

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

**THE REPUBLIC OF EL SALVADOR'S PRELIMINARY OBJECTIONS  
UNDER ARTICLES 10.20.4 AND 10.20.5 OF THE DOMINICAN REPUBLIC –  
CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT (CAFTA)**

**Lic. Romeo Benjamín Barahona  
Fiscal General de la República  
Fiscalía General de la República  
Final 4ª Calle Oriente y 19 Avenida Sur  
Residencial Primavera  
Santa Tecla, La Libertad  
El Salvador**

**Derek C. Smith  
Luis Parada  
Dewey & LeBoeuf LLP  
1101 New York Avenue, N.W.  
Suite 1100  
Washington, D.C.  
United States of America**

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## I. INTRODUCTION

1. The Republic of El Salvador is filing these preliminary objections under the expedited procedures of the Dominican Republic – Central America – United States Free Trade Agreement ("CAFTA") to request the dismissal of all claims related to the application for a mining exploitation concession in the El Dorado project, as well as the dismissal of other secondary claims under CAFTA, and the dismissal of all non-CAFTA claims.

2. Claimant's principal claims in this arbitration arise from the allegation that the Government of El Salvador has deprived Pacific Rim El Salvador ("PRES") of a "perfected right" to a mining exploitation concession in the El Dorado project. Not only is Claimant's assertion incorrect as a matter of law, but Claimant has failed to provide a factual basis for its claims, as required by CAFTA. Specifically, Claimant has failed to meet its burden with regard to PRES's alleged entitlement to such a concession. First, contrary to Claimant's suggestion, there is no automatic right to a concession under Salvadoran law. Second, instead of asserting the required facts, Claimant merely asserts a legal conclusion that PRES has purportedly "perfected" a legal right to a mining exploitation concession except for the Government's failure to approve an Environmental Impact Study and issue an Environmental Permit. In reality, Claimant fails to set forth facts to show that PRES complied with what Claimant admits are other "plain and explicit" requirements under Salvadoran law which must be satisfied before a company may seek a mining exploitation concession.

3. Claimant's failure to set forth the facts required by CAFTA stems from the fact that PRES has indeed failed to comply with those other requirements, as demonstrated by the undisputed facts set forth in Claimant's own documents. Thus, even if the Government of El Salvador were to approve the Environmental Impact Study and grant the necessary Environmental Permit, the undisputed facts show that PRES would still not have any right to obtain the mining exploitation concession. In short, even assuming as true all of Claimant's

factual allegations regarding the Environmental Permit, the alleged actions or inactions of the Government have caused Claimant no harm. Therefore, all claims related to the El Dorado project are not claims "for which an award in favor of the claimant may be made."<sup>1</sup>

4. As for the additional claims related to the exploration licenses granted to the Salvadoran Enterprises Pacific Rim El Salvador and Dorado Exploraciones, the Republic is seeking the dismissal of all claims related to the Santa Rita exploration license. Claimant again has not alleged any factual or legal basis to bring claims related to the Santa Rita exploration license. In any event, Claimant already lost any rights it may have had to renew the Santa Rita exploration license when PRES unilaterally failed to seek the renewal of the exploration license on a timely basis.

5. The Republic is also seeking the dismissal of other secondary CAFTA claims for which Claimant has not provided a factual basis.

6. Finally, the Republic is seeking the dismissal of all non-CAFTA claims in this arbitration. Claimant has violated CAFTA's exclusivity clause and its own express waiver by introducing claims under the Investment Law of El Salvador that are based on the same measures Claimant alleges are breaches of CAFTA.

7. The filing of these preliminary objections, and the limited scope of the objections, does not mean that the Republic of El Salvador accepts the jurisdiction of the Centre or the competence of the Tribunal to decide this dispute. If Claimant chooses to continue with this arbitration beyond these Preliminary Objections, the Republic of El Salvador reserves the right to object to the jurisdiction of the Centre and the competence of the Tribunal regarding any remaining claims, as allowed by CAFTA Article 10.20.4(d) and the ICSID Convention and Arbitration Rules.

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<sup>1</sup> The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004 ("CAFTA"), Article 10.20.4 (**Respondent's Authority 1**). The President of the United States signed implementing legislation for CAFTA in August 2005 and CAFTA entered into force in El Salvador on March 1, 2006.

## II. STANDARD OF REVIEW

### A. CAFTA Articles 10.20.4 and 10.20.5 Constitute an Agreement to Another Expedited Procedure for Making Preliminary Objections

1. The parties to this dispute have agreed to use the CAFTA expedited procedure for preliminary objections

8. The first sentence of ICSID Arbitration Rule 41(5) provides:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.<sup>2</sup>

9. The plain text of the Rule makes it clear that the procedure under ICSID Arbitration Rule 41(5) does not apply if "the parties have agreed to another expedited procedure for making preliminary objections . . . ."

10. In this case, the parties have agreed to such another expedited procedure through their consent to arbitration under CAFTA. The relevant provisions of CAFTA for making preliminary objections are Articles 10.20.4 and 10.20.5.<sup>3</sup>

11. CAFTA Article 10.20.4 provides:

Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

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<sup>2</sup> ICSID Rules of Procedure for Arbitration Proceedings, Article 41(5) (2006) (emphasis added).

<sup>3</sup> CAFTA Article 10.20.6, which refers to the power of the tribunal to award costs and attorney's fees, will be discussed in another section of this Request.



- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

12. CAFTA Article 10.20.5 provides:

In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

13. From these provisions it is clear that CAFTA Article 10.20.5 allows a respondent to make preliminary objections with regard to competence to be decided on an expedited basis. CAFTA Article 10.20.5, when used in conjunction with CAFTA Article 10.20.4, also allows a respondent to bring preliminary objections on the merits of the dispute and have the preliminary objections decided on an expedited basis. Therefore, CAFTA Article 10.20.5, alone or in

conjunction with CAFTA Article 10.20.4, constitutes an agreement by the CAFTA Member States to "another expedited procedure for making preliminary objections."<sup>4</sup>

14. Claimant agreed to submit to the CAFTA procedures, including the expedited procedure for making preliminary objections when it submitted its Notice of Arbitration. In its updated Exhibit 1 of its Notice of Arbitration, Claimant affirmed:

Pursuant to Article 10.18(2)(a) of the Central America – United States – Dominican Republic Free Trade Agreement ("CAFTA"), Pac Rim Cayman LLC ("PRC") hereby consents to arbitration in accordance with the procedures set out in CAFTA.<sup>5</sup>

15. In addition, CAFTA Article 10.16.5 makes clear that CAFTA provisions preempt any different provision in the ICSID Arbitration Rules.<sup>6</sup> Therefore, the parties to this dispute have agreed to use the CAFTA expedited procedure for making preliminary objections, to the exclusion of ICSID Arbitration Rule 41(5).<sup>7</sup>

2. The parties' agreement to use CAFTA procedures extends to all claims in this arbitration

16. During the process of constitution of the Tribunal, Claimant took the position that it is entitled to use two different sets of procedures in the same arbitration, because it is bringing claims under CAFTA and under the Investment Law of El Salvador.

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<sup>4</sup> See Aurélie Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, 21 ICSID Review: Foreign Investment Law Journal 427, 441 (2006) (**Respondent's Authority 2**) (referring to the 2004 U.S. Model BIT, which has procedures for making preliminary objections identical to the CAFTA provisions, as an example of an agreement by the parties to use another procedure for making preliminary objections that would make ICSID Arbitration Rule 41(5) inapplicable).

<sup>5</sup> See Notice of Arbitration ("NOA"), Updated Exhibit 1 ("Claimant's Consent & Waiver") (**Respondent's Exhibit 1**). The relevant sentence in the original waiver contained in Exhibit 1 submitted with the Notice of Arbitration was substantially the same.

<sup>6</sup> CAFTA Article 10.16.5 provides that the ICSID Arbitration Rules in effect on the date the claim or claims are submitted to arbitration under Section B of CAFTA Chapter 10 "shall govern the arbitration except to the extent modified by [CAFTA]."

<sup>7</sup> As previously stated, the Republic does not waive any objections to jurisdiction and competence by raising this preliminary objection and invoking the procedures under CAFTA and making reference to the ICSID Arbitration Rules.

17. As the Republic will show in Part VI of these Preliminary Objections, CAFTA does not allow Claimant to bring separate claims based on the same measures that Claimant alleges are breaches of the provisions of CAFTA. CAFTA's exclusivity rule precludes Claimant from bringing claims under the Investment Law and any other domestic law of El Salvador. This means that only CAFTA claims may be brought in this arbitration with regard to those measures.

18. However, setting aside for a moment the Republic's request for the Tribunal to dismiss all non-CAFTA claims, the Republic submits that CAFTA procedures should apply to all claims in this arbitration. This includes all claims that are the subject of these preliminary objections, which should be decided exclusively under the standards of CAFTA Articles 10.20.4 and 10.20.5.

19. Under CAFTA Article 10.18, titled "Conditions and Limitations on Consent of Each Party", a claimant filing arbitration under CAFTA must consent in writing to arbitration "in accordance with the procedures set out in [CAFTA]."<sup>8</sup> Claimant submitted its written consent in Exhibit 1 of its Notice of Arbitration, which Claimant updated on June 4, 2009 during the registration process of its Notice of Arbitration. In the updated waiver, Claimant stated in clear and unequivocal terms that

Pursuant to Article 10.18(2)(a) of the Central America – United States – Dominican Republic Free Trade Agreement ("CAFTA"), Pac Rim Cayman LLC ("PRC") hereby consents to arbitration in accordance with the procedures set out in CAFTA. (Emphasis added).

20. First, it is notable that the plain text of CAFTA Article 10.18.2(a) does not allow for exceptions to the exclusive use of the CAFTA procedures.

21. Second, in providing this consent to be governed by CAFTA procedures, Claimant did not suggest that any of its claims would be subject to different procedures. Thus, Claimant, knowing that it was submitting claims under the Investment Law of El Salvador in addition to claims under CAFTA, did not seek to qualify its consent to the CAFTA procedures.

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<sup>8</sup> CAFTA Article 10.18.2(a).

Instead, it clearly consented to arbitration "in accordance with the procedures set out in CAFTA." Claimant cannot attempt to repudiate its clear unqualified consent to the CAFTA procedures now that the case has been registered. Therefore, the CAFTA procedures must govern the entire arbitration, and the Republic is requesting that the Tribunal enforce Claimant's agreement to use the CAFTA procedures and direct the parties to use the CAFTA procedures for all claims in this arbitration, starting with these preliminary objections.

22. Finally, in addition to the fact that the use of the CAFTA procedures for the entire arbitration is mandated by the plain text of the relevant CAFTA provision and by Claimant's unqualified consent, the application of such procedures for the entire arbitration is also most sensible and efficient. It would not make sense to ask the Tribunal to examine the same objection on two different tracks, under two different standards with the potential of leading to different results. Using the CAFTA procedure makes particular sense in this arbitration, where all of Claimant's CAFTA claims and Investment Law claims relate to the exact same measures: the Government's alleged failure to grant the mining exploitation concession in El Dorado and the Government's alleged failure to grant the Environmental Permits for the nearby exploration areas.

**B. Standard of Review under CAFTA Article 10.20.4 Used in Conjunction with CAFTA Article 10.20.5**

23. The Republic includes this section to discuss the standard of review of the CAFTA provisions regarding preliminary objections, taking into account that this is only the third case filed under CAFTA and it is the first case in which the expedited procedure of CAFTA Article 10.20.5 is invoked with regard to preliminary objections on the merits under CAFTA Article 10.20.4.

1. The CAFTA expedited procedure is intended to dispose of frivolous claims

24. The CAFTA expedited procedure for making preliminary objections was drafted to allow an arbitral Tribunal to dispose of frivolous claims, such as those at issue here, on an expedited basis. According to the Summary of CAFTA sent by the President of the United States to the United States Congress, "Chapter [Ten] includes provisions similar to those used in U.S. courts to dispose quickly of frivolous claims."<sup>9</sup> The former Chief of the United States Department of State's NAFTA Arbitration Division also explained that the expedited provision for making preliminary objections in the United States' new investment agreements, including CAFTA, was designed "to expedite the dismissal of frivolous claims."<sup>10</sup>

2. Claimant's obligation to set forth factual bases for each claim and the Tribunal's power to consider facts not in dispute

25. In a preliminary objection under CAFTA Article 10.20.4, the Tribunal must "assume to be true claimant's factual allegations in support of any claim in the notice of arbitration."<sup>11</sup> However, in evaluating the sufficiency of the allegations, the Tribunal is expressly empowered to consider "any relevant facts not in dispute."<sup>12</sup>

26. These two provisions must be read together with the requirement of CAFTA Article 10.16.2(c) that a claimant must include, as early as in its Notice of Intent, "the legal and factual basis for each claim." (Emphasis added). This means that by the time the Notice of Arbitration is filed, a claimant must have given written notice of factual allegations sufficient to make its legal claims plausible. Thus, CAFTA Article 10.16.2(c) imposes a greater requirement

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<sup>9</sup> Message from the President of the United States Transmitting Legislation and Supporting Documents to Implement the Dominican Republic – Central America – United States Free Trade Agreement, June 23, 2005, at 1085 (Summary of the Agreement, at 13), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_documents&docid=f:hd036v1.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_documents&docid=f:hd036v1.pdf) (**Respondent's Authority 3**).

<sup>10</sup> Andrea J. Menaker, *Benefitting From Recent Experience: Developments in the United States' Most Recent Investment Agreements*, 12 U.C. Davis Journal of International Law & Policy 121, 127 (2005) (**Respondent's Authority 4**). Ms. Menaker was the Chief of the NAFTA Arbitration Division at the time the article was published.

<sup>11</sup> CAFTA Article 10.20.4(c).

<sup>12</sup> CAFTA Article 10.20.4(c).

to include the factual bases for the legal claims in the Notice of Arbitration than the corresponding requirement for a Request for Arbitration under Article 36(2) of the ICSID Convention and Rule 2 of the ICSID Institution Rules.<sup>13</sup>

27. Moreover, according to CAFTA Article 10.16.1, a claim includes, in addition to an allegation of breach of a CAFTA obligation, a showing that the claimant or its enterprise "has incurred loss or damage by reason of, or arising out of, that breach . . . ." Therefore, the heightened requirement to provide a factual basis under CAFTA applies not only to providing support for the allegation of a breach, but also with regard to demonstrating causation and damages.

28. A Notice of Arbitration is therefore defective if a claimant has not, in compliance with the requirement of CAFTA Article 10.16.2(c), included the necessary factual allegations to form a plausible basis for its claims. In such a case, a respondent may raise a preliminary objection and ask the Tribunal to dismiss any claim without an articulated factual basis.

29. In addition, taking into account the power expressly granted to the Tribunal by CAFTA Article 10.20.4(c) to "consider any relevant facts not in dispute", the respondent may also submit evidence to the Tribunal of undisputed facts relevant to a conclusion that a particular claim "is not a claim for which an award in favor of the claimant may be made."<sup>14</sup>

30. The respondent has the initial burden to submit evidence of any relevant uncontested facts it alleges in its preliminary objection under CAFTA Article 10.20.4. However, after the respondent has submitted evidence of the uncontested facts that show a legal claim or

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<sup>13</sup> See, e.g., the discussion of the requirements under the ICSID Rules in *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, paras. 99-102, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC750\\_En&caseId=C254](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC750_En&caseId=C254) (Respondent's Authority 5).

<sup>14</sup> CAFTA Article 10.20.4. Even under the less detailed examination of the facts under ICSID Arbitration Rule 41(5), it was envisioned that the respondent would be able to bring extrinsic evidence to the consideration of the Tribunal in making a preliminary objection under that Rule. See Aurélia Antonietti (Resp. Auth. 2), quoted by *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, para. 79 (Resp. Auth. 5) ("In addition, subsequently to the registration, a respondent could raise arguments and use supporting documents that were not made available to the Centre at the time of registration.").

claims to be without merit, the burden shifts to the claimant to introduce evidence or at least allege facts that are plausible on their face, to dispute respondent's facts and make each particular claim plausible. Only if the claimant meets this burden can the preliminary objection be dismissed and the case proceed.<sup>15</sup>

31. If, on the contrary, the facts set forth by the respondent in support of its preliminary objection remain uncontested, the Tribunal must make a determination regarding the interpretation of the law and its application to the uncontested facts and decide on the Preliminary Objections in accordance with CAFTA Articles 10.20.4 and 10.20.5.

3. Standard of review and time limits

32. The CAFTA expedited procedure for making preliminary objections contemplates a more thorough analysis of the facts and the law by the Tribunal to assure the viability of claims than the procedures under ICSID Arbitration Rule 41(5). Specifically, the CAFTA procedure has no counterpart to the ICSID Rule 41(5) requirement that a claim be shown to be "manifestly without legal merit." Second, CAFTA expressly authorizes the Tribunal to take into account relevant facts not in dispute. These differences suggest that a Tribunal applying the CAFTA procedure should conduct a more rigorous factual and legal analysis to dismiss claims that are frivolous on their face or after consideration of additional, undisputed facts.

33. In recognition of the need for a more thorough review of the facts and the law than might be appropriate under the ICSID procedure, CAFTA provides the Tribunal substantially more time to make a decision or award than the very short time allowed under ICSID Arbitration Rule 41(5). While ICSID Arbitration Rule 41(5) requires the Tribunal to issue its decision or award at the first session of the Tribunal, which could be in theory less than 30 days from the date of the objection, or shortly thereafter, CAFTA allows the Tribunal up to 150 days to issue a decision or award on the provisional objections (and up to 180 days if one of

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<sup>15</sup> The dismissal of preliminary objections is without prejudice to the respondent's ability to raise the same argument presented in the preliminary objections again in the merits phase. CAFTA Article 10.20.4(d).

the parties requests a hearing). Thus, even a comparison of the time periods demonstrates the rigor with which CAFTA claims should be examined at the Preliminary Objections stage.

34. The different standards between the two procedures must also be read in the context of the more stringent requirement of CAFTA Article 10.16.2(c), which, as previously mentioned, requires a claimant to include a factual basis for each of its legal claims in the Notice of Intent.

**C. Standard of Review under CAFTA Article 10.20.5 Preliminary Objections to Competence**

35. As explained earlier, CAFTA Article 10.20.5 constitutes an expedited procedure to raise preliminary objections related to competence. A preliminary objection to competence under the expedited procedure of CAFTA Article 10.20.5 is not subject to the limitations of CAFTA Article 10.20.4, and must be treated as any other preliminary objection to competence and decided under the same standard of review, except that CAFTA Article 10.20.5 includes defined time limits for the Tribunal to issue a decision or award.<sup>16</sup>

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<sup>16</sup> The only decision on jurisdiction under CAFTA Article 10.20.5 that has been issued to date is in the case *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No ARB/07/23, Decision on Objection to Jurisdiction, Nov. 17, 2008, available at <http://ita.law.uvic.ca/documents/RDC-GuatemalaDecisiononObjectiontoJurisdictionCAFTA.pdf> (**Respondent's Authority 6**).



### III. PRELIMINARY OBJECTION UNDER CAFTA ARTICLES 10.20.4 AND 10.20.5 REGARDING ALL CLAIMS RELATED TO THE APPLICATION FOR A MINING EXPLOITATION CONCESSION

#### A. Legal Requirements to Obtain a Mining Exploitation Concession

36. According to Claimant, the legal provisions for the granting of a mining exploitation concession under Salvadoran law are "plain and explicit."<sup>17</sup> The specific documents Claimant identifies as being required to obtain the mining exploitation concession are described in the Notice of Arbitration as follows:

For purposes of submitting an application to receive an exploitation concession, the pertinent documents provided by the law to be attached to a concession application are set out in Article 37 of the Mining Law. These documents include presentation of:

- ◇ A description of the area for which the concession is requested;
- ◇ A showing that the licensee owns or is authorized to use the real estate property where the mine project is located;
- ◇ The relevant *Permiso Ambiental* (Environmental Permit) ("Permit") issued by MARN and accompanied by a copy of the corresponding *Estudio de Impacto Ambiental* (Environmental Impact Study) ("EIA");
- ◇ An *Estudio de Factibilidad Técnico Económico* ("Feasibility Study"); and
- ◇ A five-year *Programa de Explotación* ("Development Plan").<sup>18</sup>

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<sup>17</sup> NOA, para. 8.

<sup>18</sup> NOA, para. 35.

**B. Claimant's Legal Conclusions Regarding Pacific Rim El Salvador's Application for the Mining Exploitation Concession**

37. In its Notice of Arbitration, Claimant repeatedly asserts the conclusion of law that PRES is entitled to obtain the El Dorado Concession, but for the lack of the Environmental Permit. For example, Claimant states that:

PRC's investments in El Salvador also include . . . PRES's perfected right to a mining exploitation concession in the area known as "El Dorado" . . . .<sup>19</sup>

With the exception of the environmental permit that remains unjustifiably withheld by the government, PRES has met all of the requirements to receive the concession.<sup>20</sup>

The factual bases for these claims . . . . include: El Salvador's illegal refusal to grant (or even act upon) the Enterprises' applications for their respective exploitation concession and environmental permits, when the Enterprises had met all of the necessary legal requirements to receive them.<sup>21</sup>

PRC's investment includes the property rights conferred by the exploration licenses and held by the Enterprises, as well PRES's perfected right to exploit El Dorado.<sup>22</sup>

38. Claimant even goes as far as asserting that, under Salvadoran law, a company that holds an exploration license has a "right to obtain the exploitation concession . . . [and] that right is perfected upon the discovery and demonstration of the existence of mineable ore deposits in the license area in accordance with Article 23 [of the Mining Law]."<sup>23</sup>

39. However, Claimant is wrong in both its assertion that there is an automatic right to a mining exploitation concession under Salvadoran law and its conclusion that it has complied with the minimum requirements under the Mining Law for the granting of an exploitation concession.

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<sup>19</sup> NOA, para. 2 (emphasis added).

<sup>20</sup> NOA, para. 65 (emphasis added).

<sup>21</sup> NOA, para. 91 (emphasis added).

<sup>22</sup> NOA, para. 96 (emphasis added).

<sup>23</sup> NOA, para. 37.

40. First, the Mining Law does not give holders of exploration licenses automatic rights to exploitation concessions. Claimant provides a self-serving interpretation of the Mining Law by focusing exclusively on one clause of Article 23 and ignoring the rest of that Article and the related provisions in Articles 40-43. These provisions specify the governmental decision-making process applicable to exploitation concessions, as well as the Ministry of Economy's authority to grant or deny such applications. Indeed, full compliance with all the formal requirements of the Law simply affords an applicant the right of having his or her application considered by the Ministry.

41. Second, while Claimant makes allegations related to PRES's inability to obtain an Environmental Permit, nowhere in the Notice of Intent or the Notice of Arbitration does Claimant provide even factual allegations, much less evidence, that PRES has submitted the other specified documents or complied with the other individual requirements to obtain the concession. This complete lack of any factual allegations relating to these legal requirements which Claimant calls "plain and explicit" violates the requirements of CAFTA Article 10.16.2(c). This shortcoming is particularly conspicuous in this case where the Notice of Arbitration includes 131 paragraphs and 55 pages, of which almost half, 56 paragraphs and 26 pages, are devoted to Section IV, titled "Factual Bases for the Claim". In the words of the Tribunal in *Trans-Global Petroleum v. Jordan*, Claimant is expecting the Tribunal to "accept a legal submission dressed up as a factual allegation."<sup>24</sup> But the Tribunal cannot accept, even at this early stage, Claimant's failure to set forth a factual basis to sustain its legal claims. The Tribunal could not accept the lack of a factual foundation for the claims even under the more lenient standards of the ICSID Rules, much less under the strict requirements of CAFTA Article 10.16.2(c).

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<sup>24</sup> *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, para. 105. (Resp. Auth. 5).

**C. There is no Automatic Right to a Mining Exploitation Concession**

42. Claimant's claims regarding its application for the El Dorado exploitation concession rest on Claimant's mistaken assertion that the law provides an automatic right to a concession for an exploration license-holder who discovers and demonstrates the existence of mineable deposits in the area of the exploration license.<sup>25</sup>

43. Claimant expressed its mistaken conclusion in the Notice of Arbitration as follows:

a licensee who completes the exploration phase is entitled to proceed to the mineral extraction or "exploitation" phase . . . .  
[T]he Government is *required* to grant the licensee an exploitation concession once the exploration phase is concluded, the existence of mineable deposits has been demonstrated, and the licensee has both filed the application provided in Article 36 of the Mining Law and enclosed the documents described below.<sup>26</sup>

44. The plain text of the Mining Law shows that these statements are simply incorrect as a matter of law. According to the Mining Law, there is no automatic right to a concession, even if the applicant has submitted the required documents. The Mining Law sets forth a series of steps for reviewing the application after it is submitted, including publication and solicitation of comments from interested parties opposing the application. Plainly, the solicitation of comments from interested parties would be a meaningless requirement if, as Claimant asserts, the Republic had no option but to issue the concession. The Ministry of Economy's Bureau of Hydrocarbons and Mines ("Bureau of Mines") can reject or accept the application, and, in accordance with Article 43 of the Mining Law, the final decision on whether to grant the concession is left to the Minister of Economy.<sup>27</sup>

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<sup>25</sup> NOA, para. 37.

<sup>26</sup> NOA, para. 34.

<sup>27</sup> See, Mining Law of El Salvador, Legislative Decree No. 544, Dec. 14, 1995, published in the Official Gazette No. 16, Book 330 of Jan. 24, 1996, *amended* by Legislative Decree No. 475, July 11, 2001, published in the Official Gazette No. 144, Book 352 of July 31, 2001 (**Respondent's Authority 7**).

45. Thus, the Resolution by the Ministry of Economy ("*Acuerdo del Ministerio*") referred to in Article 23 of the Mining Law is only one of the possible outcomes of the process for deciding upon a concession application outlined in Articles 36 through 43 of the Mining Law. As was true at the time Pacific Rim Mining Corp. decided to make its investment in El Salvador in 2002, far from being "required to grant the licensee the concession", the Ministry of Economy is given authority within the limits of the law to approve or deny an exploitation concession application, taking into consideration the public interest, among other factors.

46. Articles 36 through 38 of the Mining Law regulate the submission of the application and the verification by the Bureau of Mines that the application includes the formal requirements stated in the Mining Law. If these formal requirements are included in the application, and after completing an initial inspection, the Bureau of Mines will register the application and will begin the administrative process for adjudicating the application. However, if there is a failure to include any of the formal requirements, the Bureau of Mines will grant a maximum, non-extendable period of 30 days for the applicant to remedy the deficiency. If the deficiency is not cured in the 30-day period, the Bureau of Mines must deny the application and close the file.

47. Moreover, contrary to the suggestion of Claimant, even if the application includes the formal requirements in the Mining Law and is registered by the Bureau of Mines, the Mining Law does not provide for the concession to be automatically granted. Rather, the registration of the application triggers an administrative decision process that may result in the denial of the application at different stages.

48. First, Article 40 of the Mining Law sets forth a process for publication. The Bureau of Mines must make sure that the applicant publishes a notice in the official gazette and in two newspapers with the largest circulation in the country, with a summary of the application for the exploitation concession. In addition, the Bureau of Mines must send the summary of the application to the municipality where the mining project is located to be posted in the town hall.

49. Second, Article 41 of the Mining Law provides for a period of fifteen days after the publication of the notice in the official gazette for persons from the general public who have a legitimate interest in the application, or who believe that they will be negatively affected by the proposed concession, to express their opposition to the application. Article 41 provides that the Bureau of Mines will consider the objections and the applicant's response, and then decide whether to allow the process to continue or to stop there if the objections are well-founded. Either the objecting members of the public or the applicant can appeal the decision of the Bureau of Mines to the Minister of Economy.

50. Third, if the application process is allowed to continue, Article 42 of the Mining Law requires the Bureau of Mines to demarcate the area of the requested concession with sturdy markers. Once this process is concluded, the Bureau of Mines submits the matter to the Minister of Economy for his decision.

51. Finally and most importantly, Article 43 of the Mining Law gives the Minister the power to deny the concession if granting the concession would be unjustified. Said article gives the Minister authority to evaluate the contents of the application file and order any investigations and inspections he deems necessary. Additionally, Article 15 of the Mining Regulations provides factors that the Minister (and the Bureau of Mines before him) must take into account in deciding whether or not to grant the mining exploitation concession, including the national interest, the financial and technical capacity of the applicant, and the characteristics of the proposed mining operation.<sup>28</sup> In accordance with Article 43 of the Mining Law, the applicant can request reconsideration of an unfavorable resolution regarding the concession, which will be decided upon by the Minister. The Minister's decision on a request for reconsideration cannot be appealed.<sup>29</sup>

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<sup>28</sup> Regulations of the Mining Law of El Salvador and its Amendments, Art. 15, Legislative Decree No. 47, June 20, 2003, published in the Official Gazette No. 125, Book 359 of July 8, 2003 ("Mining Regulations") (**Respondent's Authority 8**).

<sup>29</sup> Article 43 of the Mining Law reads as follows:

Having received the file referred to in the forgoing Article, the Minister may request the reports and order the carrying out of investigations that he judges appropriate, and, within fifteen business days following

52. Thus, the plain text of Articles 40 through 43 of the Mining Law demonstrates that there is no such thing as an automatic right to a mining exploitation concession as Claimant alleges. Even if PRES had met the formal requirements of Articles 36 and 37 of the Mining Law, which it did not, PRES's application would still have been subject to the substantive technical evaluation of the submission, the public comment process, and the bounded power of the Minister of Economy to grant or deny the application for the exploitation concession.

53. It is therefore clear that, as a matter of law, PRES did not have a perfected right to a mining exploitation concession. It is axiomatic that Claimant cannot receive redress in this arbitration for the breach of a right PRES did not have. In other words, "as a matter of law, [the] claim submitted is not a claim for which an award in favor of the claimant may be made under [CAFTA] Article 10.26."<sup>30</sup>

54. Moreover, in addition to the lack of the automatic right to an exploitation concession under the Mining Law alleged by Claimant, even assuming the existence of such a right, PRES's application for a concession could not have been approved by the Bureau of Mines or by the Minister of Economy because, as demonstrated below, the application did not comply with the "plain and explicit" minimal substantive requirements of the Mining Law recognized by Claimant.

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such receipt, if it is justified, he shall issue the corresponding Resolution, which must be accepted by the applicant within eight business days after issuance. In the event he considers the concession unjustified, he shall issue an unfavorable Resolution; which may be subject to an Appeal for Reconsideration that can be filed by the interested party before the same Minister, within three business days after the corresponding notification; such appeal shall be resolved within fifteen days of its submission. This Resolution shall not be subject to Appeal.

<sup>30</sup> CAFTA Article 10.20.4 (Resp. Auth. 1).

**D. Relevant Facts Not in Dispute Demonstrate that Pacific Rim El Salvador has Failed to Meet the Legal Requirements to Obtain a Mining Exploitation Concession**

55. As noted, Claimant has not made any factual allegations about whether PRES has met the individual requirements of Article 37 of the Mining Law (other than claiming that PRES is somehow entitled to the Environmental Permit). Claimant's silence on this issue is not surprising, as the undisputed facts—all from Claimant's own documents—demonstrate that PRES has in fact not complied with other legal requirements to have a right to the concession for El Dorado. The Tribunal should consider these undisputed facts pursuant to its power under CAFTA Article 10.20.4(c) and accordingly dismiss Claimant's claims.

56. As Claimant explains, there is a two-stage framework for mining in El Salvador: an exploration phase and an extraction, or exploitation, phase. El Salvador's Mining Law contains procedures for petitioning the government for exploration licenses and exploitation concessions. The requirements for an exploitation concession are necessarily distinct from the requirements for a mere exploration license. An exploration license is obtained with the goal of identifying whether there are valuable minerals in the ground and where they are located.

57. The area for the exploitation concession must be determined based on what was found during exploration. Article 24 of the Mining Law provides that the mining exploitation concession area must be within the exploration area and that the surface area must be determined by the size of the mineral deposits and the technical justifications of the license holder.

58. Claimant admits that the legal provisions to obtain a mining exploitation concession under Salvadoran law are "plain and explicit."<sup>31</sup> According to Article 37 of the Mining Law, an applicant for an exploitation concession must present, among other requirements, documentation of ownership or authorization to use all the property that

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<sup>31</sup> NOA, para. 8.



corresponds to the area of the concession, and a technical and economic feasibility study.<sup>32</sup>

Claimant notes these requirements in its Notice of Arbitration:

the pertinent documents provided by the law to be attached to a concession application . . . . include presentation of: . . .

- ◇ A showing that the licensee owns or is authorized to use the real estate property where the mine project is located; [and]
- ◇ An *Estudio de Factibilidad Técnico Económico* ("Feasibility Study").<sup>33</sup>

59. Claimant has not only failed to allege facts to show that PRES complied with these two requirements, but the undisputed facts, from Claimant's own documents, demonstrate that PRES actually did not comply, and still does not comply, with these two requirements. Nor is there any allegation, much less proof, that the Republic has in any way hindered PRES from complying with these two requirements. In short, Claimant has failed to set forth facts demonstrating PRES's entitlement to the exploitation concession at issue in this arbitration.

1. Claimant has not even alleged that Pacific Rim El Salvador owns or is authorized to use the real estate property in the requested concession area

60. One of the requirements that Claimant calls "plain and explicit" is, to use Claimant's words, the requirement to provide a "showing that the licensee owns or is authorized to use the real estate property where the mine project is located", that is, the requirement to own or have authorization to use all the property covering the area of the exploitation concession being requested. However, nowhere in its Notice of Intent or in its Notice of Arbitration does Claimant allege any facts to support an allegation of such ownership or authorization. The reason is simple: the undisputed facts show that it does not.

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<sup>32</sup> See, Mining Law, Art. 37 (Resp. Auth. 7).

<sup>33</sup> NOA, para. 35. See, also, Mining Law, Art. 37 (Resp. Auth. 7).

2. Pacific Rim El Salvador does not own or have authorization to use the real estate property in the requested concession area

61. Beginning with the Concession Application itself, PRES did not allege or provide evidence that it owned or had permission to use the surface area over the requested concession. The concession PRES applied for consists of an area of 12.75 square kilometers.<sup>34</sup> But PRES provided proof of ownership or authorization to use only approximately 1.6 square kilometers – or only 13% of the total area requested for the concession.<sup>35</sup>

62. This deficiency in the Application for a mining exploitation concession was indicated to PRES in a letter from the Bureau of Mines dated October 2, 2006. This letter gave PRES 30 days to submit, among other documents, certified copies of the registered land purchases or authorizations for the land subject to the concession.<sup>36</sup> This request was in full compliance with Article 31 of the Mining Regulations, which provides that if an application is

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<sup>34</sup> Application: Conversion of El Dorado Norte and El Dorado Sur Licenses into an El Dorado Exploitation Concession (Solicitud: Conversión de Licencias El Dorado Norte y El Dorado Sur a Concesión de Explotación El Dorado) at 4, Dec. 22, 2004 ("Concession Application" or "Application") (**Respondent's Exhibit 2**).

<sup>35</sup> See Application, §4.2 and Map No. 5 (Resp. Ex. 2) showing the areas of land owned or leased by PRES. Map No. 5 shows all the land Claimant has alleged PRES owns or has authorization to use. The scale of the map only shows 4 square kilometers of the 12.75 square-kilometer of the requested concession area, where PRES only had ownership or permission to use less than 2 square kilometers. To place this area in perspective with the area of the requested exploitation concession, Map No. 5 should be looked at in conjunction with the 2008 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession (Informe Anual 2008 de Exploración Para Los Trabajos Realizados Por Pacific Rim El Salvador S.A. de C.V. en la Propuesta Concesión de Explotación El Dorado) (Feb. 2009), § 6 & Figura 14 ("2008 Annual Report") (**Respondent's Exhibit 3**) (showing the areas owned by Pacific Rim within the much larger area of the concession).

<sup>36</sup> Letter from Bureau of Mines to Pacific Rim El Salvador, Oct. 2, 2006 ("Ministry of Economy Warning Letter") (**Respondent's Exhibit 4**) ("Para mejor proveer PREVIENESE, a la Sociedad 'PACIFIC RIM EL SALVADOR, S.A. DE C.V.', a través de su Representante Legal, quien deberá de legitimar su personería y de conformidad a lo establecido en los Artículos 36, 37 numeral 2 y 38 de la Ley de Minería, para que en el plazo de TREINTA DIAS presente a esta Dirección la documentación siguiente: 1. Copias certificadas de los Testimonios de venta de los inmuebles debidamente inscritos o autorizaciones otorgadas en legal forma por los propietarios del área solicitada para la explotación de la mina. . . ." (Emphasis added)) ["The Bureau, in order to better reach a decision, WARNS the company PACIFIC RIM EL SALVADOR, S.A. DE C.V., through its Legal Representative, who must furnish evidence of his legal capacity, and as established in Articles 36, 37 numeral 2, and 38 of the Mining Law, that within THIRTY DAYS it must submit the following documentation: 1. Certified copies of the duly recorded official transcripts of the property sales agreements or legally executed authorizations from the landowners in the area requested for mining exploitation . . . ." (Emphasis added)].

submitted without the required documentation, the applicant shall be informed in writing and be given a maximum of 30 days to rectify the deficiency or omission.<sup>37</sup>

63. In response to the October 2006 letter, PRES merely re-submitted the exact same documents PRES had already submitted with its original application and made absolutely no mention of any additional land.<sup>38</sup>

64. Claimant has never suggested in other legal documents that PRES owns or has authorization to use all the property included in its application. In fact, Pacific Rim Mining Corp., the ultimate parent company, has suggested just the opposite: that PRES does not own or have the authority to use the property at issue. For example, in its annual filing to the United States Securities and Exchange Commission in July 2005, months after applying for the concession, Pacific Rim Mining Corp. states that it is still acquiring some tracts of land, but that these are smaller:

To provide surface rights, the Company entered into a two year lease with option to purchase agreement dated April 2, 2004 to acquire approximately 100 hectares of land near the El Dorado Property, for total consideration of \$1,000,000 of which \$14,391 was paid as the initial lease payment . . . . The Company is

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<sup>37</sup> Mining Regulations (Resp. Auth. 8) ("En caso de no presentarse en legal forma, se prevendrá por escrito al solicitante, otorgándole el plazo improrrogable de treinta días contados a partir del día siguiente a la notificación de la providencia, para que subsane los omisiones; transcurrido dicho plazo sin que lo hubiere hecho, la Dirección declarará sin lugar lo solicitado y ordenará el archivo de las diligencias, emitiendo resolución en la que conste que quede sin efecto la solicitud presentada.") ["In the event that applications are not submitted in proper legal form, applicants shall be warned in writing, granting them a non-extendible term of thirty days as of the day following notification of the warning to correct the omissions. If said term has elapsed without the applicant doing so, the Bureau shall reject the application and order the documents to be archived, issuing a resolution declaring the application in question null and void."].

<sup>38</sup> See, Letter from Pacific Rim El Salvador to Bureau of Mines, Nov. 11, 2006 ("Pacific Rim Response") (**Respondent's Exhibit 5**). The Bureau of Mines sent another letter to Claimant on December 4, 2006, but the letter was withdrawn and its original retrieved by the Bureau of Mines the next day. A copy is enclosed as **Respondent's Exhibit 6**. The Republic provides a copy of this letter so that the Tribunal has a complete record of events related to PRES's application. The December 2006 letter was issued during the initial review of the application explained in Section III.C above, which was a preliminary review of the formal requirements for the application set out in the Mining Law, not a substantive review of the application. The December 2006 letter did not provide any assessment of the Claimant's response and did not change the fact that Claimant never complied with the requirement regarding land ownership or authorization and never submitted the feasibility study required to obtain an exploitation concession.

acquiring additional smaller tracts of lands in the area for the purpose of access at nominal amounts.<sup>39</sup>

65. The Securities and Exchange Commission filing goes on to explain that of the total area of the exploration licenses for El Dorado, PRES only "owns approximately 69 hectares of real estate in the central part of the El Dorado Property and an option to acquire an additional 100 hectares."<sup>40</sup> The area applied for in the concession was 1,275 hectares.<sup>41</sup> Thus, Pacific Rim Mining Corp.'s U.S. Government filings confirm that PRES had ownership over only a small percentage of the property subject to the requested concession and did not make any reference to any permission to use the rest of the area.

66. Nor is there any evidence that PRES has obtained any additional land or authorizations in the area since the time of those filings. In fact, a 2008 report prepared for Pacific Rim Mining Corp. gives the same information—that it acquired 68.86 hectares of surface real estate from predecessors and then "acquired additional surface lands of approximately 93.42 hectares, intended for use as the site for the plant and tailings disposal facilities."<sup>42</sup> The report includes a map showing the small areas "owned or otherwise controlled by Pacific Rim" within the much larger concession area.<sup>43</sup>

67. Similarly, in February 2009, in its report of activities in El Dorado for 2008 submitted to the Salvadoran Ministry of Economy, PRES included a map that clearly shows that it still had not complied with this requirement.<sup>44</sup>

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<sup>39</sup> Pacific Rim Mining Corp., Annual and Transition Report (foreign private issuer) (Form 20-F) at 19, July 28, 2005 ("2005 Form 20-F") (**Respondent's Exhibit 7**).

<sup>40</sup> 2005 Form 20-F at 19-20 (Resp. Ex. 6).

<sup>41</sup> Pacific Rim Mining Corp., Annual Report (Form 40-F) at 21-22, July 31, 2006, *available at* <http://www.sec.gov/Archives/edgar/data/1056512/000106299306002217/exhibit1.htm> (**Respondent's Exhibit 8**).

<sup>42</sup> Technical Report Update on the El Dorado Project Gold and Silver Resources, Mine Development Associates, at 23-24, March 3, 2008 *available at* <http://www.sec.gov/Archives/edgar/data/1056512/000106299308000895/exhibit99-1.pdf> ("MDA Technical Report") (**Respondent's Exhibit 9**).

<sup>43</sup> MDA Technical Report at 15 (Resp. Ex. 9).

<sup>44</sup> 2008 Annual Report (Resp. Ex. 3).

68. Finally, as late as July 2009, in another Report to the United States Securities and Exchange Commission, Pacific Rim Mining Corp. stated that "the Company owns approximately 765,000 square metres [0.765 square kilometers] of real estate in the central part of the El Dorado Property."<sup>45</sup> PRES clearly does not have and has never claimed to have authorization to use the rest of the area applied for (11.985 square kilometers), and has therefore not complied with the requirement of Article 37 of the Mining Law regarding ownership or authorization to use the land.

69. For comparative purposes, the only existing metallic mining exploitation concession issued by the Government of El Salvador, in favor of Commerce Group Corp., a United States Corporation, in 2003, covered only 1.23 square kilometers.<sup>46</sup> Unlike PRES, Commerce Group complied with the requirement to own or obtain permission to use the land within the concession area. Commerce Group leased the entire area of the concession from its majority-owned subsidiary, Mineral San Sebastian, S.A. de C.V.<sup>47</sup>

70. The clear conclusion, based both on Claimant's failure to allege facts showing compliance with the "plain and explicit" requirements of the Mining Law and upon the undisputed facts from Claimant's own documents, is that PRES never met what it concedes is one of the requirements to obtain a mining exploitation concession under Salvadoran law:

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<sup>45</sup> Pacific Rim Mining Corp., Annual and Transition Report (foreign private issuer) (Form 20-F) under "Property Description and Location" July 29, 2009 (**Respondent's Exhibit 10**).

<sup>46</sup> Ministry of Economy Resolution No. 741, Aug. 18, 2003 (recognizing that Commerce Group complied with the legal requirements and granting it an exploitation concession) *superseded by* Ministry of Economy Resolution No. 591, May 20, 2004 (**Respondent's Exhibit 11**).

<sup>47</sup> Escritura Pública de Arrendamiento de Inmueble Rústico, otorgada por Mineral San Sebastián, S.A. de C.V. a favor de Commerce Group Corp., Jan. 14, 2003 (**Respondent's Exhibit 12**) (stating that Mineral San Sebastián owns the areas Hacienda San Sebastian and San Sebastian El Coyolar and agrees to lease all the mines within to Commerce Group for 30 years from the date of an exploitation concession). *See, also* Commerce Group, San Sebastian Gold Mine, <http://www.commercegroupcorp.com/sanseb.html>, last visited Dec. 11, 2009 (**Respondent's Exhibit 13**). The concession is inactive because of lack of activity by Commerce Group since the beginning of the concession. Commerce Group had its environmental permits revoked in 2006 due to serious environmental violations. Commerce Group filed an ICSID arbitration against the Republic of El Salvador challenging the revocation of its environmental permits (*Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17).

namely, making a "showing that the licensee owns or is authorized to use the real estate property where the mine project is located." Having not met this requirement, PRES did not have a right to the mining exploitation concession in El Dorado. Claimant filed claims in this arbitration related to the El Dorado project without even alleging the factual bases for those claims, because it could not truthfully make such allegations knowing that PRES had not met this legal requirement. Claimant's claims with respect to the El Dorado project are thus frivolous and the Republic of El Salvador is therefore requesting that the Tribunal dismiss all claims related to the El Dorado project.

3. Claimant has not even alleged that Pacific Rim El Salvador has submitted a completed Feasibility Study

71. A finding by the Tribunal that PRES has not met one of the legal requirements to obtain the mining exploitation concession would be enough to dismiss all claims related to the El Dorado project. However, there is a second, independent requirement that PRES did not meet. In addition to applying for a large concession area for which it can not show ownership or authorization to use, PRES did not submit the required Feasibility Study.

72. Claimant's Notice of Arbitration notes this requirement, but then does not anywhere assert that PRES ever submitted a completed Feasibility Study, much less a completed Feasibility Study covering the entire area applied for as a mining exploration concession.

4. Pacific Rim El Salvador has not submitted a completed Feasibility Study

73. In fact, Claimant could not have in good faith alleged that PRES has complied with this requirement because it has not done so. In the Concession Application, PRES submitted only a "Preliminary Pre-Feasibility Study."<sup>48</sup> At the time, PRES distinguished this from the required final Feasibility Study, which it admitted was not complete.<sup>49</sup> PRES submitted

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<sup>48</sup> Application, at cover letter (Resp. Ex. 2).

<sup>49</sup> Application, §4.4 (Resp. Ex. 2) ("El estudio de factibilidad técnico-económico está siendo preparado por SRK Consulting . . . . Aunque este estudio no ha sido terminado en su forma final, debido al estudio minero que esta (sic) terminándose en estos días, Pacific Rim ha trabajado con SRK para finalizar un estudio de factibilidad preliminar.") ["The technical-economic feasibility study is being prepared by SRK

a "Final" but still "Pre-Feasibility Study" in January 2005, but it never completed the actual Feasibility Study required by the "plain and explicit"<sup>50</sup> provisions of the laws of El Salvador.

74. The Concession Application itself explained that PRES would need more time and money to fully explore the area for which it had exploration licenses.<sup>51</sup> Nevertheless, in the Application, PRES included a request for the right to exploit areas that had not been completely explored, and for which it had not submitted an environmental impact assessment.<sup>52</sup> This inclusion was not based on El Salvador's Mining Law, but rather on PRES's unilateral opinion of how it could maximize its benefits: PRES argued that due to the cost of constructing the mine and beginning operations, it would not be reasonable to limit the area of the exploitation concession.<sup>53</sup>

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Consulting . . . . Although this study has not been completed in its final version because the mining study is currently being completed, Pacific Rim has worked with SRK to finalize a preliminary feasibility study."]

<sup>50</sup> NOA, para. 8.

<sup>51</sup> Application, § 2.2 (Resp. Ex. 2) ("Limitaciones en el método de exploración y en los recursos financieros no le han permitido perforar cada veta encontrada o blanco de exploración identificado. En forma sencilla, se requirieron más años para evaluar detalladamente la totalidad del área de las Licencias.") ["Limitations in the exploration method and financial resources have not allowed it to drill all discovered veins or identified exploration targets. Basically, more years are needed for a detailed assessment of the entire area covered by the Licenses."]

<sup>52</sup> Application, § 2.2 (Resp. Ex. 2) ("Se incluyó en el área de la concesión el área de la mina planificada y el área de procesamiento. Además, se incluyó la veta Nueva Esperanza al norte y la veta Minita Sur en el sur. Estas han sido incluidas debido a su cercana proximidad al área de operación planificada y por su potencial para ser incluidas en el plan operacional en el futuro cercano. Habiendo dicho eso, se reconoce que operaciones mineros (sic) en las vetas Nueva Esperanza y/o Minita Sur requerirán un estudio de impacto ambiental aprobado antes de que cualquier actividad minera pueda comenzar en estas vetas.") ["The area of the planned mine and the processing area were included in the concession area. The Nueva Esperanza vein to the north and the Minita Sur vein to the south were also included due to their close proximity to the planned operating area and because of their potential to be included in the operations plan in the near future. That being said, we recognize that mining operations in the Nueva Esperanza and/or Minita Sur veins would require an approved environmental impact study before any mining activity in these veins could begin."].

<sup>53</sup> Application, § 2.3 (Resp. Ex. 2) ("... no nos parece razonable solicitar solamente el área de las vetas Minita y Minita 3, área de la planta y presa de colas, sino que también las otras áreas cercanas donde se encuentran vetas mineralizadas y zonas geológicamente identificadas como zonas con potencial como área de Concesión") ["... we do not think it reasonable to request only the areas of the Minita and Minita 3 veins, plant and tailings dam, but also other nearby areas containing mineralized veins and geological zones identified as having potential as the Concession area."].

75. The October 2006 letter from the Bureau of Mines to PRES mentioned above with regard to the land ownership and authorization requirement, also alerted PRES to its failure to provide the required Feasibility Study. The letter gave PRES thirty days to submit, among other requirements, 1) the evidence of land ownership or authorization, 2) the environmental permit, *and* 3) the Feasibility Study with detailed plans.<sup>54</sup>

76. Consistent with its failure to act in connection with the land ownership and authorization requirement, in its response to the request from the Bureau of Mines for a Feasibility Study and professional plans, PRES simply re-submitted its Pre-Feasibility Study and added the requested plans for the six specific areas requested.<sup>55</sup> As set forth in detail below, PRES and its parent enterprises have repeatedly acknowledged, by words and actions, that the required Feasibility Study was never done.

77. The difference between a Pre-Feasibility Study and a Feasibility Study is not merely in the name. For example, Article 24 of the Mining Law specifically ties the surface area of the concession to the size of the mineral deposits and the technical justifications provided by the license holder. Thus, an applicant would have to justify in a Feasibility Study why it deserves to be awarded the concession area it is requesting. The Pre-Feasibility Study commissioned by Pacific Rim Mining Corp. by its terms demonstrates that it was clearly insufficient for this purpose and PRES was not, in fact, in a position to prepare the required Feasibility Study because it requested a concession area larger than what it could justify based on the exploration and technical work it had undertaken.

78. According to the Pre-Feasibility Study, "SRK Consulting ('SRK') was commissioned by Pacific Rim Mining Corp. ('PacRim') in March of 2004 to prepare a Canadian

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<sup>54</sup> Bureau of Mines Warning Letter (Resp. Ex. 4).

<sup>55</sup> Pacific Rim Response, at 3.b (Resp. Ex. 5) (including engineering and design of the ramp, access routes and infrastructure, a tailings dam, a flow plant, method of exploitation of the subterranean mine, and closure of the mine).



National Instrument 43-101 . . . compliant Pre-Feasibility Study for the El Dorado Project located in El Salvador."<sup>56</sup>

79. A few examples from the information contained in the Pre-Feasibility study show that this study was an incomplete basis for the Ministry of Economy to approve the exploitation concession in the area applied for by PRES. For example, according to the Pre-Feasibility Study,

Understanding of the southern sector is only just being developed.<sup>57</sup>

Seismic activity is common in El Salvador. . . . Significant events that have occurred within 100km of the El Dorado project include a magnitude 7.9 at a distance of 36km from the site, a magnitude 7.8 (January 13, 2001) at 86km, a magnitude 7.7 at 54km, a magnitude 7.1 at a distance of 99km, and two magnitude 7.0 earthquakes at 90 and 99 km from the site. These data indicate that there is potential for a major earthquake to occur near the site and the need for sophisticated seismic analyses of proposed mine facilities at appropriate levels of seismic risk.<sup>58</sup>

Overall, the tailings impoundment meets the project criteria to store the proposed tailings production volumes. However, the pre-feasibility level of engineering design is preliminary and detailed engineering will be required prior to construction. . . . The [tailings storage facility] is formed by damming a sub-drainage of the Rio San Francisco. The Rio San Francisco flows from east to west and lies to the north of the proposed [tailings storage facility] site and will be receiving water from any discharges from the [tailings storage facility].<sup>59</sup>

80. Pacific Rim Mining Corp., and thus PRES, admittedly never completed the required Feasibility Study to allow the Ministry of Economy to properly evaluate whether to grant the concession and, if so, 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.

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<sup>56</sup> Pacific Rim Mining Corp., Final Pre-Feasibility Study, El Dorado Project at i, Jan. 21, 2005 (**Respondent's Exhibit 14**).

<sup>57</sup> Pre-Feasibility Study, at 57 (Resp. Ex. 14).

<sup>58</sup> Pre-Feasibility Study, at 18 (emphasis added) (Resp. Ex. 14).

<sup>59</sup> Pre-Feasibility Study, at 116-17 (Resp. Ex. 14).

81. Even today, Pacific Rim Mining Corp.'s website refers only to the 2005 Pre-Feasibility Study and does not make reference to a completed or final Feasibility Study.<sup>60</sup>

82. Pacific Rim Mining Corp.'s U.S. Government filings provide further, repeated confirmation of the fact that it never completed the required Feasibility Study. In its 2005 Securities and Exchange Commission filing, Pacific Rim Mining Corp. suggested that there was a lot of exploration activity still to be done. Pacific Rim Mining Corp. explained that its exploration efforts combined with those of its predecessors resulted in "[g]eological mapping to varying levels of detail" covering only "2,000 hectares of the 7,500 hectare property."<sup>61</sup> The 2005 filing also noted that the Pre-Feasibility Study released in January 2005 did not encompass all of the veins the company hoped to develop in the exploitation concession area at issue. "The pre-feasibility study focused on the Minita deposit alone, and did not include other resources currently defined on the El Dorado project . . . ."<sup>62</sup>

83. Likewise, the annual reports submitted by PRES demonstrate that exploratory work in the area at issue continued after the concession was applied for, confirming that the surface area of the requested concession could not have been based on the extent and location of deposits. For example, in 2006, the company reported that the area of Minita Sur needed more study.<sup>63</sup> The 2006 Report also indicated that more geotechnical data would be presented at a later date, and that data was still being collected that would be relevant to the access ramp and

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<sup>60</sup> Pacific Rim Mining Corp., <http://www.pacrim-mining.com/s/Eldorado.asp>, last visited Dec. 11, 2009 (**Respondent's Exhibit 15**). *See, also*, MDA Technical Report at 157 (Resp. Ex. 9) (describing all the technical studies done historically on the El Dorado project, including a 1995 Pre-Feasibility Study and a 2001 internal Feasibility Study before Claimant acquired the property, and stating that Claimant only completed the January 2005 Pre-Feasibility Study).

<sup>61</sup> 2005 Form 20-F at 21 (Resp. Ex.7).

<sup>62</sup> 2005 Form 20-F at 23 (Resp. Ex.7).

<sup>63</sup> 2006 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession (Informe Anual 2006 de Exploración Para Los Trabajos Realizados Por Pacific Rim El Salvador S.A. de C.V. en la Propuesta Concesión de Explotación El Dorado) § 3.1.2, Dec. 2006 ("2006 Annual Report") (**Respondent's Exhibit 16**) ("se requiere más estudio de esta zona en lo que se refiere al resto de las perforaciones del año 2006, para incluir los intervalos de encontrados en otras perforaciones") ["further study of this area is required insofar as concerns the rest of the 2006 drillings in order to include the intervals of strikes in other drillings"].

entrance to El Dorado.<sup>64</sup> The 2007 Report included a recommendation to continue exploratory drilling in the Guadalupe area in order to complete an economic evaluation.<sup>65</sup>

84. In a 2007 interview, Pacific Rim Mining Corp. President-CEO Thomas Shrake stated that the "Feasibility Study has been stalled at this point because of a new discovery that we announced in December and we are continuing to drill on today. This new discovery will change the economic landscape of the property. . ."<sup>66</sup>

85. Likewise, no Feasibility Study had been completed by the end of 2008, as evidenced by the fact that the 2008 Annual Report predicted that in early 2009 the company would submit a final Feasibility Study incorporating data from all its past drilling campaigns.<sup>67</sup>

86. But this year, Pacific Rim Mining Corp. announced its intention to indefinitely delay completion of the Feasibility Study.<sup>68</sup> In fact, it appears that the company never intended

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<sup>64</sup> 2006 Annual Report, § 3.1.5 (Resp. Ex. 16) ("Es importante comentar que las perforaciones P06-474, 477, 479 y 483, se realizaron con el fin de obtener una serie de datos Geotécnicos los cuales se presentaran en un futuro informe pues hasta el momento se están recolectando los datos relacionados con estos pozos y que servirán de apoyo para la construcción de la rampa de acceso y el túnel de entrada a la extracción de la mina El Dorado.") ["It is important to note that drilling in P06-474, 477, 479 and 483 was carried out in order to obtain a series of Geotechnical data that will be presented in a future report because the data related to these holes are still being collected and will be used as support for the construction of the access ramp and entry tunnel to the El Dorado mine extraction area."].

<sup>65</sup> 2007 Annual Report of Exploration for the Work Done by Pacific Rim El Salvador in the Proposed El Dorado Exploitation Concession (Informe Anual 2007 de Exploración Para Los Trabajos Realizados Por Pacific Rim El Salvador S.A. de C.V. en la Propuesta Concesión de Explotación El Dorado) § 9, Jan. 2008 (**Respondent's Exhibit 17**) ("Continuar la perforación en el sector Guadalupe para completar una evaluación económica") ["Continue the drilling in the Guadalupe sector to complete an economic assessment."].

<sup>66</sup> Biography Channel, Company Executives Online, at 0:59, video available at <http://www.ceoclips.com/companyclip.aspx?id=231>.

<sup>67</sup> 2008 Annual Report, § 7 (Resp. Ex. 3) ("Durante el año 2006 el Estudio de Factibilidad Final para el proyecto El Dorado fue detenido para reorganizar los datos obtenidos en campañas pasadas de perforación a cargo de PACRIM. Luego de un informe de avance en la revisión del cálculo de reservas en Julio de 2006, se empezaron los trabajos técnicos para retomar y completar el estudio final de factibilidad a principios de 2008. Los datos obtenidos de las perforaciones hechas en 2007 y otros estudios técnicos con la información existente en el proyecto van a dar como resultado a principios de 2009, un Estudio de Factibilidad mas completo que el presentado en años pasados.") ["In 2006, the Final Feasibility Study for the El Dorado Project was delayed in order to reorganize the data obtained in past drilling campaigns conducted by PACRIM. After a progress report on the revised calculation of reserves in July 2006, technical work began to resume and complete the final feasibility study in early 2008. The data obtained from holes drilled in 2007 and other technical studies along with the existing information on the project will result in a Feasibility Study in early 2009 that is more complete than those presented in past years."].

to comply with the requirement of completing a full Feasibility Study before getting a concession. On its website describing the El Dorado project back in 2004, under "Current Activities," Pacific Rim Mining Corp. explained that a mining permit would allow it to get "exploitation licenses and commence development activities, such as the construction of an access / haulage ramp . . . intended to provide access to the Minita vein system for underground definition drilling required for a full feasibility study."<sup>69</sup>

87. Finally, Pacific Rim Mining Corp.'s most recent Securities and Exchange Commission filing, confirms, once and for all, that no Feasibility Study has ever been completed. Tellingly, Claimant in no way blames the Republic for such failure but rather Pacific Rim Mining Corp. attributes the decision not to proceed to "unpredictability in capital costs" due to "recent economic volatility." Specifically, Pacific Rim Mining Corp. explains:

A feasibility study for the El Dorado project . . . was initiated in fiscal 2006 and put on hiatus between late fiscal 2007 and early fiscal 2009 while the basis of the study was expanded due to the discovery of the Balsamo deposit. In February 2009 . . . the Company decided to defer completion of the feasibility study due to: unpredictability in capital costs as changes in commodity prices due to recent economic volatility become reflected in the prices for capital items; the Company's focus on saving cash until these inputs have stabilized and the study can accurately reflect changed economic realities; and, uncertainty in the timing of the El Dorado permitting process. While Pacific Rim intends to complete the feasibility study when the El Dorado permit issue is clarified and capital costs stabilize, it did not resume during Q1 2010.<sup>70</sup>

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<sup>68</sup> Liezel Hill, *Pacific Rim Freezes Study on El Salvador Gold Market Until Markets Stabilize*, MINING WEEKLY.COM Feb. 12, 2009, available at <http://www.miningweekly.com/article/pacific-rim-freezes-study-on-el-salvador-gold-mine-until-markets-stabilise-2009-02-12> (**Respondent's Exhibit 18**) (reporting that "Vancouver-based Pacific Rim Mining will defer the completion of a feasibility study for its El Dorado project").

<sup>69</sup> Pacific Rim Mining Corp., El Dorado, Dec. 9, 2004 available at <http://web.archive.org/web/20041209121343/www.pacrim-mining.com/s/Eldorado.asp> (emphasis added) (**Respondent's Exhibit 19**).

<sup>70</sup> Pacific Rim Mining Corp., Report of Foreign Issuer (Form 6-K) Exhibit 99.2 §3.1.2, Sept. 14, 2009 (**Respondent's Exhibit 20**).

88. Pacific Rim Mining Corp.'s express recognition that no final Feasibility Study has been completed, that the study has been indefinitely delayed or was never possible because of incomplete exploration or insufficient resources, and that there have been new deposit discoveries and changes in the "economic landscape" since the Pre-Feasibility Study, clearly shows that the submitted Pre-Feasibility Study did not and could not cover the necessary technical and economic information for an exploitation concession. Moreover, the admissions in Pacific Rim's own documents demonstrate that the failure to complete such a feasibility study was its own, not attributable to any acts of the Republic.

89. The failure to complete a Feasibility Study, at the time PRES submitted its application and since that time, is a failure to comply with a second key requirement clearly stated in the Mining Law for obtaining an exploitation concession. Thus, Claimant's conclusion that, "[w]ith the exception of the environmental permit that remains unjustifiably withheld by the government, PRES has met all of the requirements to receive the [exploitation] concession,"<sup>71</sup> is wholly unsupported by its own factual allegations and, in reality, contradicted by the undisputed facts the Republic has presented herein.

90. The provisions in the law of El Salvador requiring an exploitation concession applicant to submit specific documents do not violate any provisions of CAFTA or the Salvadoran Investment Law. Respondent complied with the law in granting PRES 30 days to remedy its deficient application. PRES did not submit the required documentation, and thus failed to meet the requirements for the mining exploitation concession under Salvadoran law. As a result, any failure by the Government to issue the Environmental Permit has caused Claimant no harm.

91. Claimant has thus filed only frivolous claims related to the Concession Application in El Dorado, all of which should be dismissed.

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<sup>71</sup> NOA, para. 65.

**IV. PRELIMINARY OBJECTION UNDER CAFTA ARTICLES 10.20.4 AND 10.20.5 REGARDING ALL CLAIMS RELATED TO THE SANTA RITA EXPLORATION LICENSE**

92. The principal claims in this arbitration are those related to the application for the mining exploitation concession for the El Dorado project, as discussed above. Of the four exploration areas complained about in the Notice of Arbitration, three exploration areas (Guaco, Huacuco, and Pueblos) surround the area applied for the El Dorado concession. The Republic does not include these claims in its Preliminary Objections, but it reserves all of its rights to present arguments regarding these claims at a later stage of this proceeding.

93. However, the Republic is seeking the dismissal of all claims related to the fourth exploration area included in the Notice of Arbitration, Santa Rita, for which PRES held an exploration license until recently. Claimant does not include any allegation of any wrongdoing by the Republic in its Notice of Arbitration related to Santa Rita. Quite the contrary, Claimant states that the Republic has granted all permits with regard to Santa Rita.<sup>72</sup> However, without any factual or legal basis, Claimant has decided to include its alleged "lost investments in connection with Santa Rita" in this arbitration.<sup>73</sup>

94. Not only is the inclusion of claims related to Santa Rita completely without factual or legal basis, but PRES no longer holds an exploration license in Santa Rita. PRES failed to request the renewal of the exploration license before the term expired, as required by the Mining Law and Regulations.<sup>74</sup> Therefore neither Claimant nor its Enterprises hold an exploration license in Santa Rita, and Claimant does not have any rights in Santa Rita upon which to base any claims in this arbitration.

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<sup>72</sup> NOA, at 23, footnote 42.

<sup>73</sup> NOA, at 23, footnote 42.

<sup>74</sup> See, Letter from Pacific Rim El Salvador to Bureau of Mines, July 17, 2009 (requesting an extension of the Santa Rita exploration license) (**Respondent's Exhibit 21**); Bureau of Mines Resolution, July 16, 2009 (noting the legal provisions relevant to exploration license extensions and that the Santa Rita license expired on July 14, 2009) (**Respondent's Exhibit 22**); Bureau of Mines Resolution, July 20, 2009 (denying the extension as the license had expired on July 14, 2009) (**Respondent's Exhibit 23**).

**V. PRELIMINARY OBJECTION UNDER CAFTA ARTICLES 10.20.4 AND 10.20 5 REGARDING OTHER CAFTA CLAIMS**

95. Claimant has failed to provide any factual bases for its claims of violation of CAFTA Articles 10.3 (National Treatment) and 10.4 (Most-Favored-Nation Treatment).<sup>75</sup> Specifically, Claimant does not allege how the Republic has treated its own nationals, or nationals of any other State, more favorably than Claimant. Accordingly, these unsubstantiated claims should be dismissed.

96. In addition, Claimant has alleged a breach of CAFTA Article 10.16.1(b)(i)(B) with regard to alleged "investment authorizations."<sup>76</sup> Claimant asserts that "El Salvador has breached the express and implied terms of the Enterprises' investment authorizations, including, without limitation, all resolutions issued by MINEC in relation to the investments in El Salvador."<sup>77</sup> CAFTA defines an "investment authorization" as "an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party."<sup>78</sup> The resolutions by the *Oficina Nacional de Inversiones* registering the investments in El Salvador are not "authorizations" but "registrations" of investments. Claimant's Entities requested registration after the funds being registered had already been transferred to El Salvador.<sup>79</sup> So there is no investment authorization from El Salvador that can be the basis for a CAFTA claim. In any event, Claimant's general reference to alleged investment authorizations is insufficient for a CAFTA claim. CAFTA Article 10.16.2(b) requires that the notice of intent "shall specify . . . the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached." Claimant does no more than refer generally to "all resolutions issued by MINEC." Because there is no investment authorization, much less one with enforceable provisions, and there is no reference to alleged breaches to the provisions of any resolution, there is no viable claim under Article 10.16.1(b)(i)(B).

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<sup>75</sup> NOA, para. 88.

<sup>76</sup> NOA, para. 89.

<sup>77</sup> NOA, para. 89. *See, also*, Notice of Intent, para. 3.

<sup>78</sup> CAFTA Article 10.28 & n.14.

<sup>79</sup> Investment Law of El Salvador, Article 17, Legislative Decree No. 732, Oct. 14, 1999 (**Respondent's Authority 9**). *See, e.g.*, NOA, Exhibits 2 and 3.

**VI. PRELIMINARY OBJECTION UNDER CAFTA ARTICLE 10.20.5 RELATED TO THE TRIBUNAL'S COMPETENCE OVER ALL NON-CAFTA CLAIMS**

97. The Republic of El Salvador objects to the competence of the Tribunal over all claims under the Investment Law of El Salvador. The exclusivity requirement in CAFTA, which precludes Claimant from initiating any non-CAFTA proceeding involving the same measures alleged to constitute a breach of CAFTA, bars the competence of the Tribunal for all claims made by Claimant under the Investment Law and any other domestic law of El Salvador.

**A. CAFTA Exclusivity Requirement**

98. CAFTA requires exclusivity of arbitration proceedings with regard to any measures alleged to constitute a breach of CAFTA. This exclusivity requirement is included in CAFTA Article 10.18, which states:

**Conditions and Limitations on Consent of Each Party**

....

2. No claim may be submitted to arbitration under this Section unless: . . .

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

(Emphasis added).

99. The scope of this exclusivity requirement goes beyond the typical fork-in-the-road provisions in many Bilateral Investment Treaties. CAFTA requires exclusivity of the CAFTA



dispute settlement provisions with respect to any claims related to the same measures alleged to constitute violations of CAFTA.

100. Waivers under CAFTA Article 10.18.2(b) have been invoked by respondents with regard to parallel arbitration proceedings related to the same measures in domestic arbitrations<sup>80</sup> and international arbitrations.<sup>81</sup> Until now, only the tribunal in *Railroad Development Corporation v. Guatemala* has issued a decision on jurisdictional objections related to the waivers under CAFTA.

101. NAFTA Article 1121 has waiver requirements similar to CAFTA's. These waiver requirements have also been invoked by respondents with regard to local judicial and local arbitration proceedings, with the resulting dismissal of claims, either voluntarily or by order of the Tribunal.<sup>82</sup> For example, in the first international arbitration between Waste Management Inc. and Mexico, the claimant was attempting to maintain two domestic judicial proceedings and one domestic arbitration based on the same measures the claimant was alleging constituted a violation of NAFTA. The claimant argued that it was allowed to keep the concurrent proceedings because they were based on other sources of law, i.e., Mexican law, and not the NAFTA provisions upon which the claims in the international arbitration were based.<sup>83</sup> The Tribunal rejected the claimant's interpretation of the waiver requirement because the measures being challenged in the concurrent proceedings were also the basis for the NAFTA claims in the international arbitration.<sup>84</sup>

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<sup>80</sup> *Railroad Development Corporation v. Republic of Guatemala*, para. 48 (Resp. Auth. 6).

<sup>81</sup> *TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic*, Respondent's Memorial on Jurisdiction, Nov. 21, 2008, available at <http://www.pca-cpa.org/upload/files/TD-DR%20Resp%20Mem%20Jur%20EN.pdf> (**Respondent's Authority 10**).

<sup>82</sup> *Waste Management, Inc. v. United Mexican States*, Case No. ARB(AF)/98/2, Award, June 2, 2000 available at

[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC571\\_En&caseId=C166](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC571_En&caseId=C166) (**Respondent's Authority 11**); *Methanex Corporation v. United States of America*, Partial Award, Aug. 7, 2002, para. 13, available at

<http://www.state.gov/documents/organization/12613.pdf> (**Respondent's Authority 12**).

<sup>83</sup> *Waste Management v. Mexico*, para. 27 (Resp. Auth. 11).

<sup>84</sup> *Waste Management v. Mexico*, paras. 28, 31 (Resp. Auth. 11).

102. Until now, the arbitral decisions and awards involving waivers under CAFTA and the similarly-worded waivers under NAFTA have only decided challenges involving parallel domestic proceedings based on the same measures that were alleged to constitute a breach of CAFTA or NAFTA in the international arbitration. But this is only because that was the issue presented in those cases, as nothing in the plain text of CAFTA Article 10.18.2(b) limits its application to domestic proceedings.

103. For example, in the first CAFTA arbitration, *TCW Group Inc and Dominican Energy Holdings, LP v. The Dominican Republic*, the respondent raised a jurisdictional objection predicated on the impermissible existence of two parallel international arbitrations in addition to the CAFTA arbitration, one alleging breaches of a BIT and one alleging violations of a contract, based on the same measures also alleged to constitute a breach of CAFTA in the CAFTA arbitration.<sup>85</sup> The claimants challenged the requirement of identity of claimants in the parallel international arbitration the claimant alleged was necessary to trigger the waiver provisions, but never alleged that the waiver required by CAFTA Article 10.18.2(b) only applied to domestic proceedings.<sup>86</sup> Thus, if the case had not settled, the tribunal's decision on jurisdiction, regardless of its ruling on claimants' identity argument, would have involved the application of the requirement of CAFTA Article 10.18.2(b) and invocation of the corresponding waiver with regard to parallel international arbitrations.

104. Therefore, any notion that the waiver requirement only applies to parallel domestic proceedings<sup>87</sup> is contradicted by the plain text of the treaty, the plain text of the waiver, and the previous invocation of a waiver under CAFTA in a situation involving parallel international arbitrations.

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<sup>85</sup> *TCW v. The Dominican Republic*, Respondent's Memorial, paras 29, 35-36 (Resp. Auth. 10).

<sup>86</sup> *TCW Group, Inc. and Dominican Energy Holdings, L.P. v. The Dominican Republic*, Claimants' Counter-Memorial on Jurisdiction, Feb. 13, 2009, paras. 71, 75-76, available at <http://www.pca-cpa.org/upload/files/TD-DR%20CI%20CMem%20Jur%20EN.pdf> (**Respondent's Authority 13**).

<sup>87</sup> See, e.g., NOA para. 24, in which Claimant acknowledges the waivers but adds the word "domestic"—implying, perhaps inadvertently, a narrower scope than what CAFTA requires and what Claimant actually waived.

105. The previous NAFTA and CAFTA cases regarding exclusivity requirements and waivers lead to a clear conclusion that Claimant would not be able to initiate parallel proceedings in domestic courts, in domestic arbitration, or in another international arbitration – even in a separate ICSID arbitration – invoking jurisdiction under the Investment Law to bring claims under the domestic laws of El Salvador based on the same measures alleged to constitute a violation of CAFTA before this Tribunal.

106. In the present arbitration, Claimant is bringing before a single ICSID Tribunal two separate proceedings, one under CAFTA and the second one under the Investment Law of El Salvador. If allowed to proceed, Claimant would be getting the opportunity to litigate two sets of legal claims with regard to the exact same measures.

107. Claimant cannot do in a single arbitration what it is not allowed to do in two separate arbitrations. Such result would force the Republic to defend itself against two proceedings related to precisely the same measures, with the possibility of inconsistent results because of different legal standards and different jurisdictional requirements. This is not allowed by the plain text of CAFTA Article 10.18.2(b), which was a condition to the Republic's consent to arbitration when the Republic became a party to CAFTA as well as when Claimant executed its waivers and commenced arbitration under CAFTA, and remains a condition to consent today.

108. Finally, several tribunals, parties to arbitration proceedings, and secondary authorities have mentioned the desire to prevent the possibility of double recovery of damages as a purpose behind the waiver provisions in NAFTA and CAFTA. The Republic does not share that narrow interpretation, because there are other ways to address the issue of double recovery, as the claimant in the *TCW v. The Dominican Republic* case suggested.<sup>88</sup> Instead, the Republic focuses its objection on the plain text of the treaty and the double jeopardy to which it would be subject in this case if the provision of CAFTA Article 10.18.2(b) did not exist.

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<sup>88</sup> *TCW v. The Dominican Republic*, Claimants' Counter-Memorial, para. 82 (Resp. Auth. 13).

**B. Claimant Consented to Exclusivity of CAFTA Arbitration and Waived its Right to Initiate any Other Proceeding with Regard to the Same Measures Alleged to Constitute a Violation of CAFTA**

109. Claimant submitted the following waiver required by CAFTA as a precondition to the parties' consent to jurisdiction under CAFTA:

Pursuant to Articles 10.18(2)(b)(i) and 10.18(2)(b)(ii) of CAFTA, PRC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to CAFTA, or other dispute settlement procedures, any proceeding with respect to any measure alleged in PRC's Notice of Arbitration, dated April 30, 2009, to constitute a breach referred to in Article 10.16 of CAFTA.<sup>89</sup>

110. In addition, Claimant consented to submit itself to the CAFTA procedures earlier in that same document:

Pursuant to Article 10.18(2)(a) of the Central America – United States – Dominican Republic Free Trade Agreement ("CAFTA"), Pac Rim Cayman LLC ("PRC") hereby consents to arbitration in accordance with the procedures set out in CAFTA.<sup>90</sup>

111. Therefore, Claimant has unequivocally waived its rights to initiate or continue "any proceeding with respect to any measure alleged in PRC's Notice of Arbitration, dated April 30, 2009, to constitute a breach referred to in Article 10.16 of CAFTA." (Emphasis added).

**C. The Claims under the Domestic Laws of El Salvador are Based on the Exact Same Measures as the Claims under CAFTA**

112. In the Notice of Arbitration, all claims under the Investment Law of El Salvador are based on the exact same measures Claimant alleges to be breaches of CAFTA: Claimant's allegations that El Salvador has failed to grant a mining exploitation concession for El Dorado, and that El Salvador has failed to issue Environmental Permits necessary for the renewal of the exploration licenses for the Guaco, Huacuco, and Pueblos projects.<sup>91</sup> In fact, Claimant addresses

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<sup>89</sup> Claimant's Consent & Waiver (Resp. Ex. 1) (emphasis added).

<sup>90</sup> Claimant's Consent & Waiver (Resp. Ex. 1).

<sup>91</sup> See, e.g., NOA, para. 91.

the factual basis for both the CAFTA and the Investment Law proceedings in a single section of the Notice of Arbitration, using the same measures as the factual basis for all claims in the two sets of legal claims. Therefore, there is an impermissible identity of measures complained about in the two sets of legal claims.

**D. The Proper Remedy is to Dismiss All Non-CAFTA Claims**

113. Having waived its rights to initiate or continue any proceeding with respect to any measure alleged to constitute a breach of CAFTA, Claimant has acted inconsistently with the terms of its waiver when it simultaneously invoked jurisdiction and introduced claims under the Investment Law and other domestic laws of El Salvador over the same measures Claimant alleges are breaches of CAFTA.<sup>92</sup>

114. Previous CAFTA and NAFTA cases involving improper waivers with regard to pending parallel proceedings have resulted in the dismissal of the CAFTA or NAFTA claims affected by the overlapping measures. That remedy was appropriate in those cases because the international arbitral tribunal deciding the objection only had the power to dismiss the claims before that tribunal, and did not have the power to terminate the concurrent proceedings.<sup>93</sup> That remedy also was appropriate because that was what the respondent requested or agreed to.

115. In this case, however, the Tribunal has before it both sets of claims, and it has the power to dismiss the second set of claims. In such situation, the proper remedy is for the Tribunal to enforce Claimant's properly-executed waiver under CAFTA and dismiss all non-CAFTA claims. This will resolve the problem created by the contradiction between Claimant's waiver and the substance of its Notice of Arbitration, and avoid the complicated situation of simultaneous lack of jurisdiction under CAFTA and lack of competence of the Tribunal under the Investment Law that would exist should both sets of claims be allowed to go forward.

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<sup>92</sup> NOA, para. 90.

<sup>93</sup> *Waste Management v. Mexico*, para. 15 (Resp. Auth. 11).

## VII. CONCLUSION

116. The Republic of El Salvador has demonstrated that Claimant's allegations of fact (if taken as true) and the undisputed facts show that PRES has failed to meet the requirements to obtain a mining exploitation concession in El Dorado, and that Claimant has no valid legal claims regarding the Santa Rita exploration license. Therefore, Claimant is not entitled to an award regarding these claims, as the alleged conduct of the Government has not caused any harm to Claimant.

117. Claimant has submitted no claim for which relief may be granted by this Tribunal with regard to the mining exploitation concession application for El Dorado and the exploration license PRES once held in Santa Rita. In addition, Claimant has not made any factual allegations to substantiate its legal allegations regarding breaches to CAFTA Articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), and 10.16.1(b)(i)(B). Consequently, these claims should be dismissed. However, if any of these claims survive these Preliminary Objections, the Republic reserves all of its rights to respond at the appropriate time.

118. The Republic of El Salvador has demonstrated that the Tribunal does not have competence to decide any claims under the Investment Law or any other domestic law of El Salvador. If the Tribunal were to decide otherwise, the Republic notes that it has demonstrated that the procedures of CAFTA should apply to all claims in this arbitration.

119. As required by CAFTA Article 10.20.5, the proceedings on the merits should be suspended while these preliminary objections are pending, with the exception of the issues on the merits raised in these preliminary objections.

## VIII. COSTS

120. The Republic respectfully requests that the Tribunal order Claimant to bear all the costs and expenses of this preliminary objection, including the Tribunal's expenses, the Republic's costs for legal representation, and interest. The Republic submits that its costs should be reimbursed because it has been forced to defend itself against these frivolous claims.

121. CAFTA Article 10.20.6 specifically provides for costs to be awarded in the event of frivolous claims:

When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.<sup>94</sup>

122. Claimant brought this arbitration knowing that PRES had failed to comply with the requirements to obtain a mining concession under Salvadoran Mining Law. Thus Claimant's claims are frivolous and merely an attempt to force El Salvador to grant the concession in spite of PRES's noncompliance with the Mining Law.<sup>95</sup> Claimant repeatedly asserts in its Notice of Arbitration that due to the actions and inactions of the Government of El Salvador, Claimant's investments in El Salvador "have been effectively destroyed."<sup>96</sup> Yet, it would appear that Claimant's real purpose in starting this arbitration is to improperly put pressure on the Government of El Salvador to grant a concession to which PRES and its parent companies are not entitled.

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<sup>94</sup> See, e.g. Christian Leathley, *International Dispute Resolution in Latin America: An Institutional Overview* 246 (2007) (**Respondent's Authority 14**) ("In a provision that departs from other dispute settlement provisions in Free Trade Agreements, Article 10.20(6) empowers the arbitral tribunal to award costs against the losing party, with particular regard given to whether the claim or objection is frivolous. . . . Clearly the intention is to eradicate speculative claims that claimants know (or ought to know) are vexatious and nothing more than an attempt to exert pressure . . . on the respondent member state.").

<sup>95</sup> See, e.g., NOA, para 103, where contrary to the previous allegations that an expropriation has already occurred, Claimant states that there is still time for the Government to "reverse[] its conduct".

<sup>96</sup> NOA, para. 9.

123. Claimant's initiation of this arbitration without a factual basis for its claims that are in reality completely baseless and without merit has forced El Salvador to spend its resources to bring these preliminary objections and otherwise defend itself in this matter. El Salvador is thus entitled to reimbursement of its expenses.

124. The Republic requests an opportunity to submit evidence of its costs, as well as of the appropriate rate of interest.




## **IX. THE REPUBLIC'S PRAYER FOR RELIEF**

125. The Republic of El Salvador respectfully requests the Tribunal to:

- Suspend the proceedings on the merits while these preliminary objections are pending, with the exception of the issues on the merits raised in these preliminary objections.
- Dismiss all claims in this arbitration related to Pacific Rim El Salvador's application for a mining exploitation concession in the El Dorado project.
- Dismiss all claims in this arbitration related to the exploration license for the Santa Rita project.
- Dismiss all claims related to allegations of violations of CAFTA Articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), and 10.16.1(b)(i)(B).
- Declare that the Tribunal does not have competence to decide Claimant's claims under the Investment Law of El Salvador and, as a consequence, dismiss all claims under the Investment Law and any other domestic law of El Salvador.
- Issue an order awarding the Republic of El Salvador its share of the arbitration costs and its attorney's fees incurred related to these objections, plus interest from the time of the decision until payment is made, at a rate to be established at the appropriate time.
- Grant the Republic any other remedy that the Tribunal considers proper.

Dated: January 4, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Derek C. Smith". The signature is fluid and cursive, with a large, sweeping flourish at the end.

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Derek C. Smith  
Luis Parada

Dewey & LeBoeuf LLP  
1101 New York Avenue, NW  
Washington, DC 20005-4213  
Telephone: (202) 346-8000  
Facsimile: (202) 346-8102

ATTORNEYS FOR THE REPUBLIC OF  
EL SALVADOR