

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)**

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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."¹

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.

¹ 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.²

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 10.20.5.³

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).

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

³ 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."⁴

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.⁵

15. In addition, CAFTA Article 10.16.5 makes clear that CAFTA provisions preempt any different provision in the ICSID Arbitration Rules.⁶ 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).⁷

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.

⁴ 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).

⁵ 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.

⁶ 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]."

⁷ 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]."⁸ 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.

⁸ 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."⁹ 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."¹⁰

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."¹¹ However, in evaluating the sufficiency of the allegations, the Tribunal is expressly empowered to consider "any relevant facts not in dispute."¹²

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

⁹ 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 (**Respondent's Authority 3**).

¹⁰ 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.

¹¹ CAFTA Article 10.20.4(c).

¹² 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.¹³

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."¹⁴

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

¹³ 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 (Respondent's Authority 5).

¹⁴ 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 Aurélie 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.¹⁵

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

¹⁵ 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.¹⁶

¹⁶ 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."¹⁷ 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").¹⁸

¹⁷ NOA, para. 8.

¹⁸ 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"¹⁹

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.²⁰

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.²¹

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.²²

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]."²³

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.

¹⁹ NOA, para. 2 (emphasis added).

²⁰ NOA, para. 65 (emphasis added).

²¹ NOA, para. 91 (emphasis added).

²² NOA, para. 96 (emphasis added).

²³ 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."²⁴ 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).

²⁴ *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.²⁵

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.²⁶

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.²⁷

²⁵ NOA, para. 37.

²⁶ NOA, para. 34.

²⁷ 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**).

