to the conclusions of the El Salvadoran *Asamblea Legislativa*, but also to the clear factual record in this case in relation to the El Dorado Project.

5. In the following sections, Claimant exposes the numerous false premises underlying the *amici's* flawed conclusions. In particular, Claimant explains that: the

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<sup>1</sup> *Amicus Curiae Submission by Member Organizations of The El Salvador National Roundtable on Mining*, dated 25 July 2014 ("*Amicus Brief*"), cover letter (emphasis added).

requirements of international environmental law do not supersede El Salvador's obligations to foreign investors and their investments (**Section II**); in any event, the "requirements" relied upon by *amici* do not reflect any accepted norms of international law that could be relevant to El Salvador's actions *vis-à-vis* Pac Rim or the El Dorado Project (**Section III**); furthermore, El Salvador's actions in this case were taken in disregard for – and not in application of – the legitimate legal framework in the country, including the Environmental Law (**Section IV**); and, finally, even leaving aside their patent illegality, the record evidence shows that the actions at issue in this case have done nothing to advance the interests identified by *amici* (**Section V**).

## **II. THE NORMS OF INTERNATIONAL ENVIRONMENTAL LAW DO NOT SUPERSEDE EL SALVADOR'S OBLIGATIONS TO CLAIMANT**

6. The scope of the Tribunal's jurisdiction is defined by Article 25 of the ICSID Convention, which provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

7. In this case, the parties consented to submit to ICSID arbitration, any "controversies or differences [ ] between [ ] foreign investors and the State, regarding the investments they have made in El Salvador...."<sup>2</sup> Consequently, the Tribunal's jurisdiction is limited to resolving disputes between the parties to this arbitration, regarding Pac Rim's investments in El Salvador. The Tribunal is not empowered to adjudicate claims related to El Salvador's compliance with its international environmental or human rights obligations, nor can it speak with the voice of law regarding the scope or content of those obligations.

8. Furthermore, to the extent that any such obligations might be relevant to the parties' dispute – which, as explained further below, is not the case – they could not in any event alter or supersede El Salvador's specific obligations to Pac Rim and its investments in the El Dorado Project. CIEL has previously presented arguments to this effect on behalf of *amici* in

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<sup>2</sup> Investment Law, Legislative Decree No. 732, dated 14 October 1999 ("Investment Law"), art. 15 (RL-9).

other cases, and these arguments have been rejected. Thus, in *AWG Group v. Argentine Republic*, the tribunal held as follows:

Argentina and the *amicus curiae* submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally.<sup>3</sup>

9. In practical terms, El Salvador's duty to harmonize its other international obligations with those at issue in this case would entail a duty to compensate Pac Rim in the event that its rights in the El Dorado Project were expropriated for legitimate environmental reasons – which, as explained below, they were not. As confirmed by the tribunal in *Compañía del Desarrollo de Santa Elena v. Costa Rica*:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature [of the act] or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.<sup>4</sup>

10. For this reason, the tribunal in the *Santa Elena* case declined to even analyze the evidence submitted by Costa Rica in relation to its supposed international legal obligation

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<sup>3</sup> *AWG Group Ltd. v. Argentine Republic*, UNCITRAL (Decision on Liability dated 30 July 2010), para. 262 (underscore added, italics in original) (CLA-330).

<sup>4</sup> *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 (Final Award dated 17 February 2000), para. 71 (emphasis added) (CLA-331).

regarding the ecological preservation of the site which was the subject of the dispute.<sup>5</sup> Such evidence, in the tribunal’s view, was simply not relevant to its task.

### **III. IN ANY EVENT, THE SOURCES RELIED UPON BY AMICI DO NOT REFLECT BINDING OBLIGATIONS UNDER INTERNATIONAL LAW**

11. As indicated above, international human rights and environmental norms are of limited relevance to the resolution of investment disputes, even where the governmental measures at issue are legitimately related to the protection of the environment – which, as further explained below, is not the case here. On the other hand, *amici* in this case do not even purport to evaluate El Salvador’s actions in relation to the El Dorado Project against its obligations under *existing international legal norms* for the protection of human rights or the environment. Rather, in their own words, they intend to “present to the Tribunal a vision and perspective on the progressive development of the international law on human rights and the environment...”<sup>6</sup>

12. Consistent with this intention, most of the sources of “law” that *amici* cite (where they cite sources at all)<sup>7</sup> can, at best, be characterized as “soft law” sources. There is a categorical difference between “hard law” and “soft law” as these terms are used international environmental and human rights law.<sup>8</sup> Soft law texts “are political commitments that can lead to law, but they are not law...”<sup>9</sup> Common expressions of soft law include “normative resolutions of international organizations”, “concluding texts of summit meetings or international

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<sup>5</sup> *Id.*, n.32 (“For this reason, the Tribunal does not analyse the detailed evidence submitted regarding what Respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property.”).

<sup>6</sup> *Amicus* Brief at 1.

<sup>7</sup> Oftentimes, *amici* cite no source at all for the propositions that they advance. Statements such as: “[I]t is recognized that the collective property rights of indigenous communities...impose a limit on the exercise of the State’s sovereignty[;]” “[I]t is recognized that the right to live in a healthy environment imposes procedural and substantive obligations on States[;]” and “[I]t is also recognized that the full exercise of access rights is the basis of the social dialogue in a democracy that defines the public interest[;]” are entirely unsourced. *Id.* at 9-10.

<sup>8</sup> Dinah L. Shelton, *Soft Law*, in *ROUTLEDGE HANDBOOK OF INT’L LAW* 68, 69 (David Armstrong, ed., 2008) (“Soft law is a type of social rather than legal norm...it usually refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior.”) (CLA-332).

<sup>9</sup> *Id.* at 68.

conferences” and “recommendations of treaty bodies overseeing compliance with treaty obligations.”<sup>10</sup> In some cases, the documents relied on by *amici* are not even capable of bearing the weight of the “soft law” label; rather, they are merely published texts or reports that reflect *amici*’s aspirations for how the law may develop in the future.

13. For example, *amici* cite the following sources of “law” in support of their argument – many of which post-date the actions by Respondent that are at issue in this dispute:

- A 2013 report to the UN Human Rights Council by Mr. John Knox, Independent Expert on human rights and the environment;<sup>11</sup>
- A 2012 report to the Human Rights Council by Mr. Knox;<sup>12</sup>
- A 2014 resolution of the Human Rights Council;<sup>13</sup>
- A 2012 report to the Human Rights Council by Mr. Calid Georgescu, Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste;<sup>14</sup>
- A 2011 resolution of the Human Rights Council;<sup>15</sup>
- A 2007 report to the Human Rights Council by Mr. John Ruggie, Special Representative on human rights and transnational corporations;<sup>16</sup>
- The 1972 Stockholm Declaration and the 1992 Rio Declaration;<sup>17</sup>
- A 2012-2014 Action Plan agreed by the signatory countries to the Rio Declaration;<sup>18</sup>
- A yet-to-be-named “international instrument that may enable to strengthening of environmental democracy” and that is “expected to

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<sup>10</sup> *Id.* at 70.

<sup>11</sup> *Amicus* Brief, n.4.

<sup>12</sup> *Id.* at n.6.

<sup>13</sup> *Id.* at n.8.

<sup>14</sup> *Id.* at n.12.

<sup>15</sup> *Id.* at n.14.

<sup>16</sup> *Id.* at n.15.

<sup>17</sup> *Id.*, n.18, 19.

<sup>18</sup> *Id.* at 8.



contribute to the full implementation of the rights of access to information, participation and environmental justice.”<sup>19</sup>

14. The principles expressed in these texts may indeed have the potential to eventually transition into binding law, either through incorporation into an international legal instrument or adoption into customary international law.<sup>20</sup> However, *amici* here do not even attempt to demonstrate how or by what mechanism they could have “hardened” into legal obligations that would be binding on El Salvador right now, much less at the time of the actions at issue in this case. There is no discussion regarding the consistency of state practice over time or expressions of *opinio juris* by any sovereign. Rather, the sources on which *amici* rely are simply assumed by them to be relevant to an analysis of El Salvador’s international legal obligations, when there is in fact no basis for any such assumption.

15. Finally, where *amici* do reference arguably hard law instruments (*i.e.*, the International Covenant on Economic Social and Cultural Rights, and the Additional Protocol to the American Convention on Human Rights in the subject of Economic, Social and Cultural Rights), it is for propositions that are extremely general and even aspirational in nature, for example that: “States shall promote the protection, preservation and improvement of the environment.”<sup>21</sup>

16. In summary, *amici* have not invoked any international legal obligations that could be relevant to the Tribunal’s assessment of El Salvador’s conduct in this case. On the other hand, as set out below, El Salvador has indeed implemented a binding legal framework at the domestic level for the purposes of ensuring that individuals are protected from “environmental, health and safety risks caused by the activities of third parties.”<sup>22</sup> However, rather than applying this legal framework as a legitimate means of achieving the goals identified by *amici*, the

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<sup>19</sup> *Id.* at 8.

<sup>20</sup> Dinah Shelton, *Soft Law* at 71-72 (“In practice, non-binding norms are often the precursor to treaty negotiations and sometimes stimulate state practice leading to the formation of customary international law.”) (CLA-332).

<sup>21</sup> *Amicus* Brief at 6.

<sup>22</sup> *Id.* at 1.

Government of El Salvador has instead blatantly and arbitrarily *disregarded it* in relation to Pac Rim and its proposed development of the El Dorado Project.

#### **IV. THE ACTIONS AT ISSUE IN THIS CASE WERE INCONSISTENT WITH EL SALVADOR'S LEGAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION**

17. *Amici* repeatedly (and, in Claimant's view, correctly) indicate that any international obligation that El Salvador may allegedly have to "protect effectively the enjoyment of rights from [ ] environmental, health and safety risks" can only be implemented by: "designing and applying a normative framework ..." for this purpose at the domestic level.<sup>23</sup> In fact, El Salvador has implemented just such a legal framework, in accordance with the mandate established in Articles 1 and 117 of the Constitution.<sup>24</sup>

18. In turn, this constitutional mandate is fulfilled through the implementation of secondary legislation, including most significantly through the general Environmental Law. As expressly stated in Article 1 of the Environmental Law:

#### **AIM OF THE LAW**

Art. 1 – The present law aims to develop the provisions of the Constitution of the Republic where it refers to the protection, conservation and recovery of the environment, the sustainable use of natural resources that allow an improved quality of life for present and future generations; and to regulate public and private management of the environment together with environmental protection as a basic obligation of the State, municipalities

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<sup>23</sup> *Id.* at 1 (emphasis added); *see also* at 2 ("*Amici* argue that the design and implementation of an appropriate regulatory framework to ensure the effective enjoyment of fundamental rights against the risks posed by extractive industries is an obligation under international human rights law.") (emphasis added); at 3 ("The implementation by the State of human rights obligations regarding the environment is effected through the design and application of a normative framework.") (emphasis added).

<sup>24</sup> Constitution of the Republic of El Salvador, art. 1 ("El Salvador recognizes the human person as the origin and the end of the state activity which is organized for the attainment of justice, legal certainty and the common good. It also recognizes as a human person every human being from the moment of conception. Accordingly, the State is obliged to ensure the citizens of the Republic the enjoyment of freedom, health, culture, economic and social welfare.") (Claimant's translation of original Spanish); art. 117 ("It is the State's obligation to protect natural resources, as well as the diversity and integrity of the environment, to guarantee sustainable development.") (Claimant's translation of original Spanish) (CLA-1); *see also* El Dorado Environmental Impact Study, dated September 2005 ("EIS") at 3-1 (C-8A).

and citizens in general; and to ensure the implementation of international treaties or agreements signed by El Salvador in this area.<sup>25</sup>

**A. The Environmental Assessment and Permitting Procedure**

19. The Environmental Law establishes the requirement for companies engaged in potentially risky activities to go through the process of environmental assessment. According to the law, the environmental assessment is:

The set of actions and procedures that ensure that activities, construction works or projects that have an adverse impact on the environment or on the quality of life of the people are, from the pre-investment phase, submitted to procedures that identify and quantify these impacts and recommend measures for preventing, reducing, compensating for or promoting them, as applicable, by selecting the alternative that best guarantees the protection of the environment.<sup>26</sup>

20. The objectives of the environmental assessment procedure are also directly reflected in Article 17 of the Amended Mining Law, which provides that:

The exploration, exploitation of mines and quarries, as well as the processing of minerals, must be done according to the technical and engineering requirements of mines, as well as the internationally established normatives, in such a manner that would prevent, control, minimize and compensate the negative effects that can be caused to people or the environment; in this sense, immediate and necessary measures must be taken to avoid or reduce said effects and compensate them by actions of rehabilitation or re-establishment.<sup>27</sup>

21. The objectives of the environmental assessment process are further elaborated in Article 18 of the General Regulation to the Environmental Law.<sup>28</sup> The process itself has been

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<sup>25</sup> Environmental Law, Legislative Decree No. 233, dated 2 March 1998, published in the *Diario Oficial* No. 79, Vol. 339, dated 4 May 1998 (“Environmental Law”), art. 1 (CLA-213).

<sup>26</sup> *Id.*, art. 18 (emphasis added); *see also* art. 5.

<sup>27</sup> Amended Mining Law, Legislative Decree No. 544, dated 14 December 1995, published in the *Diario Oficial* No. 16, Vol. 330, dated 24 January 1996, as amended by Legislative Decree No. 475, dated 11 July 2001, published in the *Diario Oficial* No. 144, dated 31 July 2001 (“Amended Mining Law”), art. 17 (emphasis added) (CLA-5).

<sup>28</sup> General Regulation for the Environmental Law, Legislative Decree No. 17, dated 21 March 2000, published in the *Diario Oficial* No. 63, Vol. 346, dated 29 March 2000, amended by the *Diario Oficial* No. 17, dated 2 March 2007, art. 18 (“The Environmental Impact Assessment, in accordance with what is (Continued...)”).

described in detail in the First Witness Statement of Ms. Ericka Colindres.<sup>29</sup> It includes public participation and community consultation procedures,<sup>30</sup> and culminates in the issuance of an environmental permit.<sup>31</sup>

## **B. Performance Bonds and Sanctions**

22. The environmental permit establishes the conditions that are required to ensure that the relevant project is carried out in an environmentally acceptable manner.<sup>32</sup> Failure to comply with the terms of the environmental permit amounts to a violation of the Environmental Law which can be sanctioned by MARN.<sup>33</sup>

23. Furthermore, failure to comply may result in revocation of the permit and consequently in the shutdown of operations on the project. For example, as Respondent has noted on several occasions, the Salvadoran Ministry of Environment and Natural Resources (MARN) revoked the environmental permits it had previously issued to Commerce Group – a company that had engaged in mining operations in San Sebastian in the 1990s, prior to the implementation of the Environmental Law – in 2006, when inspections revealed that the company had failed to implement the remediation measures required under the terms of those permits.<sup>34</sup>

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established in Art. 18 of the Law, has the following objectives: **a.** To identify, quantify and assess the environmental impacts and risks that certain activities, works, or projects may cause the environment and population; **b.** To determine the measures necessary to prevent, mitigate, control and compensate the negative impacts and to promote positive impacts, by selecting the best alternative that guarantees protection of the environment and the preservation of natural resources; **c.** To determine the environmental feasibility of the execution of an activity, work, or project; and **d.** To generate the mechanisms necessary to implement the environmental management plan.”) (CLA-239).

<sup>29</sup> First Witness Statement of Ericka Colindres, dated 22 March 2013 (“First Colindres Witness Statement”), paras. 6-17.

<sup>30</sup> Environmental Law, art. 25 (CLA-213).

<sup>31</sup> *Id.*, art. 24(b).

<sup>32</sup> *Id.*, arts. 5, 20 (English translation of Article 5 at C-2).

<sup>33</sup> *Id.*, art. 86(c).

<sup>34</sup> Respondent’s Counter-Memorial on the Merits, dated 10 January 2014 (“Counter-Memorial”), para. 207; Respondent’s Rejoinder on the Merits, dated 11 July 2014 (“Rejoinder”), para. 57; Commerce (Continued...)

24. In addition to inspections carried out by MARN, the Department of Mines also has the duty to inspect mining operations to ensure that they are being carried out safely,<sup>35</sup> and to suspend the operations in case any potential risks are detected.<sup>36</sup>

25. Furthermore, mining companies must present an environmental performance bond prior to the issuance of the relevant environmental permit.<sup>37</sup> The purpose of the bond is to ensure compliance with the environmental permit with respect to the implementation of Environmental Management and Compliance Plans; and the amount of the bond is set with reference to the total amount of investments required for the implementation of these plans.<sup>38</sup> As Ms. Colindres has explained in her testimony, “the purpose of the Bond is to give the State the capacity to implement any measure with which the titleholder fails to comply.”<sup>39</sup>

26. In addition to the environmental performance bond, mining companies are also required to post an additional bond under the terms of the Amended Mining Law.<sup>40</sup> The purpose of this additional bond, which must be presented prior to the execution of an exploitation concession contract, is to “respond for damages to the State or third parties, due to mining operations...”<sup>41</sup> The amount of the mining bond is determined taking into account “the possibility of risks,” considering parameters such as: the geographical location of the project; the geology and geomorphology of the area; proximity to population centers; proximity to communication channels; proximity to power lines and communications towers; proximity to

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Group Corp., Form 8-K, dated 15 December 2006 (C-845); Commerce Group Corp., Form 10-K, dated 31 March 2007 (C-863).

<sup>35</sup> Amended Mining Law, art. 47 (CLA-5).

<sup>36</sup> *Id.*, art. 48.

<sup>37</sup> Environmental Law, art. 29 (CLA-213).

<sup>38</sup> *Id.*; First Colindres Witness Statement, para. 47.

<sup>39</sup> First Colindres Witness Statement, para. 48.

<sup>40</sup> Amended Mining Law, arts. 25(g), 69(f) (CLA-5).

<sup>41</sup> Mining Law Bylaws, Executive Decree No. 68 published in the *Diario Oficial* No. 144, Vol. 332, dated 7 August 1996, art. 14 (CLA-6).

rivers and bodies of water; method of exploitation; size of the project; type of processing; and technology to be utilized.<sup>42</sup>

**C. MARN Failed to Carry Out the Required Environmental Assessment Procedure for the El Dorado Project**

27. In the case at hand, Pac Rim fully complied with the environmental assessment procedure established under Salvadoran law. In particular:

- On 12 January 2004, Pac Rim representatives met with MARN officials to discuss the agency's requirements and expectations for the procedure;<sup>43</sup>
- On 19 March 2004, Pac Rim submitted its Environmental Form for the proposed El Dorado mining project;<sup>44</sup>
- On 8 September 2004, Pac Rim submitted a lengthy and comprehensive Environmental Impact Study ("EIS"), in accordance with MARN's Terms of Reference;<sup>45</sup>
- On 3 February 2005, Pac Rim representatives met with MARN officials to discuss their technical comments on the EIS;<sup>46</sup>
- On 22 April 2005, Pac Rim submitted Volume IV to the EIS, which addressed all of the comments that had been made on the original study by the MARN technicians;<sup>47</sup>

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<sup>42</sup> *Id.*, art. 14.

<sup>43</sup> Memorandum from Adrián Juárez and commented on by Matthew Fuller, dated 14 January 2004 (summary of a meeting held between the MARN's Technicians, representatives of PRES, and environmental consultants involved in the preparation of the EIS for the El Dorado mine) (C-105).

<sup>44</sup> Environmental Form for the El Dorado Mine Exploitation Project, dated 19 March 2004 (C-113).

<sup>45</sup> Letter of presentation of the El Dorado EIS from Fred Earnest to the Minister of the MARN, dated 8 September 2004 (C-126); Email chain between Fred Earnest and Luis Trejo, the last dated 8 September 2004 (C-127). As noted by Ms. Colindres, the EIS presented by PRES in September 2004 fully complied with MARN's Terms of Reference, and the MARN technicians charged with evaluating the study never indicated otherwise. Second Witness Statement of Ericka Colindres, dated 11 April 2014 ("Second Colindres Witness Statement"), para. 51.

<sup>46</sup> See Email from Fred Earnest to Tom Shrake, dated 3 February 2005 (C-132).

<sup>47</sup> See Letter from Fred Earnest to Hugo Barrera, dated 22 April 2005 (C-135); Responses to the Observations of the MARN, dated 21 April 2005, "Volume IV of the EIS of the El Dorado Mine Project" ("Answers to MARN's Comments, April 2005") (C-136).

- From 27 June 2005 to 8 September 2005, Pac Rim communicated with MARN technicians and officials regarding their review of the EIS, answering a number of additional questions;<sup>48</sup>
- On 23 September 2005, MARN approved the EIS for public consultation:<sup>49</sup> a step that is taken only after the technicians have issued a favorable technical opinion on the study;<sup>50</sup>
- On 3, 4 and 5 October 2005, Pac Rim published notice of the EIS in the national newspapers, in accordance with MARN's directions;<sup>51</sup>
- On 29 March 2006, Pac Rim representatives met with MARN officials to discuss the outcome of the public comment process;<sup>52</sup>
- On 12 September 2006, Pac Rim submitted detailed responses to the public comments.<sup>53</sup>

28. The guidelines and comments provided by MARN throughout this procedure were technical, and in many cases highly detailed, thus demonstrating that MARN technicians were capable of evaluating the EIS and determining the appropriate conditions for the issuance of an environmental permit.<sup>54</sup> In fact, MARN has frequently demonstrated its ability in other

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<sup>48</sup> Email chain between Ericka Colindres and Matthew Fuller, the last dated 13 July 2005 (C-140); Letter from Fred Earnest to Francisco Perdomo Lino, dated 8 September 2005 (enclosing the final version of the El Dorado EIA) (C-151).

<sup>49</sup> Letter from Francisco Perdomo Lino to Fred Earnest, dated 23 September 2005 (C-152).

<sup>50</sup> Environmental Law, art. 25(a) (CLA-213); First Colindres Witness Statement, paras. 95, 104, 126-27, 178; Second Colindres Witness Statement, para. 62.

<sup>51</sup> First, Second and Third Publication of the El Dorado EIS, dated 3, 4, 5 October (C-153); Letter from Fred Earnest to Francisco Perdomo Lino, dated 5 October 2005 (C-154).

<sup>52</sup> See Minutes of Meeting with Titleholder of the "El Dorado Mining Exploitation" and "Santa Rita Mining Exploration" Projects dated March 29, 2006 (C-163); Monthly Report of the SPMA, dated April 2006, Fourth Week, clause 7 (C-164).

<sup>53</sup> Letter from William Gehlen to Hugo Barrera dated 12 September 2006 (enclosing the Informe de Response Report on the Technical Review of the El Dorado Mine Project) (C-170).

<sup>54</sup> See, e.g., Letter from Francisco Perdomo Lino to Jorge Ruben Brito, dated 30 July 2004 (C-120); Letter from Francisco Perdomo Lino to PRES and Jorge Brito transmitting "Observaciones del estudio de Impacto Ambiental del Proyecto Explotacion Minera 'El Dorado,'" dated 7 February 2005 (C-134); Email chain between Ericka Colindres and Matthew Fuller, the last dated 13 July 2005 (C-140); Email from Fred Earnest to Matthew Fuller, dated 25 July 2005 (C-141); Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umazor and Matthew Fuller, the last dated 26 July 2005 (C-143); Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umazor and Matthew Fuller, the last dated (Continued...)

contexts to implement highly sophisticated strategies for environmental protection – including compliance with international environmental obligations – in cooperation with private industry.<sup>55</sup>

29. Nevertheless, MARN failed to ever issue any decision on Pac Rim’s environmental permit application because the MARN technicians were instructed by their superiors to disregard their legal duties, and to take no definitive action on the application.<sup>56</sup> Instead, the agency engaged the company in a series of unofficial and extra-legal meetings and informational requests, beginning in mid-2006 and continuing through the end of 2008.<sup>57</sup> Effectively, Pac Rim’s application became mired in a “legal process in which [the company was] governed by a de facto reality that is unpredictable, drawn out, and pointless[.]”<sup>58</sup>

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27 July 2005 (C-144); Email from Fred Earnest to Ericka Colindres, dated 28 July 2005 (C-145); Email chain between Ericka Colindres and Fred Earnest, the last dated 29 July 2005 (C-146); Email from Ericka Colindres to Fred Earnest, dated 11 August 2005 (C-147); Letter from Ernesto Javier Figueroa Ruiz to Fred Earnest, dated 11 August 2005 (C-150).

<sup>55</sup> See, e.g., Second Colindres Witness Statement, paras. 90-100; MARN meets with Agroindustria Azucarera to decide environmental commitments, dated 5 November 2013 (C-790); *Environment and Sugar Sector Meeting to Reach Agreements*, LA PRENSA GRÁFICA (5 November 2013) (C-791); Plan Nacional de Implementación del Convenio de Estocolmo El Salvador, Ministerio de Medio Ambiente y Recursos Naturales (2012) (C-846).

<sup>56</sup> See, e.g., Monthly Report of the SPMA, dated June 2006, Fourth Week, Clause 6 (C-168); First Colindres Witness Statement, paras. 120, 145-46; *Presidente de El Salvador pide cautela ante proyectos de explotación minera*, INVERTIA (11 March 2008) (C-1); *Saca afirma que no concederá permisos de extracción minera*, CADENAGLOBAL.COM (15 July 2008) (C-61); *Funes rules out authorization of mining explorations and exploitations in El Salvador*, EFE (27 December 2009) (C-2).

<sup>57</sup> See, e.g., First Colindres Witness Statement, paras. 119-152; MARN, Observations on the Environmental Impact Study of the El Dorado Mining Exploitation Project, July 2006 (C-169); Letter from Scott Wood to Hugo Barrera, dated 25 October 2006 (enclosing Response Report to the Observations Presented by the Technicians of the DGA-MARN in Meeting on 14 July 2006, dated October 2006) (C-171); Letter from William Gehlen to Hugo Barrera, dated 4 December 2006, delivered at the DGA (enclosing the Technical Memorandum for a Water Treatment Plant — Quality of Mine Effluent, prepared by SNC-Lavalin Engineers & Constructors, Inc., dated 30 October 2006) (C-174); Email from Ericka Colindres to Pete Neilans, dated 1 February 2007 (C-175); Letter from Scott Wood to Carlos Guerrero, dated 14 February 2007 (C-176); Letter from Scott Wood to Carlos Guerrero, dated 24 November 2008 (C-179); Letter from Ernesto Javier Figueroa Ruiz to Frederick Earnest, dated 4 December 2008 (C-76); Letter from William Gehlen to Ernesto Javier Figueroa Ruiz, dated 8 December 2008 (transmitting *Informe de Respuesta a Nota MARN... Planta de Tratamiento de Aguas*) (C-180).

<sup>58</sup> First Expert Report of Arturo Fermandois, dated March 2013 (“First Fermandois Expert Report”) at 96.



resulting in a violation of the company's rights to property and legal security.<sup>59</sup> To date, MARN has never denied Pac Rim's environmental permit application.

30. As discussed further below in Part V, MARN's actions in relation to Pac Rim's El Dorado permit application – aside from being in clear violation of the established legal framework for environmental assessment and protection in the country – have done nothing in practice to advance the interests that are identified by *amici*.

**D. El Salvador Has Never Implemented Any Changes to Its Existing Legal Framework In Relation to Mining**

31. It is obvious that El Salvador failed to follow its own laws in relation to the permitting procedures for the El Dorado Project. Respondent has attempted to justify this failure on the basis of generalized “concerns” about the environmental impacts of mining on the part of Executive Branch officials and civil society organizations.<sup>60</sup> However, the fact remains that these “concerns” – which in any event were already fully addressed in relation to the El Dorado Project in the relevant project EIS<sup>61</sup> – were all raised by mid-2006. Thus, as acknowledged by Respondent, various bills have been pending before the Salvadoran *Asamblea Legislativa* to either ban or suspend mining since at least October 2006.<sup>62</sup> Yet, now, *eight years later*, El Salvador has still taken no steps to alter its legal framework in response to these alleged concerns.<sup>63</sup>

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<sup>59</sup> *Id.* at 95-97.

<sup>60</sup> *See, e.g.*, Rejoinder, paras. 57-63.

<sup>61</sup> *See, e.g.*, Second Colindres Witness Statement, paras. 9-46.

<sup>62</sup> *See, e.g.*, *Congress considers ban on mining while reform under debate – El Salvador* (17 October 2006) (C-710).

<sup>63</sup> *See, e.g.*, *Exigen al Legislativo retomar Ley contra la minería metálica en El Salvador*, Diario CoLatino, 22 June 2013 (“Since 2005, the organizations presented the bill to the Commission of Environment and Climate Change, however, it was never discussed ...”) (emphasis added) (Claimant’s translation of original Spanish) (C-847); *El Salvador: Organización exige la prohibición de la explotación minera*, Servindi, 19 September 2013 (“Since 2006, *La Mesa Nacional Frente a la Minería Metálica* presented a proposal to regulate mining activities, a bill that deputies never reviewed [...] The members of *La Mesa* also expressed that are no economic justifications to explain El Salvadorian Government’s inaction not to prohibit mining exploitation...”) (emphasis added) (Claimant’s translation of original Spanish) (C-848); *Exigen en El Salvador la pronta aprobación de ley contra la minería* (Continued...)

32. El Salvador's steadfast refusal to implement – indeed, even to consider – legislative changes that would suspend or ban metallic mining, stands in stark contrast to the position it has presented in this arbitration. Indeed, while El Salvador parrots the rhetoric of anti-mining activists before this Tribunal, these same activists express their concerns about the Government's potential plans to permit metallic mining activities.<sup>64</sup> As these activists correctly observe, El Salvador is just as close to permitting a gold mine today as it was eight years ago: then, as now, everything hinges upon the word of a single individual, which is apt to change with the winds of circumstance.<sup>65</sup>

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*metálica*, NO a la Mina, 24 June 2014 (“On 22 July 2013, communities and environmental organizations that are part of *La Mesa Nacional frente a la Minería*, with support of the parliamentary group of the *Frente Farabundo Martí para la Liberación Nacional (FMLN)*, demanded prompt approval of the Law that will prohibit mining exploitation in the country. However, the request did not obtain echoes in the right-wing parliamentary groups.”) (emphasis added) (Claimant's translation of original Spanish) (C-849).

<sup>64</sup> *El Dios oro que las transnacionales idolatran a costa de vida*, Contrapunto, dated 3 March 2014 (“This insatiable quest for gold has even led the most progressive governments of the Latin American left-wing to give up, and it may happen in El Salvador, some ecologists and environmental activists speculate [...] Faced with this threat, they expect consistency in the Salvadoran leftist Government's policies against mining considering the possibility of ALBA's project in Michoacan, Mexico, as pointed out by the President of Universidad Centromérica José Simeón Cañas (UCA), Father Andreu Oliva.”) Claimant's translation of original Spanish) (C-850); *see also Press Release from US Precious Metals, Inc.*, WALL STREET JOURNAL (23 May 2013) (discussing Alba Petróleos' acquisition of a joint venture interest in a gold and silver mine in Mexico) (C-851). As noted in this press release, Alba Petróleos is 40% owned by FMLN-controlled municipalities in El Salvador. In this regard, *see also ALBA Petróleos gastó \$5.3 millones en campaña de 2013*, DIARIO EL MUNDO (5 March 2014) (affirming that Alba Petróleos is “managed by members of the FMLN.”) (C-852); *FMLN cruza línea entre negocios Alba y campaña electoral*, ELSALVADOR.COM (8 February 2013) (discussing the “thin line between the businesses of Alba and the presidential campaign of the FMLN”) (C-853); *La nueva derecha, pero que patee con la zurda*, DIARIO EL MUNDO (18 February 2014) (discussing the links between former President Saca, the ruling FMLN party and Alba Petróleos) (C-854); *Dirigencia del FMLN se toma las candidaturas a diputados*, DIARIO EL MUNDO (1 September 2014) (discussing the legislative candidacy of José Luis Merino, member of the ruling board of the FMLN party and also the chief advisor to Alba Petróleos) (C-855).

<sup>65</sup> *See, e.g., Funes aseguró que no autorizará proyectos mineros*, CONTRAPUNTO (28 June 2011) (“Ángel Ibarra, President of *Unidad Ecológica Salvadoreña (UNES)*, described Funes's statement as ‘an important step but not sufficient to prevent mining.’ Ibarra highlighted the need for Funes's decision not to stay in just words but to become in a fact with the approval of a law against mining.”) (emphasis added) (Claimant's translation of original Spanish) (C-862); *Sánchez Cerén se compromete a prohibir la minería en El Salvador*, CONTRAPUNTO (24 February 2014) (noting that then-presidential candidate Sánchez Cerén's commitment not to allow metallic mining was “symbolic,” given that the previous “electoral promise” of then-President Funes had never been incorporated into any legislation due to lack of support in the current legislature) (C-856). NB: In relation to this last article, it should be noted for the (Continued...)

**V. THE ACTIONS AT ISSUE IN THIS CASE HAVE DONE NOTHING TO ADVANCE THE INTERESTS IDENTIFIED BY AMICI**

33. As noted above, El Salvador has never implemented a legislative ban or moratorium on mining. Therefore, the primary measure at issue in this case is El Salvador's implementation of a *de facto* ban on metallic mining. Despite the fact that this *de facto* ban has been in effect for a number of years now (exactly when the ban was implemented remains uncertain),<sup>66</sup> El Salvador has never taken any reasonable or proportionate steps to assess the concerns cited by *amici* in relation to the El Dorado Project. First, as explained above, Respondent has failed to complete an environmental assessment of the El Dorado Project, as it is required to do by Salvadoran law. In fact, even in this arbitration, El Salvador has failed to identify any unmitigated environmental risks that would be posed by Pac Rim's development of the project.

34. Second, El Salvador has failed to take any action to enhance the procedures for public participation in the assessment of mining projects (or any other projects, for that matter), notwithstanding that its own experts have identified this as a deficiency in the existing Salvadoran legal framework.

35. Third, and finally, there is no evidence that El Salvador has taken any steps to understand – much less address – the legitimate interests of those who live in the area of the El Dorado Project. To the contrary, the evidence shows that El Salvador is merely parroting the sentiments of anti-mining activists in the context of this arbitration, while *ignoring* the pleas of the local community members to allow the development of the El Dorado Project to go forward.

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record that while the authors characterize San Isidro as a place where the community has fiercely resisted metallic mining, current-President Sánchez Cerén went on to lose the elections in the Department of Cabañas by a significant margin, including in San Isidro. *See Elecciones 2014, Segunda Elección – Resultados Preliminares – Cabañas*, dated 9 March 2014 (C-857); *Acta de Escrutinio Final de Segunda Elección*, Tribunal Supremo Electoral, dated 9 March 2014 (C-858); *Cf.* Claimant's Reply, para. 291.

<sup>66</sup> Respondent has never identified exactly when the *de facto* ban commenced, although other sources report that MARN has not processed any environmental permits in relation to metallic mining activities since at least the end of 2006. *See* Condor Resources Plc, Update on Licenses in El Salvador, dated 8 December 2009 (C-859).

**A. El Salvador Never Completed an Environmental Assessment of the El Dorado Project, although Pac Rim Provided It With More Than Sufficient Information to Have Done So**

1. *MARN Never Completed the El Dorado Environmental Impact Assessment*

36. As attested by Ms. Ericka Colindres and borne out by dozens of documentary exhibits, Pac Rim provided MARN with more than enough information to approve the issuance of its Environmental Permit. Indeed, the EIS passed technical review by the MARN technicians prior to being published for public comment under the Environmental Law.<sup>67</sup> Thereafter, Pac Rim addressed the comments of the public, as well as the additional and extra-legal comments made by MARN, submitting detailed responses supported by copious references to the EIS and supporting technical studies.<sup>68</sup> Nevertheless, MARN never issued any decision on PRES's environmental permit application.

2. *The So-Called "Strategic Environmental Study" Does Not Contain Any Relevant Environmental Analysis*

37. In the context of this arbitration, El Salvador has attempted to blame its failure to issue a decision on the El Dorado Environmental Permit application on its alleged need to carry out a strategic environmental assessment of the mining sector in the country.<sup>69</sup> For these

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<sup>67</sup> First Colindres Witness Statement, paras. 95, 104, 126-27, 178; Second Colindres Witness Statement, para. 62.

<sup>68</sup> First Colindres Witness Statement, paras. 119-52; Second Colindres Witness Statement, paras. 59-69; Letter from William Gehlen to Hugo Barrera, dated 12 September 2006 (enclosing the *Informe de Respuesta* Report on the Technical Review and Public Comment on the El Dorado Mine Project) (C-170); Letter from Scott Wood to Hugo Barrera, dated 25 October 2006 (enclosing Response Report to the Observations Presented by the Technicians of the DGGa-MARN in Meeting on 14 July 2006, dated October 2006) (C-171); Letter from William Gehlen to Hugo Barrera, dated 4 December 2006, delivered at the DGA (enclosing the Technical Memorandum for a Water Treatment Plant — Quality of Mine Effluent, prepared by SNC-Lavalin Engineers & Constructors, Inc., dated 30 October 2006) (C-174); Letter from William Gehlen to Ernesto Javier Figueroa Ruiz, dated 8 December 2008 (transmitting *Informe de Respuesta a Nota MARN... Planta de Tratamiento de Aguas*) (C-180).

<sup>69</sup> As Claimant has previously explained, the process of strategic environmental assessment is unrelated to the environmental permitting procedure, and the execution of the former cannot result in a suspension of the administrative duty to carry out the latter. See First Colindres Witness Statement, paras. 147-48; Second Witness Statement of Thomas Shrake, dated 21 March 2013 ("Second Shrake Witness Statement"), para. 127; Third Witness Statement of Thomas Shrake, dated 11 April 2014 ("Third Shrake Witness Statement"), para. 45. Furthermore, the study that was eventually produced specifically indicates that it cannot be considered as a strategic environmental study as contemplated under Article 17 of the (Continued...)

purposes, El Salvador contracted with foreign consultants in 2006 and later in 2010. In both cases, Pac Rim collaborated with these consultants, providing them with copious technical information; welcoming them to the company's facilities; and offering to work with the Government in any way possible to develop higher standards to regulate the mining industry.<sup>70</sup>

38. Nevertheless, none of these consultants – some of whom have appeared as experts for Respondent in this arbitration – were ever asked or allowed by the Government to comment upon the environmental viability of the proposed El Dorado Project.<sup>71</sup> In fact, the report of the consultants from TAU – which Respondent has called the “Strategic Environmental Study,” but which is actually only a report of consulting services provided in relation to the *eventual completion* of such a study – does not even contain new information or analysis regarding the general environmental situation in El Salvador.<sup>72</sup>

3. *The Experts Who Have Undertaken This Assessment Have Concluded That the El Dorado Project Could be Developed Without Generating any Unmitigated Environmental Risks*

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Environmental Law, due in part to the Respondent's failure to provide the consulting group with any policy options to consider. See Tau Group, Final Report: Strategic Environmental Assessment of the Metallic Mining Sector of El Salvador, Ministry of Economy of El Salvador Foreign Cooperation Unit, dated 8 September 2011 at 2, n.3 and 79 (R-130); see also Claimant's Reply, para. 280.

<sup>70</sup> See, e.g., Letter from Fred Earnest to Manuel Pulgar, with copy to Tom Shrake, dated 25 July 2006 (C-719); Letter from Tom Shrake to Yolanda de Gavidia, dated 13 June 2006 (C-15); E-mail from Fred Earnest to Tom Shrake dated 8 July 2006 (C-716); Email from Tom Shrake to Yolanda de Gavidia, dated 14 July 2006 (C-435); Memorandum on Operations from Ericka Colindres on 11 January 2011 (C-178); Powerpoint presentation, El Dorado Mining Project, dated 27 October 2010 (C-777); Letter from TAU to Ericka Colindres, dated 11 November 2010 (C-703); Letter from Ericka Colindres to Manuel Álvarez Arenas Bayo, dated 26 November 2010 (C-177); First Colindres Witness Statement, para. 148; Second Colindres Witness Statement, paras. 83, 99-100; Witness Statement of William Gehlen, dated 31 March 2014 (“Gehlen Witness Statement”), para. 187.

<sup>71</sup> See Expert Opinion on Metal Mining of Robert Goodland, dated 17 December 2013 (“Goodland Opinion”), p. 12; Second Colindres Witness Statement, para. 100.

<sup>72</sup> Practically all of the environmental data in TAU's study is reproduced from information that was maintained by the Salvadoran Government through MARN and SNET (*Servicio Nacional de Estudios Territoriales*), with the remainder coming from publicly available reports published by international organizations. It is entirely unclear why the Government should have needed to go through the process of hiring an outside consultant – a process that took over four years to complete – merely in order to synthesize general information that was already available to it.

39. The primary document analyzing the environmental merits of the El Dorado Project is the Environmental Impact Study (“EIS” or “Study”) presented by PRES to MARN. The EIS is a comprehensive document that assessed the potential socioeconomic and environmental impacts of the El Dorado Project at various points in time (construction, operation, and post-closure) and determined how any potential impacts could be prevented, minimized, or mitigated.<sup>73</sup> This 1,400 page document was prepared by a team of highly qualified international and regional experts who were certified by MARN.<sup>74</sup> Following a thorough examination of the various environmental aspects of the Project, the EIS concluded that “the Project, as it has been designed, can be constructed, operated, and closed without causing long-term negative impacts on the environment.”<sup>75</sup>

40. Environmental experts Drs. Mudder and Hutchison closely reviewed the El Dorado EIS and found that “[t]he environmental assessment did not identify anomalous negative or challenging impacts that could not have been mitigated successfully using the currently available and identified technologies, methodologies, and procedures.”<sup>76</sup> For this reason, Drs. Mudder and Hutchison concluded that “the EI[S] adequately identified the environmental impacts of the proposed Projects” and concurred with the EIS’s findings.<sup>77</sup>

41. Likewise, Matthew Fuller, the Project Director of the EIS, affirmed the Study’s conclusion that the Project could be implemented without generating any unmitigated environmental risks and that, in several respects, the Project would have *improved* the local environmental conditions.<sup>78</sup> In addition, Ms. Ericka Colindres, a former MARN official who

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<sup>73</sup> EIS at 1-30 (C-8A).

<sup>74</sup> Fuller Witness Statement, paras. 31-37, 39.

<sup>75</sup> EIS at 1-30 to 1-31 (C-8A) (emphasis added)

<sup>76</sup> Assessment of the Environmental Strategies and Systems for the Proposed Pac Rim El Dorado Gold and Silver Mine by Drs. Terry Mudder and Ian Hutchison, dated 29 March 2013 (“Mudder and Hutchison Expert Report”) at 20.

<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g.*, Fuller Witness Statement, paras. 72-107; *see also id.*, para. 93 (“Operation of the Project would not have significant impacts on vegetal cover for any of the three areas of influence. To the contrary, Pac Rim’s reforestation campaign would have improved areas of the Project site.”); *id.* para. 94 (“Operation of the Project would not have significant negative impacts on surface water quality for the national/regional or municipal/indirect areas of influence.”); *id.* para. 102 (“...the El Dorado EIS (Continued...)”)

reviewed the El Dorado EIS during her tenure at MARN, stated that “in the EIS of the El Dorado project and the additional documentation provided at the request of MARN, all possible risks relating to water resources were taken into account and properly prevented, controlled, or compensated, as appropriate....”<sup>79</sup>

42. In short, both the experts involved in assembling and reviewing the EIS at the time it was produced, as well as those reviewing it now, agree that the El Dorado Project could have been developed without undue risk to the environment given the available mitigation measures that PRES planned to undertake.

4. *Even in the Context of This Arbitration, El Salvador Does Not Challenge the Evidence on This Point*

43. In light of the strength of the evidence that Claimant has presented in relation to the environmental viability of its proposed project, the paucity of evidence presented by Respondent is particularly striking. In fact, not only has Respondent failed to identify any unmitigated environmental risks associated with the El Dorado Project, it has largely ignored the information provided by Claimant’s witnesses and experts in relation to this issue.

a. El Salvador’s Experts in This Arbitration Have Not Identified Any Unmitigated Environmental Risks Associated With the El Dorado Project

44. Neither *amici* nor Respondent’s experts have identified any unmitigated environmental risks associated with the El Dorado Project. For instance, Behre Dolbear’s First and Second Expert Reports do not even refer to potential unmitigated environmental risks that might result from implementation of the El Dorado Project. Instead, the experts from Behre Dolbear settle for making various demonstrably incorrect allegations about the contents (or

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demonstrated that any water discharged into the San Francisco river would have been of a better quality than the water in the river, which posed a positive impact as it also increased the volume of water available to the communities”).

<sup>79</sup> Second Colindres Witness Statement, para. 12.

supposed lack thereof) of the EIS; or taking issue with the methodology employed by the EIS team.<sup>80</sup>

45. In turn, the Witness Statements of Mr. Fuller and Ms. Ericka Colindres, and the Rebuttal Expert Report of Drs. Mudder and Hutchison, contain point-by-point responses to the “issues” raised in Behre Dolbear’s First Report.<sup>81</sup> In particular, Mr. Fuller notes that the report in question fails to cite “any specific technical errors or provide any specific detailed recommendations.”<sup>82</sup> Similarly, Drs. Mudder and Hutchison conclude that Behre Dolbear’s “contentions that the EIA was insufficient did not include a detailed assessment of the facts and materials presented, but rather subjective opinions based on comparisons with qualitative guidelines.”<sup>83</sup> Notably, Behre Dolbear’s Second Report failed to respond to the rebuttal statements of Mr. Fuller, Ms. Colindres, or Drs. Mudder and Hutchison, and simply contained a brief regurgitation of the points made in its First Report.<sup>84</sup>

46. On the other hand, Dr. Bebbington’s First and Second Reports focus entirely on general environmental policy considerations and fail to identify any environmental risks posed by the El Dorado Project.<sup>85</sup> Similarly, the late Dr. Goodland specifically declined to analyze the El Dorado EIS,<sup>86</sup> preferring instead to make generalized statements about El Salvador’s environmental concerns without discussing how these were related to the proposed El Dorado Project. Dr. Goodland’s various statements pertaining to mining (which are echoed by Dr.

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<sup>80</sup> Expert Report of Behre Dolbear, dated January 2014 (“First Behre Dolbear Report”), paras. 94-138; Second Expert Report of Behre Dolbear, dated 9 July 2014 (“Second Behre Dolbear Report”), paras. 40-52.

<sup>81</sup> Fuller Witness Statement, paras. 146-210; Second Colindres Witness Statement, paras. 47-58; *see generally* Rebuttal Expert Technical Report of Drs. Terry Mudder and Ian Hutchison, dated 6 April 2014 (“Rebuttal Mudder and Hutchison Expert Report”).

<sup>82</sup> Fuller Witness Statement, para. 146.

<sup>83</sup> Rebuttal Mudder and Hutchison Expert Report at 5.

<sup>84</sup> Second Behre Dolbear Report, paras. 45-52.

<sup>85</sup> Dr. Bebbington’s First Report lacks a single reference to the El Dorado Project, while his Second Report only mentions the Project in passing.

<sup>86</sup> Goodland Opinion at 12 (“This report does not aim to provide a comprehensive review of the deficiencies of PacRim’s ESIA...”).



Bebbington and by Respondent) are inapplicable to the El Dorado Project and/or are unsupported by the factual record. For example:

- “Metal mining is very water intensive, but the whole nation is water stressed, so there is little if any water available for mining.”<sup>87</sup> Had Dr. Goodland reviewed the El Dorado EIS and related responses to MARN, he would have discovered that Pac Rim had committed to use only stored rainwater and recycled water from the tailings deposit for its operations.<sup>88</sup>
- “Drying of cyanide-contaminated wastes in warm, breezy weather causes cyanide dust to be blown over wide area[s], spreading pollution.”<sup>89</sup> Again, a review of the El Dorado EIS would have revealed to Dr. Goodland that the El Dorado Project plan proposed a *wet* tailings facility, which would prevent the spread of dust; and that any cyanide present in the tailings facility would have been well below the allowable limits to protect health and safety.<sup>90</sup> Furthermore, Pac Rim volunteered to incorporate a secondary water treatment plant into its mine plan – in addition to the primary treatment through the INCO cyanide destruction process – to further treat any discharges from the tailings impoundment, even though this was not needed to ensure the environmental viability of the project.<sup>91</sup>

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<sup>87</sup> *Id.* at 16

<sup>88</sup> EIS at 4-24 (“[w]ater for industrial use will come from the tailings deposit, where the rainwater, superficial runoff and recycled water from the processing plant will be collected) (C-8A); *id.* at 1-21 (“The Project will not have negative impacts on the supply of surface water to the community ...); EIS at 6-90 (“The environmental impact assessment does not identify any negative impact to water quality or quantity for residents.”) (C-8B); Second Colindres Witness Statement, paras. 5, 8-17 (“the El Dorado Project would not compete for water use with any other local stakeholder, since its water use needs are expected to be satisfied using captured rainwater and recycled process water from the tailings impoundment.”); First Colindres Witness Statement para. 134; Letter from William Gehlen to Hugo Barrera, dated 12 September 2006 (enclosing the *Informe de Respuesta* Report on the Technical Review and Public Comment on the El Dorado Mine Project) at 8, 13-14, 67-69 (C-170); Letter from Scott Wood to Hugo Barrera, dated 25 October 2006 (enclosing Response Report to the Observations Presented by the Technicians of the DGGA-MARN in Meeting on 14 July 2006, dated October 2006) (C-171).

<sup>89</sup> Goodland Opinion at 16.

<sup>90</sup> EIS at 4-38 to 4-47 (containing a summary of the mine production process); *id.* at 6-46 (noting that cyanide levels within the tailings facility were conservatively estimated) (C-8A); *id.* at 1-9; Fuller Witness Statement, paras. 86-87, 98 (“It is important to emphasize that ... any cyanide present in the tailings pond would have been at very low concentrations and well under the allowable limits to protect health and safety. Moreover, cyanide does not persist in the natural environment for very long as it breaks down naturally when exposed to sunlight and through natural degradation.”) (emphasis added).

<sup>91</sup> *See, e.g.*, First Colindres Witness Statement, paras. 137-138; Second Colindres Witness Statement, paras. 21-24, 34-35, 66; Letter from William Gehlen to Hugo Barrera, dated 4 December 2006, delivered at the DGA (enclosing the Technical Memorandum for a Water Treatment Plant — (Continued...))

- “In 2006, even the decades-old mining activities of the Commerce Group, particularly acid mine drainage, were causing serious environmental impacts and contaminating the San Sebastian river.”<sup>92</sup> Again, a review of the El Dorado EIS reveals that chemical analysis of the rock located at the El Dorado Project demonstrated that acid rock drainage (“ARD”), such as that described by Dr. Goodland as occurring at the Commerce Group site,<sup>93</sup> was not a risk due to the low-sulfide nature of the rocks in the El Dorado area.<sup>94</sup> This chemical analysis is further affirmed by the fact that historic mining activities *at the El Dorado site* have never produced ARD, as noted by various experts and witnesses.<sup>95</sup>
- Finally, Dr. Goodland makes several references to Pac Rim’s alleged failure to adequately disseminate information to the local population and claims that the local population “scarcely participated in mine planning and precautions.”<sup>96</sup> This allegation is directly refuted by ample evidence that should have been made available to Dr. Goodland by Respondent. For instance, the local communities were consulted at the outset of the EIS planning to ensure that the Project was designed to address the communities’ concerns.<sup>97</sup> Likewise, following the completion of the EIS, Pac Rim held a second round of community consultations to again ensure that the communities understood the findings of the EIS, particularly with respect to concerns about water and the use of cyanide.<sup>98</sup> Moreover, above and beyond

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Quality of Mine Effluent, prepared by SNC-Lavalin Engineers & Constructors, Inc., dated 30 October 2006) (C-174).

<sup>92</sup> Goodland Opinion at 10.

<sup>93</sup> *Id.* at 10-11.

<sup>94</sup> Second Colindres Witness Statement, paras. 28-29; EIS at 4-36 to 4-38, 5-74 to 5-75 (C-8); *id.*, Annex 4.4 (Geochemical Description of the Mine and Waste Materials and Evaluation of the Impacts on Water Quality); Rebuttal Mudder and Hutchison Expert Report at 31-34; Letter from Scott Wood to Hugo Barrera, dated 25 October 2006 (enclosing Response Report to the Observations Presented by the Technicians of the DGGA-MARN in Meeting on 14 July 2006, dated October 2006) at 18 (C-171).

<sup>95</sup> Memorandum from Pat Gochnour to Tom Shrake and Bill Gehlen, dated 19 June 2003 at 4 (C-619); 2004 Annual Report of Exploration Work Done by Pacific Rim El Salvador in El Dorado, dated 13 December 2004 at 32 (R-101); Second Colindres Witness Statement, paras. 30-31; Gehlen Witness Statement, para. 22; Vásquez Witness Statement, para. 16; Witness Statement of Juan Isidro Hernández, dated 7 April 2014 (“Hernández Witness Statement”), para. 6.

<sup>96</sup> Goodland Opinion at 11, 17.

<sup>97</sup> EIS at Section 7.6.3.3 (C-8B); García Witness Statement, paras. 26-36; Fuller Witness Statement, paras. 46-60; Consultoría y Tecnología Ambiental, S.A. and Vector Colorado, LLC, Report on the First Round of the Public Consultation on the Environmental Impact Assessment of the El Dorado Mining Project, dated April 2004 (C-118); Public Consultation Letters, dated 2004 (C-443).

<sup>98</sup> García Witness Statement, paras. 37-39 (“Above all, we included in this second stage of presentations as much information as possible to respond to the questions the community had raised about (Continued...)”).

the EIS community consultations – which were not required under the Environmental Law but which were nevertheless notified to local and national Government officials<sup>99</sup> – Ms. García and other company employees held hundreds of community meetings;<sup>100</sup> disseminated thousands of pamphlets containing information about the Project and Pac Rim’s activities;<sup>101</sup> and hosted community visits to the Project site that were attended by over 2,700 community members.<sup>102</sup>

b. El Salvador Has Declined to Cross-Examine Pac Rim’s Technical Staff and Experts With Regard to the Environmental Aspects of the Project

47. As noted above, Respondent’s case with regard to the environmental aspects of Pac Rim’s project rests entirely upon vague allegations about the risks of the mining industry in general; and demonstrably incorrect claims concerning the alleged inadequacies of the El Dorado EIS. In a good-faith effort to respond to these various claims and allegations, Claimant has put forward substantial Project-specific documentary evidence, as well as witness and expert testimony demonstrating that the El Dorado Project was environmentally and socially viable, and should have been permitted under the terms of El Salvador’s Environmental Law.<sup>103</sup>

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water.”); Fuller Witness Statement, paras. 126-28; Powerpoint, Second Round of Public Comments: El Dorado Project, dated 4-8 October 2004 (C-445); List of second round meetings, dated 4-8 October 2004 (C-444).

<sup>99</sup> See, e.g., Claimant’s Reply, para. 102; List of First Round of Public Consultation Meetings (C-124); E-mail from Adrián Juárez to Fred Earnest, dated 17 February 2004 (C-594).

<sup>100</sup> García Witness Statement, paras. 42, 48-53.

<sup>101</sup> See, e.g., 60 Frequently Asked Questions about Pacific Rim and the Minerals Industry, dated 2007 (C-463); Brochure, Facts and Figures about Pacific Rim, dated 2007 (C-467); Newsletter, Literacy Campaigns in Communities, dated March 2004 (C-481); Newsletter, Environmental Impact Study, dated March 2004 (C-482); Newsletter, Surface Water Quality, dated March 2004 (C-483); Newsletter, Wells – San Isidro and Llano de la Hacienda, dated March 2004 (C-484); Newsletter, El Dorado Foundation, dated May 2005 (C-485); Newsletter, Training in the Prevention of Fires, dated May 2005 (C-486); Newsletter, Air Quality, dated May 2005 (C-487); Newsletter, El Dorado Nursery, dated May 2005 (C-488); Newsletter, Wall Construction, dated 12 September 2005 (C-489); Lies and Truths of Mines, ch. 6 (C-493); Lies and Truths of Mines, ch. 7 (C-494); Lies and Truths of Mines, ch. 8 (C-495); Lies and Truths of Mines, ch. 11 (C-496); Lies and Truths of Mines, ch. 12 (C-497).

<sup>102</sup> García Witness Statement, paras. 58-61.

<sup>103</sup> See generally First Colindres Witness Statement; Second Colindres Witness Statement; Fuller Witness Statement; First Mudder and Hutchison Expert Report; Rebuttal Mudder and Hutchison Expert Report; García Witness Statement.

Remarkably, Respondent has not challenged – or even acknowledged – the vast majority of this evidence.

48. In keeping with this strategy of ignoring the specific evidence or testimony that contradicts its narrative, Respondent has declined to cross-examine Claimant’s key environmental and social witnesses and experts at the Merits Hearing, including:

- **Dr. Terry Mudder, Ph.D., CHCM:** holds a B.S. with high honors in Chemistry, an M.S. in Organic and Analytical Chemistry, and a Ph.D. in Environmental Science and Engineering. Dr. Mudder is considered to be the world’s foremost authority on the environmental aspects of cyanide in mining and has worked professionally on over 200 mining and industrial projects in two dozen countries;
- **Dr. Ian Hutchison, Ph.D., P.E.:** holds a B.S. in Civil Engineering, has a graduate diploma in Hydraulics and Soil Mechanics, has a Ph.D. in Hydrology, and is a Professional Engineer. Dr. Hutchison has extensive experience in the planning, design, and construction of mine waste and water management systems, including waste rock and tailings disposal facilities, open pit and underground mine dewatering, water supply and pollution control systems, water storage and sediment retention dams and mine development, and has worked on over 100 mines, assisting with planning and design, permitting, constructing waste and water control facilities;
- **Mr. Matthew L. Fuller:** a Certified Professional Geologist and Licensed Engineering Geologist, who served as the Project Director of the El Dorado EIS;
- **Ms. Ericka Colindres:** holds a degree in Chemical Engineering and formerly served as an Environmental Assessment Technician in the Bureau of Environmental Management within MARN. Ms. Colindres analyzed the El Dorado EIS during her tenure at MARN. She later served as the Supervisor of Environmental Protection for PRES and then as the Director of Sustainability for Pacific Rim Exploration, Inc.;
- **Ms. Elizabeth García:** the Director of Public Relations for PRES and a resident of the town of Sensuntepeque. Since she was hired in 2004, Ms. García has met with thousands of people to discuss the proposed El Dorado Project and to respond to any questions posed by local community members.

49. If Respondent truly wished to engage in a reality-based examination of the environmental and social merits of the El Dorado Project, it would have sought to cross-examine these important witnesses and experts.

5. *The Evidence Further Shows That Development of the Project Was Expected to Improve Environmental Conditions in Cabañas*

50. *Amici* mention the alleged “water scarcity and high population density” in El Salvador, implying that these circumstances provided a justification for Respondent to have taken measures to block Pac Rim’s development of the El Dorado Project.<sup>104</sup> Thus, it is worth pointing out that Pac Rim’s project is located in a sparsely populated area; and that it was actually expected to improve the existing availability and condition of water resources in that area.

51. As described in the First and Second Witness Statements of Ericka Colindres, Pac Rim took specific steps to address the community’s concerns about any potentially negative impacts on the water supply and water quality.<sup>105</sup> Thus, the water to be used in the mining processes was to come entirely from rainfall and from water stored in the tailings facility: “[t]herefore, the El Dorado Project would not compete for water use with any other local stakeholder.”<sup>106</sup> In addition, all waste water from the ore processing circuit would pass through the INCO cyanide destruction circuit prior to discharge into a double-layered tailings impoundment.<sup>107</sup> Pac Rim further committed to install a secondary water treatment plant for the purpose of further purifying any water from the tailings facility prior to discharge into the local rivers during the rainy season.<sup>108</sup> Consequently, the El Dorado Project would have actually

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<sup>104</sup> *Amicus* Brief at 10.

<sup>105</sup> Second Colindres Witness Statement, paras. 13-43; First Colindres Witness Statement, paras. 134-39, 184-89.

<sup>106</sup> Second Colindres Witness Statement, para. 17.

<sup>107</sup> *Id.*, paras. 32-33; EIS, Annex 4.4 (Geochemical Description of the Mine and Waste Materials and Evaluation of the Impacts on Water Quality) (C-8D); EIS at 4-51 to 4-52 (C-8A); EIS Annex 5.1 (Statistical Summary of Water Quality Data); Chart 1d (Comparison of Criteria of Water Quality from the Source, and Project Pattern Test Values) (C-8D). As also confirmed in the EIS, the water in the tailings impoundment would meet relevant discharge standards. *See id.* at 3-11, 6-48; *see also* Resolution No. 249, Salvadorian Binding Standard: NSO.13.49.01.09 Water, Wastewater discharged into receiving body (CLA-308).

<sup>108</sup> Second Colindres Witness Statement, para. 35; Letter from William Gehlen to Hugo Barrera, dated 4 December 2006, delivered at the DGA (enclosing the Technical Memorandum for a Water Treatment Plant — Quality of Mine Effluent, prepared by SNC-Lavalin Engineers & Constructors, Inc., dated 30 October 2006) (C-174); Letter from William Gehlen to Hugo Barrera, dated 12 September 2006 (enclosing the *Informe de Respuesta* Report on the Technical Review and Public Comment on the El (Continued...)

contributed to the availability of clean water by collecting large amounts of rainwater during the rainy season in the tailings impoundment and discharging this clean water into the local rivers, which provide the primary water source for the local communities.<sup>109</sup>

52. Furthermore, as pointed out in the Pre-Feasibility Study and in the witness statement of Mr. Gehlen, the El Dorado Project is located in a low population density area, and most of the project site is comprised of uninhabited pastureland.<sup>110</sup>

53. Finally, it should be noted that Pac Rim devised and sponsored campaigns to clean local rivers,<sup>111</sup> test the quality of the community water supplies,<sup>112</sup> and reforest areas that had previously been deforested as a result of agricultural activities.<sup>113</sup> Indeed, Pac Rim and its predecessors have planted approximately 70,000 trees on Pac Rim's land and in the local communities.<sup>114</sup> These efforts would have continued throughout the period of Pac Rim's operations – which, to reiterate – were to be carried out *in the underground*.<sup>115</sup>

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Dorado Mine Project) (C-170); Letter from Scott Wood to Hugo Barrera, dated 25 October 2006 (enclosing Response Report to the Observations Presented by the Technicians of the DGGa-MARN in Meeting on 14 July 2006, dated October 2006) (C-171).

<sup>109</sup> See, e.g., Fuller Witness Statement, para. 167 (and references cited therein); Mudder & Hutchison Rebuttal Expert Report, p. 23.

<sup>110</sup> EIS, Section 5.3 (“Biological Environment”) at 5-94 to 5-95 (C-8A); *id.*, Section 5.4.2.4 (“At Municipal Level”) at 5-149 ; *see also* Gehlen Witness Statement, para. 196.

<sup>111</sup> Second Colindres Witness Statement, para. 105.

<sup>112</sup> *Id.*, paras. 104, 107-08.

<sup>113</sup> *Id.*, para. 41; First Witness Statement, para. 185; EIS, Section 5.3.2 (“Vegetation”) at 5-96 to 5-97 (C-8A).

<sup>114</sup> *Id.*, paras. 41-42; First Colindres Witness Statement, para. 185; Photograph, Our greenhouse (C-767); Photograph, Cultivating the greenhouse (C-768); Powerpoint, Social Work, slide 4 (C-498); Photograph, Children's Reforestation Campaign 2010, 1 (C-769); Photograph, Children's Reforestation Campaign 2010, 2 (C-770).

<sup>115</sup> See First Colindres Witness Statement, para. 185; Second Colindres Witness Statement, para. 43; EIS at 1-21 (“There will be no need to fell a great number of trees to clear the area for the construction of the industrial facilities of the Project (plant, ships, roads, etc.); felling will be limited to a maximum of 115 trees in the entire area of the Project. The physiognomy of the vegetation will not undergo a significant change; impacts will be reduced to the site where the tailings deposits and industrial facilities will be built. The ecosystems in these areas are dominated by pasturelands and thickets with dispersed trees, for which potential impacts will not be significant.”) (C-8A).

**B. El Salvador Has Done Nothing to Improve the Procedures For Public Participation in the Environmental Assessment Procedure**

54. *Amici* repeatedly allude to the importance of public access to information and participation in environmental decision-making. However, the only critique that Respondent's experts have made with respect to the sufficiency of Pac Rim's public consultation process is in fact a critique of El Salvador's own laws and regulations.<sup>116</sup>

1. *El Salvador Has Taken No Steps Towards Enhancing the Public Information or Consultation Procedures Established Under its Environmental Law*

55. Behre Dolbear noted that: "PRES may have complied with the need and methodology for public consultation required by Salvadoran Law; however, it is also noted that the common time for public review in other countries is one month and that only one document was available for review and not easily available for people living in the communities."<sup>117</sup> Given that the length and methodology of the public consultation process being criticized by Behre Dolbear is mandated by El Salvador's Environmental Law,<sup>118</sup> Respondent's own experts are taking the unusual step of critiquing *Respondent's* conduct, as if it were somehow the fault of Claimant.

56. In fact, as previously noted, *Pac Rim far exceeded El Salvador's public consultation requirements* by hosting two rounds of formal public consultations during the environmental impact assessment process;<sup>119</sup> holding hundreds of informal community

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<sup>116</sup> See Fuller Witness Statement, para. 194 ("...Behre Dolbear's criticism of the one-month period for public review of the EIS is one that should be directed toward El Salvador and is unrelated to Pac Rim."); para. 140 ("I also recall Dr. Moran lambasting the fact that there was only one copy of the EIS made available at MARN's office for public review, as if this were somehow Pac Rim's fault. When we explained that those were the statutory requirements of MARN and not within the control of Pac Rim, he again redirected the conversation to another topic.").

<sup>117</sup> First Behre Dolbear Report, para. 130; Second Behre Dolbear Report, para. 47.

<sup>118</sup> Environmental Law, art. 25 (CLA-213).

<sup>119</sup> EIS at Section 7.6.3.3 (C-8B); García Witness Statement, paras. 26-39; Fuller Witness Statement, paras. 46-60, 126-28; Consultoría y Tecnología Ambiental, S.A. and Vector Colorado, LLC, Report on the First Round of the Public Consultation on the Environmental Impact Assessment of the El Dorado Mining Project, dated April 2004 (C-118); Public Consultation Letters, dated 2004 (C-443); Powerpoint, (Continued...)

meetings;<sup>120</sup> disseminating thousands of pamphlets about its activities to the local communities;<sup>121</sup> and inviting community members to visit the Project site (over 2,700 community members participated in these site visits).<sup>122</sup>

57. Meanwhile, Respondent has had ample time to eliminate the deficiencies identified by its own experts. However, there is no evidence that any steps have been proposed to improve the legal procedure for the public consultation process provided for under El Salvador's Environmental Law.

2. *On the Other Hand, Pac Rim Far Surpassed the Requirements of Those Procedures in Relation to the El Dorado Project*

58. Ms. Elizabeth García, Pac Rim's Director of Public Relations, details the numerous ways in which the public was educated and consulted with regard to the El Dorado Project.<sup>123</sup> As noted above, these efforts at public consultation far surpassed any requirements of

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Second Round of Public Comments: El Dorado Project, dated 4-8 October 2004 (C-445); List of second round meetings, dated 4-8 October 2004 (C-444).

<sup>120</sup> García Witness Statement, paras. 42, 48-53.

<sup>121</sup> *Id.*, paras. 45-46, 52, 55; *see also* 60 Frequently Asked Questions about Pacific Rim and the Minerals Industry, dated 2007 (C-463); Brochure, Facts and Figures about Pacific Rim, dated 2007 (C-467); Newsletter, Literacy Campaigns in Communities, dated March 2004 (C-481); Newsletter, Environmental Impact Study, dated March 2004 (C-482); Newsletter, Surface Water Quality, dated March 2004 (C-483); Newsletter, Wells – San Isidro and Llano de la Hacienda, dated March 2004 (C-484); Newsletter, El Dorado Foundation, dated May 2005 (C-485); Newsletter, Training in the Prevention of Fires, dated May 2005 (C-486); Newsletter, Air Quality, dated May 2005 (C-487); Newsletter, El Dorado Nursery, dated May 2005 (C-488); Newsletter, Wall Construction, dated 12 September 2005 (C-489); Lies and Truths of Mines, ch. 6 (C-493); Lies and Truths of Mines, ch. 7 (C-494); Lies and Truths of Mines, ch. 8 (C-495); Lies and Truths of Mines, ch. 11 (C-496); Lies and Truths of Mines, ch. 12 (C-497).

<sup>122</sup> García Witness Statement, paras. 58-61.

<sup>123</sup> *See id.*, paras. 26 – 64 (and exhibits cited therein).



Salvadoran law.<sup>124</sup> Moreover, the project was specifically designed to take into account the input received from the local communities.<sup>125</sup>

59. Likewise, Mr. Fuller, the EIS’s lead author, confirms the robustness of the public consultation process that Pac Rim undertook: Mr. Fuller affirms that, “Pac Rim engaged the communities surrounding the El Dorado Project through both formal public consultations as well as through community outreach and social development programs,” noting that the consultation process “was designed to comport with both Salvadoran law and the more rigorous IFC guidelines.”<sup>126</sup>

**C. El Salvador Has Done Nothing to Protect Any Legitimate Interests of the Local Landowners or Community Members**

60. As noted above, El Salvador has not applied its internal legal framework to Pac Rim, “in such a manner that provides effective protection to the environment and the rights of individuals,”<sup>127</sup> as advocated by *amici*. Instead, it has disregarded that legal framework entirely, and has declined to assess the specific environmental implications of the El Dorado Project. Similarly, El Salvador has failed to undertake any credible assessment of the interests of the local residents, or to identify or undertake any measures aimed at advancing those interests.

1. *Pac Rim Has Obtained the Necessary Authorizations For its Development of the El Dorado Project*

61. *Amici* argue that all the owners of the land in the concession area must give their authorization for Pac Rim to obtain an exploitation concession from the Government, since they “would be directly affected by the proposed mining.”<sup>128</sup> In fact, *neither El Salvador nor Amici*

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<sup>124</sup> *Id.*, para. 26 (“...these consultations were not required as part of the process of environmental impact assessment under El Salvadoran law, but were carried out because Pac Rim wanted to comply with the international best practices for mining projects.”).

<sup>125</sup> Fuller Witness Statement, para. 59 (“Following the first round of public consultation, the EIS team recommended that Pac Rim undertake specific actions with respect to the broad categories of concerns raised by the community members.”).

<sup>126</sup> *Id.*, paras. 45-46; *see also* para. 70 (“...the formal public consultation process pertaining to the EIS was only one component of the El Dorado Project Consultation Plan.”).

<sup>127</sup> *Amicus* Brief at 3.

<sup>128</sup> *Id.* at 7.

*have presented any evidence whatsoever that the landowners in question would be directly or adversely affected in the use or enjoyment of their property rights as a result of Pac Rim's proposed mining activities.* Amici's statement to this effect is based on pure supposition, and finds no basis in the abundant technical-environmental project data that was presented both to the Government and to the public in the El Dorado Project EIS.

62. On the other hand, the evidence demonstrates that Pac Rim has obtained authorizations from any and all landowners whose surface properties have been or would be affected by its activities. Pac Rim and its predecessor Kinross carried out mineral exploration activities in the El Dorado area from 1994 to 2008. During this 14-year period, the inhabitants of the area consistently authorized the companies to carry out surface works on their lands.<sup>129</sup> As Mr. Gehlen has testified, Pac Rim has carried out activities with surface impacts – such as construction of drill pads and access roads – throughout the 12.75 square kilometer area of the requested El Dorado exploitation concession, and has always easily obtained authorization for these activities from the local inhabitants.<sup>130</sup>

63. Furthermore, Pac Rim has also acquired ownership – through voluntary agreements with the local landowners – over *all* the surface areas that would be directly impacted by its proposed development of underground mining activities.<sup>131</sup>

64. Finally, it should be reiterated that Pac Rim would have obligations under the laws of El Salvador to post both an environmental compliance bond, as well as a separate bond under the terms of the Amended Mining Law, prior to its commencement of mine development activities. The purpose of these bonds is to ensure that the State can immediately cover the costs

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<sup>129</sup> See, e.g., Payment Agreement with names redacted, dated 20 September 2007 (C-609); Payment Agreement with names redacted, dated 30 November 2007 (C-648); Payment, 5 manzanas, with names redacted (C-649); Payment, 16 manzanas, with names redacted (C-660); Payment, 22 manzanas, with names redacted (C-661); Kinross Payment Agreement, dated 26 June 1996 (C-662); Kinross Payment Agreement A, 15 January 1998 (C-663); Kinross Payment Agreement B, 15 January 1998 (C-664).

<sup>130</sup> Gehlen Witness Statement, paras. 192-94.

<sup>131</sup> See Letter from William Gehlen, dated 7 November 2006 (C-11).

of any unexpected damage that might have been caused to third parties during the course of Pac Rim's development of the project.<sup>132</sup>

2. *El Salvador Has Never Identified What Further Steps Could or Should be Taken by Pac Rim to Ensure That the Interests of Local Landowners Are Protected*

65. Assuming that Pac Rim could be required to obtain further authorizations from local residents, El Salvador has presented no credible evidence that these residents would withhold such authorizations. As noted above, Pac Rim has never faced any difficulties in obtaining permission from local residents to carry out surface works related to mining activities in the area of its operations. Furthermore, the overwhelming record evidence – as summarized in the following subsection – demonstrates that the majority of residents in the proposed El Dorado concession area support the development of a mine at El Dorado, thanks in part to Pac Rim's extensive efforts at information-sharing, cooperation, and collaboration.<sup>133</sup>

66. On the other hand, Respondent has not identified any legitimate interests of the local community members that could be protected through further authorizations, nor has it explained what form such authorizations should take or what steps Pac Rim could or should have taken to secure them.<sup>134</sup>

3. *El Salvador Has Never Undertaken a Credible Assessment of the Interests of the Local Inhabitants Regarding the El Dorado Project*

67. *Amici* argue that El Salvador should take steps to “empower local communities;” and “give consideration and expression to the plurality of voices within society and the public

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<sup>132</sup> Of course, these bonds are in addition to residual rights of action that injured parties would have against Pac Rim under the terms of the Environmental Law, the Amended Mining Law, and the Civil Code. *See, e.g.*, Environmental Law, arts. 100-101 (CLA-213); Unnumbered Decree “*Codigo Civil*”, of 23 August 1895 (amended by Legislative Decree No. 512 of 11 November 2004, published in the Official Journal No. 236, Vol. 365, 17 December 2004), arts. 2065, 2067 (CLA-220).

<sup>133</sup> *See, e.g.*, Vásquez Witness Statement, paras. 7-16; Hernández Witness Statement, paras. 4-6; Second Colindres Witness Statement, paras. 77-89; García Witness Statement, paras. 26-64, 81-86.

<sup>134</sup> *See* Memo from Fred Earnest to Tom Shrake, dated 28 June 2005 (C-291); Gehlen Witness Statement, para. 190.

interest.”<sup>135</sup> However, El Salvador has done nothing to empower or give expression to the voices of the local communities with direct interests at stake in this dispute.<sup>136</sup> Although Respondent attempts to claim in the context of this arbitration that these communities oppose Pac Rim’s development of mining activities,<sup>137</sup> ***El Salvador has presented no credible evidence in support of this claim.*** Instead, El Salvador has relied solely upon second-hand information presented by self-identified anti-mining activists, most of whom have with no identifiable relationship with, or knowledge of the local communities in the area of Pac Rim’s operations:

- First, El Salvador relies upon the report of non-Salvadoran experts from Behre Dolbear, whose only identified source of information with regard to the alleged “opposition” of the community was “a prominent advocate against mining.”<sup>138</sup>
- Second, El Salvador relies upon the witness statement of Father José María Tojeira, a self-identified anti-mining activist<sup>139</sup> who portrays mining companies as competitors of the Catholic Church in the Department of Chalatenango.<sup>140</sup> Notably, the El Dorado Project is not located in

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<sup>135</sup> See *Amicus* Brief at 9.

<sup>136</sup> In fact, even the consultants from TAU noted that the voices in favor of mining in El Salvador did not have equal access to mechanisms for participation, or to have their opinions heard. Tau Group, Final Report: Strategic Environmental Assessment of the Metallic Mining Sector of El Salvador, Ministry of Economy of El Salvador Foreign Cooperation Unit, dated 8 September 2011 at 20 (“In fact, many organizations have made it clear that they strongly reject the activity, and although there are some who are arguing in favor of it (Table 5), their participation mechanisms or ways of getting their message out have not been as effective.”) (R-130) (emphasis added).

<sup>137</sup> See, e.g., Rejoinder, paras. 61-62.

<sup>138</sup> First Expert Report of Behre Dolbear, dated 6 January 2014 (“First Behre Dolbear Report”), para. 124; see also Second Expert Report of Behre Dolbear, dated 9 July 2014 (“Second Behre Dolbear Report”) (relying on “a limited number of interviews” allegedly carried out at an unspecified place and with unidentified people, as another basis for Behre Dolbear’s “perception” of polarization in the local community), para. 124.

<sup>139</sup> See, e.g., *Anti-mining groups from around the world debated the defense of water in El Salvador*, dated 13 May 2013 (quoting Father Tojeira as stating that mining carried out by transnational corporations is, “completely immoral...”) (C-860); *In El Salvador the fight against mining continues*, dated 11 May 2013 (quoting Father Tojeira as stating that, “mining companies repress and impoverish communities.”) (C-861).

<sup>140</sup> Witness Statement of Father Jose Maria Tojeira, dated 3 June 2014 (“Tojeira Witness Statement”), Appendix 1 (“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, or even more than the government itself could do in its fight against poverty. If these ignorant mining company representatives would merely add up the residential projects carried out in the (Continued...)

Chalatenango, nor do the residents of the project area identify with the rhetoric of anti-mining activists from that department.<sup>141</sup> Furthermore, there is no evidence that Father Tojeira – the ex-rector of a Jesuit university in San Salvador – has ever even been to the Department of Cabañas, much less that he is familiar with the sentiments of the local inhabitants in the area of the proposed El Dorado mine.

- And, third, El Salvador relies upon the evidence of ex-Minister of Environment Hugo Barrera, who claims to have “verified” anti-mining sentiment in the area of the El Dorado Project by asking a number of people in attendance *at an anti-mining forum*<sup>142</sup> to raise their hands if they “were owners of land where Pac Rim was requesting the concession.”<sup>143</sup> Notably, the forum in question was held in San Salvador, where few of the local inhabitants from the El Dorado area would have been able to afford to travel for the purpose of attending such a forum – something Minister Barrera might have been capable of deducing had he ever actually been to the project site or spoken to any of the local community members.<sup>144</sup>

68. In fact, there is no evidence on the record indicating that any of Respondent’s government officials – including the ones that are appearing as witnesses in this arbitration –

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Department of Chalatenango by Church institutions, they would realize how small and ridiculous their development proposals can seem when compared to what the Church has done.”)

<sup>141</sup> See Hernández Witness Statement, para. 8 (“...we community leaders of San Isidro El Dorado have shown our support for the development of the El Dorado mining project, and have rejected the unfounded claims made by anti-mining groups that do not belong to the area, including some in the Chalatenango area ...”) (emphasis added); Witness Statement of Gilberto Vásquez, dated 14 March 2014 (“Vásquez Witness Statement”), para. 12 (“When we talk about groups that are opposed to the development of mining activity, the first thing to be said is that these groups are made up principally of people who live a long way from the mine. In my experience, there are centers of opposition to mining in San Salvador; in the Department of Chalatenango; and in the northern area of Cabañas, centralized in the city of Santa Marta.”) (emphasis added).

<sup>142</sup> See Tojeira Witness Statement, para. 4 (“...UCA was contacted by non-governmental organizations that were opposed to metallic mining in El Salvador to ask us to facilitate a forum to be held at UCA facilities.”).

<sup>143</sup> Witness Statement of Hugo Barrera, dated 26 June 2014 (“Barrera Witness Statement”), para. 22; *see also* Tojeira Witness Statement, para. 8.

<sup>144</sup> See, e.g., García Witness Statement, para. 8 (“The commute from Sensuntepeque to San Salvador can take around 1.5 to 2 hours in each direction, depending on traffic.”); Vásquez Witness Statement, para. 7 (“I think it is important to point out that in the Municipality of San Isidro, only about 20% of the population has formal employment in the business or industrial sector. Most of the people work in small-scale farming and depend on money sent by relatives from abroad in order to survive.”); *see also* para. 13 (“That is the economic reality here. If an organization is going to pay my neighbor five dollars plus a meal to walk in the street with a sign saying “No to mining,” he may do it—not because he is against mining, but because unfortunately that is the best job he could get.”).

have ever actually spoken to any of the local inhabitants in the El Dorado area, much less undertaken a credible study of their interests in relation to Pac Rim’s proposed activities.

69. On the other hand, Pac Rim’s representatives live and work in the local community,<sup>145</sup> and Pac Rim has presented abundant direct evidence of their cooperative relations and the support of the local inhabitants for the development of the mine. Among other evidence, Pac Rim has presented:

- Witness statements from respected local community leaders who actually live in the area of the proposed El Dorado concession;<sup>146</sup>
- The testimony and evidence presented by Ms. Elizabeth García, who has personally spoken to thousands of local residents about Pac Rim’s proposed mining operations, over a period of approximately ten years;<sup>147</sup>

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<sup>145</sup> See, e.g., García Witness Statement, para. 24 (“My desire to learn about and understand the exploration and future extraction at El Dorado was especially strong since I live in Sensuntepeque, and I would never want any harm to come to my family, friends, or neighbors. Definitely, the people there know who I am. They also know my mother, they know who my children are and which school they attend, and they know where we live. Thus, logically, I could not be promoting a project that would later be harmful to the community and my family – I would not put my family in that situation.”); First Colindres Witness Statement, para. 190 (“It follows that, I, Ericka Colindres, could not support the El Dorado Project in El Salvador had I any doubts with respect to the scientific basis of the mine, or if I had no confidence in the commitment to the community shown by those behind the project.”); Gehlen Witness Statement, para. 1 (“Since 2002, I have divided my time between the Pac Rim offices in Reno, Nevada and in El Salvador”); para. 193 (“Over the years, we have worked on pretty much all corners of this area and have never faced opposition from the landowners.”); Vásquez Witness Statement, para. 11 (“In fact, the company’s representatives, especially Elizabeth García and Ericka Colindres, have maintained close contact with almost all the leaders of communities near the mine.”); Hernández Witness Statement, para. 4 (“As the community leader I regard myself to be, I was contacted by representatives of PRES in 2004. They approached me not only to talk about the El Dorado mining project, but also to inform me about their social programs and generally to invite me to work as part of a team with the aim of strengthening links with the community.”).

<sup>146</sup> See generally Vásquez Witness Statement; Hernández Witness Statement.

<sup>147</sup> See generally García Witness Statement; see in particular para. 68 (“Based on everything I’ve seen over my many years of speaking with the local communities about the proposed mine, I can say without reservation that the local communities are supportive of the development of the El Dorado Project.”); para. 86 (“I can say truthfully that over the past decade I have *personally* met with thousands of people to discuss Pac Rim and the proposed El Dorado mining project. I do not believe that anyone else can make such a claim ... I believe that these efforts were successful and that – while not unanimous – the majority of people in the local communities supported Pac Rim’s plans to develop a mine.”) (emphasis in original); para. 57 (“The question that I receive most frequently now is: ‘when will the mine open so that I can get my job back?’ Unfortunately, I do not have an answer to this question.”); see also (Continued...)

- Dozens of letters of support for Pac Rim, written by local community members and leaders of local government institutions,<sup>148</sup> and
- A petition asking then-President Funes to allow Pac Rim to develop its proposed mining project, supported by *thousands* of local community members.<sup>149</sup>

70. As noted by Pastor Juan Isidro Hernández, a resident and community leader in San Francisco El Dorado, the local community development organizations (“ADESCOs”) from San Isidro have also publicly appealed to the President of El Salvador to reconsider the decision to block Pac Rim’s development of the El Dorado Project,<sup>150</sup> but “[t]he Government of El Salvador so far has not listened to the request we made on that occasion, and has instead favored the political interests of other groups that have little to do with the El Dorado mining project. Five years have passed since we gave the press conference [in favor of Pac Rim], and I should like today to reiterate my position and state that I continue waiting for the Government of El Salvador to rectify and alter its policy in favor of mining in El Salvador.”<sup>151</sup>

71. Notably, El Salvador has failed to call Pastor Hernández to testify at the upcoming hearing, just as it has failed to call Mr. Gilberto Vásquez (resident of Los Jobitos, President of ACOAGUA and member of the municipal council of San Isidro), or Ms. Elizabeth García (resident of Sensuntepeque and public relations manager for PRES).

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*e.g.*, Sonia Bernal, et. al., *Uncertain Future Mining Favors Residents*, EL DIARIO DE HOY (4 September 2006) (C-265); Rodrigo Quezada, *Mining Exploitation: The Conflict Over Gold*, EL FARO (19 June 2006) (C-395); *Vision Campaign Affected*, EL DIARIO DE HOY (15 March 2007) (C-557); Open Letter to Diario CoLatino “Accusations Against Armed Forces are False”, dated 13 May 2007 (C-558).

<sup>148</sup> See, *e.g.*, Advertisement, El Salvador Union of Mining Industry Workers, LA PRENSA GRÁFICA (29 June 2011) (C-530); Letter from the Governor of the Department of Cabañas to Fred Earnest, dated 2 June 2006 (C-532); Letter from Marlon Ernesto Saravia Rivera to the Ministry of the Environment, dated 7 November 2007 (C-533); *Controversy over Mining Development*, EL DIARIO DE HOY (11 June 2006) (C-534); Public Letters of Support for Pac Rim, dated May 2011 (C-553); Letter from the Armed Forces of El Salvador to Fred Earnest, dated 1 April 2006 (C-554); Notes of José Arévalo (C-555).

<sup>149</sup> Letter to the President of the Republic of El Salvador, dated 3 September 2009 (C-556).

<sup>150</sup> *ADESCOS in favor of Pacific Rim asking to not close exploration*, DIARIO COLATINO (2 March 2009) (C-608).

<sup>151</sup> Hernández Witness Statement, para. 9 (emphasis added).

4. *Amici Provide no Evidence to Support Their Insinuations That Pac Rim's Activities Have Generated Violence in the Local Community*

72. Much like Respondent in this arbitration, *amici* have ignored the substantial evidence of community support that Pac Rim has presented, claiming that “most of the population has opposed mining.”<sup>152</sup> Like Respondent, they rely solely upon self-identified anti-mining activists – particularly members of the organization known as ADES – as support for this proposition.<sup>153</sup> However, as Messrs. Vásquez and Hernández and Ms. García have all attested, ADES does not represent the views of their communities.<sup>154</sup>

73. *Amici's* insinuations that Pac Rim has somehow “attempted to silence the public debate on mining” through “assaults against environmental defenders” are irresponsible and unsubstantiated. As Claimant has previously noted, the U.S. Embassy in El Salvador investigated these incidents (including by speaking with senior Salvadoran law enforcement officials, the human rights ombudsman, and anti-mining activists) and found “absolutely no compelling evidence, nor credible motive, linking Pacific Rim to these murders.”<sup>155</sup> In regard to this point, Claimant would also direct the Tribunal to the testimony of its witnesses, Mr. Gilberto Vásquez<sup>156</sup> and Ms. Elizabeth García,<sup>157</sup> and to additional documents in the record demonstrating that the assaults in question were unrelated either to mining or Pac Rim, and that Pac Rim has consistently advocated a policy of non-confrontation and non-violence.<sup>158</sup> Claimant repeats its

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<sup>152</sup> *Amicus* Brief at 10.

<sup>153</sup> *Id.* (“The testimony of ADES ... makes clear that most of the population has opposed mining...”).

<sup>154</sup> See García Witness Statement, paras. 71-80; Hernández Witness Statement, para 5; Vásquez Witness Statement, para. 12 (discussing an anti-mining group in Santa Marta, which is ADES), para. 17 (discussing Francisco Pineda, a leader of ADES).

<sup>155</sup> See Claimant letter to the Tribunal dated 28 April 2014 at 24; Pacific Rim Mining Company, [http://en.wikipedia.org/wiki/Pacific\\_Rim\\_Mining\\_Corporation](http://en.wikipedia.org/wiki/Pacific_Rim_Mining_Corporation) (C-864).

<sup>156</sup> Vásquez Witness Statement, para. 14 (“... I do not know anyone who believes that those murders had anything to do with mining, much less with Pac Rim.”).

<sup>157</sup> García Witness Statement, para. 118.

<sup>158</sup> See, e.g., Pacific Rim El Salvador Public Clarification, signed by Ericka Colindres, dated 28 June 2011 (C-544); Pacific Rim El Salvador Public Clarification, dated 28 June 2011 (C-545); Pacific Rim El Salvador Public Clarification, published in the Diario de Hoy on 29 June 2011, dated 29 June 2011 (C-546); Pacific Rim El Salvador Public Clarification, published in La Prensa Gráfica on 29 June 2011, dated (Continued...)



firm rejection of these allegations, which have been perpetuated over a period of years – *without any basis whatsoever* – by members of ADES.<sup>159</sup>

Respectfully submitted,

/s/

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28 June 2011 (C-547) (“We condemn the unjust accusations being made against our company and our personnel, those which are coming from the same people who are representatives of mining opposition, who for inability to possess technical arguments to justify their opposition to responsible mining... take advantage of criminal circumstances, completely unrelated, to try to disparage the company in public opinion”) (emphasis added); Pacific Rim El Salvador Public Clarification, dated 8 February 2010 (C-548) (“Pacific Rim El Salvador reiterates its repudiation of the provocations and violent acts recorded in Cabañas... peaceful coexistence is a necessity for business success and for all investment in El Salvador, therefore, violence in any form is absolutely alien and incompatible with productive activity.”); *Deaths Are From Gangs and Ex-Guerrillas*, [www.elsalvador.com](http://www.elsalvador.com) (24 January 2010) (C-549); *The Fight Against Narcotrafficking Depends on the Capital*, [www.diariocolatino.com](http://www.diariocolatino.com) (5 July 2011) (C-550); *10 Prosecuted for the Murder of Environmentalists*, LA PRENSA GRAFICA (11 April 2012) (C-551); *Trial Begun for Death of Environmentalist*, LA PRENSA GRAFICA (27 September 2010) (C-552).

<sup>159</sup> García Witness Statement, para. 80 (naming ADES members as the “primary driver behind the allegation that Pac Rim was somehow connected to or involved in [these incidents].”). Notably, Ms. Yanira del Carmen Cortez, Respondent’s witness in this arbitration, blames the Government of El Salvador for failing to adequately investigate ADES’ allegations. However, Ms. Cortez – like ADES itself – presents absolutely no evidence linking the incidents in question to mining or to Pac Rim, and merely states her “opinion” that Pac Rim’s presence in the area has generated social conflict. Cortez Witness Statement, para. 10. Ms. Cortez, like Respondent’s other witness, Father Tojeira, is not a member of the local community, nor does she provide any specific information about her interactions with the local community that would substantiate her “opinions.” Instead, she only mentions conversations that she had with environmental organizations and anti-mining activists, without reference to whether the people in question were actually members of the community that resides in the area of Pac Rim’s operations. *See id.*, paras. 11, 13.

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