

**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  
MEMORIAL ON THE MERITS AND QUANTUM**

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## GLOSSARY OF KEY DEFINED TERMS

<b>Additional Observations</b>	Official note from MARN containing observations regarding the EIS for the ED Mining Environmental Permit application, delivered to PRES on 11 August 2005
<b>Amended Mining Law</b>	<i>Ley de Minería</i> as amended by <i>Decreto No. 475</i> (The 1996 Mining Law as amended by Decree 475 in 2001)
<b>ANDA</b>	<i>Administración Nacional de Acueductos and Alcantarillados</i> (National Aquaduct and Drainage Administration El Salvador's National Sewage company)
<b>Asamblea</b>	<i>Asamblea Legislativa de El Salvador</i> (Legislative Assembly of El Salvador )
<b>Bond (or Environmental Bond)</b>	<i>Fianza de Cumplimiento Ambiental</i> (Environmental Performance Bond)
<b>Bureau of Citizen Participation (or DPC)</b>	<i>Dirección General de Participacion Ciudadana</i> (Bureau of Citizenship Participation within MARN)
<b>Bureau of Environmental Management or DGA</b>	<i>Dirección de Gestión Ambiental</i> (Bureau of Environmental Management within MARN)
<b>Bureau of Mines</b>	<i>Dirección de Hidrocarburos y Minas</i> (Bureau of Mines within MINEC)
<b>Cerro Colorado Project</b>	Exploration Project acquired by PRES in September 2006, located approximately 50 km north of San Salvador and 10 km west of the Zamora Project
<b>CIM Standards</b>	Canadian Institute of Mining Standards for Mineral Resources and Mineral Reserves
<b>Claimant</b>	PRC, PRES, and DOREX
<b>Companies (or Pac Rim)</b>	PRMC and its subsidiaries, including Claimant
<b>CONAMA</b>	<i>Comision Nacional del Medio Ambiente</i> (National Commission for the Environment)
<b>Concession Application</b>	Application to convert the El Dorado Exploration Licenses into an Exploitation Concession, submitted to the Bureau of Mines on 22 December 2004
<b>DAJ</b>	<i>Direccion General de Asuntos Juridicos</i> (Bureau of Legal Affairs within MARN)

<b>DGA (or Bureau of Environmental Management)</b>	<i>Dirección de Gestion Ambiental</i> (Bureau of Environmental Management within MARN)
<b>DOREX</b>	<i>Dorado Exploraciones, SA. de C.V.</i>
<b>DPC (or Bureau of Citizen Participation)</b>	<i>Dirección General de Participacion Ciudadana</i> (Bureau of Citizenship Participation within MARN)
<b>EAE</b>	<i>Evaluación Ambiental Estratégica</i> (Strategic Environmental Assessment)
<b>ED Drilling Environmental Permit</b>	Environmental Permit related to exploration and drilling activities at the El Dorado Project
<b>ED Mining Environmental Permit</b>	Environmental Permit related to exploitation activities at the El Dorado Project
<b>EIA (or Environmental Impact Assessment)</b>	Administrative process for the granting of environmental permits pursuant to the Environmental Law
<b>EIS</b>	<i>Estudio de Impacto Ambiental</i> (Environmental Impact Study)
<b>El Dorado Exploration Licenses</b>	The El Dorado Norte and El Dorado Sur Exploration Licenses collectively
<b>El Dorado Norte</b>	Exploration License issued by the Bureau of Mines on 10 July 1996 for an area of 29.8696 square kilometers
<b>El Dorado PFS</b>	Final Pre-Feasibility Study, dated 21 January 2005
<b>El Dorado Project (or Project)</b>	Comprised of the El Dorado Norte and El Dorado Sur Exploration License areas
<b>El Dorado Sur</b>	Exploration License issued by the Bureau of Mines on 23 July 1996 for an area of 45.1300 square kilometers
<b>El Salvador (or Government or Respondent or GOES)</b>	Republic of El Salvador
<b>Enterprises</b>	PRES and DOREX
<b>Environmental Bond (or Bond)</b>	<i>Fianza de Cumplimiento Ambiental</i> (Environmental Performance Bond)
<b>Environmental Form</b>	<i>Formulario</i> (Form required by MARN to commence the Environmental Impact Assessment)
<b>Environmental Impact Assessment (or EIA)</b>	Administrative process for the granting of environmental permits pursuant to the Environmental Law



<b>Environmental Law (or LMA)</b>	<i>Ley del Medio Ambiente 1998</i> (Environmental Law of 1998)
<b>Environmental Permit</b>	Administrative act authorizing the Permit-holder to carry out activity pursuant to the measures in the EIS
<b>Environmental Regulations (or RGLMA)</b>	<i>Reglamento General a la Ley del Medio Ambiente</i> (General Regulations for the Environmental Law)
<b>Final Observations</b>	Additional thirteen comments requiring further response regarding the EIS for the ED Mining Environmental Permit application, submitted to PRES from MARN on 14 July 2006
<b>GOES or Respondent (or El Salvador or Government)</b>	Republic of El Salvador
<b>Government or Respondent (or El Salvador or GOES)</b>	Republic of El Salvador
<b>Guaco Drilling Environmental Permit</b>	Applied-for Environmental Permit related to exploration and drilling activities within the Guaco Exploration License area
<b>Huacuco Drilling Environmental Permit</b>	Applied-for Environmental Permit related to exploration and drilling activities within the Huacuco Exploration License area
<b>Investment Law</b>	<i>Ley de Inversion de 1999</i> (Foreign Investment law of 1999)
<b>Kinross (or Kinross El Salvador)</b>	Kinross El Salvador, S.A. de C.V.
<b>La Calera Project</b>	Exploration Project located approximately 8 kilometers west of the El Dorado Project
<b>LMA (or Environmental Law)</b>	<i>Ley del Medio Ambiente de 1998</i> (Environmental Law of 1998)
<b>MARN</b>	<i>Ministerio de Medio Ambiente y Recursos Naturales</i> (Ministry of Environmental and Natural Resources)
<b>MINEC</b>	<i>Ministerio de Economia</i> (Ministry of Economy)
<b>Mineral Reserves</b>	Defined by CIM Standards as the “economically mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study”
<b>Mineral Resources</b>	Defined by CIM Standards as a mineral resource with “reasonable prospects for economic extraction”
<b>NI 43-101</b>	National Instrument 43-101 Standards regulating disclosures made by publicly traded Canadian companies
<b>ONI</b>	<i>Oficina Nacional de Inversiones</i> (National Investment Office within MINEC)

<b>Pac Rim (or Companies)</b>	PRMC and its subsidiaries, including Claimant
<b>Pac Rim Exploration</b>	Pacific Rim Exploration, Inc.
<b>PRC</b>	Pac Rim Cayman LLC
<b>PRES</b>	<i>Pacific Rim EL Salvador, S.A. de C.V.</i>
<b>PRMC</b>	Pacific Rim Mining Corp.
<b>Productive Interval</b>	The range of elevations at which ore in an epithermal vein system is typically found
<b>PROESA</b>	<i>Agencia de Promocion de Exportaciones e Inversiones de El Salvador</i> (El Salvador Agency for the Promotion of Exportation and Investment)
<b>RGLMA (or Environmental Regulations)</b>	<i>Reglamento General a la Ley del Medio Ambiente</i> (General Regulations for the Environmental Law)
<b>Respondent (or El Salvador or GOES or Government)</b>	Republic of El Salvador
<b>Responses</b>	PRES's Response to MARN's Technical Observations on the EIS for the ED Mining Environmental Permit application, presented to MARN on 22 April 2005
<b>Response to Final Observations</b>	PRES's Response to MARN's Final Observations on the EIS for the ED Mining Environmental Permit application, presented to MARN on 25 October 2006
<b>Response to Public Comments</b>	Detailed response to points raised by Dr. Moran's report regarding the EIS for the ED Mining Environmental Permit, submitted to MARN on 12 September 2006
<b>Santa Rita Project</b>	Exploration License area acquired by PRES in July 2005, located approximately 8 km north of the El Dorado Project
<b>Santa Rita Drilling Permit</b>	Environmental Permit related to exploration and drilling activities at the Santa Rita Project
<b>SPMA</b>	<i>Suprintendente de Proteccion Ambiental</i> (Supervisor of Environmental Protection)
<b>Zamora Gold Project</b>	Exploration Project acquired by PRES in 2006, located approximately 50 km north of San Salvador and 10 km east of the Cerro Colorado Project

## **I. INTRODUCTION AND SUMMARY OF CLAIMANT’S CLAIMS**

1. Pursuant to Article 15 of the *Ley de Inversiones* of El Salvador (“**Investment Law**”),<sup>1</sup> Claimant Pac Rim Cayman LLC (“**PRC**”), on its own behalf and on behalf of its Enterprises, Pacific Rim El Salvador, S.A. de C.V. (“**PRES**”) and Dorado Exploraciones, S.A. de C.V. (“**DOREX**”) (collectively, the “**Enterprises**”), respectfully submits this Memorial on the Merits (“**Memorial**”) in support of its claims against Respondent, the Republic of El Salvador (“**Respondent**,” “**El Salvador**,” “**GOES**,” or the “**Government**”). PRC, PRES, and DOREX are collectively referred to herein as “**Claimant**.”

2. PRC is a limited liability company under the laws of Nevada, U.S.A. PRC is an environmentally and socially responsible mining company. It supports robust environmental protection and fair mineral royalty payments. PRC’s parent company, Pacific Rim Mining Corporation (“**PRMC**”), is a public company established under the laws of Canada. PRMC and its subsidiaries, including Claimant, are collectively referred to herein as “**Pac Rim**,” the “**Pac Rim Companies**,” or simply the “**Companies**.”

3. In the nearly *four years* that have passed since Claimant filed its Notice of Arbitration, this Tribunal has been presented with a myriad of facts, legal arguments, expert opinions, witness testimony, and documents – and will understand that Claimant is now providing even more detailed arguments with this submission. In light of this, and before proceeding forward with the merits of Claimant’s claims, it is helpful to take a step back from all of the controversy introduced by Respondent’s successive rounds of preliminary objections.

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<sup>1</sup> *Decreto No. 732* of 14 October 1999, published in the *Diario Oficial* No. 210, Vol. 345 of 11 November 1999 (CLA-4).

Doing so reveals a case that is simple in its essence: El Salvador spent many years creating a legal framework designed to encourage the rule of law, and to facilitate foreign investment in the mining industry; El Salvador's representatives directly induced and encouraged Pac Rim (and its predecessors in the El Dorado Project) to invest millions of dollars in exploration and mine development; as a result, Claimant reasonably believed that its mineral rights would be honored and that it would be allowed to exploit the minerals at the El Dorado site for the benefit of both its shareholders and of El Salvador; then, with the announcement of a *de facto* ban on metallic mining in March 2008, the Executive Branch of the Salvadoran Government illegitimately swept aside the legal and regulatory regime upon which Claimant had relied in developing the El Dorado Project, depriving it of the value of its investments.

4. As set forth herein, through successive modifications to its mining legislation – most recently in 2001 – El Salvador has consistently sought to attract mining investment generally, and to specifically encourage exploitation of the El Dorado gold and silver Project (“**El Dorado Project**” or “**Project**”) located in the Department of Cabañas, one of the poorest regions in the country. Pac Rim was precisely the kind of investor El Salvador was looking for: a foreign investor with the funding, mining industry know-how, and mineral exploration expertise necessary to bring the El Dorado Project into production.

5. Thus, from the time of Pac Rim's investment in 2002 until March 2008, senior Government officials, including then-President Elías Antonio Saca and Vice President Ana Vilma Escobar, welcomed Pac Rim with open arms. These officials consistently assured Claimant that the Government was supportive of its investment El Dorado Project and were enthusiastic about the economic benefits they knew would accrue to El Salvador from a profitable and environmentally sound mining operation.

6. Claimant, for its part, was eager to set new standards in the Americas for environmental and socially sustainable mining. Thus, Claimant actively sought to integrate itself into the communities located near the Project, hosting hundreds of informational meetings and tours of its facilities, and sponsoring educational programs, medical clinics, and community sporting events. Claimant also sought to tangibly improve the standard of living in the Department of Cabañas where the Project is located by building roads, digging water supply wells, and planting over 40,000 trees.

7. Throughout this time, Claimant also engaged in the costly exploration work for which its seasoned mineral exploration team was uniquely qualified. Pac Rim's extensive exploration and development work established that the El Dorado Project contains a significant amount of high-grade gold reserves – to date over 1.4 million ounces – and demonstrated that the Project was technically and economically feasible to mine.

8. Thus in late 2004, PRES applied for the environmental permit and mining exploitation concession necessary to begin mineral extraction at the El Dorado Project. PRES's applications fully complied with both Salvadoran laws and regulations and international and North American good practices for engineering design and environmental management.

9. What followed was a bureaucratic morass at the *Ministerio de Medio Ambiente y Recursos Naturales* (“**MARN**”), which is charged with issuing all environmental permits in El Salvador. Over the next few years, PRES's application for an environmental permit – and then later applications submitted by DOREX in connection with its exploration licenses – languished due to persistent personnel changes within the Ministry, understaffing, and inexperience of the technical staff charged with evaluating the permit applications. Although Claimant was anxious to obtain the necessary environmental permits, it also understood that it was the first modern

mining project in the country, and was willing to be patient as it worked together with MARN officials through the permitting procedures.

10. Throughout this time, Pac Rim maintained an active collaboration with the Bureau of Mines. Furthermore, senior officials, including the head of the *Ministerio de Economía* (“MINEC”), Minister Yolanda de Gavidia, and Vice President Escobar assured Claimant that its investment was fully supported and desired by the Government, and that its environmental permit and exploitation concession would be forthcoming.

11. Then, in March 2008, then-President Saca declared a ban on all metallic mining projects in the country, abruptly and effectively nullifying the valid legal and regulatory regime upon which Claimant had relied in making its investment. This ban – which continues to date – eviscerated Claimant’s rights under the Salvadoran Investment Law, the Constitution and general principles of international law. Furthermore, it has destroyed Claimant’s mining investment and nearly destroyed the Pac Rim Companies. As explained herein, there is no legal basis for the dependent agencies within the Executive Branch to deny the Enterprises’ pending applications for the environmental permits and exploitation concession that are necessary for Claimant to realize the benefits of its investments in El Salvador. To the contrary, the failure to issue these permits and concession can only be explained as an application of the *de facto* metallic mining ban.

12. The rest of this Memorial is organized as follows:

- **Section II** sets forth Claimant’s Integrated Statement of Facts;
- **Section III** sets out the legal regime applicable to the Tribunal’s resolution of this dispute;
- **Section IV** sets out Claimant’s rights under Salvadoran Law;

- **Section V** confirms that Respondent has breached its obligations under El Salvador's Foreign Investment Law; and
- **Section VI** sets forth the relief sought by Claimant.

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

- **Mr. Thomas C. Shrake**, who serves as the President and CEO of PRMC; the President, Treasurer, and Secretary of Pacific Rim Exploration, Inc.; the Treasurer of Dayton Mining (U.S.) Inc.; and one of the Managers of PRC;
- **Ms. Catherine McLeod-Seltzer**, who serves as the Chairman of the Board of Pacific Rim Mining Corp. and is a Manager of Pac Rim Cayman;<sup>2</sup>
- **Mr. Peter Brown**, the Founder and now Honorary Chairman of Canaccord Financial Inc., Chairman of Canaccord Capital Inc., and Chairman of Canaccord Genuity Corp.;
- **Mr. Steven Ristorcelli**, the Principal Geologist with Mine Development Associates, Inc. ("MDA");
- **Ms. Ericka Colindres**, a former Environmental Assessment Technician in the Bureau of Environmental Management within MARN, the former Supervisor of Environmental Protection for PRES, and the current Director of Sustainability for Pacific Rim Exploration, Inc.;
- **Professor Arturo Fernandois**, the Senior Professor of Constitutional Law at the School of Law of Pontificia Universidad Católica de Chile (Pontifical Catholic University of Chile);

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<sup>2</sup> Ms. McLeod-Seltzer has previously submitted a Witness Statement relevant to the merits of this dispute, dated 31 December 2010. Claimant continues to rely up on that Statement in this Memorial. Ms. McLeod-Seltzer will continue to be available to provide testimony about the matters covered in her Witness Statement during this arbitration.

- ***Dr. Ian Hutchinson***, a Director of SLR Consulting, a senior-level consulting company located in Irvine, California, with groups specializing in mine planning and permitting, mine waste and water management, mine site environmental remediation, as well as remediation of industrial sites and solid waste management;
- ***Dr. Terry Mudder***, the co-owner and managing partner of TIMES Limited, an environmental science and engineering firm located in Sheridan, Wyoming, and formally a partner, office manager, and corporate consultant for SRK, a well-known international mining consulting firm; and
- ***Mr. John P. Williams***, an advisor to the World Bank and to numerous governments in Latin America and the Caribbean, Africa, Asia and the Middle East on mining law and policy, and the related investment, tax and environmental laws and regulations.

## II. **INTEGRATED STATEMENT OF FACTS**

### A. **Mining Investment in El Salvador Prior to Pac Rim's Acquisition of the El Dorado Project**

14. Central America has a long history of precious metals mining, dating back thousands of years. Beginning in the 1500s, as part of the Spanish colonization of the region, major colonial mining centers were established further to the north and south, in México and Perú. The Spanish did undertake gold and silver mining at the El Dorado Project site in Cabañas,<sup>3</sup> but the economy of the Salvador colony was largely driven by monoculture production and export of indigo.<sup>4</sup>

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<sup>3</sup> SRK Consulting, Final Pre-Feasibility Study, dated 21 January 2005 ("**El Dorado PFS**"), at i (C-9).

<sup>4</sup> Richard A. Haggarty, *El Salvador: A Country Study, Growth and Structure of the Economy* (1988) (C-287).



15. After independence from Spain, monoculture production in the new country of El Salvador shifted overwhelmingly to coffee, which continued to be the country's primary export commodity until the period of full-scale civil war in the 1980s.<sup>5</sup> During the twentieth century, "the area of El Salvador devoted to non-food cash crops (coffee, cotton and sugar cane) was greater than the area devoted to food staples, such as beans and rice, a reflection of the same cash crop orientation of the landed class as that of the original Spanish conquistadors."<sup>6</sup> This cash-crop orientation ultimately had negative environmental consequences, as mentioned further below.

### **1. El Salvador's Historic Mining Framework and Early Mining Operations in the Country**

16. Although the precious metals mining industry never rivaled cash crop production as an economic driver in El Salvador, the State encouraged and regulated investment in that industry from a very early stage in the country's development. Thus, by 1881, El Salvador had enacted a fulsome *Código Minero* (the "**1881 Mining Code**"),<sup>7</sup> which would remain in effect until it was updated on 5 July 1922 through the enactment of a new *Código Minero* (the "**1922 Mining Code**").<sup>8</sup> The 1881 and 1922 Mining Codes were enacted on the basis of the following fundamental and interrelated principles:

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

<sup>6</sup> Report on the Biodiversity and Tropical Forest in El Salvador, dated March 2010 ("**USAID Report**"), at 31 (C-275).

<sup>7</sup> *Código de Minería de la República de El Salvador* (1881), enacted on 22 March 1881 ("**1881 Mining Code**") (CLA-208).

<sup>8</sup> *Código de Minería de la República de El Salvador* (1922), enacted on 5 July 1922, published in the Official Gazette No. 183, Tomo No. 93, on 17 August 1922 ("**1922 Mining Code**") (CLA-207).

- The State is the owner of all metallic minerals in the subsoil of the national territory;<sup>9</sup>
- The primary purpose of mining is to exploit and make use of mineral deposits under the ownership of the State;<sup>10</sup>
- Mining is an activity in the public interest (*de utilidad pública*);<sup>11</sup>
- Mining is carried out by private parties who are granted concessions for that purpose by the State;<sup>12</sup>
- The person who discovers a mineable deposit has the exclusive right to obtain a concession from the State to exploit that deposit;<sup>13</sup>
- Mining concessionaires must engage in active work in order to retain their rights so as to ensure exploitation of the resource;<sup>14</sup>
- Subsurface metallic mineral deposits are real property separate and distinct from the surface estate;<sup>15</sup>
- Mines are the dominant estate and mining concessionaries have the power, when necessary for their operations, to

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<sup>9</sup> 1881 Mining Code, art. 13 (CLA-208); 1922 Mining Code, art. 12 (CLA-207). As a comparison of these provisions indicates, non-metallic or non-precious minerals in the subsoil (except hydrocarbons) were not in the public domain at the time of the 1881 Mining Code, but this had changed by the time the 1922 Mining Code was implemented. *See also* 1922 Mining Code, Committee Report, Ch. 1 (“This Chapter contains a new definition of the purpose of mining, adapting same to the Legislative Decree that returned to the State the ownership of the layers of subsoil under the land....”) (CLA-207).

<sup>10</sup> 1881 Mining Code, art. 1 (CLA-208); 1922 Mining Code, art. 1 (CLA-207).

<sup>11</sup> 1881 Mining Code, art. 60 (CLA-208); 1922 Mining Code, Committee Report, Ch. II (CLA-207).

<sup>12</sup> 1881 Mining Code, arts. 15-16.

<sup>13</sup> *Id.*, arts. 26, 85.

<sup>14</sup> *Id.*, arts. 40-44.

<sup>15</sup> *Id.*, arts. 47, 48.

invoke easements and eminent domain in regard to surface owners.<sup>16</sup>

17. The 1922 Mining Code generally followed the structure of the 1881 Mining Code while also attempting to ensure compatibility with similar legislation in other countries, such as Argentina, Spain, the United States, France, Mexico and Perú.<sup>17</sup> The Committee Report for the 1922 Mining Code indicates that while the mining industry in El Salvador was still in its infancy, if favored with a beneficial legal regime, it would “subsequently grow,”<sup>18</sup> and “become one of the country’s primary sources of wealth.”<sup>19</sup>

18. Notable reforms implemented in the 1922 Mining Code included the expansion of provisions on rights of exploration; increased stringency in the work requirements necessary to maintain a mining concession; and the expansion of provisions relating to easements and expropriation of surface rights in the service of the mining estate.<sup>20</sup> As indicated in the Committee Report, these changes were made to ensure, “the authority to dig test pits and drill soil regardless of ownership [of the surface estate];”<sup>21</sup> to ensure that mines were under the control of “diligent persons who will not subject the Country to the loss arising from the failure to exploit a natural resource;”<sup>22</sup> and to account for the fact, that mining has a special interest in not becoming bogged down in long legal proceedings that can postpone their work indefinitely. The

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<sup>16</sup> *Id.*, arts. 26, 50, 60; 1922 Mining Code, arts. 17, 66 (CLA-207).

<sup>17</sup> 1922 Mining Code, Committee Report, Introduction (CLA-207).

<sup>18</sup> *Id.*, Committee Report, Ch. XXV.

<sup>19</sup> *Id.*, Committee Report, Introduction.

<sup>20</sup> *Id.*, Committee Report, Chs. IV, VII, VIII-XI.

<sup>21</sup> *Id.*, Committee Report, Ch. IV.

<sup>22</sup> *Id.*, Committee Report, Ch. VII.

State has a similar interest.<sup>23</sup> Thus, the reforms universally aimed at stimulating greater resource extraction, which was, above all, recognized as being in the interest of the State.

19. From the late 1800s through the 1930s, under the regime established by the 1881 and 1922 Mining Codes, gold mining ventures were established in various regions of El Salvador (mainly in the Department of Morazán), and by 1911 there were approximately 100 reported gold mines in the country.<sup>24</sup> The most well-known of these were the properties of Butters' Salvador Mines, Ltd., ("**Butters' Mines**") founded around the turn of the century by the U.S. mining engineer Charles Butters.<sup>25</sup> The Butters' Mines were highly productive, with the Butters' Salvador Mine yielding US\$16 million worth of gold between 1908 and 1928.<sup>26</sup> In their annual report in 1910, the directors of Butters' Mines remarked upon, "the continued consideration which the Government of El Salvador has extended to the company;"<sup>27</sup> and contemporary sources indicate extensive collaboration between the Government and the foreign mining operation.<sup>28</sup>

20. After the sale of the Butters' Mines, mining activity in El Salvador dropped off for a time due to low gold prices.<sup>29</sup> Then, in 1939, El Salvador again confirmed the public interest in mining when it adopted the *Ley de Expropiación y Ocupación de Bienes por el Estado*

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<sup>23</sup> *Id.*, Committee Report, VIII-XI, p. 1354-55 (CLA-207).

<sup>24</sup> PERCY FALCKE MARTIN, SALVADOR OF THE TWENTIETH CENTURY 185 (1911) ("**Martin**") (C-297).

<sup>25</sup> *Id.* at 187-93. The two largest of the Butters' mines were known as "Salvador" and "Divisadero."

<sup>26</sup> Richard A. Haggarty, *El Salvador: A Country Study, Other Leading Industries* (1988) (C-287).

<sup>27</sup> MARTIN at 190 (C-297).

<sup>28</sup> *Id.* at 193,195.

<sup>29</sup> *Id.*

(“**Law on Expropriation**”), which establishes the regime for: “forcible expropriation” of private property interests as needed to facilitate mining “for reasons of public interest, [as] established in Article 50 of the Constitution....”<sup>30</sup> Article 2 of the Law on Expropriation, which is still in effect today, provides that: “[The following activities] are declared in the public interest: [...] III The Mining Industry (Art. 17 Mining Code).”<sup>31</sup>

21. In the late 1940s, gold mining activities in El Salvador picked up in the Department of Cabañas, when the New York & El Salvador Mining Company (“**NYESMC**”), a subsidiary of the New York & Honduras Rosario Mining Company, commenced a mining and milling operation near the current El Dorado Project site (the “**Rosario Mine**”).<sup>32</sup> The Rosario Mine produced approximately 72,500 ounces of gold from underground works centered on the Minita vein system, one of a large number of gold-bearing veins and vein systems later identified at the El Dorado Project site.<sup>33</sup> Although the Rosario Mine was considered as successful in bringing development to an historically impoverished district of the country, the company eventually closed it down in the 1950s due to high costs and falling gold prices, scaling back its operations to a minimal exploration program.<sup>34</sup>

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<sup>30</sup> *Decreto Legislativo* No. 33, adopted on July 25, 1939, published in the *Diario Oficial* on August 17, 1939, as modified by *Decreto Legislativo* No. 467, adopted on October 29, 1998, art. 1 (“**Law on Expropriation**”) (CLA-45).

<sup>31</sup> *Id.*, art. 2.

<sup>32</sup> ROBERT ARMSTRONG & JANET SHENK, *EL SALVADOR: THE FACE OF REVOLUTION* 263, Appendix 4: Direct Foreign Investment in El Salvador (C-304); El Dorado PFS at ii (C-9).

<sup>33</sup> El Dorado PFS at 19, 72 (C-9); Pacific Rim Mining Corp., *Projects: El Dorado, El Salvador* (C-23).

<sup>34</sup> See Mining Law Debates, dated 12 November 1995 (“1996 Mining Law Debates”), at 54 (discussing the “El Dorado mine...in the Municipality of San Isidro, Department of Cabañas,” and

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22. During this same period, the *Asamblea Legislativa* of El Salvador (“*Asamblea*”) passed the *Ley Complementaria de Minería* (“**1953 Complementary Mining Law**”).<sup>35</sup> This law removed jurisdiction over mining activities from the Departmental Governors and vested it in the new Bureau of Commerce, Industry and Mining in the national Government;<sup>36</sup> as well as imposing new work requirements upon mining concessionaires to ensure that mineral resources were reasonably exploited.<sup>37</sup>

23. During the 1970s, the NYESMC renewed its exploration activities at the El Dorado Project site and conducted a trenching and drilling program.<sup>38</sup> At this time, the company applied for and was granted two new mining concessions from the GOES under the terms of the 1922 Mining Code.<sup>39</sup> However, the renewed mining program was aborted as full-scale civil war began to break out in El Salvador, a conflict which ultimately lasted until the early 1990s.

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indicating that because of a disagreement regarding increased salaries, “the companies have suspended the new hiring of workers and have threatened to shut down the mine. This would cause huge damage to the Department of Cabañas and huge damage to the country”) (C-274); *see also* El Dorado PFS at ii (“NYESMC commenced mining and milling operations in 1948 and ended in 1953. From 1953 to present the owners of the property conducted various exploration programs.”) (C-9); *id.* at 19 (“The [Rosario Mine]...was shut down in 1953 for reasons that are somewhat unclear.”); *id.* at 72 (“No mining has been done since, although exploration continued by various companies and at various times.”).

<sup>35</sup> *Ley Complementaria de Minería*, Decree No. 930, 16 January 1953, published in the *Diario Oficial*, No. 19, Vol. 158, on 29 January 1953 (CLA-209).

<sup>36</sup> *Id.*, art. 1.

<sup>37</sup> *Id.*, art. 5.

<sup>38</sup> El Dorado PFS at 19 (C-9).

<sup>39</sup> *See* Application submitted by NYESMC to the Director of Development and Industrial Control of the Ministry of Economy, dated 11 May 1977 (requesting a concession for mining claim nos. 5, 6, 7, 8, 9, 10, 11 and 12) (C-315); Letter from Juan Francisco Hernández to Mr. Anthony Pedone, dated 6 June 1977, attaching the Act of the Ministry of Economy No. 15, dated 27 May 1977 (granting a concession over mining claims nos. 5, 6, 7, 8, 9, 10, 11 and 12) (C-316); Ministry of Economy, Bureau of Mines

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24. During the 1980s, investment and production in El Salvador dropped precipitously in all industries and by the time peace accords were signed in 1992, ending the civil war, the economy of the country had been decimated.<sup>40</sup>

## 2. **El Salvador Modernizes Its Legal Framework to Attract Foreign Investment in Mining**

25. Following the end of the Salvadoran civil war, the State embarked on a legal and economic reform process that was similar to that undertaken by many other countries in Latin America during the same timeframe. The reforms centered on the privatization of State industries, the attraction of foreign investment and, eventually, dollarization of the economy and participation in the CAFTA.<sup>41</sup> In addition, there was a push to diversify the Salvadoran economy away from the cash crop production that had dominated it for most of the country's history. Unfortunately, these large-scale commercial agricultural practices had resulted in deforestation,<sup>42</sup> surface water contamination,<sup>43</sup> and soil erosion and depletion,<sup>44</sup> creating serious problems for a

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Resolution No. 2, dated 23 July 1996 (granting an exploration license over the area known as "El Dorado Sur," in consideration of the exploitation concessions previously granted in accordance with Acts 14, 15 and 46, dated 15 December, 1976, 27 May 1977 and 14 May 1994) (C-317).

<sup>40</sup> See World Bank, *El Salvador: Poverty Assessment, Strengthening Social Policy*, Report No. 29594-SV (29 December 2005) ("**World Bank Poverty Reduction Report**") (C-282).

<sup>41</sup> *Id.*

<sup>42</sup> USAID Report at 31 ("The international market for export crops, such as sugar and cotton that grew well on the fertile, hot coastal plain drove its deforestation.") (C-275).

<sup>43</sup> *Id.* at 28 ("Agricultural chemicals also contaminate El Salvador's aquatic ecosystems. Herbicides, fungicides and insecticides are used frequently on El Salvador's major crop, coffee, in order to control insects, diseases and weeds ...").

<sup>44</sup> *Id.* at 10 ("Soil erosion affects approximately 75 percent of El Salvador's territory and causes the loss of 59 million metric tons of soil per year.").

country in which “most of the[] rural people depend wholly or partially on natural resources to earn their living.”<sup>45</sup>

26. In light of overpopulation and soil depletion in rural areas, researchers had concluded by the 1990s that “rural and urban industrialization would be a more practical way to improve rural incomes” in El Salvador. Similarly, in 2000, a World Bank report recommended a strategy of improving El Salvador’s rural economy “by increasing and improving rural education, infrastructure, technology, and off-farm employment.”<sup>46</sup> The importance of increasing non-agricultural job opportunities for the rural population was again highlighted in a 2005 World Bank report on poverty reduction, which indicated that: “[p]overty continues to be disproportionately rural. About half of Salvadorians living in rural areas are poor, a quarter of which live in mere subsistence, while 28.5 percent of the urban population is poor and only 9 percent extremely poor ... Extreme poverty is particularly concentrated in rural areas.”<sup>47</sup>

27. On the other hand, economic diversification was found to be a crucial factor in reducing rural poverty in El Salvador:

The incidence of poverty among households whose main income source was agriculture declined very little between 1991 and 2002 - just over 1 percentage point, from 75.3 to 74.1. In contrast, households who found other main income sources increased their well-being significantly. In fact, shifts away from agricultural earnings contributed to over 12 percent of national poverty reduction over the period.<sup>48</sup>

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<sup>45</sup> *Id.* at 30.

<sup>46</sup> *Id.* at 31.

<sup>47</sup> World Bank Poverty Reduction Report at xi-xii (C-282).

<sup>48</sup> *Id.* at xiii.



28. Over the past decade, increasing rural economic diversification has continued to be an important goal not only for reducing poverty, but also for advancing El Salvador's efforts in environmental conservation. In a 2010 report prepared by the U.S. Agency for International Development ("USAID"), El Salvador's Minister of Environment, Hermán Rosa Chávez, was cited as indicating that: "[i]f rural people stay poor, and do not have other attractive alternatives, then they are less likely to conserve biodiversity and forests and more likely to change land use from forest to agriculture and pasture;" and that, "[o]nly strong economic growth can provide El Salvador with sufficient financial resources of its own to finance actions to conserve its forests and biodiversity adequately over the long-term ... Economic growth and conservation of biodiversity and forests thus can be mutually beneficial."<sup>49</sup>

29. Indeed, El Salvador's efforts to implement a modern framework for environmental protection commenced soon after the end of the civil war, in the same period as reforms aimed at economic liberalization. A draft bill of the Law for Protection of the Environment was presented to the Secretary of the *Asamblea* in May 1994,<sup>50</sup> and was passed on to committee consideration on 9 June 1994.<sup>51</sup> The draft bill recognized the "the rapid deterioration of the environment" in the country, which was creating "serious economic and social problems,"<sup>52</sup> and indicated that, "[i]t is necessary to make the needs of economic and

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<sup>49</sup> USAID Report at 32 (C-275).

<sup>50</sup> Letter from Minister of Planning and Coordination of Social and Economic Development to the Secretaries of the *Asamblea Legislativa*, dated 23 May 1994 (C-311).

<sup>51</sup> Notice of the Secretary of the *Asamblea Legislativa*, dated 9 June 1994 (C-312).

<sup>52</sup> Draft Bill for the Law for Protection of the Environment, dated 25 May 1994, Preamble, paragraph II (C-313).

social development compatible with a sustainable development of natural resources and protection of the environment.”<sup>53</sup>

30. Against this particular background of legal and social reform – aimed on one hand at liberalizing the economy and increasing rural job opportunities, and on the other hand at increasing environmental protection – El Salvador’s *Asamblea* voted in December 1995 to reform and modernize the longstanding 1922 Mining Code by enacting the new *Ley de Minería* (the “**1996 Mining Law**”).<sup>54</sup> In presenting the bill for the law to the *Asamblea*, the Minister of Economy indicated that:

The object of the referenced law is to substitute the Mining Code for a simpler law that is in accordance with the current times and the economic policy of the Government; and that could interest investors in the mining sector; which will result in new employment opportunities, greater economic and social development in the places where the minerals are located and greater tax revenues.<sup>55</sup>

31. This goal was specifically reflected in the preamble of the 1996 Mining Law, which indicated that that:

It is of utmost importance for our country to possess a normative body in harmony with the principles of a social market economy, convenient for investors in the mining sector; in order to propose the creation of new job opportunities for Salvadorians, promote Economic and Social Development in the regions where the

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<sup>53</sup> *Id.*, Preamble, paras. III, VI.

<sup>54</sup> *Ley de Minería, Decreto No. 544* of 14 December 1995, published in the *Diario Oficial* No. 16, Vol. 330, 24 January 1996 (CLA-210).

<sup>55</sup> Letter from Minister of Economy to the Senior Official of the Asamblea Legislativa, dated 27 October 1995 (attaching a bill for a new Mining Law) (emphasis added) (C-314).

minerals are located, allowing the State to collect revenues necessary for the fulfillment of its objectives.<sup>56</sup>

32. Notably, the presentation of the mining reform bill also coincided with the recommencement of mining activities at the El Dorado Project site. In fact, mining activities in the area had recommenced almost as soon as the 1980s-era civil war had ended, bringing an important economic prospect to a region of the country that had suffered disproportionately during the conflict. Thus, on 18 May 1993, the Director of Mines issued a new mining concession to NYESMC, now under the control of Zinc Metal Corporation, for the El Dorado gold and silver mine.<sup>57</sup> Subsequently, the company obtained several additional exploration licenses in the surrounding area.<sup>58</sup>

33. In June 1993, Mirage Resource Corp. (“**Mirage**”) acquired an option over the El Dorado mining areas and, in December 1994, NYESMC transferred the areas to Mirage’s subsidiary, Kinross El Salvador, S.A. de C.V. (“**Kinross El Salvador**”).<sup>59</sup>

34. Under Mirage’s control, exploration efforts at El Dorado intensified and preparation of a feasibility study commenced.<sup>60</sup> In fact, the recommencement of activities at El

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<sup>56</sup> 1996 Mining Law, Preamble, para. III (emphasis added) (CLA-210).

<sup>57</sup> MINEC Act No. 96, dated 18 May 1993 (granting a mining concession in relation to mining claim no. 1) (C-318).

<sup>58</sup> See, e.g., MINEC Resolution No. 30, dated 20 July 1993 (C-319); MINEC Resolution No. 31, dated 26 July 1993 (C-320).

<sup>59</sup> See Option Agreement, dated 25 June 1993 (C-321); Escritura No. 44, dated 1 December 1994 (C-322); Escritura No. 43, dated 1 December 1994 (C-323); El Dorado PFS at 19 (C-9).

<sup>60</sup> See, e.g., Letter from Carlos Serrano to Gina Navas de Hernandez, dated 20 September 1993 (requesting an additional exploration license due to the “reinvigorated” of the mining activities as a consequence of Kinross El Salvador’s Investment Plan) (C-324); MINEC Resolution No. 96, dated 21

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Dorado was specifically noted by the members of the *Asamblea* during their consideration of the 1996 mining law reform project, where it was observed that: “[t]he company has now started working by investing millions solely to establish the feasibility of production in this mine, and they have already invested many millions of colones...;”<sup>61</sup> and that if the company were to abandon the mine because of an increase in royalties in the new law, “[t]his would cause huge damage for the Department of Cabañas and huge damage to the country. At a time in when there is enormous unemployment in this country it would not be wise to suspend mining for minerals in San Isidro..”<sup>62</sup>

35. Another member of the *Asamblea* similarly noted that a project feasibility study was being carried out for a mining project in Cabañas, according to a notice on the internet in Canada, and expressed concern that if the royalty rate in the new law were raised from 3 percent<sup>63</sup> to 5 percent, the 15 million dollars that would be spent in determining project feasibility might not be forthcoming:

...if we truly want to help our country by creating employment, by creating all the value added offered by these mining projects...Let us remember that all the great cities of the United States were established where there had been mining settlements. We already have some small examples of companies that are carrying out community projects such as the construction of kindergartens and

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December 1994 (C-325); MINEC Resolution No. 97 dated 3 January 1995 (C-436); El Dorado PFS at 20 (C-9).

<sup>61</sup> 1996 Mining Law Debates at 54 (C-274).

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> Although royalty rates of 1 percent or 3 percent may seem low, it must be recognized that such rates generally apply to the gross value of the precious metal product sold, without deductions for substantial mining and ore beneficiation costs.

schools. I'd like it if the deputies from the Department of Cabañas could expand on this a little since they know what is going on there, they are experiencing it themselves.... the 2% [increase in royalty] they've mentioned, which sounds insignificant but could mean the withdrawal of these 19 persons who have requested concessions in our country, causes it to withdraw. And it's not only these persons who would be working in the mining camps. It's all the wealth that would be generated by these mining communities. And this isn't all, since we should also consider the wealth it would generate for the municipalities in which they are located, not only the 1% in royalties but also all that will be generated in municipal taxes from the stores that will open up there, from the small businesses that will open up there. All this is wealth for our country. I don't believe that we're giving a gift tonight. I believe that tonight we're putting our country in a competitive position to attract foreign investment....<sup>64</sup>

36. Indeed, as noted above, El Salvador was intensely focused on attracting investment in the 1990s in order to regain economic stability and drive job growth, and mining was one of many industries that could potentially help it to achieve that goal. In addition, the known metallic mineral resources of El Salvador are concentrated in the northern region of the country, in which the problem of rural poverty and lack of economic diversification, mentioned above, is particularly acute.<sup>65</sup>

37. In this regard, El Salvador is little different than many other countries in which mining has been encouraged because of the contribution it can make to otherwise remote and

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<sup>64</sup> *Id.* at 50 (emphasis added); *see also id.* at 57-58 (“...the country needs to plug itself into the worldwide chain of globalization. And if we really love El Salvador we must put her in a position so that those who have money and who are capable of investing it have good reason to want to come to El Salvador ... the country above all needs more sources of employment, more jobs that generate all the value added and naturally all the economic capacity that would be produced by the arrival of new money from outside the country.”).

<sup>65</sup> *See, e.g.,* El Dorado PFS at 17 (“These activities [cultivation of corn and beans and cattle grazing] are the most important productive activities in the area”) (C-9).

economically stagnant regions. As indicated by Mr. John Williams, an international mining law and policy expert:

Even in countries where mining's contribution to the national economy is modest, its impact on the local communities near which mines are located is often dramatic. In many poorer countries, minerals exploration and mining are often among the first sectors to attract significant investment. Moreover, mines tend to be developed in remote and relatively poor regions with little pre-existing infrastructure, a weak governmental presence and few government services. The development of a mining project in such areas tends to involve transformative change in the local opportunities for employment, training, entrepreneurship, education, health services and travel.<sup>66</sup>

38. Indeed, the importance of mining to the Department of Cabañas in particular is sufficiently well-recognized that it drove parliamentary debate over the required incentives for mining companies both in 1995 – in which the Salvadoran *Asamblea* eventually voted in favor of the lower proposed mining royalty rate – and again in 2001, as discussed further below.

39. Aside from the industry's potential to make significant contributions to rural development, however, there was also another practical reason why El Salvador specifically sought foreign investment in mining in 1995. As indicated above, metallic minerals in the subsoil of Salvadoran territory had been declared as property of the State for well over a century. On the other hand, neither the State nor its domestic investors were capable of carrying out a modern mining exploration and development program. Indeed, competition in the modern metals mining market demands specialized knowledge, advanced technology, large amounts of upfront capital, and unusually high risk tolerance. As explained in the following paragraphs,

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<sup>66</sup> Expert Statement of John Williams, dated 25 March 2013 (“**Williams Expert Statement**”), at 5 (emphasis added).

only foreign direct investment could bring these elements into the equation, thereby allowing El Salvador to reap the benefits of responsible and profitable extraction of its mineral wealth in the modern era.

40. *First*, as Mr. Williams explains in his Expert Statement, mineral exploration in the 1800s and early 1900s often involved “discover[y]...[of] surface outcrops and excavation work proceeding from those surface discoveries.”<sup>67</sup> In contrast, competition in the modern market “requires the investment of many tens of millions of dollars in aeromagnetic surveys, seismic testing, drilling and geological modeling....”<sup>68</sup> This requires a serious commitment of upfront capital, access to modern technology, and a considerable amount of time.<sup>69</sup> In the case of El Salvador in particular, the demands of modern mineral exploration effectively took use of the country’s mineral wealth out of its own hands, a fact which was expressly recognized during the 1995 parliamentary debate over the new mining law. For example, one member of the *Asamblea* who was in favor of a lower royalty rate for mining companies observed:

I don’t believe that we’re giving our country away right now, or that they’re stealing the gold out of our hands, first because we don’t have it and because you have to invest and pour large amounts of money into it. Mining is not a factory that opens after a straightforward feasibility study.... it’s one of the riskiest businesses there is, so it’s not a case of us giving away 2%.<sup>70</sup>

41. Another member of the *Asamblea* who was in favor of a higher royalty rate nevertheless noted that:

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<sup>67</sup> *Id.* at 11.

<sup>68</sup> *Id.* at 18.

<sup>69</sup> *See id.* at 8, 18.

<sup>70</sup> 1996 Mining Law Debates at 50-51 (emphasis added) (C-274).

We are discussing mining legislation and the most elementary logic suggests that if this is necessary, if it has been deemed necessary to update this legislation, it is simply because it is objectively absolutely necessary to do so, and the regulation of the companies, titleholders and concessionaires who appear here have that objective purpose. But there are people who know more than us of the existence of these minerals, and they deem it necessary to establish the rules of the game for their exploitation. To me this seems logical and undeniable...Here in our country there is no scientific development or technological development that allows us Salvadorians to adequately know the resources we have. We don't even know what water resources we hold, much less our mineral resources and still less our hydrocarbon resources.<sup>71</sup>

42. *Second*, aside from the technology and risk capital required to conduct initial resource confirmation, significant intellectual and monetary capital must also be committed to modern mine development and operation in order to ensure that exploitation of the minerals will occur in a rational manner. Again, this issue was specifically considered at the time the new Salvadoran mining law was being debated in 1995. As highlighted by one assemblyman:

We can neither refuse nor start erecting barriers to foreign investment here. I think it's important to create opportunities for foreign investment to enter the country, and we must offer it the necessary facilities.

This is also important so that the laws of the country be observed. The mines in this country have been worked, but using methods or, shall we say, systems that are fairly empirical. And here we have foreign countries that have the capability to turn this into a productive situation.<sup>72</sup>

43. *Third*, and finally, the full benefits of a modern mining industry must be achieved in light of the public interest in environmental protection. As Mr. Williams points out

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<sup>71</sup> *Id.* at 52-53 (emphasis added).

<sup>72</sup> *Id.* at 56 (emphasis added).



in his Expert Statement, “the 1990s...ushered in a period of greater environmental responsibility in the mining industry (and indeed in all industries),”<sup>73</sup> and El Salvador was no exception to this general rule. Thus, as indicated above, the implementation of environmental legislation was a priority for the country as it emerged from civil conflict and attempted to rebuild its economy in a sustainable manner. The need to provide for environmental assessment of projects in all industries in El Salvador was actually being hashed out in the relevant parliamentary committee, and was therefore very present in the collective consciousness of the *Asamblea* at the time the new mining law was enacted in December 1995.<sup>74</sup>

44. However, in order to ensure adequate environmental protection and sustainable development, modern mine developers are required not only to plan infrastructure for the mine and processing facilities, but also to plan for “waste and water treatment and storage, employee housing, and a variety of health, safety, environmental protection and community engagement issues....”<sup>75</sup> Adherence to modern sustainability practices therefore entails higher costs, including higher costs upfront, which homegrown, inexperienced Salvadoran mining ventures would generally be unable to bear.

45. On the other hand, experienced mine developers with access to international capital markets actually benefit from adherence to sustainability practices. As Mr. Williams

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<sup>73</sup> Williams Expert Statement at 12.

<sup>74</sup> See Notice of the Secretary of the *Asamblea Legislativa*, dated 9 June 1994 (C-312). Indeed, the need for sustainability and consistency between mining and environmental legislation was specifically remarked upon during the debates over the 1996 Mining Law. See 1996 Mining Law Debates at 22-23 (discussing the need for exploitation to be carried out “in a sustainable manner” and mentioning the “Environmental Law project,” in which the environmental impact assessment process would ultimately be regulated) (C-274).

<sup>75</sup> Williams Expert Statement at 18.

explains, “environmental accountability has now been incorporated into the policies and practices of financial institutions as well as into the local laws and regulations of mining jurisdictions. Thus, major soft law instruments like the Equator Principles tie many mining companies’ ability to obtain financing to their ability to determine and control environmental risk.”<sup>76</sup> In consequence, the establishment of rational environmental controls and other sustainability requirements is simply a standard rule of the game for responsible international mining companies.

46. Thus, these three pillars of the modern mining industry – *i.e.*, intensive capital commitment at the exploration phase; application of modern technology to mine development and operation; and implementation of environmentally responsible and sustainable practices – all require substantial commitments of time, capital, technology and other specialized knowledge.

47. By 1995, El Salvador was not alone in its recognition that foreign investment was necessary to achieve the benefits of this industry. In fact, El Salvador was part of a larger pattern of legal reform among other countries in Latin America with which it was seeking to be “in a competitive position to attract foreign investment”<sup>77</sup> at the time it enacted the 1996 Mining Law.<sup>78</sup>

48. These countries generally focused on attracting investment through, *inter alia*, rewarding discovery of mineral deposits on a non-discriminatory basis; ensuring the security of

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<sup>76</sup> *Id.* at 14.

<sup>77</sup> 1996 Mining Law Debates at 50 (C-274).

<sup>78</sup> See Williams Expert Statement at 10-14 (describing regional trends in the modernization of mining legislation in Latin America aimed at attracting mining investment while taking account of the need for environmental responsibility).

tenure and transferability of mining rights; and adjusting the time allotted for exploration and mine development to conform to modern practice.<sup>79</sup> At the same time, they imposed “greater environmental study, planning, mitigation and rehabilitation requirements on mining companies....”<sup>80</sup> As explained by Mr. Williams in his Expert Statement:

As a general theme, the successful mining countries ... share the common goal to achieve both environmental sustainability and the transformation of the nation’s potential mineral resource wealth into liquid assets and opportunities that can contribute to economic and social development of the nation and the local communities.<sup>81</sup>

49. The provisions of El Salvador’s 1996 Mining Law clearly reflected this common goal. In particular, and notwithstanding that the 1996 Mining Law and its amendments will be discussed in greater detail in later sections of this Memorial, a few salient features should be noted. First, the 1996 Mining Law preserved the basic structure and core principles established in the country’s 1881 and 1922 Mining Codes, which had already recognized that mining is in the public interest and had sought to stimulate exploitation of the country’s mineral resources by private parties.<sup>82</sup> In particular, the existing 1922 Mining Code already recognized mineral rights as rights in real property that were separate from – and dominant to – the surface estate, as well as being fully transferable *inter vivos*.<sup>83</sup> Moreover, the 1922 Mining Code also provided the first

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<sup>79</sup> *Id.* at 10-12.

<sup>80</sup> *Id.* at 13.

<sup>81</sup> *Id.*

<sup>82</sup> 1922 Mining Code, Committee Report, Ch. II (CLA-207).

<sup>83</sup> *Id.*, arts. 44, 52, 101.

discoverer of a mineable mineral deposit with an exclusive and non-discretionary right, as well as an obligation (sometimes referred to herein as a “right-duty”), to exploit that deposit.<sup>84</sup>

50. On the other hand, the 1996 Mining Law also introduced reforms calculated to generate a more modern mining industry that would, “promote the exploration and exploitation of mining resources through the application of modern techniques that allow making the most of the minerals.”<sup>85</sup> Thus, holders of exploitation concessions were specifically required to exploit the relevant mineral resources, “rationally and sustainably...”<sup>86</sup> Moreover, mining operations could be suspended if the concessionaires, “carry out their activities in a non-technical way, thereby contributing to waste or creating destructive practices with the resources.”<sup>87</sup>

51. In addition, the 1996 Mining Law simplified the licensing structure and increased the security of minerals title tenure by implementing a two-phase process consisting of a multi-year exploration license, followed immediately by an exploitation concession upon discovery of a mineable deposit.<sup>88</sup> This eliminated the complicated and uncertain three-phase system (consisting of exploration, claim-staking or filing, and finally exploitation) that had been provided under the old 1922 Mining Code.<sup>89</sup> The old system limited the term of exploration licenses to 60 days, renewable multiple times for up to one year only.<sup>90</sup> Furthermore, once a

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<sup>84</sup> *Id.*, arts. 35.

<sup>85</sup> 1996 Mining Law, Preamble, para. II (CLA-210).

<sup>86</sup> *Id.*, art. 25(a).

<sup>87</sup> *Id.*, art. 26(1).

<sup>88</sup> *See id.*, arts. 19, 23.

<sup>89</sup> *See* 1922 Mining Code, arts. 27.3 (CLA-207).

<sup>90</sup> *Id.*, art. 27.3.

claim was staked (or filed), the title holder had only six months, renewable in some cases for an additional period of six months, to confirm the nature of the deposit and formalize the concession.<sup>91</sup> As Mr. Williams confirms in his Expert Statement, the limited term and scope of exploration rights under the 1922 Mining Code simply did not provide an adequate incentive for mining investors to undertake a modern exploration program.<sup>92</sup>

52. Finally, the 1996 Mining Law introduced the concept of environmental protection into the mining industry. In particular, mining rights holders under the 1996 Mining Law were required to carry out their activities, “in accordance with mining technical and engineering requirements, so as to prevent control, minimize and compensate the negative effects that might be caused to people or the environment...”<sup>93</sup> More specifically, mining concession holders were required under the Regulations to manage all waste in an environmentally responsible manner, including by returning all waters used in the mining operation to the waterways, “free of contamination, so that they do not affect human health or the development of animal or plant life; when it is necessary to accumulate metallurgical waste, strict precautions must be taken against ground or area contamination, constructing the necessary impoundments or dams.”<sup>94</sup> Furthermore, exploitation concessionaires were required to, “prepare an environmental impact study ... complying with technical standards calculated to avoid environmental damage and

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<sup>91</sup> *Id.*, arts. 48.

<sup>92</sup> Williams Expert Statement at 18.

<sup>93</sup> 1996 Mining Law, art. 17 (emphasis added) (CLA-210).

<sup>94</sup> *Reglamento de la Ley de Minería, Decreto No. 68* of 19 July 1996, published in the *Diario Oficial* No. 144, Vol. 332 on 7 August 1996, art. 25 (CLA-214).

contamination; as well as programs for the recovery of renewable natural resources;”<sup>95</sup> to submit regular reports on environmental protection measures;<sup>96</sup> and to comply at all times with the terms of their environmental impact studies.<sup>97</sup>

### **3. Modern Mining Commences at El Dorado under El Salvador’s Revised Legal Framework**

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53. During the late 1990s, mining exploration in El Salvador continued to ramp up in response to the new and more modern legal regime provided under the 1996 Mining Law. Among other companies operating in the country, Kinross El Salvador – at that time a subsidiary of Mirage Resource Corp. – continued to undertake active exploration at the El Dorado Project site. The 1996 Mining Law allowed all titleholders of prior mining rights 120 days from the date of its entry into force within which to conform their licenses or concessions to the provisions of the new law.<sup>98</sup> In light of this requirement, Kinross El Salvador applied for and was granted new mining rights under the 1996 Mining Law in consideration of the mineral titles it had previously obtained from NYESMC. These new rights were issued by the Bureau of Mines on 10 July 1996<sup>99</sup> and 23 July 1996,<sup>100</sup> thereby conferring on Kinross El Salvador the two exploration licenses known as, “**El Dorado Norte**,” and “**El Dorado Sur**,” the former with an area of

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<sup>95</sup> 1996 Mining Law, art. 25(d) (CLA-210).

<sup>96</sup> *Id.*, art. 18.

<sup>97</sup> *Reglamento de la Ley de Minería, Decreto No. 68* of 19 July 1996, published in the *Diario Oficial* No. 144, Vol. 332 on 7 August 1996, art. 22 (CLA-214).

<sup>98</sup> *Id.*, art. 73.

<sup>99</sup> Resolution No. 1, dated 10 July 1996 (C-326).

<sup>100</sup> Resolution No. 2, dated 23 July 1996 (C-317).

29.8696, and the latter with an area of 45.1300 square kilometers (collectively, the “**El Dorado Exploration Licenses**” or “**El Dorado Project**”).<sup>101</sup>

#### **4. El Salvador’s Legal Reform Program Continues**

54. As Kinross El Salvador continued to carry out exploration work over the next few years, two important pieces of legislation were implemented in El Salvador: first, the *Ley del Medio Ambiente*, which was passed on 2 March 1998 (“**Environmental Law**”);<sup>102</sup> and second, the *Ley de Inversiones*, which was passed on 14 October 1999 (“**Investment Law**”).<sup>103</sup> The enactment of these laws represented El Salvador’s continued commitment to modernizing its legal framework in a manner that would encourage responsible and sustainable foreign investment.

55. As had already been anticipated during consideration of the 1996 Mining Law, the Environmental Law established a mandatory administrative process for environmental impact assessment of all productive activities likely to have a significant impact on the environment (“**Environmental Impact Assessment**”), based upon preparation and review of an Environmental Impact Study (“**EIS**”).<sup>104</sup> In addition, it also established general rules to ensure that titleholders complied with the terms of their environmental permits by undertaking the

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<sup>101</sup> Exploration licenses under the 1996 Mining Law (and as later amended) are limited to a superficial extension of 50 square kilometers.

<sup>102</sup> *Ley del Medio Ambiente, Decreto No. 233*, 2 March 1998, published in the *Diario Oficial* No. 79, Vol. 339, 4 May 1998 (CLA-213).

<sup>103</sup> *Ley de Inversiones, Decreto No. 732*, 14 October 1999, published in the *Diario Oficial* No. 210, Vol. 345, 11 November 1999.

<sup>104</sup> See Environmental Law, arts. 18-25 (CLA-213); see also Witness Statement of Ericka Colindres, dated 29 March 2013, (“**Colindres Witness Statement**”), para. 6.

appropriate measures to prevent, mitigate and compensate the environmental impacts of their activities.<sup>105</sup> The law designated the *Ministerio del Medio Ambiente y Recursos Naturales* (“**Ministry of the Environment**” or “**MARN**”) as the competent agency to carry out the Environmental Impact Assessment and to issue environmental permits.<sup>106</sup>

56. As indicated above, the 1996 Mining Law required applicants for mining concessions to complete an EIS, making the presentation of such a study one of the application requirements for the mining exploitation concession,<sup>107</sup> and compliance with its terms an obligation of the concession holder.<sup>108</sup> The EIS was defined in the 1996 *Reglamento de la Ley de Minería* (“**1996 Mining Regulations**”) as a study that should, “evaluate and describe the physical-natural, biological, socio-economic and cultural aspects of the area in the area of influence of the project, with the goal of determining the existing conditions and capacity of the environment, analyze the nature, scale and foresee the effects and consequences of carrying out the Project, indicating measures of prediction and control to apply in order to achieve harmony between the development of the mining industry and the environment.”<sup>109</sup> The EIS as it was defined in the 1996 Mining Regulations, was to be carried out in accordance with the guidelines

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<sup>105</sup> See Environmental Law, arts. 27, 29 (CLA-213).

<sup>106</sup> *Id.*, art. 19.

<sup>107</sup> See 1996 Mining Law, art. 37(c) (CLA-210).

<sup>108</sup> See, e.g., *id.*, art. 22.

<sup>109</sup> *Reglamento de la Ley de Minería, Decreto No. 68* of 19 July 1996, published in the *Diario Oficial* No. 144, Vol. 332 on 7 August 1996 (CLA-214).



prepared by the Bureau of Mines and was to address a number of specific aspects, including provision of an Environmental Management Plan.<sup>110</sup>

57. The requirements for preparation of the EIS under the 1996 Mining Law and the 1996 Mining Regulations were very similar to the requirements that were implemented under the new Environmental Law and its corresponding *Reglamento General de la Ley del Medio Ambiente* (“**Environmental Regulations**”).<sup>111</sup> Consequently, the implementation of the Environmental Law did not substantively alter the legal regime applicable to the holders of mining exploitation rights.

58. On the other hand, the new Environmental Law did give rise to a conflict of competence with regard to which was the appropriate agency to administer the environmental obligations of mining companies. As discussed below, this – among other things – led to a reform in the 1996 Mining Law which was eventually undertaken in July 2001.

59. Furthermore, the Environmental Law required an Environment Impact Assessment for mining *exploration* activities,<sup>112</sup> something that the 1996 Mining Law had not done. After the entry into effect of this requirement, Kinross El Salvador filed a *Formulario* (“**Environmental Form**”) with MARN in order to commence the process of Environmental Impact Assessment in relation to its exploration and pre-production activities at El Dorado Norte and El Dorado Sur. However, on 9 May 2000, MARN issued a resolution indicating that the

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<sup>110</sup> *Id.*, art. 24.

<sup>111</sup> *Reglamento General de la Ley del Medio Ambiente, Decreto Ejecutivo No. 17*, 21 March 2000, published in the *Diario Oficial* No. 73, Vol. 347, 12 April 2000, arts. 23-24 (CLA-239).

<sup>112</sup> Environmental Law, art. 21(e) (CLA-213).

activities in question did not require an environmental permit.<sup>113</sup> As discussed further below, MARN did not begin requesting the completion of EISs for mining exploration projects until 2003, and then only at the specific request of Pac Rim.

60. Shortly after implementation of the Environmental Law, the Investment Law was enacted in 1999. The Statement of Purpose for the Law made clear that it was being proposed in recognition of the fact that:

[W]ith the globalization of the world economy in the 1990s the flow of foreign investment to third countries is increasing, requiring such countries to adopt legislation that provides their investments the necessary legal security [seguridad jurídica], especially with regard to treatment for the establishment and operation of the same. This circumstance has increased competition among the different countries in the attraction of foreign capital, obliging them to adopt measures that allow them to be more competitive.<sup>114</sup>

61. In addition, the Statement of Purpose indicated that the new Investment Law was intended to ensure that the Salvadoran legal framework conformed to the requirements of “the best international practices in investment...”, having taken into account the investment laws of other Latin American countries, as well as bilateral treaties which El Salvador had entered into with other countries, and “the best practices recognized at the international level as the ideal mechanisms for promoting investment.”<sup>115</sup>

62. As will be discussed further below, the Investment Law that was eventually implemented did indeed reflect international practices, establishing protections against

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<sup>113</sup> Resolution No. 105-2000, dated 9 May 2000 (C-100).

<sup>114</sup> Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, dated 2 June 1998, Statement of Purpose, Introduction (R-101).

<sup>115</sup> *Id.*

expropriation without compensation and against arbitrary and discriminatory treatment; as well as ensuring simplicity in administrative processes and access to international dispute resolution.<sup>116</sup>

## **5. El Salvador Is Made Aware of Deficiencies in the 1996 Mining Law**

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63. Between 1996 and 2000, as these new laws were being implemented, Kinross El Salvador carried out a program of shallow drilling throughout the El Dorado Project area under the terms of its new exploration licenses, preparing mineral resource estimates for several gold-bearing veins.<sup>117</sup> As explained further in the next section of this Memorial, the so called “**Productive Interval**” of the El Dorado epithermal vein system (in other words, the range of elevations at which the ore is typically found) were actually significantly deeper than what could be reached by most of Mirage’s shallow drilling program. Partially due to the company’s inability to obtain funding from outside partners for deeper drilling, this program therefore failed to ever uncover the Project’s true potential.<sup>118</sup> Nevertheless, the results of the exploration were still sufficiently promising to justify Mirage’s continued work at the property.

64. In the meantime, in 1997, international gold prices began to fall significantly, a trend from which they did not ultimately recover until 2004. Not unexpectedly, this decline in the world gold price made it more difficult for mining exploration projects to obtain funding and

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<sup>116</sup> See Investment Law, arts. 4-6, 8, 15 (CLA-4).

<sup>117</sup> El Dorado PFS at 21 (C-9).

<sup>118</sup> See Letter from Robert Johansing to Gina Navas de Hernández, dated 24 July 1998, at 2 (indicating that “[I]t now appears to us that the gold potential in the majority of our prospects on El Dorado Sur is deeper than originally thought, as a result of which, the future exploration will need to be deeper and more expensive. Nevertheless, the potential is there and it will be proven at a future time.”) (C-327).

Mirage began to look for a partner to help it sustain the cost of its exploration program at El Dorado.

65. On 8 October 1998, the President of Kinross El Salvador, Mr. Robert Johansing, wrote to Ms. Gina Navas de Hernández, the Director of the *Dirección de Hidrocarburos y Minas* (“**Bureau of Mines**”), part of the *Ministerio de Economía* (previously defined as “**Ministry of Economy**” or “**MINEC**”), asking that she provide the company with a written assurance that the company’s exploration licenses would be extended upon the expiration of their initial terms.<sup>119</sup> As Mr. Johansing explained, Mirage was considering partnering with another investor that would allow it to move forward with its exploration projects and eventual production plan; however, the interested parties were “looking for a guarantee from the Bureau of Mines that assures them that the license will not expire in July 1999.”<sup>120</sup>

66. In order to facilitate Mirage’s ability to obtain the necessary funding, Mr. Johansing requested Ms. Navas to provide him with a letter expressing that upon expiration of the El Dorado Norte and El Dorado Sur licenses, MINEC would grant the two-year extensions allowed under Article 19 of the 1996 Mining Law for both licenses, as long as the legal requirements had been complied with.<sup>121</sup>

67. On the other hand, Mr. Johansing’s letter clearly indicated that, in accordance with his prior conversations with Ms. Navas, these two-year extensions would not ultimately provide enough time for the company to move into production. As he stated:

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<sup>119</sup> Letter from Robert Johansing to Gina Navas de Hernández, dated 8 October 1998, at 1 (C-328).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

I want to emphasize that we have not changed our project development plan and the two years that we are asking for will not be sufficient for the complete development of the El Dorado project. Nevertheless, I think we can meet the desires of the interested parties with an extension of two years and in the meantime we will keep looking for a legal solution to ask for another two years if necessary.<sup>122</sup>

68. In closing, Mr. Johansing reiterated the need to obtain financing for the project from partners outside of El Salvador and asked for the Director of Mines' cooperation in helping Kinross to move the project forward to development and production.<sup>123</sup>

69. On 22 October 1998, Ms. Navas responded to Mr. Johansing with the requested assurance of an extension of the terms of the El Dorado Norte and El Dorado Sur exploration licenses, highlighting that, “[f]urthermore, the Law grants any holder of an exploration license, who has also complied with all legal provisions, the exclusive rights to request the respective concession.”<sup>124</sup>

70. In June 1999, Kinross El Salvador duly applied for and received extensions to several of its exploration licenses, including El Dorado Norte and El Dorado Sur.<sup>125</sup> At this same time, Kinross reiterated to the Bureau of Mines its concern that the additional two-year term provided for under the 1996 Mining Law was not sufficient to carry out the work required to complete the transition from exploration to exploitation. As Mr. Johansing indicated:

I should like to draw your attention to a deficiency in the Mining Act that has a profound effect on our exploration activities in

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<sup>122</sup> *Id.* at 1-2 (emphasis added).

<sup>123</sup> *Id.* at 2.

<sup>124</sup> Letter from Gina Navas de Hernández to Robert Johansing, dated 22 October 1998 (C-270).

<sup>125</sup> Resolution No. 57, dated 15 July 1999 (C-329); Resolution No. 58, dated 15 July 1999 (C-330).

Potonico. So far we have not made any discovery in Potonico that would allow us to concentrate our energy and financial resources on defining the limits of a precious metals resource. We have spent more than US\$269,933 on exploration and some reasonable to good targets have still to be bored. If we receive the extension, as I hope we will, we shall have two years in which to make a discovery, define its limits, complete the Feasibility Study, and prepare the Environmental Impact Study. The only option left to us then is to request an Exploitation Concession after the two years. This puts us in the difficult situation of not having enough time to be successful. The difficulty here is how to propose additional activities to our parent company, Mirage Resource Corporation. I shall be obliged to tell them that the present law does not give us enough time to be successful .... I should be grateful for your observations on this important issue because, in spite of the good intentions of Article 19, its final result will have a negative effect on the mining industry in El Salvador.<sup>126</sup>

71. One month later, on 26 August 1999, Ms. Navas wrote to Mr. Johansing, attaching a draft bill for an amendment to the 1996 Mining Law, “so that you may submit your comments....”<sup>127</sup> Among other proposed reforms, the draft bill attached to Ms. Navas’s letter specifically included amendments designed to address the concerns expressed by Kinross El Salvador by extending the period of exploration licenses and modifying the requirement that exploitation work commence within one year of signing the concession contract.<sup>128</sup> As discussed further below, this draft bill, with some modifications, was eventually enacted into law by the Salvadoran *Asamblea* in July of 2001.

72. In the meantime, Mirage finally located an outside investor for the El Dorado Project and eventually completed a merger with Dayton Mining Corp. in March 2000

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<sup>126</sup> Letter from Robert Johansing to Gina Navas de Hernández, dated 26 July 1999 (emphasis added) (C-331).

<sup>127</sup> Letter from Gina Navas de Hernández to Robert Johansing, dated 26 August 1999 (C-293).

<sup>128</sup> *See id.*, arts. 7, 8A of the attached draft bill (C-293).

(“**Dayton**”). By this time, however, the El Dorado Norte and El Dorado Sur Exploration Licenses were rapidly approaching their final expiration date. Realizing that the licenses would be expiring within the next year if the expected legislative reform did not go through, Dayton rushed to carry out a feasibility study, acquire an environmental permit<sup>129</sup> and obtain the necessary financing to move to the exploitation phase of development.<sup>130</sup> Unfortunately, by mid-2001 it had not yet been possible to finalize and approve the text of the proposed amendment to the 1996 Mining Law, which was also intended to remove the conflict of competence between MARN and the Bureau of Mines created by the enactment of the Environmental Law.

**6. El Salvador Takes Emergency Action and Amends its Law in Order to Respond to the Needs of Foreign Investors in the El Dorado Project**

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73. In June 2001, with just weeks left before the El Dorado Norte and Sur Exploration Licenses were set to expire and with the amendment to the 1996 Mining Law still under consideration, the Salvadoran *Asamblea* took action, responding to the requests by MINEC and

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<sup>129</sup> See Letter from Mr. Francisco Perdomo Lino to Mr. Robert Johansing, dated 14 December 2000 (requiring the presentation of an EIS to move forward with the environmental permitting process for the El Dorado Mine project.) (C-332).

<sup>130</sup> See Press Release, Dayton Mining Corporation Announces Operating and Financial Results for the Year Ending December 31, 2001, dated 22 February 2002 (“In 2001, the Company incurred exploration expenditures of \$0.6 million at El Dorado ... The El Dorado expenditures were focused on preparation of a draft feasibility study for submission to the El Salvador government in order to convert the property concessions into exploitation licenses.”) (emphasis added) (C-333); Press Release, Improved Financial Results for the First Quarter of 2001, dated 28 May 2001 (“Exploration spending in 2001 was almost entirely on the El Dorado property in El Salvador and was incurred to advance the preliminary economic study, which must be submitted to the government of El Salvador in mid-July.”) (C-334); Press Release, Second Quarter Financial Results, dated 15 August 2001 (“Exploration expenditures decreased because the work at the El Dorado property in El Salvador was directed towards the completion of the preliminary feasibility study in 2001 while in 2000 the Company undertook a significant in-fill drilling program.”) (C-335).

Dayton by granting an emergency legislative extension of Kinross El Salvador's Exploration Licenses to prevent them from expiring "while exploration work remains ongoing."<sup>131</sup>

74. As indicated by Decree No. 456, the 1996 Mining Law was in the process of undergoing further reforms, which, among other things, would allow for a longer term for exploration licenses. On the other hand, it was uncertain whether the reformed law could be passed before the expiration of certain existing licenses. Thus, an emergency extension was granted in consideration of the fact that:

Mining activities are highly significant for the country's economy in that they generate investment from domestic and foreign companies, thereby contributing to job creation and development in the areas in which they are performed.<sup>132</sup>

75. Furthermore, the *Asamblea* specifically demonstrated its awareness that:

[T]he aforementioned companies have invested millions of dollars in carrying out these activities; consequently [the expiration of their exploration licenses]...would cause them significant harm, due to the current downturn in international gold prices, thereby hindering their efforts to raise capital.<sup>133</sup>

76. Shortly after the passage of Decree No. 456, the Salvadoran *Asamblea* proceeded to enact Decree No. 475, in which it reformed several provisions of the 1996 Mining Law (the "**2001 Amendment**").<sup>134</sup> In particular, the 2001 Amendment extended the maximum term of

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<sup>131</sup> *Decreto No. 456* of 3 July 2001, published in the *Diario Oficial* No. 130, Vol.352, on 11 July 2001, Preamble, para. II (CLA-211).

<sup>132</sup> *Id.*, Preamble, para. I.

<sup>133</sup> *Id.*, Preamble, para. III (emphasis added).

<sup>134</sup> *Decreto No. 475* of 11 July 2001, published in the *Diario Oficial* No. 16, Vol. 352, on 31 July 2001 (CLA-212); Press Release, Changes to Salvadoran Mining Law, dated 23 August 2001 ("With the passage of these most important modifications it is clear that the Salvadoran government is eager to support the development of its natural resources in a responsible manner, broaden the foundation of its

(continued...)



exploration licenses from five years to eight years.<sup>135</sup> In a similar vein, the 2001 Amendment also modified the requirement that mining concessionaires commence “exploitation work” within one year from the date of signing the concession contract.<sup>136</sup> This requirement was amended to require only the commencement of “preparatory work for exploitation,” within one year after the date of effectiveness of the concession contract.<sup>137</sup>

77. In addition, exploitation concession holders that had failed to update their outdated mining rights within the period stipulated in the 1996 Mining Law were given an amnesty for failure to comply, and were granted an additional period of 120 days from the entry into effect of the 2001 Amendment in order conform their rights accordingly.<sup>138</sup>

78. As later explained by Catherine McLeod-Seltzer, a member of the Board of Directors of Dayton in 2001 (and later Chairman of the Board of PRMC):

[El Salvador] has ... very friendly mining laws as well – which we, as a matter of fact, had a hand in helping the government draft so

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economic reforms and modernization, and act in a way that will attract additional foreign investment.”) (emphasis added) (C-225).

<sup>135</sup> 2001 Amendment, art. 8 (amending Article 19 of the 1996 Mining Law) (CLA-212). Possibly in consideration of this extension, and given El Salvador’s historical concern with not allowing mining properties to be tied up unproductively, the 2001 Amendment also introduced a new annual fee payable by both exploration license holders and concessionaires. *Id.*, art. 8 (amending article 19 of the 1996 Mining Law); art. 12 (amending Article 24 of the 1996 Mining Law); art. 28 (amending art. 66 of the 1996 Mining Law).

<sup>136</sup> 1996 Mining Law, art. 23 (CLA-210).

<sup>137</sup> 2001 Amendment, art. 11 (emphasis added) (CLA-212).

<sup>138</sup> *Id.*, art. 32.

that El Salvador would be open and receptive to mining investment and allow deposits to be developed in a timely way.<sup>139</sup>

79. These events paint a clear and unequivocal picture of El Salvador's consistent and longstanding desire to attract mining investment generally, and to encourage exploitation of the El Dorado Project in particular. As described above, El Salvador had sought to attract a modern mining industry with the 1996 Mining Law by streamlining the licensing system and extending the term allotted for exploration and development.<sup>140</sup> On the other hand, El Salvador's mining legislation had consistently sought to prevent mining rights holders from "sitting on their rights" without undertaking active production. As indicated in the Committee Report to the 1922 Mining Code, this was viewed as being necessary in order to avoid "subject[ing] the Country to the loss arising from the failure to exploit a natural resource,"<sup>141</sup> and thus, the 1996 Mining Law did not depart entirely from this historical trajectory. Instead, as observed by Mr. Williams in his Expert Statement, it attempted to find a middle ground that would accommodate business cycles and promote substantial exploration investment, while at the same time prevent companies from "engaging in speculation or hoarding and tying up potentially valuable mineralized areas without engaging in productive development."<sup>142</sup>

80. However, as new mining investment started to take off following enactment of the new law, it became evident that the five year period selected "was not an appropriate middle

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<sup>139</sup> Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 at 3 (C-336).

<sup>140</sup> Williams Expert Statement at 18-19.

<sup>141</sup> 1922 Mining Code, Committee Report, Chapter VII (CLA-207).

<sup>142</sup> Williams Expert Statement at 12.

ground and that a longer time was needed.”<sup>143</sup> Then, *in specific response to the requests made by foreign investors in the El Dorado Project*, and with the full support of the Bureau of Mines, the national *Asamblea Legislativa* quickly acted to make the legal reforms that were necessary to ensure that the El Dorado Project could go forward. In so doing, it demonstrated that it was fully attuned to the reasonable needs of the fledgling international mining industry in the country, and that it fully supported efforts to move the El Dorado Project from exploration into production.

81. Notably, this extraordinary show of support for foreign investment in the El Dorado Project was also entirely consistent with El Salvador’s long history of favorable mining legislation; the specific recognition of the El Dorado Project’s importance to the Department of Cabañas during the parliamentary debates over the 1996 Mining Law; and the *Asamblea*’s recent enactment of an Investment Law modeled on international standards for the promotion and protection of foreign investment.

82. Indeed, other reforms were also undertaken in the 2001 Amendment with a view to increasing legal security and otherwise making conditions more favorable for mining investors. For example, the 2001 Amendment eliminated the discretion of the Bureau of Mines with regard to the application and reporting requirements for the exploitation concession. Thus, the requirement for the applicant to submit, “other documents that the Bureau may deem appropriate”<sup>144</sup> was replaced with a requirement to submit, “other documents that may be

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<sup>143</sup> *Id.* at 18.

<sup>144</sup> 1996 Mining Law, art. 37.2(g) (CLA-210).

established by regulation.”<sup>145</sup> The vague requirement for the concessionaire to submit reports “that may be requested by the Bureau,”<sup>146</sup> was also replaced with a requirement to submit an annual report setting out certain specified information.<sup>147</sup>

83. Furthermore, the 2001 Amendment removed the arbitrary five square kilometer superficial area limitation on mining concessions that had existed under the original law;<sup>148</sup> and decreased the royalty on metallic minerals due to the national Government from 3% to 1%.<sup>149</sup>

84. Aside from clarifying certain ambiguous provisions, the other main aim of the 2001 Amendment was to remove the conflict of competence between MARN and the Bureau of Mines that had been created by enactment of the Environmental Law. In this regard, the 2001 Amendment modified Articles 28(f) and 48 of the 1996 Mining Law to reflect that the Bureau of Mines was no longer responsible for determining whether the mining concession holder had caused environmental harm through its mining activities, or for imposing consequences for any potential harm.<sup>150</sup>

85. In addition, it also amended Article 37.2 of the 1996 Mining Law with respect to the environmental component of the mining concession application. As indicated above, the 1996 Mining Law had required submission of an environmental impact study and a plan of

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<sup>145</sup> 2001 Amendment, art. 20 (CLA-212).

<sup>146</sup> 1996 Mining Law, art. 25(h) (CLA-210).

<sup>147</sup> 2001 Amendment, art. 13 (amending art. 25(h) of the 1996 Mining Law) (CLA-212).

<sup>148</sup> *Id.*, art. 16 (amending Article 30 of the 1996 Mining Law).

<sup>149</sup> *Id.*, art. 27 (amending Article 65 of the 1996 Mining Law).

<sup>150</sup> *Id.*, art. 15 (amending art. 28(f) of the 1996 Mining Law); art. 25 (amending art. 48 of the 1996 Mining Law).

mitigation measures.<sup>151</sup> In the 2001 Amendment, this was replaced with the requirement to submit the environmental permit issued by the competent authority, with a copy of the EIS.<sup>152</sup> As explained by Mr. Williams in his Expert Statement, this modification tended to ensure the security of legal rights of mining investors in light of the new separation of competence between MARN and MINEC in regard to mining activities.<sup>153</sup>

86. As indicated above, the 1996 Mining Law required the concessionaire to commence work within one year from the date of signature of the relevant concession contract, a requirement that was modified but nevertheless preserved in the 2001 Amendment.<sup>154</sup> Notably, the period to commence work provided under Article 23 was extendable for up to one year *only* in the event the concessionaire could demonstrate the existence of a *force majeure* event,<sup>155</sup> which was very much in keeping with El Salvador's longstanding tradition of imposing strict work requirements on mining concessionaires in order to stimulate prompt development of its mineral deposits.<sup>156</sup>

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<sup>151</sup> 1996 Mining Law, art. 37.2(e) (CLA-210).

<sup>152</sup> 2001 Amendment, art. 20 (amending art. 37 of the 1996 Mining Law) (CLA-212).

<sup>153</sup> See Williams Expert Statement at 21-24.

<sup>154</sup> 1996 Mining Law, art. 23 (CLA-210); 2001 Amendment, art. 11 (CLA-212).

<sup>155</sup> *Id.*

<sup>156</sup> See, e.g., 1881 Mining Code, art. 40 (providing that, “[n]o mine may be considered to be legally protected unless it has established jobs with four operatives directly employed in its exploitation.”), arts. 41-43 (providing specific requirements for the type of work to be carried out) (CLA-208); 1922 Mining Code, Committee Report, Chapter VII (indicating that mines must be confiscated for lack of work so as not to “subject the Country to loss from the failure to exploit a natural resource”) (CLA-207); see also *id.* art. 48(1) (providing that a mine shall be considered abandoned, *inter alia*, “[w]hen six months have passed since the concession was awarded and no preliminary work has been done at the mining property on the surface or underground that would show that the concessionaire has the good faith intention to move forward with mining the concession. Said six-month period may be extended if the interested party

(continued...)

87. On the other hand, the new Environmental Law required the mining concessionaire to obtain an environmental permit from MARN prior to commencing mining operations.<sup>157</sup> Thus, if the new mining concessionaire were to sign its contract with MINEC and then face an inordinate delay in obtaining the necessary environmental permit from MARN, it ran the risk that its mining rights would be forfeited.

88. By making the environmental permit an application requirement for the mining exploitation concession, the 2001 Amendment facilitated compliance with the requirement to commence operations under Article 23, allowing that requirement to be maintained while still protecting mining investors who faced delay in processing their applications before other administrative agencies.<sup>158</sup> Indeed, as confirmed by Mr. Williams in his Expert Statement, there is no requirement in the 1996 Mining Law (nor was one imposed in the 2001 Amendment) for an applicant for an exploitation concession to hold a valid exploration license at the time that it is awarded the concession.<sup>159</sup> On the other hand – and as discussed further in **Section V**, below – an applicant that holds a valid exploration license at the time it submits its concession application preserves its *exclusive right to the concession* under Articles 19 and 23 of the 1996 Mining Law, and as amended. For the remainder of this submission, the 1996 Mining Law as Amended in 2001 will be referred to as the “**Amended Mining Law.**”

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(continued)

can provide justifiable grounds for requesting an extension, prior to the end of the initial six month period, or in the event the competent authority deems it necessary to extend it. The extension may not exceed an additional six months”); *id.*, arts. 49-52; *see also* Williams Expert Statement at 21-22.

<sup>157</sup> Environmental Law, art. 19 (CLA-213).

<sup>158</sup> *See* Williams Expert Statement at 22-23.

<sup>159</sup> *Id.* at 22.

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89. As set out in the foregoing subsections, El Salvador has a long history of encouraging mining investment, beginning in the late 1800s. Indeed, active mining operations, including commercial exploitation, were carried out by foreign companies at various points in the country's history and were consistently welcomed by the Government.

90. Although the modern mining industry did not develop in El Salvador to a significant degree – partially due to civil conflicts which plagued the country for much of the 20<sup>th</sup> century – the country's lawmakers made the mining industry a priority in a post-war economic and social reform program which also eventually included the Environmental Law and the Investment Law. Notably, the new 1996 Mining Law already reflected the ethos of both of these later laws, specifically aiming to attracting investment while also implementing new standards for environmental protection. Nevertheless, it was the Mining Law which was pushed to the top of the reform agenda, out of recognition of the “fundamental importance” of attracting mining investors to the country in order to: “create new job opportunities for Salvadorans, promoting the Economic and Social Development of the regions in which the minerals are found, allowing the State to collect the revenues that are so necessary for the fulfillment of its objectives.”<sup>160</sup>

91. Indeed, as has been widely reported and was specifically recognized during the parliamentary debates over the 1996 Mining Law, poor regions of El Salvador such as Cabañas are in desperate need of economic diversification in order to alleviate severe poverty and prevent

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<sup>160</sup> 1996 Mining Law, Preamble, para. III (emphasis added) (CLA-210).

further environmental degradation as a result of unsustainable farming practices. Moreover, neither the Government nor the local private industry possessed the risk capital, experience or technology to successfully locate the country's substantial mineral resources or bring them into production in a "rational and sustainable" manner.<sup>161</sup>

92. When foreign mining companies began to ramp up work at the El Dorado Project contemporaneously with the new 1996 Mining Law – first Zinc Metals, then Mirage, and later Dayton – they were consistently welcomed by the Government and enjoyed collaborative relationships with the Bureau of Mines. In fact, the events that transpired in connection with the development of the El Dorado Project between 1998 and 2001 demonstrate beyond doubt that the interests of all the relevant actors in El Salvador were completely aligned with those of the foreign investors that were struggling to advance the Project through a period of low gold prices. Indeed, so important was investment in the El Dorado Project viewed by El Salvador that in 2001 the *Asamblea* issued a special law just to ensure that the foreign investors would not be damaged by an expiration of their exploration rights.

93. As a result of El Salvador's demonstrated commitment to the success of the El Dorado Project – both in 1995 and again in 2001 – Dayton was able to move forward with the preparation of a feasibility study and attempt to bring the El Dorado Project online. Unfortunately, while Dayton had an experienced mining team, including mining engineer Fred Earnest, it did not have the cash in hand to begin development of the El Dorado Project, nor did

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<sup>161</sup> See, e.g., *id.*, art. 25(a).



it have the required exploration expertise to substantially increase the property's reserve base in order to attract additional financing.<sup>162</sup>

94. As explained in the following subsections, these were precisely the qualities that Pac Rim brought to the equation when it entered onto the scene in 2001, along with a high standard for environmental and social consciousness and a desire to develop a low-cost, highly-profitable and environmentally clean mine. Thus, the 2002 merger between Dayton and Pac Rim was literally a match made in heaven for the El Dorado Project, and, by all reasonable and historical accounts, for the country of El Salvador.

## **B. Overview of the Pac Rim Companies**

95. As explained in Claimant's previous submissions, the Pac Rim Companies are comprised of a small group of entities located in several different jurisdictions.<sup>163</sup> The number and structure of the Companies have changed several times from 1997 to the present, based on the Companies' acquisition and disposition of assets and their overall business needs. But the basic management of Pac Rim, and the two locations from which the Companies as a group have been managed – Reno, Nevada, U.S.A., and Vancouver, Canada – have not changed.<sup>164</sup>

### **1. The Formation of the Pac Rim's Management Team**

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<sup>162</sup> See, e.g., Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 (C-336); Press Release, Pacific Rim and Dayton Mining Propose Merger, dated 9 January 2002 (C-217).

<sup>163</sup> Claimant's Counter-Memorial in Response to Respondent's Objections to Jurisdiction, dated 31 December 2010 ("**Counter-Memorial**") at 18.

<sup>164</sup> Witness Statement of Catherine McLeod-Seltzer, dated 31 December 2010 ("**McLeod-Seltzer Witness Statement**"), para. 5; First Witness Statement of Thomas C. Shrake, dated 31 December 2010 ("**First Shrake Witness Statement**"), para 35; Second Witness Statement of Thomas C. Shrake, dated 21 March 2013 ("**Second Shrake Witness Statement**"), para. 33.

96. As the Tribunal may recall, the current management of the Pac Rim Companies essentially dates back to 1997. Since that time, the two senior officers of the Companies have been Mr. Thomas Shrake, who currently serves as the President and Chief Executive Officer (“CEO”) of PRMC, and Ms. Catherine McLeod-Seltzer, who currently serves as the Chairman of the Board of Directors of PRMC.<sup>165</sup> Both Mr. Shrake and Ms. McLeod-Seltzer are well-known figures in the mining world.

97. Mr. Shrake is a U.S. citizen who has worked and lived in Reno, Nevada, U.S.A., from 1983 to the present (with the exception of a three-year period spent in Hermosillo, Mexico).<sup>166</sup> Prior to joining Pac Rim, Mr. Shrake already enjoyed a well-established reputation for finding and developing mineral deposits both in the United States and in Latin America.<sup>167</sup> Mr. Shrake’s extensive background in exploration geology is set forth in detail in his First and Second Witness Statements, but in short, over the past thirty years, he has found numerous significant mineral deposits in Latin America and the United States (many of them in Nevada).<sup>168</sup> During the course of his career, Mr. Shrake has also honed his ability to develop and manage highly profitable mining operations, working closely with metallurgists, mining engineers, and corporate managers.<sup>169</sup>

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<sup>165</sup> Counter-Memorial, para. 43; First Shrake Witness Statement, para. 33; Second Shrake Witness Statement, para. 32.

<sup>166</sup> First Shrake Witness Statement, para. 1; Second Shrake Witness Statement, para. 1.

<sup>167</sup> McLeod-Seltzer Witness Statement, para. 22.

<sup>168</sup> See First Shrake Witness Statement, paras. 14-25; Second Shrake Witness Statement, paras. 5-27.

<sup>169</sup> Second Shrake Witness Statement, paras. 15-27.

98. While Mr. Shrake is well-known as an exploration geologist, Ms. McLeod-Seltzer's reputation is for financing and putting together successful mining companies.<sup>170</sup> Her model has been to put the right management team in place and raise the necessary financing; she then finds a talented exploration geologist to lead the technical side of the business.<sup>171</sup> Peter Brown, founder of Canaccord Financial Inc. ("**Canaccord**") (which has financed more mining and/or exploration projects than any other company in the world) explains that Ms. McLeod-Seltzer is "revered" in the mining community:

She is knowledgeable and understands the mining business in a way few others do. She is one of the best, most experienced, and most respected Canadian managers of mining projects worldwide, with particular expertise in Latin America. She is revered in the mining community.<sup>172</sup>

Mr. Brown adds that "any project on which [Ms. McLeod-Seltzer] works and endorses is certainly financeable. To put it more simply, Catherine is 'financeable.'"<sup>173</sup>

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<sup>170</sup> First Shrake Witness Statement, paras. 27-30; McLeod-Seltzer Witness Statement, paras. 18, 20, 22; Second Shrake Witness Statement, para. 29-30 ; Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004:

Myself, I come from a financial background. I was responsible for the co-founding of a company called Arequipa, which went from being a small company acquiring projects in Peru to the discovery of the Pierina deposit in a period of about three years. We sold that company for about \$1 billion. I've been involved in mining finance ever since. That was in 1996. (C-336).

<sup>171</sup> McLeod-Seltzer Witness Statement, para. 18, 20, 22 ; Counter-Memorial, para. 46; First Shrake Witness Statement, para. 27; Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 (C-336); Witness Statement of Peter Brown, dated 26 March 2013 ("**Brown Witness Statement**"), para. 5 (stating that Ms. McLeod-Seltzer "always creates top level teams around her (such as the team at PRMC)").

<sup>172</sup> Brown Witness Statement, para. 5 (emphasis added).

<sup>173</sup> *Id.* (emphasis added).

99. In 1996, Ms. McLeod-Seltzer was looking for new mining companies to finance and develop. She was introduced to PRMC, a small publicly traded Canadian company that had been founded in 1986. At the time, PRMC held an interest in the Diablillos silver project in Salta, Argentina through an Argentine subsidiary. Ms. McLeod-Seltzer believed that PRMC had potential, but could accomplish more with better financing and a better overall management team. Accordingly, she led the acquisition of PRMC through a private placement financing and acquired control of the Companies.<sup>174</sup>

100. Following her usual model, Ms. McLeod-Seltzer wanted to find an accomplished exploration geologist to manage and lead the Companies' exploration and mining efforts. She knew Mr. Shrake by reputation and arranged for a meeting with him.<sup>175</sup> As Ms. McLeod-Seltzer explained in a 2004 interview:

Tom has a long history of exploration success, having worked most of the last 25 years or so in South and Central America. He was responsible for the acquisition that made Gibraltar a takeover candidate in the mid-1990s. That went from about a \$50 million market cap company to a \$300 million market cap company in a very short period of time, and it was basically the acquisition he made that drove that increase in value.<sup>176</sup>

101. Mr. Shrake found that he and Ms. McLeod-Seltzer share many of the same social values as well as the same philosophy for how a mining business should be run. Both for business reasons as well as personal conviction, Mr. Shrake and Ms. McLeod-Seltzer believe that

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<sup>174</sup> McLeod-Seltzer Witness Statement, para. 21.

<sup>175</sup> *Id.*, paras. 22-23.

<sup>176</sup> Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 (C-336).

mining companies operating in the developing world must adhere to the highest environmental and safety standards and must be committed to sustainable development.<sup>177</sup>

102. Following their meeting, Ms. McLeod-Seltzer offered Mr. Shrake the position of CEO of PRMC. Mr. Shrake accepted the position and began work for the Companies in February 1997.<sup>178</sup>

## **2. Pac Rim's Institutional Talent and Expertise**

103. As explained by both Mr. Shrake and Ms. McLeod-Seltzer, the talent and expertise required to locate valuable mineral deposits and to develop them into mines that are financially profitable and environmentally sound is rare and often harder to find than the financial capital.<sup>179</sup> One of Pac Rim's primary assets is the intellectual capital it boasts among its management team, employees, and Board of Directors.<sup>180</sup> This institutional talent is rare, particularly for a junior mining company such as Pac Rim.

104. Upon accepting the position of CEO of PRMC in early 1997, Mr. Shrake established an office in Reno and hired an office manager.<sup>181</sup> He also hired the core team of geologists, Messrs. William T. Gehlen and David Ernst, with whom he had worked at Gibraltar

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<sup>177</sup> First Shrake Witness Statement, para. 30; McLeod-Seltzer Witness Statement, paras. 25-26.

<sup>178</sup> First Shrake Witness Statement, para. 33; Second Shrake Witness Statement, para. 31; McLeod-Seltzer Witness Statement, para. 27.

<sup>179</sup> McLeod-Seltzer Witness Statement, paras. 18, 22; First Shrake Witness Statement, para. 63.

<sup>180</sup> Brown Witness Statement, para. 5 (stating that Ms. McLeod-Seltzer "always creates top level teams around her (such as the team at PRMC)"); Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 ("We've got a very dedicated, ambitious management team. And we also have a very high-quality exploration group out in the field. And I think that's going to continue to add value on top of the development of El Dorado.") (C-336).

<sup>181</sup> First Shrake Witness Statement, para. 34.

Mines Limited (where Mr. Shrake had been Vice-President for Exploration prior to joining the Pac Rim Companies). Messrs. Shrake, Gehlen, and Ernst have worked together for over twenty years, and together they form an exceptionally strong geological exploration team.<sup>182</sup> As described on PRMC's website:

Pacific Rim's exploration strategies and geological programs are conceived, planned and carried out by a core group of successful explorationists including Tom Shrake, the Company's CEO, Bill Gehlen, VP Exploration and Dave Ernst, Chief Geologist. This team has over 75 years combined experience in gold and copper exploration and was responsible for the identification and delineation of a number of world class mineral deposits. They have many years of experience working in North, Central and South America, and have a unique understanding of the gold belts of Central America.<sup>183</sup>

105. Both Messrs. Gehlen and Ernst have been instrumental in exploring and developing the El Dorado Project.<sup>184</sup> Today, Mr. Gehlen serves as the President of the Companies' Salvadoran subsidiaries, PRES and DOREX. He also serves as the Vice President of Exploration for PRMC and Pacific Rim Exploration, Inc. ("**Pac Rim Exploration**") and maintains an office in Pac Rim's Reno office. Since 2002, Mr. Gehlen has divided most of his time between El Salvador and Reno, Nevada.<sup>185</sup> Mr. Gehlen is a Certified Professional Geologist and a "Qualified Person" as defined by National Instrument 43-101 ("**NI 43-101**"). (As explained in Claimant's previous submissions, the NI 43-101 Standards are regulatory reporting

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<sup>182</sup> Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 ('we have a very seasoned exploration team that has had a history of success') (C-336).

<sup>183</sup> Pacific Rim Mining Corp., Projects Overview (emphasis added) (R-15); Second Shrake Witness Statement, paras. 34-36.

<sup>184</sup> First Shrake Witness Statement, paras. 37-39, 61; Second Shrake Witness Statement, para. 34.

<sup>185</sup> First Shrake Witness Statement, paras. 39, 61; Second Shrake Witness Statement, para. 34.

standards that apply to publicly traded Canadian companies, including Claimant's corporate parent, PRMC.<sup>186</sup>) Mr. Shrake discusses Mr. Gehlen's qualifications further in his Second Witness Statement.

106. Mr. Ernst serves as the Chief Geologist for both PRMC and Pac Rim Exploration, leading the Companies' project generation campaign in North, Central, and South America.<sup>187</sup> He has also devoted substantial amounts of his time to the El Dorado Project since 2002. When not in the field, Mr. Ernst also maintains his office in Reno, Nevada.<sup>188</sup> Mr. Ernst is geologist licensed by the State of Washington, U.S.A., and, like Mr. Gehlen, is a Qualified Person as defined in NI 43-101.<sup>189</sup>

107. Following its investment in El Salvador, Pac Rim moved Mr. Frederick H. Earnest to El Salvador to oversee the Companies' Salvadoran operations. Mr. Earnest was a highly competent and experienced mining engineer, who had been President of Dayton's subsidiary in Chile. Mr. Earnest served as the President of PRES from 2004 through 2006, when he left to pursue another opportunity in the United States. As Mr. Shrake explains: "Mr. Earnest speaks Spanish and is experienced with managing mining operations in Latin America. We considered ourselves fortunate to have him on our team."<sup>190</sup>

108. Pac Rim also hired a number of highly qualified Salvadoran professionals to assist with the development of the El Dorado Project. Among others, Pac Rim hired Ms. Ericka

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<sup>186</sup> Pacific Rim Mining Corp., National Instrument 43-101 Information (C-337).

<sup>187</sup> Pacific Rim Mining Corp. 2003 Annual Report at 5 (R-97).

<sup>188</sup> First Shrake Witness Statement, paras. 39, 61.

<sup>189</sup> Pacific Rim Mining Corp., National Instrument 43-101 Information (C-337).

<sup>190</sup> Second Shrake Witness Statement, para. 67.

Colindres, a chemical engineer and former Technician at MARN, to serve as the Environmental Protection Manager of the Project. Another Salvadoran employee, Ms. Cristina Elizabeth Garcia Martinez (“Betty Garcia”),<sup>191</sup> was hired to serve as the Salvadoran Director of Public Relations. In this capacity, Ms. Garcia oversaw and managed the many social and environmental programs implemented by the Companies and discussed *infra* in **subsection D.2**.

109. By early 2008, Pac Rim employed over 200 Salvadorans to assist with the Companies’ drilling, exploration, and development activities. The Company encouraged and benefited from the talent of its Salvadoran employees and looked forward to hiring more workers from the local communities once the El Dorado mine went into operation.<sup>192</sup> As Mr. Shrake explains:

Our employees were trained to represent the Company in an open, honest and respectful manner, and worked hard daily to earn the Companies’ “social license” to operate in El Salvador. I believe that the Salvadoran professionals on our team embodied our commitment to working in El Salvador in a conscientious manner to ensure benefits to both the Companies and El Salvador.<sup>193</sup>

110. In addition to the institutional talent and expertise of its management team and employees, PRMC boasted an extraordinarily talented Board of Directors.<sup>194</sup> PRMC’s Board is comprised of seasoned professionals who have located mineral deposits, built and operated

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<sup>191</sup> As a point of clarification, MINEC also had an employee named “Betty Garcia,” whose name appears on many of Claimant’s documents as the person at MINEC who received the Companies’ various correspondence and submissions. The two Ms. Garcias are distinct.

<sup>192</sup> Pacific Rim Mining Corp., Social and Environmental Responsibility (C-59).

<sup>193</sup> Second Shrake Witness Statement, para. 41.

<sup>194</sup> Brown Witness Statement, para. 5.



successful mines, and have exceptional market credibility.<sup>195</sup> As both Mr. Shrake and Ms. McLeod-Seltzer explain, the caliber of PRMC's Directors is an unusual asset for a junior exploration company.<sup>196</sup>

**C. The Pac Rim Companies Invest in El Salvador**

111. From 1997 to 2001, under Mr. Shrake's direction, the Companies continued to develop the Diablillos project in Argentina, and also acquired several additional projects in Argentina, which PRMC held through PRC and several other subsidiaries.<sup>197</sup> The geological team also spent considerable time looking at projects in Perú, which it ultimately decided not to pursue.<sup>198</sup> Thus, by 2001, despite significant exploration efforts in Argentina and Perú, the Companies had not found a project that met their overall strategic goals.

112. As Mr. Shrake explains, by 2001, the low price of gold had caused both investors and mining companies to focus on maximizing gold production:

In 2001, the price of gold was only trading at about US\$270 an ounce (current gold prices are closer to US\$1600 an ounce). With the price of gold relatively low, investors had been betting for some time on a commodity boom (gold price increase) and had invested in those companies that boasted the most ounces of gold in their projects. As a result, most CEOs were focused on locating

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<sup>195</sup> Second Shrake Witness Statement, paras. 43-47; Pacific Rim Mining Corp. 2003 Annual Report at 1 ("The importance of Pacific Rim's exploration projects to the Company's growth is matched only by that of its people. We have a very talented exploration team (some of whom you will meet in the next few pages) supported by management and a board of directors with many years of front-line experience discovering, building, financing and operating mines around the world.") (R-97).

<sup>196</sup> Second Shrake Witness Statement, paras. 43-47.

<sup>197</sup> See, e.g., Pacific Rim Mining Corp. 2000 Annual Report at 2 (C-338); Pacific Rim Mining Corp. 2001 Annual Report at 1-2 (C-339).

<sup>198</sup> First Shrake Witness Statement, para. 42; Second Shrake Witness Statement, para. 48; Pacific Rim Mining Corp. 2000 Annual Report at 2 (C-338); Pacific Rim Mining Corp. 2001 Annual Report at 1-2 (C-339).

large deposits in order to maximize gold production, irrespective of the costs of extracting the minerals from the deposit.<sup>199</sup>

113. Although the market had previously emphasized gold production, Pac Rim's Management Team and Board of Directors believed that the market was shifting and that investors were rewarding those companies that emphasized *profitability* rather than the total number of ounces produced.<sup>200</sup> As Mr. Shrake explains, Pac Rim decided to emulate one of the few profitability-focused companies in the market at that time, Meridian Gold, Inc. ("**Meridian**"), which was operating the El Peñón deposit in Chile. The El Peñón deposit was a low-sulfidation type epithermal gold deposit. This type of precious metals deposit can yield a high quality, low cost product.<sup>201</sup>

114. Low-sulfidation mineral deposits, as the name suggests, contain little sulfur or other non-precious metals. This enables mineral recovery without generating acid and thus

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<sup>199</sup> Second Shrake Witness Statement, para. 49.

<sup>200</sup> See, e.g., Second Shrake Witness Statement, para. 50; see also 2002 Extraordinary General Meeting, Presentation to Shareholders, dated 10 April 2002 ("There has been a paradigm shift...[in] the past couple of years. [...] This differs from the past when companies were primarily valued based on the total number of ounces produced.") (emphasis added) (C-218); Press Release, Pacific Rim and Dayton Mining Propose Merger, dated 9 January 2002 ("Both Pacific Rim and Dayton recognize that the primary driver for shareholder value in the gold industry today is profit, which is best served by the discovery and development of sizeable, economically viable gold deposits with potential for operating costs in the lower quartile on a worldwide basis. Dayton's El Dorado gold project in El Salvador has the potential to become a low-cost underground gold operation capable of generating significant free cash flow in today's gold price environment.") (emphasis added) (C-217); Press Release, Pacific Rim Formalizes Strategic Plan, dated 2 July 2003 ("The basis of Pacific Rim's Strategic Plan is the Company's recognition that the highest market multiples in the gold mining industry today are being afforded to companies that demonstrate strong profitability and cash flow, not necessarily those with the largest production and reserve bases. Being big is no longer as important as being profitable.") (emphasis added) (C-219).

<sup>201</sup> First Shrake Witness Statement, para. 44; Second Shrake Witness Statement, para. 51; Leia Michele Toovey, *An Overview of Epithermal Gold Deposits* (21 March 2011) ("...these deposits represent a high-grade, easily mineable source of gold.") (C-220).

minimizes environmental risk.<sup>202</sup> Low-sulfidation systems have the potential to yield large amounts of high-quality gold and silver in an environmentally clean manner, with a relatively low extraction cost.<sup>203</sup> By focusing on low-sulfidation type epithermal gold deposits, Pac Rim hoped to locate a project with a high quality mineral deposit, low cost of extraction, and minimal environmental impact.<sup>204</sup>

115. Thus, in March 2001, Mr. Shrake attended a mining conference where he learned about an interesting exploration opportunity in El Salvador, owned by Dayton, a publicly traded Canadian company.<sup>205</sup> At the time, Dayton held several exploration licenses in El Salvador, but, as explained above, the primary focus of its activities was the El Dorado Sur and the El Dorado

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<sup>202</sup> First Shrake Witness Statement, para. 44; Second Shrake Witness Statement, para. 51.

<sup>203</sup> First Shrake Witness Statement, para. 44; Second Shrake Witness Statement, para. 51; Witness Statement of Steven Ristorcelli, dated 20 March 2013 (“**Ristorcelli Witness Statement**”) para. 29 (“...the low-sulfidation nature of the El Dorado precious-metal deposits made them even more rare and attractive for mine development.”).

<sup>204</sup> Second Shrake Witness Statement, para. 52; *see also* 2002 Extraordinary General Meeting, Presentation to Shareholders, dated 10 April 2002 (“To become profitable requires an unusual deposit that has both low operating and low capital costs. Achieving the extraordinary profits that we seek is best accomplished by delivering a high grade underground deposit of sufficient size to attract the attention of the market.”) (C-218); Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 (“the types of projects that we’re focused on are low-cost, high-grade deposits. So these are deposits that can weather the storm of lower gold prices and produce a lot of money in times of high gold prices.”) (emphasis added) (C-336).

<sup>205</sup> First Shrake Witness Statement, para. 45; Second Shrake Witness Statement, para. 53.

Norte Exploration License areas.<sup>206</sup> Mr. Shrake was told that the El Dorado Project was a low-sulfidation gold deposit, with estimated mineral resources of around 300,000 ounces.<sup>207</sup>

116. As explained above, while Dayton had an experienced mining team, it did not have the liquid assets in 2001 to move the El Dorado Project into production, nor did it have the exploration expertise to substantially expand the mineral resources in order to attract financing. Thus, it was looking to partner with another junior or mid-tier mining company that would provide the right synergies to advance the Project. On the other hand, Pac Rim had cash in hand from the recent sale of its Diablillos property, as well as an excellent geological team with extensive experience and interest in hydrothermal alterations.

117. Mr. Shrake's interest was piqued and he decided to travel to El Salvador to visit the site. Upon visiting El Dorado and seeing the Project first-hand, Mr. Shrake concluded that El Dorado was exactly the type of property that the Companies had been seeking: a large, high-quality, low-sulfidation type epithermal vein system.<sup>208</sup>

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<sup>206</sup> See Resolution No. 57, dated 15 July 1999 (C-329); Resolution No. 58, dated 15 July 1999 (C-330); Resolution No. 1, dated 12 July 1996 (C-326); Resolution No. 2, dated 23 July 1996 (C-317); Notification from Gina Navas de Hernandez, dated 12 November 2001 (C-340).

<sup>207</sup> First Shrake Witness Statement, para. 46; Second Shrake Witness Statement, para. 54. The NI 43-101 Standards are regarded as the highest international disclosure standards. In turn, the NI 43-101 Standards required Pacific Rim Mining Corp. to adhere to the Canadian Institute of Mining ("**CIM**") Definition Standards for Mineral Resources and Mineral Reserves ("**CIM Standards**"). As defined by NI 43-101 and CIM Standards a mineral resource estimate is an estimation of the aggregate "**measured resources**," "**indicated resources**," and "**inferred resources**" located in a deposit, as those terms are defined by NI 43-101 and CIM Standards on Mineral Resources and Mineral Reserves. CIM Definition Standards – For Mineral Resources and Mineral Reserves, CIM Standing Committee on Reserve Definitions, on Mineral Resources and Reserves: Definitions and Guidelines 4, dated 22 November 2005 (CLA- 33).

<sup>208</sup> First Shrake Witness Statement, para. 47; Second Shrake Witness Statement, para. 56.

118. As Mr. Shrake explains in his Second Witness Statement, Pac Rim's geology team has a specialized understanding of hydrothermal systems like the ones that typify the El Dorado Project site.<sup>209</sup> After visiting the El Dorado site, Mr. Shrake recognized that the exploration activities conducted by previous mining companies had been insufficient to fully explore the true potential of the Project.<sup>210</sup> In particular, he believed that the previous exploration programs had not drilled deeply enough to find the bulk of the high-grade gold veins, which, because of their hydrothermal properties, occupied a specific range of elevations (or, "**Productive Interval**") that were deeper than most of the drilling had been.<sup>211</sup> He was convinced that the Project likely contained far more than the 300,000 ounces of gold estimated by Dayton. (To date over 1.4 million ounces of recoverable gold have been delineated and significant resources remain to be explored.)<sup>212</sup>

119. Another attractive feature of the Project was that, because of its nature and geology, it could be mined underground, in a manner that would pose minimal environmental

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<sup>209</sup> Second Shrake Witness Statement, paras. 8-11, 14, 26, 55.

<sup>210</sup> *Id.*, para. 55; Pacific Rim Mining Corp. 2003 Annual Report at 2 (noting that "[a] majority of the roughly 200 drill holes that were completed at El Dorado prior to Pacific Rim's involvement in the project were shallow holes that did not test the Productive Interval [or area where most of the resource is located].") (R-97).

<sup>211</sup> Second Shrake Witness Statement, para. 55; 2003 Annual Report at 2 (noting that "[a] majority of the roughly 200 drill holes that were completed at El Dorado prior to Pacific Rim's involvement in the project were shallow holes that did not test the Productive Interval [or area where most of the resource is located].") (R-97).

<sup>212</sup> Pacific Rim Mining Corp. Management's Discussion and Analysis for the fiscal year ended April 30, 2010, Sec. 3.1.6 (C-24).

risk, especially if accompanied by proper safety and environmental controls.<sup>213</sup> While much of El Salvador is densely populated, the area where the El Dorado Project is located is not.<sup>214</sup> (In fact, the Companies later determined that the surface entry to the mine and the related facilities would be located on a former cattle ranch.)<sup>215</sup> Thus, the mining operations would pose no disturbance to local residents, while at the same time providing hundreds of well-paid, skilled jobs for near-by communities.<sup>216</sup>

120. Mr. Shrake was excited by the El Dorado Project and knew that his geology team's expertise was uniquely suited for this type of deposit.<sup>217</sup> Mr. Shrake's expectations extended well beyond the El Dorado Project. He believed he and his team had uncovered an underappreciated "gold belt" and that they had an excellent opportunity to discover additional mineral deposits at other locations within El Salvador.<sup>218</sup>

121. Mr. Shrake had originally wanted the Pac Rim Companies to acquire only Dayton's assets in El Salvador. However, he ultimately concluded that a merger with Dayton in its entirety would be more advantageous for the Pac Rim Companies, because Dayton held other assets that could eventually be used to help finance development of both the exploration and

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<sup>213</sup> Second Shrake Witness Statement, para. 56; First Shrake Witness Statement, para. 47; Counter-Memorial, para. 67.

<sup>214</sup> El Dorado PFS at 133 (C-9); First Shrake Witness Statement, para. 48.

<sup>215</sup> First Shrake Witness Statement, para. 48.

<sup>216</sup> *Id.*, para. 48; Second Shrake Witness Statement, para. 89; Pacific Rim Mining Corp., Social and Environmental Responsibility (C-59).

<sup>217</sup> Second Shrake Witness Statement, para. 55.

<sup>218</sup> *Id.*, para. 55; *see also* Pacific Rim Mining Corp. 2008 Annual Report at 1 (C-33).

exploitation aspects of the El Dorado Project.<sup>219</sup> Specifically, Dayton owned a subsidiary called Dayton Mining (U.S.) Inc., a Nevada corporation that held a 49% interest in a gold mining operation called the Denton-Rawhide Joint Venture (“**Denton-Rawhide**”). Located near Fallon, Nevada, the Denton-Rawhide mine was projected to generate millions of dollars in revenue for the next several years.<sup>220</sup> These cash flows were an attractive source of funding for the Companies’ planned operations and exploration activities in El Salvador. Dayton also owned an asset in Chile called the Andacollo Gold Mine (which the Companies eventually sold to the Trend Mining Company in 2005 for a total of US \$5.4 million).<sup>221</sup>

122. At the time Mr. Shrake proposed the merger with Dayton, Ms. McLeod-Seltzer sat on the Board of Dayton, and Dayton’s President and CEO, Mr. William Myckatyn, sat on the Board of PRMC.<sup>222</sup> Accordingly, Ms. McLeod-Seltzer and Mr. Myckatyn recused themselves

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<sup>219</sup> First Shrake Witness Statement, para. 50; Second Shrake Witness Statement, para. 59; Pacific Rim Mining Corp. 2002 Annual Report at 2 (“The merger of Pacific Rim and Dayton has created a company whose position is stronger than the sum of its parts. Pacific Rim’s current market capitalization of approximately \$38 million is more than 3 times of the combined Dayton (\$5.8 million) and old Pacific Rim (\$4.5 million) market capitalization of \$10.3 million when the merger proposal was announced.”) (C-28).

<sup>220</sup> Press Release, Pacific Rim and Dayton Mining Propose Merger, dated 9 January 2002 (C-217); *see also* Pacific Rim Mining Corp. 2002 Annual Report at 7 (“the Company anticipates profits from the [Denton-Rawhide] operation to increase substantially in the coming years.”) (C-28).

<sup>221</sup> First Shrake Witness Statement, para. 50; Witness Statement of Steven Krause, dated 31 December 2010 (“**Krause Witness Statement**”), para. 23; Press Release, Pacific Rim Announces Fiscal 2006 First Quarterly Results, dated 7 September 2005 (C-27); Second Shrake Witness Statement, para. 59.

<sup>222</sup> First Shrake Witness Statement, para. 51; McLeod-Seltzer Witness Statement, para. 29; Second Shrake Witness Statement, para. 60.

from the discussions of a potential transaction between the Pac Rim Companies and Dayton. Mr. Shrake led the due diligence and negotiation teams for the Pac Rim Companies.<sup>223</sup>

123. The due diligence undertaken by the Pac Rim Companies in El Salvador prior to the Dayton merger is summarized in previous filings.<sup>224</sup> In sum, Mr. Shrake and his geology team spent the next few months studying detailed information about the El Dorado deposit and the exploration work carried there out by Dayton and its predecessors. They met with geologists, geochemists, metallurgists, and mining engineers to review Dayton's geologic exploration data.<sup>225</sup> Messers. Shrake, Ernst, and Gehlen also traveled to El Salvador to conduct additional geologic due diligence and to further advance Pac Rim's understanding of the nature of the El Dorado deposit.<sup>226</sup>

124. Mr. Shrake also met with local counsel to learn about El Salvador's mining, environmental, and investment laws, its investment ratings, and the investment climate more generally.<sup>227</sup> Mr. Shrake learned that, as described above in **subsection A**, El Salvador had a long history of supporting the mining industry in general – and the El Dorado Project specifically.<sup>228</sup>

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<sup>223</sup> First Shrake Witness Statement, para. 51; McLeod-Seltzer Witness Statement, para. 29; Second Shrake Witness Statement, paras. 60-65.

<sup>224</sup> Notice of Arbitration, dated 30 April 2009 ("**Notice of Arbitration**"), paras. 45-49; Claimant's Response to Respondent's Preliminary Objection, dated 26 February 2010 ("**Response to Preliminary Objections**"), paras. 22-26; Transcript of Hearings on Respondent's Preliminary Objection, dated 31 May 2010 ("**Preliminary Objection Transcript**"), 183:22-186:17, 208:21-211:7; Counter-Memorial, para. 70.

<sup>225</sup> Second Shrake Witness Statement, paras. 58.

<sup>226</sup> First Shrake Witness Statement, para. 51; Second Shrake Witness Statement, para. 58.

<sup>227</sup> Second Shrake Witness Statement, paras. 61-63; First Shrake Witness Statement, para. 51.

<sup>228</sup> Dayton Press Release, Encouraging Results from El Dorado Drilling, dated 22 June 2000 (For example, a Dayton press release noted that "Bill Myckatyn and Robert Johansing, Project Manager of El

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Mr. Shrake also discovered that El Salvador was embarking on an aggressive campaign to attract foreign investment and that the country's investment climate and regulatory environment had received high ratings.<sup>229</sup> For instance, in 2000 the Heritage Foundation Index of Economic Freedom ranked El Salvador 11th globally, which fell just below the United States (4th) and was on par with Canada (11th) and Chile (11th). (In stark contrast, in the 2013 Index of Economic Freedom, El Salvador has fallen to 53rd, while the United States, Canada, and Chile are ranked 10th, 6th, and 7th, respectively.<sup>230</sup>)

125. Moreover, to further promote foreign investment, in 2000 El Salvador had established a foreign investment agency, "**PROESA**" (short for Promoting Exports and Investment in El Salvador).<sup>231</sup> El Salvador's sitting Vice President acts as the President of PROESA. El Salvador plainly wanted to attract foreign investment and to do so in an

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Dorado, met with the Vice President and with the Minister of Economy of El Salvador in March 2000 and both offered their support and encouragement for the development of the El Dorado Project by Dayton.") (emphasis added) (C-266); Memo from Robert Johansing to William Myckatyn, dated 21 February 2000 (A memo drafted in 2000 for Dayton similarly observed: "We have maintained a reasonably close relationship with Gina [Navas de Hernández of the Bureau of Mines] over the past 6½ years and her support is invaluable.") (emphasis added) (C-267); Second Shrake Witness Statement, para. 96; *see also Q&A: Carlos Quintanilla Schmidt, VP of El Salvador, BUSINESS NEWS AMERICAS* (18 July 2002) ("The point for foreign investors is that we are a very stable country, with a very good labor force and strong private sector. They should have the idea that when they come to El Salvador, they can be sure to succeed. ... we are launching this campaign, to let investors know that El Salvador exists and that it is one of the three Latin American countries with a good investment grade") (C-26).

<sup>229</sup> 2000 Heritage Foundation Index of Economic Freedom (C-222); Minutes of Meeting, Trade Policy Review: El Salvador, WT/TPR/M/23 (25-26 November 1996) (C-79); During this same time, El Salvador's rankings on the Transparency International's "Corruption Perception Index" have also plummeted, falling from 53 in 2001 to 83 in 2012; *see also* Transparency International, <http://www.transparency.org/cpi2012/results> (last visited 28 March 2013); Transparency International, [http://archive.transparency.org/policy\\_research/surveys\\_indices/cpi/2001](http://archive.transparency.org/policy_research/surveys_indices/cpi/2001) (last visited 28 March 2013).

<sup>230</sup> 2013 Heritage Foundation Index of Economic Freedom (C-223).

<sup>231</sup> *See El Salvador and Foreign Investment Targets Multinational Corporations*, undated (C-224).

environmentally responsible way – all of which was appealing to Mr. Shrake and the Pac Rim Companies.<sup>232</sup>

126. Finally, Mr. Shrake met with high-ranking Government officials, including Ms. Gina Navas from Bureau of Mines. Ms. Navas verified that Dayton's licenses were valid and in good standing.<sup>233</sup> Mr. Shrake encountered enthusiasm from the officials he met, both for the El Dorado mining Project and the possibility of the Pac Rim Companies' investment in the country.<sup>234</sup>

127. Following the positive results of the due diligence in El Salvador, and of Dayton overall, Mr. Shrake recommended that PRMC's Board of Directors approve the merger.<sup>235</sup> The Board did so and in turn recommended approval of the merger to the shareholders.<sup>236</sup> The Press Release announcing the Board's approval specifically recognized amalgamated entity's enhanced ability to develop the El Dorado Project:

"We are extremely excited by the win-win opportunity this amalgamation presents," states Pacific Rim CEO Tom Shrake. "The El Dorado gold project represents a unique opportunity to explore a high-grade, potentially low-cost gold deposit with a known resource and substantial upside potential." ... Dayton's President and CEO, Bill Myckatyn states, "The proven

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<sup>232</sup> First Shrake Witness Statement, paras. 51-52; David Gates *Q&A: Carlos Quintanilla Schmidt, VP of El Salvador*, BUSINESS NEWS AMERICAS (18 July 2002) (C-26); Second Shrake Witness Statement, paras. 62-63.

<sup>233</sup> Second Shrake Witness Statement, para. 97; *see also* Resolution No. 1, dated 12 July 1996 (C-326); Resolution No. 2, dated 23 July 1996 (C-317); Notification from Gina Navas de Hernandez, dated 12 November 2001 (C-340).

<sup>234</sup> First Shrake Witness Statement, para. 52; Second Shrake Witness Statement, para. 64.

<sup>235</sup> First Shrake Witness Statement, para. 53; Second Shrake Witness Statement, para. 65.

<sup>236</sup> Press Release, Pacific Rim and Dayton Mining Propose Merger, dated 9 January 2002 (C-217); Pacific Rim Mining Corp. Report to Shareholders, dated 25 March 2002 (C-229).

technical team and immediate cash that Pacific Rim brings to the merged company will allow meaningful work to be undertaken at El Dorado right away. The merged company will be a very well-financed exploration and development company with a potentially world class asset.”<sup>237</sup>

128. Following the approval of their respective shareholders, the Pac Rim Companies and Dayton merged in April 2002.<sup>238</sup>

129. After the merger, the parent corporation of the amalgamated companies retained the name PRMC and remained a publicly-traded Canadian company.<sup>239</sup> Mr. Shrake remained principally responsible for the core exploration and mining functions of the Companies.<sup>240</sup>

130. On 5 April 2002, Kinross El Salvador, Dayton’s Salvadoran operating entity, and the holder of the El Dorado Norte and El Dorado Sur Exploration Licenses that comprised the El Dorado Project – notified MINEC of the merger.<sup>241</sup> At the time, Kinross El Salvador was held through several Dayton subsidiaries.<sup>242</sup>

131. On 24 January 2003, Kinross El Salvador’s Articles of Incorporation were modified, changing the name of the Companies’ Salvadoran operating entity to Pacific Rim El

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<sup>237</sup> Press Release, Pacific Rim and Dayton Mining Propose Merger, dated 9 January 2002 (emphasis added) (C-217).

<sup>238</sup> Press Release, Shareholders Approve Amalgamation of Pacific Rim and Dayton Mining, dated 3 April 2002 (C-230).

<sup>239</sup> Organizational Structure Immediately Following the 2002 Merger with Dayton (C-54).

<sup>240</sup> First Shrake Witness Statement, paras. 55-56; Second Shrake Witness Statement, para 66; Transcript, Company Interview: Catherine McLeod-Seltzer, Pacific Rim Mining Corp., dated 28 June 2004 (“The company is basically managed by Tom Shrake, who is our CEO.”) (C-336).

<sup>241</sup> Letter from Robert Johansing to Gina Navas de Hernandez, dated 5 April 2002 (C-341).

<sup>242</sup> Organizational Structure Immediately Following the 2002 Merger with Dayton (C-54).

Salvador S.A. de C.V. (previously defined as “**PRES**”).<sup>243</sup> MINEC was notified of this modification on 10 March 2003.<sup>244</sup> On 5 December 2003 and 18 December 2003, MINEC transferred the El Dorado Sur and El Dorado Norte Exploration Licenses respectively, from Kinross El Salvador to PRES.<sup>245</sup>

132. As indicated in Claimant’s previous submissions, the Companies ultimately vested ownership of PRES in PRC on 30 November 2004, in order to obtain various tax benefits for the Companies.<sup>246</sup> On 11 August 2005, the *Oficina Nacional de Inversiones* (“**ONI**”), a department of MINEC, acknowledged PRC’s status as the new owner of PRES.<sup>247</sup> As indicated in the Companies’ contemporaneous books and records, all of the investments that the Companies had made in El Salvador prior to November 2004 were then assigned to PRC. In addition, from 2005 forward, virtually all of the Companies’ direct investments of financial capital into El Salvador were made through PRC.<sup>248</sup>

**D. Pac Rim’s Development of the El Dorado Norte and El Dorado Sur License Areas (2002 – 2003)**

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133. Following the 2002 merger, the Pac Rim Companies began to focus most of their personnel and financial resources in El Salvador. Messrs. Shrake, Gehlen, and Ernst, all spent

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<sup>243</sup> Kinross El Salvador Articles of Incorporation, dated 24 January 2003 (C-342).

<sup>244</sup> Letter from Edgardo Serrano to Gina Navas de Hernandez, dated 10 March 2003 (C-343); Letter from Edgardo Serrano to Gina Navas de Hernandez, dated 10 March 2003 (C-344).

<sup>245</sup> Resolution No. 181, dated 5 December 2003 (C-345); Resolution No. 189, dated 18 December 2003 (C-346).

<sup>246</sup> Organizational Structure Chart, dated 30 November 2004 (C-54); First Shrake Witness Statement, paras. 40, 107; Krause Witness Statement, para. 26; Counter-Memorial, para. 134.

<sup>247</sup> Resolution No. 383-R, dated 11 August 2005 (NOA Exh. 2).

<sup>248</sup> Krause Witness Statement, para. 26.

considerable time undertaking exploration activities at El Dorado and other locations in El Salvador, traveling back and forth between El Salvador and Reno.

# **1. Pac Rim Commences Its Exploration Program in El Salvador**

134. Immediately after the merger, Pac Rim’s exploration team began compiling the results of the exploration work that had been previously conducted at the El Dorado Project.<sup>249</sup> Pac Rim’s exploration team also initiated a surface mapping and sampling program of the El Dorado Project area.<sup>250</sup> Thanks to these efforts, Pac Rim was able to begin exploration activities shortly after the merger was approved, commencing a comprehensive drilling and exploration program at El Dorado in May 2002 that continued through July 2008.<sup>251</sup>

135. As Mr. Shrake explains, Pac Rim’s drilling program had two primary goals.<sup>252</sup> First, Pac Rim needed to identify where the high-grade ore was located within the El Dorado Project area in order to design a mine and also to expand the NI 43-101 compliant mineral resource estimates of the known deposits and other deposits that would likely be in the nearby area.<sup>253</sup> Expansion of the El Dorado resource estimates associated with the property would

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<sup>249</sup> Pacific Rim Mining Corp. Quarterly Report to Shareholders, dated 19 September 2002 (C-347).

<sup>250</sup> *Id.*

<sup>251</sup> Second Shrake Witness Statement, para. 68; Press Release, Pacific Rim Commences Diamond Drilling Program on El Dorado, dated 28 May 2002 (C-231); Press Release, Pacific Rim Suspends Drilling in El Salvador Until Mining Environmental Permit Granted; Local Staffing Reduced, dated 3 July 2008 (C-262).

<sup>252</sup> Second Shrake Witness Statement, para. 69; Press Release, Pacific Rim Formalizes Strategic Plan, dated 2 July 2003 (C-219); Press Release, Pacific Rim Announces 2005 Second Quarter Results, dated 14 December 2004 (C-232).

<sup>253</sup> As previously noted, according to the NI 43-101 Standards and CIM definitions, a “**mineral resource**” is defined as a resource “in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction.” In turn, a “**mineral reserve**” is “the economically

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enable Pac Rim to attract the significant financial capital required to ultimately finance and build a mine at El Dorado. Knowing the hydrothermal characteristics of low-sulfidation mineral deposits, Mr. Shrake and his team were uniquely qualified to a deliberate, systematic approach to locate these additional resources.<sup>254</sup>

136. The second goal of Pac Rim's drilling program was to develop a very detailed scientific understanding of the geological history of the El Dorado deposits so that the exploration team could apply this knowledge to identify additional, previously unknown mineral deposits in El Salvador.<sup>255</sup>

137. To accomplish these two goals, Pac Rim's exploration team conducted extensive underground exploration work throughout 2002. Mr. Shrake and his exploration team also conducted geologic exploration on the surface to identify additional potential mineral deposits.<sup>256</sup>

Highlights of this exploration activity include:

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mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study." CIM Definition Standards – For Mineral Resources and Mineral Reserves, CIM Standing Committee on Reserve Definitions, on Mineral Resources and Reserves: Definitions and Guidelines 4, adopted 11 December 2005 (emphasis added) (CLA-33).

<sup>254</sup> Second Shrake Witness Statement, para. 70; Press Release, Additional Drill Results from El Dorado program, dated 23 September 2002 ("El Dorado is a very large mineralized system that will take many drill holes over the coming months to evaluate. We are very pleased to have intersected high-grade gold mineralization both north and south of the known Minita resource, as well as in two other veins on the property, which will be followed up with future drilling. Furthermore, our surface exploration is resulting in the discovery of numerous additional, mineralized veins and is giving us a better understanding of the structural controls on mineralization. Our intent is to use a systematic and deliberate approach to the drill program to seek additional ounces at El Dorado.") (emphasis added) (C-233).

<sup>255</sup> Second Shrake Witness Statement, para. 69; El Dorado PFS at ii, 25-33 (C-9).

<sup>256</sup> Second Shrake Witness Statement, para. 71; Press Release, Pacific Rim Intersects High-Grade Gold on El Dorado Drill Program, dated 3 July 2002 ("Targeting continues using trenching, surface rock

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- **May 2002:** Pac Rim implemented a first phase drilling program at the El Dorado Project designed to identify high-grade veins within the “Productive Interval.”<sup>257</sup>
- **July 2002:** Pac Rim added a second diamond drill rig in order to accelerate the El Dorado exploration program.<sup>258</sup>
- **October 2002:** PRMC’s Board of Directors voted to extend the Companies’ “scout” drilling program at El Dorado in order to advance the promising results obtained from the first round of drilling.<sup>259</sup>
- **December 2002:** Pac Rim’s exploration team announced a plan to expand drilling and exploration activities to include additional exploration license areas.<sup>260</sup> In accordance with Article 22 of the Mining Law, Pac Rim reported its

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sampling and detailed geologic mapping. This work has identified several very attractive targets in the central part of the district.”) (C-234).

<sup>257</sup> Press Release, Pacific Rim Commences Diamond Drilling Program on El Dorado, dated 28 May 2002 (C-231); Pacific Rim Mining Corp. 2002 Annual Report at 6 (“The goal of Pacific Rim’s first phase drilling is to identify veins that contain high-grade mineralization. Successful holes will then be followed up with additional drilling, with the objective of expanding the current resource within the Minita vein and/or on other veins within the El Dorado district.”) (C-28).

<sup>258</sup> Press Release, Pacific Rim Intersects High-Grade Gold on El Dorado Drill Program, dated 3 July 2002 (C-234).

<sup>259</sup> Press Release, Pacific Rim Mining to Extend El Dorado Drill Program, dated 10 October 2002 (C-237); *see also* Press Release, Additional Drill Results from El Dorado Program, dated 5 November 2002 (C-238).

<sup>260</sup> Press Release, Latest Drill Results from the El Dorado Program and Update on the Denton-Rawhide Mine, dated 3 December 2002 (“To date, our drill program at El Dorado has focused on wide-spaced scout drilling a large number of veins around the Minita resource ... We have identified three encouraging areas with this approach and we have now switched to follow-up drilling these areas. Scout drilling of additional veins at El Dorado will continue in the coming months. ... Following the infill drilling at El Dorado, the drills will be moved to the La Calera project, where we are eager to follow up on the very intriguing surface gold results documented to date.”) (emphasis added) (C-239); Press Release, Pacific Rim Mining Corp. Announces Second Quarter Results, dated 18 December 2002 (“Our objective at El Dorado is to discover additional gold resources that can enhance the approximately 352,000 ounces of high grade gold that is currently outlined within the Minita vein system.”) (C-348).

exploration activities to MINEC, as it continued to do each December thereafter.<sup>261</sup>

138. During the course of 2003, the scope of Pac Rim's activities expanded, as the Companies pursued a "two-pronged strategy for El Dorado."<sup>262</sup> Specifically, the Companies began to "move forward with development plans for the 585,000 ounce Minita resource while at the same time continuing to explore for additional resources on the property."<sup>263</sup> Thus, Mr. Shrake and his team began the internal review and preparations necessary to develop and construct a mine at the El Dorado Project while continuing to pursue additional exploration activities at the Project and elsewhere.<sup>264</sup> During this time, members of Pac Rim's team also met with employees of MARN and MINEC to appraise them of the Project's progress and to ascertain how best to proceed with the Companies' plans to convert the Exploration Licenses into an Exploitation Concession.<sup>265</sup>

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<sup>261</sup> El Dorado South and North 2002 Annual Report (C-349); El Dorado South and North 2003 Annual Report (C-350); El Dorado South and North 2007 Annual Report (C-351).

<sup>262</sup> *See, e.g.*, Memo from Fred Earnest to Tom Shrake, dated 20 March 2003 ("In general, I see many opportunities here to improve the costs through better studies. I acknowledge that many assumptions have been made and in most cases the conservative approach has been used.") (C-352); Memo from Fred Earnest to Tom Shrake, dated 28 April 2003 (C-353); Memo from Fred Earnest to Tom Shrake, dated 14 August 2003 (C-274).

<sup>263</sup> Press Release, Pacific Rim Announces 2005 First Quarter Results, dated 8 September 2004 (C-354).

<sup>264</sup> *See, e.g.*, Memo from Fred Earnest to Tom Shrake, dated 20 March 2003 ("In general, I see many opportunities here to improve the costs through better studies. I acknowledge that many assumptions have been made and in most cases the conservative approach has been used.") (C-352); Memo from Fred Earnest to Tom Shrake, dated 28 April 2003 (C-353); Memo from Fred Earnest to Tom Shrake, dated 14 August 2003 (C-272).

<sup>265</sup> *See, e.g.*, Memorandum from Fred Earnest to Tom Shrake, dated 14 August 2003 (C-272); Letter From Fred Earnest to Minister Miguel Lacayo, dated 14 August 2003 (C-355); Letter from Fred Earnest to Gina Navas de Hernandez, dated 14 August 2003 (C-356); Letter from Jorge Brito to Francisco Perdomo, dated 16 October 2003 (C-357).



139. Among other things, the Companies' 2003 exploration activities included:

- **January 2003:** Pac Rim expanded exploration activities to include drilling at the nearby La Calera Project and mapping and sampling the El Paisnal and Cerro Gaspar Projects.<sup>266</sup> (However, Pac Rim's primary focus remained on locating and testing veins within the El Dorado Project area in order to discover additional resources and to study the geologic history of the El Dorado deposits.<sup>267</sup>)
- **March 2003:** Pac Rim announced that drilling at the El Dorado Project had identified several new gold veins and that it had received encouraging results from its drill program at the La Calera Project.<sup>268</sup>
- **October 2003:** Pac Rim announced that its exploration efforts had expanded the resource estimates for the

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<sup>266</sup> Press Release Update on El Salvador Drill Programs and Denton-Rawhide Mine, dated 27 January 2003 (C-240); Press Release, Report to Shareholders, dated 19 September 2002 ("Pacific Rim acquired two new projects to add to its portfolio in El Salvador. In May, 2002, the Company announced its acquisition of the La Calera project, located approximately 8 kilometers west of El Dorado. In August, 2002, Pacific Rim announced the formation of a joint venture on the Cerro Gaspar project, located approximately 100 kilometers east of El Dorado. Both La Calera and Cerro Gaspar host bonanza epithermal gold vein systems similar to that at El Dorado.") (C-347).

<sup>267</sup> Pacific Rim Mining Corp. 2003 Annual Report at 4 ("Pacific Rim's primary exploration and development property is the El Dorado gold project. ... Of the \$3.3 million spent on exploration during [fiscal year] 2003, \$2.9 million was expended on El Dorado" and only "\$0.3 million was expended on La Calera.") (R-97); Press Release Update on El Salvador Drill Programs and Denton-Rawhide Mine, dated 27 January 2003 (With the onset of the dry season, a systematic program of surface mapping and sampling has begun in two areas at El Dorado. ... This work continues the focus of locating and sampling the veins with special emphasis on the structural geology.") (emphasis added) (C-240).

<sup>268</sup> Press Release, High Grade Gold Mineralization Found in New Discovery on La Calera Property, dated 10 March 2003 (C-358); Press Release, Pacific Rim Mining Corp. Announces Third Quarter Results, dated 19 March 2003 ("Advancement of Pacific Rim's El Dorado gold project was a key component of the Company's exploration activities during the quarter.") (emphasis added) (C-359); Press Release, La Calera Drilling Yields Potential for Both Bulk Mineable and High Grade Underground Resources, dated 23 May 2003 (presenting additional drill results from the La Calera and El Dorado Projects) (C-360); *see also* Press Release, El Dorado Step-Out Drilling Yields New High-Grade Intercepts, dated 25 July 2003 (C-241); Press Release, La Calera Project Emerges as Potential Bulk Mineable Target, dated 27 August 2003 (C-361); Press Release, Minita Vein Gold Mineralization Expanded Further with Additional High-Grade Drill Intercepts, dated 22 September 2003 (C-242).

Project's Minita vein system by 67%.<sup>269</sup> The Companies also announced new NI 43-101 compliant resource estimates for the Coyotera and Nueva Esperanza veins located within the El Dorado Project area, incorporating the results to date from Pac Rim's ongoing drill program.<sup>270</sup>

- **December 2003:** Pac Rim announced that it had identified a new area of gold mineralization, the Gonso vein structure, within the El Dorado Project area.<sup>271</sup> Excited by the new find, Pac Rim moved both of its drilling rigs to the Gonso vein to further test the economic significance of the discovery.<sup>272</sup>

A helpful diagram of the known mineral structures within the El Dorado Project area can be found in PRMC's 2002 Annual Report.<sup>273</sup>

140. The effective terms of the El Dorado Norte and El Dorado Sur Exploration Licenses were due to expire on 1 January 2004. However, at PRES's request, on 18 December 2003, MINEC extended the terms of the El Dorado Norte and El Dorado Sur Exploration Licenses to 1 January 2005.<sup>274</sup> According to Article 19 of the Amended Mining Law, the

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<sup>269</sup> Press Release, El Dorado Resource Grows To 821,000 Ounces Of Gold, Including 67% Increase in Minita Resource, dated 27 October 2003 (C-235).

<sup>270</sup> *Id.*; see also Press Release, High Grade Gold Intersected on El Dorado Drill Program, dated 2 August 2002 (C-236); Press Release, Pacific Rim Mining Corp. Announces Second Quarter Results, dated 17 December 2003 (C-362).

<sup>271</sup> Press Release, New Areas of Gold Mineralization Discovered in Gonso Vein Drilling, dated 8 December 2003 (C-244).

<sup>272</sup> *Id.* (“We will expedite our understanding of the dimensions of the Gonso vein system by using both drill rigs under contract on the El Dorado project to test this new discovery.”) (emphasis added).

<sup>273</sup> Pacific Rim Mining Corp. 2002 Annual Report at 2 (C-28).

<sup>274</sup> Resolution No. 191, dated 18 December 2003 (NOA Ex. 4); Resolution No. 192, dated 18 December 2003 (NOA Exh. 4).

Exploration Licenses could not be extended beyond a total of eight years.<sup>275</sup> Thus, in order to maintain its mineral rights to the El Dorado Project, PRES was required to submit an application to convert the El Dorado Exploration Licenses into an Exploitation Concession prior to 1 January 2005 (“**Concession Application**”).

## **2. Pac Rim’s Commitment to Sustainable Development**

141. In addition to commencing exploration activities in 2002, the Companies also began to engage with the communities near the El Dorado Project, informing them about Pac Rim and the Companies’ plans for the El Dorado Project. As an environmentally and socially responsible mining company, Pac Rim was and is committed to providing long term, sustainable benefits to the communities in which it operates.<sup>276</sup> Thus, from the outset of Pac Rim’s investment in El Salvador, the Companies’ sought to earn the approval and respect of the communities located near the mine. As Mr. Shrake explains, this “social license” was of paramount importance and the Companies’ management team and employees took Pac Rim’s responsibility to the local communities very seriously.<sup>277</sup>

142. Thus, during the course of Pac Rim’s activities in El Salvador, the Companies held well over 20 community consultation meetings and hundreds of informal informational meetings in and around Sensuntepeque and San Isidro, the towns nearest the El Dorado site, so that Pac Rim could describe its plans for the mine and the positive socio-economic benefits of

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<sup>275</sup> Amended Mining Law, art. 19 (CLA-5).

<sup>276</sup> Pacific Rim Mining Corp., Social and Environmental Responsibility (C-59).

<sup>277</sup> Second Shrake Witness Statement, para. 85.

the Project.<sup>278</sup> These meetings were not required by law, but Pac Rim believed it was important to provide local stakeholders with a forum to discuss the Project and air any questions or concerns so that they could be taken into account in the preparation of the EIS and other plans for the Project.<sup>279</sup> As a result of this effort, the Companies were able to design the Project to specifically address numerous concerns and questions raised by the local community members.<sup>280</sup> As Mr. Shrake attests, the resulting proposal for the El Dorado mine design and safeguards would have raised the bar for environmentally clean mining in the Americas (including North America).<sup>281</sup>

143. Pac Rim also opened its facilities to local community members, public and private institutions, and government officials. The Companies conducted hundreds of tours in which visitors were invited to attend a presentation on the proposal for the El Dorado mine facility, learn about ongoing exploration activities, and to tour the Companies' facilities.<sup>282</sup>

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<sup>278</sup> Second Shrake Witness Statement, para. 86; El Dorado PFS at 133-34 (C-9); First Shrake Witness Statement, para. 69; Pacific Rim Mining Corp., Social and Environmental Policy (C-59); Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011 (summarizing Pac Rim's social development and sustainability programs) (C-210); also cite to pages of the annexes to the Response to Public Comments (cited in Ericka's WS

<sup>279</sup> Pacific Rim Mining Corp., Social and Environmental Policy (C-59).

<sup>280</sup> See e.g., Pacific Rim Mining Corp. 2004 Annual Report at 18 ("During the dry season, water in the El Dorado project vicinity can become scarce; an annual complication for the many farmers that live in the area. Pacific Rim is conducting hydrogeologic studies aimed at identifying new sources of ground water for local communities.") (C-29); Pacific Rim Mining Corp., Social and Environmental Policy (C-59).

<sup>281</sup> First Shrake Witness Statement, para. 83; Second Shrake Witness Statement, para. 86; Pacific Rim Mining Corp., Social and Environmental Policy (C-59).

<sup>282</sup> Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011 at 7 (C-210).

144. In addition, the Companies sought to improve the standard of living for those living in the communities surrounding the mine. By way of background, El Salvador is among the smallest and poorest Central American countries. The El Dorado Project area is located in the Department of Cabañas, which contains the highest level of poverty in the country.<sup>283</sup> As of 2005, 65 percent of the population of Cabañas was poor and 37 percent lived in absolute poverty; the literacy rate was only 30 percent, and 42 percent of the population did not have access to potable water.<sup>284</sup> Moreover, approximately 80 percent of the population of San Isidro – the community nearest the El Dorado Project site – receives remittances from family members living in the United States, resulting in a dependent class of people who do not have formal employment.<sup>285</sup>

145. In order to serve the many needs of the local population, Pac Rim hired Ms. Betty Garcia to serve as the Companies' Salvadoran Director of Public Relations. In this capacity, Ms. Garcia implemented many of many of the Companies' social and environmental programs and actively informed the community about Pac Rim's plans and activities.<sup>286</sup>

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<sup>283</sup> El Dorado PFS at 133 (C-9).

<sup>284</sup> *Id.* at 133; Pacific Rim Mining Corp., El Dorado Project Overview (C-23).

<sup>285</sup> El Dorado PFS at 133 (C-9).

<sup>286</sup> Second Shrake Witness Statement, para. 87; Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011 (C-210).

146. The Companies also set up a non-profit foundation to provide funding for health and education programs in the local communities and committed to a minimum annual funding level of 0.5% of El Dorado's operating costs.<sup>287</sup>

147. Throughout the Companies' investment in El Salvador, Pac Rim has funded a number of projects, including but not limited to:

- Partnering with a local NGO to fund health services, including free eye care to children in the community to help them see and perform better in school;
- Establishing environmental education programs in the local schools, including annual "Let's Take Care of the Environment" drawing contests;
- Establishing the first recycling program in the region;
- Removing tons of refuse from the local river system;
- Planting over 40,000 trees, through an annual revegetation campaign;<sup>288</sup>
- Conducting hydrogeologic studies to locate new sources of ground water for local communities;
- Drilling water wells to provide clean water for local residents;<sup>289</sup>

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<sup>287</sup> Pacific Rim Mining Corp., Social and Environmental Policy (C-59); Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011(C-210).

<sup>288</sup> Pac Rim's reforestation efforts were particularly important for improving sustainability efforts in El Salvador. See USAID Report at 31 ("The international market for export crops, such as sugar and cotton that grew well on the fertile, hot coastal plain drove its deforestation...") (C-275); *id.* at 10 ("Soil erosion affects approximately 75% of El Salvador's territory and causes the loss of 59 million metric tons of soil per year.").

<sup>289</sup> *Id.* at 28 ("Agricultural chemicals also contaminate El Salvador's aquatic ecosystems. Herbicides, fungicides and insecticides are used frequently on El Salvador's major crop, coffee, in order to control insects, diseases and weeds ...").

- Providing materials, labor, and technical supervision for the design and construction of a security wall at a local hospital;
- Erecting retaining walls and chain link fences at local elementary schools and playgrounds;
- Establishing a non-profit foundation to serve as a mechanism for community development; and
- Partnering with a local foundation to build 50 homes for needy families.<sup>290</sup>

148. In addition, Pac Rim implemented an adult literacy program for its Salvadoran employees and members of the local communities..<sup>291</sup> Once the El Dorado mine went into operation, the Companies intended to hire locally to the maximum extent possible. Thus, it was important for the local community members to have the literacy and math skills necessary to qualify for the skilled jobs at the mine.<sup>292</sup> As Mr. Shrake explains, these programs had the full support of Pac Rim’s Directors and management: “We knew that hiring as many local employees as possible would greatly improve the standard of living for the entire region. In fact, the generally accepted ratio of direct to indirect job creation in the industry is 1 to 5.”<sup>293</sup>

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<sup>290</sup> Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011 (C-210); Second Shrake Witness Statement, para. 88; Pacific Rim Mining Corp. 2004 Annual Report at 17-18 (C-29); Pacific Rim Mining Corp. 2005 Annual Report at 19 (C-30); Pacific Rim Mining Corp., Social and Environmental Policy (C-59); Pacific Rim Mining Corp. 2006 Annual Report at 23 (C-31); Pacific Rim Mining Corp. 2007 Annual Report at 27-28 (C-32).

<sup>291</sup> Pacific Rim Mining Corp. 2004 Annual Report at 17 (C-29); Pacific Rim Mining Corp. 2005 Annual Report at 19 (C-30); Pacific Rim Mining Corp. 2006 Annual Report at 23 (C-31); Pacific Rim Mining Corp. 2007 Annual Report at 28 (C-32); El Dorado PFS at 133, 135 (C-9).

<sup>292</sup> El Dorado PFS at 133 (C-9).

<sup>293</sup> Second Shrake Witness Statement, paras. 89-90; *see also* Pacific Rim Social and Environmental Policy (C-59).

### 3. **PRES Initiates the El Dorado Environmental Impact Assessment Process With MARN**

149. As described above, El Salvador's Environmental Law was enacted in 1998.<sup>294</sup> Among other things, the Environmental Law established a uniform system for assessing any economic activity performed in El Salvador that might have an environmental impact,<sup>295</sup> as defined by an administrative process ("**Environmental Impact Assessment**") for the granting of environmental permits.<sup>296</sup> The Environmental Law invests MARN with the authority to administer Environmental Impact Assessments and the competence to grant environmental permits.<sup>297</sup> Ms. Colindres, a former Environmental Assessment Technician at MARN, details the objectives and purpose of this process in her Witness Statement.<sup>298</sup>

150. As described above in **subsection D.1**, following the merger between PRMC and Dayton, there was a significant increase in the drilling program being conducted on the El

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<sup>294</sup> Legislative Decree No. 233, dated 2 March 1998 (published on 4 May 1998) ("**Environmental Law**") (CLA-213).

<sup>295</sup> The legal process of Environmental Assessment is limited to activities that could cause "any significant alteration..." See Environmental Law, art. 5 ("**Environmental Impact**") (emphasis in original) (CLA-213).

<sup>296</sup> The Environmental Law defines an Environmental Impact Assessment as:

The set of actions and procedures that ensure that any 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 or promoting them, as applicable, by selecting the alternative that best guarantees the protection of the environment.

Environmental Law, art. 18 (CLA-213).

<sup>297</sup> *Id.*, art. 19.

<sup>298</sup> Colindres Witness Statement, paras. 18-54; *see also* Republic of El Salvador Country Environmental Analysis: Improving Environmental Management to Address Trade Liberalization and Infrastructure Expansion, Report No. 35226-SV, dated 20 March 2006, at 21-25 (explaining the Environmental Permitting Process) (C-282).



Dorado Norte and El Dorado Sur Exploration License areas. Although not required by MARN to do so, in 2003, PRES initiated a new Environmental Impact Assessment in order to ensure it would have a valid environmental permit for its drilling activities at the El Dorado Project site (“**ED Drilling Environmental Permit**”).

151. As noted by the MARN Technician assigned to the project:

People commented about the Project Company doing an EIS for the exploration stage, while other companies at the same stage are not required by MARN to do so, because it is not required. The Project Company is doing the [exploration] EIS based on its own request and interest.<sup>299</sup>

152. Indeed, MARN had previously issued Resolution MARN-No. 105-2000 in favor of Kinross El Salvador,<sup>300</sup> confirming “that the project known as ‘El Dorado Norte and El Dorado Sur’... DOES NOT REQUIRE AN ENVIRONMENTAL PERMIT in order to be carried out....<sup>301</sup> In 2002, MARN issued a similar resolution for exploration activities at the license area known as “La Calera.”<sup>302</sup>

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<sup>299</sup> Memorandum prepared by Adrián Juárez and commented on by Matt Fuller, dated 14 January 2004 (C-105); *see also* Colindres Witness Statement, n.25 (“In accordance with the MARN contemporary practice, the expansion of the exploration project would not of itself have caused a change in the categorization of the project. However, PRES wanted by all means to obtain the Environmental Permit, for which reason the EIS requirement was made on July 30, 2003.”).

<sup>300</sup> Resolution MARN-No 105-2000, dated 9 May 2000 (C-100).

<sup>301</sup> *Id.* (emphasis in original); Colindres Witness Statement, para. 22, and n.23 (noting that Kinross El Salvador subsequently initiated the formalities to develop a mine exploitation project on the El Dorado site between 2000 and 2001, but that this application was abandoned when Dayton, the parent company of Kinross El Salvador, made the decision to pursue an amalgamation with PRMC.)

<sup>302</sup> Communication MARN-DGA-NPA-155/2002, dated 21 May 2002, sent by Francisco Perdomo Lino, Director of Environmental Management, to Mauricio Enrique Retana (“having analyzed the environmental form and having carried out inspection of the mining exploitation project site called ‘La Calera’... the technical team assigned to make the assessment concludes that no Environmental Permit is required for its implementation...” (emphasis added) (C-101).

153. PRES submitted the Environmental Form to obtain the ED Drilling Environmental Permit on 9 June 2003.<sup>303</sup> On 30 July 2003, MARN sent PRES the necessary Terms of Reference in order to prepare the EIS for the ED Drilling Environmental Permit.<sup>304</sup> Upon receipt of the Terms of Reference, PRES hired an independent environmental consultant to prepare the EIS for the ED Drilling Environmental Permit.

154. Over the next several months, PRES worked to prepare the EIS, submitting the final EIS to MARN on 1 December 2003.<sup>305</sup> Later that month, on 22 December 2003, MARN instructed PRES to begin the public consultation process for the ED Drilling Environmental Permit.<sup>306</sup> PRES promptly complied, notifying MARN on 15 January 2004 that it had completed the public consultation requirement.<sup>307</sup>

155. As detailed below in *subsection D.3*, by the end of 2003, the Companies had also initiated preparations for converting the El Dorado Exploration Licenses into an Exploitation Concession. Under the Amended Mining Law, an applicant for an exploitation concession must submit, among other things, an environmental permit for the proposed mining activities issued by MARN.<sup>308</sup> Thus, while waiting to obtain the ED Drilling Environmental Permit, the

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<sup>303</sup> Environmental Form for the El Dorado Norte and El Dorado Sur mining exploration project, dated 9 June 2003 (C-104).

<sup>304</sup> Letter from Francisco Perdomo Lino to Jorge Ruben Brito, dated 30 July 2003 (C-103).

<sup>305</sup> Letter from Jorge Ruben Brito to Francisco Antonio Perdomo Lino, dated 1 December 2003 (C-363).

<sup>306</sup> Letter from Francisco Antonio Perdomo Lino to Jorge Ruben Brito, dated 22 December 2003 (C-106).

<sup>307</sup> Letter from Carlos Edgardo Serrano to Francisco Antonio Perdomo Lino, dated 15 January 2004 (C-107).

<sup>308</sup> Amended Mining law, art. 37(CLA-5).

Companies also began preparations to obtain the necessary environmental permit for PRES's Concession Application (the "**ED Mining Environmental Permit**"). On 30 December 2003, Pac Rim retained Vector Colorado LLC ("**Vector**") to serve as the principal author of the EIS for the ED Mining Environmental Permit.<sup>309</sup>

**E. PRES's Conversion of the El Dorado Project to an Exploitation Concession (2004)**

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156. As described previously, PRES had until 1 January 2005 to request conversion of the El Dorado Norte and El Dorado Sur Exploration Licenses to an exploitation concession.<sup>310</sup> Thus, in 2004, Pac Rim pursued parallel tracks of activities, investing millions of dollars in exploration activities to locate additional resources while also finalizing preparations to convert the El Dorado Norte and El Dorado Sur Exploration Licenses to an exploitation concession.<sup>311</sup> In addition, PRES continued to work with MARN to obtain both the ED Drilling Environmental Permit and to advance the ED Mining Environmental Permit process.

157. In order to facilitate its efforts to move the El Dorado Project into production, Pac Rim moved Mr. Earnest, a mining engineer, to El Salvador to oversee the Companies'

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<sup>309</sup> Letter from Vector Colorado LLC to Fred Earnest, dated 30 December 2003 (C-37).

<sup>310</sup> Resolution No. 189, dated 18 December 2003 (C-346); Resolution No. 191, dated 18 December 2003 (NOA Exh. 4); Resolution No. 192, dated 18 December 2003 (NOA Exh. 4).

<sup>311</sup> See Email from Tom Shrake, dated 13 April 2004 ("We are working on two fronts, development and exploration.") (emphasis added) (C-364); Press Release, Pacific Rim Announces 2005 First Quarter Results, dated 8 September 2004 ("In July 2003, Pacific Rim adopted a two-pronged strategy for El Dorado; to move forward with development plans for the 585,000 ounce Minita resource while at the same time continuing to explore for additional resources on the property.") (C-354).

Salvadoran operations. Mr. Earnest served as the President of PRES from 2004 through August 2006, when he left to pursue another opportunity in the United States.<sup>312</sup>

**1. Pac Rim's Continued Exploration and Drilling Activities  
Confirms the Economic Viability of the El Dorado Project**

158. As Mr. Shrake explains in his Second Witness Statement, 2004 was an important year for the Companies: during the course of the year's exploration activities, the Pac Rim exploration team made a breakthrough on their understanding of the relationship between the gold mineralization at El Dorado and the volcanic history of the region.<sup>313</sup> Mr. Shrake and his exploration team were ultimately able to apply their proprietary knowledge about the history and geologic nature of the El Dorado Project to their exploration efforts elsewhere in El Salvador, and made a number of new gold discoveries, including the Santa Rita and Zamora Projects, discussed below in *subsection G.5*.<sup>314</sup>

159. Notable exploration achievements from 2004 include:

- **January 2004:** The addition of a third drill rig to Pac Rim's exploration program in order to expedite the development of the El Dorado Project.<sup>315</sup>

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<sup>312</sup> First Shrake Witness Statement, para. 62.

<sup>313</sup> Second Shrake Witness Statement para. 73; Current Activities, Pacific Rim Mining Corp. Project Overview (C-23).

<sup>314</sup> Second Shrake Witness Statement para. 73; Current Activities, Pacific Rim Mining Corp. Project Overview (C-23); Press Release, Pacific Rim Mining Expands El Salvador Project Holdings with Acquisition of Zamora Gold Project, dated 7 February 2006 (C-245).

<sup>315</sup> Second Shrake Witness Statement, para. 71; Press Release, Pacific Rim Adds Third Drill Rig to El Dorado Gold Project, dated 20 January 2004 ("Management is eager to scout drill these two equally compelling target areas in a timely manner, which will be made possible by supplementing the two core rigs already employed on the El Dorado project with a third drill.") (C-243); *see also* Press Release, Pacific Rim Mining Corp. Announces Third Quarter Results, dated 15 March 2004 ("Cognizant of the potential market premiums afforded to producers with larger operations, and with a series of high quality vein targets on the El Dorado project remaining to be tested, Pacific Rim is concurrently conducting

(continued...)

- **April 2004:** Pac Rim resumed drill testing at La Calera in late April 2004, utilizing a reverse circulation drill rig; a more cost effective technique for shallow drilling.<sup>316</sup>
- **May 2004:** Pac Rim announced the discovery of two new areas of gold mineralization within the El Dorado Project area. High grade gold was discovered in the previously untested areas of the South Minita vein in the Central District and the Nance Dulce vein in the South District of the El Dorado Project area.<sup>317</sup>
- **November 2004:** Pac Rim commenced a resource definition drill program at the newly-discovered South Minita district in the El Dorado Project area in order to “to flesh out both the South Minita and Nance Dulce gold discoveries with the drill intersection of additional high-grade gold mineralization.”<sup>318</sup>

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additional exploration drilling in the search for new chutes of mineralization. A third core drill rig was added to the El Dorado drill program subsequent to the end of the quarter.”) (C-365).

<sup>316</sup> Press Release, La Calera Drill Program Resumes After Geophysical Survey Identifies Over 5 km of New Targets, dated 26 April 2004 (C-366); *see also* Press Release, Pacific Rim Mining Corp. Announces Third Quarter Results, dated 15 March 2004 (C-365).

<sup>317</sup> Press Release, New High Grade Vein Intercepts Encountered In South Minita And Nance Dulce Drilling, dated 25 May 2004 (“The generation of these targets and the positive results they have returned to date are the result of our growing detailed understanding of the controls and timing of gold mineralization in the El Dorado system. ... Needless to say, these are exciting times for our company as we strive to accomplish our goal of becoming a highly profitable, growth-oriented intermediate level gold producer.”) (emphasis added) (C-367); *see also* Press Release, Progress Report on the El Dorado Gold Project, dated 15 June 2004 (C-368); Press Release, Pacific Rim Announces 2004 Year-End Results, dated 30 July 2004 (C-369); Press Release, Follow-up Drilling Extends South Minita and Nance Dulce Gold Discoveries, dated 10 August 2004 (C-370); Press Release, Pacific Rim Announces 2005 First Quarter Results, dated 8 September 2004 (C-354).

<sup>318</sup> Press Release, Resource Definition Drill Program Commences at South Minita Gold Zone PMU, dated 4 November 2004 (“Our increased understanding of the El Dorado mineralized system has led to the discovery and initial delineation of two new, previously unknown zones of high grade gold mineralization - South Minita and Nance Dulce - and the recognition of upside potential elsewhere on the structure that connects these two zones”, states Tom Shrake, CEO. ‘Our next step is to better understand their potential for adding additional ounces to the El Dorado resource, currently dominated by the Minita deposit. The next series of holes at South Minita will delineate the mineralization at depth and at Nance

(continued...)

160. In the fall of 2004, Pac Rim also made the determination that the La Calera Project did not warrant further exploration.<sup>319</sup> In keeping with El Salvador's regulatory goal of utilizing mineral rights in a productive manner, Pac Rim returned exploration licenses whenever the Companies' determined it would not be economically feasible to pursue further exploration activities under said licenses.<sup>320</sup>

161. In its 2004 Annual Report, Pac Rim reported that it was "continuing its exploration drill program at El Dorado with the goal of enlarging the resource further," and affirmed its continued commitment to developing the El Dorado Project: "The El Dorado project remains the cornerstone of Pacific Rim's strategy for growth. Of the \$5.2 million spent on exploration during fiscal 2004, \$4.8 million was expended on the El Dorado project, primarily on the on-going drill program, pre-feasibility study components and environmental studies."<sup>321</sup>

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Dulce we will continue to scout-drill along trend. We hope to bring both new zones toward new resource estimates in the coming months and remain confident that our flagship El Dorado gold has the potential to launch Pacific Rim into the ranks of the low-cost, intermediate producers.") (emphasis added) (C-371).

<sup>319</sup> Press Release, Reverse Circulation Drill Results Received For La Calera Gold Project, dated 13 October 2004 (C-372).

<sup>320</sup> See Resolution No. 265, dated 14 December 2002 (C-373) Letter from Carlos Edgardo Serrano Trujillo to Gina Navas de Hernandez, dated 9 December 2002 (C-374); Letter from Carlos Edgardo Serrano Trujillo to Gina Navas de Hernandez, dated 4 April 2003 (C-375); Resolution No. 49, dated 25 April 2003 (C-376); Letter from Jorge Brito to Gina Navas de Hernandez (C-377); Resolution No. 114, dated 2 September 2003 (C-378); Letter from Carlos Edgardo Serrano Trujillo to Gina Navas de Hernandez, dated 7 October 2003 (C-379); Resolution No. 145, dated 10 October 2003 (C-380); Letter from Luis Medina to Gina Navas de Hernandez, dated 4 February 2005 (C-381); Resolution No. 30, dated 8 February 2005 (C-382); Resolution No. 34, dated 8 February 2005 (C-383); Resolution No. 36, dated 8 February 2005 (C-384); Letter from Luis Medina to Gina Navas de Hernandez, dated 5 February 2005 (C-385). .

<sup>321</sup> Pacific Rim Mining Corp. 2004 Annual Report at 11 (emphasis added) (C-29).

## 2. **PRES Continues the El Dorado Environmental Permitting Process Through MARN**

162. Throughout 2004, Pac Rim continued to work with MARN to obtain the ED Drilling Environmental Permit while simultaneously engaging in the process to obtain the ED Mining Environmental Permit needed for PRES's Concession Application. Ms. Colindres explains why the Companies engaged in a two-pronged approach:

On the one hand, this strategy was connected with the planning, construction and operation of a subterranean mine over the short term. On the other hand, it was connected with the intensive exploration program being developed for the purpose of defining and significantly expanding the gold resources and reserves that would eventually become available for exploitation. The construction and operation of a subterranean mine requires the prior preparation of a very extensive EIS, quite apart from the other plans and studies necessary. On the other hand, the company at no time wished to suspend the exploration program since its results were continually increasing the value of the project. As mentioned earlier, this is why the company regarded the obtaining of the Environmental Permit as indispensable for exploration operations, even though the preparation of the EIS for the construction and operation of the mine was already in progress.<sup>322</sup>

163. As mentioned above in *subsection D.3*, Pac Rim retained the Vector environmental engineering firm in December 2003 to serve as the principal author of the comprehensive EIS that would be drafted in connection with PRES's ED Mining Environmental Permit application. In January 2004, Vector, along with Consultoría y Tecnología Ambiental, S.A. ("CTA") (a Guatemalan environmental consulting firm that assisted Vector in the preparation of the EIS), visited the El Dorado site in order to gather preliminary data and begin working on the EIS. During this trip, Vector, CTA, and several Pac Rim representatives met

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<sup>322</sup> Colindres Witness Statement, para. 59 (emphasis added).

with MARN to discuss PRES's application for the ED Mining Environmental Permit.<sup>323</sup> In this meeting, Pac Rim informed MARN officials of its strategy to pursue exploration operations in tandem with the construction and operation of the El Dorado mine. In addition, they discussed the content and the review process of the EIS for the mine project.<sup>324</sup>

164. It was later observed by Vector and CTA that the MARN officials in charge of the process did "not have an understanding of the Project, and the Project Company [PRES] should start an educational or informational process."<sup>325</sup> Thus, on 6 January 2004, Mr. Earnest sent officials at MARN and MINEC an invitation to visit operating mines in the United States so that these officials could see first-hand the practices and standards PRES intended to implement at El Dorado:

Through our working relationships with representatives from the Ministry of the Environment and Natural Resources, we have encountered professionals who are highly qualified in environmental matters. Given that the mine and plant we are proposing to build will be the first of its kind in the country, it is unreasonable to think that the professionals would be experts in the subject matter related to this type of operation.<sup>326</sup>

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<sup>323</sup> See Memorandum from A. Juarez for Pacific Rim Mining Corp., dated 14 January 2004 (C-105).

<sup>324</sup> See *id.*

<sup>325</sup> See *id.*

<sup>326</sup> Letter from Fred Earnest to Miguel Lacayo, dated 6 February 2004 (C-248); Letter from Fred Earnest to Walter Jockish, dated 6 February 2004 (emphasis added) (C-247).



Mr. Earnest also offered to sponsor a 2-day training course in modern mining techniques for MARN and MINEC officials to be taught by an independent consultant.<sup>327</sup> (MARN and MINEC accepted PRES's offer and a 2-day training program was held in August 2004.<sup>328</sup>)

165. Beginning in February 2004 and continuing over the next several years, Pac Rim, along with Vector and CTA, began to hold public consultations in the local communities to discuss the Companies planned exploitation activities.<sup>329</sup> These consultations, held before PRES had even applied for the ED Mining Environmental Permit, were not required by Salvadoran law, but were sponsored by the Companies in order to preemptively ascertain and address any concerns the local communities may have had about the Project.<sup>330</sup>

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<sup>327</sup> Letter from Fred Earnest to Miguel Lacayo, dated 6 February 2004 (C-248); Letter from Fred Earnest to Walter Jockish, dated 6 February 2004 ("I hope that this offer of technical visits and/or training will be received in the spirit in which it is made. We want to be a part of El Salvador's development through our mining project, which is expected to provide between 300 and 350 jobs for the people of the municipalities of San Isidro, Sensuntepeque, and Guacotecti. I repeat, we promise to comply with the process and legal requirements without any expectation of special treatment.") (C-247).

<sup>328</sup> Email from Fred Earnest to Luis Trejo, dated 10 August 2004 (C-278); List of Seminar Attendees, dated 13 August 2004 (C-125); Letter from Fred Earnest to Walter Jockish, MARN, dated 6 February 2004 (C-247); Letter from Fred Earnest to Miguel Lacayo, MINEC, dated 6 February 2004 (C-248); Memorandum from Dorey and Associates to Fred Earnest, dated 23 July 2004 (C-279); El Dorado PFS at 127 (C-9).

<sup>329</sup> See, e.g., Summary Report of the Social Outreach carried out by Pacific Rim El Salvador, S.A. de C.V. en Cabañas: Community Projects and Activities, prepared during the first half of 2011 at 2 (C-210) ("In February of 2004, a process of public consultation and dissemination of the proposal to implement the El Dorado Mine Project was launched in the communities of Sensuntepeque, El Banader, Guacotecti, Llano de la Hacienda, Los Jobos, Iglesia de San Isidro, Potrero y Tabla, San Matias, and San Francisco El Dorado; several meetings were held with local NGOs, including Plan International and San Marta Social Development Association and others, with approximately 900 people participating from among all of the regions."); Memorandum from Adrian Juarez to El Dorado EIS Team, dated 27 February 2004 (C-386); Letter from Fred Earnest to Gina Navas de Hernandez, dated 28 September 2004 (C-129); Letter from Fred Earnest to Luis Armando Trejo, dated 28 September 2004 (C-128).

<sup>330</sup> Memorandum from Adrian Juarez to El Dorado EIS Team, dated 27 February 2004 ("from each public consultation meeting, concerns and expectations were written by the participants, and this information collected. ... The analysis at this time will not eliminate any concerns; each of them will be

(continued...)

166. In the meantime, on 10 February 2004, MARN notified PRES that it had issued a Favorable Technical Opinion for the Environmental Impact Assessment in connection with the ED Drilling Environmental Permit.<sup>331</sup> MARN thus instructed PRES to pay a \$3,500 Environmental Bond (“**Bond**”) for the ED Drilling Environmental Permit.<sup>332</sup>

167. PRES complied with the Bond requirement for the ED Drilling Environmental Permit on 8 March 2004.<sup>333</sup> As described by Ms. Colindres in her Witness Statement, “the issue of the Bond requirement implied the acceptance [by MARN] of the EIS, and that the environmental permit would therefore be issued so long as the titleholder complied with the submission of the required Bond.”<sup>334</sup> However, MARN did not immediately issue the ED Drilling Environmental Permit following PRES’s submission of the Bond. As later explained by Mr. Gehlen, such delays by MARN were commonplace:

Although the EIS for exploration at El Dorado was completed and submitted last year to MARN (December 2003), the official permit has not yet been received. For the record, there always seems to be some issue and the final document is always just a week or so away. Please keep this in mind when planning future activities and scheduling. This “manana” factor was anticipated and now has

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listed, along with an interpretation, which will have the aim to complete the ideas and situations, and sent to the EIS team for consideration.”) (C-386); *see also* Report on the First Round of the Public Consultation on the Environmental Impact Assessment of the El Dorado Mining Project, prepared by Consultoría y Tecnología Ambiental, S.A. and Vector Colorado, LLC, dated April 2004, at 2-5(C-118).

<sup>331</sup> Letter from Jose Antonio Calderon to Jorge Ruben Brito, dated 10 February 2004 (C-108).

<sup>332</sup> *Id.*

<sup>333</sup> Letter from Carlos Edgardo Serrano Trujillo to MARN, dated 8 March 2004 (C-110).

<sup>334</sup> Colindres Witness Statement, para. 45.

been verified. What you hear and what you get is usually very different!<sup>335</sup>

168. While waiting for MARN to issue the ED Drilling Environmental Permit, PRES moved forward with the Environmental Impact Assessment for the mine project, submitting the Environmental Form on 19 March 2004.<sup>336</sup>

169. By May 2004, MARN had not issued the Terms of Reference in connection with the ED Mining Environmental Permit application, nor had the ED Drilling Environmental Permit been signed by the Minister of MARN, even though PRES had complied with all of MARN's procedures, including payment of the \$3,500 Bond on 8 March 2004.<sup>337</sup>

170. On 1 June 2004, President Saca took office. This change in administration delayed the processing of PRES's environmental permits even more, as the new administration and Ministry officials required time to get up to speed on the various activities of the prior administration. As explained by one of Pac Rim's employees:

We ... went to MARN ... hoping to get the environmental permit we are working so hard to get. We got a big surprise because the outgoing Minister did not sign the Environmental Permit and the new Minister is getting familiar with his new office and does not want to sign anything until his advisors inform him of what he can and cannot sign. We continue waiting expectantly.<sup>338</sup>

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<sup>335</sup> Memorandum from Bill Gehlen to Tom Shrake, dated 9 April 2004 (emphasis added) (C-277).

<sup>336</sup> MARN Environmental Form, dated 19 March 2004 (C-113).

<sup>337</sup> Letter from Jorge Ruben Brito to Walter Jockish, dated 5 May 2004 (C-387).

<sup>338</sup> Email from Carlos Serrano to Jorge Ruben Brito, Fred Earnest, and Bill Gehlen, dated 3 June 2004 (C-276).

On 15 June 2004, the ED Drilling Environmental Permit was signed by the new MARN Minister, Hugo Barrera.<sup>339</sup>

171. In the meantime, since submitting the Environmental Form for the ED Mining Environmental Permit in March 2004, PRES had been working diligently with Vector and CTA to prepare the EIS related to that Permit, to the extent possible without the Terms of Reference, which MARN had yet to issue.

172. On 21 July 2004, Mr. Earnest wrote to Luis Trejo, Director, Bureau of Environmental Management, within MARN referencing a meeting held with Minister Barrera the previous week and inquiring as to the status of the Terms of Reference for the ED Mining Environmental Permit.”<sup>340</sup> The following day Mr. Trejo responded, explaining: “we have experienced some difficulties in preparing the ToRs; but will have an initial proposal for Monday, the 26th, so we ask that your expert on the subject come and meet with us at 10:00 a.m. on that day.”<sup>341</sup>

173. The Terms of Reference for the ED Mining Environmental Permit were eventually issued on 30 July 2004.<sup>342</sup> As he later informed Mr. Earnest with respect to this document, Jorge Brito, a geologist and official administrator of PRES at the time, spent “six hours waiting in Trejo’s office to catch him.”<sup>343</sup> Commenting on MARN’s delay in issuing the

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<sup>339</sup> Resolution No. 151-2004, dated 15 June 2004 (NOA Exh. 5).

<sup>340</sup> Emails between Fred Earnest and Luis Trejo, the last dated 22 July 2004 (C-119)

<sup>341</sup> *Id.*

<sup>342</sup> Terms of Reference, dated 30 July 2004 (C-120); Email from Jorge Brito to Fred Earnest, dated 31 July 2004 (C-121).

<sup>343</sup> Email from Jorge Brito to Fred Earnest, dated 31 July 2004 (C-121).

Terms of Reference Ms. Colindres explains that this delay was understandable in light of the scope of the Project and the personnel changes that had occurred at MARN:

[I]t doesn't surprise me that the company had to proactively stimulate the process in this way in order to make any progress on it, given the scope of the project and the change of Minister that occurred in early 2004. It should be stated here that this change of Minister in early 2004 unleashed a series of internal alterations in the MARN that resulted in a general delay affecting almost all requests for Environmental Impact Assessment submitted between 2004 and 2005. Among other changes, Lic. Hernán Martínez, the Technician who usually handled mining projects, left the DGA. As a result of his departure, it seems that responsibility for the preparation of the Terms of Reference for the El Dorado Project had to be transferred to another Technician in mid course, something that would have prolonged the process even more than usual.<sup>344</sup>

174. As noted above, on 19-20 August 2004, Pac Rim sponsored a training program for personnel from MINEC and MARN, representatives of the NGOs active in the Department of Cabañas, and political leaders of Cabañas and the municipalities near the El Dorado Project site.<sup>345</sup> On 20 August 2004, Mr. Earnest also met with El Salvador's then Vice President, Ana Vilma de Escobar. During his meeting with Vice President Escobar, Mr. Earnest updated her on Pac Rim's progress at the El Dorado Project and requested her assistance to speed up MARN's evaluation of our environmental applications.<sup>346</sup> Vice President Escobar "expressed interest in

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<sup>344</sup> Colindres Witness Statement, para. 65 (emphasis added).

<sup>345</sup> Email from Fred Earnest to Luis Trejo, dated 10 August 2004 (C-278); List of Seminar Attendees, dated 13 August 2004 (C-125); Letter from Fred Earnest to Walter Jockish, MARN, dated 6 February 2004 (C-247); Letter from Fred Earnest to Miguel Lacayo, MINEC, dated 6 February 2004 (C-248); Memorandum from Dorey and Associates to Fred Earnest, dated 23 July 2004 (C-279); El Dorado PFS at 127 (C-9).

<sup>346</sup> El Dorado Project Report for the month ending 31 August 2004 (C-280); Second Shrake Witness Statement, para. 105.

the Project and provided contact information within the government that may be helpful in obtaining the necessary permits/approvals and in advancing the project.”<sup>347</sup>

175. The next month, on 8 September 2004,<sup>348</sup> PRES submitted the EIS related to the ED Mining Environmental Permit, and provided MARN with an electronic copy of the same on 11 October 2004 to facilitate MARN’s ability to review it in a timely manner.<sup>349</sup>

176. In October 2004, while the technical assessment of the EIS should have been in progress, PRES held a second round of public consultations with the communities in the vicinity of the Project to present the results of the EIS to them.<sup>350</sup> Ms. Colindres explains that “these consultations were not carried out within the framework of the [Environmental Law], but in order to comply with international standards on the development of mining projects.”<sup>351</sup> However, representatives of MARN were invited along with those from the Bureau of Mines.<sup>352</sup>

177. On 17 November 2004, as the deadline approached for PRES to convert the El Dorado Exploration Licenses to an Exploitation Concession, Mr. Earnest wrote to the Director of

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<sup>347</sup> El Dorado Project Report for the month ending 31 August 2004 (C-280); Second Shrake Witness Statement, para. 105.

<sup>348</sup> Email from Fred Earnest to the Minister of the MARN, dated 8 September 2004 (C-127); Email chain between Fred Earnest and Luis Trejo, the last dated 8 September 2004 (C-127).

<sup>349</sup> Letter from Fred Earnest to Hugo Barrera, dated 11 October 2004 (C-130).

<sup>350</sup> *See* Letter from Fred Earnest to Luis Trejo, dated 28 September 2004 (inviting Ing. Trejo and/or members of his team to attend the meetings) (C-128); Letter from Fred Earnest to Gina Navas de Hernández, dated 28 September 2004 (inviting Ing. Navas and/or members of her team to attend the meetings) (C-129).

<sup>351</sup> Colindres Witness Statement, para. 70.

<sup>352</sup> *See* Letter from Fred Earnest to Luis Trejo, dated 28 September 2004 (inviting Ing. Trejo and/or members of his team to attend the meetings) (C-128); Letter from Fred Earnest to Gina Navas de Hernández, dated 28 September 2004 (inviting Ing. Navas and/or members of her team to attend the meetings) (C-129).

the Bureau of Environmental Management, Mr. Trejo, inquiring as to MARN's progress in analyzing the EIS PRES had submitted for the ED Mining Environmental Permit.<sup>353</sup> The next day, Mr. Trejo responded, assuring Mr. Earnest that MARN's technical staff was working on the matter:

If you have not received a reply concerning your project it is simply because of our technical staff's heavy workload and it means that the matter is being processed. As you would say in English, "no news is good news." Thanking you in advance for your understanding and patience. As soon as I have any news I shall let you know.<sup>354</sup>

178. Although PRES was certainly eager to obtain the Permit, there was no concern that MARN's delay would affect PRES's ability to apply for the El Dorado Exploitation Concession.<sup>355</sup> As Mr. Shrake explains in his Second Witness Statement:

Naturally, we were anxious to have the evaluation completed because we did not believe we could move forward with mine development until we received the environmental permit. However, we had come to understand that delay was an unavoidable element of the environmental permitting process in El Salvador, regardless of the industry. Based on Ms. Navas's repeated assurances, I was confident that this delay did not have any impact on our right to the concession and therefore I viewed it mostly as an annoyance that we would just have to accept as part of the cost of doing business in El Salvador.<sup>356</sup>

179. Although PRES had been attempting to stimulate action at MARN throughout the environmental permitting process, Ms. Navas of the Bureau of Mines, advised PRES to "pursue

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<sup>353</sup> Email between Fred Earnest and Luis Trejo, dated 18 November 2004 (C-131).

<sup>354</sup> *Id.* (emphasis added).

<sup>355</sup> Letter from Gina Navas de Hernandez to Fred Earnest, dated 25 August 2004 (C-123).

<sup>356</sup> Second Shrake Witness Statement, para. 107 (internal citation omitted) (emphasis added).

a path of contact and pressure at the level of the Minister.”<sup>357</sup> Thus, on 15 December 2004, Mr. Earnest wrote to MARN Minister Barrera noting that the 60 business days allowed in the Environmental Law for MARN’s review of the EIS had passed and requesting a meeting to discuss the permitting process.<sup>358</sup>

180. By the end of December 2004, MARN had still not reviewed the EIS. However, PRES remained reassured that: “The fact that the EIS has not been approved will delay the approval of the concession, but will not jeopardize our rights.”<sup>359</sup>

### **3. PRES Prepares and Submits the Application to Convert the El Dorado Exploration Licenses to an Exploitation Concession**

181. At the same time PRES was working its way through MARN’s environmental permitting process, the Companies’ team was also working closely with MINEC and other mining professionals to prepare for the conversion of the El Dorado Exploration Licenses to an Exploitation Concession. In addition to the preparation of the EIS, the Concession Application

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<sup>357</sup> Email from Fred Earnest to Luis Medina, dated 9 December 2004 (“In my conversation with Gina Navas yesterday, she inquired about the status of the environmental approval. I told [her] that we had been maintaining a low profile and applying only subtle pressure. She counseled that we should pursue a path of contact and pressure at the level of the Minister. She informed me that she had personal knowledge of other large EIS studies that had been approved in two months, but with a lot of pressure.”) (emphasis added) (C-281).

<sup>358</sup> Letter from Fred Earnest to Hugo Barrera, dated 15 December 2004 (R-55).

<sup>359</sup> El Dorado Project Report for the Month Ending 31 December 2004 (C-388); *see also* El Dorado Project Report for the Month Ending 30 November 2004 (“The EIS is in review. We are continuing the program of subtle pressure. Indirect contact with MARN has resulted in signals indicating that they will be using the full period of time allowed by the law. In direct contact with MARN, the General Director has indicated that ‘No news is good news.’ On December 8<sup>th</sup>, the 60 working days for review of the EIS will end. The law does allow for additional time if the material being reviewed is sufficiently complex. I expect they will invoke this clause. If this is the case we are entitled to a justification. I will follow-up with MARN during the week of the 13<sup>th</sup> if we receive no formal notification at the end of the 60 day period.”) (emphasis added) (C-389).



required the Companies to prepare a Technical-Economic Feasibility Study,<sup>360</sup> and an Exploitation Development Plan.<sup>361</sup>

182. Thus, at Mr. Shrake's direction, the Companies retained a number of the best mining design, environmental, and other consulting firms to plan and develop an operating mine at El Dorado.<sup>362</sup> The Companies' goal was for the El Dorado mine to conform to – or exceed – the highest international safety and environmental standards.<sup>363</sup>

183. In March 2004, Pac Rim announced its intention to conduct an NI 43-101 compliant preliminary feasibility study, *i.e.*, a pre-feasibility study, for the El Dorado Project (the **"El Dorado PFS"**):

Pacific Rim is proceeding with its two-pronged approach to the continued advancement of the El Dorado gold project. To evaluate the preliminary economic viability of the El Dorado resource, Pacific Rim intends to conduct a pre-feasibility study for the El Dorado project in the coming months, and has begun to collect additional data from the project required for this assessment.<sup>364</sup>

184. Later that month, Pac Rim contracted with SRK Consulting (**"SRK"**) of Denver, Colorado to complete the El Dorado PFS:

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<sup>360</sup> Amended Mining Law, art. 37(d) (CLA-5).

<sup>361</sup> *Id.*, art. 37(e).

<sup>362</sup> First Shrake Witness Statement, paras. 63-67; Second Shrake Witness Statement, para. 74 (As Mr. Shrake explains in his First and Second Witness Statements, a considerable part of the value that the Pac Rim exploration team contributed to the development of the Project (in addition to their geology and engineering skills) was being able to identify and work with the best minds in the mining industry); *see also* Letter from Fred Earnest to Call and Nicholas, Inc., dated 13 February 2004 (C-38).

<sup>363</sup> Second Shrake Witness Statement, para. 74; El Dorado PFS at 127-33, 136-37 (C-9); Pacific Rim Mining Corp. Homepage (C-246); Letter from Fred Earnest to Walter Jockish, dated 6 February 2004 (C-115); Letter from Fred Earnest to Miguel Lacayo, dated 6 February 2004 (C-248).

<sup>364</sup> Press Release, Pacific Rim Mining Corp. Announces Third Quarter Results, dated 15 March 2004 (C-365); Press Release, El Dorado Gold Project Drill Program Update, dated 16 March 2004 (C-390).

SRK will lead the pre-feasibility study, incorporating components completed by a number of other contractors hand-selected by Pacific Rim based on their respective areas of expertise. ... The final pre-feasibility report will be a high quality product and we look forward to a detailed understanding of the potential economics of an operation at El Dorado.<sup>365</sup>

As noted in the announcement, Mr. Shrake and his team had also contracted with a number of other highly respected experts to contribute to the El Dorado PFS.<sup>366</sup>

185. As Mr. Shrake explains, it was Pac Rim's intention that the El Dorado PFS meet Canadian reporting requirements for publicly traded firms (which are considered to be the highest international reporting standards for the mining industry) as well as the Salvadoran requirements for obtaining an exploitation concession under the Amended Mining Law. This objective is reflected in the Executive Summary of the El Dorado PFS:

This Pre-Feasibility Study is intended to be used by PacRim to further the development of the El Dorado Project primarily by facilitating: The conversion of the exploration licenses to exploitation concessions....<sup>367</sup>

186. Although the Companies originally planned to complete the El Dorado PFS by mid-2004,<sup>368</sup> its completion was delayed because the scope of the Study was broadened.<sup>369</sup>

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<sup>365</sup> Press Release, Pacific Rim Launches El Dorado Pre-Feasibility Study, dated 25 March 2004 (emphasis added) (C-391).

<sup>366</sup> See, e.g., Geotechnical Design Parameters for the El Dorado Mine, dated March 2004 (C-18); Preliminary Capital Cost Summary, dated March 2004 (C-41); Letter from Fred Earnest to McClelland Laboratories, dated 1 March 2004 (C-39).

<sup>367</sup> El Dorado PFS at i (emphasis added) (C-9).

<sup>368</sup> See Email from Tom Shrake, dated 13 April 2004 ("We are working on two fronts, development and exploration. A professional study will be written and the economics studied by SRK, Denver (recommended by MacQuarie Bank). McIntosh (formerly with Redpath) is doing the underground design. Vector is handling the tailings design and environmental baseline studies, and Gene McClelland is

(continued...)

187. In the meantime, Pac Rim worked closely with Ms. Navas and the Bureau of Mines to discuss the Companies' ongoing exploration activities and the progress on being made on PRES's Exploitation Concession Application.<sup>370</sup>

188. In light of the delay in the Environmental Impact Assessment process at MARN throughout 2004, Mr. Earnest wrote to Ms. Navas, on 23 August 2004. Mr. Earnest informed Ms. Navas that PRES was in the process of applying for the ED Mining Environmental Permit through MARN, however, he noted, "it is possible that there is some delay with the procedures, especially because this is a new industry in El Salvador and the operating details are not fully known by those responsible for issuing the different permits."<sup>371</sup> Thus, Mr. Earnest asked Ms. Navas to state the "official position of her Bureau" with respect to the possible effect of a delay in obtaining the Environmental Permit on the right of the company to request the Concession.<sup>372</sup>

189. Two days later, on 25 August 2004, Ms. Navas responded to Mr. Earnest, informing him that PRES's right to request the Concession should not be affected by any delay in obtaining the Environmental Permit through MARN:

To answer your question, when the company presents documentation showing that the MARN...has not awarded the

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(continued)

managing the metallurgy. We expect to have all the pieces by the end of May and the document by the end of June. Permit application is set for the mid-summer.") (C-364).

<sup>369</sup> Press Release, Progress Report on the El Dorado Gold Project, dated 15 June 2004 (C-368).

<sup>370</sup> Letter from Fred Earnest to Gina Navas de Hernandez, dated 14 August 2003 (C-356).

<sup>371</sup> Letter from Fred Earnest to Gina Navas de Hernandez, dated 23 August 2004 (C-122).

<sup>372</sup> *Id.*

permit, and provided that it doesn't take too long, your rights will not be affected.<sup>373</sup>

190. Given the Bureau of Mines' longstanding support of the mining industry and willingness to facilitate the El Dorado Project, as described *supra* in **subsection A**, PRES worked closely with Ms. Navas as it finalized the El Dorado Concession Application. For example, at a meeting between Mr. Earnest and Ms. Navas on 8 November 2004, the question arose as to how large the concession area should be. Mr. Earnest reported:

There is a question as to whether we can convert the area outside of the EIS study area, but within the license area. This presents two options as Nance Dulce is not included in the EIS study area. 1) Gina suggests that we request all of the area within the license area that we want with the area inside the EIS study area noted as the current area of planned operations and the rest of the license area as an [sic] productive buffer (ie. area de proteccion) – she is to confirm this, 2) One of the engineers talking to Carlos Serrano suggested that we request the conversion of the area within the EIS study area and request two new claims covering the area outside of the study area and that we give them new names, for example: San Matias and Nance Dulce.<sup>374</sup>

191. At this 8 November 2004 meeting, Mr. Earnest also informed Ms. Navas that the final version of the El Dorado PFS (*i.e.*, the version to be disclosed to the Canadian securities market) would not be completed until early January: “I indicated that the subsequent changes to the pre-feas[ibility study] and translation would take time. She suggested that we start

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<sup>373</sup> Letter from Gina Navas de Hernandez to Fred Earnest, dated 25 August 2004 (NOA Exh. 6); El Dorado Report for the Month Ending 30 November 2004 (“We will be presenting a copy of the EIS submitted in September. The fact that the EIS has not been approved will delay the approval of the concession, but will not jeopardize our rights.”) (emphasis added) (C-389).

<sup>374</sup> Email from Fred Earnest to Tom Shrake, dated 8 November 2004 (emphasis added) (C-392).

translating right now and indicate where the changes might occur.”<sup>375</sup> Ms. Navas’ reaction demonstrates her agreement that the El Dorado PFS was appropriate for the Concession Application.<sup>376</sup>

192. On 25 November 2004, Mr. Earnest wrote to Ms. Navas to follow up on their 8 November 2004 meeting. Mr. Earnest specifically requested Ms. Navas’ confirmation of how large the requested Exploitation Concession area should be:

I hope this email finds you well. In our meeting on the 8th of this month, we discussed the conversion of the El Dorado Norte and Sur exploration permits to an exploitation concession. There is one pending matter for which I await your response, which is the following.

The environmental impact assessment area is part of the area of the permits. After the date we started collecting and preparing the data [for] the EIA, we have focused a portion of the exploration activities in the area of Nance Dulce (El Dorado Sur), where we have found very good results. At your office, we spoke about two options for the conversion:

- 1) request all parts of the permits that we consider prudent, classifying them as area of imminent

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<sup>375</sup> *Id.*

<sup>376</sup> Indeed, PRES’s predecessor in interest, Dayton, also understood that a pre-feasibility study was appropriate for purposes of converting the El Dorado Exploration Licenses to an Exploitation Concession. *See* Press Release, Dayton Mining Corporation Announces Operating and Financial Results For The Year Ending 31, 2001, dated 22 February 2002 (“In 2001, the Company incurred exploration expenditures of \$0.6 million at El Dorado ... The El Dorado expenditures were focused on preparation of a draft feasibility study for submission to the El Salvador government in order to convert the property concessions into exploitation licenses.”) (emphasis added) (C-333); Press Release, Improved Financial Results For the First Quarter of 2001, dated 28 May 2001 (“Exploration spending in 2001 was almost entirely on the El Dorado property in El Salvador and was incurred to advance the preliminary economic study, which must be submitted to the government of El Salvador in mid-July.”) (C-334); Press Release, Second Quarter Financial Results, dated 15 August 2001 (“Exploration expenditures decreased because the work at the El Dorado property in El Salvador was directed towards the completion of the preliminary feasibility study in 2001 while in 2000 the Company undertook a significant in-fill drilling program.”) (C-335).

development and area of conservation (or future growth); and

- 2) request the area incorporated in the EIA and request new exploration permits for the areas outside the EIA area.

Your recommendation was the first of those two, but you said you would confirm. Before we begin the final revisions, I would like to have this confirmation.<sup>377</sup>

193. In his 25 November 2004 email, Mr. Earnest again informed Ms. Navas that the final version of the El Dorado PFS would not be ready until late January:

I would like to take this opportunity to inform you that the new mining plan will not come out until 17 December. That means that the final version of the Pre-Feasibility Study will not come out until mid to late January. The draft version of the pre-feasibility study is being translated, and the parts that may change will be noted. Once the final version is available, it will be translated and submitted, but that will not be ready until February.<sup>378</sup>

There is no indication that Ms. Navas objected to this information. Indeed, as Mr. Earnest reported a few days later: “A cleaned-up version ... of the ‘Draft Final’ pre-feasibility study is being translated for inclusion. [...] The Direccion de Minas understands that this study is a confidential document that will be superseded by the public document to be released in late-January.”<sup>379</sup>

194. On 22 December 2004, PRES submitted its application to convert the El Dorado Norte and Sur Exploration Licenses to an Exploitation Concession (previously defined as

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<sup>377</sup> Email from Fred Earnest to Gina Navas de Hernandez, dated 25 November 2004 (emphasis added) (C-393).

<sup>378</sup> *Id.* (emphasis added).

<sup>379</sup> El Dorado Report for the month ending 30 November 2004 (emphasis added) (C-389).

“**Concession Application**”).<sup>380</sup> Per Ms. Navas’ advice and counsel, PRES’s original Concession Application was for a 62 square kilometer area. (As discussed in the following subsection the Parties prior understanding that the Concession Application was initially for 12.75 square kilometer area was mistaken.)

195. The final version of the El Dorado PFS was completed on 21 January 2005.<sup>381</sup> The Study outlined a proposed underground mining operation at the El Dorado Project based on the Minita deposit only, including an underground mine plan, metallurgy and processing, tailings impoundment, environmental matters, and capital and operating costs.<sup>382</sup> The mining plan set out in the El Dorado PFS met the requirements of El Salvadoran laws and regulations as well as international and North American best practices for engineering design and environmental management.<sup>383</sup>

196. The El Dorado PFS furthermore converted a substantial portion of the Minita mineral resources to “reserves” (defined by NI 43-101 to constitute that portion of resources that have *proven economic viability*)<sup>384</sup> and outlined the economics of these reserves

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<sup>380</sup> Application for the Conversion of the Licenses of El Dorado Norte and El Dorado Sur, dated 22 December 2004 (C-181).

<sup>381</sup> See El Dorado PFS (C-9).

<sup>382</sup> Press Release, Low Operating Costs Cited in Positive Minita Gold Deposit Pre-Feasibility; Definition Drilling Continues at South Minita, dated 27 January 2005 (C-250); see El Dorado PFS (C-9).

<sup>383</sup> Press Release, Low Operating Costs Cited in Positive Minita Gold Deposit Pre-Feasibility; Definition Drilling Continues at South Minita, dated 27 January 2005 (emphasis in original) (C-250); see El Dorado PFS at 125 (C-9); see also Dr. Terry Mudder and Dr. Ian Hutchison, Assessment of Environmental Strategies and Systems for the Proposed Pac Rim El Dorado Gold and Silver Mine, dated 29 March 2013 (“Mudder Expert Report”), p. 23.

<sup>384</sup> CIM Definition Standards, adopted by CIM Council on 11 December 2005 (CLA-33); Ristorcelli Witness Statement, para. 22.

according to the mine plan and input commodity and capital costs valid at the time.<sup>385</sup> Confirming Mr. Shrake's belief in the El Dorado Project's potential to become a low-cost, profitable mining operation, the results from the Study indicated **“that operating costs for the Minita deposit are within the lowest quartile on a worldwide basis....”**<sup>386</sup>

197. As Mr. Brown of Canccord observes, the El Dorado PFS fully demonstrated the economic mining viability of the El Dorado Project:

financing this project with Catherine [McLeod-Seltzer] at the helm would have been virtually guaranteed. In fact, I and my analysts at Canaccord expressed to Catherine and her team our interest on several occasions that we very much wanted to be the first in line to finance the El Dorado project.<sup>387</sup>

198. Furthermore, as indicated by the facts above, the Bureau of Mines was well aware of what document PRES would be submitting with its Concession Application to meet the requirement of a “Technical-Economic Feasibility Study” under Article 37(d) of the Amended Mining Law. There is no record that Ms. Navas or anyone else at the Bureau questioned whether the content – or title – of the Study would satisfy the requirements of the Mining Law either before or after the Study was submitted.<sup>388</sup>

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<sup>385</sup> Pacific Rim Mining Corp. Project Overview: El Dorado, El Salvador (C-23).

<sup>386</sup> Press Release, Low Operating Costs Cited in Positive Minita Gold Deposit Pre-Feasibility; Definition Drilling Continues at South Minita, dated 27 January 2005 (C-250).

<sup>387</sup> Brown Witness Statement, para. 7.

<sup>388</sup> See, e.g., Email from Fred Earnest to Tom Shrake, dated 8 November 2004 (C-392); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 November 2004 (C-393); El Dorado Report for the month ending 30 November 2004 (C-389).



**F. PRES Continues to Work Constructively With The Government to Obtain the El Dorado Exploitation Concession (2005)**

199. In 2005, PRES worked with MINEC to refine the Concession Application and to resolve questions that arose regarding the Amended Mining Law. However, as discussed below, throughout 2005, the Companies' primary focus remained on shepherding the slow-moving ED Mining Environmental Permitting process through MARN. Throughout the year, the Companies also continued to invest millions of dollars into further exploration and development activities.

**1. MINEC's Review of the El Dorado Exploitation Concession Application**

200. Following PRES's submission of the Exploitation Concession Application, the Companies were optimistic that the ED Mining Environmental Permit and the El Dorado Exploitation Concession would soon be granted, enabling the prompt commencement of construction activities. As a local news article noted:

According to [Fred] Earnest, if the permit is issued in February structural work could begin in May. "If that happens, we would starting working on the tunnel and enter a pre-production stage that would last for between 24 and 28 months," he explained. The work would allow the company to start large-scale gold extraction in 2007. Earnest added that 460 direct jobs would be created in the pre-production but that the number would fall when production began. "We think there will be 220 direct jobs then," he said.<sup>389</sup>

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<sup>389</sup> Jose Alberto Barrera, *Canadian Firm Invests in Cabanas Gold Mine*, EL DIARIO DE HOY (7 January 2005) (emphasis added) (C-394); *see also* El Dorado PFS at 150 ("The overall pre-production schedule is driven by the underground mine development, and results in a start of production in the second quarter of 2007.") (C-9); *Mining Exploitation: The Conflict Over Gold*, LEGISLATIVE OBSERVATORY (19 June 2006) ("For its part, MINEC is resolute: mining-exploitation in the northern region will provide good returns for the country in terms of economic and social development. ... 'In addition they have to pay 25% of income taxes ... Moreover, there is job creation; roads and streets being opened up,' stated [Ms. Navas', summing it up as follows: 'I believe that the communities can benefit from developing a mine.']) (C-395).

201. Ms. Navas was publicly supportive of the planned El Dorado mine and the benefits it would bring to the surrounding communities. As a local newspaper stated:

The Director of the Bureau of Mines said that that the exploitation of minerals in areas like San Isidro is beneficial because the condition of the land makes agriculture difficult, and mining solves some of the problems of development.<sup>390</sup>

202. Pac Rim also received encouragement from the very highest levels of Government, including both Vice President Escobar and President Elías Antonio Saca.<sup>391</sup>

203. It is evident from the foregoing that the Saca Administration and the Bureau of Mines were supportive of the El Dorado Project and desirous of working together with PRES to develop a Project that would benefit both the Companies and the communities near the El Dorado Project.

**a. MINEC Works with PRES to Define the Exploitation Concession Area and to Preserve the Companies' Rights over the Entire Area of the El Dorado Norte and El Dorado Sur Exploration Licenses**

204. Following the submission of the Final Pre-Feasibility Study in January 2005 (previously defined as the “**El Dorado PFS**”), PRES continued to have discussions with MINEC about the size of the applied-for El Dorado Exploitation Concession. As described above, PRES’s Concession Application to convert the El Dorado Norte and El Dorado Sur Exploration Licenses had been prepared in consultation with the Bureau of Mines, and it was at the

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<sup>390</sup> *Id.* (emphasis added).

<sup>391</sup> Government Communications Summary, dated 12 May 2005 (“Fred Earnest has had one meeting with the Vice President and has been introduced to the President of the Republic. Both have expressed their support for the project and willingness to help as needed.”) (C-396).

suggestion of Ms. Navas that PRES had initially defined the Exploitation Concession area to cover most of the area of the El Dorado Norte and Sur Exploration Licenses.

205. As also previously noted, the Parties' prior submissions on this point have inadvertently and mistakenly stated that PRES's original Concession Application was for a 12.75 square kilometer area.<sup>392</sup> As Claimant is now aware, following the submission of the Concession Application and the El Dorado PFS, the Bureau of Mines concluded that the originally requested Concession area of 62 square kilometers<sup>393</sup> was too large.

206. Thus, as described below, in early 2005, MINEC worked with PRES to define a smaller area over which PRES could obtain an Exploitation Concession.<sup>394</sup> MINEC recognized the economic mining potential of the El Dorado Sur and El Dorado Norte Exploration License areas and wanted the Companies to continue investing in and conducting exploration work over these areas. Therefore, in consultation with MINEC, PRES began the process of incorporating a new subsidiary – DOREX – that could hold exploration licenses surrounding the new El Dorado Concession area.<sup>395</sup>

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<sup>392</sup> See, e.g., Notice of Arbitration, para. 66; First Shrake Witness Statement, paras. 71-73; Response to Preliminary Objections para. 46; Counter-Memorial para. 102.

<sup>393</sup> As Respondent rightly observed in its Reply to Preliminary Objections, dated 31 March 2010 ("**Reply to Preliminary Objections**"), the El Dorado PFS at 140 (C-9) refers to 62.73 square kilometers. Likewise, exhibit R-30 states: "An area of 62.0km<sup>2</sup> has been requested."

<sup>394</sup> El Dorado Project Report for the Month Ending 28 February 2005 ("various conversations have been held to discuss the surficial extent of the exploitation concession, but no decisions have been taken.") (C-397); El Dorado Project Report for the Month Ending 30 April 2005 (noting that the formal registration of DOREX was expected to be finalized in June. "Once these requirements are satisfied, the requests for the new exploration licenses will be submitted.") (C-290).

<sup>395</sup> First Shrake Witness Statement, para. 73.

207. By April 2005, Mr. Earnest reported that “an area agreeable to the government and workable from our point of view has been defined.”<sup>396</sup> Through this agreement, the applied-for Exploitation Concession area was to be reduced to a 12.75 square kilometer area. Mr. Earnest further explained that, per the Companies’ agreement with MINEC, the Concession area would have a “buffer zone” in order to protect the Companies’ investment and continued exploration activities:

As the exploitation concession area will be considerably smaller than the El Dorado license area, new exploration licenses will be requested to provide a buffer zone around the concession. The process of forming a new company [DOREX] to be the formal holder of the new exploration licenses is almost complete.<sup>397</sup>

208. In June 2005, the incorporation of DOREX was finalized. DOREX, like PRES, was directly owned by PRC.<sup>398</sup>

209. On 26 August 2005, DOREX applied for Exploration Licenses for the areas known as Huacuco, Pueblos, and Guaco, covering the remainder of the area of the original Exploration Licenses outside of the newly defined Concession area.<sup>399</sup>

210. On 28 and 29 September 2005, MINEC granted the Huacuco, Pueblos, and Guaco Exploration Licenses to DOREX.<sup>400</sup> Although the documentary record is not entirely clear, it

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<sup>396</sup> El Dorado Project Report for the Month Ending 30 April 2005 (emphasis added) (C-290).

<sup>397</sup> *Id.*

<sup>398</sup> See Resolution No. 288, dated 21 June 2005 (C-36).

<sup>399</sup> Dorex Request for Exploration License El Guaco dated 26 August 2005 (C-414), Dorex Request for Exploration License Huacuco dated 26 August 2005 (C-413), Dorex Request for Exploration License Pueblos, dated 26 August 2005 (C-398).

<sup>400</sup> Resolution No. 205, dated 28 September 2005 (Huacuco) (C-43); Resolution No. 211, dated 29 September 2005 (Guaco) (C-45); Resolution No. 208, dated 29 September 2005 (Pueblos) (C-44).

appears that at this same time PRES's original application for the El Dorado Exploitation Concession was replaced with a version specifying the 12.75 square kilometer area agreed upon by MINEC and PRES.<sup>401</sup> As Mr. Earnest explained in a memo to Mr. Shrake:

At the same time as the requests were made for the new exploration licenses in the name of [DOREX], new documents were presented for the conversion of the El Dorado North and South exploration licenses to the El Dorado Exploitation Concession. The area of the concession is now 12.75km<sup>2</sup> and is contiguous to the limits of the three new exploration licenses.<sup>402</sup>

211. By working together to redefine the size of the applied-for Concession area, PRES and MINEC continued their practice of working in a cooperative and constructive manner to accomplish their shared vision of an economically productive mining project at El Dorado.

**b. MINEC Works with PRES to Clarify the Land Ownership Requirements under the Amended Mining Law**

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212. At the same time that MINEC and PRES were working to define the appropriate Concession size, they were also working to clarify the specific requirements of the Amended Mining Law.

213. As the Tribunal may recall from the Parties' previous submissions, in March 2005, shortly after PRES's submission of an application for an Exploitation Concession at El

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<sup>401</sup> Application for Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession, dated 22 December 2004 (C-181).

<sup>402</sup> El Dorado Project Report for the Month Ending 31 August 2005 ("At the time that the new documents were presented, the Direccion de Minas requested: a copy of the January 2005 Pre-Feasibility Study, a copy of the final version of the EIS, a new development and production schedule that is linked to the Jan '05 Pre-Feasibility Study, and certified copies of the documents that demonstrate ownership of the surface property in the area of the old El Dorado mine. Everything except the final version of the EIS will be delivered to the Dir. de Minas the first week of September. It is anticipated that a copy of the EIS will be available for presentation to the Dir. de Minas ] the second week of September.") (C-288).

Dorado, Ms. Navas informed PRES that several persons in MINEC's legal department were of the view that Article 37(2)(b) of the Amended Mining Law required PRES to acquire ownership of, or authorization to use, the entire land surface overlaying the Concession.<sup>403</sup>

214. The Companies, in consultation with their Salvadoran counsel, believed the issue was clear and that the Amended Mining Law did not require ownership of or authorization to use the entire land surface overlaying the Concession (an issue that, as the Tribunal knows, remains in dispute among the Parties).<sup>404</sup> Indeed, even those Government officials who thought the language did not unambiguously support the Companies' position agreed that a requirement to obtain ownership or authorization for the entire land surface made no sense and was inconsistent with the Salvadoran legal framework.<sup>405</sup>

215. On 5 May 2005, PRES's local counsel submitted a legal memorandum to the Bureau of Mines summarizing PRES's position on the matter.<sup>406</sup> Following the submission of this memorandum, a number of internal documents were exchanged within MINEC and

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<sup>403</sup> See, e.g., Claimant's Rejoinder on Respondent's Preliminary Objection, dated 12 May 2010 ("**Claimant's Rejoinder on Preliminary Objection**"), paras. 133-42; Decision on Preliminary Objections, paras. 192-93, 197-98; Counter-Memorial, para. 111; First Shrake Witness Statement, para. 84; Second Shrake Witness Statement, para. 109.

<sup>404</sup> First Shrake Witness Statement, para. 85; Second Shrake Witness Statement, para. 110; Claimant's Rejoinder on Preliminary Objection, paras. 27-59.

<sup>405</sup> Email from Fred Earnest to Tom Shrake, dated 14 April 2005 (C-286); First Shrake Witness Statement, paras. 84-88; Second Shrake Witness Statement, para. 110; Email from Ricardo Suarez to Luis Medina, dated 23 September 2005- ("We share your opinion that the legal requirement that the surface landowners authorize subsurface mining is not consistent with the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil is the State.") (emphasis added) (C-289).

<sup>406</sup> Interpretation of Mining Law, dated 5 May 2005, submitted to Luis Mario Rodriguez on 25 May 2005 (R-30); Interpretation of Mining Law, dated 5 May 2005, submitted to Marta Angelica Mendez on 25 May 2005 (R-31).

between MINEC and other executive agencies. (Notably, these internal communications were never shared with Claimant prior to this arbitration.)

216. Thus, for example, on 25 May 2005, MINEC Minister Yolanda de Gavidia apparently forwarded this memorandum to Luis Mario Rodriguez, the Secretary for Legislative and Legal Affairs in the Office of the President. Minister de Gavidia's letter briefly summarized the Claimant's position as follows:

The Company's argument is that they will be mining the subsoil and the subsoil belongs to the State; and if they request permission from the landowners, it would amount to saying that the owners of the surface land are owners of the subsoil.<sup>407</sup>

Minister de Gavidia further observed that "several of our attorneys" did not agree with the conclusions of PRES's 5 May 2005 memorandum. She then asked the Secretary for his "opinion on this issue."<sup>408</sup>

217. Also on 25 May 2005, Ms. Navas forwarded PRES's 5 May 2005 memorandum to Dr. Marta Angélica Méndez, Legal Counsel for MINEC. As with Minister de Gavidia's letter, Ms. Navas's cover memorandum summarizes Claimant's position and asks Dr. Méndez for her opinion.<sup>38</sup> These documents demonstrate considerable uncertainty within both MINEC and the Bureau of Mines on the issue.

218. In June 2005, Mr. Earnest was informed that the Office of the Secretary for Legislative and Legal Affairs had reviewed the 5 May 2005 memoranda and had concluded

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<sup>407</sup> Letter from the Minister of the Economy to the Office of the President of the Republic, dated 25 May 2005 (R-30).

<sup>408</sup> *Id.*

that MINEC's legal counsel's interpretation was correct.<sup>409</sup> When he asked for a copy of the opinion he "was informed that it was an internal Ministry document and that their lawyer advised that it not be shared."<sup>410</sup>

219. Although disappointed that the 5 May memorandum had not fully resolved the confusion, Mr. Earnest was prepared to work constructively with Ms. Navas to work through the issue, as they had on previous occasions. Mr. Earnest asked Ms. Navas whether PRES should obtain the local landowners' permission for the Government to grant PRES a concession to mine the deposits underneath their properties. Ms. Navas immediately rejected this approach since the mineral deposits belonged to the State and not to the surface owners. As Mr. Earnest reported:

I asked what kind of authorization was required, suggesting something along the lines of "I, John Doe, authorize the Republic of El Salvador to grant an exploitation concession to Pacific Rim El Salvador ...". This was immediately rejected with the argument that the government didn't need any authorization to grant the concession. [Ms. Navas] then indicated that it was an authorization for us to use the land, to which I replied that we already have all of the authorizations for the land that will be occupied by the project. She became very reflective (almost as though she was beginning to see the point), but offered no further suggestions.<sup>411</sup>

220. Mr. Earnest further reported that he and Ms. Navas had "discussed the pros and cons of pushing for a formal declaration on this point and agreed that now is not the time."<sup>412</sup>

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<sup>409</sup> Memo from Fred Earnest to Tom Shrake, dated 28 June 2005 (C-291).

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* (emphasis added).

<sup>412</sup> *Id.*



221. As with the size of the requested concession area, Pac Rim was confident that it would eventually reach a workable solution with MINEC and remained content to follow MINEC's lead as to the most appropriate way to resolve the question. In the meantime, confident in Minister de Gavidia's support of the El Dorado Project, Mr. Earnest requested Minister de Gavidia's help in expediting the long-delayed EIS review process at MARN:

Given that more than ten months have passed since the start of the EIA evaluation process, I respectfully request your assistance to expedite the EIA approval process. As I have told Minister Hugo Barrera, the long EIA evaluation process and the granting of the Environmental Permit for the El Dorado Mine Project is harming and delaying the investment in, and the development of, the project.”<sup>413</sup>

222. Several months later, in August 2005, Mr. Earnest reported that MINEC was still working with PRES to determine the most expedient course of action:

In the matter of the interpretation of the law regarding the need to obtain the authorization of the surface owners, the “Ministra de Economia” has acknowledged that something needs to be done. Meetings have been held with political consultants to determine the best course of action should it become necessary to seek an authentic interpretation or a change in the law. It is hoped that a course of action will be clear after the meetings to [be] held during Tom Shrake's visit in September.<sup>414</sup>

223. PROESA, the Salvadoran agency founded to attract and promote foreign investment, was also actively following the matter and in September 2005, Mr. Earnest informed Ms. Aceto of PROESA that he had heard from Minister de Gavidia that there was a project to

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<sup>413</sup> Letter from Fred Earnest to Minister Yolanda Gavidia, dated 19 July 2005 (C-139).

<sup>414</sup> El Dorado Project Report for the Month Ending 31 August 2005 (emphasis added) (C-288).

modify the law but that the Minister was unable to provide him with any details.<sup>415</sup> Later that same month, as documents filed by Respondent in this arbitration revealed, Ms. Navas sent MINEC’s legal counsel an internal draft reform to the Amended Mining Law, stating: “I do not neglect to inform you that the draft is urgent.”<sup>416</sup>

224. On 20 September 2005, following a meeting with the Vice President’s office, PRES’s local counsel also sought assistance in obtaining “*una interpretación auténtica*” (“**authentic interpretation**”) from Ricardo Suarez of the Vice President’s Office in order to move the issue forward on a different front.<sup>40</sup> Mr. Suarez replied, agreeing that the Amended Mining Law was inconsistent with the Constitution, but concluding that an authentic interpretation was not the appropriate method to resolve the issue:

We share your opinion that the legal requirement that surface landowners authorize subsurface mining is not consistent with the ownership practice enshrined in our legal system ... However, that is the current legal text, and the one that must be observed. ... Therefore, although we share your view regarding the problems posed by the current wording of [Article] 27 and the advisability of making it consistent with the Constitution ... we do not believe that the proposed authentic interpretation is the correct legal approach.<sup>417</sup>

225. Later that month, Marjorie Chavez, a legal advisor for PROESA confirmed the continued involvement of the Office of the President in helping to resolve the confusion:

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<sup>415</sup> Series of emails between Lorena Aceto and Fred Earnest, dated 9 September 2005 (C-399); Government Communication Summary, dated 12 May 2005 (“PROESA: The government of El Salvador has established a foundation to promote foreign investment in the country ... The board of directors of the foundation is chaired by the Vice President of the Republic and includes the Ministers of Economy and MARN among the directors....To-date, PROESA has been very helpful in providing advice and contacts in the senior levels of the government.”) (C-396).

<sup>416</sup> Memorandum from Gina Navas de Hernandez to Eli Valle, dated 13 September 2005 (R-35).

<sup>417</sup> Email from Ricardo Suarez to Luis Medina, dated 23 September 2005 (emphasis added) (C-289).

With regard to your concern about the current state of the Mining Law, the Minister of Economy has referred the matter to the Legal Department in the Office of the President, where the pertinent analyses are being made about what would be the best way to bring out change in the law, either by reform or by proper interpretation thereof. Once we have an answer to this matter, we will contact you immediately.<sup>418</sup>

226. On 24 October 2005, MINEC faxed PRES a copy of MINEC's proposed reform of the Amended Mining Law.<sup>419</sup> As it had done in conjunction with the 2001 Mining Law reform,<sup>420</sup> MINEC shared the draft legislation with the mining industry and sought the industry's input and suggestions.<sup>421</sup> Shortly thereafter, Mr. Earnest met with Ms. Navas to offer some suggestions to the reform.<sup>422</sup>

227. In October 2005, Messrs. Shrake and Earnest again met with El Salvador's Vice President Escobar, and the Minister of the Economy, Yolanda de Gavidia. During the meeting Mr. Shrake gave a short presentation about the benefits the El Dorado Project would bring to El

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<sup>418</sup> See, e.g., Email from Marjorie Chavez to Fred Earnest, dated 18 October 2005 (emphasis added) (C-292).

<sup>419</sup> Proposed New Mining Law, received October 2005 (C-14); Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, Bill Gehlen, dated 25 October 2005 (C-400).

<sup>420</sup> Letter from Gina Navas de Hernández to Roberto Johansing, dated 26 August 1999 (C-293); Press Release, Changes to Salvadorian Mining Law, dated 23 August 2001 (C-225).

<sup>421</sup> Proposed New Mining Law, received October 2005 (C-14); Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, Bill Gehlen, dated 25 October 2005 (C-400); Email from Fred Earnest to Lorena Aceto, dated 3 November 2005 (C-294).

<sup>422</sup> Email from Fred Earnest to Tom Shrake, Barbara Henderson, Catherine McLeod-Seltzer, Bill Gehlen, dated 25 October 2005 (C-400); Email from Fred Earnest to Lorena Aceto, dated 3 November 2005 (C-294).

Salvador's local and federal economies.<sup>423</sup> Mr. Shrake recalls that these senior Administration officials recognized the benefits that accrue to El Salvador from the Project:

Vice President Escobar and Minister de Gavidia were enthusiastic and again assured me that the Saca Administration strongly supported the El Dorado Project and would work to help us obtain our exploitation concession. They further informed me that President Saca's two key initiatives were to grow El Salvador's economy and to decentralize the economy away from the capital city of San Salvador. They recognized that our Project fit both of these initiatives.<sup>424</sup>

228. Although MINEC's proposed reform to the Amended Mining Law was not introduced in 2005, the Companies' remained confident that the Government was supportive of the El Dorado Project and committed to working to find an expedient solution.<sup>425</sup>

229. Again, as discussed above, if the Bureau of Mines had asked PRES to purchase additional lands or to revise its application for an Exploitation Concession to include a smaller concession area, PRES would have done so<sup>426</sup> – as it had previously taken the Bureau's advice in reducing the size of the requested Concession. However, the Bureau of Mines never informed PRES that a further reduction would be required to obtain approval of the Exploitation Concession application. Moreover, Mr. Shrake and the Companies believed that if a legislative solution could be implemented, such a solution would be preferable to further reducing the concession area or trying to buy or acquire authorization to use more surface land. Accordingly,

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<sup>423</sup> Second Shrake Witness Statement, para. 113.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*, paras. 121-22.

<sup>426</sup> First Shrake Witness Statement, para. 86.

the Companies chose to continue following MINEC's lead on how best to resolve the matter while waiting for MARN to act on its application for the ED Mining Environmental Permit.<sup>427</sup>

230. As discussed below, throughout 2005, the Companies' primary focus was actually on the slow-moving EIA process through MARN. The conversations with MINEC about clarifying the Amended Mining Law were certainly not seen as indicative of a fundamental flaw in PRES's Concession Application, particularly given Ms. Navas' public support of the Project and the support the Company had received from other officials – including the Vice President and Minister de Gavidia.<sup>428</sup>

## **2. MARN's Continued Review of the El Dorado Exploitation Environmental Permit Application**

231. In 2005, PRES's primary focus remained on working with the overworked and understaffed Bureau of Environmental Management to finalize the ED Mining Environmental Permit process. Following Mr. Earnest's 15 December 2004 letter to MARN Minister Barrera urging MARN to finalize review of PRES's Environmental Permit application, MARN began working diligently to review the EIS PRES had submitted on 8 September 2004.<sup>429</sup> As Ms. Colindres states in her Witness Statement: "I can confirm that from January 2005 and until the

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<sup>427</sup> *Id.*, para. 88.

<sup>428</sup> Second Shrake Witness Statement, para. 113; Government Communication Summary, dated 12 May 2005 ("Given the status of the El Dorado Project at the present time, communication with various government entities is an ongoing activity. Government communications occur on the national, diplomatic, departmental and local levels.") (C-396).

<sup>429</sup> Colindres Witness Statement, para. 74 ("To my knowledge no one in the MARN had started actively working on the review until that time. Consequently, I regard it as probable that the letter sent by Fred Earnest to Minister Barrera on December 15, 2004, played an important part in advancing the process.") (emphasis added).

time I left the MARN at the end of July that same year, Minister Barrera pressured the Technicians to hasten our review of the El Dorado EIS.”<sup>430</sup>

232. Thus, throughout January 2005, PRES’s EIS was assessed by a multidisciplinary technical team coordinated by MARN Technician, Cristina Lobo.<sup>431</sup> In describing the EIS’s compliance with the Terms of Reference, Ms. Colindres recalls that “all the Technicians involved in assessing the study were agreed that the El Dorado EIS was one of the most complete studies that had ever been delivered to the MARN.”<sup>432</sup>

233. As was to be expected with such a complicated document, MARN’s initial assessment of the EIS gave rise to a number of Technical Observations on various aspects of the project that MARN wanted the company to expand on or clarify. These Technical Observations were delivered to PRES on 1 February 2005.<sup>433</sup>

234. On 3 February 2005, representatives of PRES met with the Bureau of Environmental Management’s Technical team, including Ms. Colindres, to discuss certain

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<sup>430</sup> *Id.*

<sup>431</sup> *Id.*, para. 75 (“The Technicians that I recall having worked on the review of the EIS at that time included Sara Sandoval for assessing the area of hazardous materials; Emperatriz Mayorga for assessing the area of the processing plant; Jorge Palma for assessing the area of air quality and occupational health, hygiene and safety; Cristina Lobo, who coordinated the assessment and was responsible for assessing the area of infrastructure; Manuel Sarmiento for assessing such compensatory measures as reforestation, replanting, etc.; and myself who was responsible for assessing those aspects of the project that might have an impact on water resources.”).

<sup>432</sup> *Id.*, para. 76 (“Having been subject to detailed preparation by highly qualified professionals in the field of environmental assessment, the initial version of the El Dorado EIS was, in my opinion, fully in keeping with the characteristics of the Terms of Reference.”).

<sup>433</sup> Letter from Francisco Perdomo Lino to Jorge Ruben Brito, dated 1 February 2005 (enclosing the first version of the Technical Observations) (C-133).

aspects of the Technical Observations.<sup>434</sup> From the meeting that day, Ms. Colindres observed “that the representatives of the company had a very good grasp of the observations and that there were only a few points on which they wanted clarification.”<sup>435</sup> During this meeting, PRES requested MARN to provide them with the Technical Observations listed in number order and referencing all the relevant pages of the EIS in order to help in organizing the responses. MARN redelivered the Technical Observations in a more organized format on 7 February 2005.<sup>436</sup>

235. Over the next several weeks, PRES carefully prepared a response to each of MARN’s Technical Observations. PRES delivered these responses (“**Responses**”) to MARN on 22 April 2005, along with a copy for Minister Barrera, calling them “Volume IV” of the EIS, comprising approximately 60 pages and including more than 150 pages of numbers, tables and enclosures.<sup>437</sup> In accordance with MARN’s instructions, the company indicated that “[o]nce all the observations made had been addressed, Pacific Rim El Salvador, S.A. de C.V. would submit

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<sup>434</sup> Colindres Witness Statement, para. 78; *see* Email from Fred Earnest to Tom Shrake, dated 3 February 2005 (C-132).

<sup>435</sup> Colindres Witness Statement, para. 78.

<sup>436</sup> Letter from Francisco Perdomo Lino to Jorge Brito, dated 7 February 2005( enclosing the 82 Technical Observations of the MARN with respect to the EIS of the El Dorado Mine Exploitation Project) (C-134).

<sup>437</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 Exploitation Project” (“**Responses**”) (C-136).

complete copies of the “EL DORADO MINE PROJECT” Environmental Impact Assessment containing the approved corrections and expansions.”<sup>438</sup>

236. Unfortunately, both Mr. Luis Trejo (Director General of the Bureau of Environmental Management) and Ms. Lobo (the Technician responsible for reviewing El Dorado EIS) had left MARN during the period between the remittance of the Technical Observations and the submission of the Responses, resulting in a new obstacle for the processing of the Environmental Permit requested by PRES.<sup>439</sup>

237. Upon learning of the situation, Mr. Earnest once again contacted Minister Barrera on 2 May 2005, to request “that a new evaluation be appointed quickly and that the review of our responses to the comments be given priority.”<sup>440</sup> In response to Mr. Earnest’s request, Mr. Perdomo Lino (the Director of the Bureau of Environmental Management) assigned Ms. Colindres the responsibility for coordinating the assessment of the EIS in early May 2005.<sup>441</sup> Ms. Colindres thus undertook the considerable task of reviewing the entire EIS (which, by this point, contained approximately 1,700 pages).<sup>442</sup> Ms. Colindres recalls the sense of urgency at MARN concerning the El Dorado EIS:

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<sup>438</sup> Responses, April 2005 letter of presentation (C-136); Letter from Fred Earnest to Hugo Barrera dated 21 April 2005 (C-136).

<sup>439</sup> Email from Fred Earnest to Lee Gochnour and Matt Fuller, dated 29 April 2005 (C-137).

<sup>440</sup> Letter from Fred Earnest to Hugo Barrera, dated 2 May 2005 (C-138).

<sup>441</sup> Colindres Witness Statement, para. 82.

<sup>442</sup> *Id.*; see also Email from Fred Earnest to Tom Shrake, dated 3 February 2005 (observing that the EIS had approximately 1500 pages) (C-132); Letter from Fred Earnest to Hugo Barrera, dated 22 April 2005 (C-135); Responses, April 2005 (comprising 60 pages and including more than 150 pages of numbers, tables and enclosures) (C-136).



It should be stated that on several occasions during the period in which the Responses were being reviewed, I received calls from Ivonne de Umanzor, assistant to Minister Barrera. On each of these occasions she called to hasten my review of the EIS and to ask me when it would be finished. Although I am unaware of the circumstances that prompted these calls, I always had the impression that the Minister, together with personnel at the Ministry of Economy, were anxious to push ahead with the El Dorado Project.<sup>443</sup>

238. Ms. Colindres continued to review the EIS in June and July 2005, corresponding with PRES to clarify any questions that arose.<sup>444</sup> On 22 July 2005, members of the Bureau of Environmental Management, including Ms. Colindres, met with PRES representatives to discuss both the EIS and Responses related to the El Dorado Project.<sup>445</sup> As the Coordinator of the EIS assessment, Ms. Colindres reported that she “regarded both the EIS and the Responses given by the company to have been full and satisfactory. On the other hand, I asked them to add more detail on certain things when the final version of the EIS was prepared.”<sup>446</sup> Additional topics were discussed at the meeting, including some questions that Ms. Colindres had with respect to water resources, including the possible contamination of subterranean water with nitrate as a result of the explosives which were planned to be used inside the mine. Ms. Colindres informed

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<sup>443</sup> Colindres Witness Statement, para. 83 (emphasis added).

<sup>444</sup> *Id.*, paras. 83-91 (citing Email chain between Ericka Colindres and Matt Fuller, the last dated July 13, 2005 (C-140); Email from Fred Earnest to Matt Fuller, dated 25 July 2005 (listing the changes suggested in the meeting held on July 22) (C-141)).

<sup>445</sup> Colindres Witness Statement, para. 88.

<sup>446</sup> *Id.*, para. 89; *see* Email from Fred Earnest to Matt Fuller, dated 25 July 2005 (listing the changes suggested in the meeting held on 22 July) (C-141).

the representatives of the company that she planned to complete her investigation on this point before finalizing the assessment.<sup>447</sup>

239. At the conclusion of the meeting, Ms. Colindres agreed with Mr. Earnest that she would send her final comments in writing the following week so that PRES could add its Responses to the final version of the EIS, which would be the version to send to the *Dirección General de Participación Ciudadana* (“**Bureau of Citizen Participation**”) for publication.<sup>448</sup> Ms. Colindres also requested Mr. Earnest to supply her with Volumes I, II and III of the EIS (that is, the study originally submitted) in an electronic version to ensure that all the Technicians could complete their review and submit any other comments they had to her for inclusion in the written commentaries to be sent to the company.<sup>449</sup>

240. In an email to Ms. Lorena Aceto of PROESA, who continued to assist PRES with speeding up the process at MARN, Mr. Earnest reported:

My meeting with the people at MARN last Friday was quite good. They informed me that they have reviewed everything and have accepted the Environmental Impact Assessment submitted with the responses to [their] comments. They also informed me that a resolution should be ready this Wednesday. Once the resolution is received, we will begin the process of incorporating the responses

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<sup>447</sup> Colindres Witness Statement, para. 89.

<sup>448</sup> *Id.*, para. 90; *see* Email chain between Loren Aceto and Fred Earnest, the last dated July 25, 2005 (in which Fred Earnest states on July 25 that “My meeting with the MARN people last Friday went pretty well. They told me that they had reviewed everything and had accepted the Environmental Impact Assessment submitted together with the responses to their observations. They also informed me that a resolution should be ready on Wednesday. Once the resolution has been received, let’s begin the process of incorporating the responses into the original documents and publishing it in its final form.”) (C-142).

<sup>449</sup> Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umanzor and Matt Fuller, dated 26 July 2005 (C-143).

into the original document and producing the final version. That is obviously a big step forward and we are very pleased.<sup>450</sup>

241. However, mindful of the delay experienced in connection with the ED Drilling Environmental Permit process in 2003 and 2004, Mr. Earnest added:

Unfortunately, our experience indicates that we can still experience delays due to lack of timely action. The environmental permit for the exploration program was delayed months in the ministry's legal department. I will keep you informed of progress in the process.<sup>451</sup>

242. Unfortunately, Ms. Colindres' last day with the Bureau of Environmental Management was scheduled to be 27 July 2005, as she had accepted a position as the Technical Environmental Collaborator of the Environmental Management Unit of the *Administración Nacional de Acueductos and Alcantarillados* (National Aqueduct and Drainage Administration) (“**ANDA**”).<sup>452</sup>

243. Ms. Colindres explains that she hoped to complete the technical assessment of the EIS prior to her departure from MARN.<sup>453</sup> Thus, she exchanged emails with Mr. Earnest following the 22 July meeting in order to clarify the last changes that PRES would have to make in the final version of the EIS.<sup>454</sup> As she stated in the emails:

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<sup>450</sup> Email from Lorena Aceto to Fred Earnest, dated 25 July 2005 (emphasis added) (C-142).

<sup>451</sup> *Id.*; see also Email from Tom Shrake to Fred Earnest, dated 25 July 2005 (C-401).

<sup>452</sup> Colindres Witness Statement, para. 91. ANDA is an independent public service institution dedicated to providing and helping to provide aqueducts and drainage to the people of the Republic of El Salvador.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*, para. 92; Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umanzor and Matt Fuller, dated 26 July 2005 (C-143); Email chain

(continued...)

I've taken the liberty of writing the above to you in order to help streamline your responses; the observations will be officially sent to you later; the technicians are still working on their areas, and I will wait until tomorrow for their comments and observations.<sup>455</sup>

244. Although Messrs. Earnest and Fuller quickly responded to Ms. Colindres' emails, Manuel Sarmiento of MARN did not deliver Ms. Colindres' comments prior to her departure date and she was unable to formally deliver MARN's final observations to PRES prior to her departure on 27 July 2005.<sup>456</sup>

245. On 28 July, Mr. Earnest wrote to Ms. Colindres to inform her that he had gone to the offices of MARN late on the 27th to await the formal commentaries but that "no one knew anything about the resolution..."<sup>457</sup> Ms. Colindres (who had already left her position at MARN by this point) wrote to Mr. Earnest explaining exactly how the final version of the EIS should be drafted in connection with the information provided by Matt Fuller with respect to the use of nitrate and other points identified in her earlier emails.<sup>458</sup> Ms. Colindres further advised Mr. Earnest to speak to Minister Barrera to resolve the matter of the observations that were still outstanding from MARN's Manuel Sarmiento in order to move the Environmental Impact

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(continued)

between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umanzor and Matt Fuller, dated 27 July 2005 (C-144).

<sup>455</sup> Colindres Witness Statement, para. 92; Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umanzor and Matt Fuller, dated 26 July 2005 (C-143); Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umanzor and Matt Fuller, dated 27 July 2005 (C-144).

<sup>456</sup> Colindres Witness Statement, para. 93.

<sup>457</sup> Email from Fred Earnest to Ericka Colindres, dated 28 July 2005 (C-145). Colindres Witness Statement, para. 94.

<sup>458</sup> Email chain between Ericka Colindres and Fred Earnest, dated 29 July 2005 (C-146).

Assessment forward, and apologized to him for not being able to finish the process prior to her departure from MARN.<sup>459</sup>

246. On 10 August 2005, Mr. Earnest wrote to Ms. Aceto at PROESA, requesting her further assistance in obtaining information about the ED Mining Environmental Permit application. Mr. Earnest explained:

On 29 July, we tried to contact Mr. Francisco Perdomo Lino, without success. Actually, all the receptionist did was hang up the line every time we called or transfer the call to an extension that no one answers. I returned to the country yesterday and we started again in the afternoon. The receptionist has refused our request to leave a message asking the engineer to call us, saying that this is not allowed because that is the engineer's assistant's job. As I explained in an earlier email, we have been verbally informed that the assessment has been reviewed and a resolution should come soon. We have not received anything, nor have we been able to speak with anyone who can explain to us what is happening.<sup>460</sup>

247. Ms. Aceto responded later that same day, copying Ricardo Suarez from the Vice President's Office, and requesting "Please keep us informed so that we can provide you with as much assistance as possible. We will make every effort to expedite your case."<sup>461</sup>

248. Frustrated by the personnel turnover rate and slow processing times, Pac Rim also reached out to Francisco de Sola, a member of MARN's Public Advisory Board and a supporter of the Project. Mr. de Sola spoke with MARN's Vice Minister, Michelle Gallardo de Gutierrez, later reporting that the delays appeared to be due to inexperience:

[The Vice Minister] is aware of what is going on but not the details. She is more or less on the same wave length as I in

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<sup>459</sup> Colindres Witness Statement, para. 94.

<sup>460</sup> Email from Lorena Aceto to Fred Earnest, dated 10 August 2005 (emphasis added) (C-149).

<sup>461</sup> *Id.*

thinking that possibly, ignorance and fear, both prevalent at the lower bureaucratic levels in MARN, may be holding up what would erstwhile be a pretty transparent process.<sup>462</sup>

249. Given the intervention by PROESA and Mr. de Sola, Vice Minister Gutierrez began to make inquiries on PRES's behalf within MARN. Ms. Colindres – who had by then started her position at ANDA – notified Mr. Earnest on 11 August 2005 that she had sent a description of the entire review process to Vice Minister Gutierrez at the Vice Minister's request, and had expressed her availability to assist with the process as needed.<sup>463</sup> Ms. Colindres also sent a memorandum to Mr. Perdomo Limo and Javier Figueroa at the Bureau of Environmental Management stating that PRES's Responses had been sufficient to address her observations and that MARN Technicians Sara Sandoval and Emperatriz Mayorga were also satisfied with the Responses.<sup>464</sup>

250. Also on 11 August, following PROESA's timely intervention, Mr. Figueroa finally remitted an official note to Mr. Earnest stating what needed to be completed in the final version of the EIS (the “**Additional Observations**”). Mr. Figueroa specifically requested that PRES add additional information on three specific areas: (1) the estimated costs of air quality

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<sup>462</sup> Email from Francisco R.R. de Sola to Fred Earnest, dated 10 August 2005 (C-284).

<sup>463</sup> Email from Ericka Colindres to Fred Earnest, dated 11 August 2005 (“I am sorry to have left the El Dorado Mine Project unresolved. On Tuesday, 9 August, I sent a memo to Mr. Francisco Perdomo, copying Mr. Javier Figueroa, with my observations on the Mine along with those of Mr. Jorge Palma, attaching Mateo Fuller's answers and stating that these answers satisfactorily addressed my comments. Sara Sandoval and Emperatriz Mayorga are satisfied with the answers in volume IV; Mr. Sarmiento is still pending. Today I sent an account or description of the entire project review process, requested by the Deputy Minister of MARN, and I expressed my professional availability to support them.”) (C-147).

<sup>464</sup> *Id.*

and noise management; (2) the use of tailings deposits after the end of operations; and (3) the certification of a foreign monitoring laboratory.<sup>465</sup>

251. PRES submitted a final version of the EIS, on 8 September 2005, incorporating “all the replies to the observations that were submitted as a separate document on April 22, 2005,” in addition to the “replies to the three points raised in the letter received from Ernesto Javier Figueroa Ruiz... dated August 11, 2005.”<sup>466</sup>

252. On 23 September 2005, MARN issued the Public Consultation requirement for the El Dorado EIS, in accordance with Article 25(a) of the Environmental Law.<sup>467</sup>

The publications came out in La Prensa Gráfica on 3, 4 and 5 October<sup>468</sup> and MARN was notified of this fact on 5 October 2005.

253. At this point, PRES was hopeful that the final steps of the Environmental Permit process through MARN would be completed in short order. Indeed, Ms. Colindres affirms her belief at the time that PRES would be issued the ED Mining Environmental Permit:

Although I was working at ANDA in October 2005, my colleagues in the MARN informed me that the El Dorado EIS had finally gone out to the public consultation stage. I can confirm that at that moment I didn't have the slightest doubt that the Environmental

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<sup>465</sup> Letter from Ernesto Javier Figueroa Ruiz to Fred Earnest, dated 11 August 2005 (C-150); *see also* Email from Lorena Aceto to Fred Earnest, dated 24 August 2005 (Ms. Aceto recommended that PRES involve El Salvador's Vice President, Ana Vilma de Escobar (who also served as the head of PROESA) to help facilitate the permitting process with MARN. Ms. Aceto further affirmed “you always have our support in expediting the process.”) (emphasis added) (C-402).

<sup>466</sup> Letter from Fred Earnest to Francisco Perdomo Lino, dated 8 September 2005 (enclosing the final version of the El Dorado EIS) (C-151).

<sup>467</sup> Letter from Francisco Perdomo Lino to Fred Earnest, dated 23 September 2005 (C-152).

<sup>468</sup> First Publication of the El Dorado EIS, dated 3 October 2005 (C-153); Second Publication of the El Dorado EIS, dated 4 October 2005 (C-153); Third Publication of the El Dorado EIS, dated 5 October 2005 (C153) ; Letter from Fred Earnest to Francisco Perdomo Lino, dated 5 October 2005 (C-154).

Permit of the El Dorado Mine Exploitation Project would be issued. The process had been a lengthy one up to that point, but this prolongation was entirely due to changes in personnel in the MARN, the fact that we were all overworked, and the scope of the project to be assessed. Moreover, everything pointed to the fact that the project was being promoted at the ministerial level. In addition, the company had submitted a very complete EIS and had addressed all the Technical Observations made by the technical team. I reiterate that I know of no case of an Environmental Impact Assessment in El Salvador undergoing this level of procedure and not culminating in the issue of an Environmental Permit.<sup>469</sup>

254. On 25 November 2005, PRES received word that Minister Barrera appreciated the Companies’ “understanding in the matter of the [El Dorado] project environmental permit” and that Minister Barrera would “push the approval” of Claimant’s other environmental permit applications for Santa Rita and Huacuco (discussed below in **subsection G.4**).<sup>470</sup>

255. Though frustrating, the delays Claimant experienced at MARN did not seem particularly surprising. El Salvador’s Amended Mining Law and Environmental Law were both relatively new. There had been almost no gold mining activities in the country for many years. Thus, the Companies understood that the officials at MARN were overseeing an industry that was new to them.<sup>471</sup>

### **3. Pac Rim’s Continued Investment in Exploration Activities**

256. Following the positive results of the El Dorado PFS, which demonstrated that the El Dorado project was technically and economically feasible, Pac Rim continued to invest

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<sup>469</sup> Colindres Witness Statement, para. 104 (emphasis added).

<sup>470</sup> Email from Fred Earnest to Tom Shrake and Bill Gehlen, dated 25 November 2005 (C-285).

<sup>471</sup> First Shrake Witness Statement, para. 68; Second Shrake Witness Statement, para. 94.



millions of dollars in exploration activities in El Salvador, embarking upon an aggressive target-generation and exploration program during 2005.<sup>472</sup>

257. Thus, in February 2005, the Companies announced that Pac Rim's drilling program had expanded the known dimensions of the South Minita gold zone in the El Dorado Project area.<sup>473</sup> Throughout the Spring, Pac Rim continued a definition drilling program at the South Minita gold zone.<sup>474</sup> The South Minita gold zone was of particular importance to the Companies because of its potential to be mined alongside the Minita deposit:

Because of its proximity to Minita, it is possible for South Minita to expand the size and economic outcome of the proposed operation at Minita by potentially increasing the gold ounces with relatively small incremental increases in capital costs. This possibility forms the basis of Pacific Rim's current exploration strategy.<sup>475</sup>

258. Led by Pac Rim's skilled exploration team, the Companies' target-generation program also paid dividends and in June 2005, Pac Rim announced that it had discovered and staked a new epithermal gold system near the El Dorado Project area.<sup>476</sup> The new area, called the

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<sup>472</sup> Press Release, South Minita Gold Zone Continues to Evolve as a Key Component of Pacific Rim's Exploration Strategy, dated 9 September 2005 ("Pacific Rim has undertaken an aggressive target-generation program in the southern part of the El Dorado project over the past seven months.") (C-253).

<sup>473</sup> Press Release, South Minita Gold Zone Expanded with High-Grade Gold at Depth, dated 17 February 2005 (C-251).

<sup>474</sup> See Press Release, Pacific Rim Announces 2005 Third Quarter Results, dated 15 March 2005 (C-403); Press Release, South Minita Gold Zone Extended with Deep Drilling; Bottom of Zone Remains Open, dated 27 April 2005 ("Drilling is focused on continuing to explore the veins at depth and to fill-in areas that require additional drill testing to enable a resource estimate, which the Company expects to commission in the coming months.") (C-252).

<sup>475</sup> Press Release, South Minita Gold Zone Continues to Evolve as a Key Component of Pacific Rim's Exploration Strategy, dated 9 September 2005 (C-251).

<sup>476</sup> Press Release, Pacific Rim Discovers New Gold and Copper Systems, dated 22 June 2005 (C-404).

Santa Rita Project, located roughly 8 km from “the Company’s flagship El Dorado gold project,” was discovered in large part due to specialized knowledge Pac Rim’s exploration team had acquired in their study of the El Dorado Project:

“When charting the course for our low-cost gold strategy several years ago, we elected to spend a significant amount of our project generation efforts on grassroots reconnaissance,” explains Tom Shrake, CEO. “Our team understands the time and effort it takes to achieve success in green-fields exploration, but are dedicated to this strategic approach to future growth as quality, established projects for acquisition are both scarce and costly. Growth through science-based exploration is one of Pacific Rim’s core strengths and we intend to leverage this expertise to establish a pipeline of projects for the future as our high-grade El Dorado project heads toward the development phase.”<sup>477</sup>

259. By December 2005, Pac Rim reported positive results from the Santa Rita Project and announced that it was “in the process of completing a baseline environmental assessment of the Santa Rita project and will apply for permits to drill test this exciting gold discovery shortly.”<sup>478</sup> Pac Rim also announced that it was nearing completion of its delineation drilling

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<sup>477</sup> Press Release, Pacific Rim Discovers New Gold and Copper Systems, dated 22 June 2005 (C-404); *see also* Second Shrake Witness Statement, para 73; Press Release, South Minita Definition Drilling Nears Completion; New El Dorado Exploration Targets to Become Focus of 2006 Drill Program, dated 6 December 2005 (“Over the past year Pacific Rim has identified a number of new, high-priority exploration targets on the El Dorado project, in addition to its high-grade surface discovery at the nearby Santa Rita gold project. These targets were discovered after the Company’s geological team made several key scientific breakthroughs regarding the controls on, and most importantly timing of the bonanza gold mineralization in the El Dorado district. Pacific Rim will begin to test these targets once the South Minita delineation drilling is completed.”) (emphasis added) (C-254).

<sup>478</sup> Press Release, Pacific Rim Announces Fiscal 2006 Second Quarterly Results, dated 13 December 2005 (C-405).

program at South Minita and planned to commission an economic assessment of the Minita/South Minita deposits in the coming year.<sup>479</sup>

**G. PRES Continues to Collaborate With MARN and MINEC To Obtain Environmental Permits and the El Dorado Exploitation Concession (2006 -2007)**

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260. Throughout 2006 and 2007 the Companies continued to engage with MARN on the issue of the ED Mining Environmental Permit and with MINEC on the Exploitation Concession and the proposed reform of the Amended Mining Law. MARN also continued to review and process Environmental Permits related to DOREX's Huacuco, Pueblos, Guaco, and Santa Rita Exploration Licenses.

261. At the same time, the Companies were continuing their exploration activities at El Dorado and elsewhere under other environmental permits and exploration licenses that had been issued by both MARN and MINEC. The Companies continued to do so well into 2008, during which time they were repeatedly assured by high-level Government officials that the environmental permits and Exploitation Concession for El Dorado were forthcoming. As described below, until 2008, the Salvadoran Government as a whole, and at its highest levels, represented to Claimant that it strongly supported the Companies' work in El Salvador.<sup>480</sup>

**1. MARN Continues to Review The El Dorado Environmental Impact Assessment**

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<sup>479</sup> Press Release, South Minita Definition Drilling Nears Completion; New El Dorado Exploration Targets to Become Focus of 2006 Drill Program, dated 6 December 2005 (C-254).

<sup>480</sup> See Shrake First Witness Statement, para. 89-97, 101-04.

262. In January 2006, Ms. Ericka Colindres – formerly of MARN – began working for PRES as the Supervisor of Environmental Protection for both PRES and its sister company, DOREX.<sup>481</sup>

263. When Ms. Colindres joined the Companies, PRES was still in the process of completing the Environmental Impact Assessment associated with the ED Mining Environmental Permit. As the Tribunal will recall from *subsection F.2* above, in October 2005, PRES had published the EIS announcement per MARN’s request and had been waiting since that time for MARN to either provide notification that a municipal consultation was required or to issue a Bond requirement.<sup>482</sup> Ms. Colindres reports that in January 2006, she called MARN on multiple occasions: “Each time I called, they informed me that they had received comments from the public but for one reason or another delayed presenting them to the company.”<sup>483</sup>

264. Although MARN assured PRES that a meeting would be held in February 2006 to address these public comments, no meeting was convened.<sup>484</sup> PROESA again intervened on the Companies’ behalf and finally, on 28 February 2006, Ms. Aceto informed representatives of PRES that, according to Mr. Perdomo Lino from the Bureau of Environmental Management, some of the public comments were difficult to address.<sup>485</sup> PROESA’s recommendation was that

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<sup>481</sup> Colindres Witness Statement, para. 105. During all times relevant to this dispute, Ms. Colindres worked for PRES. At present, she is employed by Pac Rim Exploration, and divides her time between El Salvador and Reno, Nevada.

<sup>482</sup> *Id.*, para. 109.

<sup>483</sup> *Id.* (citing Monthly Report of the Supervisory Bureau of Environmental Protection — “SPMA”, January 2006 (C-157), First Week, clause (2); Fourth Week, clause (10)).

<sup>484</sup> Colindres Witness Statement, para. 110.

<sup>485</sup> Email from Erwin Haas to Fred Earnest, dated 28 February 2006 (C-159).

PRES should again request MARN to forward the comments so that PRES could resolve the situation.<sup>486</sup>

265. Mr. Earnest therefore presented a letter to Minister Barrera on 1 March 2006, stating that:

The period of public consultation, as provided in Article 24, point (a) of the Environmental Law, concluded on October 19, 2005. We understand that the MARN received comments during this consultation period and that these are currently being assessed, in accordance with technical, legal and social criteria.

PRES would like to make it known that it is available to respond formally to the comments received. In view of this, we request a copy of the comments for the purpose of providing adequate responses to each one.

Mining for metals is still unknown in El Salvador. However, our plans of operation take a responsible position with respect to protecting the environment. For the purpose of collaborating in developing a broader understanding of the modern mining industry and increasing awareness of the practices and procedures involved in the operation and closure of a modern mine, we would like to offer PRES's assistance in coordinating a visit to a mine containing a deposit, extraction method, mineral processing system, metal extraction and cyanide treatment similar to what is proposed for the El Dorado Mine Project.<sup>487</sup>

266. That same day, Mr. Earnest also met with PROESA personnel who expressed their wish to sponsor Minister Barrera on a trip to visit to an underground gold mine (the Midas Mine in Nevada) and cyanide manufacturing and transport plants.<sup>488</sup> (Recall that in 2004, PRES

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<sup>486</sup> *Id.*

<sup>487</sup> Letter from Fred Earnest to Hugo Barrera, dated 1 March 2006 (emphasis added) (C- 160).

<sup>488</sup> Email from Fred Earnest to Tom Shrake, dated 1 March 2006 (C-161).

had offered to send MARN and MINEC personnel on this trip.<sup>489</sup> As observed by the El Dorado PFS, MARN had not accepted PRES's offer for fear of appearing biased toward PRES.<sup>490</sup>)

267. Throughout March 2006, Ms. Colindres remained in contact with personnel from MARN, who informed her that MARN had requested assistance from the U.S. Environmental Protection Agency (“**U.S. EPA**”) (which is not uncommon for MARN, “whether for purposes of general training or to request more specific advice on the Environmental Impact Assessment of a particular project”).<sup>491</sup> However, when Ms. Colindres contacted the U.S. EPA, she was informed that MARN had never requested that Agency's assistance.<sup>492</sup> Ms. Colindres observes that MARN's failure to consult with the U.S. EPA is indicative that MARN did not have technical concerns about the ED Mining Environmental Permit:

No consultation of this type was ever made with respect to the Environmental Impact Assessment of the El Dorado Project, despite the fact that [MARN] could have done so at any time. From my perspective, this demonstrates that the failure to issue the Environmental Permit for the Project did not arise from a legitimate concern or lack of technical expertise with respect to the environmental risks that could result from it. Had the Technicians of the MARN harbored this type of concern, the

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<sup>489</sup> Letter from Fred Earnest to Walter Jockish, dated 6 February 2004 (C-247); Letter from Fred Earnest to Miguel Lacayo, dated 6 February 2004 (C-248).

<sup>490</sup> El Dorado PFS at 127 (“PacRim has approached the government with suggestions for educational support. MARN has been very sensitive to potential perceptions of conflict of interest and to date has not accepted invitations from PacRim for educational tours of modern mining operations in other countries.”) (emphasis added) (C-9).

<sup>491</sup> Colindres Witness Statement, paras. 113-14.

<sup>492</sup> *Id.*, para. 113 (citing Monthly Report of the SPMA, March 2006, First Week, clause 3; Second Week, clause 5 (C-162)).

appropriate action would have been to consult objective sources of information to resolve it one way or another.<sup>493</sup>

268. On 16 March 2006, MARN personnel again assured Ms. Colindres that they were taking steps to address the public comments on the EIS for the ED Mining Environmental Permit.<sup>494</sup> Finally on 29 March 2006, a meeting was convened among MARN personnel and PRES representatives, including Ms. Colindres, Mr. Earnest, and Mr. Luis Medina (PRES's local counsel).<sup>495</sup> During this meeting, MARN provided PRES with public comments consisting of two notes expressing opposition to the El Dorado Project, one submitted by representatives of the *Asociación de Desarrollo Económico Social Santa Marta* (Santa Marta Economic and Social Development Association or “ADES”); and the other submitted by representatives of the *Comité Ambiental de Cabañas* (Cabañas Environmental Committee or “CAC”), enclosing signatures from members of the public. Both of these notes cited a report prepared by a U.S. geologist, Dr. Robert Moran, as technical support for their opposition.<sup>496</sup>

269. Mr. Earnest and Ms. Colindres informed MARN personnel that PRES was already in possession of Dr. Moran's report given that it was publicly available on the Internet, and offered their general reaction to the criticisms put forward in that report.<sup>497</sup> The importance of keeping the public informed about the Project was mentioned and Ms. Colindres and Mr. Earnest informed MARN that the Companies had held over 70 public meetings with members of

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<sup>493</sup> Colindres Witness Statement, para. 114 (emphasis added).

<sup>494</sup> *Id.*, para. 115 (citing Monthly Report of the SPMA, March 2006, Third Week, clause 7 (C-162)).

<sup>495</sup> Colindres Witness Statement, para. 115.

<sup>496</sup> *Id.*, para. 116; *see* Technical Review of the El Dorado Mining Project Environmental Impact Study (EIS), El Salvador), dated 19 October 2005 (C-165).

<sup>497</sup> Colindres Witness Statement, para. 117.

the communities in the vicinity of the Project, including over 20 meetings held *prior* to the drafting of the EIS for the ED Mining Environmental Permit, in order to inform the preparation of the EIS.<sup>498</sup>

270. Finally, MARN discussed with PRES's representatives what the next steps should be with respect to the Environmental Impact Assessment for the ED Mining Environmental Permit. PRES agreed to review Dr. Moran's comments and to resolve each of them in writing.<sup>499</sup> According to Ms. Colindres, "Eng. Perdomo categorically informed us that there would be three possible scenarios after we had delivered our responses: 'a) It is established that we can move on to a municipal consultation ...; b) That there is a favorable technical report; c) That there is an unfavorable technical report which goes to court.'"<sup>500</sup> However, none of these scenarios came to pass.

271. Following the meeting with MARN, PRES began the process of preparing an analysis of the points raised in Dr. Moran's report ("**Response to the Public Comments**").<sup>501</sup> As had been the case in the preparation of the EIS and the Responses to the Technical Observations, the Response to the Public Comments was prepared and reviewed by a multidisciplinary technical team, mainly including Matt Fuller (principal author of the EIS), Mr. Earnest and Ms. Colindres, with additional advice provided by Pat Gochnour (an

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<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*, para. 118.

<sup>501</sup> See Monthly Report of the SPMA, May 2006, Second Week, clause 8; Third Week, clause 1; Fourth Week, clause 3; Fifth Week, clause 3 (C-167); Monthly Report of the SPMA, June 2006, First Week, clause 1 (C-168).



independent consultant).<sup>502</sup> PRES carried out a detailed study of the criticisms made in Dr. Moran's report. As Ms. Colindres notes, many of observations and critiques contained in Dr. Moran's report were not of technical relevance to the Project:

It should be stated that none of the criticisms were insurmountable, and many of them were without technical foundation. Nonetheless, we addressed them one by one, based on studies and technical analysis, and assessing alternatives to address each of them in the most appropriate way.<sup>503</sup>

272. Mr. Shrake testifies that throughout the permitting process with MARN Pac Rim remained encouraged by the repeated assurances of support received from Salvadoran officials, including El Salvador's Vice President, Ana Vilma de Escobar, and MINEC's Minister de Gavidia.<sup>504</sup> The Companies thus continued to understand that the long processing time of the ED Mining Environmental Permit was the result of bureaucratic inexperience rather than any opposition to the El Dorado Project. Indeed, Mr. Shrake observes: "we had come to understand that delay was an unavoidable element of the environmental permitting process in El Salvador, regardless of the industry."<sup>505</sup>

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<sup>502</sup> Colindres Witness Statement, para. 119.

<sup>503</sup> *Id.*

<sup>504</sup> Second Shrake Witness Statement, para. 115-16.

<sup>505</sup> *Id.*, para. 107; Memo from William Gehlen to Tom Shrake, dated 9 April 2004 ("Although the EIS for exploration at El Dorado was completed and submitted last year to MARN (December 2003), the official permit has not been received. For the record, there always seems to be some issue and the final approved document is always just a week or so away. Please keep this in mind when planning future activities and scheduling. This 'manana' factor was anticipated and now has been verified. What you hear and what you get is usually very different!") (emphasis added) (C-277); Republic of El Salvador Country Environmental Analysis: Improving Environmental Management to Address Trade Liberalization and Infrastructure Expansion, Report No. 35226-SV, dated 20 March 2006 at 24 (Noting that MARN had the EIA "process has become a bottleneck for projects" and MARN had "a backlog of nearly 2,500 EIAs pending review, thereby delaying the permitting process from the statutory 60 days to

(continued...)

273. Thus, PRES was surprised when, in late June 2006, Mr. Lino of MARN informed Ms. Colindres that “there been no significant advance because all mining projects were ‘on hold,’ on the orders of the Minister.”<sup>506</sup> This assertion coincided with public statements made by MARN Minister Barrera to media outlets in El Salvador in July 2006. In these statements, the Minister declared himself to be against mining due to the supposed risks it would hold for the environment.<sup>507</sup> (At the same time, however, Minister Barrera acknowledged that mining activity was not prohibited by Salvadoran law.<sup>508</sup>)

274. According to Ms. Colindres, she was surprised to learn that Minister Barrera had ordered a stoppage to the Environmental Impact Assessments for mining projects, because the Amended Mining Law did not grant him this authority:

The MARN’s duty is to evaluate each of the productive projects proposed for development in the country, determine the appropriate means for mitigating or offsetting their environmental impacts, and ensure that these measures were complied with. On the other hand, it is not within the competency of the Ministry to cease processing a duly requested Environmental Impact Assessment, much less put a stop to the evaluation of all requests from a certain industry. Based on my experience as a Technician at the MARN, I can confirm that while we always took longer to

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up to two years in some cases.”) (emphasis added) (C-282); USAID Report at 86 (“The Minister of MARN has identified two core weaknesses in El Salvador’s environmental evaluation process. One weakness is that the DGMA lacks sufficient technical expertise, especially regarding water contamination. Consequently, the environmental assessment process stifles and discourages investments rather than contributing to their financial success.”) (C-275).

<sup>506</sup> Colindres Witness Statement, para. 120 (citing Monthly Report of the SPMA, June 2006, Fourth Week, clause 6 (C-168)).

<sup>507</sup> Edgardo Rivera, *Government Does Not Endorse Mines*, EL MUNDO (1 July 2006) (C-46).

<sup>508</sup> See A.Dimas/K. Urquilla, *Hugo Barrera Opens the Door to Mining*, EL DIARIO DE HOY (23 July 2006) (C-301).

process requests than the period stipulated in the [Environmental Law], it never occurred to us to cease working on a task assigned to us, nor did we ever receive instructions of this kind from the Minister.<sup>509</sup>

275. Following Minister Barrera's comments to the press, Mr. Shrake was sufficiently concerned that he immediately flew to El Salvador to meet with various officials including Minister de Gavidia, Vice President Escobar, and Minister Barrera.<sup>510</sup> During these meetings, Mr. Shrake was assured that Minister Barrera's comments were at odds with the policy of the Saca Administration and that the Administration fully supported the El Dorado Project.<sup>511</sup>

276. Even more importantly, Minister Barrera met with Mr. Shrake and Vice President Escobar, where the Minister downplayed his remarks and assured Mr. Shrake that if a few minor questions were addressed, he would have "no problem" approving the ED Mining Environmental Permit.<sup>512</sup> The next day, Mr. Shrake again met with Vice President Escobar where he reported that she reaffirmed "her "optimism that this will all work out for us and El Salvador."<sup>513</sup>

277. Shortly after Mr. Shrake's visit, Minister Barrera and Minister de Gavidia publicly announced that El Salvador's laws allow mining and that an administrative agency cannot impede what the law permits:

In a 180-degree turnaround from what he said days ago, Minister of the Environment, Hugo Barrera, along with the Minister of Economy, Yolanda de Gavidia, reached out to mining companies seeking precious materials in the country to allow them to carry

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<sup>509</sup> Colindres Witness Statement, para. 122 (emphasis added).

<sup>510</sup> Second Shrake Witness Statement, paras. 117-19.

<sup>511</sup> *Id.*, para. 117.

<sup>512</sup> Second Shrake Witness Statement, paras. 118-19.

<sup>513</sup> *Id.*; Email from Fred Earnest to Jose Mario, dated 12 July 2006 (C-299).

out mining operations underground. ... Barrera made it clear that in the country there is no express prohibition of mining projects, only a regulation that dictates the conditions on how these companies must operate.<sup>514</sup>

278. As Mr. Shrake testifies: “I understood the Ministers’ comments to be a direct result of our meetings and I remained confident of the Government’s support for our Project.”<sup>515</sup>

279. During this same time, PRES and MARN continued to move forward on the ED Mining Environmental Permit application, and Ms. Colindres and Mr. Earnest attended a series of meetings with technicians at MARN to review the El Dorado EIS.<sup>516</sup>

280. At one of these meetings, which took place on 14 July 2006, and which was attended by Mr. Earnest and Ms. Colindres on behalf of PRES; and Engineers Ítalo Córdova and Jorge Palma on behalf of MARN, Mr. Córdova showed Mr. Earnest and Ms. Colindres a handwritten set of thirteen additional comments to which he wanted PRES to respond to (the “**Final Observations**”).<sup>517</sup> These Final Observations were delivered to PRES unofficially, that is to say without formal remission from MARN to the PRES.<sup>518</sup> Ms. Colindres observes that “[t]he majority of these Observations related to the use and discharge of water, in the same vein (I thought) as the comments made earlier by Minister Barrera to Tom Shrake.”<sup>519</sup>

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<sup>514</sup> A. Dimas and K. Urquilla, *Hugo Barrera opens the door to mining*, EL DIARIO DE HOY (23 July 2006) (C-300).

<sup>515</sup> Second Shrake Witness Statement, para. 120.

<sup>516</sup> Colindres Witness Statement, para. 124.

<sup>517</sup> *Id.*, para. 125; Thirteen Observations on the Environmental Impact Study of the El Dorado Mining Exploitation Project, issued by the MARN, undated document (C-169).

<sup>518</sup> Colindres Witness Statement, para. 125.

<sup>519</sup> *Id.*

281. The provision of these additional comments was not specifically provided for within MARN's legal procedure for Environmental Permitting, which is limited to a single round of technical observations followed by the responses of the titleholder, and additional observations relating to the assessment of the responses. MARN's technical decision is then made and, if favorable, followed by the public consultation. As Ms. Colindres points out: "The procedure leaves the Technicians no possibility of restarting the assessment of the EIS after the public consultation."<sup>520</sup>

282. Recall from *subsection F.2 supra*, that MARN had already delivered the Technical Observations to PRES in February 2005<sup>521</sup> and the technical team (under Ms. Colindres' coordination) had analyzed PRES's Responses in detail, and officially issued the Additional Observations on 11 August 2005.<sup>522</sup> On 24 September 2005, MARN had issued the requirement for PRES to publish the EIS, which only occurs once a favorable technical decision has been issued.<sup>523</sup> Subsequently, the Bureau of Environmental Management together with MARN Technicians had delivered comments received during the public consultation to PRES,<sup>524</sup> and PRES was in the process of preparing its responses to the same. Ms. Colindres states: "At

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<sup>520</sup> *Id.*, para 126.

<sup>521</sup> *Id.*, para 127.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

this stage, it was really not appropriate for the Technicians to come back with more observations for us.”<sup>525</sup>

283. However, PRES wanted to be as cooperative, forthcoming, and flexible as possible, particularly in light of the information that Minister Barrera had temporarily suspended the assessment of mining projects within MARN. Ms. Colindres explains that she understood Minister Barrera had subsequently altered his position during a meeting with Mr. Shrake in July 2006,<sup>526</sup> but that the Minister had expressed “his desire to have certain points clarified with respect to this. In this sense, the meetings held with the Technicians, including the meeting of July 14, seemed to relate directly to the Minister’s orders and we understood that the information we were providing was specifically for him.”<sup>527</sup> In view of this, PRES took the thirteen additional handwritten comments from Mr. Córdova and proceeded to prepare a full response to each question, notwithstanding the fact that these Observations were unofficial and untimely.<sup>528</sup>

284. In August and September, PRES’s representatives held additional meetings with MARN to continue discussing the El Dorado EIS and to answer any additional questions that MARN personnel may have had regarding the Project. Ms. Colindres notes:

While these events were not strictly in accordance with the law, we interpreted them as a signal that the suspension had somehow been lifted, a positive step so long as it indicated that the fortunes of the company were now re-hitched to the results of an environmental technical analysis. Frustrating as it was, there was nothing in this

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<sup>525</sup> *Id.*

<sup>526</sup> *Id.*, para. 128.

<sup>527</sup> *Id.* (emphasis added).

<sup>528</sup> *Id.*, para. 129.

type of process that might cause a refusal of the Environmental Permit.<sup>529</sup>

285. In August 2006, Ms. Colindres that she had been informed “from the MARN that the go-ahead had been given to continue with the assessment and respond to the requests for Environmental Permits for mining projects.”<sup>530</sup>

286. Thus, on 12 September 2006, PRES submitted its Response to the Public Comments to MARN, copying Minister Barrera.<sup>531</sup> In the Response, PRES dealt with all the points raised in Dr. Robert Moran’s report, which was the only purported technical support for the comments.<sup>532</sup> In her Witness Statement, Ms. Colindres discusses PRES’s Response to the Public Comments in detail, pointing out the errors and omissions contained in Dr. Moran’s report and the various commitments made by PRES to with respect to the water supply of the communities near the El Dorado Project.<sup>533</sup> For instance:

- PRES repeatedly promised that “100% of the total demand for water by the El Dorado Mine Project ... would be

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<sup>529</sup> *Id.*, paras. 131-32.

<sup>530</sup> *Id.* (emphasis added).

<sup>531</sup> Letter from William Gehlen to Hugo Barrera, dated 12 September 2006 (enclosing the Response Report on the Technical Review of the El Dorado Mine Project) (C-170).

<sup>532</sup> Colindres Witness Statement, para. 133.

<sup>533</sup> *Id.*, paras. 133-36 (Ms. Colindres further explains: “I would like to highlight the clarification we made with respect to the allegation made by Dr. Moran that ‘no real test was made of the aquifer and the pumping in order to assess the detailed hydrogeological characteristics or the long-term impacts’ for the EIS. The Technicians of the MARN appeared to think that this allegation had a lot of weight but, as we explained in the Response, Dr. Moran was wrong to assume that PRES should have carried out the test using multiple pumping wells, since this type of test is not suitable for the hydraulic conditions of the El Dorado site, which is characterized by a system of fractured rock. On the other hand, the Packer test used by the company in preparing the EIS reflected actual conditions and produced reliable data with respect to these.”) (emphasis added).

supplied by the rainwater harvesting [...] This being the case, the El Dorado Mine Project will not compete with current use of local water resources.”<sup>534</sup>

- With respect to discharges of water into the river and the quality of these discharges, PRES explained the INCO detoxification process through which processed waters will pass before being deposited into the tailings impoundment, at a level consistent with water-quality standards favoring aquatic habitats.<sup>535</sup>
- PRES undertook to install a water purification plant before reusing or discharging any water from this deposit, as an additional measure to make doubly sure of the quality of the water.<sup>536</sup>

In sum, the Companies undertook to design a reservoir system that would collect rainwater during the rainy season. PRES would then use this stored water in its operations. Therefore, PRES would never utilize the river water for use it in its operations. In addition, in the event some of the mining operations discharged water into a local tributary, this water would first be purified at a water treatment facility.<sup>537</sup>

287. Having presented the Response to the Public Comments, PRES continued preparing the responses to the Final Observations, which were presented to MARN on 25 October 2006 (“**Responses to the Final Observations**”).<sup>538</sup> As Ms. Colindres points out, “[i]n

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<sup>534</sup> Response Report on the Technical Review of the El Dorado Mine Project at 8, 13–14, 67–69 (C-170) (emphasis supplied).

<sup>535</sup> *Id.* at 71, 73, 75–77.

<sup>536</sup> *Id.* at 68, 71–72, 74.

<sup>537</sup> *Id.* at 8, 13–14, 67–77.

<sup>538</sup> Letter from Scott Wood to Minister Barrera, dated 25 October 2006 (enclosing Response Report to the Observations Presented by the Technicians of the DGGA-MARN in Meeting dated 14 July 2006) (C-171).



fact, a majority of the Final Observations were easily responded to or were already included in the EIS.”<sup>539</sup>

288. In addition, due to the concern expressed with respect to the quality of the water that could be discharged into the San Francisco River, PRES offered to present a technical proposal for a water treatment plant that would be used to treat all the water utilized in or discharged from the operations.<sup>540</sup>

289. Around the same time PRES presented the Responses to the Final Observations, several articles appeared in the Salvadorian news media in which Minister Barrera stated that he supported a new law to regulate mining activity, and declared that MARN “only adhered to rules provided in law” on this matter.<sup>541</sup> As Mr. Shrake notes in his Second Witness Statement, PRES interpreted these statements as a positive sign and continued to believe the assurances they had received from senior Saca Administration officials that the ED Mining Environmental Permit was forthcoming.<sup>542</sup>

290. Moreover, as discussed below in **subsection G.4**, another positive sign of administrative progress at MARN came on 9 November 2006, with the issuance of a Bond requirement for the Huacuco exploration project. This resolution acknowledged the issuance of

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<sup>539</sup> Colindres Witness Statement, para. 137.

<sup>540</sup> Letter from Scott Wood to Minister Barrera, dated 25 October 2006 (enclosing Response to the Observations Presented by the Technicians of the DGGA-MARN in Meeting dated July 14 2006) (C-171); *see also* Colindres Witness Statement, para. 138 (“It should be reiterated that the company had already committed itself in the original EIS to ensuring that the discharged waters would be adjusted to all applicable water-quality standards, and had identified measures to ensure compliance with this commitment, including via the treatment of waters from the leaching cycle using the INCO detoxification process.”) (emphasis added).

<sup>541</sup> *Study of Mining Law Will Continue*, EL DIARIO DE HOY (7 November 2006) (C-172).

<sup>542</sup> Second Shrake Witness Statement, para. 139; *see also* Colindres Witness Statement, para. 140.

a favorable Technical Report, meaning that all PRES needed was the signature of Minister Barrera in order for the corresponding Environmental Permit to be issued.<sup>543</sup>

291. Meanwhile, PRES continued to make progress on the ED Mining Environmental Permit application and on 4 December 2006, PRES submitted the technical proposal for the water purification plant that the Companies' had undertaken to incorporate into the El Dorado Project as a result of PRES's meetings with various MARN officials in the summer of 2006.<sup>544</sup> As explained in the submission letter, the purpose of the water treatment plant was to "guarantee the quality of the waters discharged into the San Francisco River," in accordance with the standards of Canada, the United States, El Salvador and the World Bank.<sup>545</sup>

292. Having presented MARN with a plan for the state-of-the-art water treatment facility in December 2006, the Companies had addressed every concern raised by MARN throughout the extended EIA review process.<sup>546</sup>

293. Unfortunately, in what was a recurring theme in Claimant's experience with MARN, soon after Claimant's final submission to MARN there was another personnel change,

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<sup>543</sup> Letter from Rosario Gochez Castro to Frederick Earnest, dated 9 November 2006 (C-173); Colindres Witness Statement, para. 140.

<sup>544</sup> Letter from William Gehlen to Minister Barrera, dated 4 December 2006, delivered at the DGA, (enclosing the Technical Memorandum for a Water Treatment Plant — Quality of Effluent from the Mine, prepared by SNC-Lavalin Engineers & Constructors, Inc., dated 20 October 20, 2006, translated into Spanish) (C-174).

<sup>545</sup> *Id.*; *see also* First Shrake Witness Statement, paras. 80-82 (explaining that the water discharged from the water treatment plant would be in a state clean enough to meet federal discharge standards in the United States); Notice of Arbitration, paras. 62-63.

<sup>546</sup> *See* First Shrake Witness Statement, para. 88.

and Minister Barrera was replaced by Minister Carlos José Guerrero.<sup>547</sup> As Ms. Colindres describes, PRES was uncertain what implications the change in Minister might have for the ED Mining Environmental Permit application:

Given that we had prepared the proposal (like the other Responses to the Final Observations) for what we reckoned was the fundamental purpose of responding to the concerns of Minister Barrera, we did not know how this change of Minister would affect the processing of our permits.<sup>548</sup>

294. Consequently, on 29 January 2007, Ms. Colindres went to MARN to inquire about the review status of the responses submitted by PRES between September and December 2006. While there, she spoke with Mr. Córdova, who was responsible for reviewing the El Dorado EIS. Mr. Córdova told her that he was reviewing the final responses of the company and that he did not have any questions in connection with these.<sup>549</sup>

295. On 14 February 2007, PRES submitted an official letter to Minister Guerrero recounting the history of the El Dorado Environmental Impact Assessment proceedings and requesting that he encourage the Bureau of Environmental Management to move forward with its technical assessment, “since subsequent technical and environmental requirements imply a delay in the process of obtaining the environmental permit which has so far taken three years.”<sup>550</sup>

296. Subsequently, on 7 March 2007, Ms. Colindres attended a meeting with Minister Guerrero, and the *Comisión Nacional de Medio Ambiente* (National Commission for the

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<sup>547</sup> Lorena Baires, *More Changes in the Cabinet*, ELSALVADOR.COM (7 December 2006) (C-47).

<sup>548</sup> Colindres Witness Statement, para. 142.

<sup>549</sup> Colindres Witness Statement, para. 142; Email from Ericka Colindres to Pete Neilans, dated 1 February 2007 (C- 175).

<sup>550</sup> Letter from Scott Wood to Carlos Guerrero, dated 14 February 2007 (C-176).

Environment – “**CONAMA**”), in which she presented the technical and environmental features of the El Dorado Mine Project. As Ms. Colindres recalls: “Despite the fact that I invited them to put any questions to me, the Minister asked none and in truth seemed to not be interested in the least in what I was explaining to them. For example, all he did was check his cell phone instead of watching the presentation I gave.”<sup>551</sup>

297. Soon after, Ms. Colindres went to MARN to request the assistance of Zaida Osorio, head of the *Gerencia de Evaluación Ambiental* (“**Environmental Assessment Office**”), in encouraging Mr. Córdova of MARN to make progress with the evaluation of the responses that PRES had submitted after the Public Consultation. At this time, Ms. Osorio told Ms. Colindres that Minister Guerrero had ordered all permits relating to mining, including exploration, to be put on hold.<sup>552</sup>

298. Following this announcement, on 7 May 2007, a meeting was held to which representatives of all the mining companies in the country were invited. The meeting was convened by Minister Guerrero and also the Minister of Economy, Yolanda de Gavidia.<sup>553</sup> At this meeting, the mining companies were informed that all mining activity in the country would be halted until such time as an *Evaluación Ambiental Estratégica* (Strategic Environmental Assessment or “**EAE**”) of the mining industry was conducted.<sup>554</sup>

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<sup>551</sup> Colindres Witness Statement, para. 144.

<sup>552</sup> *Id.*, para. 145.

<sup>553</sup> *Id.*, para. 146; *see also* Second Shrake Witness Statement, para. 127.

<sup>554</sup> Colindres Witness Statement, para. 146.

299. Regarding the inappropriateness of the EAE as a tool to halt mining activity, Ms. Colindres states:

As can clearly be seen in the Environmental Law, the EAE is an environmental assessment tool for use in assessing administrative programs. It has no connection with the MARN's duty to perform an Environmental Impact Assessment of all the projects that are submitted to it for this purpose. However, during his time at the MARN, all Minister Guerrero did was push this EAE, and no permits for the exploration or extraction of metallic minerals made any progress at all.<sup>555</sup>

300. As Mr. Shrake and Ms. Colindres affirm, by this point, the Claimant was aware that the delay PRES faced at MARN was political and would therefore not be resolved by means of technical environmental assessment, but only through political means.<sup>556</sup>

301. Claimant thus focused its efforts on understanding and addressing the political concerns that appeared to be impeding the processing of its applications by MARN. Although Claimant understood that a minority of politicians were uncomfortable with mining, Claimant was led to believe that it continued to enjoy the full support of the Saca Administration and that it's Concession Application would ultimately be approved.<sup>557</sup>

302. On 24 November 2008 – following President Saca's March 2008 announcement of the *de facto* ban on mining, discussed below – when Claimant was on the verge of submitting

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<sup>555</sup> *Id.*, para. 147 (emphasis added) (citing Environmental Law, art. 17 and Notice of the Award, Strategic Environmental Assessment (EAE) of the Metallic Mining Sector of El Salvador, 13 September 2010 (C-62)); *see also* Second Shrake Witness Statement, para 127 (“I assured Minister de Gavidia that we supported the concept of any study that would help the Government to strengthen environmental protections. I did not believe that this study should impact our rights to obtain our exploitation concession.”).

<sup>556</sup> Colindres Witness Statement, para. 148; Second Shrake Witness Statement, para. 128.

<sup>557</sup> Second Shrake Witness Statement, paras. 129-130.

its Notice of Intent, PRES sent a letter to Minister Guerrero requesting that he inform the Companies of the status of the application for the ED Mining Environmental Permit.<sup>558</sup>

303. On 4 December 2008, Javier Figueroa of MARN acknowledged receipt of PRES's letter indicating "we will be in a position to resolve your request for an Environmental Permit for your aforementioned 'El Dorado' mining exploitation project within 30 days of the date on which all proceedings relating to the Environmental Impact Assessment have been completed."<sup>559</sup> In this letter, Mr. Figueroa stipulated six requirements that supposedly needed to be met in order to continue with the process, all relating to the discharge of water for mining operations.<sup>560</sup>

304. PRES responded to this communication on 8 December 2008, underlining that each of the six requirements for information detailed by Mr. Figueroa in his 4 December communication *had already been addressed in the EIS*.<sup>561</sup> Of MARN's 4 December letter, Ms. Colindres states:

At this point, it was obvious to me that the MARN's communication bore no relation whatsoever to a technical and environmental evaluation of the Project. However, we could not pass up the opportunity of once again clarifying the environmental feasibility of the project, and for this purpose enclosed with our reply a report summarizing the information referred to, referencing

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<sup>558</sup> Letter from Scott Wood to Carlos Guerrero, dated 24 November 2008 (C-179).

<sup>559</sup> Letter from Ernesto Javier Figueroa Ruiz to Fred Earnest, dated 4 December 2008 (C-180).

<sup>560</sup> *Id.*

<sup>561</sup> Letter from William Gehlen to Ernesto Javier Figueroa Ruiz, dated 8 December 2008 (enclosing Response Report to Note MARN-DGGA-EIS-2218/2008) (C-180).

it to the EIS and to the subsequent responses submitted by the company.<sup>562</sup>

305. Subsequently, Claimant initiated this proceeding and all further communication ceased between PRES and MARN with respect to PRES's request for the ED Mining Environmental Permit.

**2. MINEC Works With PRES To Move The Environmental Impact Assessment Process Forward at MARN and to Resolve the Confusion Regarding the Amended Mining Law**

306. As discussed below, throughout 2006 and 2007, the Companies believed they were moving the El Dorado Project forward (albeit slowly) – with the overall support of the Salvadoran government.

307. Recall from *subsection F.1.b, supra*, that in late 2005, MINEC had proposed a reform of the Amended Mining Law in order to clarify the outstanding confusion regarding the requirements of surface ownership.<sup>563</sup> Although PRES's applications for the ED Mining Environmental Permit and Exploitation Concession were in compliance with the existing Amended Mining Law, the Companies were supportive of this proposal and remained willing to follow MINEC's lead as to the best way to move forward with the Exploitation Application process.<sup>564</sup>

308. Although MINEC first showed Pac Rim the draft reform of the Amended Mining Law in late 2005, Minister de Gavidia informed the Companies that President Saca had

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<sup>562</sup> Colindres Witness Statement, para. 150.

<sup>563</sup> Letter from Gina Navas de Hernandez to Eli Valle, dated 13 September 2005 (R-35); Fax of proposed new mining law, dated October 2005 (C-406).

<sup>564</sup> Second Shrake Witness Statement, para. 114; First Shrake Witness Statement, para. 86.

instructed that the reform of the Amended Mining Law not be introduced until after the elections in March 2006.<sup>565</sup> Mr. Shrake explains that this did not cause the Companies' any concern: "Because we believed we had the support of the local communities and the Government, we wanted to be cooperative and did not rush MINEC to introduce the proposed legislative reform."<sup>566</sup>

309. In May 2006, Mr. Shrake and Ms. McLeod-Seltzer visited El Salvador and met with a number of Salvadoran officials, including Vice President Escobar and MINEC Minister de Gavidia: "these high-ranking officials assured us that the Government was supportive and enthusiastic about our work in El Salvador."<sup>567</sup> As Mr. Shrake testifies, at this time Minister de Gavidia agreed that it was time to push forward with reforming the Amended Mining Law. Minister de Gavidia further promised that she would meet with MARN Minister Barrera to see if she could facilitate progress on PRES's ED Mining Environmental Permit.<sup>568</sup>

310. Minister de Gavidia held true to her commitment and on 8 May 2006, she informed PRES that she had spoken with MARN about the pending ED Mining Environmental

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<sup>565</sup> Email from Fred Earnest to Tom Shrake, dated 15 February 2006 ("...the Minister of Economy ... confirmed that it is the president's instructions to present the project [mining law reform] after March 12<sup>th</sup> for reasons of election strategy, to not stir up opposition to the reform project. She said that today [Tuesday] she would be visiting the president to jointly sign and have the initiative ready, The documents have now been signed and are ready to be presented on the indicated dated. This demonstrates that there is no opposition on the part of the government and the auxiliary organizations. Based on this, we have sought and obtained the commitment of support for the project from PCN [one of the moderate parties – their vote along with ARENA will ensure that the reform passes]. With a great deal of satisfaction, I can inform you that we are ready in the legislative area, which confirms our perception that the resistance was more than anything electoral concerns.") (emphasis added) (C-295).

<sup>566</sup> Second Shrake Witness Statement, para. 114.

<sup>567</sup> *Id.*, para. 115; First Shrake Witness Statement, para. 92; McLeod-Seltzer Witness Statement, para. 32; El Dorado Project Weekly Summary for the week ending 2 June 2006 (C-296).

<sup>568</sup> Second Shrake Witness Statement, para. 115.



Permit and other Environmental Permits related to PRES's and DOREX's other exploration licenses (discussed below in *subsection G.4*. It was reported that Minister de Gavidia had "obtained the commitment from MARN that we should receive a response for at least one of the exploration licenses by the end of this week."<sup>569</sup> And indeed, a few days later, DOREX was informed that the exploration permit for Huacuco had entered the public consultation stage of the Environmental Impact Assessment,<sup>570</sup> and PRES received the Environmental Permit for the Santa Rita Exploration License the following month.<sup>571</sup>

311. Following Minister de Gavidia's indication that she would move forward with the reform of the Amended Mining Law, Mr. Shrake sent Minister de Gavidia a letter in June 2006. Mr. Shrake's letter summarizes suggestions for how the Amended Mining Law could be improved and strengthened "in an effort to help El Salvador build a model mining country where the citizenry benefits from the economic advantages the industry offers while eliminating or minimizing the environmental impacts."<sup>572</sup> Mr. Shrake's efforts were meant to be constructive and helpful and were not limited to the land ownership issue. In addition, he offered proposals:

- to increase the royalty payments that would be paid by concessionaires to the Government;
- to add enhanced environmental rules and protections;
- to levy an additional tax against mining operations, with the revenues going directly to a mining division of MARN to

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<sup>569</sup> Email from Luis Medina to Tom Shrake, dated 9 May 2006 (C-407).

<sup>570</sup> Letter from Ing. Francisco Perdomo Lino to Frederick H. Earnest, dated 11 May 2006 (C-187).

<sup>571</sup> Technical Report on the Environmental Impact Assessment for the "Santa Rita Mining Exploration Project," dated 9 June 2006 (C-408).

<sup>572</sup> Letter from Tom Shrake to Minister Yolanda de Gavidia, dated 13 June 2006 (C-15).

increase the agency's ability to properly regulate the industry; and

- to establish Legacy Funds at all mining operations, which would provide millions of dollars in capital to local communities to establish new businesses once the mining resources are exhausted and the operations ceased.<sup>573</sup>

312. As discussed above in **subsection G.1**, in July 2006 Minister Barrera made a public statement opposing mining – which he immediately retracted, both publicly and in a personal conversation with Mr. Shrake and Vice President Escobar.<sup>574</sup> Minister de Gavidia also met with Mr. Shrake at this time and assured him “that Minister Barrera’s statements represented only his personal views; that those views were at odds with Administration policy; that the Administration fully supported the El Dorado Project and intended to comply with El Salvador’s applicable laws; and that Minister Barrera no longer remained in good standing within the Administration.”<sup>575</sup> (Recall that Mr. Shrake also met with Vice President Escobar who assured him that the Administration remained supportive of the Project.<sup>576</sup>)

313. Shortly thereafter, Ministers Barrera and de Gavidia publicly announced that they were going to propose a reform of the Amended Mining Law, an announcement Pac Rim fully supported and welcomed.<sup>577</sup> As noted previously, Mr. Shrake testifies that he “understood the

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<sup>573</sup> First Shrake Witness Statement, para. 87.

<sup>574</sup> A. Dimas and K. Urquilla, *Hugo Barrera opens the door to mining*, EL DIARIO DE HOY (23 July 2006) (C-300); Second Shrake Witness Statement, paras. 117-20.

<sup>575</sup> Second Shrake Witness Statement para. 117; First Shrake Witness Statement, para. 93.

<sup>576</sup> Second Shrake Witness Statement, para. 118.

<sup>577</sup> *They will seek reform of the Mining Act*, EL DARIO DE HOY (24 July 2006) (C-301), Ricardo Valencia, *Mining Law to be Reformed*, LA PRENSA GRAFICA (23 July 2006) (C-409); Pacific Rim Mining Corp. 2007 Annual Report at 10 (C-32) (“Pacific Rim believes this new law will provide the framework

(continued...)

Ministers' comments to be a direct result of our meetings and I remained confident of the Government's support for our Project."<sup>578</sup>

314. Through the end of 2006, members of the *Asemblea*, NGOs, and officials from MARN and MINEC engaged in a public discussion about mining, with opponents calling for a ban on mining while supporters – including MINEC and Ms. Navas – highlighted the economic benefits and environmental protections of modern mining operations.<sup>579</sup>

315. As discussed in the Parties' prior submissions, in October 2006, while the issue of the Amended Mining Law reform was being publicly debated, Ms. Navas sent a letter to Claimant, requesting the following documentation in connection with its application for an Exploitation Concession:

1. Certified copies of the duly recorded official transcripts of the property sales agreements or legally executed authorizations from the landowners in the area requested for mining exploitation.

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(continued)

around which its application for an Exploitation Concession can be evaluated, and will allow its EIS to proceed expeditiously to final approval.”); Pacific Rim Mining Corp. 2008 Annual Report at 7-8 (C-33); Second Shrake Statement, para. 121; Email from Tom Shrake to Yolanda de Gavidia, dated 14 July 2006 (“I support strong Laws to protect the environment. I have suggested changes to the mining law that help accomplish these goals.”)

<sup>578</sup> Second Shrake Witness Statement, para. 120

<sup>579</sup> See, e.g., *I believe that the communities can benefit from developing a mine*, LEGISLATIVE OBSERVATORY (19 June 2006) (“We undoubtedly see this as a development possibility for areas where there is no greater opportunity to have another type of development. Because there are places in [L]as [M]inas where corn won’t even grow.”) (C-410); *Investigated Mines Without Authorization*, EL MUNDO (7 November 2006) (C-206); *Mining Exploitation: The Conflict Over Gold*, LEGISLATIVE OBSERVATORY (19 June 2006) (“For its part, MINEC is resolute: mining-exploitation in the northern region will provide good returns for the country in terms of economic and social development. ... ‘In addition they have to pay 25% of income taxes ... Moreover, there is job creation; roads and streets being opened up,’ stated [Ms. Navas], summing it up as follows: ‘I believe that the communities can benefit from developing a mine.’”) (C-396).

2. Copy of the Environmental Permit issued by the competent authority certified by a Notary Public, with a copy of the environmental impact study including the annexes and the modifications made to said study approved by the competent authority.
3. Technical-Economic Feasibility Study prepared by professionals with proven experience in the field, which must contain the methodology for calculating mineable mineral reserves and also include the following information, such as the Detailed Design Plans for:
  - a. Engineering and final design of the ramp.
  - b. Engineering and design of roads and accesses and additional infrastructure.
  - c. Engineering and design of the tailings dam and sterile dumps.
  - d. Engineering and design of the process plan and flow diagrams.
  - e. Engineering and design of the exploitation method for the underground mine.
  - f. Engineering and final design of mine operation. (Mine Closing).

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

4. Exploitation program for the first five years, based on the mineral reserves to be mined. . . .<sup>580</sup>

316. Claimant had already submitted most of these documents (except for the ED Mining Environmental Permit) with its original application two years earlier. Nonetheless,

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<sup>580</sup> Letter from Gina Navas de Hernandez to the Ministry of Economy, dated 2 October 2006 (R-4).

Claimant updated the documents as appropriate, and resubmitted all of them to the Bureau of Mines – except, again, for the ED Mining Environmental Permit, which it was still waiting to receive.<sup>581</sup>

317. To accompany these documents, Claimant also provided a written submission to the Bureau of Mines, explaining why it was unable to submit the ED Mining Environmental Permit. Claimant specifically asked the Bureau to excuse the absence of the ED Mining Environmental Permit on the grounds that there was an “Impediment with Just Cause” (*“Impedimento con Justa Causa”*).<sup>582</sup>

318. As previously noted, MARN had still not ruled one way or the other on Claimant’s application for the ED Mining Environmental Permit, a factor that was beyond Claimant’s ability to control.<sup>583</sup> Claimant’s submission also specifically observed that some of the data included in the El Dorado PFS might change. Indeed, Claimant had always explained to the Government, as stated in its application in December 2004, that “[t]he studies related to a mining project are largely iterative and change according to the costs, metal prices, operating upgrades, available technology and exploration program results.”<sup>584</sup> No one in the Government had ever suggested that this was problematic and, indeed, no issue was ever raised with the El Dorado PFS until this arbitration.

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<sup>581</sup> Letter from PRES to the Ministry of Economy, dated 8 November 2006 (C-11).

<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

<sup>584</sup> Application for the Conversion of the Licenses of El Dorado Norte and El Dorado Sur, dated 22 December 2004 at 6 (C-181).

319. Ms. Navas responded in a letter dated 4 December 2006, repeating that PRES's November 2006 response had been "partially" complete, but still lacked the ED Mining Environmental Permit:

Having received on [8 November 2006] the document and attachments whereby Mr. William Thomas Gehlen, Legal Representative of the Company "Pacific Rim El Salvador, S.A. de C.V.," *partially complies* with the warning notice dated [2 October 2006], and also requests that the deadline for the presentation of the documentation relating to the environmental permit be suspended and that the company be granted three days from the delivery of the permit by the corresponding Authority to submit it in turn to this Bureau.<sup>585</sup>

320. Although Respondent contends before this Tribunal that this letter was delivered to PRES but subsequently "withdrawn,"<sup>586</sup> Respondent has never offered any evidence to support the belated assertion that the letter was formally or even informally withdrawn. While the Parties may dispute the legal significance (if any) of whether or not it was "withdrawn," the fact remains that as of December 2006 (which is also when PRES submitted its proposal for the water treatment facility to MARN), PRES believed it had submitted all of the documentation needed to obtain the Exploitation Concession for El Dorado – except, again, for the ED Mining Environmental Permit, which PRES understood would soon be issued by MARN.<sup>587</sup> This is the last official communication to PRES from MINEC regarding its Concession application, which

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<sup>585</sup> Letter from Gina Navas de Hernandez to Ministry of Economy, dated 4 December 2006 (R-6).

<sup>586</sup> Respondent's Preliminary Objections, dated 4 January 2010 ("**Preliminary Objections**"), para. 63, n.38.

<sup>587</sup> First Shrake Witness Statement, para. 88.

was fully in keeping with Pac Rim's understanding that final approval of the Concession was dependent on the ED Mining Environmental Permit.<sup>588</sup>

321. As noted above, when the discussion of reforming the Amended Mining Law continued through 2007 and no further progress was made on the ED Mining Environmental Permit application or the Exploitation Concession application, the Companies began to understand that the delay PRES faced with respect to its Concession application would not be resolved by through the technical assessment, but only through political means.<sup>589</sup>

322. However, throughout 2007, due to the express assurances from officials at the highest levels of the Salvadoran Government, discussed further in *subsection H*, Pac Rim remained confident that the Government would continue to work collaboratively with the Companies to bring about a mutually beneficial resolution.<sup>590</sup>

### **3. Discovery and Development of the Santa Rita Property**

323. As previously noted, thanks to the talents and skills of Pac Rim's exploration team and the scientific breakthroughs they made concerning the geologic history of the El Dorado deposits, a number of additional properties with mineral potential were discovered in El

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<sup>588</sup> See *They will seek reform of the Mining Act*, EL DIARIO DE HOY (24 July 2006) (C-301); Ricardo Valencia, *Mining Law to be Reformed*, LA PRENSA GRAFICA (23 July 2006) (C-409); Pacific Rim Mining Corp. 2007 Annual Report at 10 (C-32) ("Pacific Rim believes this new law will provide the framework around which its application for an Exploitation Concession can be evaluated, and will allow its EIS to proceed expeditiously to final approval."); Pacific Rim Mining Corp. 2008 Annual Report at 7-8 (C-33); Second Shrake Witness Statement, para. 121.

<sup>589</sup> Colindres Witness Statement, para. 148; Second Shrake Witness Statement, para. 128.

<sup>590</sup> Second Shrake Witness Statement, para. 129-30.

Salvador, including the Santa Rita Project, located roughly 8 km north of the El Dorado Project.<sup>591</sup>

324. Pac Rim announced the discovery of the Santa Rita Project in June 2005, and promptly requested an exploration license from MINEC.<sup>592</sup> Consistent with that Ministry's efforts to support Pac Rim's ongoing exploration and investment in El Salvador,<sup>593</sup> MINEC quickly granted PRES the Santa Rita Exploration License for a four year, renewable term.<sup>594</sup>

325. With the acquisition of the Exploration License, PRES initiated the Environmental Impact Assessment through MARN in September 2005, in order to obtain an Environmental Permit for the Companies' exploration activities at the site ("**Santa Rita Drilling Environmental Permit**").<sup>595</sup>

326. On 2 December 2005, MARN issued the Terms of Reference for the preparation of the EIS related to the Santa Rita Drilling Environmental Permit application.<sup>596</sup> Shortly

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<sup>591</sup> Pacific Rim Mining Corp., Projects: Santa Rita, El Salvador (C-411). For a diagram of where Claimant's Projects are located within El Salvador see Pacific Rim Mining Corp. Presentation, dated June 2012 (C-412).

<sup>592</sup> Press Release, Stakes New Ground in Latin America, dated 22 June 2005 (C-404).

<sup>593</sup> Jose Alberto Barrera, *Canadian Firm Invests in Cabanas Gold Mine*, EL DIARIO DE HOY (7 January 2005) ("The Director of the Bureau of Mines said that that the exploitation of minerals in areas like San Isidro is beneficial because the condition of the land makes agriculture difficult, and mining solves some of the problems of development") (emphasis added) (C-394).

<sup>594</sup> Resolution No. 127, dated 8 July 2005 (C-415).

<sup>595</sup> Environmental application for new mineral exploration in the Santa Rita exploration license, dated 26 September 2005 (C-416).

<sup>596</sup> Terms of Reference for Santa Rita, dated 2 December 2005 (C-417).



thereafter, on 16 January 2006, PRES presented the EIS for the Santa Rita Drilling Environmental Permit application to MARN.<sup>597</sup>

327. The remaining steps of MARN's permitting process moved rapidly. On 9 February 2006, MARN instructed PRES to publicly announce the EIS,<sup>598</sup> and PRES complied, publishing the announcements on 11, 12, and 13 February.<sup>599</sup> In March and April, MARN and PRES met on several occasions to discuss the public comments to the EIS, and on 19 April 2006, PRES formally responded to the same.<sup>600</sup>

328. Recall that during this permitting process, in May 2006, Mr. Shrake and Ms. McLeod-Seltzer traveled to El Salvador, where they met with a number of Salvadoran officials, including Vice President Escobar and Minister de Gavidia.<sup>601</sup> At this meeting, Minister de Gavidia promised Mr. Shrake "that she would meet with MARN Minister Barrera to see if she could facilitate progress on our environmental permits."<sup>602</sup> Recall also that Minister de Gavidia held true to her commitment and on 8 May 2006, she informed PRES that she had spoken with MARN about the pending ED Mining Environmental Permit and other Environmental Permits related to PRES's and DOREX's other exploration licenses.

329. Minister de Gavidia's intervention proved successful, at least with respect to the Santa Rita exploration permit. In what proved to be record time for MARN, the Santa Rita

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<sup>597</sup> Letter from Fred Earnest to Hugo Barrera, dated 16 January 2006 (C-418).

<sup>598</sup> Letter from Francisco Perdomo Lino to Fred Earnest, dated 9 February 2006 (C-419).

<sup>599</sup> *Falling Consumer Confidence in the U.S.*, LA PRENSA GRAFICA (3 October 2005) (C-153).

<sup>600</sup> Letter from Fred Earnest to Francisco Perdomo Lino, dated 19 April 2006 (C-420).

<sup>601</sup> Second Shrake Witness Statement, para. 115; McLeod-Seltzer Witness Statement, para. 32.

<sup>602</sup> Second Shrake Witness Statement, para. 115.

Drilling Environmental Permit was signed by Minister Barrera on 8 June 2006 and received by PRES the following day, less than a year after the process was initiated.<sup>603</sup> Shortly thereafter, PRES began constructing an access road and negotiating surface rights agreements with the local land owners.<sup>604</sup>

330. In November 2006, with the surface rights agreements finalized and access roads upgraded and constructed, Pac Rim announced that it had commenced a drilling program at the Santa Rita Project.<sup>605</sup> As Mr. Shrake stated at the time: “The Trinidad vein target on our Santa Rita gold project is one of the most exciting surface discoveries this Company has ever made. ... We are very excited to be drill testing this target to determine the underground extent of the high grade results we have seen on surface in this vein.”<sup>606</sup>

331. Unfortunately, Pac Rim was unable to complete this drilling program due to the intervention of a small number of extremist anti-mining NGOs. As Mr. Shrake recalls:

Unfortunately, several [NGOs] resorted to violence and spread mistruths about the Companies’ activities, making ridiculous statements like the following: The company was pumping cyanide into the ground with our drills and removing gold and uranium; we were using the uranium to build nuclear weapons; our work was causing sterility in women. I understood that we still had the

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<sup>603</sup> Technical Report on the Environmental Impact Assessment for the “Santa Rita Mining Exploration Project,” dated 9 June 2006; Press Release, Pacific Rim Mining Receives Santa Rita Drill permit, dated 12 June 2006 (C-420).

<sup>604</sup> Press Release, El Dorado Project Exploration Drilling Confirms Extensions to Gold Mineralization in Minita – South Minita Area, dated 11 September 2006 (C-421).

<sup>605</sup> Press Release, Santa Rita Gold Project Drill Program Underway; El Dorado Project update, dated 9 November 2006 (C-309).

<sup>606</sup> *Id.*

social license from the local communities and saw this as a case of a few doing harm to the majority.<sup>607</sup>

332. Thus, despite widespread support for Pac Rim's exploration work and social programs from the vast majority of local residents, upon the commencement of drilling, small, intermittent and localized protests took place at the Santa Rita site, primarily consisting of protesters from outside the Santa Rita area.<sup>608</sup> As a result, Pac Rim announced its plan to temporarily suspend drilling activities to prevent a further escalation of violence and until the NGOs' social and environmental concerns could be addressed:

"There are several points we want to make very clear," states Tom Shrake, President and CEO of Pacific Rim. "Firstly, our temporary suspension of the Santa Rita program was at our election and was driven by our concerns for our employees and local residents of Santa Rita. Secondly, we have the support of the majority of the local Santa Rita population; opposition is primarily being imported from outside areas at the encouragement of certain NGOs and a very small number of local opponents. Thirdly, and importantly, this opposition is confined to the Santa Rita project. Lastly, we will take whatever steps necessary to resolve these issues with the NGOs and expect to be successful in coming to a workable solution and resuming the Santa Rita drill program as soon as possible. We hope the 'cooling off' period we have provided will serve its purpose of allowing time to resolve this conflict through dialogue and independent mediation."<sup>609</sup>

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<sup>607</sup> Second Shrake Witness Statement, para. 92.

<sup>608</sup> Press Release, Santa Rita Drill Program update, dated 13 December 2006 (C-263); *see also* Pacific Rim Mining Corp. 2007 Annual Report at 11 (C-32).

<sup>609</sup> Press Release, Santa Rita Drill Program Update, dated 13 December 2006 (C-263).

333. Throughout 2007, Pac Rim continued its diplomatic approach with the NGOs and attended mediated meetings.<sup>610</sup> Pac Rim also purchased the surface rights over the high grade section of the Trinidad vein located on the Santa Rita Project, giving the Companies unlimited access to the property, built new roads to access the vein, and continued its public service and charitable works in the Santa Rita area.<sup>611</sup>

334. Following the decline of protest activity at Santa Rita toward the end of 2007, Pac Rim resumed limited exploration activities and announced plans to continue surface exploration activities at the Project.<sup>612</sup> The Companies' continued conducting these exploration activities

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<sup>610</sup> Press Release, Santa Rita Gold Project Update, dated 21 February 2007 (C-422); 2007 annual report, p. 11 ("While Pacific Rim has honored its good-faith commitment to not pursue exploration work at its Santa Rita Project at this time, the NGOs have continued to stage occasional protests, including in one instance shutting down a much-needed eye exam clinic being co-sponsored by the Company. The Company believes the tactics being used by the NGOs and their preclusion of the Companies social benefits programs are not only failing to garner local support for their anti-mining agenda, the protests appear to be cementing negative local public opinion regarding the NGOs, while support for the Company and its exploration and social plans remains strong."); *see also* Pacific Rim Social and Environmental Policy (C-59); *Uncertain Future Mining Favors Residents*, EL DIARIO DE HOY (4 September 2006):

Employees are hoping to keep their jobs. It is their only source of employment. This is the main reason why 76 employees of Pacific Rim and 16 employees of Triada SA hope that the Ministry of Environment and Natural Resources (MARN) will soon authorize mining exploitation projects in the country. For them, the existence of these companies has represented secure, stable, and well-paid jobs. Many who work there earn 10 times or more what they would get in agriculture.... [Ediz] Torres, from canton Los Jobos, strongly criticizes the non-governmental organizations that oppose the State giving approval for the mining of metals. His opinion, like many others, is that this is more for political than technical reasons." (emphasis added) (C-265).

<sup>611</sup> Press Release, Surface Trenching at Santa Rita Project Reveals high Grade Gold Over Wide Vein Widths, dated 23 January 2008 (C-423).

<sup>612</sup> Press Release, Surface Trenching at Santa Rita Project Reveals high Grade Gold Over Wide Vein Widths, dated 23 January 2008 ("Pacific Rim recently resumed limited exploration work at the Santa Rita project following its voluntary suspension of work there in late 2006, when Santa Rita became the target

(continued...)

until July 2008, when all drilling activity was suspended following President Saca's announcement of the *de facto* mining ban, discussed below in **subsection I**.<sup>613</sup> Following that time, exploration expenditures at the Project were limited to amounts necessary to maintain the Santa Rita Exploration License in good standing.<sup>614</sup> In July 2009, the Santa Rita Exploration License expired<sup>615</sup> and was immediately re-applied for by PRES's sister company, DOREX.<sup>616</sup> To date, no administrative decision has been made regarding the pending application.

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(continued)

of intermittent anti-mining protests led by a small El Salvadoran Non-Governmental Organization ("NGO" ) utilizing protestors imported from outside the Santa Rita area ... In recent months a marked decrease in protest activity at Santa Rita was noted. Consequently, the Company assessed little risk to a resumption of limited exploration work and commenced the trenching program reported on herein. Pacific Rim intends to continue surface exploration at Santa Rita through the coming months.") (C-423).

<sup>613</sup> Press Release, Pacific Rim Suspends Further Drilling in El Salvador Until Mining Environmental Permit Granted; Local Staffing Reduced, dated 3 June 2008 (C-262).

<sup>614</sup> Pacific Rim Mining Corp., Projects: Santa Rita, El Salvador (C-411).

<sup>615</sup> Resolution, dated 16 July 2009 (R-22).

<sup>616</sup> Santa Rita Application for Exploration License, dated 22 July 2009 (C-424)

335. As explained throughout this submission, prior to President Saca's March 2008 announcement of the *de facto* mining ban, Pac Rim had been led to understand that El Salvador was interested in promoting a robust and responsible mining industry. The issuance of the Santa Rita Exploration License and Drilling Environmental Permit by MINEC and MARN, which occurred during the course of the Company's ongoing – and more complex – ED Mining Environmental Permit application, only bolstered Pac Rim's confidence in the Government's continued support of the Companies' investment in the Country.

#### **4. MARN's Review of the Pueblos, Guaco, and Huacuco Drilling Environmental Permit Applications**

336. As previously explained, Pac Rim followed a two-track strategy in El Salvador: on the one hand, the development of an underground mine and processing plant over the short term; and on the other hand, an intensive exploration program designed to provide long-term growth.<sup>617</sup>

337. Pac Rim's exploration team was very confident as to the extent of the system of epithermal silver and gold veins located in the El Dorado Project area and knew that with additional exploration, more veins could be included in the mining plan, thereby considerably extending the projected life of the El Dorado mine. As Ms. Colindres describes: "This would not only be a benefit of the company but also to the community and the country, bearing in mind the

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<sup>617</sup> Email from Tom Shrake, dated 13 April 2004 ("We are working on two fronts, development and exploration.") (C-364); Press Release, Pacific Rim Announces 2005 First Quarter Results, dated 8 September 2004 ("In July 2003, Pacific Rim adopted a two-pronged strategy for El Dorado; to move forward with development plans for the 585,000 ounce Minita resource while at the same time continuing to explore for additional resources on the property.") (emphasis added) (C-354); Colindres Witness Statement, para. 153.

employment and social programs that would have been developed in Cabañas and the income for the Government at both national and municipal level.”<sup>618</sup>

338. As noted above in **subsection F.1**, in June 2005, Claimant, in consultation with MINEC, had incorporated DOREX in order to acquire three new exploration licenses that would serve as a “buffer zone” around the newly-reduced El Dorado Exploitation Concession area.<sup>619</sup> These three Exploration Licenses were called “Huacuco,”<sup>620</sup> “Pueblos” and “Guaco.”<sup>621</sup>

339. For the same reasons that PRES had desired the ED Drilling Environmental Permit, DOREX deemed it prudent to obtain new Environmental Permits before pursuing operations authorized by the new Exploration Licenses.

**a. The Huacuco Drilling Environmental Permit**

340. DOREX submitted the Environmental Form for the Huacuco Drilling Environmental Permit on 23 November 2005.<sup>622</sup> On 19 December, MARN issued the company the Terms of Reference for the EIS.<sup>623</sup>

341. The EIS was submitted on 17 February 2006<sup>624</sup> but its analysis met with the delays that typified MARN’s processing of Environmental Permits. When more than two

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<sup>618</sup> Colindres Witness Statement, para. 153.

<sup>619</sup> El Dorado Project Report for the Month Ending 30 April 2005 (C-290).

<sup>620</sup> Resolution No. 205, dated 28 September 2005 (C-43).

<sup>621</sup> Resolution No. 211, dated 29 September 2005 (C-45); MINEC Resolution No. 208, dated September 29, 2005. (C-44).

<sup>622</sup> Letter from Fred Earnest to Hugo Barrera, dated 23 November, 2005, enclosing Environmental Form for mining exploration operations in the Exploration License called Huacuco and attached documents (C-183).

<sup>623</sup> Letter from Francisco Perdomo Lino to Fred Earnest, dated 19 December, 2005, enclosing Terms of Reference for Huacuco (C-184).

months had passed since the submission of the study, Ms. Colindres wrote to Ms. Zaida Osorio of MARN on 26 April 2006, in order to request her collaboration in streamlining the aforementioned EIS.<sup>625</sup>

342. Two weeks later DOREX received a letter from MARN ordering the company to proceed with the public consultation stage.<sup>626</sup> As previously explained, this implied that the EIS submitted by DOREX had been analyzed by MARN and have been issued a favorable Technical Opinion.<sup>627</sup>

343. The public consultation period took place between 22 May and 2 June 2006, following publication of the EIS announcements on 18, 19, and 20 May.<sup>628</sup> No observation or comment whatsoever was presented by the public during this period.<sup>629</sup> As Ms. Colindres notes, the lack of public comment led Pac Rim to hope that the granting of the Huacuco Drilling Environmental Permit was imminent, particularly considering that the Technical Opinion on the EIS would have been approved prior to the public consultation.<sup>630</sup>

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<sup>624</sup> Letter of conduct of the EIS for mining exploration operations in the Exploration License called Huacuco, from Frederick Earnest to Minister of the MARN Hugo Barrera, dated 17 February, 2006. (C-185).

<sup>625</sup> Email from Ericka Colindres to Ing. Zaida Osorio, dated 26 April 2006 (C-186).

<sup>626</sup> Letter from Ing. Francisco Perdomo Lino to Frederick H. Earnest, dated 11 May 2006 (C-187).

<sup>627</sup> Colindres Witness Statement, para. 159.

<sup>628</sup> *See* Letter from Ricardo Enrique Araujo to Francisco Perdomo Lino, dated 22 May 2006 (C-188).

<sup>629</sup> Monthly Report of the SPMA, June 2006, First Week, clause 7 (C-168).

<sup>630</sup> Colindres Witness Statement, para. 160; *see* Monthly Report of the SPMA, June 2006, Second Week, clause 7 (recording that the Technical Report was being prepared) (C-168); Third Week, clause 4 (recording that the Technical Report would be ready the same week) (C-168).



344. However, the Huacuco Drilling Environmental Permit was never issued. DOREX was informed that the Huacuco environmental permitting process was impeded by the cessation of proceedings ordered by Minister Barrera in July 2006.<sup>631</sup> As Ms. Colindres explains, “we understood that this stoppage as ordered by Minister Barrera with respect to mining projects was later lifted between July and August.”<sup>632</sup> For this reason, on 20 September, Mr. Gehlen wrote to Minister Barrera, explaining “we have been informed that they are waiting for specific instructions from you,” and requesting Minister Barrera’s intervention, either by resolving the request or by requesting DOREX to provide any information that might be missing.<sup>633</sup>

345. Shortly thereafter, in a letter dated 9 November 2006, DOREX was notified that the Technical Opinion of the Huacuco EIS had been favorable and that DOREX should proceed to remit the Environmental Performance Bond.<sup>634</sup> This Bond was remitted on 20 December 2006.<sup>635</sup>

346. As explained by Ms. Colindres, once the titleholder of the project remits the aforementioned Bond, the Minister of MARN need only issue the Environmental Permit without any further review of the background, since it is understood that the project has already been

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<sup>631</sup> Monthly Report of the SPMA, June 2006, Fourth Week, clause 6 (C-168).

<sup>632</sup> Colindres Witness Statement, para. 161; Monthly Report of the SPMA, August 2006, Second Week, clause 6 (C-189).

<sup>633</sup> Letter from William Gehlen to the Minister of the MARN Hugo Barrera, dated 20 September, 2006 (C-190).

<sup>634</sup> Letter from Dra. Rosario Góchez Castro to Frederick Hume Earnest, dated 9 November , 2006 (C-191).

<sup>635</sup> Letter from Ricardo Enrique Araujo to Dra. Rosario Góchez Castro, dated 20 December, 2006 (C-191).

studied and approved by MARN Technicians and professionals expert on the subject.<sup>636</sup> Ms. Colindres therefore went to MARN on 29 January 2007, to inquire as to the status of the Permit.<sup>637</sup> She was informed that the Huacuco Drilling Environmental Permit would be ready the following week.<sup>638</sup>

347. Unfortunately, it is evident that the Huacuco Drilling Environmental Permit became mired in the same political quagmire that impeded the ED Mining Environmental Permit process. As a result, DOREX was never able to carry out the exploration operations that it had planned for the Huacuco Exploration License area.<sup>639</sup> Once DOREX had complied with the final step of the MARN permitting process by remitting the Environmental Performance Bond, MARN failed to take any further action and the Huacuco Exploration License expired without the Environmental Permit ever being issued.

**b.     The Pueblos and Guaco Drilling Environmental Permits**

348. In the autumn of 2006, Pac Rim continued to believe that the ED Mining Environmental Permit application and the Huacuco Drilling Environmental Permit applications were still moving forward (albeit slowly) through MARN.<sup>640</sup> At this time, DOREX decided to also apply for Exploration Environmental Permits for the Guaco and Pueblos Exploration Licenses. Ms. Colindres explains that while these Exploration Licenses had been granted

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<sup>636</sup> Colindres Witness Statement, paras. 18-54.

<sup>637</sup> *Id.*, para. 163.

<sup>638</sup> *Id.*

<sup>639</sup> See Four-Year Work Plan (48 months), Dorado Exploraciones S.A. de C.V., Huacuco License, 5 June 2005 (C-194).

<sup>640</sup> See, e.g., Monthly Report of the SPMA, August 2006, Second Week, clause 6 (C-189).

contemporaneously with the Huacuco Exploration License, the exploration activities conducted at Guaco and Pueblos up to that point (such as inspections of the area, mapping and sampling of the surface, etc.), had not required an Environmental Impact Assessment.<sup>641</sup>

349. On 10 October 2006, DOREX submitted the respective Environmental Forms for Guaco and Pueblos.<sup>642</sup> On 26 and 27 October 2006, MARN sent letters requesting DOREX to prepare and submit EISs for the Guaco and Pueblos Drilling Environmental Permits, respectively, and enclosing the Terms of Reference on which these had to be based.<sup>643</sup>

350. Based on the Terms of Reference delivered by MARN, DOREX prepared the EISs for the Guaco and Pueblos Drilling Environmental Permits, which were submitted on 7 and 17 August 2007, respectively, in full compliance of all the requirements established by the Environmental Law, the Environmental Regulations, and MARN.<sup>644</sup>

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<sup>641</sup> Colindres Witness Statement, para. 165.

<sup>642</sup> Environmental Form for Mining Exploration in the Guaco Exploration License, submitted on October 2006, via letter of conduct dated 9 October 2006, from William Gehlen to the Minister of the MARN Hugo Barrera (C-195); Environmental Form for Mining Exploration in the Pueblos Exploration License, submitted on 10 October 2006, via letter of conduct dated 9 October 2006, from William Gehlen to the Minister of the MARN Hugo Barrera (C-195).

<sup>643</sup> Letter from Ing. Zaida Osorio de Alfaro to William Gehlen, dated 27 October 2006 (C-196); Letter from Ing. Zaida Osorio de Alfaro to William Gehlen, dated 26 October 2006 (C-197).

<sup>644</sup> Letter from William Gehlen to Ing. Francisco Perdomo Lino, dated 7 August, 2007, enclosing EIS for the Pueblos Mining Exploration Project; Letter from William Gehlen to Ing. Francisco Perdomo Lino, dated 17 August 2007 (enclosing the EIS for the Proyecto de Exploración Minera Guaco (Guaco Mining Exploration Project)) (C-216).

351. With respect to the Guaco EIS, on 27 November 2007, DOREX received a letter containing a series of Technical Observations relating to the EIS that, in Ms. Colindres' observation, left some doubt as to MARN's true intentions.<sup>645</sup> As she explains:

from an analysis of these [observations] and mindful of the attitude of the MARN with respect to the assessment of the remaining requests, it was obvious that these observations had the sole purpose of delaying the granting of the Environmental Permit. The complexity of the observations had no correlation with the straightforward nature of the mining explorations, nor with the type of observations made by the MARN when it assessed the exploration projects relating to the El Dorado Norte and El Dorado Sur, Santa Rita and Huacuco areas. In addition, practically all the issues raised in the observations made by the MARN had already been treated in the EIS. Finally, they attempted to give us just 20 days to respond to the observations, while, as we have seen, it was not the MARN's practice to set terms for the submission of responses by the titleholder as part of the Environmental Impact Assessment process.<sup>646</sup>

352. By virtue of this, on 4 December 2007, DOREX met with MARN to clarify MARN's observations.<sup>647</sup> Mr. Gehlen responded to MARN's Technical Observations on 8 February 2008.<sup>648</sup>

353. As Ms. Colindres observes that: "[t]he delaying tactics employed by the MARN in issuing the observations relating to the Guaco area project were even more obvious in that

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<sup>645</sup> Colindres Witness Statement, para. 168; Letter from Ing. Ítalo Andrés Flamenco Córdova to William Gehlen, dated 27 November 2007 (enclosing Technical Report to the Observations on the Environmental Impact Study of the Guaco Mining Exploration Project) (C-199).

<sup>646</sup> Colindres Witness Statement, para. 168 (emphasis added).

<sup>647</sup> *Id.*, para. 169.

<sup>648</sup> Letter from William Gehlen to Ing. Francisco Perdomo Lino, dated 8 February 2008 (enclosing Response Report to the Observations on the Environmental Impact Study in Note MARN-DGA-EIS-9521-1733-2007, dated 27 November 2007) (C-200).

authority's processing of the EIS of the project relating to the area known as Pueblos.”<sup>649</sup> In effect, on 9 January 2008, MARN issued a series of Technical Observations that pointed toward the need to prepare a new EIS.<sup>650</sup> MARN further enclosed new Terms of Reference that were very similar to the preceding ones.<sup>651</sup>

354. Despite MARN's unusual behavior, DOREX submitted a response, highlighting in its letter that the previous EIS had already addressed MARN's Technical Observations and stressing the need for MARN's technicians to visit the Project area in order to properly assess the Companies' operations and activities:

[t]he EIS originally submitted contained a majority of the responses to the technical observations issued by the MARN, which is why we consider it necessary that the technicians who assess mining exploration projects visit our installations ... at any time they find convenient, our doors are always open for you [...] Mining exploration is a harmless activity both for the environment and for public health. A field visit to an active exploration project is indispensable for assisting an objective understanding and assessment of these operations.<sup>652</sup>

355. Moreover, DOREX stated as follows in the revised EIS:

We have responded to the request made in Note MARN-DGGA-EIS (9522-0030)/2008, remitted on January 9, 2008, in which you requested a full EIS from us, in accordance with terms of reference

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<sup>649</sup> Colindres Witness Statement, para. 170.

<sup>650</sup> Letter from Arq. Ernesto Javier Figueroa Ruiz to William T. Gehlen, dated 9 January 2008 (enclosing Observations on the Environmental Impact Study of the Pueblos Mining Exploration Project) (C-201).

<sup>651</sup> Colindres Witness Statement, para. 170.

<sup>652</sup> Letter from William Gehlen to Francisco Perdomo Lino, dated February 11, 2008, received March 26, 2008 (enclosing EIS dated February 2008, containing responses to the observations remitted by the MARN in Note MARN-DGGA-EIS (9522-0030)/2008, dated 9 January 2008) (emphasis added) (C-202); Colindres Witness Statement, para. 171.

that are essentially the same as those that were considered during the preparation of the EIS originally submitted.

The EIS submitted here contains expanded information and we are certain that the explanations and expansions made throughout the EIS will be intelligible to any who has made at least one visit to a mining exploration operation.

We are extremely concerned that a full EIS has been requested without any specific indication as to how the report originally presented should be expanded. However, we have done everything possible to improve the content of the EIS submitted on August 7, 2007. The expansions and explanations have been prepared by professional specialists in Geology and Environmental Impact Assessment.

Finally, we would request that the EIS originally submitted be subject to a detailed review and comparison with that submitted here, and that you reflect on the environmental cost of using so much paper and ink.<sup>653</sup>

356. Regarding the Companies' invitation for MARN to visit the Project area, Ms. Colindres states, "[u]nfortunately, the MARN's Technicians never accepted repeated invitations from us to visit the company's installations in order to verify the nature of the work which it was proposed to carry out."<sup>654</sup> She goes on to note that "[m]oreover, after the presentation of the new EIS for the Pueblos project, the MARN never changed its unreasonable and unjustified posture with respect to the Environmental Impact Assessment of mining operations."<sup>655</sup>

357. On 1 July 2009, that is, one year and seven months after DOREX had submitted responses to MARN's observations relating to the Guaco Drilling Environmental Permit

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<sup>653</sup> EIS dated February 2008 (containing responses to the observations remitted by the MARN in note MARN-DGGA-EIS (9522-0030)/2008, dated 9 January 2008) (emphasis added) (C-203).

<sup>654</sup> Colindres Witness Statement, para. 173.

<sup>655</sup> *Id.*

application and one year and three months after the DOREX had presented MARN with a second EIS relating to the Pueblos Drilling Environmental Permit application, MARN sent a letter to the company requesting certification of both the Exploration Licenses and the legal documentation accrediting the ownership or possession of the real estate on which the exploration operations would be carried out.<sup>656</sup>

358. Regarding MARN's untimely request, Ms. Colindres concludes:

Aside from being illegal in view of the fact that the Exploration Licenses had already been accompanied (on presentation of the Environmental Form) and given that the legal documentation relating to the properties does not fall within its competence for the granting of an Environmental Permit, this request was illegal given that Article 33 of the [Environmental Regulations] authorizes the MARN to formulate observations only once, and it may only formulate new observations should new issues appear while attempting to resolve the first ones, which is clearly not the case.<sup>657</sup>

359. As with Claimant's other environmental permit applications, Pac Rim again concluded that the process was being impeded by political machinations and not technical concerns regarding the applications.<sup>658</sup>

##### **5. Pac Rim Continues to Increase its Investment in Exploration and Development Activities Through 2006 – 2007**

360. Through 2006 and 2007 Pac Rim continued to invest millions of dollars in project generation and exploration activities in El Salvador, all with the continued expectation and

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<sup>656</sup> Letter from Ing. Marcial Antonio Pineda Zamora to William Thomas Gehlen, dated 24 June 2009 (C-204).

<sup>657</sup> Colindres Witness Statement, para. 175.

<sup>658</sup> Second Shrake Witness Statement, para. 139.

understanding that El Salvador desired and supported foreign investment in and development of its mining industry.<sup>659</sup>

361. For instance, in February 2006, Pac Rim signed a Letter of Intent to acquire an interest in the Zamora gold Project, located 50 km north of San Salvador.<sup>660</sup> Pac Rim's investment in the Zamora Project indicates the Companies' understanding that Pac Rim and El Salvador were engaged in a long-term, mutually beneficial partnership to modernize El Salvador's mining industry:

Zamora is a new discovery that plays well into our exploration strategy for El Salvador of acquiring high-quality gold targets in an important, previously underappreciated mineral belt. ... These new projects complement our advanced-stage El Dorado gold project by providing the Company with long term, organic growth potential.<sup>661</sup>

362. Based on the assurances Pac Rim had been given by various Salvadoran officials, the Companies had been led to believe that the ED Mining Environmental Permit and Exploitation Concession would be issued during 2006. Thus, Pac Rim began to prepare for the anticipated start of construction activities on the El Dorado mine. For example, in March 2006, Mr. Earnest began the process of "pre-qualifying" contractors for the development of the underground workings at the El Dorado Project.<sup>662</sup> In a letter Mr. Earnest sent to solicit a bid, he

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<sup>659</sup> *Id.*, para. 122.

<sup>660</sup> Pacific Rim Mining Corp., Projects: Zamora/Cerro Colorado, El Salvador (C-425).

<sup>661</sup> Press Release, Pacific Rim Mining Expands El Salvador Project Holdings with Acquisition of Zamora Gold Project, dated 7 February 2006 (emphasis added) (C-245); *see also* Press Release, Pacific Rim Announces Fiscal 2006 Quarterly Results, dated 14 March 2006 (C-428).

<sup>662</sup> *See, e.g.*, Letter from Fred Earnest to Underground Mining Contractors, dated 1 March 2006 (C-429).



explained “At this time, Pacific Rim is in the final stages of obtaining the environmental permit for the project. Included in Pacific Rim’s commitments to the government and people of El Salvador is the commitment to hire and train, to the maximum extent possible, workers from the project area. Pacific Rim is searching for contractors that are experienced in the safe and efficient development of underground workings and who have the professional and organizational capacity to train an inexperienced labor force.”<sup>663</sup>

363. In further preparation for the anticipated Exploitation Concession, Pac Rim expanded its management team in the summer of 2006 so that the Companies’ could move forward and develop the Project as soon as the Exploitation Concession had been received. In June 2006, Pete Neilans was hired to serve as PRMC’s Chief Operating Officer (“COO”).<sup>664</sup> As COO, Mr. Neilans was to be responsible for overseeing the construction and operation of the El Dorado gold mine. In August 2006, April Hashimoto began working as PRMC’s Chief Financial Officer (“CFO”).<sup>665</sup> Mr. Shrake confirms that these costly and highly experienced executives were only hired because the Companies had been assured by Salvadoran Government officials that the ED Mining Environmental Permit and Exploitation Concession would be issued in the near future:

We would not have hired Mr. Neilans and Ms. Hashimoto had we not had full confidence that PRES would soon receive the permits necessary to begin mineral extraction at El Dorado.<sup>666</sup>

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<sup>663</sup> *Id.*

<sup>664</sup> Press Release, Pete Neilans Joins Pacific Rim as Chief Operating Officer, dated 16 June 2006 (C-302).

<sup>665</sup> Press Release, April Hashimoto Joins Pacific Rim Mining as CFO, dated 8 August 2006 (C-303).

<sup>666</sup> Second Shrake Witness Statement, para. 124.

364. In September 2006, Pac Rim announced that it had acquired an additional exploration project, the Cerro Colorado Project (located approximately 50 km north of San Salvador and 10 km west of the Zamora Project).<sup>667</sup> As with the Zamora Project, the acquisition of the Cerro Colorado Project further demonstrates the Companies' understanding that El Salvador continued to desire and support a thriving mining industry:

Over the past year, Pacific Rim has been conducting an intensive reconnaissance-style project generation initiative within El Salvador to capitalize on its unique geological knowledge and continue to build its portfolio of high-quality gold projects. The acquisition of the Cerro Colorado project is the latest in this effort. The Company is in the process of staking additional ground between the Cerro Colorado and Zamora projects. This large package will cover what the Company believes to be a significant, 19+ kilometer gold-bearing epithermal system, situated on a prolific gold belt on which numerous new million-plus ounce gold systems have been discovered including Glamis' Marlin and Cerro Blanco mines in Guatemala and the Company's El Dorado deposit in El Salvador.<sup>668</sup>

365. While preparing for the various events that would be set in motion by the approval of the Exploitation Concession, Pac Rim continued to invest heavily in exploration activities. Key developments in 2006 and 2007 include:

- **June 2006:** Pac Rim published an NI 43-101 compliant resource estimate for the El Dorado Project demonstrating the tremendous economic potential of Project. Highlights from the estimate included:

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<sup>667</sup> Press Release, Pacific Rim Mining Acquires Cerro Colorado Gold Project in El Salvador, dated 25 September 2006 (C-258); Pacific Rim Mining Corp., Projects: Zamora/Cerro Colorado, El Salvador (C-425).

<sup>668</sup> Press Release, Pacific Rim Mining Acquires Cerro Colorado Gold Project in El Salvador, dated 25 September 2006 (emphasis added) (C-258).

- Total measured and indicated resources and proven and probable reserves at the El Dorado project of 1,222,000 million gold equivalent ounces, plus a further 115,000 gold equivalent inferred resource ounces;
  - Indicated resources at the South Minita deposit of 350,000 gold equivalent ounces plus a further 77,000 gold equivalent inferred resource ounces.<sup>669</sup>
- **25 July 2006:** Pac Rim amended the June 2006 resource estimate to incorporate inferred resources that were estimated for the Nance Dulce deposit in the El Dorado Project Area.<sup>670</sup>
  - **September 2006:** Pac Rim announced that it had discovered two potential new resources, the Deep Minita and Los Jobos veins within the El Dorado Project.<sup>671</sup>
  - **November – December 2006:** Pac Rim continued to report additional discoveries within the El Dorado Project area.<sup>672</sup>
  - **January – August 2007:** Pac Rim continued exploration drilling in order to expand the resource estimates and to

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<sup>669</sup> Press Release, El Dorado Measured & Indicated Resource Reaches 1.2 Million Gold Equivalent Ounces, dated 19 June 2006 (C-257); *see also* Press Release, High Grade Gold Over Significant Width Intersected at South Minita, dated 24 January 2006 (C-430); Press Release, South Minita Delineation Drilling Yields Additional High Grade Gold; Updated Resource Calculation Initiated, dated 27 March 2006 (“Since discovering the South Minita gold mineralization over a year ago, we have been working hard to delineate this complex deposit so that we could demonstrate the upside economic benefit that these gold ounces offer to the proposed El Dorado mine.”) (C-256); Press Release, Latest South Minita Drill Results Include Best Hole Drilled on El Dorado Project to Date, dated 1 May 2006 (C-255).

<sup>670</sup> Press Release, El Dorado Resource Estimate Increased with Addition of Nance Dulce Deposit, dated 25 July 2006 (C-431).

<sup>671</sup> Press Release, El Dorado Project Exploration Drilling Confirms Extensions to Gold Mineralization in Minita, dated 11 September 2006 (C-421).

<sup>672</sup> Press Release, New Gold Zone Discovered at El Dorado Gold Project, dated 15 November 2006 (C-97); Press Release, Balsamo Discovery Continues to Yield Bonanza Gold Grades; Drill Permit Granted for South El Dorado Claim, dated 13 December 2006 (C-263).

discover new gold zones within the El Dorado Project and elsewhere.<sup>673</sup>

- **August 2007:** Pac Rim announced plans to perform an updated resource estimate for the El Dorado Project to include the Balsamo deposit that had been discovered in late 2006.<sup>674</sup>
- **January 2008:** An updated resource estimate for the El Dorado Project was completed in January 2008. Highlights of the 2008 resource estimate include:
  - Total measured and indicated resources of 1,430,000 gold equivalent ounces, plus a further 282,000 gold equivalent inferred resource ounces.
  - Indicated resources at the Balsamo deposit, one of El Dorado's newest discoveries, of 209,000 gold equivalent ounces plus a further 80,000 gold equivalent inferred resource ounces.<sup>675</sup>

366. As Pac Rim's public announcements demonstrate that into early 2008, Pac Rim remained enthusiastic about the its ability to build a successful mine at the El Dorado Project and openly discussed the Companies' plans to invest in further exploration projects:

Not all resources are created equal – El Dorado is particularly exciting because the gold and silver resources it contains are high

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<sup>673</sup> Press Release, Pacific Rim Announces 2007 Year-End Results, dated 23 July 2007 (C-432); *see also* Press Release, Pacific Rim Mining's High Grade Balsamo Gold Discovery Continues to Grow, dated 6 March 2007 (C-48); Press Release, Balsamo Gold Zone on Pacific Rim Mining's El Dorado Project Continues to Yield High Gold Grades and Take Shape, dated 10 April 2007 (C-49); Press Release, Pacific Rim Mining's Balsamo Gold Deposit Delineation Nearing Completion; Another New Gold-Bearing Vein Discovered, dated 2 August 2007 (C-50).

<sup>674</sup> Press Release, Pacific Rim Mining's Balsamo Gold Deposit Delineation Nearing Completion; Another New Gold Bearing Vein Discovered, dated 2 August 2007 (C-49).

<sup>675</sup> *Id.*

grade and potentially low cost. We believe these resources comprise the critical mass needed to build Central America's next high grade gold mine. ... we believe there are more ounces to find in this part of the Central District that will be the focus of ongoing exploration for years to come.<sup>676</sup>

367. In his Witness Statement, Mr. Ristorcelli observes that the 2008 updated resource estimate “represents an increase of 96% and 104% for Measured and Indicated Resources for gold and silver ounces, respectively; and 98% and 146% for Inferred Resources for gold and silver ounces, respectively....Those increases reflect serious, dedicated and successful mineral exploration work on the part of the Company.”<sup>677</sup>

**H. El Salvador's Demonstrated Support of the El Dorado Project and Repeated Assurances That PRES Would Receive an Exploitation Concession**

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368. As discussed at length in *subsection A*, El Salvador has maintained laws and regulations promoting and fostering metals mining by private parties in El Salvador for well over 100 years. More specifically, prior to Pac Rim's investment in the country, El Salvador had a demonstrated a commitment to ensuring the success of the El Dorado Project, going so far as to pass emergency legislation designed to protect the investment of Claimant's predecessor in the El Dorado Project.<sup>678</sup>

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<sup>676</sup> *Id.* (emphasis added).

<sup>677</sup> Ristorcelli Witness Statement, para. 16 (emphasis added).

<sup>678</sup> See discussion *supra* in *subsection A.6* (El Salvador Takes Emergency Action and Amends its Law in Order to Respond to the Needs of Foreign Investors in the El Dorado Project); see also Dayton Press Release, Encouraging Results from El Dorado Drilling, dated 22 June 2000 (“Bill Myckatyn and Robert Johansing, Project Manager of El Dorado, met with the Vice President and with the Minister of Economy of El Salvador in March 2000 and both offered their support and encouragement for the development of the El Dorado project by Dayton.”) (emphasis added) (C-266); Memo from Robert

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369. El Salvador continued to encourage the development of the El Dorado Project following the 2002 merger between Dayton and PRMC. As detailed by Mr. Shrake in his First and Second Witness Statements, through early 2008, Salvadoran officials were open in their support and enthusiasm for the El Dorado Project and worked to facilitate Pac Rim's and El Salvador's shared goal of developing the El Dorado property.<sup>679</sup>

370. For example, in August 2003, Mr. Earnest reported that the then Minister of Economy, Miguel Lacayo, was eager to see the El Dorado mine be developed and was already thinking of how the Project might benefit Salvadoran companies and suppliers.<sup>680</sup> Minister Lacayo also offered to intervene at the Cabinet level to help the Companies resolve the delays associated with MARN's processing of the ED Drilling Environmental Permit at that time.<sup>681</sup>

371. Likewise, and as described throughout the preceding subsections of this Memorial, Minister Lacayo's successor, Yolanda de Gavidia, continued to champion Pac Rim's cause and to worked to find constructive solutions to questions as they arose by, *inter alia*,

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Johansing to William Myckatyn, dated 21 February 2000 ("We have maintained a reasonably close relationship with Gina [Navas] over the past 6 ½ years and her support is invaluable.") (C-267).

<sup>679</sup> First Shrake First Witness Statement, Section III.D; Second Shrake Second Witness Statement, Section VII.

<sup>680</sup> Denver/El Dorado Trip Report from Fred Earnest to Tom Shrake, dated 14 August 2003 ("The meeting with the economic minister was very favorable. He asked questions about what might be done by the government to help El Salvadoran companies (and individuals in Sensuntepeque) qualify as suppliers to the mine.") (C-272).

<sup>681</sup> *Id.* ("[The Minister of Economy] offered us help in environmental matters saying that at the level of the cabinet he could help us with environmental minister.").

facilitating the permitting process through MARN,<sup>682</sup> working with PRES to amend the area requested in the original Concession Application,<sup>683</sup> and proposing amendments to the Amended Mining Law to clarify the confusion over that Law's surface ownership requirements.<sup>684</sup> Minister de Gavidia was aided in these efforts by Ms. Navas, of the Bureau of Mines, who was publicly supportive of the development of the Project and frequently worked with the Companies in order to attain that goal.<sup>685</sup>

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<sup>682</sup> See e.g., Letter from Fred Earnest to Minister Yolanda Gavidia, dated 19 July 2005 (C-139); Second Shrake Witness Statement, para. 115; Email from Luis Medina to Tom Shrake, dated 9 May 2006 (C-407).

<sup>683</sup> See Discussion *supra* **subsection F.1.a.**

<sup>684</sup> See Discussion *supra* **subsection F.1.b.**

<sup>685</sup> See, e.g., Letter from Gina Navas to Fred Earnest, dated 25 August 2004 (NOA Exh. 6); Email from Fred Earnest to Luis Medina, dated 9 December 2004 (C-281) ("In my conversation with Gina Navas yesterday, she inquired about the status of the environmental approval. I told [her] that we had been maintaining a low profile and applying only subtle pressure. She counseled that we should pursue a path of contact and pressure at the level of the Minister. She informed me that she had personal knowledge of other large EIS studies that had been approved in two months, but with a lot of pressure.") (emphasis added) (C-281); Email from Fred Earnest to Gina Navas de Hernandez, dated 25 November 2004 (C-393); Memo from Fred Earnest to Tom Shrake, dated 28 June 2005 (C-291); Memorandum from Gina Navas de Hernandez to Eli Valle, dated 13 September 2005 (forwarding an internal draft of a proposed reform to the Amended Mining Law to MINEC's legal counsel and noting "I do not neglect to inform you that the draft is urgent.") (R-35); Email from Fred Earnest to Lorena Aceto, dated 3 November 2005 (C-294); Jose Alberto Barrera, *Canadian Firm Invests in Cabanas Gold Mine*, EL DIARIO DE HOY (7 January 2005) ("The Director of the Bureau of Mines said that that the exploitation of minerals in areas like San Isidro is beneficial because the condition of the land makes agriculture difficult, and mining solves some of the problems of development") (emphasis added) (C-394); *I believe that the communities can benefit from developing a mine*, LEGISLATIVE OBSERVATORY (19 June 2006) ("The ministry of Economy sees in mining exploitation the possibility of development in the northern region of the country and cites job creation and construction of roads. With the Mining Law in hand, Gina de Hernández, the Ministry's Director of Hydrocarbons and Mines, asserts that by granting an exploitation permit, they are ensuring that production is carried out in accordance with national legislation and are seeking to protect the environment and the population.") (C-395); *Mining Exploitation: The Conflict Over Gold*, LEGISLATIVE OBSERVATORY (19 June 2006) ("For its part, MINEC is resolute: mining-exploitation in the northern region will provide good returns for the country in terms of economic and social development. ... 'In addition they have to pay 25% of income taxes ... Moreover, there is job

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372. Of even greater import, the El Dorado Project had the attention and support of the highest levels of the Saca Administration, including both President Saca<sup>686</sup> and Vice President Escobar.<sup>687</sup> Regarding the considerable time that Vice President Escobar devoted to the El Dorado Project, Mr. Shrake notes: “[i]t was extraordinary that the Vice President of El Salvador took the time to meet with us – repeatedly – and it gave me great confidence in our ability to collaborate with El Salvador to build and operate a successful mine at El Dorado.”<sup>688</sup>

373. Likewise, PROESA, the agency formed to facilitate foreign investment (and which was headed by Vice President Escobar), provided support and assistance to the Companies throughout their investment in El Salvador.<sup>689</sup> In particular, PROESA maintained close tabs on

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creation; roads and streets being opened up,’ stated [Ms. Navas’, summing it up as follows: ‘I believe that the communities can benefit from developing a mine.’”) (C-395).

<sup>686</sup> Email from Fred Earnest to Tom Shrake, dated 15 February 2006 (“...the Minister of Economy ... confirmed that it is the president’s instructions to present the project [mining law reform] after March 12<sup>th</sup> for reasons of election strategy, to not stir up opposition to the reform project. She said that today [Tuesday] she would be visiting the president to jointly sign and have the initiative ready, The documents have now been signed and are ready to be presented on the indicated dated. This demonstrates that there is no opposition on the part of the government and the auxiliary organizations.”) (emphasis added) (C-295); Government Communications Summary, dated 12 May 2005 (“Fred Earnest has had one meeting with the Vice President and has been introduced to the President of the Republic. Both have expressed their support for the project and willingness to help as needed.”) (C-396).

<sup>687</sup> See, e.g., Second Shrake Witness Statement, paras. 105, 108, 113, 115, 118-19, 129 (describing various meetings and communications with Vice President Escobar); First Shrake Witness Statement, paras. 91-92. El Dorado Project Report for the month ending 31 August 2004 (C-280); Email from Tom Shrake to Mark Klugmann, dated 18 May 2007 (C-306); Government Communications Summary, dated 12 May 2005 (“Fred Earnest has had one meeting with the Vice President and has been introduced to the President of the Republic. Both have expressed their support for the project and willingness to help as needed.”) (C-396).

<sup>688</sup> Second Shrake Witness Statement, para. 105.

<sup>689</sup> See, e.g., Government Communication Summary, dated 12 May 2005 (“PROESA: The government of El Salvador has established a foundation to promote foreign investment in the country ... The board of directors of the foundation is chaired by the Vice President of the Republic and includes the

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Pac Rim's progress through the MARN environmental permitting processes, leveraging connections with the President's office, the Vice President, and Ministry officials to successfully facilitate the forward progress of the various environmental permit applications by MARN's ever-changing roster of bureaucrats.

374. Owing to the demonstrated support and assistance of these Salvadoran officials and others, Claimant was confident that the Government would ultimately issue its environmental permits and Exploitation Concession, notwithstanding the administrative inefficiencies evident in MARN's processing of Claimant's environmental permits.<sup>690</sup>

375. Over the course of the Companies' investment in El Salvador, however, the "top down" nature of the decision-making process within the Saca Administration manifested itself. This was not a cause for concern because Pac Rim had been assured – repeatedly – that the highest levels of the Administration were supportive of the El Dorado Project. Nevertheless, due to the vertical nature evident in the Administration's bureaucratic decision-making processes, the

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Ministers of Economy and MARN among the directors....To-date, PROESA has been very helpful in providing advice and contacts in the senior levels of the government.) (C-396); Email from Lorena Aceto to Fred Earnest, dated 25 July 2005 (C-283); Email from Lorena Aceto to Fred Earnest, dated 28 July 2005 (C-148); Email from Marjorie Chavez to Fred Earnest, dated 18 October 2005 (C-292); Email from Lorena Aceto to Fred Earnest, dated 10 August 2005 (C-149); Email from Erwin Haas to Fred Earnest, dated 28 February 2006 (C-159); Email from Fred Earnest to Tom Shrake, dated 21 March 2006 (C-433); Email from Fred Earnest to Lorena Aceto, dated 16 August 2005 (C-434).

<sup>690</sup> Second Shrake Witness Statement, para. 133; Republic of El Salvador Country Environmental Analysis: Improving Environmental Management to Address Trade Liberalization and Infrastructure Expansion, Report No. 35226-SV, dated 20 March 2006 at 24 (Noting that MARN had "a backlog of nearly 2,500 EIAs pending review, thereby delaying the permitting process from the statutory 60 days to up to two years in some cases.") (C-282); USAID Report at 86 ("The Minister of MARN has identified two core weaknesses in El Salvador's environmental evaluation process. One weakness is that the DGMA lacks sufficient technical expertise, especially regarding water contamination. Consequently, the environmental assessment process stifles and discourages investments rather than contributing to their financial success.") (C-275).

Companies came to realize that many of the permitting delays required intervention at a higher level within the Administration.<sup>691</sup> Thus, Pac Rim relied upon its many supporters within the Administration to facilitate the forward momentum of its various applications.

376. Recall that in December 2004, when faced with delays by MARN's Technical staff, Mr. Earnest wrote a letter to Minister Barrera (per Ms. Navas' recommendation).<sup>692</sup> Following the receipt of that letter, Ms. Colindres, who at the time worked for MARN, remembers that Minister Barrera then pressured MARN's Technicians to finish their review of the EIS, which they had not yet begun to even review:

To my knowledge no one in the MARN had started actively working on the review until that time. Consequently, I regard it as probable that the letter sent by Fred Earnest to Minister Barrera on December 15, 2004, played an important part in advancing the process. I can confirm that from January 2005 and until the time I left the MARN at the end of July that same year, Minister Barrera pressured the Technicians to hasten our review of the El Dorado EIS.<sup>693</sup>

377. Several months later, in May 2005, following yet another a turn-over of personnel within MARN, Mr. Earnest again reached out to Minister Barrera, requesting "that a new coordinator for the assessment be appointed soon and that priority be given to analyzing the

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<sup>691</sup> Email from Francisco R.R. de Sola to Fred Earnest, dated 10 August 2005 (As Mr. Francisco de Sola, a member of MARN's public advisory board advised: "There is nothing to lose by talking up at the top, as I insisted when you visited me. Please call her and introduce yourself, get your President to come down soon, and pay them a comprehensive courtesy call at Medio Ambiente!") (emphasis added) (C-284).

<sup>692</sup> Letter sent by Fred Earnest to Hugo Barrera, dated 15 December 2004 (C-426); *see also* Email from Fred Earnest to Luis Medina, dated 9 December 2004 (C-281).

<sup>693</sup> Colindres Witness Statement, para. 74 (emphasis added).

revised responses to the observations.”<sup>694</sup> Upon receipt of this letter, Minister Barrera again pressured the Technicians to move forward with the permitting process:

It should be stated that on several occasions during the period in which the Responses were being reviewed, I received calls from Ivonne de Umanzor, assistant to Minister Barrera. On each of these occasions she called to hasten my review of the EIS and to ask me when it would be finished. Although I am unaware of the circumstances that prompted these calls, I always had the impression that the Minister, together with personnel at the Ministry of Economy, were anxious to push ahead with the El Dorado Project.<sup>695</sup>

378. In August 2005, following Ms. Colindres’ departure from MARN and the attendant delays that the change in personnel brought, Pac Rim reached out to both PROESA and Mr. de Sola (a member of MARN’s Public Advisory Board and a supporter of the Project). PROESA reached out to MARN, involving Vice President Escobar’s office,<sup>696</sup> while Mr. de Sola reached out to MARN’s Vice Minister, Michelle Gutierrez.<sup>697</sup> Given the intervention by PROESA and Mr. de Sola – both on 10 August – Vice Minister Gutierrez began to make inquiries on PRES’s behalf within MARN, leaning on the Technicians to make progress on the ED Mining Environmental Permit process.<sup>698</sup>

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<sup>694</sup> Letter from Fred Earnest to Hugo Barrera, dated 2 May 2005 (C-138).

<sup>695</sup> Colindres Witness Statement, para. 83 (emphasis added).

<sup>696</sup> Email from Lorena Aceto to Fred Earnest, dated 10 August 2005 (C-149).

<sup>697</sup> *Id.* (“[The Vice Minister] is aware of what is going on but not the details. She is more or less on the same wave length as I in thinking that possibly, ignorance and fear, both prevalent at the lower bureaucratic levels in MARN, may be holding up what would erstwhile be a pretty transparent process.”) (C-284).

<sup>698</sup> Email from Ericka Colindres to Fred Earnest, dated 11 August 2005 (“I am sorry to have left the El Dorado Mine Project unresolved. On Tuesday, 9 August, I sent a memo to Mr. Francisco Perdomo, copying Mr. Javier Figueroa, with my observations on the Mine along with those of Mr. Jorge Palma,

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379. Pac Rim's other supporters within the Administration also intervened on the Companies' behalf to help overcome the bureaucratic delays within MARN.<sup>699</sup> For example, former MINEC Minister Lacayo offered to urge his counterpart at MARN to hasten the processing of the ED Drilling Environmental Permit process.<sup>700</sup> Likewise, Minister de Gavidia successfully intervened on several occasions to pressure Minister Barrera and MARN to push forward with their slow-moving review of the EIS. Indeed, in May 2006, Minister de Gavidia promised Mr. Shrake and Ms. McLeod-Seltzer that she would meet with Minister Barrera to facilitate progress on the ED Mining Environmental Permit and Claimant's other applications being considered by at MARN at that time.<sup>701</sup> A few days later, Minister de Gavidia reported that she had "obtained the commitment from MARN that we should receive a response for at least one of the exploration licenses by the end of this week."<sup>702</sup> And correspondingly, a few days later, DOREX was informed that the exploration permit for Huacuco had entered the public

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(continued)

attaching Mateo Fuller's answers and stating that these answers satisfactorily addressed my comments. Sara Sandoval and Emperatriz Mayorga are satisfied with the answers in volume IV; Mr. Sarmiento is still pending. Today I sent an account or description of the entire project review process, requested by the Deputy Minister of MARN, and I expressed my professional availability to support them.") (C-147).

<sup>699</sup> World Bank Report at xii ("Given the lack of prioritization and the limited number of Ministry staff assigned to review these reports, the Ministry has a current backlog of over 2,500 EIAs. This situation is unsustainable and has substantial negative effects on economic activity and on the overall competitiveness of the country.") (C-282)

<sup>700</sup> Denver/El Dorado Trip Report from Fred Earnest to Tom Shrake, dated 14 August 2003 (C-272).

<sup>700</sup> *Id.* ("[The Minister of Economy] offered us help in environmental matters saying that at the level of the cabinet he could help us with environmental minister.").

<sup>701</sup> Second Shrake Witness Statement, para. 115.

<sup>702</sup> Email from Luis Medina to Tom Shrake, dated 9 May 2006 (C-407).

consultation stage of the Environmental Impact Assessment,<sup>703</sup> and PRES received the Environmental Permit for the Santa Rita Exploration License the following month.<sup>704</sup> Pac Rim understood that the ED Mining Environmental Permit application was complex, and the first of its kind, but the Companies viewed the forward progress on its other applications as signs of continued support by El Salvador.

380. Pac Rim's supporters within the Saca Administration also successfully intervened on its behalf in July 2006, when Minister Barrera made a public statement opposing mining. Following the immediate intervention of Vice President Escobar, Minister Barrera retracted his statement both publicly and in a personal conversation with Mr. Shrake and Vice President Escobar.<sup>705</sup> Recall that Mr. Shrake later met with Vice President Escobar who assured him "that this will all work out for [PRES] and El Salvador."<sup>706</sup>

381. In 2007, however, the ED Mining Environmental Permit process essentially ground to a halt. Pac Rim came to realize that this delay was likely the result of political considerations and not technical concerns with the permitting applications.<sup>707</sup> Mr. Shrake explains:

As time passed and PRES's permits were still not granted, I started to have the feeling that there was opposition to mining at a higher

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<sup>703</sup> Letter from Ing. Francisco Perdomo Lino to Frederick H. Earnest, dated 11 May 2006 (C-187).

<sup>704</sup> Technical Report on the Environmental Impact Assessment for the "Santa Rita Mining Exploration Project," dated 9 June 2006 (C-408).

<sup>705</sup> A. Dimas and K. Urquilla, *Hugo Barrera opens the door to mining*, EL DIARIO DE HOY (23 July 2006) (C-300); Second Shrake Witness Statement, paras. 117-20.

<sup>706</sup> Email from Fred Earnest to Jose Mario, dated 12 July 2006 (C-299); Second Shrake Witness Statement, para. 119.

<sup>707</sup> Second Shrake Witness Statement, para. 128; Colindres Witness Statement, para. 181.

level within the Salvadoran Government that was impeding our permitting process. However it seemed inconceivable to me that the entire mining industry would be proscribed. Particularly after El Salvador had gone through so much trouble to enact a legal regime designed to attract investment in the mining industry. Moreover, I am not aware of another country in the world that has banned metallic mining.<sup>708</sup>

382. Although the environmental permitting delays appeared to be politically motivated, throughout 2007, the Companies' continued to receive assurances from the highest levels of the Administration that the Project remained an economic priority for the Saca Administration and that the ED Mining Environmental Permit and Exploitation Concession would soon be issued.

383. In May 2007, for example Mr. Shrake learned that President Saca had requested his participation in a pro-mining documentary for El Salvador.<sup>709</sup> He testifies: "I took this as a positive step forward and believed that the Saca Administration would soon grant our permits. I also continued to meet with Vice President Escobar who continued to offer her support and advice on how to move the Project forward."<sup>710</sup>

384. Finally, in August 2007, Pac Rim was told that the President had personally agreed to move forward on the El Dorado Project.<sup>711</sup> Mr. Shrake believed that the El Dorado Concession would soon be approved: "We were optimistic that our environmental permit and

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<sup>708</sup> Second Shrake Witness Statement, para. 128 (emphasis added).

<sup>709</sup> Email from Barbara Henderson to Tom Shrake and Catherine McLeod-Seltzer, dated 3 May 2007 (C-305).

<sup>710</sup> Shrake Second Witness Statement, para. 129; Email from Tom Shrake to Mark Klugmann, dated 18 May 2007 (C-306).

<sup>711</sup> Email from Tom Shrake, dated 14 August 2007 (C-307).

Concession would soon be issued and the Companies would soon be able to begin constructing and operating the El Dorado mine.”

385. Over the next several months, senior Administration officials continued to assure Pac Rim remained that the ED Mining Environmental Permit and Exploitation Concession would soon be issued. For instance, in January 2008, Mr. Shrake met with Guillermo Gallegos, who was, at the time, the Majority Leader in Congress, and had been part of a delegation that had visited the Midas Mine in Nevada in November 2006.<sup>712</sup> Mr. Gallegos assured Mr. Shrake that MARN would soon issue the ED Mining Environmental Permit.<sup>713</sup> Mr. Shrake was thrilled to hear this positive news and eager to move forward with the Project. He explains: “Although we had been frustrated by the many delays, at the beginning of 2008, we believed that the Government would soon address our pending El Dorado exploitation applications in accordance with the established terms of El Salvador’s Mining and Environmental Laws.”<sup>714</sup>

**I. President Saca’s Announcement of the *De Facto* Ban on Metallic Mining (2008)**

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386. Given the assurances that Claimant had received even prior to its investment and through the beginning of 2008, Claimant was understandably dismayed when, on 11 March 2008, President Saca was reported as making remarks that were widely interpreted as imposing a

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<sup>712</sup> First Shrake Witness Statement, para. 101.

<sup>713</sup> Second Shrake Witness Statement, para. 132.

<sup>714</sup> *Id.*, para. 133.

*de facto* ban on metallic mining in El Salvador: “What I am saying is that, in principle, I am not in favor of granting those permits.”<sup>715</sup>

387. As explained above, Claimant understood that it was dealing with a “top down” political structure and was thus justifiably alarmed when the head of the Administration announced that he was no longer in favor of mining (whether for political reasons or otherwise). In light of these remarks, the Companies interpreted the reports of President Saca’s March 2008 statement as indicating that the Government was willing to abandon – and indeed, was abandoning – its mining and environmental laws for the sake of political expedience. Claimant thus understood that the ED Mining Environmental Permit and Concession Application would not move forward.<sup>716</sup>

388. On 14 April 2008, hoping to remedy the situation, Mr. Shrake wrote a letter to President Saca, requesting a meeting with the President “so that we can present the details of our project and exchange the best possible solutions.”<sup>717</sup>

389. Ultimately, the U.S. Ambassador to El Salvador, Charles T. Glazer, arranged for Mr. Shrake to meet with President Saca in San Salvador on 25 June 2008. The meeting was attended by President Saca; Mr. Shrake; Ambassador Glazer; Mr. Donn-Allan Titus, the Economic Counselor at the U.S. Embassy to El Salvador; Mr. Carlos José Contreras Guerrero,

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<sup>715</sup> *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 March 2008) (C-1).

<sup>716</sup> First Shrake Witness Statement, para. 116.

<sup>717</sup> Letter from Tom Shrake to President Elías Antonio Saca González, dated 14 April 2008 (NOA Exh. 8).



who, as mentioned above, had become Minister of the Environment in January 2007; and Minister Yolanda de Gavidia, the Minister of the Economy.<sup>718</sup>

390. At this meeting, President Saca assured Mr. Shrake that he was not opposed to mining, but clarified that he was worried that issuing permits to PRES would cost his ARENA party votes in the upcoming elections. President Saca stated that his Administration would issue PRES both the ED Mining Environmental Permit and Exploitation Concession for El Dorado in April 2009, after the national elections scheduled for March 2009.<sup>719</sup> President Saca then told Mr. Shrake that he should meet with Ministers Guerrero and de Gavidia to find a solution that would not hurt the ARENA party in the upcoming elections.<sup>720</sup>

391. Later in the day on 25 June 2008, at President Saca's direction, Mr. Shrake met with Minister Guerrero. Although President Saca had requested Minister de Gavidia to attend this meeting as well, she did not appear, and resigned her position as Minister of the Economy the next day.<sup>721</sup> Mr. Shrake and Minister Guerrero were not able to come to any sort of agreement at this meeting.<sup>722</sup>

392. Despite President Saca's assertions to Mr. Shrake at their 25 June 2008 meeting that he was in favor of mining – and his encouragement for Mr. Shrake to work with his

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<sup>718</sup> First Shrake Witness Statement, para. 119.

<sup>719</sup> Second Shrake Witness Statement, para. 139.

<sup>720</sup> *Id.*, para. 139.

<sup>721</sup> First Shrake Witness Statement, para. 120; *see also* Yolanda de Gavidia deja el Ministerio de Economía, ELSALVADOR.COM (27 June 2008) (C-60).

<sup>722</sup> First Shrake Witness Statement, para. 120.

Ministers to find a satisfactory arrangement – President Saca continued to make anti-mining statements in public.<sup>723</sup>

393. Following these developments, Mr. Shrake no longer believed that El Salvador’s officials (and in particular, President Saca) were dealing with him in good faith.<sup>724</sup> In the meantime, the Companies’ financial situation continued to deteriorate as a direct result of the newly announced *de facto* ban on metallic mining in El Salvador. On 29 February 2008 – just prior to President Saca’s reported comments in mid-March – PRMC’s stock had been trading at approximately US\$1.21 per share. By 30 June 2008, the share price had fallen to US\$0.80 – a decline of more than 30%.

394. In July 2008 Pac Rim made the difficult decision to suspend all drilling activity at the El Dorado project.<sup>725</sup> This decision was made in order to preserve capital and substantially reduce Pacific Rim’s El Salvador investment activity while the El Dorado licensing issues remain unresolved. The Companies were also forced to make the wrenching decision to lay off over 200 employees in El Salvador at the end of July 2008.<sup>726</sup> In September 2008, Mr. Shrake

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<sup>723</sup> See *Saca afirma que no concederá permisos de extracción minera* (15 July 2008) (C-61). The original Spanish text of the article reads: “Al ser consultado sobre declaraciones de la empresa canadiense Pacific Rim, que podría iniciar un proceso de arbitraje internacional contra el Estado, Saca dijo que ‘hoy por hoy no daré ningún permiso para la minería, mientras no se cumplan’ dos requisitos.”

<sup>724</sup> First Shrake Witness Statement, para. 124.

<sup>725</sup> Press Release, Pacific Rim Suspends Further Drilling in El Salvador Until Mining Environmental Permit Granted; Local Staffing Reduced, dated 3 July 2008 (C-262).

<sup>726</sup> Press Release, Pacific Rim Suspends Further Drilling in El Salvador Until Mining Environmental Permit Granted; Local Staffing Reduced, dated 3 July 2008 (C-262); Second Shrake Witness Statement, para. 141.

traveled to Vancouver to lay off employees in that office.<sup>727</sup> Also in November 2008, PRMC vacated the offices it had previously leased, and moved into smaller office space in Vancouver, which it shares with a number of other companies.<sup>728</sup> Since then, there have been further layoffs in El Salvador, Canada, and the United States.

395. Since July 2008 Pac Rim has restricted its activities at El Dorado to low-cost surface exploration work, minor community and environmental initiatives, security, and non-recurring expenditures related to reductions in activity, and has not conducted any significant exploration work to further advance the El Dorado Project.<sup>729</sup>

396. Following several additional efforts to reach an amicable solution with the Government, Claimant submitted a Notice of Intent under CAFTA Article 10.16 on 9 December 2008.<sup>730</sup>

397. On 9 February 2009, President Saca was quoted in the press as stating:

While Elías Antonio Saca is in the Presidency, he will not grant a single permit [for mining exploration], not even environmental permits, which are issued prior to [the Mining Environmental Permits] being granted by the Ministry of the Economy.

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[Claimant is] about to file an international complaint, and I would like to reaffirm, I would prefer to pay the \$90 million than give them a permit.<sup>731</sup>

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<sup>727</sup> First Shrake Witness Statement, para. 126; Second Shrake Witness Statement, para. 141; Press Release, Pacific Rim Mining Announces Head Office Cutbacks, dated 18 September 2008 (C-64).

<sup>728</sup> First Shrake Witness Statement, para. 126.

<sup>729</sup> Pacific Rim Mining Corp. Project Overview: El Dorado (C-23).

<sup>730</sup> First Shrake Witness Statement, paras. 127-28.

398. Also, in February 2009, it was reported that then Presidential candidate, Mr. Mauricio Funes, agreed with the *de facto* ban on mining in an open letter styled “*Bienvenido Buen Pastor*.”<sup>732</sup>

399. On 15 March 2009, Mr. Funes won the presidential elections in El Salvador. Following the elections, the Companies’ representatives again reached out to both President Saca and President-elect Funes to see if a negotiated solution could be reached.<sup>733</sup>

400. Unable to obtain such a solution, Claimant filed this arbitration 30 April 2009.

### III. APPLICABLE LAW

401. The claims in this arbitration are brought under Article 15 of the Investment Law of El Salvador. Article 15 provides that:

In the case of disputes arising between foreign investors and the State, regarding their investment in El Salvador, the investors may submit the dispute to: (a) the International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by means of conciliation and arbitration, in accordance with the Convention on Settlement of Investment Disputes Among States and Nationals of other States (ICSID Convention) ...<sup>734</sup>

402. As the text of the provision makes clear, Article 15 does not specify the source(s) of the legal obligation(s) that must give rise to the “disputes” submitted to ICSID arbitration

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(continued)

<sup>731</sup> See Notice of Arbitration, para. 78 (quoting *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 Mar. 2008) (emphasis added) (C-1)).

<sup>732</sup> First Shrake Witness Statement, para 130; *Un año de espera*, DIAROCOLATINO.COM (19 May 2010) (C-65).

<sup>733</sup> First Shrake Witness Statement, para. 131.

<sup>734</sup> Investment Law, art. 15 (CLA-4).

there under. As long as such disputes are “regarding [the investors’] investment in El Salvador,” they may be submitted to ICSID jurisdiction.

403. In turn, Article 42 of the ICSID Convention provides that:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>735</sup>

404. In this case, the Parties have not agreed to the application of any particular rules of law and Article 15 of the Investment Law, which is the instrument of consent to arbitration, does not contain an applicable law clause. Thus, the Tribunal should proceed under the second sentence of ICSID Convention Article 42(1) by applying, “the law of the Contracting State party to the dispute ... and such rules of international law as may be applicable.”

405. The second sentence of Article 42(1) has given rise to some debate in terms of its precise application, but in principle it is non-controversial that: (1) both domestic and international law may be applied by the Tribunal, as relevant, although international law will prevail in the event of any inconsistency between the two bodies of law; and (2) domestic law must in any event provide the factual predicate for many of the claims at issue, particularly in giving content to the rights and expectations that were destroyed by the Respondent’s illegal conduct.

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<sup>735</sup> ICSID Convention, art. 42(1).

**A. Salvadoran Law as a Factual Predicate for the Claims**

406. With regard to the second issue, the Claimant's rights and expectations in this case must be defined with reference to the domestic legal framework that was in effect when it invested in El Salvador, and to which its investments were specifically subject. In this context, the primary laws of relevance for the resolution of the present dispute are: (1) the Amended Mining Law and the corresponding Amended Mining Regulations, in accordance with which PRES submitted its Concession Application; (2) the Environmental Law and the Environmental Regulations, in accordance with which PRES and DOREX both submitted their various environmental permit applications; (3) the Constitution of El Salvador, which "prevail[s] over all laws and regulations;"<sup>736</sup> and (4) certain well-accepted principles of administrative law, which gave further content to the duties of MINEC and MARN in processing the Enterprises' applications. Claimant will address the application of these laws and principles in **Section IV**, below.

**B. The Investment Law as the Dispositive Law**

407. In considering the application of ICSID Convention Article 42(1) with regard to the dispositive law in this case, it is important to indicate from the outset that the rules of treatment for investors and protection of their property under the Salvadoran Investment Law are specifically intended to be consistent with international law. As explained in **Section II.A** of this Memorial, the Investment Law was enacted in 1999, as one of a series of legal reforms and internationalization measures intended to "plug [El Salvador] into the worldwide chain of

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<sup>736</sup> Constitution of the Republic of El Salvador, art. 246 (CLA-1).

globalization,”<sup>737</sup> modernize El Salvador’s legal framework and make it a more attractive destination for responsible foreign investment. In this regard, the Statement of Purpose indicates that the Investment Law was being proposed in recognition of the fact that:

[W]ith the globalization of the world economy in the 1990s the flow of foreign investment to third countries is increasing, requiring such countries to adopt legislation that provides their investments the necessary legal certainty [*seguridad jurídica*], especially with regard to treatment for the establishment and operation of the same. This circumstance has increased competition among the different countries in the attraction of foreign capital, obliging them to adopt measures that allow them to be more competitive.<sup>738</sup>

408. More specifically, as Respondent pointed out at the jurisdictional phase of this arbitration,<sup>739</sup> the Statement of Purpose indicates that the Investment Law was intended to ensure that the Salvadoran legal framework conformed to the requirements of “the best international practices in investment,” as considered in light of the numerous bilateral investment treaties which El Salvador had entered into with other countries during the 1990s, as well as “the best practices recognized at the international level” as the ideal mechanisms for promoting investment.”<sup>740</sup>

409. This is also confirmed in the Preamble to the Investment Law, which provides that:

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<sup>737</sup> 1995 Mining Law Debates at 57 (C-274).

<sup>738</sup> Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, dated 2 June 1998, Statement of Purpose, Introduction (emphasis added) (RL-101).

<sup>739</sup> Respondent’s Memorial on Objections to Jurisdiction, para. 370.

<sup>740</sup> Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, dated 2 June 1998, Statement of Purpose, Introduction (emphasis added) (RL-101).

In order to increase the level of foreign investment in the country, it is necessary to establish an appropriate legal framework that contains clear and precise rules, in accordance with best practices in this area, that enable us to compete internationally in an effort to attract new investment.<sup>741</sup>

410. Similarly, in setting out the reasoning behind the specific investment protections and guarantees established under the Investment Law, the Statement of Purpose indicates that the principles reflected in these measures are based upon the notion that:

[W]ith regard to the treatment afforded to investments [by the State] this should be fair and equitable, non-discriminatory, and without any limitations other than those established in the domestic legal framework. In this regard, it is important to expressly establish in the law the conditions of this treatment, such that the investor has clear and precise knowledge of the rules in which it will establish and carry out its investments, as well as the guarantees to which it is entitled.<sup>742</sup>

411. Thus, the purpose of the Investment Law makes it clear that the law is intended to reflect, and should be construed in light of, the “best practices” in international investment law, including: (i) the principle of fair and equitable treatment; and (ii) the protection of foreign investors’ legitimate expectations, particularly as based upon the rules established in the existing legal framework.

412. Notably, these latter principles – fair and equitable treatment and protection of legitimate expectations – also go hand-in-hand with the cardinal principle of *seguridad jurídica* (“**legal certainty**”), as enshrined in the Constitution of El Salvador and developed by the relevant Salvadoran jurisprudence.

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<sup>741</sup> Investment Law, Preamble, para. IV (CLA-4).

<sup>742</sup> Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, dated 2 June 1998, Principles of Protection and Guarantee (emphasis added) (RL-101).



413. Indeed, the Constitution of El Salvador – alongside relevant international law and practice – is necessarily of fundamental importance in construing and applying the protections and guarantees provided to foreign investors under Salvadoran law, and particularly under the Investment Law. As the Constitution expressly indicates: “The principles, rights, and obligations established by this Constitution shall not be altered by the laws that govern their exercise. The Constitution shall prevail over all laws and regulations....”<sup>743</sup>

414. The current Constitution of El Salvador was adopted in 1983. As confirmed by Professor Fermandois, an expert on Latin American constitutional law, the Salvadoran Constitution, “establishes the three characteristics most typically recognized by the legal literature as belonging to a nation under the Rule of Law: separation of functions among national agencies, recognition and protection of individual rights of persons, and subjection of the government – and of the exercise of sovereignty in general – to the Constitution and the law.”<sup>744</sup>

415. In the following paragraphs, Claimant sets out the salient principles established in the Salvadoran Constitution and recognized in the international law of investment protection, in conjunction with the specific provisions of the Investment Law.

**1. Legality, Non-Arbitrariness and Proportionality in State Action**

416. Article 86 of the Salvadoran Constitution establishes the principle of legality, in light of the constitutional structure of separation of powers. In accordance with that provision:

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<sup>743</sup> Constitution, art. 246 (CLA-1).

<sup>744</sup> Expert Report of Arturo Fermandois, dated 21 March 2013 (“**Fermandois Expert Report**”), at 22 (citing CASSAGNE, Juan Carlos, *Derecho Administrativo* [Administrative Law], Volume I, Seventh Edition, Lexis Nexis, Buenos Aires, 2002, at 75–76).

### **Article 86**

Public power stems from the people. Government agencies shall exercise it independently in accordance with the respective powers and jurisdictions established by this Constitution and the laws. The powers of the Government agencies may not be delegated, but said agencies shall collaborate among themselves in the exercise of their public duties.

The fundamental branches of Government are the Legislative, the Executive, and the Judicial.

Government officials are representatives of the people and have no powers other than those expressly conferred on them by the law.<sup>745</sup>

417. Given that the actions of the Executive Branch and the President of the Republic more specifically are at issue in the present dispute, the principle of legality established in Article 86 of the Constitution must also be viewed in conjunction with Articles 164 and 168, which provide as follows:

### **Article 164**

Any decrees, decisions, orders, or resolutions issued by officials of the Executive Branch that exceed the powers established in this Constitution shall be null and void and shall not be obeyed, even if issued with the intent of submitting them to the Legislative Assembly for approval.

### **Article 168**

The President of the Republic is empowered and obliged to:

1 – Observe and enforce the Constitution, treaties, laws, and other legal provisions

[...]

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<sup>745</sup> Constitution, art. 86 (emphasis added) (CLA-1). In contrast, individuals have the right to do anything the law does not expressly prohibit. *Id.*, art. 8. (CLA-1).

8 – Sign, promulgate, and publish the laws and ensure that they are enforced

[...]

14 – Decree regulations necessary to facilitate and ensure the application of the laws he is responsible for enforcing

20 – Exercise the other powers conferred upon him by law.<sup>746</sup>

418. As indicated in Article 168, the President is obliged to observe and enforce the laws, to publish and ensure application of the laws, and to exercise powers conferred upon him by the laws. On the other hand, the President, and the Executive Branch of Government in general, is not empowered to make, interpret, amend or repeal laws. Instead, these functions are to be carried out exclusively by the legislative branch of government, *i.e.*, by the *Asamblea*.<sup>747</sup> Furthermore, in the event that the President or any other official within the Executive Branch of Government were to attempt to make, interpret, amend or repeal a law through a decree, decision, order, or resolution, such action would be “null and void” under the Salvadoran constitutional framework.<sup>748</sup>

419. Furthermore, it is important to point out that the principle of legality applies equally to all representatives of the Executive Branch, including in the specific context of administrative proceedings. In this context, legality entails the conferring of a specific authority upon a government agent (which serves as a limitation upon the actions of that agent), *as well as*

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<sup>746</sup> Constitution, art. 164, 168 (CLA-1).

<sup>747</sup> *Id.*, arts. 121, 131.5, 142.

<sup>748</sup> *Id.*, art. 164 (emphasis added).

a corresponding duty for the agent to carry out that authority in accordance with the terms of law.<sup>749</sup> As explained by the relevant Salvadoran doctrine:

The competency [conferred upon an administrative agency by the law] is imperative and not optional; therefore, the agency must exercise it. Otherwise, it would fail in its duty. The competency is irrevocable for the agency to which it is granted; therefore, it constitutes a power/duty and not a subjective right.<sup>750</sup>

420. As explained further below, the duty that is imposed upon all agents of the public administration to carry out the duties conferred upon them by law is also given specific application in the Constitution of El Salvador in the context of the rights to due process and to petition and response.

421. With regard to the application of legality to the protection of individual rights, El Salvador's Constitution falls within the same social-humanistic tradition that lies at the foundation of most of the modern Latin American constitutions.<sup>751</sup> Thus, Article 1 provides that:

El Salvador recognizes the individual as the source and purpose of the activity of the Government, which is organized in pursuance of justice, legal certainty, and the common good.

...

Consequently, the Government is obligated to guarantee the inhabitants of the Republic the enjoyment of freedom, health, culture, economic wellbeing, and social justice.<sup>752</sup>

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<sup>749</sup> See Fernandois Expert Report at 44-45.

<sup>750</sup> RICARDO MENA GUERRA, GÉNESIS DEL DERECHO ADMINISTRATIVO EN EL SALVADOR [THE ORIGIN OF ADMINISTRATIVE LAW IN EL SALVADOR] 116 (2005) (emphasis added) (AF-18).

<sup>751</sup> See Fernandois Expert Report at 19.

<sup>752</sup> Constitution, art. 1 (emphasis added) (CLA-1).

422. As Professor Ferandois highlights in his Expert Report, the principle of “legal certainty” mentioned in Article 1 of the Constitution is a generally accepted principle of law which, “requires a degree of stability from the legal system, so as to allow citizens to foresee the consequences of their actions under the law.”<sup>753</sup> This conforms to the manner in which the principle of legal certainty has been interpreted by the Supreme Court of El Salvador, which describes the principle in the following terms:

Legal certainty is, from the perspective of constitutional law, the condition resulting from the legal system's predetermination of the boundaries of legality and illegality in the actions of individuals, which implies a guarantee of the fundamental rights of the individual and a limitation on arbitrary action by the government. It may manifest itself in two ways: first, as an objective requirement of structural and functional regularity of the legal system through its rules and institutions; and, second, in its subjective aspect, as certainty of the law, *i.e.*, as a projection, in personal situations, of objective certainty in the sense that the subjects of the law may determine their present conduct and formulate expectations for future legal actions under reasonable standards of predictability.<sup>754</sup>

423. Thus, legal certainty establishes a guarantee against arbitrariness in State action, both in light of the objective principles of separation of powers and strict legality, as well in light of the right enjoyed by subjects of law to, “determine their present conduct and formulate expectations for future legal actions under reasonable standards of predictability.”<sup>755</sup> As indicated above, legal security in its subjective aspect is intimately related to the protection of legitimate expectations as that concept has been developed under international investment law.

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<sup>753</sup> See Ferandois Expert Report at 25.

<sup>754</sup> Supreme Court of El Salvador, Constitutional Law Division, Judgment in case No. 305-99 dated 19 March 2001 (emphasis added).

<sup>755</sup> *Id.*

In addition, it is also linked to the guarantee against retroactivity in the law, which is specifically recognized in Article 21 of the Constitution.<sup>756</sup>

424. Aside from enshrining legal security as a cardinal principle, the Constitution of El Salvador also circumscribes arbitrariness in State action through Article 3(1) of the Constitution, which provides that: “All people are equal before the law. No restrictions may be imposed on the enjoyment of civil rights based on nationality, race, sex, or religion.”<sup>757</sup> As Professor Fernandois explains, the principle of equality in the Latin American constitutional order is closely linked to the principles of non-arbitrariness and proportionality in State action:

In order to determine if equality before the law is being violated, it is necessary to also address the objective sought by the lawmaker when intervening in the fundamental right in question, which must be adequate, necessary, and tolerable for its recipient, as indicated by the most authoritative legal scholarship.<sup>758</sup>

425. The foregoing constitutional principles – requiring that all State action *vis-à-vis* individuals be strictly legal, non-arbitrary and proportional – must inform the standards of

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<sup>756</sup> Constitution, art. 21 (“Laws shall not have a retroactive effect, except in matters of public order and in criminal matters when the new law is favorable to the offender. [ ] The Supreme Court of Justice shall always have the authority to determine, in accordance with its jurisdiction, whether a law is a public order law or not.”).

As Professor Fernandois explains, application of the general principle of non-retroactivity “within the context of the modern Rule of Law” entails that a law may only be applied retroactively when such application would be to the benefit of the affected individual. *See* Fernandois Expert Report at 31-32 (quoting CESAR LANDA ARROYO, TRIBUNAL CONSTITUCIONAL Y ESTADO DEMOCRÁTICO [CONSTITUTIONAL COURT AND DEMOCRATIC STATE] 786-87 (3<sup>rd</sup> ed., 2007).

<sup>757</sup> Constitution, art. 3(1) (CLA-1).

<sup>758</sup> Fernandois Expert Report at 31 (citing Tomás Ramón Fernández, *De la Arbitrariedad del Legislador. Una crítica de la jurisprudencia constitucional* [On the Arbitrariness of the Lawmaker. A Critique of Constitutional Jurisprudence], EDITORIAL CIVITAS 34, 42 (1988) at 34, 42); *see generally* at 29-31.

treatment set out in the Investment Law, and particularly Articles 5 and 6 thereof. These articles provide that:

**Article 5**

Foreign investors and the commercial companies in which they participate, shall enjoy the same rights and be bound by the same responsibilities as local investors and partnerships, with no exceptions other than those established by law, and no unjustified or discriminatory measures which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of their investments, shall be applied to them.

**Article 6**

Any individual or legal entity, local or foreign, may make any type of investments in El Salvador, except those limited by law, and may not be subjected to discrimination or differences due to their nationality, residence, race, sex or religion.

426. In addition, these rules must also be construed in light of the “best international practice in investment protection,” and specifically in light of the principles of fair and equitable treatment and protection of legitimate expectations. As indicated above, these principles were specifically highlighted in the Statement of Purpose for the Investment Law; are consistent with Salvadoran constitutional law and particularly the principle of legal certainty; and, in any event, have supervening effect in the present arbitration pursuant to Article 42(1) of the ICSID Convention.<sup>759</sup>

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<sup>759</sup> See Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, 2 June 1998, Statement of Purpose, at 1 (RL-101); ICSID Convention, art. 42(1).

## **2. The Principle of Economic Freedom**

427. Chapter V of the Constitution establishes the Economic Order of El Salvador, which includes a guarantee of the right to private property, discussed below. More broadly, the provisions of Chapter V establish that:

### **Article 101**

The economic order shall answer primarily to principles of social justice that are conducive to ensuring that all inhabitants of the country have an existence worthy of human beings.

The State shall encourage economic and social development through increased production and productivity and the rational utilization of resources. For the same purpose, it shall support the different production sectors and defend consumers' interests.

### **Article 102**

Economic freedom is guaranteed, provided that it does not run contrary to the interests of society.

The State shall encourage and protect private enterprise with due regard to the conditions required to increase national wealth and to ensure that its benefits reach the greatest number of the country's inhabitants.

428. Thus, as Professor Fermandois confirms, the Constitution of El Salvador guarantees the economic freedom of private parties, subject to the limitations of public interest, "in line with the prevailing tendency in Latin America."<sup>760</sup> Furthermore, it requires the State to encourage and protect private enterprise, in light of its fundamental duty to provide for the economic wellbeing of the population.

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<sup>760</sup> Fermandois Expert Report at 28.



429. Notably, this same principle underpins El Salvador's enactment of the Investment Law, as expressly indicated by the law's Preamble:

It is the obligation of the State to encourage economic and social development through increases in production and productivity;

One of the means of encouraging economic and social development is through domestic and foreign investment, as a result of which resources can be directed at such productive activities as are necessary to generate employment and maintain sustained economic growth for the benefit of all the country's inhabitants....<sup>761</sup>

430. Furthermore, it is also very much in line with the purpose underlying the 1996 Mining Law, which aimed to establish a framework that would be convenient for investors in the mining sector, in order to, "create new job opportunities for Salvadorans, promoting the Economic and Social Development of the regions in which the minerals are found, allowing the State to collect the revenues that are so necessary for the fulfillment of its objectives."<sup>762</sup>

431. Notably, the Preamble to the Investment Law also specifically highlights the importance of attracting investment as a means of enhancing the technology, knowledge and experience of the country relevant to the productive activities being undertaken, so that those activities will be more competitive on the world market:

It is also important to promote and encourage investment in general; to attract foreign investment into the country so that its contributions of capital, technology, knowledge, and experience can increase the efficiency and competitiveness of those productive activities to which the aforementioned resources are directed.<sup>763</sup>

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<sup>761</sup> Investment Law, Preamble, paras. I-II.

<sup>762</sup> 1996 Mining Law, Preamble, para. III (emphasis added) (CLA-210).

<sup>763</sup> Investment Law, Preamble, para. III (emphasis added) (CLA-4).

432. Again, this is in line with the purpose underlying the enactment of the 1996 Mining Law, which aimed to “promote exploration and exploitation of mineral resources through the application of modern techniques that allow making the most of the minerals.”<sup>764</sup> As explained at length in **Section II.A** of this Memorial, El Salvador did not possess the risk capital, technology or experience to develop a competitive mining industry or to otherwise locate or make use of its abundant mineral resources without the aid of private foreign private investment.

433. Thus, the promotion of foreign investment in metallic minerals mining fit squarely within the aims of the Investment Law and the promotion of economic freedom in the service of development.<sup>765</sup>

### **3. Protection of the Right to Property**

434. In addition to the general obligation of the State to promote economic and social development through the protection and promotion of private enterprise, the Salvadoran Constitution also specifically guarantees the right to private property and prohibits the State from interfering with that right except under certain limited circumstances. The ownership and disposal of private property, in its aspect as a fundamental individual right, is established in Articles 2 and 22 of the Constitution, which provide as follows:

#### **Article 2**

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<sup>764</sup> 1996 Mining Law, Preamble, para. II (CLA-210).

<sup>765</sup> In this regard, Article 7(b) of the Investment Law specifically recognizes that: “The subsoil belongs to the State, which may grant concessions for its exploitation,” thereby recognizing that investment in the mining industry, while subject to a special legal regime, is otherwise covered by the protections of the Investment Law. (emphasis added). *See also* Constitution, art. 103 (CLA-1).

Every person has the right to life, physical and moral well-being, liberty, security, work, property and possession, and to be protected in the conservation and defense of the same...

### **Article 22**

Every person has the right to dispose freely of his property in accordance with the law. Property may be transferred in the form determined by law. Wills may be freely made.

435. These basic principles of property protection are reflected in Article 13 of the Investment Law, in the following terms:

### **Article 13**

In conformity with the Constitution of the Republic, domestic and foreign investors are guaranteed protection of their property, and the right to freely dispose of their assets.

436. Within the specific context of the Economic Order of the State, the individual right to private property is recognized in the context of its social function, in the following terms:

### **Article 103**

The right to private property is recognized and guaranteed in view of its social function.

Likewise, intellectual and artistic property is also recognized, for the time and in the form determined by law.

The subsoil belongs to the State, which may grant concessions for its development.

437. As indicated in this provision, concessions for the development of the subsoil are for the development of State property. Indeed, the subsoil, as property in the public domain, *is to be exploited for the benefit of the nation as a whole*, thereby contributing in a very direct way to

the economic development that is, “so necessary for the fulfillment of the [State’s] objectives.”<sup>766</sup>

That is why, as previously indicated, the mining laws of El Salvador have historically recognized that mining is an economic activity *in the public interest* (“*de utilidad pública*”).

438. As stipulated by Article 106 of the Constitution, the State may only deprive a private party of its property rights, even on legally established grounds of public interest, after payment of fair compensation:

**Article 106**

Expropriation shall be admissible on the grounds of legally proven public utility or social interest, after payment of fair compensation.

When expropriation is motivated by causes arising from war, public disaster or when its purpose is the supply of water or electricity, or the construction of housing or highways, roads or public thoroughfares of any kind, compensation will not necessarily be paid in advance.

When the amount of compensation to be paid for property expropriated pursuant to the previous paragraphs justifies it, payment may be made in installments over a period that shall not exceed fifteen years in total, and in such cases the applicable bank interest shall be paid to the person whose property has been expropriated. Said payment shall be established in cash.

...

Confiscation as a penalty or for any other reason is prohibited. Authorities that contravene this rule shall answer at all times with their persons and their properties for the harm caused. The statute of limitations is not applicable to confiscated property.

439. The guarantee against expropriation without compensation is also specifically reflected in the Investment Law, which provides as follows:

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<sup>766</sup> 1996 Mining Law, Preamble, para. III (CLA-210).

## **Article 8**

According to the Constitution of the Republic, expropriation shall proceed, due to legally established cause of public need or social interest, following advance payment of fair indemnity. When expropriation is caused or arises by reason of war, public disaster, or when required for the provision of water or electric energy, or the construction of housing or highways, streets or any type of public roads, the indemnity may not be paid in advance. When justified by the amount of the indemnity, payment may be made in installments, in which case the corresponding banking interest shall be paid.

440. It is important to point out that while Article 106 of the Constitution and Article 8 of the Investment Law do not specifically stipulate that expropriatory measures must be non-discriminatory, as well as necessary and reasonable to achieve their legitimate ends, these requirements are inherent in the Salvadoran constitutional order based on the right to equality, as discussed above. Furthermore, any State measures involving a deprivation of property rights must also be undertaken in accordance with due process of law, as discussed below.

## **4. Due Process and the Right to a Response**

441. The Salvadoran Constitution safeguards the fundamental rights of individuals through the requirement of due process. This requirement is set out in Article 11 of the Constitution, which provides as follows:

## **Article 11**

No person may be deprived of the right to life, liberty, property and ownership, nor of any other of their rights, without first having been heard and defeated in a trial in accordance with the law; nor may a person be tried twice for the same reason.

442. As confirmed by the Salvadoran Supreme Court, article 11 ensures that:

...in order to be legally valid, the deprivation of rights must necessarily be preceded by a process followed ‘in accordance to the law.’ Such reference to the law does not mean that any procedural violation necessarily implies a constitutional violation, but it does require adherence to the content of the right to a

hearing. Some general aspects of such right include, but are not limited to: (a) that the person whose right is sought to be deprived be granted due process, which may not necessarily be special, but the one established for each case by the corresponding constitutional provisions; (b) that such process be aired before pre-established entities, which in administrative cases means processing before a competent authority; (c) that essential procedural formalities be observed during the proceedings; and (d) that the decision be issued in accordance with laws existing prior to the event that motivated it.<sup>767</sup>

443. The guarantee of due process established in the Constitution of El Salvador is specifically applicable in the context of administrative proceedings, as recognized by the Administrative Division of the Supreme Court. As the Court confirms:

This Court holds that an administrative act is comprised of a series of (subjective, objective, and formal) elements which must be present in proper form in order for the act to be valid.

[...]

The procedure is not merely a formalistic requirement for the establishment of the act; rather, it functions as a full guarantee for the concerned party since it provides him with the opportunity to participate in its issuance and to object, if he so desires, to those points on which he disagrees, by submitting any evidence he deems relevant. This requirement is in accordance with our constitutional framework, which provides that “no person may be deprived of the right to life, liberty, property and possession, or any other right held by him, without a prior hearing unless he has first been heard and defeated at trial in accordance with law.”

[...]

Thus, it is clear that an administrative act cannot be produced at the will of the person vested with the office responsible for issuing the act, thereby obviating adherence to a procedure and to the constitutional guarantees. Rather, this person absolutely must

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<sup>767</sup> Supreme Court of El Salvador, Constitutional Law Division, Judgment in case N° 150 – 97, dated 13 October 1998 (emphasis added) (CLA-262).

follow a specified procedure. As a necessary consequence, illegality arises when the act has been issued in violation of a lawfully established procedure and, obviously, when the act has been pronounced by completely and absolutely dispensing with any procedure, i.e., without observing the minimum guarantees to ensure the effectiveness and success of the administrative decisions and the rights of those concerned.”<sup>768</sup>

444. Also closely related to the guarantee of due process in the deprivation of rights is the right to petition and response. As established in Article 18 of the Constitution, this right applies in all cases, regardless of the specific interest at stake:

### **Article 18**

Every person has the right to send written petitions, in a polite manner, to the legally constituted authorities; to have said petitions resolved, and to be informed of the resolution.

445. In light of this specific provision, Professor Fernandois confirms that, “in principle, inaction of an authority in response to a petition of an individual shall be inadmissible under the Constitution, without prejudice to the deadlines and procedural rules that the lawmaker may develop in relation thereto.”<sup>769</sup> This is also confirmed by the Administrative Division of the Supreme Court of El Salvador, which has held that:

[T]he exercise of the right of petition entails the corresponding obligation of all government officials to respond or reply to all requests submitted to them. However, the aforementioned reply cannot be limited to acknowledging receipt of the petition; rather, the respective authority has the obligation to analyze the content of

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<sup>768</sup> Supreme Court of El Salvador, Administrative Law Division, Judgment in case no. 45 – V- 1996, dated 31 October 1997 (emphasis added) (CLA-266).

<sup>769</sup> Fernandois Expert Report at 36.

the request and to make a decision on it in accordance with the powers legally conferred on it.”<sup>770</sup>

## **5. Specific Rules Applicable to Administrative Procedures**

446. Finally, Article 4 of the Investment Law establishes the requirement for El Salvador to provide foreign investors with “brief and simple legal registration procedures ...”<sup>771</sup> As Professor Fernandois affirms, this provision reflects relevant principles of administrative law accepted in El Salvador, including the principles of officiality (requiring the administration “to carry out, *sua sponte*, all the procedures and formalities that may be necessary to render a final decision”);<sup>772</sup> semi-formalism (requiring that administrative procedures not be employed “as an obstacle course to be surmounted as a necessary requirement for the rendering of a final decision, but rather, as an organized channel capable of guaranteeing the legality and correctness of this decision with the utmost respect for the rights of private parties”);<sup>773</sup> and efficiency (requiring that administrative procedures be conducted with a standard of “celerity, simplicity and economy”).<sup>774</sup>

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<sup>770</sup> Supreme Court of El Salvador, Administrative Law Division, Judgment in case no. 404 – 2007, dated 25 February 2010 (emphasis added) (CLA-265).

<sup>771</sup> Investment Law, art. 4.

<sup>772</sup> Fernandois Expert Report at 47 (quoting García de Enterría).

<sup>773</sup> *Id.* at 49 (quoting García de Enterría).

<sup>774</sup> *Id.* at 50 (quoting Cassagne).



#### **IV. THE RIGHTS AND EXPECTATIONS THAT ARE AT ISSUE IN THIS ARBITRATION**

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447. Before applying the dispositive rules of law set out above to Respondent's conduct in this case, it is important to define the legal rights and legitimate expectations<sup>775</sup> of which Claimant was deprived as a result of that conduct. This is particularly important given that Respondent has already raised an issue as to the nature (or even existence) of Claimant's rights and expectations during the preliminary phase of this case. Specifically, Respondent alleges: (1) that it is clear from the plain text of Salvadoran law that, "there is no automatic right to a concession" for an exploration license holder that successfully locates a mineable deposit;<sup>776</sup> and (2) that in any event, PRES did not comply with the "requirements under Salvadoran law which must be satisfied before a company may seek a mining exploitation concession."<sup>777</sup>

448. Thus, according to Respondent's case, "even if the Government of El Salvador were to approve the Environmental Impact Study and grant the necessary Environmental Permit [for the El Dorado Exploitation Concession], the undisputed facts show that PRES would still not have any right to obtain the mining exploitation concession."<sup>778</sup>

449. As Claimant indicated in response to these Preliminary Objections,

PRES's right to a mining exploitation concession at El Dorado is founded upon the following: (1) its undertaking significant exploration (and expense) at the El Dorado site pursuant to its

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<sup>775</sup> In this context, Claimant's legitimate expectations specifically relate to the domestic legal framework and its application, although this is without prejudice to other assurances received by Pac Rim in regard to its investment.

<sup>776</sup> Preliminary Objections, para. 2.

<sup>777</sup> *Id.*

<sup>778</sup> Preliminary Objections, para. 3.

valid exploration licenses, and in full compliance with all the pertinent requirements of Salvadoran law; (2) its discovery and demonstration of the existence of mineable ore deposits within the area covered by those licenses; and (3) its submission of a concession application to MINEC, as required by law.<sup>779</sup>

450. Claimant further explained that, “when an applicant [who is an exploration license holder] complies with the requirements of the Mining Law, the Government has minimal (if any) discretion to deny the concession.”<sup>780</sup> Furthermore, PRES and DOREX “complied with all the requirements imposed on them under the Mining Law and its regulations, the Environmental Law and its regulations, and all other applicable law to obtain the requisite permits and concessions.”<sup>781</sup>

451. In addition, Claimant pointed out that, “PRC’s expropriation claim is hardly limited to Respondent’s expropriation of its rights conferred by domestic law which, in any event, go beyond solely the right to obtain an exploitation concession for El Dorado,”<sup>782</sup> indicating that PRES was in any event, “denied even [the] right [to have its application considered] – in violation of the due process protections to which it is entitled ...”<sup>783</sup>

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<sup>779</sup> Response to Preliminary Objections, para. 130.

<sup>780</sup> *Id.*, para. 36.

<sup>781</sup> *Id.*, para. 41.

<sup>782</sup> *Id.*, para. 137.

<sup>783</sup> *Id.*, para. 134.

452. Finally, Claimant recalled that its case against Respondent was not based solely on expropriation, but also on violation of its rights to fair and equitable treatment and to non-arbitrary and non-discriminatory treatment.<sup>784</sup>

453. Although all of these arguments were put forward in relation to the validity of Claimant's claims under CAFTA – which was the subject of the Preliminary Objections phase of these proceedings – they are nevertheless directly relevant, among other arguments, to PRC's claims under the Investment Law. Since the Tribunal appropriately did not attempt to determine the exact content of Claimant's rights and expectations based on the limited information available during the preliminary phase of proceedings, Claimant will now address this issue by:

- (A) Briefly summarizing the factual context within which PRES submitted its Concession Application in December 2004, as this bears directly upon Claimant's expectations with regard to that process and to the related environmental proceedings;
- (B) Confirming the nature of PRES's legal right to the Exploitation Concession as the holder of the El Dorado Norte and El Dorado Sur Exploration Licenses in December 2004;
- (C) Explaining the purpose and function of the application requirements set out in Article 37 of the Amended Mining Law;
- (D) Confirming that PRES met the formal requirement established in Article 37(2)(d);
- (E) Confirming that PRES and DOREX met the formal requirement established in Article 37(2)(c);
- (F) Confirming that the formal requirement established in Article 37(2)(b) did not apply to PRES and that, even if it did, PRES complied with it.

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<sup>784</sup> *Id.*, para. 139.

**A. Relevant Factual Context**

454. Before considering the relevant Salvadoran legal framework, it is important to briefly reemphasize some of the fundamental facts about Claimant's investment in El Salvador, which Claimant has now finally had the chance to set out for the Tribunal in **Section II** of this Memorial. These facts are critical to understanding how a reasonable investor in PRC's place could or should have expected the laws of El Salvador to be interpreted and applied with regard to its investments in the El Dorado Project.

- *First*, Pac Rim acquired its investment in El Salvador at a time when the owner of the El Dorado Project, *in collaboration with multiple branches of the Government of El Salvador*, was undertaking urgent efforts to move the Project to production, but lacked the funding and exploration expertise to do so, thus opening the door for Pac Rim's participation in the Project;
- *Second*, Pac Rim embodied everything that El Salvador's actions over the prior century-and-a-half – and particularly in the years leading up to the investment – indicated that the Government was aiming to attract: an investor who would bring upfront capital, mineral exploration and development, experience, technology, and social and environmental consciousness to bear upon the exploitation of a public resource, all while providing employment and other development opportunities to an impoverished and economically stagnant rural community;
- *Third*, Pac Rim's investment was received by the Government of El Salvador exactly as one might expect in light of the facts mentioned above: the company was welcomed by officials of the Government at the highest levels, and enjoyed an excellent relationship with the Bureau of Mines,;
- *Fourth*, Pac Rim "walked the walk," immediately rolling up its sleeves and doing everything that the country's new mining, investment and environmental regime aimed to achieve for El Salvador: it commenced an expensive and sophisticated diamond drilling program, entailing many millions of dollars of investments annually; employing hundreds of Salvadorans and bringing to bear its proprietary knowledge of the country's epithermal vein systems to expand the El Dorado resource and discover new mineral resources in the country. Furthermore, it immediately hired a local Community Relations Manager and commenced a program of community consultation about the Project; instituted adult literacy classes and other social programs; and hired highly qualified international experts to ensure that its mine project would meet the highest environmental standards – all while commencing – and ultimately completing – the technical and economic

studies that would enable it to finance the construction of the mine and rapidly move the El Dorado Project into active production all accruing to the direct benefit of the Government of El Salvador;

- Fifth, Pac Rim maintained an open, transparent and collaborative relationship with the relevant Salvadoran administrative agencies, offering to provide whatever information or training would assist them to better fulfill their functions; working with them to reduce the size of its applied-for Concession and obtain new exploration licenses that enabled it to continue its resource expansion efforts at the El Dorado site; repeatedly inviting the relevant technicians and bureaucrats to visit the company's operations; and meeting numerous times with various MARN officials to answer all their specific questions about the proposed mine project. Indeed, Pac Rim maintained an open-door policy with all the stakeholders in the El Dorado Project, including the Government, the community, its Salvadoran employees, and its public shareholders, taking into account any concerns that were expressed and attempting to bring to fruition a "best case scenario" Project for all the interested parties;
- Sixth, in view of all the foregoing, Pac Rim filed its Concession Application with MINEC in December 2004 with the reasonable understanding that the application procedure was a formality: given the long history of Government interest in development of the El Dorado Project and the open working relationship that prevailed between Pac Rim and the Bureau of Mines, there was simply no question that upon administrative verification of the substantive requirements of the law – which largely consisted of verification of the identified proven ore reserves and MARN's sign-off on the environmental viability of the Project – the Concession would be granted. Furthermore, Claimant had no reason to doubt MARN's sign-off, either, since the plans for the Project met the highest international environmental standards and, *a fortiori*, those established under Salvadoran law.

**B. PRES's Right to a Mining Concession under the Amended Mining Law**

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455. As reiterated above, PRES submitted its Concession Application in December 2004, fully confident that it would soon receive its ED Mining Environmental Permit and Exploitation Concession, and would move the El Dorado Project forward into production. The factual context into which Pac Rim invested in El Salvador – as well as the facts that transpired between that time and the date of filing of the Concession Application — provided a more than reasonable basis for these expectations.

456. In addition, however, the laws of El Salvador also gave PRES a *right* to the El Dorado Exploitation Concession, upon demonstrating that it met the requirements of the Amended Mining Law. This conclusion arises from: (1) the nature of mining rights under Salvadoran law; (2) the relationship between mining exploration and exploitation under the Amended Mining Law; and (3) the regulated nature of the opposition and ministerial review procedures that are required before formalization of the concession.

**1. Mining Rights under Salvadoran Law**

457. As indicated above, the Constitution of El Salvador declares that the subsoil of the national territory is property of the State, which may grant concessions for its use.<sup>785</sup> This entails that subsoil mineral deposits are properties in the public domain, intended for the benefit of all the nation of El Salvador. In this regard, it is clear that such exploitation results in taxes, royalties and other direct revenues for the State. Furthermore:

Mining in recent years has been the single most dynamic component of many poorer countries' total productive activity. Thus it has become a potential source of both direct and indirect incomes and a potential catalytic force for faster overall economic growth. In many countries, the mining and metals industry can and should be recognized as an important potential contributor to the critical policy objectives of both job creation and poverty reduction.<sup>786</sup>

458. In this case, the historical record indicates that El Salvador has long been attuned to the potential benefits of promoting a responsible private mining industry in the country. Thus, in the 1881 Mining Code, El Salvador had already established that no private party or company

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<sup>785</sup> Constitution, art 103 (CLA-1).

<sup>786/</sup> Williams Expert Statement at 4-5 (citing International Council on Mining & Metals, THE ROLE OF MINING IN NATIONAL ECONOMIES (ICMM, OCTOBER 2012), at 19, Exhibit JPW6).

could impede another private party from undertaking mining works on its property<sup>787</sup> and that neighboring landowners would be required to sell their land when necessary for the benefit of exploitation of the metals,<sup>788</sup> declaring that: “as mines are the property of the State, their exploitation is for the public benefit ....”<sup>789</sup>

459. Similarly, the Committee Report to the 1922 Mining Code states the expectation that: “as such an industry [as mining] begins to take shape [it would] become one of the country’s primary sources of wealth.”<sup>790</sup> The report further indicated that a private party who had received a mining right from the State, “cannot be allowed to not work the mine for several years,” since this would “subject the Country to the loss arising from the failure to exploit a natural resource.”<sup>791</sup>

460. The 1922 Mining Code itself reiterated that: “the mining industry is for the public benefit (*“de utilidad pública”*); in consequence the owners of the mines have the right to expropriate ...”<sup>792</sup> And, as further explained by the Committee Report, expropriation is appropriate to enable mining activity in El Salvador because, “mining has a special interest in not becoming bogged down in long legal proceedings that can postpone their work indefinitely. The State has a similar interest.”<sup>793</sup>

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<sup>787</sup> 1881 Mining Code, art. 50 (CLA-208).

<sup>788</sup> *Id.*, art. 60.

<sup>789</sup> *Id.* (emphasis added).

<sup>790</sup> 1922 Mining Code, Committee Report, Introduction (CLA-207)

<sup>791</sup> *Id.*, Chapter VII (emphasis added).

<sup>792</sup> *Id.*, art. 17.

<sup>793</sup> 1922 Mining Code, Committee Report, Chapters VIII, IX, X and XI (emphasis added) (CLA-207).

461. This longstanding recognition of mining by private parties as an activity in the public interest was again made manifest at the time of El Salvador's enactment of the 1996 Mining Law, when the *Asamblea* specifically recognized the benefits that mining in Cabañas would bring to economic diversification of the northern region,<sup>794</sup> as well as recognizing limitations on the country's ability to effectively exploit its own mineral wealth.<sup>795</sup>

462. Thus, the first fundamental premise underlying mining rights in El Salvador is that such rights are granted to private parties by the State,<sup>796</sup> with the purpose of providing a public benefit. Furthermore, this benefit arises primarily from the effective exploitation of the mineral resource, which – notwithstanding all the auxiliary benefits that arise from the industry when managed under appropriate guidelines and controls – is the ultimate purpose of mining, and the only reason why any rational entity undertakes investments in that industry.

463. With this in mind, El Salvador has a long tradition of establishing favorable rules for mining investment: a proposition which requires, above all else, the provision of legal security for the private party who stakes its investment capital on the risky attempt of finding and developing the mineral resources of the country.<sup>797</sup> One key element of this strategy was in El Salvador's early recognition that mineral rights have the character of real property rights: thus,

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<sup>794</sup> See generally 1996 Mining Law Debates (C-274).

<sup>795</sup> *Id.*

<sup>796</sup> See 1881 Mining Code, arts. 15-16, 60 (CLA-208); 1922 Mining Code, arts. 12, 18 (CLA-207); Amended Mining Law, arts. 2, 13 (CLA-5).

<sup>797</sup> See Williams Expert Statement at 6-10.



they are fully separable from the rights associated with the surface overlying the relevant mineral deposits;<sup>798</sup> and they may be encumbered and transferred *inter vivos*.<sup>799</sup>

464. Another aspect of this strategy was in El Salvador's express authorization for mining rights holders to demand such legal easements and expropriatory measures as necessary for the rational development of the mineral resources within their concession areas.<sup>800</sup>

465. Finally, the most critical element of El Salvador's historical framework for mining – indeed, the linchpin for any country's ability to attract investment in that industry – was its clear and unequivocal recognition that the discoverer of a valuable mineral deposit has the right to demand a concession from the State for the exploitation of that deposit. Indeed, as noted above, the exploitation of the targeted mineral resources is the fundamental purpose of all mining activity. It is only the expectation of a future exploitation and use of such minerals that drives investors – as it has driven them for centuries, across a wide range of legal, social, cultural and historical frameworks – to contribute their time and capital to the task of geological exploration and mine planning in countries with stable governing systems.<sup>801</sup> .

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<sup>798</sup> 1881 Mining Code, arts. 47-48 (CLA-208); 1922 Mining Code, arts. 35, 40 (CLA-207); Amended Mining Law, art. 10 (CLA-5).

<sup>799</sup> 1881 Mining Code, arts. 18, 47-49 (CLA-208); 1922 Mining Code, arts. 44, 52, 101 (CLA-207); Amended Mining Law, arts. 10, 14 (CLA-5).

<sup>800</sup> 1881 Mining Code, arts. 26, 50, 60 (CLA-208); 1922 Mining Code, arts. 29, 53, 54 (CLA-207) ; Amended Mining Law, arts. 54, 56, 57 (CLA-5).

<sup>801</sup> See Georgius Agricola, *De Re Metallica* at 32 (Latin ed. 1556) (translated by Herbert Clark Hoover and Lou Henry Hoover 1912) (Dover Publications, Inc. 1950) (“Then, the miner should make careful and thorough investigation concerning the lord of the locality, whether he be a just and good man or a tyrant, for the latter oppresses men by force of his authority, and seizes their possession for himself; but the former governs justly and lawfully and serves the common good. The miner should not start mining operations in a district which is oppressed by a tyrant, but should carefully consider if in the

(continued...)

466. Thus, as provided by the 1881 Mining Code:

**Article 26**

Any person who discovers a new vein, stratum, mass or bed of any other type containing metals or another of the substances indicated in Article 13 has the right to its concession, which shall be granted to him by virtue of the corresponding application ....

467. Similarly, Article 29 of the 1922 Mining Code provided:

**Article 29**

Any person who discovers a new vein, stratum, mass or bed of any of the substances listed in Article 12 has the right to receive a concession, which shall be granted to him by virtue of the corresponding application ....

468. These provisions of law do not leave room for doubt as to the right of a discoverer of a mineral deposit to receive the corresponding concession. As explained further in the following subsections, it would be absurd to consider that El Salvador intended to do away with this right when it modernized its mining laws in 1996, with the express purpose of making the legal framework “convenient for investors in the mining sector...”<sup>802</sup> Furthermore, the idea that the right to a mining concession has somehow been removed from the Amended Mining Law is not supported by either the text or the structure of the law, whether viewed on its own or in light of its historical context.

**2. The Relationship Between Exploration and Exploitation Under the Amended Mining Law**

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(continued)

vicinity there is any other locality suitable for mining and make up his mind if the overlord there be friendly or inimical.”).

<sup>802</sup> 1996 Mining Law, Preamble, para. III (emphasis added) (CLA-210).

469. As set out in **Section II.A**, above, the benefits afforded to mining investors under the older Salvadoran Mining Codes, while substantial, were nevertheless better suited for an older era. Most notably, “the limited term and scope of exploration rights ... were not adequate for modern metals mining,” with all the up-front investment that it entails.<sup>803</sup> Thus, in the new 1996 Mining Law, El Salvador streamlined the licensing process for minerals exploitation, adopting a two-phase structure that is similar to many other modern mining laws,<sup>804</sup> as well as significantly extending the times allotted for exploration and initial mine planning.<sup>805</sup>

470. The nature of the relationship between exploration rights and exploitation rights that is established under the 1996 Mining Law (and as amended) is intended to provide continuity between the two phases, and therefore to enhance security of minerals title tenure. This is clear from the following circumstances:

471. *First*, exploration rights under the Amended Mining Law constitute real property rights of the titleholder. As provided in Article 10:

The mineral deposits that are referred to in this Law are real property separate from that which forms the surface territory ... in consequence, the concession is a right *in rem* and transferable *inter vivos*, with the previous authorization from the Ministry; hence, the concession is susceptible to serve as guaranty in mining operations.<sup>806</sup>

472. Notably, the term “concession” as used in Article 10 is not limited to the “Exploitation Concession,” as the latter term is used in later provisions of the law. Instead, it

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<sup>803</sup> Williams Expert Statement at 17.

<sup>804</sup> *See id.* at 11.

<sup>805</sup> *See* 1996 Mining Law, art. 19 (CLA-210); *see also* Williams Expert Statement at 18.

<sup>806</sup> Amended Mining Law, art. 10 (emphasis added) (CLA-5).

includes also the “Exploration License,” which, as employed in the Amended Mining Law, amounts to a “concession” within the general meaning of that term.<sup>807</sup> Indeed, the title of Article 10 is general with regard to whether it refers to Exploration Licenses or Exploitation Concessions, as it refers only to the type of mineral deposit in question, namely “metallic minerals.” Thus, Article 10 is entitled, “*Minas Bienes Inmuebles*” (“Mines [as] Real Property”), with the term “*minas*” defined in Article 2 of the Amended Mining Law as: “*yacimientos metálicos*” or “metallic mineral deposits.”<sup>808</sup>

473. However, an Exploration License under the Amended Mining Law undoubtedly confers rights in subsurface metallic mineral deposits, as is confirmed through reference to other provisions of the Amended Mining Law. For example, Article 50 provides for registration of encumbrances that lie on the “right to explore or exploit...”<sup>809</sup> Obviously, it would not make sense to include such a reference if the right to exploration could not in fact be encumbered and, in turn, it would make no sense to conceive of a right as being subject to encumbrance if it did not have the character of property.

474. Furthermore, the Amended Mining Law also requires the registration of guaranties that have been constituted by the titleholders of “Licenses and Concessions...”<sup>810</sup> The

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<sup>807</sup> In this regard, a “concession” is generally distinguished from a “license,” in the absence of other specific definitions that may be assigned by law (such as occurs in the Amended Mining Law with regard to the “Exploration License” and the “Exploitation Concession”), because whereas the latter only removes prior conditions placed upon the exercise of a right, the former transfers an entirely new right to the grantee.

<sup>808</sup> Amended Mining Law, art. 2 (CLA-5).

<sup>809</sup> *Id.*, art. 50(a).

<sup>810</sup> *Id.*, art. 50(d) (emphasis added).

term “guaranty” (“*garantía*”) is the same term that is found in Article 10 of the Amended Mining Law, where it is indicated that a “concession [for metallic minerals] is susceptible to serve as guaranty in mining operations.”<sup>811</sup>

475. Thus, it is clear that the Exploration License is a “right *in rem*,” as provided in Article 10. Mr. Williams reaches the same conclusion in his Expert Statement, where he indicates that: “the exploration License for metallic minerals, as well as the exploitation Concession for metallic minerals, constitutes a real property right in a mineral estate that is distinct and separate from the real property right in the surface estate.”<sup>812</sup>

476. Second, the object of the property rights conferred under the Exploration License is the corresponding subsurface mineral deposits, notwithstanding that those deposits have not as yet been located at the time the rights are conferred. This is clear from Article 19 of the Amended Mining Law, which provides that: “[t]he Exploration License gives the Titleholder the exclusive faculty to carry out mining activities, to localize the deposits of the mineral substances for which the License has been granted, within the limits of the area given and at an indefinite depth...”<sup>813</sup> That the License holder is being granted a right in the subsoil – property of the State – is therefore undeniable.

477. Third, the subsurface mineral deposits that are the object of the Exploration License are the *same* subsurface mineral deposits that, once located, become the object of the Exploitation Concession. This follows from the last sentence of the first paragraph of Article 19,

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<sup>811</sup> *Id.*, art. 10.

<sup>812</sup> Williams Expert Statement at 28

<sup>813</sup> Amended Mining Law, art. 19 (emphasis added) (CLA-5).

which indicates that the Exploration License, “also grants the exclusive right to request the respective concession” in respect of the selfsame “deposits of mineral substances for which the [License] has been granted...”<sup>814</sup> Thus, as Professor Fermandois confirms:

Legally speaking, the right [to the concession] is born and from the outset adds to the assets of the exploration license holder by mere operation of law, but its enforceability is dependent upon ... the future and uncertain act of discovering minerals ...<sup>815</sup>

478. *Fourth*, the rights and obligations relevant to Exploration License holders and Exploitation Concession holders are set out in the same chapter of the Amended Mining Law (Chapter III). In this regard, the causes for suspension, termination and cancellation of the rights conferred under the two different concessions are exactly the same,<sup>816</sup> as are the eligibility requirements for obtaining the rights in question.<sup>817</sup> Even the obligations imposed during the two different phases are extremely similar and differ only as a function of the different nature of the operational activity to be carried out.<sup>818</sup> All of this indicates that the transition from exploration to exploitation is intended to be seamless.

479. Notably, this is in contrast to the isolation of exploration and exploitation activities in separate chapters under earlier iterations of the Salvadoran mining laws.<sup>819</sup> Indeed, in the 1881 Mining Code, “exploration” was a largely unregulated activity which did not require

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<sup>814</sup> *Id.* (emphasis added).

<sup>815</sup> Fermandois Expert Report at 66-67.

<sup>816</sup> Amended Mining Law, arts. 26-28.

<sup>817</sup> *See id.*, art. 9.

<sup>818</sup> *See id.*, arts. 22, 25.

<sup>819</sup> *See* 1881 Mining Code, Chapters IV-V and 85 (CLA-208); 1922 Mining Code, Chapters IV, X (CLA-207).

the granting of any right by the State, and which did not bear any specific relationship to the eventual granting of a concession.<sup>820</sup> The 1922 Mining Code represented a step forward, creating an administrative authorization to facilitate exploration and granting the holder of the authorization the exclusive right to make a mining claim within the exploration area.<sup>821</sup> However, as previously indicated, the license area was limited to 500 square meters,<sup>822</sup> and the term of the license was limited to 60 days, extendable by subsequent periods only up to a total of one year.<sup>823</sup> Furthermore, it was not necessary to obtain an exploration authorization to carry out exploration works;<sup>824</sup> the beneficiary of the authorization was not under any specific obligations; there was no recognition of a real property right in favor of the beneficiary; and there was no direct transition from the exploration authorization to the mining concession.

480. In this regard, the changes between the old Mining Codes and the 1996 Mining Law, and as amended, are striking. Indeed, it cannot be doubted in light of these changes – specifically recognizing that an Exploration License confers a right in the subsoil mineral estate and directly linking that right to the rights conferred under the Exploitation Concession – that the major preoccupation of the 1996 mining law reform was to increase the security of tenure

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<sup>820</sup> See 1881 Mining Code, arts. 24-25 (CLA-208).

<sup>821</sup> 1922 Mining Code, art. 27.4 (CLA-207).

<sup>822</sup> *Id.*, art. 27.4.

<sup>823</sup> 1922 Mining Code, art. 27.3 (CLA-207).

<sup>824</sup> *Id.*, art. 27.7.

available to the holders of exploration rights, consistent with other contemporaneous mining law reforms in the region.<sup>825</sup>

481. *Fifth*, as Claimant has indicated in its previous submissions in this arbitration, the actual transition from the exploration to the exploitation phase of development is expressly described in Article 23 of the Amended Mining Law, clearly marking the middle of the continuum between the two activities regulated by Chapter III. In accordance with this provision:

Upon conclusion of exploration and verification of the existence of economic mining potential in the authorized area, the grant of a Concession shall be requested for the exploitation and utilization of the minerals, which shall be confirmed by Order of the Ministry followed by the grant of a 30-year contract signed between the Ministry and the Holder ...<sup>826</sup>

482. The language of Article 23 is mandatory. It states unequivocally that the concession “shall be requested” by the Exploration License holder, and that it “shall be verified” by the Ministry. Mr. Williams, an international mining law expert and longtime consultant on mining law reform in numerous countries around the world, concludes unequivocally in his Expert Statement that, “Article 23 confers a substantive right to the grant of a Concession upon the conclusion of exploration work that results in the verification or proof of the existence of economic mining potential.”<sup>827</sup>

483. Professor Ferandois, a specialist in Latin American constitutional law, has no difficulty confirming this conclusion. According to Professor Ferandois’ analysis:

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<sup>825</sup> See Williams Expert Statement at 10-11.

<sup>826</sup> Amended Mining Law, art. 23(CLA-5).

<sup>827</sup> Williams Expert Statement at 29-30.



From this article it is deduced that:

- Once the exploration phase has concluded and the existence of economic mining potential at the authorized site is confirmed, the production concession must be requested;
- This must be verified through a Ministerial Resolution;
- The holder of both of these concessions is the same, that is, the party who conducted the exploration is the one who will be granted the production concession;
- The legislature and the State have an interest in the successful production of the respective mineral deposit, and thus, pursuant to Article 23 it is a mandatory requirement that the production concession be granted. This is because it is not beneficial to the State for an already discovered deposit not to be exploited; however, and this is what is relevant here: it is also not beneficial for it to be exploited by anyone other than the party who discovered it.<sup>828</sup>

484. The consistent conclusions of these two legal experts are supported by the declared public interest in mining in El Salvador, and by the express purpose behind the 1996 mining law reform in that country, *i.e.*, to make the mining sector more “convenient for investors...”<sup>829</sup> As Professor Fermandois confirms, this purpose, as expressed in paragraph III of the Preamble to the 1996 Mining Law, “contains precisely the type of precedent to answer a question of interpretation such as the one at hand, that is, the nature of the legal relationship that the Mining Law gives to exploration vis-à-vis exploitation.”<sup>830</sup>

485. In addition, as Professor Fermandois indicates, the recognition of a mandatory requirement for the granting of an exploitation concession in Article 23 is also dictated by the

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<sup>828</sup> Fermandois Expert Report at 66 (emphasis added).

<sup>829</sup> 1996 Mining Law, Preamble (CLA-210).

<sup>830</sup> Fermandois Expert Report at 63.

rules of systematic and logical interpretation, according to which all provisions of a law must be interpreted consistently and in harmony with each other, and in a manner that is logical and reasonable.<sup>831</sup> In this case, if Article 23 were to be interpreted as allowing for the exercise of discretion, the “exclusive right” conferred under Article 19 would be deprived of practical effect.

486. Furthermore, all the obligations assumed by the Exploration License holder under Article 22, including its payment of fees and assumption of substantial investment commitments, would have been assumed without any legitimate cause or purpose. Plainly, “[i]t would not be reasonable, then, for an investor to provide free exploration services to the Government and then later have its access to the subsequent production of what it discovered banned, restricted or made equivalent to that of a party who did not perform any exploration whatsoever.”<sup>832</sup>

**3. The Regulated Nature of the Opposition and Ministerial Review Procedures That Are Required Before Formalization of the Concession**

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487. As explained in the preceding sections, the discovery and verification of economic mining potential within the Exploration License area is the touchstone for the licensee’s right to transition from the exploration to the exploitation phase of development of the relevant subsoil mineral deposits. Notably, Respondent has never questioned (whether in this arbitration or in any other context) that PRES was the titleholder of the El Dorado Norte and Sur Exploration Licenses, or that the company verified the existence of mineral reserves establishing the economic mining potential within the relevant license areas prior to filing its Concession Application in December 2004. In any event, it would be impossible for Respondent to make

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<sup>831</sup> *Id.* at 64.

<sup>832</sup> *Id.*

such an allegation in light of the overabundance of factual evidence – both in the record of this arbitration and in the public domain – demonstrating the extraordinary value of the mineral reserves at the El Dorado Project, as uncovered through Pac Rim’s diligence, as well as its significant contribution of capital, technology, and specialized knowledge and experience.

488. Given that PRES has undoubtedly fulfilled the only fundamental substantive condition for the granting of a concession provided under Article 23 of the Amended Mining Law, Respondent has attempted to call the company’s right to the concession into question by instead focusing on the provisions set out in Chapter VI of the law, entitled, “Procedure for the Presentation of Applications and Attached Documents.” In particular, Respondent alleges: (i) that the requirement of “solicitation of comments from interested parties” entails that the outcome of the Concession Application process is uncertain; and (ii) that the Minister ultimately has discretion not to issue the Concession for reasons of “public interest,” among others.<sup>833</sup>

489. First, with regard to the objection procedure, which is set out in Articles 40-41 of the Amended Mining Law, it would be erroneous to conceive of this procedure as a kind of open forum in which any interested party may appear to stymie the granting of an Exploitation Concession under the terms of the law. As Professor Fermandois explains: “the[] generic grounds for harm [mentioned in Article 41] must be interpreted in accordance with the exclusive right provided for in Article 19 and the compulsory requirement provided for in Article 23; thus [...], it is not sufficient grounds to eliminate the exclusive right, but rather is meant to serve as a formal control of licenses and technical requirements of the applicant, in the exercise of the right

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<sup>833</sup> Preliminary Objections, para. 45.

to petition, or to protect another type of right that is specifically recognized under the law and that may potentially conflict with the exploitation.”<sup>834</sup>

490. In this regard, the only apparent example of a conflicting right that might call the granting of the concession into question would be an existing mining right previously granted to another party. Indeed, as the Amended Mining Law makes clear, in line with its historical predecessors, the holder of a mining concession carries out activities in the service of the public interest. Consequently, the concessionaire’s right in the exploitation of the State’s mineral deposits prevails over conflicting private patrimonial rights and interests. That is why – as discussed further below – the titleholder of the mining concession is authorized to demand legal easements and, if strictly necessary, even to request expropriation of surface rights holders whose interests will be affected by the mining activities.

491. Second, with regard to the issue of ministerial discretion, the Minister simply does not have discretion under the Amended Mining Law not to grant a mining concession to an Exploration License holder who meets the requirements of the law. In accordance with Article 43, the Minister has a period of fifteen days of receiving a concession application file from the Bureau of Mines within which he may “request reports and order such investigations as he deems convenient” before deciding whether the issuance of the relevant *Acuerdo* granting the concession would be appropriate or not.<sup>835</sup> There is nothing about this provision which suggests any measure of discretion on the part of the Minister. To the contrary, the

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<sup>834</sup> Fernandois Expert Report at 67-68.

<sup>835</sup> Amended Mining Law, art. 43 (CLA-5).

purpose of the provision is plainly to afford the Minister an opportunity to verify that the requirements for the concession have been met.<sup>836</sup>

492. Indeed, Respondent does not appear to rely upon Article 43 of the Amended Mining Law, so much as it relies upon Article 15 of the Amended Mining Regulations. This regulation provides that:

The Licenses and Concessions that this Law refers to, create a juridical relationship between the State and the Title Holders, which brings with it mutual rights, obligations and duties; to issue them, the Direction, or the Ministry will take into consideration amongst other factors, the national interest, the financial and technical capacity of the applicant and the characteristics of the mining activities to be performed.<sup>837</sup>

493. Article 15 of the Amended Mining Regulations is generic in that it refers to the granting of any and all kinds of rights under the law, including rights to Exploration Licenses and to Exploitation Concessions for non-metallic minerals. Notably, Exploitation Concessions for non-metallic minerals do not appear to be preceded by any corresponding exploration license under the terms of the Amended Mining Law,<sup>838</sup> and therefore the granting of those concessions, like the granting of Exploration Licenses for metallic minerals, *do not involve the*

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<sup>836</sup> See Williams Expert Statement at 36-37 (“Thus, whereas it is appropriate for the Minister to have the power to deny a mining Concession if the review of the application documents and or the formal objections raised after publication of notice of the same reveal that the application fails to meet the requirements for the grant of the Concession - for example, if the application does not provide adequate evidence of the discovery of a mineral deposit with economic mining potential - the Minister’s authority under Article 43 must be read as being limited to legitimate, objective, justifiable and nondiscretionary criteria established in the law, in light of the clear right of the discoverer to an exploitation Concession pursuant to Article 23 of the Amended 1995 Mining Law.”).

<sup>837</sup> *Reglamento de la Ley de Minería, Decreto Ejecutivo No. 68*, 19 July 1996, as amended by *Decreto Ejecutivo No. 47* of 20 June 2003 (“Amended Mining Regulations”), art. 15 (CLA-214).

<sup>838</sup> Compare Chapters III and IV of the Amended Mining Law (CLA-4).

*adjudication of prior and acquired rights such as the one established in Article 23* in regard to the Exploration License holder who applies to convert its License into a metallic minerals Exploitation Concession.

494. Furthermore, applicants for Exploration Licenses and for Exploitation Concessions for non-metallic minerals will be subjected to a first-time review of financial and technical capacity, whereas the Exploration License holder that acquires a right to a Concession under Article 23 has already been required to demonstrate its financial and technical capacity in order to acquire and maintain its rights under the Exploration License. In view of these considerations, it cannot be presumed that the considerations enumerated in Article 15 are of equal relevance to the different situations of applicants for the various different types of mining rights.

495. On the other hand, Article 18 of the Amended Regulations is the provision that deals specifically with an application for an Exploitation Concession for metallic minerals. In accordance with that provision, the key requirement to be reviewed by the Ministry is plainly established in the first paragraph, which provides that:

When an application for an Exploitation Concession is requested and an Exploration License preceded it, the demonstration of the mineral deposit that is referred to in Art. 23 of the Law, will be done with documents that are in accordance with the actual studies and activities that were conducted during the term of the License and the final report that is mentioned in the previous Article.<sup>839</sup>

496. This provision confirms that the key requirement to be reviewed by the Ministry when evaluating an application to convert an Exploration License into an Exploitation

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<sup>839</sup> Amended Mining Regulations, art. 18 (CLA-214).

Concession is the demonstration of existence of a mineable mineral deposit. This is confirmed by Professor Fernandois, who indicates that:

Although Article 15 of the cited regulations authorizes the Government agency, as a general rule, to consider national interest, among other factors, in issuing licenses, this general rule is subject to, limited by and secondary to the more specific text of Article 18 thereof, which regulates the specific situation of an exploration licensee who submits an application for production the discovered mineral deposits;

In fact, pursuant to the first two sections of Article 18, it is deduced that when there is an existing exploration license, an application for production is subject to only one essential requirement: demonstrate the existence of the mineral deposit or deposits referred to in Article 23 of the Mining Law. This primary and sole requirement is consistent with the exclusive right of request provided for in Article 19 of the law ...<sup>840</sup>

**C. The Purpose and Function of the Application Requirements Set Out in Article 37 of the Amended Mining Law**

497. In addition to alleging that an Exploration License holder does not have any right to convert its licenses to an Exploitation Concession upon the discovery of a mineable deposit, Respondent also alleges that PRES did not meet the application requirements for the concession as established under Article 37 of the Amended Mining Law. Indeed, this issue was subject to extensive debate during the Preliminary Objections phase of the arbitration.

498. In revisiting this issue, it is important to consider the purpose of the application requirements set out in Articles 36 and 37 of the Amended Mining Law, in light of the Exploration License holder's right to conversion as established in Article 23. In this regard, Professor Fernandois concludes that:

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<sup>840</sup> Fernandois Expert Report at 64-65 (emphasis added).

[T]he requirements of Articles 36 and 37 of the Mining Law for an applicant of a production concession who discovered a mineral deposit are *formal* requirements from a legal standpoint. In other words, **they seek only to confirm that the applicant satisfies the necessary technical, economic and legal conditions to undertake the production, and that such production will include reasonable and standard environmental mitigations.** Given that it is not a point of dispute in this case that the only substantive requirement has already been met by the applicant – the discovery of a mineral deposit – the degree of the State’s discretionary authority is eliminated. Its powers may only be exercised for the purpose of verifying that the legal, economic, geological and environmental background conditions make it possible for the future concessionaire to carry out a production that is economically feasible, legally sound and acceptable in terms of its environmental impacts. This discretionary authority is minimal, it is strictly limited to technical criteria and excludes any consideration of the convenience of the production itself [...]<sup>841</sup>

499. Again, Professor Ferandois’ conclusion is in keeping with the principles of logical and systematic interpretation of laws. In this regard, it would be irrational to assume that the application requirements established in Article 37 serve any function other than that of ensuring that the applicant has verified the existence of a mineable deposit of minerals; that he is capable of mining it; and that he is capable of mining it in a manner which does not cause undue harm to third parties or to the environment.

500. Furthermore, the formalistic nature of the requirements established in Article 37 is confirmed by the structure of the Amended Mining Law, and particularly the fact that the substantive rights and obligations associated with Exploration Licenses and Exploitation Concessions appear in a different chapter of the law from Article 37, which appears in the

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<sup>841</sup> Ferandois Expert Report at 65-66 (emphasis added).



chapter entitled, “Procedure for the Presentation of Applications and Attached Documents.”<sup>842</sup> In this regard, the Amended Mining Law is very similar to the predecessor Mining Codes of El Salvador, which also set out the key requirement for a mining concession – the mineral “discovery” – as well as the rights and obligations of the concession holders, in a different part of the law from the “Forms of Application”<sup>843</sup> and “Formalities for making a claim and processing a concession application.”<sup>844</sup>

501. As these laws make clear, the purpose of the “formalities” associated with the processing of a concession application was to ensure that the applicant had located a mineable deposit. Thus, after filing the application, the applicant was required to “open a shaft or otherwise drill a bore hole using modern methods that allows for the existence of the substance to be verified.”<sup>845</sup> Thereafter, the relevant administrative authority would conduct an investigation to make a record of the characteristics of the deposit, the type of mineral substances it contained and, if possible to determine, their grade.<sup>846</sup> Having completed this investigation, the concession would be issued.<sup>847</sup>

502. As discussed at length in **Section II.A** of this Memorial, El Salvador reformed the regime established under the 1922 Mining Code in 1996, specifically in order to make that

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<sup>842</sup> Amended Mining Law, Chapter VI (emphasis added) (CLA-5).

<sup>843</sup> 1881 Mining Code, Chapter XIII (CLA-208); 1922 Mining Code, Chapter XVII (CLA-207).

<sup>844</sup> 1881 Mining Code, Chapter XIV (CLA-208); *see in particular* arts. 79-82 (requiring a demonstration of the existence of a mineable deposit) and 83-90 (setting out a procedure of notification and objection to the granting of the concession where prior rights would be affected thereby); 1922 Mining Code, Chapter XVIII (CLA-207).

<sup>845</sup> 1922 Mining Code, art. 126 (CLA-207).

<sup>846</sup> *Id.*

<sup>847</sup> *Id.*, arts. 123-27

regime *more convenient for mining investors*. Then, El Salvador reformed the regime again in 2001 to even further strengthen the security of tenure for Exploration License holders by: (1) extending the term of exploration licenses;<sup>848</sup> (2) modifying the requirement in Article 23 to commence exploitation work within one year of signing the concession contract;<sup>849</sup> (3) reducing administrative discretion in setting application requirements;<sup>850</sup> and (4) adding the environmental permit as an application requirement in order to further facilitate compliance with Article 23.<sup>851</sup>

503. In light of this trajectory, it is unreasonable to assume that, by requiring that certain documents be submitted with the Exploitation Concession application in the new Article 37, El Salvador intended to inject an administrative discretion into the procedure under the Amended Mining Law that did not exist even under the “outdated” laws that it replaced. To the contrary, as set out below, the application requirements established in Article 37 have relevant substantive antecedents in the Amended Mining Law. Viewed in light of these antecedents, and as further supported by the principles of administrative law applicable to MINEC (and to MARN) in its review of the Application, it is clear that PRES has complied with each and every one of the requirements for conversion of its Exploration Licenses to an Exploitation Concession.

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<sup>848</sup> 2001 Amendment, art. 8 (CLA-212).

<sup>849</sup> *Id.*, art. 11.

<sup>850</sup> *Id.*, art. 20.

<sup>851</sup> *Id.*

**D. The Requirement of Article 37(2)(d): the Technical-Economic Feasibility Study**

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504. During the previous phases of this arbitration, Respondent questioned whether PRES had complied with the requirement to submit a “Technical-Economic Feasibility Study,” as required under Article 37(2)(d) of the Amended Mining Law. Respondent’s primary arguments in this regard appear to focus on two issues: (1) that the Final Pre-Feasibility Study (previously defined as the “**El Dorado PFS**”) submitted by PRES did not meet the requirements of Article 37(2)(d) because it was called a “Pre-Feasibility Study” and not a “Feasibility Study”; and (2) that the El Dorado PFS did not address the technical and economic justifications for the entire concession area being requested. In order to respond these issues, Claimant will first identify the substantive antecedent for the requirement set out in Article 37(2)(d); and then confirm that the alleged deficiencies identified by Respondent have no impact on PRES’s compliance with that requirement.

**1. The Purpose of the Requirement**

505. The substantive obligations specifically imposed on the holder of an Exploitation Concession are established in Articles 23 and 25 Amended Mining Law. In accordance with Article 25(a), the first obligation of the concessionaire is to:

Exploit, rationally and sustainably, the deposit or deposits which are the object of the Concession; the technical Management of the exploitation must be under the responsibility of expert professionals in the mining industry.<sup>852</sup>

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<sup>852</sup> Amended Mining Law, art. 25(a) (CLA-5).

506. Thus, the fundamental requirement for a mining concessionaire to maintain its rights is that it be capable of mining the relevant deposits in a rational and sustainable manner. The importance of active production as a general matter is also reflected in Article 23 of the Amended Mining Law, which requires that the beneficiary of a concession contract for the exploitation of metallic minerals, “begin the preparatory work for deposit exploitation” within one year from the effective date of the contract.<sup>853</sup> This term may be extended, in an event of *force majeure*, for a maximum additional term of one year only.<sup>854</sup>

507. In fact, the requirement for a concessionaire to promptly commence and maintain its activities is reflective of a long tradition in Salvadoran mining law, the purpose of which has been clearly stated as the need to avoid “the loss arising from the failure to exploit a natural resource.”<sup>855</sup> Thus, Chapter VII of the 1881 Mining Code<sup>856</sup> established the key requirement for a mining concessionaire to engage in active production in order to attain recognition of its mining rights by the State.<sup>857</sup> This requirement was maintained and strengthened in Chapter VII of the 1922 Mining Code,<sup>858</sup> which provided in Article 48 that a mining operation would be considered to have been abandoned under the following circumstances:

1. When six months have passed since the concession was awarded and no preliminary work has been done at the mining property on

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<sup>853</sup> *Id.*, art. 23.

<sup>854</sup> *Id.*

<sup>855</sup> 1922 Mining Code, Committee Report, Chapter VII (CLA-207).

<sup>856</sup> 1881 Mining Code, arts. 40-46 (CLA-208).

<sup>857</sup> *Id.*, art. 40 (“No mine may be considered to be legally protected unless it has established jobs with four operators directly employed in its exploitation”).

<sup>858</sup> 1922 Mining Code, arts. 48-57 (CLA-207).

the surface or underground that would show that the concessionaire has the good faith intention to move forward with mining the concession. Said six month period may be extended if the interested party can provide justifiable grounds for requesting an extension, prior to the end of the initial six month period, or in the event the competent authority deems it necessary to extend it. The extension may not exceed an additional six months.

2. When mining work that had been underway has either been paralyzed for six months, or so severely reduced that it can no longer rationally be considered in relation to the importance or mineral richness of the mining property.

508. In turn, the consequence of abandonment of the mine was that: “the mining concession shall lapse and the rights acquired under the concession shall be lost.”<sup>859</sup>

509. In the 1996 Mining Law, the requirement for a concessionaire to commence work promptly was maintained in Article 23, in the following terms:

If, within the period of one year, counted from the date that the contract was signed, the Holder does not commence the exploitation works, the concession will be cancelled, following the summary procedure, except for reasons of Act of God or force majeure, classified by the Directorate, in which case, an additional period will be granted that will not exceed one year.<sup>860</sup>

510. As explained in **Section II.A** of this Memorial, Article 23 of the 1996 Mining Law was modified in 2001, at the request of Dayton, such that the concessionaire could comply with the requirement to commence work through “preparatory work,” rather than outright production.<sup>861</sup> This amendment was complementary with the extension of the exploration license

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<sup>859</sup> *Id.*, art. 53.

<sup>860</sup> 1996 Mining Law, art. 23 (CLA-210).

<sup>861</sup> 2001 Amendment, art. 11. (CLA-212).

period from five years to eight years,<sup>862</sup> all in recognition of the fact that modern exploration and mine development require significant time, and that if the time afforded for these activities is not sufficient, mining investment will be discouraged.<sup>863</sup>

511. As Mr. Williams explains, modern mining law reforms have generally increased exploration and development times, in view of the requirements of the modern industry. On the other hand, “indefinite extensions of exploration licenses could lead to companies engaging in speculation or ho[a]rding and tying up potentially valuable mineralized areas without engaging in productive development. Thus, many countries that wanted to see mineral exploration result in actual mine development sought a middle ground that lengthened exploration license periods, while still imposing limits intended to stimulate the transition from exploration to exploitation.”<sup>864</sup>

512. This is exactly what El Salvador was attempting to do with the 1996 Mining Law; however, when mining investors made it aware that the “middle ground” it had selected was not long enough, it quickly acted to correct this by extending the term for an additional three years.<sup>865</sup> Notably, however, El Salvador did not entirely remove the term limits on exploration licenses, nor did it eliminate the requirement for concessionaires to commence activities promptly.

513. Again, this reflects El Salvador’s longstanding focus on ensuring that its mineral resources are effectively exploited, a focus that is also clearly reflected in the requirement in

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<sup>862</sup> *Id.*, art. 8.

<sup>863</sup> *See* Williams Expert Statement at 10

<sup>864</sup> *Id.* at 12.

<sup>865</sup> *Id.* at 198.

Article 23 of the Amended Mining Law for an Exploration License holder to request an Exploitation Concession upon discovery and verification of economic mining potential.<sup>866</sup> Indeed, as noted above, Article 23 imposes a *duty* on the Exploration License holder to apply for the concession, just as much as it imposes a duty on the State to grant that concession. As Professor Fernandois confirms, these interrelated duties respond to the fact that:

The legislature and the State have an interest in the successful exploitation of the respective mineral deposit, and thus, pursuant to Article 23 it is a mandatory requirement that the exploitation concession be granted. This is because it is not beneficial to the State for an already discovered deposit not to be exploited; however, and this is what is relevant here: it is also not beneficial for it to be exploited by anyone other than the party who discovered it.<sup>867</sup>

514. In addition to maintaining the requirement for the concessionaire to engage in active production, however, the 1996 Mining Law, and as amended, also incorporates the notion that the exploitation of the mineral resource must be accomplished in a “rational and sustainable” manner, and under the direction of competent professionals.<sup>868</sup> The requirement for “rational and sustainable” exploitation set out in Article 25(a) responds to important considerations revolving around the need to modernize the mining industry in El Salvador and to prevent wasteful or outdated practices. These themes were actively discussed by the *Asamblea* at the time the 1996 Mining Law was enacted, and they are clearly reflected in the terms of the new law. For example, Article 26(b) of the Amended Mining Law indicates that mining activities will be

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<sup>866</sup> Amended Mining Law, art. 23 (CLA-5).

<sup>867</sup> Fernandois Expert Report at 65 (emphasis added).

<sup>868</sup> Amended Mining Law, art. 25(a) (CLA-5).

suspended if the concessionaire carries out its activities, “in a non-technical manner, propitiating waste or generating ruinous practices with the resources.”<sup>869</sup>

515. In view of all the foregoing, it is very clear that the application requirement established in Article 37(2)(d) of the Amended Mining Law – the requirement to present a “Technical-Economic Feasibility Study” – is intended to ensure that the applicant for an Exploitation Concession will be able to move forward with active production of the verified mineral deposit, and to do so in a rational, efficient, and technically competent manner.

516. In view of these considerations, Claimant will now explain why the El Dorado PFS submitted by PRES plainly satisfied the requirement of Article 37(2)(d).

## **2. PRES’s Satisfaction of the Requirement**

517. The El Dorado PFS presented by PRES to the Bureau of Mines is in the record of this arbitration.<sup>870</sup> As can be easily observed in a review of that document, it contains a comprehensive assessment of the planned underground El Dorado mine and the related processing facilities, tailings impoundment and other components of the mine project, including detailed engineering and technical designs and preliminary costing. Based on these detailed plans, the El Dorado PFS concluded that the recovery rate of minerals processed through the El

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<sup>869</sup> *Id.*, art. 26( c).

<sup>870</sup> *See* (C-9)



Dorado plant and CCD circuit would be **99.5%**.<sup>871</sup> Furthermore, the operating costs for the Project were in *the lowest quartile* for gold mining projects on a worldwide basis.<sup>872</sup>

518. The El Dorado PFS also contained detailed information on the Minita deposit, the target of the mine plan. Studies of the Minita deposit, undertaken by Steven Ristorcelli, in his capacity as the Principle Geologist for MDA, indicated an average gold grade of 11.3 gpt (grams per tonne),<sup>873</sup> which he identifies as being very high.<sup>874</sup> Based on Mr. Ristorcelli studies of the Minita deposit, SRK classified 535,586 oz. AUEq (gold equivalent ounces) as “reserves” in the El Dorado PFS.<sup>875</sup> As set out in the CIM definitions that were applied in the preparation of the Study,<sup>876</sup> and as further explained by Mr. Ristorcelli: “mineral reserves are [by definition] determined to be economically recoverable after the application of adequate information on mining, processing, metallurgical, economic and other relevant factors.”<sup>877</sup>

519. In other words, the El Dorado PFS demonstrated – in accordance with the strict NI 43-101 disclosure standards that were applicable both to the Qualified Persons that prepared the El Dorado PFS, as well as to Pac Rim itself – that the Minita deposit could be economically mined using modern, efficient and technologically-sound methods. In fact, so compelling were the results of the El Dorado PFS that Canaccord, the top mining finance company in the

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<sup>871</sup> El Dorado PFS at vi, 113 (C-9).

<sup>872</sup> Press Release, Low Operating Costs Cited in Positive Minita Gold Deposit Pre-Feasibility; Definition Drilling Continues at South Minita, dated 27 January 2005 (C-250).

<sup>873</sup> El Dorado PFS at iv (C-9).

<sup>874</sup> Ristorcelli Witness Statement, paras. 7-8.

<sup>875</sup> El Dorado PFS at iv (C-9).

<sup>876</sup> *Id.* at 201.

<sup>877</sup> Ristorcelli Witness Statement, para. 22 (emphasis added).

business, was lining up to finance the El Dorado Project based on the results of that Study. As confirmed by Mr. Peter Brown: “I and my analysts at Canaccord expressed to Catherine [McCleod-Seltzer] and her team our interest on several occasions that we very much wanted to be first in line to finance the El Dorado Project. The initial two-year pre-production costs of \$50-100 million range would have had the market (including Canaccord) fighting to do the financing of the Project.”<sup>878</sup>

520. In view of these straightforward facts, it is beyond doubt that Pac Rim satisfied the requirement of Article 37(2)(d), which, as indicated above, *is intended to confirm that the applicant has verified the existence of a mineral deposit, and is capable of mining it using rational and technologically-sound methods.*

***a. Feasibility vs. Pre-Feasibility***

521. In light of the foregoing considerations, the fact that the cover page of the document reads, “Pre-Feasibility Study,” and not “Feasibility Study” – a fact seized upon by Respondent during the Preliminary Objections phase of this proceeding - is simply irrelevant to the determination of whether PRES met the requirement established by the Amended Mining Law. As Claimant has explained on previous occasions, the title “Pre-Feasibility Study” was used out of an abundance of caution due to PRMC’s need to comply with the NI 43-101 disclosure standards applicable in the context of the U.S. and Canadian public securities markets. Notably, these standards are designed to protect the interests of unsophisticated investors in

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<sup>878</sup> Brown Witness Statement, para. 7.

publicly-traded mining companies. They are not intended to protect the interests of Pac Rim, of private mining financiers, or of the Government of El Salvador.

522. On the other hand, the El Dorado PFS *was in fact a feasibility study* as that term is generally understood by *mining specialists* such as the members of Pac Rim management that were responsible for making the determination whether to proceed with the El Dorado Project, as well as the Bureau of Mines personnel charged with reviewing PRES's Concession Application. As explained by Mr. Ristorcelli, the El Dorado PFS was, "a type of feasibility study as that term is generally understood by mining and government mining specialists in the context of private transactions..."<sup>879</sup> Indeed, as Mr. Ristorcelli points out, the general definition of a feasibility study (as opposed to the definition that is understood to apply in the specific context of NI43-101 compliant public disclosure) is simply a "preliminary engineering and economic stud[y] ... to gather together the information that is required for a decision whether and how to proceed further."<sup>880</sup>

523. In this case, the El Dorado PFS submitted by PRES to the Bureau of Mines unquestionably demonstrated that the mine plan would be economically viable, and PRES was

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<sup>879</sup> Ristorcelli Witness Statement, para. 28; *see also* Press Release, Pacific Rim Announces Fiscal 2007 Second Quarter Results, dated 15 December 12, 2006 ("Progress continues to be made on the Company's bankable feasibility study for the El Dorado Project that is currently underway." Pac Rim then clarified that completion of its feasibility study was solely for financing purposes: "The term 'bankable' in reference to feasibility study is defined as a comprehensive analysis of a project's economics and is used by the banking industry for financing purposes.") (emphasis added) (C-427).

<sup>880</sup> Ristorcelli Witness Statement, paras. 23 and 24 (quoting the DICTIONARY OF MINING, MINERAL, AND RELATED TERMS and the SME's MINERAL PROCESSING HANDBOOK) (CLA-218).

committed to moving forward with the plan on that basis.<sup>881</sup> In particular, the El Dorado PFS enabled the economic and engineering determinations that were required to confirm substantial “proven reserves” at the El Dorado site. As Mr. Ristorcelli explains:

Once a comprehensive preliminary feasibility study (pre-feasibility) study has been done, and Proven and/or Probable mineral reserves are determined to exist, there is a demonstrated basis that the proponent of the mining project will be able to carry out an economically viable project. In the case of the El Dorado Project, these determinations were confirmed in the Final Pre-Feasibility Study in January 2005 ..., based on the engineering design and mineral exploration carried out in 2004 and before.<sup>882</sup>

524. Mr. Ristorcelli further confirms that: “a ‘high degree of confidence’ is required for a designation of ‘proven mineral reserves’ which are defined to be ‘economically viable’.”<sup>883</sup> Indeed, as mentioned above, the ore grade of the Minita deposit was very high, and the costs for the mine development were very low, on a comparative basis. Thus, “a higher-confidence

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<sup>881</sup> Indeed, Pac Rim’s plan and ability to begin constructing the El Dorado mine was not dependent upon completion of a “feasibility study”, as evidenced by a March 2007 press release about the newly-discovered Balsamo gold zone located near the Minita deposit:

Balsamo has the potential to significantly increase the high grade gold resource at El Dorado and enhance the project's economic landscape. The Company has therefore deferred its El Dorado feasibility study in order to realize the economic benefit of the Balsamo deposit. The underground access tunnel [for the El Dorado mine] will take a year and a half to complete, once [the exploitation] permits are in hand, providing the Company ample time to determine the economic impact of the Balsamo deposit in parallel with development.

Press Release, Pacific Rim Mining’s High Grade Balsamo Gold Discovery Continues to Grow, dated 6 March 2007 (emphasis added).

<sup>882</sup> Ristorcelli Witness Statement, para. 27.

<sup>883</sup> *Id.*, para 26.

feasibility study would not be expected to materially change the size or grade of the reserves, or the conclusions of the January 2005, Final Pre-Feasibility Study.”<sup>884</sup>

525. Finally, the issue of the title that was given to the “Final Pre-Feasibility Study” must be considered in light of the principle of administrative law known in El Salvador as semi-formalism. According to the Administrative Division of the Supreme Court of El Salvador:

This pertains to excusing or forgiving the citizen, with respect to the observance of certain non-essential formal requirements, which can sometimes be satisfied at a later time. It requires a merciful interpretation of specific formalities in the proceeding, with the citizen invoking the flexibility of the rules when these benefit him.<sup>885</sup>

526. In accordance with this principle, the Bureau of Mines could not have rejected the “Final Pre-Feasibility Study” merely based on its title. Rather, it should have viewed this as a non-essential formal requirement, and focused on evaluating whether or not the content of the study met the requirements of the Amended Mining Law – which it plainly did. In fact, as Claimant has noted on prior occasions, the Bureau of Mines never raised any question about the adequacy of the El Dorado PFS submitted by PRES until after the commencement of this arbitration.

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<sup>884</sup> *Id.*, para. 28.

<sup>885</sup> Supreme Court of El Salvador, Administrative Law Division, judgment in case No. 124-P-2001, 30 March 2004 (CLA-271).

***b. The Surface Area of the Concession Application versus the Area of the Deposit Covered by the Final Pre-Feasibility Study***

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527. The mine plan set out in the El Dorado PFS focused on the NI 43-101 compliant mineral “reserves” that had been classified at the time the Study was submitted. It therefore included only a small portion of the very substantial resources at the Project, which were quickly and continuously being expanded through Pac Rim’s diligent efforts.<sup>886</sup> MINEC was fully aware that Claimant continued to conduct exploration activities in order to expand the known resources within the proposed Concession area

528. As explained above in **Section II.F**, following the January 2005 completion of the El Dorado PFS, the Bureau of Mines determined that the originally applied-for Concession area of 62 square kilometers was not justified by the El Dorado PFS.<sup>887</sup> Upon making this determination, the Bureau of Mines entered into discussions with PRES to define a smaller area over which PRES *could* be granted a Concession.<sup>888</sup> Working together, the Bureau of Mines and PRES agreed to reduce the requested Concession area to 12.75 square kilometers.<sup>889</sup>

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<sup>886</sup> See discussion at **Section II.F.3** (Pac Rim’s Continued Investment in Exploration Activities) and **Section II.G.5** (Pac Rim Continues to Increase its Investment in Exploration and Development Activities Through 2006 – 2007).

<sup>887</sup> Respondent has previously confirmed that the purpose of the Technical-Economic Study is “to allow the Ministry of Economy to properly evaluate whether ... PRES had provided justification, and showed the technical and economic capacity, for the 12.75 square kilometer area it was requesting for the exploitation concession.” Preliminary Objection, para. 80 (emphasis added).

<sup>888</sup> See El Dorado Project Report for the Month Ending 28 February 2005 (“various conversations have been held to discuss the surficial extent of the exploitation concession, but no decisions have been taken”) (C-397).

<sup>889</sup> El Dorado Project Report for the Month Ending 30 April 2005 (“an area agreeable to the government and workable from our point of view has been defined.”) (C-397).

529. Respondent has previously characterized Claimant's Concession Application for a 12.75 square kilometer area as "arbitrary," asserting: "the size of the concession cannot be set arbitrarily by the applicant ... Article 24 of the Mining Law specifically requires that the size of the concession correspond to the size of the mineral deposits to be mined and the technical justifications submitted by the applicant."<sup>890</sup>

530. It is apparent here, that the Bureau of Mines – by actively redefining the size of the Concession – expressly recognized the existence of economic mining potential in the newly-delineated 12.75 square kilometer area, as verified by the El Dorado PFS. There is thus nothing arbitrary about the size of Claimant's requested Concession.

**E. The Requirement of Article 37(2)(c): the Environmental Permit**

**1. The Purpose of the Requirement**

531. Like the other application requirements in Article 37, the requirement to obtain an environmental permit is associated with substantive requirements in the Amended Mining Law. Those requirements are set out in Article 17, which provides that:

**Article 17**

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 norms, in such a manner that would prevent, control, minimize and compensate the negative effects than 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

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<sup>890</sup> Reply to Preliminary Objections, para. 130

rehabilitation or re-establishment.<sup>891</sup>

532. As explained in **Section II.A**, above, the 1996 Mining Law already included a substantive requirement for mining operations to be carried out in an economically viable manner. In fact, the 1996 Mining Law and associated Mining Regulations required the applicant for an Exploitation Concession to submit an EIS as part of its application, in accordance with the guidelines provided to it for that purpose by the Bureau of Mines.<sup>892</sup>

533. In the 2001 Amendment to the law and regulations, the substantive requirements of the 1996 Mining Law and the 1996 Mining Regulations with regard to environmental protection were not altered. However, the competence for preparing the guidelines for the EIS and reviewing that study were transferred from the Bureau of Mines to MARN,<sup>893</sup> in an effort to “harmonize the two laws [the 1996 Mining Law and the new Environmental Law] for improved implementation.”<sup>894</sup>

534. According to the Environmental Law, the EIS is submitted as part of a process, known as Environmental Impact Assessment, which generally culminates in the issuance of the Environmental Permit that is required under Article 37(2)(c) of the Amended Mining Law. In accordance with Article 21 of the Environmental Law, every project of mining exploitation and

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<sup>891</sup> Amended Mining Law, art. 17 (CLA-5).

<sup>892</sup> 1996 Mining Law, art. 37(e) (CLA-210); 1996 Mining Regulations, art. 24 (CLA-214); *see also e.g.*, 1996 Mining Law, art. 28(f) (CLA-210); 1996 Mining Regulations, art. 25 (CLA-214).

<sup>893</sup> *See* 2001 Amendment, art. 20 (CLA-212).

<sup>894</sup> *Id.*, Preamble, para. III.



exploration must be submitted to the Environmental Impact Assessment process prior to commencing operations.<sup>895</sup>

535. The Environmental Impact Assessment is defined as:

A set of actions and procedures that ensure that activities, construction work 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>896</sup>

536. The objectives of the Environmental Impact Assessment are defined in the 2000 Environmental Regulations as follows:

- a. To identify, quantify and assess the environmental impacts and risks that a given activity, construction or project might have on the environment and the population;
- b. To determine the measures necessary to prevent, reduce, control and compensate the negative impacts and to promote positive impacts, by selecting the best alternative that best guarantees the protection of the environment and the preservation of natural resources;
- c. To determine the environmental feasibility of execution of an activity, work of construction or project; and
- d. To generate the mechanisms necessary to implement an environmental management plan.<sup>897</sup>

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<sup>895</sup> Environmental Law, art. 21(e), 19 (CLA-213).

<sup>896</sup> *Id.*, art. 18 (emphasis added).

<sup>897</sup> General Regulation for the Environmental Law, D.E. No. 17 of March 21, 2000, published in the D.O. No. 63, Volume 346 of March 29, 2000, amended by the D.E. No. 17 of March 2, 2007, art. 18 (CLA-239) The RGLMA was amended in 2007.

537. As is clear from these provisions, the purpose of the Environmental Impact Assessment is to ensure that productive activities in El Salvador are undertaken in the manner that “best guarantees the protection of the environment.” The process evidently does not include a determination by MARN as to whether a particular productive activity should be allowed to proceed as a general matter.<sup>898</sup>

538. In turn, the tool which is used by MARN to determine the environmental viability of a project is the EIS. The EIS is defined as follows:

ENVIRONMENTAL IMPACT STUDY: means of analysis, assessment, planning and control comprised of a set of technical and scientific activities carried out by a multidisciplinary team for the purpose of identifying, predicting and controlling the environmental impact, both positive and negative, of an activity, construction work or project during its entire lifecycle, together with its alternatives, presented in a technical report; and prepared in accordance with legally established criteria.<sup>899</sup>

539. As Ms. Colindres, a former MARN technician, explains in her Witness Statement:

The components of an EIS are detailed in articles 23–28 of the [2000 Environmental Regulations] and include background information on the project and the location where it is intended for it to be carried out, in addition to an Environmental Management Plan. The purpose of the Environmental Management Plan is to identify and ensure the monitoring and compliance of those measures that are aimed at preventing, reducing and offsetting the environmental impact of the project throughout its life cycle.<sup>900</sup>

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<sup>898</sup> See Fernandois Expert Report at 84 and n.97 (indicating that the purpose of the provisions and institutions in the Environmental Law is, “to establish the conditions under which certain activities may be performed”).

<sup>899</sup> Environmental Law, art. 5 (CLA-213).

<sup>900</sup> See Colindres Witness Statement, para. 12 (citing RGLMA, arts. 24-28).

540. The EIS and the environmental permit are closely linked: “[t]he terms of the Environmental Permit ... arise from the content of the EIS,” inasmuch as the measures identified in the Environmental Management Plan are incorporated into the environmental permit as legal obligations of the titleholder. In fact, the analysis of the EIS is the *only* factor to be considered in issuing (or not issuing) an environmental permit. Thus, Article 19 of the Environmental Law establishes that, “it shall correspond to the Ministry to issue the environmental permit upon approval of the EIS.”<sup>901</sup> Similarly, Article 24 provides that: “In the event that an Environmental Impact Study is approved, the Ministry shall issue the corresponding Environmental Permit within a period no longer than ten working days following notification of the corresponding resolution...”<sup>902</sup>

541. In view of these provisions, it is clear that the process of Environmental Impact Assessment, and the ultimate issuance of an environmental permit, is a completely regulated one in which MARN does not enjoy discretion. To the contrary, the competence conferred upon MARN under the Environmental Law is limited to the evaluation of the EIS, and specifically whether that study has adequately, “identified, predicted and controlled” the environmental impact of the relevant activity, so that the appropriate measures can be incorporated into the environmental permit and made legally binding upon the title holder of the project. As Ms. Colindres affirms:

[T]he aim of the Environmental Impact Assessment is to identify the environmental impacts of the project, together with the measures necessary to prevent, reduce or compensate for them, all

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<sup>901</sup> RGLMA, art. 19 (emphasis added) (CLA-239).

<sup>902</sup> *Id.*, art. 24 (emphasis added).

for the purpose of ensuring that the titleholder of the project assumes a legal obligation to comply with these measures as a precondition for the initiation of the project. Put simply, the aim of the process is to *permit* the development of the productive activity in question, under the most suitable conditions for ensuring the protection of the environment.<sup>903</sup>

542. Given the purpose of the Environmental Impact Assessment procedure, and its regulated and non-discretionary nature, it is clear from the relevant evidence and testimony in the record of this arbitration, summarized below, that the Enterprises were entitled to be issued environmental permits for their mining activities.

**2. The Enterprises' Rights to the Environmental Permits Necessary to Exercise Their Mining Rights**

543. As explained above, the issuance of an environmental permit depends upon one factor, and one factor alone: the approval of the EIS. Furthermore, the purpose of the EIS is to identify the environmental impacts of a project, along with the appropriate measures to eliminate, reduce or offset them, in order to ensure that the project is carried out under the most suitable conditions for ensuring the protection of the environment.

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<sup>903</sup> Colindres Witness Statement, para. 177.

**a.     The ED Mining Environmental Permit**

544. In the case of the EIS submitted by PRES in connection with the proposed El Dorado mine project,<sup>904</sup> there is no question of the standard set out above having been met. Ms. Colindres, a chemical engineer who participated in the evaluation of the El Dorado EIS both as a technician at MARN and later as the Environmental Supervisor of PRES, explains that process in detail in her Witness Statement in this arbitration. As Ms. Colindres' testimony makes abundantly clear, *MARN has never identified any technical deficiencies in the El Dorado EIS.*

545. In fact, "all the Technicians involved in assessing the study were agreed that the El Dorado EIS was one of the most complete studies that had ever been delivered to the MARN."<sup>905</sup> Furthermore, while the MARN technicians were unfamiliar with mining projects and thus had initial questions and observations regarding the Study, *all those questions and observations were satisfactorily answered by PRES by July 2005.*<sup>906</sup> Indeed, the El Dorado EIS

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<sup>904</sup> See Letter from Fred Earnest to Francisco Perdomo Lino, dated September 8, 2005, enclosing the final version of the El Dorado EIS (C-151).

<sup>905</sup> Colindres Witness Statement, para. 76.

<sup>906</sup> See Letter from Francisco Perdomo Lino to Jorge Ruben Brito, dated 1 February 2005 (enclosing the first version of the Technical Observations) (C-133); Letter from Francisco Perdomo Lino to Jorge Brito, dated 7 February 2005 (enclosing the 82 Technical Observations of the MARN with respect to the EIS of the El Dorado Mine Exploitation Project) (C-134); 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 Exploitation Project**") (C-136); Email chain between Ericka Colindres and Matt Fuller, the last dated 13 July 2005 (C-140); Email from Fred Earnest to Matt Fuller, dated 25 July 2005 (C-141); Email chain between Loren Aceto and Fred Earnest, the last dated 25 July 2005 (C-142); Email chain between Fred Earnest and Ericka Colindres, copying Javier Figueroa, Francisco Perdomo Lino, Ivonne de Umanzor and Matt 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 Umanzor and Matt Fuller, the last dated 27 July 2005 (C-144); 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 Fred Earnest to Francisco Perdomo Lino, dated 8 September 2005 (enclosing the final version of the El Dorado EIS) (C-151).

was sent out for publication and public comment in October 2005, which indicates that it had already passed technical approval by MARN at that time.<sup>907</sup>

546. Thereafter, MARN asked PRES to submit responses to the comments received from the public, which were based upon a study prepared by Dr. Robert Moran.<sup>908</sup> As Ms. Colindres attests: “[n]one of the criticisms [raised by Dr. Moran] were insurmountable, and many of them were without technical foundation.”<sup>909</sup> Nevertheless, the company “addressed them one by one, based on studies and technical analysis, and assessing alternatives to address each of them in the most appropriate way.”<sup>910</sup>

547. While the company was involved in preparing the responses to this report, in July 2006, MARN made additional, informal observations on the EIS in connection with a specific request by the Minister of MARN, Hugo Barrera.<sup>911</sup> Although these observations were not contemplated as part of the legal procedure for an Environmental Impact Assessment, the company nevertheless agreed to, and did, respond to them in October 2006.<sup>912</sup> As verified by

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<sup>907</sup> Colindres Witness Statement, paras. 102-104; Letter from Francisco Perdomo Lino to Fred Earnest, dated 23 September 2005 (C-152); First, Second and Third Publication of the El Dorado EIS, dated 3-5 October (C-153); Letter from Fred Earnest to Francisco Perdomo Lino, dated 5 October 2005 (C-154).

<sup>908</sup> Colindres Witness Statement, para. 118; Minutes of Meeting with Titleholder of the “El Dorado Mining Exploitation” and “Santa Rita Mining Exploration” Projects, dated 29 March 2006 (C-163).

<sup>909</sup> Colindres Witness Statement, para. 119.

<sup>910</sup> *Id.*, para. 119; Response Report on the Technical Review of the El Dorado Mine Project (emphasis supplied) (C-170).

<sup>911</sup> See Colindres Witness Statement, paras. 123-131; Thirteen Observations on the Environmental Impact Study of the El Dorado Mining Exploitation Project, issued by the MARN, undated (C-169).

<sup>912</sup> Colindres Witness Statement, para. 137; Letter from Scott Wood to Minister Barrera, submitted to the DGA and to the Minister, dated 25 October 2006 (enclosing Response Report to the Observations

(continued...)

Ms. Colindres, “a majority of the Final Observations [made to the company in July 2006] were easily responded to or were already included in the EIS.”<sup>913</sup>

548. Following the submission of these responses by the company, MARN failed to take any further action to approve or deny the environmental permit. As explained by Ms. Colindres:

With respect to the El Dorado Mine Project in particular, PRES not only submitted a comprehensive EIA prepared by highly qualified professionals duly registered with the MARN, but received a favorable decision with respect to this study by the MARN’s technical team.

The company subsequently addressed all the criticisms made by Dr. Robert Moran, the hydrogeologist whose report supported the public comments on the EIA. I would like to reiterate that the MARN’s technical team never identified any deficiency in the responses we presented on 12 September 2006, which demonstrated that many of the comments made by Dr. Moran corresponded neither to the actual characteristics of the El Dorado Mine Project nor to the content of the EIA, but instead focused on generalizations and thoughts with respect to hypothetical situations or ones that were not analogous with the objective reality, or quite simply irrelevant from any technical or environmental standpoint. Even when reference was made to the El Dorado EIA, this was usually erroneous or a misinterpretation of information contained in that study.

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(continued)

Presented by the Technicians of the DGGA-MARN in Meeting, dated 14 July 2006) (C-171). In December 2006, PRES also submitted the technical design for the water treatment plant. Colindres Witness Statement, para. 141. *See* Letter from William Gehlen to Minister Barrera, dated 4 December 2006, delivered at the DGA (enclosing the Technical Memorandum for a Water Treatment Plant — Quality of Effluent from the Mine, prepared by SNC-Lavalin Engineers & Constructors, Inc., dated 20 October 2006, translated into Spanish) (C-174).

<sup>913</sup> Colindres Witness Statement, para. 137.

Based on all of the foregoing, I'm quite convinced that the MARN could not justify the refusal of the Environmental Permit of the El Dorado Mine Project. Put simply, no deficiency has been identified in the measures the company has committed itself to adopt in order to ensure the protection of the environment....<sup>914</sup>

549. Ms. Colindres' testimony with regard to the adequacy of the El Dorado EIS is fully corroborated by Drs. Ian Hutchinson and Terry Mudder, both highly experienced international experts on environmental issues in the mining industry, in their Expert Report in this arbitration.<sup>915</sup> Dr. Hutchinson has a Ph.D. in Hydrology, a graduate diploma in Hydraulics and Soil Mechanics, and a Bachelor of Science in Civil Engineering. He 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, access and haul roads, and mine closure planning and post-closure operation and maintenance. He has provided expert reports and opinions for numerous legal proceedings, teaches tailings disposal and water management courses and is a member of the International Mine Water Association.<sup>916</sup>

550. Dr. Mudder holds a Bachelor of Science degree with high honors in Chemistry from the South Dakota School of Mines and Technology, and a Master of Science degree in Organic and Analytical Chemistry and a Doctorate degree in Environmental Science and Engineering from the University of Iowa. He is considered the leading international expert with respect to the environmental aspects of cyanide in mining and was selected to participate in the

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<sup>914</sup> *Id.*, paras. 178-80 (emphasis added).

<sup>915</sup> *See generally* Mudder Expert Report.

<sup>916</sup> *Id.* at 3-4.



meetings sponsored by the United Nations Environmental Program for the creation of the now well-recognized International Code for Management of Cyanide at Gold Mining Operations (“**Cyanide Code**”). He has actively worked in implementing the Cyanide Code since its adoption. In addition to mining companies, his clients have also included aboriginal peoples, citizen groups, international non-governmental organizations, and regulatory agencies throughout the world. Dr. Mudder has provided expert technical advice to the former International Council on Metals and the Environment (“**ICME**”), and The Gold and Silver Institutes in the United States.<sup>917</sup>

551. As unequivocally concluded by Drs. Hutchinson and Mudder following a thorough analysis of the EIS and all the related documents,<sup>918</sup> including the report of Dr. Robert Moran and the observations made by MARN technicians:

The 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. The Authors conclude that the EIA (C-8) adequately identified the environmental impacts of the proposed Project and concur with its findings.<sup>919</sup>

[...]

The EIA (C-8) put forth a valid comprehensive scenario indicating that if the company followed its proposed operational designs and EMP [Environmental Management Plan], the Project could be constructed, operated and closed in an environmentally acceptable manner. In addition, the EIA (C-8) was in full compliance with the El Salvadorian environmental regulations, as well as the

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<sup>917</sup> *Id.* at 4-7.

<sup>918</sup> A list of the documents reviewed by Drs. Mudder and Hutchinson can be found on page 2 of their report.

<sup>919</sup> Mudder Expert Report at 20.

international guidelines and standards of best practices published by the International Finance Corporation and World Bank.<sup>920</sup>

552. In addition, Drs. Hutchinson and Mudder also conclude that: “[a]ll comments received after the EIA (C-8) were issued for public review were appropriately addressed and did not reveal any potential flaws or significant negative impacts...”<sup>921</sup>

553. Finally, they observe that:

The professional staff of the company and its consultants exhibited extensive international experience and expertise in the permitting, design, operation, management, and closure of mining projects. Pac Rim demonstrated an appropriate level of care and due diligence with respect to preparing the EIA (C-8). The company and its representatives put forth a quality Project simultaneously recognizing their responsibilities as professionals, while demonstrating their moral obligation to promote environmental stewardship and social responsibility.<sup>922</sup>

554. In light of the conclusions reached by Ms. Colindres and confirmed by independent experts Drs. Mudder and Hutchinson, it is easy to see why MARN has never identified any technical deficiencies in the EIS that PRES submitted. In fact, the proposed mine project that is comprehensively and professionally assessed in that study does not give rise to any legitimate environmental concerns, which means that, in accordance with the regulated nature of the Environmental Impact Assessment procedure, *MARN must issue the environmental permit*. Instead, as described below, MARN has simply refused to take any action to bring the Environmental Impact Assessment to a close, in implementation of the ban on metallic mining that has been illegally declared and instituted by the Executive Branch of El Salvador.

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<sup>920</sup> *Id.* at 20-22.

<sup>921</sup> *Id.* at 23.

<sup>922</sup> *Id.*

**b.     The Environmental Drilling Permits**

555. DOREX's rights to the necessary environmental permits for its exploration activities at Pueblos, Guaco and Huacuco are no less clear than is PRES's right to the ED Mining Environmental Permit. Indeed, as Ms. Colindres explains, the Environmental Impact Assessment for the Huacuco Exploration License was actually favorably completed in late 2006, to the point that MARN requested DOREX to make payment of the environmental bond which precedes issuance of the environmental permit. Notably, MARN's request for the deposit of the bond indicated that the resolution granting the environmental permit had already been issued.<sup>923</sup> Nevertheless, after DOREX duly made payment of the requested bond, MARN simply failed to issue the permit. As Ms. Colindres notes:

In effect, despite having done everything in its power for the MARN to issue the report approving the EIS (which was favorable), once it had remitted the Environmental Performance Bond, the MARN issued no further declaration on the matter and its Exploration License expired without the Environmental Permit ever being issued.<sup>924</sup>

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<sup>923</sup> Colindres Witness Statement, paras. 162-163; Letter from Dra. Rosario Góchez Castro to Frederick Hume Earnest, dated 9 November 2006 (C-191); Letter from Ricardo Enrique Araujo to Dra. Rosario Góchez Castro, dated 20 December 2006 (C-192); *see also* Letter from Fred Earnest to Hugo Barrera, dated 23 November 2005 (enclosing Environmental Form for mining exploration operations in the Exploration License called Huacuco and attached documents) (C-183); Letter from Francisco Perdomo Lino to Fred Earnest, dated 19 December 2005 (enclosing Terms of Reference for Huacuco) (C-184); Letter of conduct of the EIS for mining exploration operations in the Exploration License called Huacuco, from Frederick Earnest to Minister of the MARN Hugo Barrera, dated 17 February 2006. (C-185); Email from Ericka Colindres to Ing. Zaida Osorio, dated 26 April 2006. (C-186); Letter from Ing. Francisco Perdomo Lino to Frederick H. Earnest, dated 11 May 2006 (C-187); *see* Letter from Ricardo Enrique Araujo to Francisco Perdomo Lino, dated 22 May 2006 (C-188); Monthly Report of the SPMA, June 2006, First Week, clause 7 (C-168).

<sup>924</sup> Colindres Witness Statement, para. 164.

556. Subsequently, when DOREX instituted Environmental Impact Assessment procedures for its Pueblos and Guaco Drilling Environmental Permit applications in the latter part of 2007,<sup>925</sup> MARN simply refused to review the relevant EISes with even a minimal level of good faith. Indeed, MARN's failure to issue the Huacuco Drilling Environmental Permit upon PRES's payment of the required environmental bond in early 2007 marked a turning point in MARN's conduct towards the Enterprises. From that point forward, MARN's communications with PRES and DOREX in relation to their environmental permit applications were overtly aimed only at delaying the assessment processes rather than at resolving them in any way. In connection with the Pueblos project, for example, MARN responded to DOREX's EIS by simply asking the company to submit another EIS, containing the same information that had been contained in the first study.<sup>926</sup>

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<sup>925</sup> Environmental Form for Mining Exploration in the Guaco Exploration License, submitted on 10 October 2006, via letter of conduct dated 9 October 2006, from William Gehlen to the Minister of the MARN Hugo Barrera (C-195); Environmental Form for Mining Exploration in the Pueblos Exploration License, submitted on 10 October 2006, via letter of conduct dated 9 October 2006, from William Gehlen to the Minister of the MARN Hugo Barrera (C-195).

<sup>926</sup> Colindres Witness Statement, para. 170; *see also* Letter from Arq. Ernesto Javier Figueroa Ruiz to William T. Gehlen, dated 9 January 2008 (enclosing Observations on the Environmental Impact Study of the Pueblos Mining Exploration Project) (C-201); Environmental Form for Mining Exploration in the Pueblos Exploration License, submitted on 10 October 2006, via letter of conduct dated 9 October 2006, from William Gehlen to the Minister of the MARN Hugo Barrera (C-195); Letter from Ing. Zaida Osorio de Alfaro to William Gehlen, dated 27 October 2006 (C-196); Letter from Ing. Zaida Osorio de Alfaro to William Gehlen, dated 26 October 2006 (C-197); Letter from William Gehlen to Ing. Francisco Perdomo Lino, dated 7 August 2007 (enclosing EIS for the Proyecto de Exploración Minera Pueblos (Pueblos Mining Exploration Project) (C-198).

Nevertheless, the company complied with the request, submitting substantially the same information over again. *See* Letter from William Gehlen to Francisco Perdomo Lino, dated 11 February 2008, received 26 March 2008 (enclosing EIS dated February 2008, containing responses to the observations remitted by the MARN in Note MARN-DGGA-EIS (9522-0030)/2008, dated 9 January 2008) (emphasis supplied) (C-202).

557. With regard to the Guaco Drilling Environmental Permit application, MARN provided “technical observations,” on the EIS, but these observations focused on topics that were simply irrelevant or repetitive of information already contained in the EIS. As Ms. Colindres attests with regard to the Environmental Impact Assessment for the Guaco project:

[I]t was obvious that these observations [by the MARN technicians] had the sole purpose of delaying the granting of the Environmental Permit. The complexity of the observations had no correlation with the straightforward nature of the mining explorations, nor with the type of observations made by the MARN when it assessed the exploration projects relating to the El Dorado Norte and El Dorado Sur, Santa Rita and Huacuco areas.<sup>927</sup>

558. Indeed, MARN technicians were familiar with mineral exploration activities, there being numerous such activities under development in El Salvador during the 1990s and 2000s. *Environmental permits for such projects had consistently been issued in the past, both for PRES and for other companies.* This is not surprising, given that mineral exploration of the kind that DOREX proposed to undertake in regard to its Pueblos, Guaco and Huacuco Exploration License areas, “is a harmless activity both for the environment and for public health.”<sup>928</sup>

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<sup>927</sup> Colindres Witness Statement, para. 168; *see also* Environmental Form for Mining Exploration in the Guaco Exploration License, submitted on 10 October 2006, via letter of conduct dated 9 October 2006, from William Gehlen to the Minister of the MARN Hugo Barrera (C-195); Letter from Ing. Zaida Osorio de Alfaro to William Gehlen, dated 27 October 2006 (C-196); Letter from William Gehlen to Ing. Francisco Perdomo Lino, dated 17 August 2007 (enclosing the EIS for the Guaco Mineral Exploration Project) (C-216); Letter from Ing. Ítalo Andrés Flamenco Córdova to William Gehlen, dated 27 November 2007 (enclosing Technical Report to the Observations on the Environmental Impact Study of the Guaco Mining Exploration Project) (C-199).

<sup>928</sup> Letter from William Gehlen to Francisco Perdomo Lino, dated 11 February 2008, received 26 March 2008 (enclosing EIS dated February 2008, containing responses to the observations remitted by the MARN in Note MARN-DGGA-EIS (9522-0030)/2008, dated 9 January 2008) (C-202).

559. Nevertheless, MARN never issued the Drilling Permits for the Huacuco, Pueblos or Guaco projects, or – to Claimant’s knowledge – for any other mining projects after that time. Again, MARN’s failure to issue the requested environmental permits (which were never denied, either) was patently arbitrary and can only be explained as an application of the Executive Branch’s illegal, *de facto* ban on metallic mining.

**F. The Requirement of Article 37(2)(b): Use of the Surface Rights**

560. In the Preliminary Objections phase of this proceeding, Respondent also took issue with PRES’s alleged non-compliance with Article 37(2)(b) of the Amended Mining Law, which requires the applicant for an exploitation concession to present the “property title for the real estate, or the authorization granted in legal form by the landowner” (“*escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario*”).<sup>929</sup> In particular, Respondent alleged that Article 37(2)(b) required PRES to present proof of ownership or permission to use *all* the surface property within the area of the proposed concession; and that PRES had failed to comply with that requirement.<sup>930</sup> As explained below, Article 37(2)(b) is not an applicable requirement for exploitation concessions for metallic minerals, but, in any event, PRES has the rights to use all the surface properties that it needed to make use of for purposes of carrying out its proposed mining activities. Respondent’s argument that PRES was required to obtain the permission of surface owners to carry out underground mining activities beneath their properties is patently incorrect, since there is no “permission” that could be given by such owners.

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<sup>929</sup> Amended Mining Law, art. 37.2 (b) (CLA-5).

<sup>930</sup> See, e.g., Preliminary Objections, paras. 61-70.

## 1. The Purpose of the Requirement

561. As explained above, each of the requirements set out in Article 37 has a substantive antecedent in the previous chapters of the Amended Mining Law. Otherwise, there would be no legitimate reason to impose such requirements upon the applicants for mining rights. Notably, in past iterations of the Salvadoran mining laws, the sole application requirement for the concession to exploit metallic minerals was proof of the discovery of a mineable deposit.<sup>931</sup> As explained at length above, that continues to be the primary requirement today. On the other hand, the 1996 Mining Law expressly aimed to attract a *modern* mining industry that could be developed in a rational manner and with appropriate environmental controls. Thus, those considerations were incorporated into substantive requirements of the law and, in turn, reflected in the application requirements set out in Articles 37(2)(d) and 37(2)(c).

562. In contrast to the requirements established in Articles 37(2)(d) and (c), the requirement established in Article 37(2)(b) – the “property title for the real estate, or the authorization granted in legal form by the landowner” (“*escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario*”) – does not find any substantive basis in the Amended Mining Law with regard to the applicants for *metallic* mining concessions. That is because this requirement is intended to apply only to applicants for *non-metallic* mining concessions.

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<sup>931</sup> 1881 Mining Code, arts. 79-85 (CLA-208); 1922 Mining Code, arts. 126 (CLA-207).

563. As the title to Article 37(2) indicates, that provision applies to “Concession for Exploitation of Mines and Quarries,”<sup>932</sup> meaning that it contains the documentation requirements for *both* types of concessions. “Mines” are defined in Article 2 of the Amended Mining Law as metallic mineral deposits, whereas “quarries” are referred to as non-metallic mineral deposits.<sup>933</sup> As Mr. Williams observes, Article 37(2) “is not entitled ‘FOR EXPLOITATION CONCESSION FOR METALLIC **OR** NON-METALLIC MINERALS,’ which would imply that it contains the documentation requirements for either type of Concession.”<sup>934</sup>

564. In turn, the determination of whether the requirement in Article 37(2)(b) is intended to apply to applicants for metallic mining concessions must be made on the basis of a systematic review of the Amended Mining Law, viewed in light of the Constitution of El Salvador.

565. First, as Mr. Williams explains in his Expert Statement, the term “*inmueble*” is not defined in the Amended Mining Law, and there is only one substantive antecedent for that term in the earlier chapters of the law. This is found in Article 30 of the law, which establishes the basic rules applicable to the Exploitation Concession for quarries, or non-metallic mineral deposits.”<sup>935</sup> Non-metallic minerals include common sandstone, gravel, limestone, and other aggregates which are normally near the land surface and are most often extracted by open pit quarries.

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<sup>932</sup> Amended Mining Law, art. 37 (emphasis added) (CLA-5).

<sup>933</sup> *Id.*, art. 2.

<sup>934</sup> Williams Expert Statement at 31.

<sup>935</sup> Amended Mining Law, art. 2 (CLA-5).



566. In accordance with Article 30: “the real estate in which the non-metallic minerals that are the target of the exploitation are found, must be the property of the person applying for it or [the applicant] must have the authorization of the owner or possessor, granted in legal form.”<sup>936</sup> As Mr. Williams explains, the applicant for a non-metallic mining concession is required to own or have authorization to use the surface because, in accordance with Article 10 of the Amended Mining Law, non-metallic minerals do not constitute real property separate and distinct from the surface whenever they have any surface occurrences.<sup>937</sup> Thus, the State would not be able to grant a concession over such minerals unless the applicant also owned the surface estate or had formal authorization from the surface estate owner.<sup>938</sup>

567. In contrast, the State undoubtedly owns all metallic mineral deposits in the subsoil, and it conveys a real property right in those deposits to the holder of the relevant Exploration License or Exploitation Concession, as expressly recognized in Article 10 of the Amended Mining Law. Furthermore, in view of the fact that all subsurface metallic mineral deposits are the State’s own property – and therefore to be exploited for the public benefit – they comprise the dominant estate with respect to the surface rights of private landholders. Thus, Chapter VIII of the Amended Mining Law provides for the constitution of both voluntary and legal easements in favor of the holders of Exploration Licenses and Exploitation Concessions for metallic minerals.<sup>939</sup>

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<sup>936</sup> *Id.*, art. 30.

<sup>937</sup> *Id.*, art. 10; Williams Expert Statement at 32-33.

<sup>938</sup> Williams Expert Statement at 32-33.

<sup>939</sup> Amended Mining Law, arts. 53-54; Williams Expert Statement at 33.

568. As Mr. Williams explains, the title holders of mining rights in metallic minerals (as opposed to non-metallic minerals), “do not need to own the surface estate or have formal authorization to use it as a prerequisite for a metallic mining Concession application because as exploration License Holders and eventually metallic mining Concession Holders they have the ability to obtain legal easements for their various use needs if they are unable to reach voluntary agreements with the landowners.”<sup>940</sup>

569. In this regard, Mr. Williams’ expert conclusions affirm those reached by Pac Rim’s legal counsel in El Salvador, as expressed in the memo provided by Minister de Gavidia to MINEC’s legal affairs department in May 2005.<sup>941</sup>

570. Furthermore, these conclusions are compelled by the basic constitutional order in El Salvador, which establishes that the mining of metallic minerals, as a productive use of the State’s own property, *is an activity in the public interest*. As plainly established in the Constitution: “the public interest takes priority over the private interest.”<sup>942</sup> In view of this provision, a private landholder cannot obstruct the development of mining activities intended for the public benefit.

571. Indeed, the titleholders of concessions for metallic minerals have long been entitled to demand use of the surface properties that are necessary to enable their mining activities to go forward.<sup>943</sup> Thus, Article 50 of the 1881 Mining Code provides that:

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<sup>940</sup> Williams Expert Statement at 34.

<sup>941</sup> Letter from Yolanda de Gavidia to Luis Rodriguez, dated 25 May 2005 (R-30).

<sup>942</sup> Constitution, art. 246 (CLA-1).

<sup>943</sup> *See generally* Williams Expert Statement at 14-15.

## **Article 50**

No individual or corporation may prevent on the surface of their land: the digging of mines, undertaking work to build devices for their benefit, the establishment of treating sites, dynamite areas, slag heaps or recreation areas, the opening of paths for communication or transit, or the performance of other similar work, in service of the mines. However, the beneficiaries are obligated to first provide appropriate compensation for occupation of the land and for other damage caused to the owner; or to provide a bond that is satisfactory to said party, should the indemnity not be produced immediately.<sup>944</sup>

572. The 1922 Mining Code expanded significantly upon this provision, establishing a number of specific legal easements that could be demanded by the mining rights holder (*e.g.*, rights of way, ventilation easements and drainage easements),<sup>945</sup> as well as maintaining the right for the mining titleholder to demand expropriation of the surface rights necessary to serve the interests of the subsurface mineral estate.<sup>946</sup>

573. In 1939, the State enacted the *Ley de Expropiación y Ocupación de Bienes por el Estado* (“**Law on Expropriation**”), which establishes the regime for: “forcible expropriation for reasons of public interest, [as] established in Article 50 of the Constitution...”<sup>947</sup> In turn, Article 2.III of the Law on Expropriation expressly recognizes that the “Mining Industry (Art. 17 Mining Code)” is in the public interest,<sup>948</sup> and therefore that the interested party is able to demand

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<sup>944</sup> 1881 Mining Code, art. 50 (emphasis added) (CLA-208).

<sup>945</sup> 1922 Mining Code, arts. 66-84 (CLA-207).

<sup>946</sup> *Id.*, art. 17 (“The mining industry is eminent domain and as such the owners of mining claims have the right to expropriate property in the cases and in the situations set forth in this Code”); *see also id.*, arts. 88-93.

<sup>947</sup> Law on Expropriation, art. 1 (CLA-45).

<sup>948</sup> *Id.*, art. 2.III.

expropriation of the property necessary to carry out works in that industry. Notably, the Law on Expropriation was amended on 29 October 1998, *after* the implementation of the Amended Mining Law in early 1996,<sup>949</sup> without making any change to this provision.<sup>950</sup>

574. In fact, even those members of the administration in El Salvador who believed that Article 37(2)(b) requires ownership or permission for the surface estate owners in connection with an exploitation concession for metallic minerals expressly acknowledged that this interpretation ran contrary to the legal order in El Salvador. Thus, Mr. Ricardo Suarez indicated to Mr. Luis Medina, Pac Rim's Salvadoran counsel in an e-mail dated 23 September 2005:

We share your opinion that the legal requirement that surface landowners authorize subsurface mining is not consistent with the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil is the State. In any case, surface landowners' rights are protected; if damages occur, the party carrying out building work would be obligated to repair them or provide compensation.

[...]

Therefore, although we share your view regarding the problems posed by the current wording of Section 27 [sic] and the advisability of making it consistent with the Constitution, after analyzing the text of the proposed interpretation, we do not believe

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<sup>949</sup> *Decreto Legislativo No. 467*, adopted on 29 October 1998, published in the *Diario Oficial* No. 212, Tomo 341, 13 November 1998 (CLA-45).

<sup>950</sup> In particular, the reference to the 1922 Mining Code in Articles 2.III and 56 of the Law on Expropriation cannot be construed as entailing that the public interest in mining somehow disappeared when that Code became obsolete. To the contrary, the public interest in mining is above all established in the Constitution, which declares that subsurface mineral deposits are the property of the State. In fact, the reference to the Constitution in Article 1 of the Law on Expropriation also continues to make reference to an outdated Constitution as the source of the authority established thereunder. Nevertheless, there is no question that the Law on Expropriation is still valid and applied in El Salvador today.

that the proposed authentic interpretation is the correct legal approach.<sup>951</sup>

575. In effect, Mr. Suarez is recognizing in this e-mail that Respondent's proposed interpretation of Article 37(b), as previously advanced in this arbitration, is *unconstitutional*. As such, that interpretation cannot be accepted under Salvadoran law, which plainly mandates that: "[t]he Constitution shall prevail over all laws and regulations."<sup>952</sup>

## **2. PRES's Satisfaction of the Requirement**

576. As indicated above, Article 37.2(b) does not apply to applicants for metallic mining concessions and therefore the question of whether PRES complied with it is simply irrelevant. Nevertheless, as Claimant pointed out on numerous occasions during the preliminary phase of these proceedings, PRES did obtain all the surface rights over areas that would have been affected by its proposed mining operations.<sup>953</sup> Furthermore, PRES maintained good relations with all the surface owners within the proposed El Dorado Exploitation Concession area, and believed it could get whatever "permission" that may be required from them if it became necessary. However, the question of what kind of "permission" PRES could obtain was not easily resolved, given that these surface owners did not have any legitimate interest in the activities that PRES would be carrying out. As Mr. Fred Earnest noted in relation to a meeting held with Ms. Navas of the Bureau of Mines:

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<sup>951</sup> Emails chain between Ricardo Suarez and Luis Medina, dated 23 September 2005 (emphasis added) (C-289); *see also* El Dorado Project Report for the Month Ending 31 August 2005 at 2 ("In the matter of the interpretation of the law regarding the need to obtain the authorization of the surface owners, the 'Ministra de Economía' has acknowledged that something needs to be done.") (C-288).

<sup>952</sup> Constitution, art. 246 (CLA-1).

<sup>953</sup> *See* Response to Preliminary Objections, paras. 142-157.

Near the close of the meeting, I asked what kind of authorization was required, suggesting something along the lines of “I, John Doe, authorize the Republic of El Salvador to grant an exploitation concession to Pacific Rim El Salvador...”. This was immediately rejected with the argument that the government didn’t need any authorization to grant the concession. Gina then indicated that it was an authorization for us to use the land, to which I replied that we already have all the authorizations for the land that will be occupied by the project. She became very reflective (almost as though she was beginning to see the point), but offered no further suggestions.<sup>954</sup>

## **V. RESPONDENT’S BREACHES**

577. As Mr. Earnest’s comments demonstrate, the idea that PRES could have obtained permission from private parties to carry out an activity on behalf of the State, particularly where that activity would not occupy or burden their property, is simply nonsensical. Regardless of whether certain members of the administration may have accepted this nonsensical view, *it was wrong as a matter of law* and therefore cannot legitimately have any impact on PRES’s right to the Exploitation Concession.

578. As explained above, Claimant’s claims in this arbitration arise under the Investment Law, which must be interpreted in light of the principles established in the Constitution of El Salvador, as well as the general principles of international investment law. In accordance with that law, PRC was entitled to certain standards of treatment for investors, including principally: the right for PRES and DOREX not to be subjected to any illegal, arbitrary

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<sup>954</sup> Memorandum from Fred Earnest to Tom Shrake, dated 28 June 2005 (C-291).

or discriminatory measures in the establishment, use or development of their direct investments in the El Dorado Project.<sup>955</sup>

579. As explained further above, these standards of treatment were intended to reflect the “best international practices in investment,” including in providing an assurance that treatment afforded to investments by the State would be, “fair and equitable,” and that the investor would have “clear and precise knowledge of the rules in which it will establish or carry out its investments, as well as the guarantees to which it is entitled.”<sup>956</sup>

580. In addition, the Investment Law is also to be construed in light of the associated principles of constitutional law, including: the principle of economic freedom, which is plainly reflected in the Preamble of both the Investment Law and the 1996 Mining Law; the guarantee of due process and the right to a reasoned response; and the principles of legality, equality and legal certainty.

581. Aside from providing standards of treatment for investors and their investments, the Investment Law also extends protection to the property of foreign investors, in the terms established in the Constitution;<sup>957</sup> and specifically requires prior compensation for expropriation.<sup>958</sup>

582. As explained in the following sections, the primary conduct at issue in this arbitration – the implementation by the Executive Branch of El Salvador of a *de facto* ban on

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<sup>955</sup> Investment Law, arts. 5-6 (CLA-4).

<sup>956</sup> Letter of Presentation of the draft bill for an Investment Law (RL-101).

<sup>957</sup> Investment Law, art. 13 (CLA-4).

<sup>958</sup> *Id.*, art. 8.

metallic mining in the country – plainly violated PRC’s rights to the standards of treatment provided under the Investment Law. Furthermore, it deprived Claimant and its Enterprises of their legitimate expectations, as well as their substantial rights under Salvadoran law. As explained in the previous Section of this Memorial, those rights included PRES’s right to receive the El Dorado Exploitation Concession; and the rights of PRES and DOREX to receive the environmental permits necessary to exercise their mining rights.

583. In short, the *de facto* ban has completely shut down metallic mineral mining in the country of El Salvador, destroying PRC’s ability to carry out its investment activities or to recover any value whatsoever for those investments: investments which, as explained above, it planned and executed in the light of a favorable legal framework for mining (which, notably, still stands on the books of El Salvador), as well the assurances and collaboration of officials at all levels of the Salvadoran Government.

584. In this regard, it is also important to note that while PRC and the Enterprises have been deprived of the value of the El Dorado Project, the value of the project itself still remains. Thanks to Pac Rim’s diligent efforts and significant investments in exploration and mine planning (all of which are recorded in annual reports and studies now in the hands of the Salvadoran Government), El Salvador has been provided with key knowledge about its own mineral wealth: where it is located; how extensive it is; and how to extract it in a modern, rational and sustainable manner.

585. As explained in previous sections of this Memorial, it was lack of access to this very knowledge that drove El Salvador to implement the 1996 Mining Law and its 2001



Amendment, and to make those laws, “convenient for investors in the mining sector.”<sup>959</sup> In particular, mining investors under the Amended Mining Law were entitled to freely dispose of their mining rights, as well as to keep the majority of the revenues from production of the deposits they had discovered, *in consideration for* how the production in question (made possible through the application of modern methods that El Salvador did not possess), would “promote Economic and Social Development in the regions where the minerals are located, allowing the State to collect revenues necessary for the fulfillment of its objectives.”<sup>960</sup>

586. Furthermore, these same exact considerations also drove implementation of El Salvador’s Investment Law. As clearly stated in the Preamble to that law:

It is also important to promote and encourage investment in general; to attract foreign investment into the country so that its contributions of capital, technology, knowledge, and experience can increase the efficiency and competitiveness of those productive activities to which the aforementioned resources are directed.<sup>961</sup>

587. In this case, Pac Rim’s investment in the El Dorado Project provided everything that El Salvador had hoped to gain when it offered investors the legal regime that is established under the Amended Mining Law and the Investment Law. Yet, as soon as Pac Rim’s substantial contributions to the project had crystallized, and the moment had come to turn those contributions into a source of capital, certain members of the Salvadoran Executive Branch suddenly decided that the promises made to investors in these laws were no longer “convenient” for the country.

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<sup>959</sup> 1996 Mining Law, Preamble, para. III (CLA-210).

<sup>960</sup> Amended Mining Law, Preamble, para. III (emphasis added) (CLA-5).

<sup>961</sup> Investment Law, Preamble, para. III (CLA-4).

588. Whatever may be the precise motivations for the conduct of these officials – and Claimant very much looks forward to having them explained by Respondent in this arbitration – they are plainly illegitimate. Indeed, this is evidenced, among other things, by the simple fact that the ban continues to be a “*de facto*” one, never having been implemented through any legal means whatsoever. Moreover, this illegal measure has resulted in Pac Rim providing a free service to the Respondent, as a result of which it has greatly increased the value of its mineral wealth through no contribution of its own.

589. In the following sections, Claimant will set out why the measure of the *de facto* ban specifically violates: (A) the applicable standards for treatment of investors; and (B) the applicable standards for protection of property.

**A. Violation of the Applicable Standards for Treatment of Investors**

590. The principal measure that is at issue in this arbitration is Respondent’s illegal institution of a *de facto* ban on metallic mining throughout the country of El Salvador, and the resultant failure by the administrative agencies responsible for mining to take any action on the Enterprises’ pending applications. In the following subsections, Claimant first confirms the existence of the ban, and then considers its implications for PRC and the Enterprises.

**1. Existence of the De Facto Ban on Metallic Mining**

591. Notably, Respondent does not deny the existence of the *de facto* ban in principle, and indeed it cannot be seriously questioned that high-ranking officials in the Executive Branch of the Salvadoran Government have publicly indicated that applications for administrative authorizations to carry out mining activities are not being processed in accordance with the required legal procedures.

592. Indeed, during the jurisdictional phase of this case, much ink was spilled over what Pac Rim should have ascertained from the various statements made by Executive Branch

officials with regard to the processing of applications for mining activities in El Salvador between 2006 and 2010. In fact, Respondent alleged that Pac Rim should have known in July 2006 that its mining permits would never be granted, since the Minister of MARN, Hugo Barrera, had stated as much to the press at that time.<sup>962</sup> Indeed, Minister Barrera did indicate to the press at that time that no environmental permits would be given for mining exploitation projects:

Q: So you're saying that exploitation permits will not be given to mining companies? A: This girl is sharp! ... Q: This is in line with not giving the exploitation permit to Pacific Rim and other mining companies? A: That's right.<sup>963</sup>

593. Of course, as Mr. Shrake has explained, his initial concern over Minister Barrera's rather blithe statements was eventually resolved after he flew to El Salvador, where he personally met with the Vice-President of the country, Ana-Vilma Escobar, as well as with the Ministers of MARN and MINEC.<sup>964</sup> During these meetings, Minister Barrera "downplayed the remarks that were reported in the press, joking that he should make statements to the press more frequently so that he could see more of the Vice President."<sup>965</sup> The following day, the Vice President confirmed to Mr. Shrake that, "this will all work out for us and El Salvador."<sup>966</sup>

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<sup>962</sup> Respondent's Reply on Objections to Jurisdiction, dated 31 January 2011 ("**Reply on Jurisdiction**"), para. 81.

<sup>963</sup> *Adíos a las Minas*, LA PRENSA GRAFICA (9 July 2006) (R-120).

<sup>964</sup> Second Shrake Witness Statement, paras. 117-18; *see also* Colindres Witness Statement, paras. 123.

<sup>965</sup> Second Shrake Witness Statement, para. 118.

<sup>966</sup> *Id.*, para. 119.

594. Days later, Minister Barrera, together with Minister de Gavidia of MINEC, publicly announced that El Salvador's laws allow mining and that an administrative agency cannot impede what the law permits:

In a 180-degree turnaround from what he said days ago, Minister of the Environment, Hugo Barrera, along with the Minister of Economy, Yolanda de Gavidia, reached out to mining companies seeking precious materials in the country to allow them to carry out mining operations underground. ... Barrera made it clear that in the country there is no express prohibition of mining projects, only a regulation that dictates the conditions on how these companies must operate.<sup>967</sup>

595. As this series of events demonstrates – along with many others recounted in this Memorial – foreign investors attempting to resolve any problems they may face in El Salvador are typically required, and expected, to demand to “speak to the supervisor.” As Pac Rim was advised by Mr. Francisco de Sola, a member of MARN's public advisory board, in August 2005:

There is nothing to lose by talking up at the top, as I insisted when you visited me. Please call her [the Vice-Minister] and introduce yourself, get your President to come down soon, and pay them a complementary courtesy call at Medio Ambiente!<sup>968</sup>

596. As Mr. de Sola indicated, he had himself spoken to the Vice-Minister of MARN, Ms. Michelle Gallardo de Gutierrez, about the ED Environmental Permit application. She had indicated to Mr. de Sola that she was “aware of the situation,” but not of the details, and believed that the delay in processing the application was merely due to inefficiency.<sup>969</sup> Notably, at around this same time, Ms. Gutierrez made a point of reaching out to Ms. Ericka Colindres, the MARN

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<sup>967</sup> A. Dimas and K. Urquilla, *Hugo Barrera opens the door to mining*, EL DIARIO DE HOY (23 July 2006) (C-300).

<sup>968</sup> Email from Francisco R.R. de Sola to Fred Earnest, dated 10 August 2005 (C-284).

<sup>969</sup> *Id.*

technician who had previously been in charge of reviewing the El Dorado EIS, asking Ms. Colindres to personally, “provide her with a summary of the Environmental Impact Assessment process of the El Dorado Project.”<sup>970</sup> It is difficult to imagine that these events are coincidental, particularly when viewed in light of other similar events.

597. For example, Ms. Colindres explains that while PRES had submitted its ED Environmental Permit application in September of 2004, no one had even begun to review the application by December of that year. Nevertheless, when Mr. Earnest wrote directly to Minister Barrera in December 2004 – at the urging of Ms. Navas from the Bureau of Mines – review of the EIS commenced shortly thereafter. According to Ms. Colindres: “I regard it as probable that the letter sent by Fred Earnest to Minister Barrera on December 15, 2004, played an important part in advancing the process. I can confirm that from January 2005 and until the time I left the MARN at the end of July that same year, Minister Barrera pressured the Technicians to hasten our review of the El Dorado EIS.”<sup>971</sup>

598. Indeed, up until 2008, Pac Rim had sought and received assistance from higher powers within the Government on numerous occasions, for the legitimate purpose of provoking *compliance* with the law. It was not until President Saca’s statement in March of 2008 that the relevant higher powers radically altered their message, suddenly instructing their dependants *not to comply* with the law or with El Salvador’s commitments to foreign mining investors.

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<sup>970</sup> Colindres Witness Statement, para. 95.

<sup>971</sup> *Id.*, para. 74.

599. As the Tribunal will recall, President Saca declared to the press in March of 2008 that: "... in principle, I am not in favor of granting those [mining] permits..."<sup>972</sup> President Saca went on to state that: "after we reflect on it, and we're shown proof that green mining exists and that it is possible to grant the exploitation permits, which is what we have not given them, at that time, a law must be made to make everything very clear."<sup>973</sup>

600. Notably, Respondent does not appear to find anything untoward about these statements by the President, taking it upon himself to "reflect" or "decide" upon whether a legally permitted industry should be allowed to operate in accordance with the existing law; and indicating that foreign investors can be deprived of their rights unless they can "show proof" to him personally that their legally authorized activities meet a new, vague and undefined standard that he has decided to establish for them. Indeed, in the jurisdictional phase of this arbitration, Respondent denied that a *de facto* ban on mining existed in El Salvador, but openly admitted in connection with a discussion of President Saca's statement that, "El Salvador is currently engaged in the process of deciding what the future of metallic mining in El Salvador will be ...."<sup>974</sup>

601. Respondent took a similar position with regard to the earlier statements by Minister Barrera in July of 2006, which, as noted above, were eventually reversed after the Vice President's intervention. Indeed, Respondent presented those statements as being declarative of

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<sup>972</sup> *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA (11 March 2008) (C-1).

<sup>973</sup> *Id.*

<sup>974</sup> Reply on Jurisdiction, n.31.

a situation – namely, the Minister’s expression of an intention not to implement the law in granting PRES’s environmental permit – that should have made Pac Rim aware that its environmental permit would never be issued.<sup>975</sup> In effect, Respondent has confirmed that comments made to the press by public officials in El Salvador should be viewed as having binding legal effect.

602. On one hand, Respondent’s posture with regard to this issue is somewhat baffling, particularly given the pendency of the current proceedings. Indeed, even if Respondent were not embroiled in an international arbitration revolving around the mining ban’s impact on the rights of investors, it would nevertheless be difficult to understand how it could treat the Executive Branch’s disregard for the laws so nonchalantly.

603. On the other hand, it would be difficult for Respondent to take any other position in light of the unequivocal nature of the statements that have been made by the relevant Government officials, all of which confirm that they are intended to have direct and binding effect. Thus, President Sacá stated in July 2008 that, “as of today **I** am not giving any mining permit” (as if it were the President’s function to grant environmental permits); and that before he would do so, “**I** need to have the study, **I** need to know how much potential gold we have, **I** need to know what impact the use of cyanide will have on the water” (again, as if he were personally responsible for weighing the economic benefits or environmental impacts of the execution of an existing law, and then making the decision whether the law should be executed or not).<sup>976</sup> Notably, in the same interview, President Sacá indicated that one of the requirements for him to

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<sup>975</sup> *Id.*, paras. 81, 84-85.

<sup>976</sup> *Sacá affirms that he will not grant mining permits* (15 July 2008) (C-61).

permit mining would be “approval of a Mining Law,”<sup>977</sup> as if he were somehow unaware that there was *already* a modern Mining Law in effect in the country enacted in 1996 and amended in 2001.

604. By February 2009, President Saca had been reminded that the country did in fact have a Mining Law after Pac Rim informed Respondent that it would be filing international arbitration proceedings against it. However, this did not seem to trouble President Saca, who responded by indicating that: “As long as Elías Antonio Saca holds the office of president, he will not grant a single permit (for mining exploitation);” that he would “rather pay \$90 million than grant them a permit;” and that “we have no obligation to grant the exploitation permit, even though they have the exploration permit.”<sup>978</sup>

605. In December 2009, President Funes declared that: “The Government is not approving any mining exploration or exploitation project.”<sup>979</sup> In 2010, it was affirmed that President Funes had, “reiterated several times that he will not permit mining projects, but has not finalized the decision by passing an executive decree or imposing a new mining law.”<sup>980</sup> Instead, President Funes was quoted as stating that: “I do not need to pass a decree for such authorization not to be given, since that would mean questioning the President’s word.”<sup>981</sup>

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<sup>977</sup> *Id.*

<sup>978</sup> Keny Lopez Piche, “No” to mining: Saca closes the doors to the exploitation of metals, LA PRENSA GRAFICA (26 February 2009) (C-4).

<sup>979</sup> *Funes rules out the authorization of mining explorations and exploirations in El Salvador* (27 December 2009) (C-2).

<sup>980</sup> *One Year of Waiting*, DIAROCOLATINO.COM (19 May 2010) (C-65).

<sup>981</sup> *No to mining*, LA PRENSA GRAFICA (13 January 2010) (C-3).



606. In view of the foregoing, it is abundantly clear that the Executive Branch of Government, led by the President, has implemented a *de facto* ban on metallic mining in El Salvador. This is confirmed by Professor Ferandois in his Legal Expert Report. As he explains:

Combined with the vehemence of the declarations [by the President], and the structure of a presidential system, it is immediately concluded that the subordinate officials, directly dependent on the person making such declarations, must obey them. Even if they are not stated in administrative acts such as decrees, official communications or instructions, the declarations in this context have the quality of producing obedience in the subordinate. In political science, this phenomenon has been called “*command and obedience*,” referring to the position that is adopted by a subordinate who is compelled to act by his superior or by whoever appears as the superior since, in this case, that is the person who appointed him and who can remove him.

Therefore, the declarations of President Saca, even if they lack legal grounds, have definite effects upon the Government and private parties, with legal consequences, executed by subordinate agencies and officials.

To be precise, in this type of presidential system, it does not seem persuasive to say that the will of the Head of State, in an explicit statement in which he exerts pressure on a position of the Government in the specific matter in question, is irrelevant in terms of not affecting the performance or the omission of administrative acts or procedures.<sup>982</sup>

607. Thus, Professor Ferandois comes to the conclusion that, “the declarations of President Elías Saca are actual manifestations of the will that, while overstepping the law, produce *de facto* effects (compliance) by bringing about obedience on the part of subordinate

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<sup>982</sup> Ferandois Expert Report at 70-71.

government officials of the Government of El Salvador.”<sup>983</sup> Professor Fermandois’ conclusions in this regard apply *a fortiori* to the statements made by President Funes, which have been just as unequivocal as President Saca’s and which, furthermore, have confirmed the ban as a consistent presidential policy.<sup>984</sup>

608. Given that the existence of the ban is undeniable, Claimant will proceed to consider the impacts of the ban with regard to Respondent’s obligations to foreign investors.

**2. Illegal and Unjustified Measures, Including Violation of the Principles of Legality, Economic Freedom, Non-Abuse of Right & Legitimate Expectations**

609. It does not require significant discussion or analysis to conclude that the *de facto* ban violates the principle of legality, as well as the basic separation of powers established in the Salvadoran Constitution. In particular, Article 86 provides that: “Government officials are delegates of the people and have only the powers expressly conferred upon them by the law.”<sup>985</sup>

In turn, Article 164 provides with specific reference to the President, that:

Any decrees, decisions, orders, or resolutions issued by officials of the Executive Branch that exceed the powers established in this Constitution shall be null and void and shall not be obeyed, even if issued with the intent of submitting them to the Legislative Assembly for approval.<sup>986</sup>

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<sup>983</sup> *Id.*

<sup>984</sup> *See id.* at 71, para. xi. (“To this it should be added also that these types of declarations have been made by two consecutive Presidents of the Republic, thereby observing a consistent line of action that reinforces administrative obedience”).

<sup>985</sup> Constitution, art. 86 (emphasis added) (CLA-1).

<sup>986</sup> *Id.*, art. 164.

610. Furthermore, Article 168 provides that the President is “empowered and obliged to ... [o]bserve and enforce the Constitution, treaties, laws, and other legal provisions...”<sup>987</sup> As these provisions make clear, the President of the Republic of El Salvador is required to enforce the existing laws and is prohibited from exercising powers that are not conferred upon him by those laws.

611. In this instance, the *Asamblea Legislativa* of El Salvador, in the exercise of its lawmaking function, implemented the 1996 Mining Law and its 2001 Amendment based upon a review of whether mining would be beneficial for the country. As set out at length in this Memorial, the *Asamblea* concluded that it would be. In fact, the *Asamblea* concluded – both in 1996 and again in 2001 – that mining would be so beneficial that the promotion of the industry was deemed to be “of fundamental importance” for the country.<sup>988</sup>

612. These determinations still stand, and are still incorporated into the legal framework of El Salvador. In view of that situation, it is difficult to understand how Respondent can credibly claim to believe that the Executive Branch – the duty and function of which is to *enforce the law* – can purport to make decisions about whether mining will be allowed and, if so, at what time, based merely on its own alleged considerations and “reflections” on the topic.

613. Indeed, regardless of the nature of President Saca’s or President Funes’s musings about the convenience of the mining industry (assuming of course that they have not just been

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<sup>987</sup> *Id.*, art. 68.

<sup>988</sup> 1996 Mining Law, Preamble, para. III (CLA-210).

musings about their election strategies),<sup>989</sup> they certainly have no authority to determine the requirements of the public interest in relation to the mining industry, which – as set out extensively above – has already been declared as an activity in the public interest by the laws of El Salvador for over 125 years. As Professor Ferandois confirms: “the public interest defined by law cannot be expanded by administrative acts inconsistent with such law. The above comprises a fundamental principle of constitutional law ...”<sup>990</sup>

614. Nevertheless, as a result of the *de facto* ban which has, since 2008, been expressly ordered and authorized by successive Presidents of the Republic, the Enterprises have been unable to exercise their lawful economic activities in El Salvador, in violation of the principle of economic freedom established in Article 102 of the Constitution and reflected in the Preamble to the Investment Law.<sup>991</sup> Specifically, PRES has been denied of its right to obtain the El Dorado Exploitation Concession and carry out its contemplated activities there under; and DOREX has been deprived of its rights to exercise mining activities under the terms of its Exploration Licenses for Pueblos, Guaco and Huacuco.

615. As already discussed during the preliminary phases of this arbitration, the direct impediment to the Enterprises’ ability to carry out their investments is the failure by MARN to act upon their environmental permit applications. In turn, MARN’s failure to act violates the

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<sup>989</sup> See Ferandois Expert Report at 95 (characterizing President Saca’s declarations as “based on typically political, expedient and opportunistic considerations...”).

<sup>990</sup> *Id.* at 89.

<sup>991</sup> *Id.* at 90.

principle of legality as it is applied in the context of administrative procedures, in which it entails that:

The competency [conferred upon an administrative agency by the law] is imperative and not optional; therefore, the agency must exercise it. Otherwise, it would fail in its duty. The competency is irrevocable for the agency to which it is granted; therefore, it constitutes a power/duty and not a subjective right.<sup>992</sup>

616. Certainly, MARN is not permitted under the express terms of the law to fail to take action upon applications that are submitted for its resolution. To the contrary, the Environmental Law specifically requires MARN to review and issue a resolution on all EISes submitted in the context of an Environmental Impact Assessment within 60 days of their presentation.<sup>993</sup>

617. More importantly, Article 18 of the Constitution requires MARN to resolve all petitions that are directed to its attention as a matter of constitutional right of the petitioner.<sup>994</sup> In accordance with this provision, MARN had a duty to, “analyze the content of the request and to make a decision on it in accordance with the powers legally conferred on it.”<sup>995</sup>

618. As has been demonstrated herein, MARN technicians did initially take actions to analyze the Enterprises’ applications, generally with prompting from above. For example, MARN issued the El Dorado Norte and El Dorado Sur Drilling Environmental Permit, as well as

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<sup>992</sup> RICARDO MENA GUERRA, *GÉNESIS DEL DERECHO ADMINISTRATIVO EN EL SALVADOR* [THE ORIGIN OF ADMINISTRATIVE LAW IN EL SALVADOR] 116 (2005) (emphasis added) (AF-19).

<sup>993</sup> Environmental Law, art. 24 (CLA-213).

<sup>994</sup> Constitution, art. 18 (CLA-1).

<sup>995</sup> Supreme Court of El Salvador, Administrative Law Division, Judgment in case no. 404 – 2007, dated 25 February 2010 (CLA-265); *see also* Fernandois Expert Report at 89.

the Drilling Environmental Permit for Santa Rita. With regard to the ED Mining Environmental Permit, the MARN technicians undertook a good faith review of PRES's application until at least September 2005.<sup>996</sup> Thus, while PRES was frustrated by the delay in processing its ED Mining Environmental Permit application, it reasonably believed that a favorable resolution would eventually be forthcoming as it had been with other permits in the past. Indeed, as Ms. Colindres attests:

Some delay was an inevitable and therefore a known feature by all those involved in the [Environmental Impact Assessment] process, both the titleholders of the projects and the Technicians.

On the other hand, I would like to reiterate that I am also unaware of a single Environmental Impact Assessment process that resulted in the issue of a Resolution not to approve the EIS submitted...<sup>997</sup>

619. Given the regulated nature of the Environmental Impact Assessment process, and the fact that the agency itself never identified any deficiency in the EIS submitted by PRES for the El Dorado Mining Project, MARN's refusal to issue the related environmental permit is presumptively illegal. This illegality is only further confirmed by the historical precedent that environmental permits are in practice never denied after submission and review of an EIS; and the fact that the EIS submitted by PRES was unimpeachable from a technical-environmental standpoint, as confirmed by Ms. Colindres and by independent international experts, Drs. Hutchinson and Mudder.

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<sup>996</sup> Colindres Witness Statement, paras. 100, 104.

<sup>997</sup> *Id.*, paras. 56-57 (emphasis added); *see also* para. 104 ("I reiterate that I know of no case of an Environmental Impact Assessment in El Salvador undergoing this level of procedure and not culminating in the issue of an Environmental Permit.").

620. With regard to the applications submitted by DOREX for the Drilling Environmental Permits, the arbitrariness in MARN's conduct is perhaps even more apparent, since it can be plainly contrasted with the agency's treatment of past applications submitted by PRES for drilling activities at El Dorado and Santa Rita. In this regard, the Administrative Division of the Supreme Court of El Salvador has affirmed the principle of administrative precedent, indicating that:

[T]he public servant ... has a duty to give reasons for all decisions made that depart from the principle followed in previous decisions, which in case law has become known as administrative precedent, i.e., a decision by the Government that is, in some way, binding on its future decisions, inasmuch as its decisions in similar cases must be based on similar grounds

[...]

However, if the Government decides to change the principle used in previous decisions, it must provide arguments to justify the change, i.e., it must state the objective reasons that have led it to act differently and abandon its former principle, due to the importance of the constitutional rights and principles that may be violated.<sup>998</sup>

621. In this case, MARN had consistently issued environmental permits for drilling activities and there was no basis to distinguish the activities to be undertaken at Huacuco, Pueblos and Guaco from the ones that had gone before.

622. In view of all the foregoing, there is simply no explanation for MARN's illegitimate failure ever to grant the environmental permits in question, except as an implementation of the *de facto* ban. In essence, successive Presidents of the Republic, along

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<sup>998</sup> 288-A-2003, Administrative Law Division, dated 15 November 2004 (CLA-269).

with certain Ministers of MARN, have commandeered the administrative procedures through which PRES and DOREX were legitimately attempting to effectuate their rights, and have steered those procedures into an infinite holding pattern. Again, it requires little analysis to conclude that this is illegal. As held by the Administrative Division of the Supreme Court of El Salvador: “It is clear then that administrative decisions cannot be produced at the whim of the head of the body responsible for issuing them, without adhering to a procedure and respecting constitutional rights.”<sup>999</sup>

623. Furthermore, Professor Fernandois classifies MARN’s conduct in implementing the *de facto* ban as an abuse of power:

The Government has no right to invoke discretion in the terms expressed by President Sacá to halt the process of granting exploitation concessions and environmental permits. This would be fraudulent evasion of the law or abuse of power, in the sense of using Government inaction or repeated requests for further documentation to attain an objective—a freeze on granting new mining concession—which is not provided by law, and, worse still, contradicts it;

Abuse of power is recognized in public law when the act of the Government serves a purpose other than that specified in the law conferring the power. This is exactly what has happened in this case with the Environmental Law. Although the provisions and institutions contained in said law seek to establish the conditions under which certain activities may be performed, the law has been used and applied for a different purpose, revealed by the chief of state, President Sacá, consisting in freezing all activity related to metallic mining ...<sup>1000</sup>

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<sup>999</sup> 45-V-96 Administrative Division of the Supreme Court, dated 31 October 1997 (CLA-266)

<sup>1000</sup> Fernandois Expert Report at 83.



624. Moreover, Professor Fernandois notes that the implementation of the *de facto* ban violates the cardinal principle of legal certainty, which the Constitution has elevated “from its traditional place of individual guarantees – to the place of highest values, as universal and fundamental in a constitutional democracy as justice and the common good.”<sup>1001</sup> This is confirmed by decisions of the Constitutional Division of the Supreme Court of El Salvador, which have held that: “Legal certainty is a principle that informs the entire legal system in El Salvador. It stands as a general right in our Constitution, as a protection in interaction both among citizens and between citizens and the Government.”<sup>1002</sup>

625. In Professor Fernandois’ view, the principle of legal certainty, along with the principle of legality, are closely related to the principle of *confianza legítima* (or legitimate expectations as it is generally referred to in the international investment jurisprudence).<sup>1003</sup> As indicated further above, the principle of legitimate expectations was clearly alluded to in the Statement of Purpose for the Investment Law,<sup>1004</sup> moreover, it is considered as a general principle of law, having “acquired recognition in practically all relevant administrative systems. On occasion it is identified with an extrapolation of private good faith to the sphere of ‘*ius publicist*.’”<sup>1005</sup>

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<sup>1001</sup> *Id.* at 72.

<sup>1002</sup> 642-99, Constitutional Division, dated 26 June 2000 (CLA-250).

<sup>1003</sup> Fernandois Expert Report at 73.

<sup>1004</sup> Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, 2 June 1998, Statement of Purpose, Principles of Protection and Guarantee. (RL-101).

<sup>1005</sup> Fernandois Expert Report at 74 (quoting JORGE BERMUDEZ SOTO, DERECHO ADMINISTRATIVO GENERAL [GENERAL ADMINISTRATIVE LAW], 86 (2011)).

626. In essence, the principle of legitimate expectations entails a duty of non-contradiction, meaning that:

[T]he Government is obligated to refrain from thwarting the expectations that have been entrusted to it by private parties in a series of actions that bring about a specific legal situation that is favorable thereto.<sup>1006</sup>

627. Furthermore, Professor Fernandois confirms that: “Such situation of trust cannot be defined only by laws but also from actions of the Administration itself...”<sup>1007</sup>

628. In this case, there is no doubt that Pac Rim entrusted its expectations to the Government of El Salvador, based both upon the existing legal framework in 2002,<sup>1008</sup> as well as the specific conduct of the Government leading up to Pac Rim’s investment in the El Dorado Project and continuing for a significant period of time thereafter. This conduct included, *inter alia*:

- The extraordinary signs of good will shown by the Bureau of Mines and the *Asamblea* to PRES’s predecessor, Kinross El Salvador, including in the issuance of an emergency decree and the implementation of amendments to the 1996 Mining Law to make the legal regime more beneficial for Kinross’s shareholder, Dayton Mining Corp;
- The assurances offered to Pac Rim by Government officials at the time it was conducting its due diligence for its merger with Dayton;
- The Bureau of Mines’ active collaboration in obtaining a solution to the MINEC Legal Department’s

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<sup>1006</sup> Fernandois Expert Report at 76.

<sup>1007</sup> *Id.* at 77.

<sup>1008</sup> As Professor Fernandois confirms, the Investment Law and the Mining Law, “are appropriate for describing a situation of trust that produces expectations that, due to coming from express laws that are understood to have a minimum duration, are legitimate.” *Id.* at 78.

misinterpretation of Article 37(b) of the Amended Mining Law;

- The Bureau of Mines' active collaboration in preserving Pac Rim's rights over the remaining area of the El Dorado Norte and El Dorado Sur Exploration Licenses that fell outside the mutually-defined Exploitation Concession area;
- The favorable administrative resolution of a number of procedures instituted by PRES and DOREX, including the issuance of the ED Drilling Environmental Permit; the issuance of the Santa Rita Exploration License and the Santa Rita Drilling Environmental Permit; and the issuance of the Exploration Licenses for Pueblos, Guaco and Huacuco.
- The personal collaboration and expressions of support for the El Dorado Project by high-ranking Government officials, including the Minister of Economy, Yolanda de Gavidia; the Vice-President, Ana Vilma Escobar; and, as late as 2007, the President, Elías Antonio Saca.<sup>1009</sup>

629. In reasonable reliance on these conditions, Pac Rim acquired the El Dorado Norte and El Dorado Sur Exploration Licenses (and other exploration licenses), and proceeded to carry out the fundamental purpose of the Amended Mining Law, which was to discover and develop the site's economic mining potential. In consequence, PRES acquired a right: namely, the right conferred under Article 23 of the Amended Mining Law, which, as discussed above, was a right to the El Dorado Exploitation Concession.

630. In December 2004, when PRES applied for the Exploitation Concession, the Bureau of Mines determined that the area would need to be reduced in light of the technical and

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<sup>1009</sup> See Second Shrake Witness Statement, para. 129 ("In May 2007, I was thrilled to learn that President Saca requested our participation in a pro-mining documentary for El Salvador"); para. 130 ("Finally, in August 2007, we were told that the President had personally agreed to move forward on our permit").

economic justifications that had been developed in relation to the Exploration License areas up to that date. Nevertheless, the Bureau of Mines, *in express recognition that Pac Rim had the ability to discover and develop the potential of these areas in the near future*, agreed to grant new exploration licenses to DOREX covering the entire original area of El Dorado Norte and El Dorado Sur. In consequence, DOREX, too, acquired valuable rights, as confirmed by Professor Fernandois.<sup>1010</sup>

631. Nevertheless, after these valuable rights had been acquired, as a result of substantial contributions by Pac Rim, the Executive Branch of the Salvadoran Government decided to simply disregard the entire legal framework in the country in its application to investors in the mining sector. Indeed:

The situation of trust that motivated the Companies to invest in El Salvador has not been the subject of relevant legal modifications or official changes. Such process of incentives to foreign investment and promotion of metallic minerals has not been changed by legislative means. On the contrary, consistent administrative practice has fully implemented this process by processing and granting the necessary permits, as explained.

However, in spite of the lack of legal precepts that support such conduct, the executive branch has opted, suddenly and surprisingly, to suspend all administrative processing related to the permits needed to carry out mining work, whether for exploration or exploitation.<sup>1011</sup>

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<sup>1010</sup> See Fernandois Expert Report at 81-82 (“The exploration license held by PRES, as it incorporates the exclusive right to request an exploitation concession in the case of success ... naturally has a pecuniary value, since it entitles the holder to become the owner of the minerals in the deposit, in the terms established by law.”)

<sup>1011</sup> *Id.* at 79 (emphasis added).

632. In short, the actions of the Executive Branch have been surprising, abrupt, manifestly unlawful, and in contravention of El Salvador's clearly stated laws and policies towards mining for the past 135 years. There is no question under these circumstances of Pac Rim having been deprived of its legitimate expectations as an investor in the El Dorado Project.

**B. Unlawful Interference with Property and Expropriation**

633. As set out in the preceding section, Respondent – and particularly its Executive Branch – has acted in an overtly unlawful and arbitrary manner in disregarding the existing legal framework for mining in the country, and in doing so has thwarted Pac Rim's legitimate expectations. In addition, the *de facto* mining ban has also substantially deprived Claimant of its rights, including the mining rights described in **Section IV**, above, and the shares of PRC in the Enterprises.

634. As previously mentioned, the Investment Law provides for the protection of property in accordance with the Constitution,<sup>1012</sup> and guarantees that expropriation shall only proceed for legally demonstrated reasons of public or social interest, and upon prior payment of fair compensation.<sup>1013</sup> Furthermore, as noted in **Section III**, above, it is understood that the expropriatory measure must also be non-discriminatory and proportionate to the legitimate end, since these are general principles of law which are part of the Salvadoran constitutional framework and, in any event, must be applied by this Tribunal pursuant to Article 42(1) of the ICSID Convention.

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<sup>1012</sup> Investment Law, art. 13 (CLA-4).

<sup>1013</sup> *Id.*, art. 8.

635. El Salvador has not developed substantial jurisprudence which would shed further light on the guarantee against expropriation without compensation in Salvadoran law, whether under the Constitution or the Investment Law. However, it has long been recognized by tribunals applying customary international law that a measure is *prima facie* expropriatory when it results in a substantial deprivation of the investment in question.<sup>1014</sup> Under the orthodox test – sometimes known as the “sole-effects” test – the effect of the measure ends the inquiry: if the investor has been substantially deprived of its property rights, the measure will be considered expropriatory, regardless of the form in which it is implemented or the intentions behind it.<sup>1015</sup>

636. On the other hand, a competing viewpoint provides that the issue should not be decided without giving due consideration to any showing by the respondent state that the deprivation resulted from *bona fide* regulation of the kind that is commonly understood as being within the police power of states, *unless* the regulation is discriminatory and/or disproportionate. For example, the tribunal in *Tecmed* indicated with regard to a Resolution refusing to renew a permit: “As far as the effects of such Resolution are concerned, the decision can be treated as an expropriation .... However, the Arbitral Tribunal deems it appropriate to examine ... whether the Resolution, due to its characteristics and considering not only its effects, is an expropriatory

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<sup>1014</sup> See ANDREW NEWCOMBE AND LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 325-26 (2009) (“No matter how the expropriation is described, international law looks to the effect of the government measures on the investor’s property. The form and intent of the government measure is not determinative, although it is often relevant.”) (CLA-275).

<sup>1015</sup> See, e.g., *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFAA Consulting Engineers of Iran*, 6 IRAN-U.S. CL. TRIB. REP. 219, 225-26 (1984) (“The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”) (CLA-278).

decision.”<sup>1016</sup> The tribunal went on to conclude that the Resolution was disproportionate and thus that a compensable expropriation had occurred.<sup>1017</sup>

637. Regardless of the amount of emphasis that may be given to the form and intent of the measure or measures at issue, it is clearly not necessary for the State to actually take title to a foreign investor’s property in order for a compensable expropriation to occur. Indeed, it has long been established that an expropriation may occur whenever there is an, “unreasonable interference with the use, enjoyment, or disposal of property so as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.”<sup>1018</sup>

638. Thus, the *Restatement of the Law (3d) of Foreign Relations Law of the United States* confirms that the customary international law prohibition on takings of alien property applies not only to cases of direct appropriation, “but also to other actions of the government that

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<sup>1016</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (Award dispatched 29 May 2003), paras. 117-118 (CLA-279).

<sup>1017</sup> See also *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 (Award dated 28 February 2010), para. 387 (“The Tribunal finds that the circumstances of Mr. Kardassopoulos’ claim present a classic case of direct expropriation, Decree No. 178 having deprived GTI of its rights in the early oil pipeline and Mr. Kardassopoulos’ interest therein. The Tribunal also finds that this deprivation was not an exercise of the State’s *bona fide* police powers.”) (CLA-274); *RosInvest Co. UK Ltd. v. Russian Federation*, S.C.C. Arbitration V (079/2005)m para. 628 (noting that the “normal application of domestic tax law in the host state cannot be seen as an expropriatory act,” but that an expropriation would occur if the host state were to undertake an “an abuse of tax law to in fact enact an expropriation.”) (CLA-276).

<sup>1018</sup> Louis V. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT’L L. 545, 553 (1961) (Art. 10(3)(a) of the draft convention) (emphasis added) (CLA-283).

have the effect of ‘taking’ the property, in whole or in large part, outright or in stages....”<sup>1019</sup> As explained in the *Restatement*:

A state is responsible as for an expropriation of property ... when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the state’s territory.<sup>1020</sup>

639. In this case, there cannot be any serious doubt that the *de facto* mining ban, as announced in 2008 and confirmed by successive Presidents and implemented by MARN, has prevented PRC and the Enterprises from effectively enjoying their rights. As Professor Fernandois concludes:

[T]he right to property is violated by the moratorium because it has produced the effect of preventing conclusion of the administrative procedure, depriving the Companies of their essential powers of ownership of their intangible and tangible rights. In the case of the former, it arises from a situation in which a citizen is in a legal process in which the citizen is governed by a *de facto* reality that is unpredictable, drawn out, and pointless. In the second instance, the use, enjoyment, and disposition of the principal component of the exploration license – the right of convertibility into an exploitation concession– is taken away by the Government, which cancels any legal effect.<sup>1021</sup>

640. In other words, by illegitimately freezing the administrative proceedings which would have enabled PRES and DOREX to achieve the full use and enjoyment of their mining rights (and which MARN and MINEC had a duty to bring to a favorable resolution under the plain terms of Salvadoran law), Respondent has effectively deprived the Enterprises – and

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<sup>1019</sup> Restatement (Third) of Foreign Relations, sec. 712 cmt (g).

<sup>1020</sup> *Id.* (emphasis added).

<sup>1021</sup> Fernandois Expert Report at 96 (emphasis added).



indirectly, PRC – of those rights.<sup>1022</sup> Indeed, the ban has already been in effect for a minimum of five years to date, and appears by all accounts to be of indefinite duration – at least inasmuch as it pertains to Pac Rim.<sup>1023</sup> This is thus much more than a case of “delayed opportunity.”

641. Furthermore, it is clear that there is no legitimate purpose behind Respondent’s implementation of the *de facto* ban since it already fails the most basic test established by the terms of Article 8 of the Investment Law: namely, that it be legal. Indeed, the *de facto* ban is a patently *extralegal* measure, implemented by an Executive Branch that has publicly draped itself with a legislative mantle and depicted the President’s “word” as if it were the accepted law of the land. As Professor Ferandois confirms:

The reasons given by President Saca to justify the moratorium, halting mining exploitation, comes from an authority that lacks the constitutional and legal competence to establish same, as it is an act that alters and contradicts the effective and essential purpose of the law.

[...]

If the objective sought by the moratorium has been defined, then, by an authority lacking competence, and therefore the objective in this case is unlawful, the moratorium can under no circumstances satisfy the principle of proportionality, thus making the acts and omissions ordered to meet this objective arbitrary, capricious and in violation of the constitutional guarantee of equality. The moratorium is thus a politically binding action on the agencies subordinate to the President, but exercised outside their formal

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<sup>1022</sup> As the Tribunal is by now aware, the shares in the Enterprises are PRC’s only substantial assets, and their interests in the El Dorado Project are the only substantial assets held by the Enterprises.

<sup>1023</sup> As Claimant pointed out above, the value of the plans and studies developed by Pac Rim and, of course, the value of the mineral deposits that it discovered, will remain at the disposal of the Government of El Salvador. What will become of them once Pac Rim is out of the picture remains to be seen, but if history is a guide they will not be left unexploited.

scope of authority, making it annullable, unlawful, void, *contra constitutionem*.<sup>1024</sup>

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In sum, by adopting and steadfastly maintaining the extra legal and *de facto* mining ban, El Salvador has expropriated Pac Rim's valuable mining investments without compensation. In so doing, El Salvador has grievously damaged Pac Rim and must now provide just compensation to Claimant.

## **VI. DAMAGES AND QUANTUM**

### **A. General Principles: The Investment Law, Salvadoran Law and the General Principles of International Law Govern the Damages Award in This Arbitration**

642. As discussed above in **Section III**, this Tribunal is governed by the Investment Law, the Constitution of El Salvador, and general principles of international law. Accordingly, the Tribunal is also bound to apply these laws in determining the full amount of damages to be awarded to Claimant for the injury it suffered as a result of the unlawful acts of Respondent.

643. With respect to Claimant's claims for violations of the Investment Law, the Parties have not agreed to the application of any particular substantive law, and the Investment Law itself does not prescribe one. In such circumstances, pursuant to Article 42(1) of the ICSID Convention, Claimant's claims under the Investment Law are governed by Salvadoran law, and by such rules of international law as may be applicable. As set out in **subsections 1** and **2** below, Claimant submits that the remedy for damages under Salvadoran and international law are consistent. In the alternative, if it is not accepted that Salvadoran and international law standards

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<sup>1024</sup> Fernandois Expert Report at 86.

are consistent, then ICSID Convention Article 42(1) should be applied by the Tribunal to determine that international law governs to determine the appropriate remedy in this arbitration.

### **1. Principles of Damages in Salvadoran Law**

644. It is well-recognized in the Salvadoran jurisprudence that when the constitutional rights to legal security and protection of property are infringed, as demonstrated above, the State has objective liability to compensate the injured party. The concept of compensation for damages is well understood and incorporated into Salvadoran law, including the concept of compensation for lost profits. In particular, Article 245 of the Constitution provides that: “Government employees and functionaries will be personally liable, and the State will be liable subsidiarily, for material or moral damages that are caused as a result of the violation of the rights enshrined in this Constitution.” The Civil Code Articles 2065 and 2067 establish the obligation of a “person”, such as Respondent, who causes damages to compensate for such damages.<sup>1025</sup>

645. As set out in Salvadoran jurisprudence, lost profits are available as a remedy in cases of non-contractual breaches, whereby the elements to be proven include: “... a) the existence of the injurious act or omission; b) the bad faith or negligence with which it was executed (negligence is presumed); c) the injury; and d) a causal link between the act and the

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<sup>1025</sup> Civil Code, art. 2065 (“A person who has committed, a crime, unintentional tort, or misdemeanor is obligated to pay compensation without prejudice to the penalty imposed by the law for the act committed.”); art. 2067 (“The person who caused the damage and his heirs are obligated to pay compensation.”) (CLA-220).

injury.”<sup>1026</sup> As stated in a recent Salvadoran case law, compensation includes actual damages and loss of profits.<sup>1027</sup>

646. Accordingly, the compensation for damages under Salvadoran law, whether with respect to the breach of obligations related to the Investment Law or for breach of civil and constitutional obligations, should aim to put Claimant in the position it would have been in if the Respondent had acted in accordance with its own laws and not deprived Claimant of its investment.

## **2. General Principles of Damages in Customary International Law**

### **a. The Chorzów Factory Case Standard**

647. It is well understood and accepted that the standards for compensation upon lawful expropriation are different from those for unlawful expropriation, and the former cannot

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<sup>1026</sup> Civil Court Judgment 1325 – 2001 (CLA-282) (Original Spanish: “...si en autos se ha establecido la prueba de las condiciones que deben concurrir para el perfilamiento de la fuente de obligación y para el nacimiento de la misma, para tal efecto dice la Cámara, que de manera uniforme la doctrina establece que debe probarse; a) la existencia del hecho u omisión dañosa; b) el dolo o culpa con que el mismo se ejecutó (la culpa se presume); c) el perjuicio; y d) un nexo de causalidad entre el hecho y el perjuicio.”); see also Case 134-C-2005 (CLA-221): “In other words, all liability always arises from a voluntary act that produces an injury for which compensation must be provided when a causal link can be established between said action and result such that it can be affirmed that the latter is a consequence of the former. This doctrine of tort is established in our Civil Code, Arts. 2035, 2065 and 2080.” (Original Spanish: “En otras palabras, toda responsabilidad siempre emana de un acto voluntario que genera un daño que debe ser indemnizado cuando, entre tal acción y el resultado, se puede establecer una relación de causalidad, de tal forma que se pueda decir que éste proviene de aquélla, Esta teoría de la responsabilidad civil extracontractual la desarrolla nuestro Código Civil en sus Arts. 2035, 2065 y 2080.”)

<sup>1027</sup> Case 134-C-2005 (CLA-221) defines these terms as follows: “Actual damages consist of the direct detriment, damage or physical destruction of property, independently from any other effects, whether financial or otherwise, that may result from the act that caused them. Lost profits refers to the gain or benefit lost as a result of violation of the right in question.” (Original Spanish: “El daño material comprende: el daño emergente y lucro cesante. El daño emergente es el detrimento directo, menoscabo o destrucción material de los bienes, con independencia de los otros efectos, patrimoniales o de otra índole, que puedan derivar del acto que los causo. El lucro cesante, es la ganancia o beneficio que se dejó de percibir como consecuencia de la violación del derecho vulnerado.”)

be used to estimate the latter.<sup>1028</sup> Moreover, it is also well established that the compensation available in the event of unlawful expropriation may be higher than for lawful expropriation.

The tribunal in *Siemens v. Argentina* expressed this in the following terms:

The key difference between compensation under the Draft Articles and the Factory at *Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account “all financially assessable damage” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.<sup>1029</sup>

648. The seminal case of *The Chorzów Factory* recites the well recognized principle of international law for awarding damages:

The essential principle contained in the actual notion of an *illegal act* — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss

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<sup>1028</sup> See IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL LAW para. 2.51 (2009) (CLA-222). This is because the function of such payments are different; for example, compensation may be a symbolic payment to the investor in recognition of his loss, or may be based in the political ethics standard of “fairness.” *Id.*, paras. 2.40, 2.41. Most formulations of compensation under Agreements, in fact, are not meant to fully compensate the investor for the loss incurred, but rather seek to balance the interests of an investor in retaining his private property with the public interest of the state and the benefits of its nationals as a whole when providing for payment awards upon expropriation. *Id.*, paras. 2.23, 2.52.

<sup>1029</sup> *Siemens AG v. Argentina*, ICSID Case No ARB/02/8 (Award and Separate Opinion dated 6 Feb. 2007), para. 352 (CLA-223).

sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>1030</sup>

649. Thus, international law follows the principle of awarding damages for unlawful expropriation sufficient to put the claimant in the position it would have been in had the investment not been expropriated.<sup>1031</sup> Restitution in kind is preferred but often impossible. In lieu of in kind restitution, the Claimant is entitled to a monetary damages awarded in the amount equivalent to the benefit of the bargain it would have had if the respondent had not wrongfully expropriated the Claimant's property.<sup>1032</sup>

650. Although the *Chorzów Factory* case concerned an unlawful expropriation, the famous statement of the Permanent Court deals with the consequences of “illegal acts” generally, for example for breaches of fair and equitable treatment or discriminatory treatment. As noted by Ripinsky and Williams: “[A]rbitral tribunals confronted with non-expropriatory violations typically referred to the general principle that a claimant should be fully compensated for the loss suffered as a result of the unlawful state conduct. Full compensation is viewed as putting the investor into a position that would have existed but for the breach.”<sup>1033</sup> Citing as only a few

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<sup>1030</sup> *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (13 Sept.), at 47. (CLA-225)

<sup>1031</sup> MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 51-52 (2008) (CLA-224) *see also* Monroe Leigh, *Judicial Decisions*, 82 AM. J. INT'L L. 351, 360 (1988) (summarizing *Amoco Int'l Fin. Corp. v. Islamic Republic of Iran*, Award No. 310-56-3, IRAN-UNITED STATES CLAIMS TRIBUNAL (24 July 1987), which found that under the application of the *Chorzow Factory* principle, claimant is entitled to all damages that would wipe out the consequences resulting from unlawful expropriation, including lost profits) (CLA-238).

<sup>1032</sup> *See* MARBOE, para. 2.103 (CLA-222).

<sup>1033</sup> SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 89 (2008) (citing *American Manufacturing and Trading v. Zaire*, ICSID Case No. ARB/93/1 (Award dated

(continued...)

examples numerous famous arbitral decisions, the tribunal in *Biloune v. Ghana* confirms this long-standing and customary principle of international law:

The standard for compensation in cases of expropriation is restoration of the claimant to the position he would have enjoyed ***but for*** the expropriation. This principle of customary international law is stated in many recent awards of international arbitral tribunals.<sup>1034</sup>

**b. ILC Articles Standard**

651. The international standard in the *Chorzów Factory Case* for damages is also confirmed in the ILC Articles. The legal consequence of a state's internationally wrongful act is the "obligation to make full reparation for the injury caused by the internationally wrongful act," which includes damages.<sup>1035</sup> Full reparation may "take the form of restitution, compensation and satisfaction" in that order of preference, made "singly or in combination" so as to fully compensate the injured party.<sup>1036</sup>

652. The ILC Articles thus provide that restitution—or the "re-establish[ment of] the situation which existed before the wrongful act was committed"—should be the primary remedy

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21 Feb. 1997), para. 4.2.1(a); *SD Myers v Canada*, Partial Award of 13 Nov. 2000, para. 315; *Petrobart Ltd. v Kyrgyz Republic*, S.C.C. No. 126/2003 (Award dated 29 Mar. 2005), para. 78) (CLA-226-).

<sup>1034</sup> *Biloune and Marine Drive Complex, Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL (Award on Jurisdiction and Liability dated 27 Oct. 1989), reprinted in 95 INT'L L. REPORTS 183, 228 (1994) (citing *Texaco Overseas Petroleum v. Libya*, in IV YEARBOOK 177-187 (1979) (CLA-227); *Sedco Inc v. The National Iranian Oil Co*, Award No. ITL 59-129-3, 10 IRAN-US CLAIMS TRIBUNAL REP. 180, 184-89 (1986) and separate opinion of Judge Brower in *id.* (CLA-231); *Amoco International Finance Corp v. Islamic Republic of Iran*, Award No 310-56-3, 15 IRAN-US CLAIMS TRIBUNAL REP. 189, paras. 183-209 (1987)) (CLA-228).

<sup>1035</sup> ILC Articles, art. 31 (CLA-229).

<sup>1036</sup> *Id.*, arts. 34-37 (CLA-229).

if it is not impossible or disproportionately burdensome.<sup>1037</sup> To the extent that the injury is not compensated by such restitution, the ILC Articles require the state “to compensate [the injured party] for the damage caused thereby,” which “compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”<sup>1038</sup>

**c. Summary of Damages Standards under International Law**

653. The *Chorzów Factory* formulation of reparation in the form of compensation is consistent with the principles of restitution laid out in the ILC Articles and under international law.<sup>1039</sup> Respondent must place Claimant in the same position in which they would have been had Respondent not wrongfully deprived Claimant of its interests in the El Dorado Project.

**3. Governing Principles of Damages in this Arbitration**

**a. Damages Principles under Salvadoran and International Law are Consistent**

654. Full reparation of Claimant’s injury includes the awarding of restitution under general international law principles, or synonymously, compensation as described under the ILC Articles. Consistent with both Salvadoran and international law, this Tribunal is permitted to make an award of damages including compensation for lost profits. As discussed above, the

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<sup>1037</sup> *Id.*, art. 35 (CLA-229).

<sup>1038</sup> *Id.*, art. 36 (CLA-229).

<sup>1039</sup> See KANTOR at 51 (CLA-224); see also *S.D. Myers*, First Partial Award and Separate Opinion, paras. 306-313 (finding that the treaty standard of compensation only applies to lawful expropriation and that because respondent unlawfully deprived claimant of the value of his investment, it must fully compensate claimant under the *Chorzow Factory* and ILC Articles principles of international law for all the economic harm claimant sustained) (CLA-230); *LG&E Energy Corp.*, paras. 31, 36 (stating that under *Chorzow Factory* and ILC Articles, full reparation in the form of actual damages to the claimant must be paid and that the standard provided in the treaty must apply only to lawful expropriation and is therefore inapplicable in calculating damages) (CLA-232).



rules of treatment for investors and protection of their property under the Salvadoran Investment Law are specifically intended to be consistent with international law.<sup>1040</sup>

655. Accordingly, as set out in *subsections 1 and 2* above, whether applying Salvadoran or international law principles, the Tribunal must compensate Claimant for all of the damages that it suffered as a result of Respondent's illegal actions, putting Claimant in the position it would have enjoyed but for these illegal actions.

**b.      Alternatively, Damages Principles under International Law  
Apply in the Absence of a Specific Standard under the  
Investment Law**

656. In the alternative, if it is not accepted that Salvadoran and international law standards are consistent, then the ICSID Convention Article 42(1) should be applied by the Tribunal to determine whether Salvadoran and/or international law should be applied.

657. As discussed above, in the development of the jurisprudence concerning the application of ICSID Convention Article 42(1), it has been accepted by past tribunals that, at minimum, international law should be applied in cases where there are lacunae in the domestic law, or the domestic law is inconsistent with international law, whereby the international law would then apply in a corrective and supervening function.<sup>1041</sup> In other words, if Salvadoran Law

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<sup>1040</sup> The Statement of Purpose for the Investment Law indicates that it was intended to ensure that the Salvadoran legal framework conformed to the requirements of "the best international practices in investment," as considered in light of the numerous bilateral investment treaties which El Salvador had entered into with other countries during the 1990s, as well as "the best practices recognized at the international level as the ideal mechanisms for promoting investment." See also Letter of Presentation of the draft bill for an Investment Law, issued by the Minister of Economy, 2 June 1998, Statement of Purpose, Introduction (emphasis added) (RL-101).

<sup>1041</sup> See lengthy discussion by CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 620-627 (2d ed. 2009). (CLA-233).

does not meet the standard of international law, the international law standard will apply at minimum.

658. This theory of the supplemental and corrective function of international law has been criticized.<sup>1042</sup> For example, the tribunal in the *Wena Hotels v. Egypt* arbitration went further and held that in the application of ICSID Convention Article 42(1) “international law can be applied by itself if the appropriate rule is found ...”<sup>1043</sup> Based on the *Wena Hotels* decision, Gaillard and Banifatemi have argued that:

[E]ach ICSID tribunal should have the discretion to decide whether any rules of international law are directly applicable, without any requirement of initial scrutiny into the law of the host State.<sup>1044</sup>

659. In the specifics of this arbitration, Respondent has acted in a manner contrary to the Investment Law and the Constitution of El Salvador, including under: Articles 5 (equal protection), 6 (non-discrimination), and 8 (compensation for expropriation). The standard for compensation for a lawful expropriation under Article 8 of the Investment Law is one of “prior advance payment of fair indemnity.”<sup>1045</sup> Neither Articles 5 nor 6 of the Investment Law provide for a standard of compensation, nor does Article 9 of the Investment Law indicate a standard of

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<sup>1042</sup> See Emmanuel Gaillard and Yas Banifatemi, *The Meaning of ‘and’ in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REVIEW – FILJ 375, 382-388 (2003) (CLA-234).

<sup>1043</sup> *Wena Hotels v. Egypt* (Decision on Annulment, February 5, 2002), at paras. 39-40. This was quoted with approval in *Siemens v. Argentina* (Award, 6 February, 2007), at para. 77 (CLA-235).

<sup>1044</sup> Gaillard and Banifatemi at 409. This view was expressly endorsed in *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1 (Decision on Liability, dated 3 October 2006), para. 96 (CLA-234).

<sup>1045</sup> This is consistent with Article 106 of the Constitution: “Expropriation shall be admissible on the grounds of legally proven public utility or social interest, after payment of fair compensation.” See: Constitution, art. 106 (CLA-1).

compensation for Respondent's unlawful expropriation. In light of the absence of the agreement of the parties as to the substantive law to apply under the Investment Law,<sup>1046</sup> consistent with the *Wena Hotels* case, this ICSID Tribunal should apply such rules of international law as may be applicable.<sup>1047</sup>

660. It is Claimant's position that, whether or not the Tribunal applies the supplemental and corrective interpretation, or an autonomous application of international law consistent with the *Wena Hotels* case, the well accepted customary international standard set out in the *Chorzów Factory Case* is the minimum standard that should be applied by this Tribunal with respect to the unlawful expropriation and other breaches of the Investment Law. Taking either view of Article 42(1), both Salvadoran law and international law have a role to play. However, at minimum international law standards will apply where there are lacunae, and will assure that Salvadoran law standards are consistent with international law.

661. In summary, in an arbitration under the ICSID Convention, it is ultimately appropriate for this Tribunal to apply the general principles of damages under customary international law to determine the appropriate standard of compensation for an unlawful expropriation and the breach of other standards under the Investment Law.

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<sup>1046</sup> There is no applicable law clause in the Investment Law.

<sup>1047</sup> SCHREUER at 570: "The mere fact that jurisdiction is based on a provision of the host State's law cannot be taken as a choice of the host State's law. Nor can a jurisdictional provision relating to ICSID for disputes arising out of the interpretation and application of a national investment law necessarily be taken as a general choice of the host state's legal system...." (CLA-233)

**B. Quantum**

**1. Claimant is Entitled to be Fully Compensated for Its Losses, Including All Consequential Damages Resulting from Respondent's Breaches of the Investment Law and Salvadoran Law**

662. The principles described above direct this Tribunal to award to Claimant damages that would place Claimant in the same financial situation it would have occupied had Respondent's unlawful acts not been committed. Claimant must be compensated for the full amount of damages it suffered as a result of Respondent's breaches of obligations under the Investment Law and Salvadoran law that wrongfully deprived Claimant of its interests in the El Dorado Project. But for the illegal conduct of Respondent, Claimant would have had the opportunity to develop and operate the El Dorado Project and Claimant's related mineral exploration licenses in El Salvador. Claimant is entitled to the damages for the lost opportunity measured by determining the fair market value of the lost El Dorado Project and Claimant's related mineral exploration licenses.

663. A date (1) immediately prior to the unlawful act, or (2) at the time of the award, are the two typical valuation points used for calculating damages in the case of an unlawful expropriation or other breach of obligations.<sup>1048</sup> For the purpose of the valuation of Claimant's losses, the valuation date is set at the date immediately prior to the 11 March 2008 speech of President Saca announcing the mining ban. As noted by the Tribunal's 1 June 2012 *Decision on the Respondent's Jurisdictional Objections*,

As unequivocally explained at the Hearing on several occasions, the Claimant's alleged measure, the de facto ban forming the legal

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<sup>1048</sup> KANTOR at 64-65 (CLA-224).

and factual basis pleaded for its CAFTA claims, must be understood by the Tribunal as a continuous act relevant for the Claimant's claims for compensation from March 2008 onwards (not before); that, as such, it became known to the Claimant only from the public report of President Saca's speech on 11 March 2008; and that, also as such, it was not known to or foreseen by the Claimant before 13 December 2007 as an actual or specific future dispute with the Respondent under CAFTA.<sup>1049</sup>

664. Accordingly, the valuation date for the assessment of damages "but for" the actions and omissions of Respondent in breach of its obligations under Salvadoran Law and the Investment Law has been set at 10 March 2008 (the "**Valuation Date**"). Through its Counsel, Claimant has engaged FTI Consulting to prepare an independent expert opinion to determine the quantum of damages sustained by Claimant as a result of Respondent's breaches at the Valuation Date.<sup>1050</sup> FTI has appraised the fair market value of Claimant's mineral property interests in El Salvador which the Respondent has expropriated. Whether the focus of calculating damages is one of foreseeability, as it would be in a contracts case, or causation as it would be with respect

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<sup>1049</sup> *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12 (Decision on the Respondent's Jurisdictional Objections, dated 1 June 2012), para. 2.109 (CLA-\_\_\_). Note also that the measures complained of related not only to the CAFTA claims, but also breached the Investment Law. As stated by the Tribunal quoting statements by Claimant's Counsel at the Jurisdiction Hearing: "... let me just emphasize in response to the Tribunal's question as to whether the measure at issue is the same for the CAFTA claims and the Investment Law claims, it is. In both cases the measure at issue is the de facto mining ban. Also, as I said earlier, in both cases, Claimant is alleging damages only from the period from March 2008 forward and not from any earlier period." *Id.*, para. 2.108 (emphasis added).

<sup>1050</sup> Expert Report of Howard N. Rosen and Jennifer Vanderhart, FTI Consulting Inc., 28 March 2013 ("**FTI Expert Report**"). FTI also agreed that a valuation at the current date would be too speculative to conduct at this time, subject to further estimations of the increased reserves and resources that would have been confirmed as a result of the further exploration that would have occurred during pre-production and production. See FTI Expert Report, at paras. 6.10-6.12.

to expropriation or other breaches, Claimant is entitled to all damages caused by Respondent's wrongful acts.<sup>1051</sup>

665. In holding that damages are only claimed for the period following the announcement of the *de facto* mining ban, the Tribunal recognized that the ban was the definitive act after continuous omissions to act had begun much earlier, for example, as early as the time of Claimant's request for the environmental permits in 2004. As determined by the Tribunal:

... the alleged *de facto* ban should be considered as a continuing act under international law, which: (i) started at a certain moment of time after the Claimant's request for environmental permits and an exploitation concession but before the Claimant's change of nationality in December 2007 and (ii) continued after December 2007, being publicly acknowledged by President's Saca speech in March 2008; or, in other words, that the alleged practice continued after the Claimant's change of nationality on 13 December 2007."

666. For the purpose of damages calculation, "but for" the continuing omission to grant the environmental permits and exploitation concession, it is reasonable for the Tribunal to conclude that the environmental permits and exploitation concession would have certainly been granted at some point in time earlier than March 2008.<sup>1052</sup> In light of that determination, it must

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<sup>1051</sup> *S.D. Myers Inc. v. Canada*, UNCITRAL (Second Partial Award dated 21 Oct. 2002), para. 159 (CLA-236).

<sup>1052</sup> As discussed above in **Section II.G.5** of the Statement of Facts, based on the assurances Pac Rim had been given by various Salvadoran officials, the Companies had been led to believe that the ED Mining Permit and Exploitation Concession would be issued during 2006, Pac Rim began to prepare for the anticipated start of construction activities on the El Dorado mine by (i) beginning the process of "pre-qualifying" contractors for the development of the underground workings at the El Dorado Project, and by (ii) expanding its management team.

be concluded that the construction of the El Dorado Project would have proceeded before March 2008 (in the manner set out in the project schedule of the El Dorado PFS).<sup>1053</sup>

667. Claimant seeks damages for Respondent's unlawful destruction of its investment in El Salvador, specifically the omission to grant the environmental permit and exploitation concession leading to the effective destruction of the value of the El Dorado Project and Claimant's related mineral exploration licenses. Claimant is entitled to the quantum of damages that would put it in the position it would have occupied if the exploitation concession had been granted and the El Dorado Project had been permitted to proceed as planned and as set out under the El Dorado PFS. This includes the full value of the El Dorado Project and related mineral exploration licenses as of the Valuation Date, as well as any losses Claimant suffered as a result of being wrongfully deprived of its investment.

**2. Use of the Income Approach Discounted Cash Flow (DCF) Method and the Market Approach Provides the Correct Valuation of Claimant's Losses**

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668. Ripinsky observes that there is "nearly universal recognition of 'fair market value' as the appropriate standard of value" used in international arbitrations. He notes, "Valuation serves to determine the 'fair market value' (FMV) of an investment, ie how much the asset is worth, or would be worth, on the market."<sup>1054</sup> Business valuation theory recognizes three

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<sup>1053</sup> El Dorado PFS at 150-52. As noted in the Study, a 24 month period of construction was required prior to the beginning of operations. It was anticipated by SRK that production could have started as early as the spring of 2007. FTI has assumed (on the instruction of counsel) that an exploitation concession would have been granted and construction would have proceeded at or prior to March 2008. *See* FTI Expert Report, para. 3.6.

<sup>1054</sup> *See* RIPINSKY & WILLIAMS at 182-186, 188 (CLA-226; *see also* KANTOR at 34 ("Arbitral tribunals applying public international law also often focus on fair market value. Crawford's

(continued...)

main approaches to assess the fair market value of an investment: (1) *Income-based Approach*, (2) *Market-based Approach*, and (3) *Cost-based Approach*.<sup>1055</sup> The Income and Market-based approaches are the methods most commonly used in business practice.<sup>1056</sup> The Cost-based approach (also called “**Asset-based**”) is less commonly used as the general drawback of the method is that it does not “take into account the value of a business that exceeds the value of its individual assets. ... [F]or the purposes of valuing a business, asset-based methods generally produce a less reliable result than income-based or market-based methods ...”<sup>1057</sup>

669. Accordingly, FTI conducted a valuation of Claimant’s losses as of the Valuation Date under the Income-based and the Market-based Approaches. In particular, since the El Dorado PFS modeled the mining of the reserves of the Minita deposit, FTI applied the Income-based Approach in determining the FMV of the Minita reserves, and applied the Market-based Approach to determine the FMV for the remaining resources of the Minita deposit, and for the Balsamo, South Minita, Nance Dulce, Coyotera and Nueva Esperanza Deposits. FTI also applied the Market-based approach on a per hectare basis from transactions involving similar

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(continued)

Commentaries on the International Law Commission’s 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts point out that ‘[c]ompensation reflecting the capital value of property taken or destroyed as a result of an internationally wrongful act is generally assessed on the basis of ‘fair market value’ of the property lost.’ (citing to J. CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY at 255.) International arbitral tribunals regularly use fair market value as a touchstone to calculate compensation in a variety of causes of action.” (CLA-224).

<sup>1055</sup> FTI Expert Report, paras. 6.18-6.25.

<sup>1056</sup> RIPINSKY at 193 (CLA-226).

<sup>1057</sup> *Id.*, at 218-219 (CLA-\_\_\_). FTI has also concluded that the cost or “asset based” approach is not an appropriate basis for damages in this case. *See* FTI Expert Report, para. 6.15.



properties to determine the FMV of the Santa Rita and Zamora/Cerro Colorado early exploration properties.<sup>1058</sup>

670. The discounted cash flow (“DCF”) method of valuation is one method applied to determine the “but for” fair market value of Claimant’s losses in this case. The DCF method has been used widely for valuations of various investments in other international arbitrations, and the appropriateness of the DCF method has also been confirmed by the practice of the United Nations Compensation Commission.<sup>1059</sup> The DCF method is a forward-looking concept that estimates the future free cash flows that would have been generated by the income-earning assets and then discounts those cash flows using a “discount rate” to identify a business’ net present value. The DCF method is the most widely used valuation tool for valuing both going concerns and greenfield investments. The DCF method is the most widely used and accepted for calculating the expected future benefits.<sup>1060</sup> “The discounted cash flow method is the most conceptually correct method because it captures the driving principle of valuation: Value is the present worth of future benefits.”<sup>1061</sup> Although *Amoco Finance Corp. v. Iran* was a case in which expropriation was lawful, it duly noted that in cases of unlawful expropriation where the value of an operating business must be calculated, the DCF method is perfectly suited for the task.<sup>1062</sup>

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<sup>1058</sup> FTI Expert Report, paras. 6.24-6.25.

<sup>1059</sup> See, e.g., UNCC, Report and Recommendations Made by the Panel of Commissioners Concerning the Second instalment of “EI” Claims, S/AC.26/I 999/10 (24 June 1999), para. 439 (CLA-237).

<sup>1060</sup> See MARBOE, paras. 5.71, 5.87-90 (CLA-222); KANTOR at 131-32 (CLA-224).

<sup>1061</sup> KANTOR at 131 (quoting SHANNON P. PRATT, LAWYER’S BUSINESS VALUATION HANDBOOK 105 (2000)) (CLA-224).

<sup>1062</sup> *Amoco*, para. 231-232 (CLA-228).

The tribunal in *Biloune v. Ghana* likewise confirmed that “[n]ormally, in cases of expropriation of a going concern, the most accurate measure of the value of the expropriated property is its fair market value, which in its nature takes into account future profits. The discounted cash flow method of valuation is often used to calculate the worth of the enterprise at the time of the taking.”<sup>1063</sup>

671. FTI used the Weighted Average Cost of Capital (“WACC”) method<sup>1064</sup> to calculate the appropriate discount rate to employ in this matter. The WACC rate is derived by calculating the cost of capital and obtaining the weighted average of that cost.<sup>1065</sup> Two types of capital are used in this calculation: debt and equity. The cost of equity is estimated by using the Capital Asset Pricing Model (“CAPM”), with adjustments for country risk.<sup>1066</sup>

672. The second approach used to determine the “but for” value of Claimant’s investment in this case is the Market-based method.<sup>1067</sup> The Market-based approach is also forward looking and is used, as described by Kantor, to

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<sup>1063</sup> *Biloune* at 228 (citing *Starrett Housing Corp v. Islamic Republic of Iran*, Award No 314-24-1, 16 IRAN-US CLAIMS TRIBUNAL 112, paras. 279-80 (1987)) (CLA-227).

<sup>1064</sup> The WACC method works as follows:

The WACC procedure for computing a discount rate considers that the proper discount rate should approximately balance between risks and benefits that arm’s-length third party investors and lenders would reach if they made new equity investments and new loans to the company at the valuation date. The WACC procedure estimates the future cost to the company of borrowing those new loans and the future cost to the company of obtaining that new equity capital. The valuation then proportionately weighs the cost of the new debt and the cost of the new capital to determine the WACC. *See* KANTOR at 160 (CLA-224).

<sup>1065</sup> FTI Expert Report, paras. 6.46-6.70.

<sup>1066</sup> *Id.*, paras. 6.49-6.52.

<sup>1067</sup> *Id.*, paras. 6.71-6.134.

derive the value of the business in dispute by looking at the value placed by the securities market on publicly traded stock of a second, comparable company. In such a case, the current public stock prices of the comparable company will embody, among other matters, the accumulated views of individual stock market investors about the future earnings prospects of the comparable company.<sup>1068</sup>

673. Under the multiples method used in the Market-based approach, “the value of an asset is derived from the prices of comparable assets, standardized through the use of a common variable such as earnings, cash flows, book value or revenues. Prices of comparable assets, usually shares, can be derived ... from the stock markets (if the company is publicly traded)....”<sup>1069</sup> The Income-based and Market-based methods are viewed by commentators as being complementary. As described by Kantor, “[a]s a result of this reliance on the market’s perception of future earnings potential, the Income-based and Market-based Approaches converge towards a single fundamental measure - earnings.”<sup>1070</sup>

### **3. Respondent is Liable for US\$ 314 million in Damages to Claimant**

674. Claimant submits that the use of the *Income-based* approach (as addressed in *subsection a* below) and the *Market-based* approach (*subsection b*) to the valuation of the El Dorado Project are appropriate on the facts of this case. In particular, there is more than sufficient information on which to support the calculations involved in the DCF valuation of the Minita Reserves and the Market analysis related to the other Mineral Properties, in particular

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<sup>1068</sup> KANTOR at 14 (CLA-224). Kantor also notes, at 26, that “Valuation methods are often complementary. If the valuations reached by two methodologies are widely inconsistent with each other, that can be a strong signal something is awry. If several valuation methods produce consistent results, arbitrators may take greater comfort from the valuations.”

<sup>1069</sup> RIPINSKY at 213 (CLA-226).

<sup>1070</sup> KANTOR at 15 (CLA-224).

because of *other contemporaneous evidence* of the significant value of the El Dorado Project (*subsection c*), such as other independently determined data points which support the damages claimed in this Memorial. The reliability of this data is also highlighted by the fact that the El Dorado Project was extensively drilled in an advanced stage of development (having previously been mined) and containing proven mineral reserves which were determined to be economically mineable. Moreover, since Claimant's parent company, PRMC, is a publicly traded company in a well understood mineral resources sector, the valuation of the El Dorado Project is also ideally suited to the use of the Market-based approach. The resulting amount of damages owed to Claimant by Respondent is no less than US\$ 314 million (including pre-judgment interest).

**a. Income-based Approach**

675. The FTI Report utilizes the Income-based DCF approach and the WACC/CAPM procedure for obtaining the proper discount rate to arrive at its damages calculation. As summarized in the FTI report:

Based on the foregoing and subject to the assumptions and restrictions noted herein we have determined the FMV of the Minita deposit's Reserves to range from \$79.7 million to \$92.8 million, as summarized in Schedules 3 and 3.1. Based on total gold equivalent ounces of Reserves of 554,186 at the Valuation Date, this range implies a \$/oz range of \$150 to \$175, which is consistent with the \$/oz concluded upon in our comparable transaction approach, which is discussed next.<sup>1071</sup>

676. As further described in the FTI Report, the process to estimate the fair market value of the El Dorado Project based on the Income-based DCF approach involves the application of a number of factors:

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<sup>1071</sup> FTI Expert Report, para. 6.70.

- a. The expected capital and operating expenditures specific to the Project and the expected production. FTI conducted an update to March 2008 of the operating and capital expenditure assumptions set out in the El Dorado PFS.<sup>1072</sup> As indicated in their Report, FTI applied an overall cost increase (both operating and capital expenditures) of 36% to the cost assumptions of the El Dorado PFS in calculating the low end of the FMV range for the Reserves of the Minita deposit in our DCF.<sup>1073</sup>
- b. Project Financing. FTI concluded that Claimant, and its parent PRMC, would have had no issues with obtaining financing for the further development of the El Dorado Project.<sup>1074</sup>
- c. The total mineral resources and mineral reserves for the Mineral Properties;<sup>1075</sup>
- d. The expected revenues of the project. In projecting cash flows, FTI applied gold prices of \$864/oz in 2011, increasing to \$871/oz from 2016 over the long-term and silver prices of \$16 in 2011 and onwards.<sup>1076</sup>;
- e. The expected taxation and royalties; and
- f. The appropriate discount rate.<sup>1077</sup>

677. The resulting fair market valuation of damages using the income approach (“DCF”), as specifically applied to the Minita Deposit, is thus calculated by FTI to be between US\$ 79.7 and US\$ 92.8 million (excluding pre-judgment interest).<sup>1078</sup>

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<sup>1072</sup> *Id.*, paras. 6.30-6.39, and as summarized in Schedule 3.

<sup>1073</sup> *Id.*, para. 6.38.

<sup>1074</sup> *Id.*, paras. 6.40-6.43.

<sup>1075</sup> *Id.*, at Section 4.

<sup>1076</sup> *Id.*, para. 6.30, Schedule 4 and Appendix 6.

<sup>1077</sup> *Id.*, paras. 6.46-6.70.

<sup>1078</sup> *Id.*, para. 6.71, Figure 1, and as summarized in Schedules 3 and 3.1

**b. Market-Based Approach**

678. FTI's assessment of the fair market value of the El Dorado Project is additionally based on two valuation methods under the Market-based Approach: (1) the Comparable Trading Multiples Approach (comparing publicly traded companies and gold projects with PRMC and the El Dorado Project) and (2) the Comparable Transactions Approach (identifying sales transactions involving companies and gold projects similar to PRMC and the El Dorado Project).

679. In particular, FTI elected to apply the market approach to the following properties: (1) the remaining Resources of the Minita Deposit of El Dorado (excluding Reserves, which were valued using an income approach);<sup>1079</sup> (2) the Resources of the Balsamo, South Minita, Nance Dulce, Coyotera and Nueva Esperanza Deposits of El Dorado; and (3) the Santa Minita and Zamora/Cerro Colorado exploration properties, based on separate valuation metrics from that applied for El Dorado.<sup>1080</sup>

680. In determining the FMV of the Mineral Properties under the market approach FTI considered the following different types of market based information and approaches:

- **PRMC's Stock Price Data** – applying this approach, FTI assessed PRMC's trading price, volume and market capitalization information in the period prior to the Valuation Date. FTI rejected a valuation based on PRMC's stock price data;<sup>1081</sup>

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<sup>1079</sup> FTI explains, at para. 6.19, that the approach selected depends on "prospects of the Mineral Properties and is subject to the type and quality of information that is available upon which a valuation conclusion may be based." In this case, FTI determined that only the Minita reserves, whose economic viability was demonstrated by the Pre-Feasibility Study, were properly the subject of the income approach. *See id.*, para. 6.23.

<sup>1080</sup> *Id.*, para. 6.71.

<sup>1081</sup> *Id.*, paras. 6.75-6.82.

- **Previous Transactions of PRMC's Equity** – In this approach, information relating to transactions involving PRMC's equity in the years **leading** up to the Valuation Date is assessed. FTI also rejected a valuation based on previous transactions involving PRMC's equity;<sup>1082</sup>
- **Comparable Market Transactions** – This approach uses value metrics (i.e. price paid per ounce of gold equivalent Resources or hectare acquired) derived from transactions involving Mineral Properties and companies with interests in Mineral Properties deemed suitably comparable to the Mineral Properties. FTI found a significant number of project transactions as being comparable in terms of geographical location and other relevant factors as described below;<sup>1083</sup>
- **Comparable Trading Multiples** – FTI applied value metrics (i.e. enterprise value per ounce of gold equivalent Resources reported) of publically traded companies deemed suitably comparable to Pac Rim at the Valuation Date. Due to a small sample size, FTI was only able to use a small weighting in respect of this approach;<sup>1084</sup> and,
- **Other market based information** – This information provides an indication of the FMV of the company's equity, including a valuation prepared by Scotia Capital prior to the March 10, 2008 valuation date.<sup>1085</sup>

681. In its application of the *Comparable Market Transactions Approach*, FTI initially analyzes a broad group of over 28 project transactions and 26 company transactions as

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<sup>1082</sup> *Id.*, paras. 6.83-6.87.

<sup>1083</sup> *Id.*, paras. 6.88-6.109.

<sup>1084</sup> *Id.*, paras. 6.110-6.128.

<sup>1085</sup> *Id.*, paras. 6.129-6.133.

being applicable to the Valuation Date,<sup>1086</sup> reducing that list to 7 project transactions as being the most comparable with the El Dorado Project. As noted in the FTI Report:

In reviewing the project and company transactions based on the above criteria, we considered the following characteristics to be comparable to El Dorado (in order of importance) in our refinement of these transactions:

*i. Geographical location:* We have reviewed transactions on a global basis and selected transactions relating to mineral assets or companies with primary interests in mineral assets in Mexico, Central America and South America (“Latin America”) due to their geographical proximity to the Mineral Properties;

*ii. Gold grade:* At an average gold grade of 9.4 g/t, the El Dorado project is a high grade gold project. As such, we have considered higher grade gold projects to be more comparable to El Dorado than lower gold grade projects;

*iii. Mining method:* We considered transactions involving underground mining techniques to be more comparable to El Dorado;

*iv. Type of ore:* We considered projects with Epithermal gold systems to be more comparable to El Dorado; and

*v. Resource category:* In our review of the project transaction, we did not observe a linear relationship between category of Reserves and Resources and transaction value per gold equivalent ounce. As such, the \$/oz applied to El Dorado at the Valuation Dates represents a blended value based on a number of different resource categories. We have applied these blended average valuation metrics to the gold equivalent Measured and Indicated Resources of El Dorado at the Valuation Date. For the Inferred

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<sup>1086</sup> *Id.*, paras. 6.89-6.90.



resources of El Dorado, we have applied a 50% discount to the blended \$/oz at the Valuation Date to approximate the additional risk associated with this category of resource. The selection of this discount is based on our professional experience with similar mining valuations and discussions with industry sources such as investment bankers.<sup>1087</sup>

682. After identifying the seven most comparable project transactions, FTI calculated the price paid per gold equivalent Resources to determine a range of values per ounce of gold equivalent Resources to apply to the NI 43-101 Resources for the Mineral Properties. Since the gold at El Dorado was considerably higher grade than the gold at other comparable projects, FTI applied a premium multiplier of 3 to the price ratios derived from those transactions. As summarized by FTI:

...the average Price Ratios for low grade Latin American project transactions excluding the high and high/low were 5% and 6%, respectively. Applying our high grade premium (factor of 3) to these results in a Price Ratio range of 15% to 18%. At the gold spot price at the Valuation Date, this Price Ratio range implies a \$/oz range of \$146 to \$175 as being applicable for Measured and Indicated Resources under our Comparable Transaction Approach.

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we have applied a discount to the Inferred Resources of the Mineral Properties. As such, the range applicable to Inferred Resources is \$73 to \$87.50 (50% of Measured and Indicated).<sup>1088</sup>

683. In its application of this approach to the Santa Rita and the Zamora/Cerro Colorado properties, FTI also analyzed majority interest transactions pertaining to early

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<sup>1087</sup> *Id.*, para. 6.91.

<sup>1088</sup> *Id.*, paras. 6.105-6.107.

exploration properties in Latin America within one year of the Valuation Date, establishing a \$103 value per hectare to determine their fair market value.<sup>1089</sup>

684. Under the *Comparable Trading Multiples Approach*, FTI identified 1 directly comparable public junior developer company with a primary interest in high grade gold/ silver in Latin America – Andean Resources (Cerro Negro). Cerro Negro has comparable characteristics to El Dorado, including: geographical proximity, high grade, underground mining, ore type, cash costs and development stage.<sup>1090</sup> As concluded by FTI:

The Enterprise Value per gold equivalent ounce of \$378 implies a Price Ratio of 39%,<sup>1091</sup> and is approximately twice that of the high end of the \$/oz range we concluded upon in our comparable transaction approach.<sup>1092</sup> This Price Ratio confirms that such high grade comparable projects do command a valuation premium and that the premium we have calculated herein of 3 may be conservative. However, as we lack a sufficient sample size of such high grade gold and gold/silver projects in Latin America (Cerro Negro and El Peñón, with El Peñón being at the production development stage) we have placed a lower weighting on the valuation metrics derived under this approach.<sup>1093</sup>

685. In summary, FTI assigned a weighting of 10% to the Price Ratio derived under the Trading Multiples Approach and a weighting of 90% to the Price Ratio of the Comparable Transactions Approach, concluding that “we have applied a \$/oz range of \$180 to \$207 in

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<sup>1089</sup> *Id.*, paras. 6.108-6.109.

<sup>1090</sup> *Id.*, para. 6.113.

<sup>1091</sup>  $\$378 / \$973$  (gold spot price as at 10 March 2008) = 39%.

<sup>1092</sup>  $\$378 / \$175$  (high end of \$/oz range considered in our comparable transaction approach) = 2.146.

<sup>1093</sup> FTI Expert Report, para. 6.114.

determining the FMV of the Resources of the Minita (excluding Reserves), Balsamo, South Minita, Nance Dulce, Coyotera and Nueva Esperanza deposits of El Dorado...”<sup>1094</sup>

686. Accordingly, taking into account the results of the income and market approaches, FTI concludes that the El Dorado Project had a fair market value as of the Valuation Date of US\$ 314 million (including pre-judgment interest).

		\$ / Au Eq Oz or Ha		Au Eq Oz at March 10, 2008				FMV	
Mineral Property	Approach	High	Low	Reserves	M&I	Inferred	Ha	High	Low
El Dorado									
Minita	Market Approach	207	180		128,290	29,636		29,585,598	25,826,003
	Income Approach (DCF)			554,186				92,799,277	79,678,998
								122,384,875	105,505,001
Balsamo	Market Approach	207	180		221,198	83,647		54,375,944	47,466,112
South Minita	Market Approach	207	180		362,929	79,600		83,258,491	72,678,405
Nance Dulce	Market Approach	207	180			91,328		9,440,354	8,240,719
Coyotera	Market Approach	207	180		182,647	4,489		38,223,711	33,366,427
Nueva Esperanza	Market Approach	207	180		37,518	4,967		8,269,766	7,218,885
Santa Rita	Market Approach	103	103				4,860	502,424	502,424
Zamora / Cerro Colorado	Market Approach	103	103				12,500	1,292,242	1,292,242
				Total FMV of Mineral Properties				317,747,807	276,270,215
				Total FMV of Mineral Properties - Rounded				317,700,000	276,300,000
					Point Estimate (Midpoint of Range)				297,000,000
					Pre-Judgement Interest - Compound				16,600,000
					Total Damages - Coumpound Interest				313,600,000
				Total Damages - Coumpound Interest (Rounded)				314,000,000	

### c. Other Evidence of Fair Market Value

687. There is additional evidence which should be taken into consideration by the Tribunal that provides additional comfort that the quantum assessment of FTI is a reasonable and conservative one. These factors include:

- Price of Gold** – the significant increase of 62% in the price of gold since March 2008 would logically allow the conclusion that the value of the project would have also increased by the date of the award (projected for no earlier than 2014). As noted by FTI, “it is likely that the FMV of

1094 *Id.*, para. 6.120.

the Mineral Properties as calculated at the Valuation Date would benefit favourably from this increase.”<sup>1095</sup> However, by choosing a Valuation Date at March 2008 rather than a current valuation accounting for the price increase, FTI’s valuation must certainly be considered as being conservatively less than the full potential value.

- **Exploration leverage** – by choosing a valuation date at 10 March 2008 as opposed to a current date, FTI also recognized that the quantum does not fully take into account the updating of the resource and reserves as would have occurred as the El Dorado Project progress through the production stage, and as further exploration work continued at Santa Rita and the Zamora/Cerro Colorado properties.<sup>1096</sup> As concluded by FTI,

... the potential for Reserve and Resource additions between the Valuation Date and present day, “but for” the Breaches, is strong. Therefore, the application of valuation metrics derived from comparators in and around a current valuation date to the total Reserves and Resources for El Dorado as originally reported in the technical reports in 2005 and 2008, respectively, **would understate the FMV of El Dorado at a current valuation date.** The same is true for the early exploration properties of Santa Rita and Zamora/Cerro Colorado.<sup>1097</sup>

Canaccord similarly acknowledged the significant upside that would result from the further delineation of the reserves that would have occurred during the building of the ramp in the pre-production phase. This was described as the “exploration leverage”.<sup>1098</sup> And,

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<sup>1095</sup> *Id.*, para. 6.10 and Appendix 6.

<sup>1096</sup> *Id.*, paras. 6.12-6.14. FTI also uses the example of the Cerro Negro project in Argentina to provide a directly comparable real-world example of the potential increase that could have occurred.

<sup>1097</sup> *Id.*, para. 6.14(emphasis added).

<sup>1098</sup> Brown Witness Statement, para. 6(c) (citing *Moving The El Dorado Gold Project Towards Feasibility*, CANACCORD ADAMS DAILY LETTER (15 November 2006) at 4 (C-97). As described in the Canaccord newsletter, “Our view remains that further material resource expansion is **very likely**.” *Id.* (emphasis added)).

- **Quality of Management** – as confirmed by Peter Brown, founder of Canaccord, Catherine McLeod-Seltzer, Chairman of the PRMC Board of Directors, is “one of the best, most experienced, and most respected Canadian managers of mining projects worldwide, with particular expertise in Latin America. She is revered in the mining community.”<sup>1099</sup> The quality of the management of PRMC and Claimant is critical for the success of the operation and the ability to finance the company to production.

### C. Prejudgment Interest

688. In addition to the core amount claimed as compensation for damages, Claimant is entitled to an additional award of interest in order to fully compensate them for Respondents’ wrongful breaches of its domestic laws and international law. “In damages cases . . . the principle of ‘full reparation’ is central which means that interest should remedy the concrete loss incurred by the injured party because of the delayed payment.”<sup>1100</sup> The obligation to pay interest begins at the time the wrongful act by the state gives rise to the payment obligation and ends when the payment is actually made.<sup>1101</sup> The tribunal in *Biloune v. Ghana* confirms: “Interest is required to be awarded in order fully to compensate the victim of an expropriation for the delay in payment of the value of the expropriated property, calculated from the time of taking to the time of payment of the award.”<sup>1102</sup>

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<sup>1099</sup> Brown Witness Statement, para. 5.

<sup>1100</sup> MARBOE, para. 6.289 (CLA-222); *LG&E Energy*, para. 55 (“In the Tribunal’s view, interest is part of the ‘full’ reparation to which the Claimant is entitled to assure that they are made whole.” (CLA-232)); ILC, art. 38(1) states that an injured claimant is entitled to “[i]nterest on any principal sum due . . . when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.” (CLA-229).

<sup>1101</sup> ILC, art. 38(2) (CLA-229).

<sup>1102</sup> *Biloune* at 230 (also stating that the LIBOR rate is appropriate for awarding interest) (CLA-227).

689. The payment of interest under the state responsibility duty and ILC Article 38 “is to remedy the concrete damage incurred by the injured party.”<sup>1103</sup> Interest should properly be compounded, since that ““is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor.””<sup>1104</sup> Furthermore, awarding interest functions to prevent the wrongdoer’s unjust enrichment and encourages timely dispute resolution.<sup>1105</sup>

690. Thus, Claimant submits that Respondent should pay interest on the amount owed to Claimant beginning from the Valuation Date, 10 March 2008, to the date of the award. The FTI Report conservatively applies 12 month LIBOR rates to the quantum of damages for a total of almost US\$ 16.6 million in interest.<sup>1106</sup>

\* \* \*

691. In this Memorial, the Tribunal has been presented with a valuation confirming that Claimant’s lost interests in the El Dorado Project are worth at least US\$ 300 million. The independent expert analysis of FTI, using the most respected analytic methods, supports the conclusion that Respondent’s wrongful acts caused massive losses to Claimant. In summary,

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<sup>1103</sup> MARBOE, para. 6.16 (CLA-222).

<sup>1104</sup> *LG&E Energy*, para. 56 (quoting *MTD*, Award dated 25 May 2004, para. 251) (italics omitted) (CLA-232). *Also see*: FTI Expert Report, at paras. 6.136-6.137: “Considering the compensatory function of interest, in our view, compounding is the appropriate method of calculation as almost all present-day financing vehicles involve compound interest and the Breaches caused the Company to forego investment opportunities that would have included compounding effects, whereas simple interest would fail to compensate the Company. ... In our summary of losses above we have included our calculation of interest under the compound method as in our view this is the appropriate method to compensate the Company.”

<sup>1105</sup> KANTOR at 264 (CLA-224).

<sup>1106</sup> FTI Expert Report, paras. 6.135-6.138.

based on these approaches, the damages that Claimant has experienced from the acts and omissions of Respondent resulting in the breaches of the Investment Law and Salvadoran Law are estimated to be no less than US\$ 314 million (including prejudgment interest).

## **VII. CONCLUSION**

692. Claimant respectfully requests the Arbitral Tribunal to:

- (1) Declare that Respondent has breached the terms of the Foreign Investment Law, the Constitution, and general principles of international law;
- (2) Award Claimant monetary damages of not less than US\$ 314 million (Three Hundred and fourteen million U.S. dollars) in compensation for all of its losses sustained as a result of Respondent's illegal action and inaction and thus being deprived of its rights under the Foreign Investment Law, the Constitution and general principles of international law;
- (3) Award all costs (including, without limitation, attorneys' and all other professional fees) associated with any and all proceedings undertaken in connection with this arbitration, including all such costs undertaken to investigate this matter and prepare this and earlier submissions, and all such costs expended by Claimant in attempting to resolve this matter amicably with Respondent; plus further costs and expenses as the Tribunal may find are owed under applicable law;
- (4) Award pre-and post-judgment interest at a rate to be fixed by the Tribunal; and
- (5) Grant such other relief as counsel may advise or the Tribunal may deem appropriate.

/s/

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