

**IN THE MATTER OF AN ARBITRATION  
UNDER THE RULES OF ARBITRATION OF THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE  
CENTRAL AMERICA – UNITED STATES – DOMINICAN REPUBLIC FREE TRADE  
AGREEMENT AND THE FOREIGN INVESTMENT LAW OF EL SALVADOR**

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

**CLAIMANT PAC RIM CAYMAN LLC'S  
RESPONSE TO RESPONDENT'S PRELIMINARY OBJECTION**

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Claimant Pac Rim Cayman LLC (“PRC”), on its own behalf and on behalf of its Enterprises (referred to collectively as “Claimant”), respectfully submits this Response to the Preliminary Objection submitted under Articles 10.20.4 and 10.20.5 (“Preliminary Objection”) of the Central America – United States – Dominican Republic Free Trade Agreement (“CAFTA”) by Respondent, the Republic of El Salvador (“Respondent,” “El Salvador,” or the “Government”).

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

1. In its Preliminary Objection, Respondent at least acknowledges that the provisions of Articles 10.20.4 and 10.20.5 are meant to enable tribunals “to expedite the dismissal of *frivolous* claims”<sup>1</sup> – *i.e.*, claims that are “[m]anifestly insufficient or futile.”<sup>2</sup> The claim must be such that, even assuming the claimant’s factual allegations to be true, the Tribunal can determine “as a matter of law” that it “is not a claim for which an award in favor of the claimant *may* be made . . . .”<sup>3</sup> Legal impossibility, therefore, is the standard that must be applied as a result of the plain language of CAFTA. The claim must be so palpably without merit that, as a matter of law, the claim could not possibly be the basis on which an award may be made, even assuming all of claimant’s allegations to be true. The purpose behind Articles 10.20.4 and 10.20.5 is to ensure that undue time and expense are not wasted on claims that are meritless on the face of the pleading or based on undisputed facts.

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<sup>1</sup> Preliminary Objection, para. 24 (quoting Andrea J. Menaker, *Benefiting from Recent Experience: Developments in the United States’ Most Recent Investment Agreements*, 12 U.C. DAVIS J. OF INT’L LAW & POLICY 121, 127 (2005) (“Menaker”) (emphasis added) (Respondent’s Authority 4).

<sup>2</sup> THE OXFORD ENGLISH DICTIONARY ONLINE (2<sup>ND</sup> ed. 1989) (defining “Futile” as “Incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain”), Claimant’s Authority 43. *Black’s Law Dictionary* defines a frivolous claim as one that “is clearly insufficient on its face . . . and is presumably interposed for mere purposes of delay . . . .” BLACK’S LAW DICTIONARY 601 (5<sup>TH</sup> ed. 1979), Claimant’s Authority 42.

<sup>3</sup> CAFTA, Article 10.20.4 (emphasis added), Respondent’s Authority 1.

2. Despite acknowledging these high standards, Respondent quickly abandons them. Instead of basing its Preliminary Objection on PRC’s “factual allegations” (which, again, must be taken as true) and on “any relevant facts not in dispute,”<sup>4</sup> Respondent’s Preliminary Objection entirely ignores most of PRC’s essential factual allegations. Moreover, Respondent also introduces its own additional factual allegations, including through the submission of additional documentary exhibits totaling more than 273 pages, and represents to the Tribunal that these allegations are “undisputed.” Anyone who has actually reviewed PRC’s Notice of Intent and Notice of Arbitration, however, could not seriously assert that these new allegations represent “undisputed” facts. Indeed, some of these documents – written by Respondent’s own officials – actually *refute* the factual allegations asserted by Respondent in its Preliminary Objection. The notion that they are evidence of “undisputed” facts is, therefore, not only inherently contradictory, but also nonsensical.

3. The extent to which Respondent’s Preliminary Objection completely ignores the heart of PRC’s factual allegations is also remarkable – almost as though the allegations are nowhere to be found in PRC’s Notice of Intent and Notice of Arbitration. The allegations are indeed set forth at considerable length in those two submissions, but are worth quickly summarizing at the outset of this Response.

4. In short, based on the provisions of El Salvador’s Mining Law and Investment Law, and based on repeated statements of support and encouragement from the Government,

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<sup>4</sup> *Id.*, at Article 10.20.4(c).

PRC and its Enterprises proceeded to invest over \$77 million in the country beginning in 2002.<sup>5</sup> Claimant discovered substantial deposits of gold and silver<sup>6</sup> and fully complied with all of the regulatory requirements imposed by Salvadoran law in order to proceed to extraction. Notwithstanding the requirements of El Salvador's Mining Law – which *requires* licenses and concessions to be issued within certain timeframes if the prescribed requirements are met – the Government simply refused to rule one way or the other on Claimant's applications. Indeed, the *Ministerio de Medio Ambiente y Recursos Naturales* ("MARN") never ruled on the extensive submissions made by Claimant to obtain an environmental permit. The application was never granted or denied; it was simply ignored. Similarly, the Department of Mines, part of the *Ministerio de Economía* ("MINEC"), never ruled on the extensive submissions made by Claimant to obtain a mining concession for the El Dorado site. Here, too, the application was never granted or denied; it was simply ignored.<sup>7</sup>

5. As the applications languished before MARN and MINEC, PRC and its Enterprises continually attempted to engage the Government at every level. It was only in March 2008 that then-President Saca announced a *de facto* ban on all mining projects in the country.<sup>8</sup> This ban was not made pursuant to Salvadoran law, but rather by executive pronouncement, and entirely outside of any legal framework. Remarkably, no mention is made anywhere in

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<sup>5</sup> As set forth in its Notice of Intent and Notice of Arbitration, the Enterprises are PRC's wholly-owned subsidiaries in El Salvador: Pacific Rim El Salvador, Sociedad Anónima de Capital Variable ("PRES") and Dorado Exploraciones, Sociedad Anónima de Capital Variable ("DOREX").

<sup>6</sup> Because the vast majority of the deposits consist of gold rather than silver, the term "gold" refers to both precious metals throughout this Response.

<sup>7</sup> Claimant's Notice of Arbitration, para. 81 (30 Apr. 2009) ("Notice of Arbitration"); Claimant's Notice of Intent, para. 23 (9 Dec. 2008) ("Notice of Intent").

<sup>8</sup> *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA, 11 Mar. 2008, Claimant's Exhibit 1.

Respondent's Preliminary Objection of President Saca's actions, the legal bases therefor (if any), or the consequences for PRC's claims under CAFTA or the Investment Law.

6. Similarly, under the administration of President Funes, who succeeded President Saca, and whose term began on 1 June 2009, MINEC and MARN have also failed to take any action one way or the other on Claimant's applications. Indeed, recent press accounts have reported President Funes as stating that mining exploitation projects will *not* be authorized during his presidency. President Funes was quoted as saying on 22 December 2009:

“The Government is not approving any mining exploration or exploitation project . . .”<sup>9</sup>

President Funes was quoted again on 12 January 2010 as saying that “no mining exploitation projects will be authorized.”<sup>10</sup> The President reportedly explained:

I do not need to pass a decree for such authorization not to be given, since that would mean questioning the president's word. The authorization of mining exploitation projects is not included either in the governmental programs or in the Five Year Plan . . . .<sup>11</sup>

Interestingly, no mention is made in Respondent's Preliminary Objection of President Funes's comments or the legal consequences under CAFTA of his position.

7. The stated policy from both the former and current President of El Salvador is therefore clear: notwithstanding an extensive body of laws setting forth the rights of those who

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<sup>9</sup> *Funes rules out authorization of mining explorations and exploitations in El Salvador*, by EFE AGENCY, 27 Dec. 2009, Claimant's Exhibit 2. The original Spanish text states: “El Gobierno no está aprobando ningún proyecto de exploración ni explotación minera.” As stated in this article, the ban apparently applies only to metallic – as opposed to non-metallic – mining, the latter of which is carried out primarily by Salvadoran companies and non-parties to CAFTA. Thus, unless otherwise specified, the term “mining” as used herein refers to metallic mining.

<sup>10</sup> *No to Mining: Presidential Commitment*, PRENSA GRAPHICA, 13 Jan. 2010, Claimant's Exhibit 3.

<sup>11</sup> *Id.* The original Spanish text states: “No necesito emitir un decreto para que esa autorización no se dé, eso sería dudar de la palabra del presidente. No existe en los programas del gobierno, no está en el Plan Quinquenal la autorización de proyectos de explotación minera.”

invest in El Salvador to develop the country's mining resources, the chief executive is entitled simply to declare that no further mining licenses or concessions will be granted, and to demand that the relevant administrative agencies (here, MARN and MINEC) refrain from ruling on licenses and concessions as required by law. In the words attributed to President Funes, all that is needed "to prevent this authorization from being given" is for the President to publicly state his opposition. Then, even applications like those of Claimant – which meet all of the requirements of Salvadoran law, and which, under Salvadoran law, are required to be granted – will not be acted upon.

8. Again, there is no legal basis for denying Claimant's applications – which explains why, in fact, the Government has never denied them. In fact, a denial at this point – after the applications have been pending for so many years without action – could only be seen as a tactic undertaken solely for this arbitration.

9. Thus, the heart of PRC's claim is not simply (as Respondent mischaracterizes it) that PRC would have obtained an exploitation concession but for the Government's failure to issue an environmental permit. Rather, it is that after having complied with all of El Salvador's legal and regulatory requirements for obtaining an exploitation concession, and after having invested millions of dollars in the country based on El Salvador's laws and regulations (not to mention the encouragement and representations of El Salvador's highest officials), the Government has declared that there is *nothing* that PRC can do to obtain an exploitation concession. The legal and regulatory regime upon which Claimant relied in making its investment in the country has been effectively wiped out (along with Claimant's investment) by the Government's arbitrary, capricious and extra-legal conduct.



10. As a result of the Government's *de facto* ban on mining – in violation of El Salvador's own laws, including its Mining Law and Investment Law – Claimant's investment in the country has been destroyed. Claimant has invested over US \$77 million in El Salvador on an asset that, with the applications granted, would now be worth hundreds of millions of dollars, but which the Government, through its unlawful actions, has rendered virtually worthless.<sup>12</sup>

11. Rather than respond to the actual allegations of PRC's Notice of Intent and Notice of Arbitration, Respondent has offered a Preliminary Objection that is so manifestly lacking in merit that, again, it seems designed solely to delay the proceedings and increase costs for the Claimant. The arguments in Respondent's Preliminary Objection fall into three categories.

12. *First*, Respondent asserts various arguments (with little and in many instance no support) concerning Salvadoran law, and then alleges that Claimant did not comply with or otherwise meet the requirements of that law. Nowhere does Respondent address or even mention the *de facto* and illegal ban on mining that President Saca announced in March 2008, or President Funes' subsequent pronouncements. Instead, Respondent's principal argument is that *if* MINEC and MARN *had* ruled on Claimant's applications, they *could* have found grounds to deny them.<sup>13</sup> Again, that assertion ignores the most basic factual assertion underlying PRC's claim – *i.e.*, that there is nothing that Claimant could have done to obtain an exploitation concession because the President of El Salvador declared that no further concessions would be granted. It also ignores the numerous paragraphs in the Notice of Arbitration that discuss at length all of the requirements necessary for obtaining an exploitation concession and that

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<sup>12</sup> The tragedy for El Salvador is not only that it will have to compensate Claimant for these enormous losses, but that El Salvador will also be deprived of a project that could contribute significantly to the country's economy with *de minimis* environmental impact – far less than other projects that are proceeding in the country but that provide relatively little benefit to El Salvador or its people.

<sup>13</sup> Preliminary Objection, paras. 42-53.

specifically allege that Claimant fulfilled them. As PRC demonstrates below (and will demonstrate at greater length at the appropriate time in this arbitration), Respondent's factual assertions that Claimant did not satisfy various regulatory requirements have no basis either in Salvadoran law or in the other facts of this case. Regarding the two specific regulatory arguments raised in Respondent's Preliminary Objection, PRC did, in fact, demonstrate that it obtained ownership of or permission to use all of the property for which it was required to make such a showing under Salvadoran law, and PRC submitted an *Estudio Factibilidad Técnico y Económico* (a "Feasibility Study") that more than satisfied the requirements of El Salvador's Mining Law.

13. But more fundamentally for present purposes, whether Claimant's lengthy mining application and accompanying submissions (only portions of which Respondent has placed before the Tribunal) complied with El Salvador's regulatory scheme is an intensely factual inquiry. Moreover, as a matter of international law, questions of local law – viz., what Salvadoran law requires or provides for – are themselves considered questions of fact. Thus, the determination of Salvadoran law, and whether Claimant complied with or otherwise met its requirements, are determinations of fact that are entirely inappropriate in the context of a Preliminary Objection under Articles 10.20.4 and 10.20.5. Respondent cannot seriously hope to use its Preliminary Objection to launch an expedited merits trial on whether Claimant's application did or did not meet the requirements of Salvadoran law. No reasonable person could believe that that is the proper function of an expedited proceeding under Articles 10.20.4 and 10.20.5. Thus it becomes apparent that the only purpose behind Respondent's submission of its Preliminary Objection is the imposition of delay and expense.

14. *Second*, Respondent argues that there is a “heightened” standard of pleading under CAFTA, and that Claimant has failed to meet this alleged higher standard with respect to certain of its claims. Respondent’s argument finds no support in the text of CAFTA or on any other grounds. But as detailed below, the 131 paragraphs and 54 pages of PRC’s Notice of Arbitration, especially when combined with the 38 paragraphs and 16 pages of PRC’s Notice of Intent, satisfy any reasonable pleading standard. All of PRC’s claims are amply supported by PRC’s factual allegations.

15. *Third*, Respondent asserts an objection under CAFTA Article 10.20.5 that the Tribunal is not competent to hear PRC’s claims under the Investment Law along with PRC’s claims under CAFTA. Here, too, Respondent’s argument finds no support in the text of CAFTA or elsewhere in law. Respondent rests its argument on CAFTA Article 10.18.2, which provides that a claimant under CAFTA must submit with its Notice of Arbitration 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). The Article 10.18.2 waivers are plainly designed to prevent duplicative proceedings before “any administrative tribunal or court” or under “*other dispute settlement procedures*.” But Respondent attempts to twist this language into some sort of waiver by PRC of its right to bring its *claims* under El Salvador’s Investment Law along with its *claims* under CAFTA before a single ICSID tribunal, based on consents to ICSID arbitration contained in those two instruments. Not only is Respondent’s argument unsupported by the terms of CAFTA; it is refuted by them. Article 10.16 specifically provides that a claimant may assert claims that a respondent has breached obligations specified under Section A of CAFTA Chapter 10, as well as under an “investment authorization” or an “investment agreement.” Obviously, then, claims

under an investment authorization or an investment agreement are specifically authorized under Article 10.16 and are not waived under Article 10.18.2. As stated in PRC's Notice of Arbitration, and as explained below, PRC received investment authorizations from MINEC and was therefore explicitly protected by the provisions of El Salvador's Investment Law. Respondent's argument to the contrary is, like the other arguments asserted in its Preliminary Objection, frivolous.

16. PRC's Response to Respondent's Preliminary Objection is divided into the following sections:

- In Section II, PRC summarizes the relevant factual allegations that support its claims in this arbitration.
- In Section III, PRC explains the appropriate standard of review for a Preliminary Objection under CAFTA, as well as the pleading requirements for stating a CAFTA claim, based on the actual text of CAFTA (a task that Respondent failed to undertake in any sort of principled or coherent manner in its Preliminary Objection).
- In Section IV, PRC explains why Respondent's arguments concerning PRC's claims related to the application for a mining exploitation concession are wrong as a matter of fact (including the facts concerning Salvadoran law), but also why Respondent's arguments are entirely inappropriate for resolution in the context of this Preliminary Objection.
- In Section V, PRC shows that its factual allegations support its claims concerning the Santa Rita site, as well as all its other CAFTA claims, under any reasonable standard.

- In Section VI, PRC explains why Respondent's argument that the Tribunal is not competent to hear PRC's claims under El Salvador's Investment Law in this proceeding is completely baseless.
- In Section VII, PRC explains why it is entitled to costs and attorney's fees under CAFTA Article 10.20.6.

17. In light of the submissions and details that follow, Claimant trusts the Tribunal will agree that Respondent's Preliminary Objection is in all respects frivolous – so much so that it is difficult to believe that Respondent filed it for any reason other than to delay these proceedings and impose unnecessary expense on PRC. The Tribunal should reject Respondent's dilatory tactics and, pursuant to CAFTA Article 10.20.6, award Claimant the costs and attorney's fees incurred in opposing the Objection. The fact that this is apparently the first time in which a Preliminary Objection under Article 10.20.4 has been made, and the first time that the expedited procedure of 10.20.5 has been invoked with respect to a Preliminary Objection under Article 10.20.4, should not dissuade the Tribunal from awarding Claimant its costs and fees. To the contrary, the Tribunal should send a strong message that attempts by respondents to abuse the provisions of Article 10.20.4 and 10.20.5 – to add another layer of expense and time to what is already a costly and time-consuming process – will not be tolerated. In addition, to the extent that Respondent decides to put forward an objection to the Tribunal's jurisdiction, any such objection should be joined to the merits of the dispute. Respondent should not be permitted to delay a final determination of Claimant's rights any further.

## **II. PRC'S CLAIMS AND THE FACTUAL ALLEGATIONS RELEVANT TO DECIDING RESPONDENT'S PRELIMINARY OBJECTION**

18. On 9 December 2008, as required under CAFTA Article 10.16.2, PRC served a Notice of Intent To Submit a Claim to Arbitration (“Notice of Intent”) on El Salvador. Article 10.16.2 provides that a claimant must deliver such a Notice of Intent to a respondent at least 90 days before submitting a claim to arbitration. On 30 April 2009, after the expiration of that 90-day period, and after numerous promises by various Government officials to the effect that the Enterprises would receive their permits and concessions never materialized, PRC filed its Notice of Arbitration.<sup>14</sup> The ICSID Secretariat registered the case on 15 June 2009 and notified the parties that the Tribunal was constituted on 18 November 2009. Respondent submitted its Preliminary Objection on 4 January 2010.

19. Both the Notice of Intent and the Notice of Arbitration set forth claims under CAFTA and El Salvador’s Investment Law. Specifically, the Notices set forth claims that Respondent breached the following obligations under Section A of Chapter 10 of CAFTA:

- (i) Article 10.3 – National Treatment;
- (ii) Article 10.4 – Most-Favored-Nation Treatment;
- (iii) Article 10.5 – Minimum Standard of Treatment; and
- (iv) Article 10.7 – Expropriation and Compensation.<sup>15</sup>

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<sup>14</sup> The Notice was filed pursuant to CAFTA Article 10.16.1 and in accordance with the requirements of the ICSID Convention and ICSID Rules.

<sup>15</sup> Notice of Arbitration, paras. 10, 83-88; Notice of Intent, paras. 2-3, 35-37.

The Notices further allege that Respondent violated the express and implied terms of Claimant's investment authorizations and that Respondent violated the following obligations under El Salvador's Investment Law:

- (i) Article 5 – Equal Protection;
- (ii) Article 6 – Non-discrimination; and
- (iii) Article 8 – Expropriation.<sup>16</sup>

20. Claimant will not repeat all of the allegations set forth in its two Notices. However, because Respondent argues in its Preliminary Objection that Claimant has somehow fallen short of the pleading requirements necessary to state certain claims under CAFTA, Claimant will summarize its main factual allegations relevant to deciding the Preliminary Objection.

**A. PRC, Pacific Rim, and the Enterprises**

21. PRC is a limited liability company under the laws of Nevada, U.S.A. PRC is an environmentally and socially responsible mining company. It supports robust environmental protection and fair mineral royalty payments. PRC's parent company, Pacific Rim, is a public company established under the laws of Canada and traded on both the NYSE Amex Stock Exchange and the Toronto Stock Exchange. A majority of Pacific Rim's shareholders are U.S. nationals. Both Pacific Rim and PRC are predominantly managed out of the companies' exploration headquarters in Reno, Nevada. PRC's most significant investment is in El Salvador,

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<sup>16</sup> Notice of Arbitration, paras. 89-91; Notice of Intent, paras. 3-4.

through its Enterprises, Pacific Rim El Salvador (“PRES”) and Dorado Exploraciones (“DOREX”).<sup>17</sup>

**B. Pacific Rim Invests in El Salvador**

22. In 2001, Pacific Rim set its sights on potential gold deposits in the north-central part of El Salvador, not far from the country’s border with Honduras. Pacific Rim was interested in this project for several reasons. First, this part of El Salvador is dominated by “low sulfidation” geological systems, which allow for non-acid-generating metals recovery. In addition, the gold deposits are recoverable through underground mining, which allows recovery through a relatively small surface entry, and has far fewer environmental consequences than open pit mining. Pacific Rim was (and is) convinced that gold can be mined in the area with as minimal an environmental impact as anywhere in the world – and with significantly less impact than numerous other development projects in El Salvador that the Government has approved to proceed elsewhere in the country.<sup>18</sup>

23. Second, El Salvador recently had enacted modern mining and foreign investment laws. The Government actively was courting foreign investors of all types and particularly was interested in developing El Salvador’s mining resources. The Government recognized that such development posed potentially huge economic benefits for the country, but also that few Salvadoran companies had the expertise and experience to mine such resources in an environmentally and economically sound manner. Accordingly, the Government spent

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<sup>17</sup> Notice of Arbitration, paras. 14-15; Notice of Intent paras. 6-8.

<sup>18</sup> Notice of Arbitration, para. 44.



considerable time and effort meeting with Pacific Rim’s executives and encouraging them to commence mining operations in El Salvador.<sup>19</sup>

24. In 2002, Pacific Rim entered El Salvador by merging with Dayton Mining Company (“Dayton”), a Canadian mining company that had been operating in El Salvador since 1993. Through the merger, Pacific Rim acquired Dayton’s mining rights in El Salvador, including two exploration licenses in an area known as El Dorado, located in the administrative departments of Las Cabañas and San Vicente. Because the El Dorado site exceeded the permissible size for a single exploration area, MINEC had divided El Dorado into two areas – El Dorado Norte and El Dorado Sur – and granted an exploration license for each area.<sup>20</sup>

25. In addition to the financial, legal, scientific, technical, and operational due diligence that is customarily completed in merger and acquisition transactions such as the one undertaken by Pacific Rim, the company’s senior management also held due diligence meetings with the Government. In the course of these meetings, Pacific Rim’s representatives received assurances from the Ministers of both MINEC and MARN that the mineral rights in the El Dorado license areas had been legally acquired and properly administered under the relevant laws. In particular, high-level officials from MINEC’s Department of Mines gave their assurances that the company’s local operating subsidiary (which, at the time, was called Kinross-ES) would be granted, in accordance with the Mining Law, an exploitation concession upon confirming the commercial mining potential of the El Dorado exploration site.<sup>21</sup>

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<sup>19</sup> Notice of Arbitration, paras. 46-49; Notice of Intent, para. 16.

<sup>20</sup> Notice of Arbitration, paras. 49-51; Notice of Intent, paras. 9- 10.

<sup>21</sup> Notice of Arbitration, para. 48; Notice of Intent, para. 16.

26. Assured by its due diligence into the legal, economic, political, and technical aspects of the Salvadoran mining rights, as well as the various assurances it had received, Pacific Rim consummated its merger with Dayton in April 2002. As a result of the transaction, Pacific Rim became the owner of Kinross-ES, Dayton's wholly owned Salvadoran operating authority, and of Kinross-ES's mineral exploration rights in various license areas in El Salvador. Again, the most important of these licenses were the exploration licenses for El Dorado Norte and El Dorado Sur.<sup>22</sup>

27. In January 2003, Kinross-ES was renamed "Pacific Rim El Salvador" (*i.e.*, PRES). The Government acknowledged PRES's mining rights in the El Dorado Norte and El Dorado Sur license areas in Resolution 181, dated 5 December 2003, and Resolution No. 189, dated 18 December 2003. Resolutions 181 and 189 specifically modified all previous exploration licenses issued with respect to the El Dorado Norte and El Dorado Sur areas, recognizing PRES as the owner of all exploration rights in those areas.<sup>23</sup>

28. On 30 November 2004, Pacific Rim vested sole ownership rights in PRES in its direct subsidiary, PRC. On 11 August 2005, the *Oficina Nacional de Inversiones* ("ONI"), a department ("*dependencia*") of MINEC, acknowledged PRC's status as the new owner of PRES via Resolution No. 383-R.<sup>24</sup>

29. In June 2005, for reasons discussed in greater detail below (as well as in PRC's Notice of Arbitration), PRC incorporated DOREX to hold three additional exploration licenses

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<sup>22</sup> Notice of Arbitration, para. 49.

<sup>23</sup> *Id.*, para. 50; Notice of Intent, para. 10.

<sup>24</sup> Notice of Arbitration, para. 51 and accompanying footnote. *See also* Notice of Arbitration, Exhibit 2.

over areas contiguous to, and partially overlapping with, the El Dorado Norte and El Dorado Sur license areas. These areas are known as “Huacuco,” “Pueblos,” and “Guaco.”<sup>25</sup>

**C. Overview of the Legal Framework for Mining in El Salvador**

30. PRC has included in its Notice of Arbitration an overview of the legal framework for mining in El Salvador that is far more extensive than what one would typically find in a such a Notice (and certainly more extensive than what is required).<sup>26</sup> Again, PRC will not reproduce the same overview here, but will instead provide a shorter summary of the most salient points. PRC addresses many of these issues at greater length in responding to specific arguments made by Respondent.

31. In 1996, El Salvador enacted a new and modern *Ley de Minería* (the “Mining Law”) to replace its previous mining law, which had been in place since 1922.<sup>27</sup> Like the mining laws of many other countries, El Salvador’s Mining Law sets forth a two-step regulatory process for the extraction or exploitation of minerals: (1) exploration followed by (2) exploitation. These two separate but integrally interrelated regulatory phases are designed to ensure that only qualified applicants – who have the technical and financial capacity to undertake exploration activities in a technically sophisticated and environmentally sound manner – are able to proceed

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<sup>25</sup> Notice of Arbitration, para. 52; Notice of Intent, para. 11.

<sup>26</sup> See Notice of Arbitration, paras. 27-42.

<sup>27</sup> See Legislative Decree No. 544 published in Official Journal, No. 16, Volume 330, 24 Jan. 1996 (amended by Legislative Decree No. 475 published in Official Journal No. 144, Volume 352, 31 Jul. 2001) (“Mining Law”), Claimant’s Authority 5. Until 1996, mining activities in El Salvador were governed by the *Código de Minería* of 1922 and the *Ley Complementaria de Minería* of 1953. The Mining Law was amended in 2001. Legislative Decree No. 475 of 11 Jul. 2001, published in the Official Journal No. 144, Volume 352, of 31 Jul. 2001. The Mining Law has not been modified since then.

to the exploitation phase, if mineable ore deposits are found.<sup>28</sup> The requirements necessary to obtain and maintain an exploration license are therefore considerable.

**1. Exploration Licenses and Exploitation Concessions**

32. Article 9 of the Mining Law, titled “QUALIFICATIONS FOR ACQUIRING MINING RIGHTS” – which includes both exploration and exploitation rights – provides that all applicants for mining rights must “prove their technical and financial capacity to develop mining projects.”<sup>29</sup> Exploration licenses are granted by ministerial orders issued by MINEC’s Bureau Mines. Exploitation concessions (memorialized in a concession agreement) are authorized pursuant to an “*Acuerdo del Ministerio*.”

33. To obtain an exploration license, an applicant must file an application with the MINEC’s Bureau of Mines, which must include, among other items: a map of the exploration area; a map and technical description of the areas within the exploration area where exploration activities are to be conducted; a technical exploration program (which describes the mining activities to be carried out and the amount of capital to be invested in each activity); and documents “proving” the applicant’s technical expertise, financial capacity, and mining experience.<sup>30</sup>

34. If an exploration license is granted, the Mining Law imposes various obligations on the licensee. Article 22 of the Mining Law sets out the obligations of an exploration licensee to demonstrate the extent of its investment activities to MINEC. For example, licensees are required to (1) comply with a technical program for exploration activities approved by the

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<sup>28</sup> Notice of Arbitration, paras. 32-34; Notice of Intent, paras. 13-15.

<sup>29</sup> Mining Law, Article 9, Claimant’s Authority 5.

<sup>30</sup> *Id.*, Articles 9 and 37; Notice of Arbitration, para. 30.

Department of Mines; (2) demonstrate on an annual basis to the Department of Mines the activities and investments that were undertaken by the licensee pursuant to the technical program; (3) file annual reports describing, *inter alia*, the nature of the minerals being explored, the nature and extent of the licensees' exploration efforts, the results of those efforts, the corresponding expenses incurred, and plans for future explorations; and (4) pay the annual license fee. In short, exploration licensees must undertake and maintain substantial exploration activities and investments, in compliance with the requirements of the Mining Law, in order to preserve their right to continue to explore. A licensee cannot simply "sit on its rights" to develop a claim merely by paying a license fee.<sup>31</sup>

35. In accordance with the regime established by the Mining Law, the exploration phase may last up to eight years,<sup>32</sup> during which time the mining company expends significant capital in its attempt to locate and develop mineable deposits of minerals.<sup>33</sup> Under this framework, the mining company assumes the great risks inherent in the exploration phase. However, it undertakes those risks with the legitimate expectation that, if it is able to prove that a discovery of a valuable mineral deposit has been made and it otherwise complies with the requirements of the Mining Law, it will be granted an exploitation concession. Without that expectation, no one would undertake exploration. Only during the exploitation phase can a mining company extract precious metals from the land and begin to generate a return on the substantial upfront investment it made during the exploration phase. Receiving an exploitation

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<sup>31</sup> Notice of Arbitration, para. 31 (citing Mining Law Article 22, Claimant's Authority 5).

<sup>32</sup> Mining Law, Article 19, Claimant's Authority 5. Exploration licenses are granted for an initial period of four years, which can be extended by the Department of Mines for two additional two-year periods, up to a maximum of eight years.

<sup>33</sup> Notice of Arbitration, para. 33.

concession represents the benefit to be derived from the large expense incurred by a mining company licensee during the exploration phase. In short, the promise of an exploitation concession is the reason why the companies undertake their investments in the first place.<sup>34</sup>

36. Thus, while the Mining Law imposes various obligations on exploration licensees, it also extends to them significant rights. Respondent baldly asserts in its Preliminary Objection that the only right conferred is to have an application for an exploitation concession considered.<sup>35</sup> To the contrary, when an applicant complies with the requirements of the Mining Law, the Government has minimal (if any) discretion to deny the concession.<sup>36</sup> Article 23 of the Mining Law provides in relevant part:

Upon completion of the exploration and verification of the existence of economic mining potential in the authorized area, an application *shall be made* for the Concession to exploit and make use of the minerals; which *shall be verified* by Ministerial Order *followed by the award of a contract between the Ministry and the Concessionaire for a thirty-year term*, which may be extended at the interest party's request, provided that, at the Ministry's discretion, the requirements under the Act are met.<sup>37</sup>

37. Article 37 of the Mining Law sets forth the documentation that must accompany an application for an exploitation concession. As summarized in the Notice of Arbitration, an

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<sup>34</sup> *Id.*, para. 38.

<sup>35</sup> Preliminary Objection, para. 44.

<sup>36</sup> Notice of Arbitration, para. 32.

<sup>37</sup> (Emphasis added), Claimant's Authority 5. It should be noted that while the extension following a thirty-year term is discretionary on the part on MINEC, the original grant is not. The Spanish original of this text reads:

Concluída la exploración y comprobada la existencia del potencial minero económico en el área autorizada, se solicitará el otorgamiento de la Concesión para la explotación y aprovechamiento de los minerales; la cual se verificará mediante Acuerdo del Ministerio seguido del otorgamiento de un contrato suscrito entre éste y el Titular por un plazo de treinta años, el cual podrá prorrogarse a solicitud del interesado, siempre que a juicio del Ministerio cumpla con los requisitos que la Ley establece.

applicant must submit, *inter alia*: a description of the area for which the concession is requested; a showing that the applicant owns or is authorized to use the real estate property where the mine project is located; the relevant *Permiso Ambiental* (“Environmental Permit”) issued by MARN, along with a copy of the corresponding *Estudio de Impacto Ambiental* (“Environmental Impact Assessment”); an *Estudio de Factibilidad Técnico Económico* (“Feasibility Study”); and a five-year *Programa de Explotación* (“Development Plan”).<sup>38</sup>

38. Therefore, under the two-phase framework, a licensee who completes the exploration phase – and who demonstrates the existence of a mineable ore deposit and otherwise complies with the requirements for exploitation – is entitled to proceed to the exploitation phase, without which all of the investment and effort devoted to the exploration phase would be wasted.

## **2. MARN’s Environmental Permit Process**

39. As also explained in the Notice of Arbitration, and as stated above, Article 37 of the Mining Law requires an applicant for an exploitation concession to include an environmental permit with its application. Accordingly, pursuant to Articles 19 and 82 of the *Ley del Medio Ambiente* (“Environmental Law”),<sup>39</sup> an entity seeking to engage in mining exploration must also apply to MARN for an environmental permit before undertaking those activities.<sup>40</sup>

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<sup>38</sup> Notice of Arbitration, para. 35 (citing Mining Law Article 37, Claimant’s Authority 5).

<sup>39</sup> Legislative Decree No. 233 published in Official Journal No. 70, Volume 339, 5 Apr. 1998 (amended by Legislative Decree No. 237 published in Official Journal No. 47, Vol. 374, 9 Mar. 2007) (“Environmental Law”), Claimant’s Authority 2.

<sup>40</sup> *Id.*, Articles 19 and 82; Notice of Arbitration, para. 40 (citing Mining Law, Article 37, Claimant’s Authority 5).

40. The Regulations to the Environmental Law (the “Environmental Law Regulations”)<sup>41</sup> set forth the administrative procedure to obtain an environmental permit from MARN. First, the company must file an environmental form containing preliminary information requested by MARN. In response to that form, MARN then issues terms of reference for the preparation of a “multidisciplinary” Environmental Impact Assessment (“EIA”). The applicant must prepare the EIA and file it with MARN. After receiving the EIA, MARN subjects it to its own technical review and then to public comment. MARN then issues a report, in which it may identify additional concerns to the applicant. If the applicant is unable to address those additional concerns, MARN may deny the application. If the applicant is able to address the additional concerns, then MARN must grant the application and issue the permit. In either case, MARN must grant or deny the application within 60 working days of the submission of the original EIA.<sup>42</sup>

41. As stated repeatedly and in detail in PRC’s Notice of Arbitration, PRC and its Enterprises strictly complied with all of the requirements imposed on them under the Mining Law and its regulations, the Environmental Law and its regulations, and all other applicable law to obtain the requisite permits and concessions.<sup>43</sup>

**D. PRES’s Application for the El Dorado Exploitation Concession**

42. By 2004, PRES had verified substantial gold ore deposits at the El Dorado Norte and El Dorado Sur license areas. PRES immediately undertook the necessary steps to secure an

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<sup>41</sup> Executive Decree No. 17 published in Official Journal No. 73, Volume 347, 4 Dec. 2000 (amended by Executive Decree No. 39 published in Official Journal No. 98, Volume 383, 29 May 2009) (“Environmental Law Regulations”), Claimant’s Authority 3.

<sup>42</sup> Notice of Arbitration, para. 41 (citing Environmental Law, Article 24, Claimant’s Authority 2 Environmental Law Regulations, Article 34, Claimant’s Authority 3).

<sup>43</sup> See, e.g., Notice of Arbitration, paras. 42, 53, 65; see also Notice of Intent, paras. 18-24.



exploitation concession from MINEC, and accordingly, in March 2004, filed an application with MARN for an environmental permit. Again, Article 37 of the Mining Law includes an environmental permit as one of the documents that must accompany an application for a mining concession.<sup>44</sup>

43. In furtherance of its application for the environmental permit, PRES prepared the required EIA for exploitation activities (the “Exploitation EIA”) for submission to MARN. The Exploitation EIA was a thorough and detailed study, fully assessing the baseline environmental conditions and the projected environmental impacts of the mining and reclamation activities using best available operating practices and mitigation measures.<sup>45</sup>

44. In response to concerns raised by PRES that MARN was moving slowly on its application for an environmental permit, and whether that would affect PRES’s ability to obtain an exploitation permit, the Director of MINEC’s Bureau of Mines, Ms. Gina Navas de Hernández, wrote PRES a letter dated 25 August 2004. In that letter, Ms. Navas assured PRES that its ability to solicit an exploitation concession over the El Dorado Norte and El Dorado Sur license areas would not be affected by any potential delay in receiving the environmental permit.<sup>46</sup>

45. In September 2004, PRES filed its Exploitation EIA with MARN. By December 2004, the company had not yet received a response to its EIA, although, as stated above, MARN was required under the Environmental Law and Environmental Regulations to rule on the

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<sup>44</sup> Notice of Arbitration, paras. 35, 54.

<sup>45</sup> *Id.*, para. 55.

<sup>46</sup> *Id.*, para. 56; see also Notice of Arbitration., Exhibit 6.

application within 60 days of its submission, and more than 60 days had passed without any action.<sup>47</sup>

46. At the same time, the eight-year period for the exploration licenses for El Dorado Norte and El Dorado Sur was coming to an end. PRES was required, *pursuant to the requirements of Article 25 of the Mining Law*, to apply for an exploitation concession at the end of that period. Given that requirement, and based on MINEC's earlier assurances that delays at MARN would not affect its application, PRES formally submitted its application for a mining exploitation concession to MINEC on 22 December 2004. Pursuant to preliminary discussions between PRES and MINEC, the concession application covered only a portion of the area previously covered by the El Dorado Norte and El Dorado Sur exploration licenses. Specifically, MINEC explained that it could not approve a concession covering such a large area. Accordingly, PRES and MINEC worked together to define an acceptable portion of the two license areas over which PRES could solicit an exploitation concession. The areas that were "carved out" of the original proposed concession areas were the Huacuco, Pueblos, and Guaco areas, where PRES had done little exploration work. Because the eight-year exploration licenses that PRES held for El Dorado Norte and El Dorado Sur (which together covered Huacuco, Pueblos, and Guaco) were expiring, PRC, with the Government's approval, established a new operating subsidiary, DOREX, to hold new exploration licenses over the three "carve out" areas. PRES's application for an exploitation concession, therefore, covered a much smaller area than

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<sup>47</sup> Notice of Arbitration, para. 57.

had been covered by the two exploration licenses that it had held for El Dorado Norte and El Dorado Sur.<sup>48</sup>

47. In the meantime, in February 2005, MARN responded to the Exploitation EIA that PRES had submitted in September 2004 with a series of observations. These observations were fully addressed by the company in a supplemental volume to the Exploitation EIA, which PRES submitted to MARN in April 2005. After receiving additional input from MARN, PRES submitted a revised (and final) Exploitation EIA in September 2005, which addressed additional comments that MARN had made in April and August 2005.<sup>49</sup>

48. Finally, in December 2006, PRES presented MARN with a plan for a state-of-the-art water treatment facility that the company proposed to build in order to treat any effluent from the mining and processing operations. Although this proposal went far beyond what was required under any applicable law or regulation, PRES provided it as a further demonstration of its ability and intention to mine the mineral deposit in a manner that meets or surpasses the highest environmental standards anywhere. With the submission of the water treatment facility proposal, PRES had addressed every observation and concern expressed by MARN (whether reasonable, substantiated, or otherwise) throughout the extended EIA review process. Indeed, since December 2006, MARN has not once expressed concerns as to the adequacy of the company's EIA. It has likewise never expressed any doubt as to PRES's full compliance with all of the requirements of the permitting process. As such, in accordance with Salvadoran law, PRES is entitled to receive an environmental permit for mining on the El Dorado site.<sup>50</sup>

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

<sup>49</sup> *Id.*, paras. 58-59.

<sup>50</sup> *Id.*, paras. 62-63.

49. From December 2006 through December 2008, however, MARN ceased all official communication with the company with respect to its application, notwithstanding the fact that Salvadoran law clearly stipulates that MARN must take definitive action on EIA submissions within 60 business days, and even under exceptional circumstances, within a maximum of 120 business days.<sup>51</sup> Despite this requirement, MARN did not provide, and still has not provided, PRES with any justification for its inexplicable silence. Indeed, on 5 December 2008, MARN requested that PRES provide information about the same water treatment plant that PRES had already submitted in December 2006. On 8 December 2008, in response to this request, PRES informed MARN that it had previously provided the information during the EIA review process.<sup>52</sup> There has been no communication between PRES and MARN since that time.

50. With the exception of the environmental permit that remains unjustifiably withheld by the Government, PRES has met all of the requirements necessary to receive the exploitation concession for the El Dorado project.<sup>53</sup> And PRES has been unable to obtain the environmental permit only because of MARN's inaction.

51. As set forth in the Notice of Arbitration, DOREX encountered very similar problems in obtaining environmental permits from MARN in order to continue exploration activities at Huacuco, Pueblos, and Guaco. In essence, applications for environmental permits to conduct exploration in those areas were filed in September 2005 (for Huacuco) and in October 2006 (for Pueblos and Guaco). MARN has never ruled on these applications either.<sup>54</sup> However, since Respondent does not address any of the arguments in its Preliminary Objection to PRC's

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<sup>51</sup> Environmental Law, Article 24, Claimant's Authority 2.

<sup>52</sup> Notice of Arbitration, para. 64.

<sup>53</sup> *Id.*, para. 65.

<sup>54</sup> *Id.*, paras. 66-72.

claims with respect to those sites, PRC will not further summarize its factual allegations with respect to them.

**E. President Saca's 2008 Announcement of Opposition to PRC's Investment Activities**

52. Initially, Claimant legitimately believed that MARN's inaction was an unofficial temporary aberration, perhaps the result of bureaucracy, incompetence, inter-agency lack of communication, or some combination of those factors. As such, Claimant's officials continued to meet with the Government in the hope of resolving what they believed to be only a temporary impasse; Claimant's personnel were repeatedly assured by senior government officials that the permits would be issued imminently.<sup>55</sup>

53. In 2008, however, it became clear that the Government's delay tactics with respect to the issuance of the Enterprises' various permits and concessions had been designed and implemented with the unlawful, discriminatory, and politically motivated aim of preventing the Enterprises' mining operations.<sup>56</sup>

54. In March 2008, President Saca publicly stated that he opposed the granting of any pending mining permits. At a press conference, President Saca announced that he intended to vacate the entire legal framework that was already in place to regulate mining in El Salvador – *i.e.*, the very legal system upon which Claimant had relied in investing tens of millions of dollars in the country. According to press accounts, President Saca stated (among other things):

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<sup>55</sup> *Id.*, para. 73.

<sup>56</sup> *Id.*, para. 74.

What I am saying is that, in principle, I am not in favor of granting [pending mining] permits . . . .<sup>57</sup>

55. PRC and the Enterprises were astonished by President Saca's assertions, which were contrary to El Salvadoran law and, in particular, the country's Mining Law, as well as the numerous assurances that had been given to them by high-level government officials that their permits and concessions would be forthcoming. Following that statement, PRC and the Enterprises had a number of communications and meetings with high-level officials, including President Saca himself, in order to try to reach a resolution to the matter. PRC also specifically raised the possibility of having no choice but to seek arbitration against El Salvador if the Government did not lift the *de facto* (and illegal) ban on mining that President Saca had announced. Nonetheless, President Saca's public statements continued to adhere to the position he had announced in March 2008. Thus, in February 2009, President Saca was quoted in the press as stating:

As long as Elías Antonio Saca holds the office of president, he will not grant a single permit (for mining exploitation) not even environmental permits, which are prior to the permits given by the Ministry of Economy.

\* \* \* \*

[PRC and the Enterprises] are about to file an international claim and I want to make this clear, I'd rather pay \$90 million than grant them a permit.<sup>58</sup>

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<sup>57</sup> *President of El Salvador asks for caution regarding mining exploitation projects*, INVERTIA, 11 Mar. 2008, Claimant's Exhibit 1. The original Spanish text reads in pertinent part: "Lo que estoy diciendo es que, en principio, yo no estoy de acuerdo con otorgar esos permisos . . . ."

<sup>58</sup> *No to Mining: Presidential Commitment*, PRENSA GRAPHICA, 13 Jan. 2010, Claimant's Exhibit 3. The original Spanish text reads:

Mientras Elías Antonio Saca esté en la presidencia, no otorgará ni un tan solo permiso, (para la explotación minera) ni siquiera permisos ambientales, que son previos a los que

(continued...)

56. In sum, as alleged in Claimant’s Notice of Intent and Notice of Arbitration, the Enterprises have satisfied all legal requirements and have responded to all of the observations presented by MARN, in most cases exceeding the requirements of the law and international standards. Significantly, the Government has not actually denied any of the Enterprises’ applications; indeed, it cannot, as *it has no legal basis to do so*. Instead, it has unlawfully failed to act upon these applications and declared a *de facto* ban on mining operation in the country, thus effectively preventing the Enterprises from continuing their operations without providing them the benefit of due process, and indeed without providing any justification whatsoever for its decision.<sup>59</sup> Given the Government’s illegal actions, Claimant has had to abandon mineral exploration and development activities elsewhere in the country, including its Santa Rita site, where the Government’s conduct and its current stance toward mining has made any further development of this license area impossible.<sup>60</sup>

**III. THE STANDARD OF REVIEW FOR A PRELIMINARY OBJECTION UNDER CAFTA ARTICLE 10.2.4 AND PLEADING REQUIREMENTS UNDER CAFTA**

57. In setting forth the “standard of review” by which Respondent proposes the Tribunal should review its Preliminary Objection, Respondent has confused and conflated the issue of standard of review with that of sufficiency of the pleadings. They are distinct issues, relevant at different time frames within the lifecycle of an investor-state arbitration, and with

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(continued)

otorga el Ministerio de Economía” and “Están a punto de entablar una demanda internacional y le quiero dejar claro algo, prefiero pagar los \$90 a darles un permiso.

As noted above, President Funes, who took office after Claimant commenced this arbitration, has continued President Saca’s policy, stating recently that [the] Government is not approving any mining exploration or exploitation project.” *Funes rules out authorization of mining explorations and exploitations in El Salvador*, by EFE AGENCY, 27 Dec. 2009, Claimant’s Exhibit 2.

<sup>59</sup> Notice of Arbitration, para. 81.

<sup>60</sup> *Id.*, para. 53, n. 42.

different implications. The standard of review for purposes of Article 10.20.4 is discussed in Section A below. The applicable pleading requirements are addressed in Section B.

**A. The Standard of Review Under Article 10.20.4**

58. Respondent bases most of the arguments in its Preliminary Objection on the standards of CAFTA Article 10.20.4, combined with the expedited procedure set forth in Article 10.20.5. Only Respondent's last argument (*i.e.*, that the Tribunal lacks competence to hear PRC's "non-CAFTA" claims) is asserted solely under Article 10.20.5.<sup>61</sup> (The standard of review under Article 10.20.5 for objections based on competence is discussed *infra* at Section VI.)

59. Respondent concedes, as it must, that it has the burden of proof to sustain each of the arguments in its Preliminary Objection.<sup>62</sup> Yet despite styling an entire section of its Preliminary Objection as "Standard of Review," Respondent fails to provide the Tribunal with any coherent analysis of the standard by which Respondent believes that the Tribunal should rule on its objections – *i.e.*, the standard that Respondent concedes it has the burden to meet. Although Respondent quotes portions of the relevant treaty provisions, it then offers varying statements defining the purported standard of review, some of which have little or no relationship to the applicable text or, for that matter, to each other.

60. For example, Respondent asserts at the outset that the Tribunal's task is to evaluate whether Claimant's allegations are "frivolous" under a standard similar to that used by

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<sup>61</sup> 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 therefore, 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." Respondent's Authority 1.

<sup>62</sup> Preliminary Objection, para. 30.



U.S. courts,<sup>63</sup> which typically define a frivolous claim as one “that is both baseless and made without a reasonable and competent inquiry” (or some similar formulation).<sup>64</sup> Elsewhere,

Respondent argues that:

after the respondent has submitted evidence of the uncontested facts that show a legal claim or 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>65</sup>

61. Respondent’s position on these points is as unclear as it is contradictory. Respondent argues that it has submitted evidence of “uncontested facts.”<sup>66</sup> On the other hand, however, it submits that its evidence of such “uncontested facts” shifts the burden to Claimant “to dispute respondent’s facts.”<sup>67</sup> Is Claimant supposed to “introduce evidence” or simply “allege facts”? There is a stark difference between those two tasks. Similarly, there is a significant difference between “disput[ing] respondent’s facts” and simply “mak[ing] each particular claim plausible.”<sup>68</sup>

62. As demonstrated below, none of the alternative standards involving the “facts” that appear to be contained in Respondent’s argument has any support in the actual text of CAFTA Article 10.20.4 (or anywhere else). Article 10.20.4 provides:

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<sup>63</sup> *Id.*, para. 24.

<sup>64</sup> *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990), Claimant’s Authority 30. See also *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) (“[T]o constitute a frivolous legal position . . . , it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands.”), Claimant’s Authority 23.

<sup>65</sup> Preliminary Objection, para. 30.

<sup>66</sup> *Id.*, para. 30.

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

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

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).
- 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.

Thus, the standard is "as a matter of law" and Claimant's factual allegations, for the purposes of determining the validity of Respondent's Preliminary Objection, must be taken as true. Although Article 10.20.4(c) provides that the "tribunal may also consider any relevant facts not

in dispute,” the parameters of that phrase are necessarily quite narrow. Respondent’s “evidence” of what it argues to be “undisputed facts” does not come anywhere near those parameters.

63. A determination of the proper standard of review must, of course, be based on the text of the applicable treaty, which should be analyzed under the principles set forth in the Vienna Convention on the Law of Treaties (“Vienna Convention”).<sup>69</sup> Consistent with Article 31 of the Vienna Convention, the standard of review must be derived from the plain terms of the treaty, interpreted in light of its object and purpose. Given that this is apparently the first time that a Tribunal has considered objections brought under Article 10.20.4, as well as the first time that the expedited procedures of Article 10.20.5 have been invoked with respect to objections under Article 10.20.4, a full examination of the relevant provisions is warranted.

64. The discussion below is organized as follows:

- In sub-section 1, Claimant sets out language concerning CAFTA’s object and purpose that are relevant to the standard of review;
- In sub-section 2, Claimant establishes why the standard to be overcome by Respondent is “legal impossibility;”
- In sub-section 3, Claimant clarifies Respondent’s mistaken effort to convert this Preliminary Objection proceeding, which must be decided as “a matter of law,” into a full merits review.

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<sup>69</sup> Vienna Convention on the Law of Treaties, Article 31(1), 23 May 1969, 1155 U.N.T.S. 331 (“Vienna Convention”), Claimant’s Authority 10. The States of both Claimant and Respondent, *i.e.*, the United States of America and the Republic of El Salvador, have signed but not ratified the Vienna Convention. Nevertheless, the provisions of the Vienna Convention relating to the interpretation of treaties reflect customary international law and thus are still applicable. *Aguas del Tunari SA v. Bolivia*, Decision on Respondent’s Objections to Jurisdiction, ICSID Case No. ARB/02/3, IIC 8, 21 Oct. 2005, para. 88, Claimant’s Authority 11.

Claimant’s presentation makes it clear beyond peradventure that Respondent’s interpretation and proposed application of CAFTA’s Preliminary Objection standards are irresponsibly wrong.

**1. Object and Purpose**

65. The Preamble of CAFTA states that in entering the treaty, the Parties “resolved,” *inter alia*, to ensure “a predictable commercial framework for business planning and investment.”<sup>70</sup> Chapter One states that CAFTA’s objectives are, *inter alia*, to:

(a) encourage expansion and diversification of trade between the Parties;

\* \* \* \*

(d) substantially increase investment opportunities in the territories of the Parties; [and]

\* \* \* \*

(f) create *effective procedures* for the implementation and application of this Agreement, for its joint administration, *and for the resolution of disputes*.<sup>71</sup>

66. These objectives are, of course, all interrelated. The provision of investment protections, such as those contained in CAFTA Chapter Ten – and for enforcement of those protections through meaningful dispute resolution – is one of the hallmarks by which investment treaties and free trade agreements encourage the expansion and diversification of trade and increase investment opportunities in the territories of one another. Investors of the Parties will be more likely to invest in the territories of other Parties if there are clear, robust, and well-defined investment protections, accompanied by effective procedures for enforcing them.

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<sup>70</sup> CAFTA, Preamble, Claimant’s Authority 8.

<sup>71</sup> *Id.*, at Article 1.2.1(a), (d) and (f) (emphasis added).

67. To be “effective,” procedures for the resolution of disputes must be fair and efficient. Procedures that allow claimants to assert and maintain patently meritless claims through costly and protracted proceedings are not effective. But procedures that allow a respondent to assail selected facts underlying a claim that has a complex factual predicate – thereby forcing the claimant to fully and finally adjudicate a potentially meritorious claim on a highly expedited basis, with little or no meaningful review of the relevant evidence – would be both ineffective and unfair. Such procedures would hardly instill confidence in investors that there are meaningful dispute resolution procedures to enforce the protections afforded by the Treaty.

68. These basic principles – that the purposes of CAFTA are, *inter alia*, to encourage expansion and diversification of trade between the Parties, to substantially increase investment opportunities between the Parties, and, in particular, to create effective procedures for the resolution of disputes – are conveniently ignored by Respondent, but must undergird the text of Articles 10.20.4 and 10.20.5 and inform its proper interpretation.<sup>72</sup>

## 2. **The Standard: Legal Impossibility**

69. The chapeau of CAFTA Article 10.20.4 provides as follows:

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.<sup>73</sup>

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<sup>72</sup> See *Railroad Dev. Corp. v. Republic of Guatemala*, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, ICSID Case No. ARB/07/23, 17 Nov. 2008, para 44, Respondent’s Authority 6 (construing provisions of Chapter 10 in accordance “with the stated objective of CAFTA to create effective procedures for the resolution of disputes”).

<sup>73</sup> (Emphasis added), Respondent’s Authority 6.

70. The phrase “as a matter of law” is a commonly used, straightforward term in the legal context. *Black’s Law Dictionary* defines a “matter of law” as follows:

Whatever is to be ascertained or decided by the application of statutory rules or the principles and determinations of the law, as distinguished from the investigation of particular facts, is called “matter of law.”<sup>74</sup>

Lest there be any doubt, Article 10.20.4(c) specifically provides that “[i]n 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) . . . .”

71. The inquiry made by the Tribunal, therefore, is not one involving facts, but one involving principles of law. Assuming the facts pled by Claimant to be true, the question is whether there is a claim that falls within legal parameters such that the claim is one on which an award “**may**” – not “will,” “must,” or even “likely will” – but “**may**” be granted.

72. At the outset, it must be observed that the plain meaning of the word “may” means to express “possibility.”<sup>75</sup> It is an expansive rather than restrictive word, meaning something that is “capable of [ ] happening.”<sup>76</sup> The opposite of “possible,” of course, is “impossible.” To determine as a matter of law (and assuming the facts as pled to be true) that a claim submitted is not a claim for which an award in favor of the claimant **may** be made requires absolute certainty as to its lack of legal merit. Where there is room for doubt as to whether a claim may or may not sustain an award, a Preliminary Objection under Article 10.20.4 must fail.

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<sup>74</sup> BLACK’S LAW DICTIONARY at 883, Claimant’s Authority 42.

<sup>75</sup> THE OXFORD ENGLISH DICTIONARY ONLINE (defining “may”), Claimant’s Exhibit 44. *Black’s Law Dictionary* also defines “may” as “expressing ability . . . [or] possibility.” BLACK’S LAW DICTIONARY at 883, Claimant’s Exhibit 43.

<sup>76</sup> See THE OXFORD ENGLISH DICTIONARY ONLINE (defining “possibility” as something that is “capable of existing or happening”), Claimant’s Exhibit 44.

All that is required for a claim to move forward, at this preliminary phase, is that it fall somewhere within (and even at the outer reaches of) the boundaries of legal possibility.<sup>77</sup>

73. The drafters of CAFTA have, therefore, set the bar high for a Preliminary Objection made under Article 10.20.4. Article 10.20.4 was plainly meant to be used sparingly and only in extraordinary cases. That the standard is extremely demanding is underscored by the terms of Article 10.20.4(d), which provides:

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.

Thus, under Article 10.20.4, a claimant is faced with losing its claim at the outset of its case, based on a highly expedited procedure. A respondent, by contrast, does not waive “any objection as to competence or any argument on the merits” by virtue of asserting a Preliminary Objection. Respondents are given the opportunity to take other bites at the apple. As such, the terms of Article 10.20.4 both provide for and necessitate an extremely high standard, in order to be effective and fair.

74. As Respondent itself acknowledges, “[t]he CAFTA expedited procedure for making Preliminary Objections was drafted to allow an arbitral Tribunal to dispose of *frivolous* claims . . . on an expedited basis.”<sup>78</sup> Respondent states:

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

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<sup>77</sup> CAFTA was executed in both English and Spanish and provides that each version is “equally authentic.” CAFTA, Article 22.9, Claimant’s Authority 8. The Spanish language version is equally clear on this point: “la reclamación sometida no es un reclamación respecto de la cual *se pueda* dictar un laudo favorable para le demandante de acuerdo con el Artículo 10.26.” (Emphasis added). “Se pueda” (*i.e.*, “can” or “may”) similarly connotes something that is possible.

<sup>78</sup> Preliminary Objection, para. 24 (emphasis added).

quickly of *frivolous* claims.” The former Chief of the United States Department of State’s NAFTA Arbitration Division [Andrea Menaker] 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>79</sup>

75. Under the Vienna Convention, recourse to supplementary means of interpretation is generally reserved for treaty terms that are ambiguous,<sup>80</sup> and the terms at issue here are plain and unambiguous. Nor are there any available *travaux preparatoires* for CAFTA, which might otherwise serve as a supplementary means of interpretation. Nonetheless, in considering the authorities discussed by Respondent and included with its Preliminary Objection, it is worth observing that the definition of “frivolous” under U.S. law is entirely consonant with that of legal impossibility. Notably in this regard, the U.S. Supreme Court has characterized a “frivolous” claim as one that “lacks even an arguable basis in law.”<sup>81</sup> As one prominent U.S. Court of Appeals put it: “[T]o constitute a frivolous legal position . . . , it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands.”<sup>82</sup> Still other U.S. Courts of Appeals “have succinctly defined frivolous claims or appeals as those which involve ‘legal points not arguable on their merits,’ or

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<sup>79</sup> *Id.*, para 24 (citing 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, 23 Jun. 2005 at 1085, Respondent’s Authority 3; Menaker at 127, Respondent’s Authority 4).

<sup>80</sup> Vienna Convention, Article 32, Claimant’s Authority 10.

<sup>81</sup> *Neitzke v. Williams*, 490 U.S. 319, 328 (1989), Claimant’s Authority 27.

<sup>82</sup> *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) (citing *Int’l Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390 (2d Cir.), *cert. denied*, 493 U.S. 1003 (1989)), Claimant’s Authority 23.



those whose disposition is obvious.”<sup>83</sup> In other words, a claim that is frivolous is one that, even assuming the facts pled by claimant to be true, is legally impossible.

76. Furthermore, as written by Ms. Menaker in the article that Respondent cites and includes with its submission, the United States sought to include provisions such as Article 10.20.4 in its investment treaties because of the experience it had in the context of NAFTA. According to Ms. Menaker:

In order to expedite the dismissal of frivolous claims, the United States’ new investment agreements also contain a provision requiring tribunals to address as a preliminary matter an objection that a claim fails as a matter of law. At least one tribunal applying the UNCITRAL Arbitration Rules in a NAFTA investor-State arbitration determined that it lacked authority to address admissibility objections, as opposed to jurisdiction objections, in a preliminary phase. The United States’ recent agreements ensure that such issues may be dispensed with at a preliminary phase, thus potentially avoiding the time and cost of an evidentiary hearing.<sup>84</sup>

77. Although Ms. Menaker’s article did not identify the specific case at issue, there is little doubt that she was referring to *Methanex Corporation v. United States*.<sup>85</sup> In that case, the respondent made a motion challenging “admissibility” with respect to “lack of legal merit” of the claimant’s substantive claims under NAFTA Articles 1102 (national treatment), 1105 (fair and equitable treatment) and 1110 (expropriation). As described by the *Methanex* tribunal:

The USA’s challenges to admissibility are based upon the legal submission that, even assuming all the facts alleged by Methanex to be true, there could still *never* be a breach of the individual provisions pleaded by Methanex; and hence Methanex’ claims are

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<sup>83</sup> *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000-01 (Fed. Cir. 1987) (multiple cites therein omitted), Claimant’s Authority 17.

<sup>84</sup> Menaker at 127, Respondent’s Authority 4.

<sup>85</sup> *Methanex Corp. v. United States*, Partial Award, Ad hoc – UNCITRAL Arbitration Rules; IIC 166 7 Aug. 2002, Claimant’s Authority 25.

bound to fail, regardless of any factual evidence to be adduced by Methanex.<sup>86</sup>

The respondent was thus characterized as setting the standard for its admissibility objection as follows:

In other words, that taking all of the allegations of fact made to be true, including uncontested facts, that as a matter of law, **there can be no claim**, and that the claim is ripe for dismissal at this stage for that reason.<sup>87</sup>

The *Methanex* tribunal later described the respondent's motion as seeking a

definitive interpretation of the substantive provisions of Chapter 11, Section A (namely Articles 1102, 1105 and 1110) to show that even on Methanex's alleged facts, there could **never** be a breach of the provisions; and that Methanex's claim is therefore "inadmissible."<sup>88</sup>

78. Ultimately, the tribunal in *Methanex* denied the motion based on its conclusion that NAFTA did not permit this type of admissibility objection.<sup>89</sup> As demonstrated by Respondent's own authorities, therefore, Article 10.20.4 was designed to "ensure that such issues [as those respondent sought to raise in *Methanex*] may be dispensed with at a preliminary phase, thus potentially avoiding the time and cost of an evidentiary hearing."<sup>90</sup> And the specific procedure sought in *Methanex* was one designed to dispose of claims that, even assuming the factual allegations to be true, could "never" breach the provisions of the treaty invoked.

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<sup>86</sup> *Id.*, para. 109 (emphasis added).

<sup>87</sup> *Id.* (citing statements by Respondent's counsel at hearing) (emphasis added).

<sup>88</sup> *Id.*, para. 122 (emphasis added).

<sup>89</sup> *Id.*, para. 124 ("There is no express power to dismiss a claim on the grounds of 'inadmissibility,' as invoked by the USA; and where the UNCITRAL Arbitration Rules are silent, it would be still more inappropriate to imply any such power from Chapter 11.").

<sup>90</sup> Menaker at 127 (emphasis added), Respondent's Authority 4.

79. Again, because the provisions of Article 10.20.4 are straightforward on this point, the Tribunal does not need recourse to supplemental means of interpretation. However, the Tribunal may nonetheless take comfort from the fact that the authorities placed before it by Respondent support and reinforce the plain and unambiguous terms of Article 10.20.4.

80. The *purpose* of Article 10.20.4 is therefore clear: to enable the tribunal to dispense with frivolous claims at a preliminary phase, thus potentially avoiding the time and cost of an evidentiary hearing. The *standard* is equally clear: the Tribunal must assess whether Respondent has satisfied the burden of proving that, assuming PRC's factual allegations to be true, its claims under CAFTA are legally impossible, *i.e.*, that as a matter of law they could not possibly sustain an award. Respondent has not come remotely close to satisfying that burden.

### 3. A Legal, Not a Factual Objection

81. As set forth above, a “matter of law” means a matter to be decided based on “the principles and determinations of the law, as distinguished from the investigation of particular facts . . . .”<sup>91</sup> The purpose underlying Article 10.20.4, to cite Respondent’s own authority, is to enable the Tribunal to dispense with claims based on the law, and thus to “avoid[ ] the time and cost of an evidentiary hearing . . . .”<sup>92</sup> Again, Article 10.20.4(c) provides that “[i]n deciding an objection, the tribunal *shall* assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration . . . .”<sup>93</sup> Therefore, Respondent’s argument that, through the submission of what it characterizes as “undisputed facts,” it can “shift” the burden “to the

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<sup>91</sup> BLACK’S LAW DICTIONARY at 883, Claimant’s Authority 42.

<sup>92</sup> Menaker at 127, Respondent’s Authority 4.

<sup>93</sup> CAFTA, Article 10.20.4(c) (emphasis added), Respondent’s Authority 1.

claimant to introduce evidence . . . to dispute respondent’s facts”<sup>94</sup> – and turn the proceedings on the Preliminary Objection into an evidentiary hearing – has no legal basis in the text of CAFTA (or anywhere else).

82. Although no tribunal has previously considered a Preliminary Objection under Article 10.20.4, at least two tribunals have considered the term “without legal merit” in the context of a Preliminary Objection under ICSID Arbitration Rule 41(5): *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*<sup>95</sup> and *Brandes Investment Partners LP v. Venezuela*.<sup>96</sup> Rule 41(5) provides that a party may “file an objection that a claim is manifestly without legal merit.”

83. A claim that is “manifestly without legal merit” is very similar (if not identical) to a claim that, as a matter of law, is “a claim for which an award in favor of the claimant may not be made.”<sup>97</sup> As the tribunal observed in *Trans-Global*, the ordinary meaning of the term “manifest” is “palpable” or “obvious,” and has been interpreted by ICSID tribunals in other contexts to mean “self-evident,” “clear,” “plain on its face,” or “certain.”<sup>98</sup> A claim that is obviously without merit leaves no room for doubt. Similarly, a claim for which an award *may not* be made leaves no room for doubt; it is manifestly without merit.

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<sup>94</sup> Preliminary Objection, para. 30.

<sup>95</sup> *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules, ICSID Case No. ARB/07/25, 12 May 2008, Respondent’s Authority 5.

<sup>96</sup> *Brandes Inv. Partners LP v. Venezuela*, Decision on Rule 41(5) Objection ICSID Case No. ARB/08/3, 2 Feb. 2009, Claimant’s Authority 12.

<sup>97</sup> CAFTA, Article 10.20.4, Respondent’s Authority 1.

<sup>98</sup> *Trans-Global*, para. 84, Respondent’s Authority 5.

84. But even omitting the word “manifestly” from the formulation, the analysis by the tribunals in *Trans-Global* and *Brandes* of the term “without legal merit” is instructive for construing the standard for assessing a claim that, as a matter of law, is not a claim for which an award in favor of the claimant may be granted. It also demonstrates why Respondent’s demand that its factual evidence should be considered in this proceeding (and that Claimant needs to rebut it) is wrong.

85. In *Trans-Global*, the tribunal examined the drafting history of Rule 41(5), noting that the word “legal” had not appeared in an earlier draft. In part on that basis, as well as the plain language of the rule, the tribunal concluded that

the tribunal is not concerned, *per se*, with the factual merits of the Claimant’s three claims. At this early stage of the proceedings, without any sufficient evidence, ***the Tribunal is in no position to decide disputed facts alleged by either side in a summary procedure.***<sup>99</sup>

The *Trans-Global* tribunal recognized that “it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced.”<sup>100</sup> But the tribunal further concluded that its review of the factual allegations made by claimant was extremely limited:

[T]he Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as factual allegation. ***The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.***<sup>101</sup>

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<sup>99</sup> *Id.*, para. 97 (emphasis added), Respondent’s Authority 5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, para. 105 (emphasis added).

86. The tribunal in *Trans-Global* accepted only one argument advanced by the respondent in its Preliminary Objection under Rule 41(5), dismissing a claim asserted under Article VIII of the United States-Jordan bilateral investment treaty, which required the respondent to consult with the U.S. government, but not with the claimant. But even claimant’s counsel recognized this particular deficiency. Indeed, he withdrew the claim and acknowledged at hearing:

I think this is a clear and classic example of where, without any reference whatsoever to facts or without the need to construe facts, this is a claim that is, on further reflection and consideration, manifestly without legal basis, and so that claim is, indeed, being withdrawn.<sup>102</sup>

87. The tribunal in *Brandes Investment Partners LP v. Venezuela* applied a similar analysis. Citing *Trans-Global* with approval, the *Brandes* tribunal held that “the factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed.”<sup>103</sup> In *Brandes*, the claimant alleged that the respondent had coerced it into selling its shares in a television station for far below their actual value. Respondent, in its Preliminary Objection under Rule 41(5), argued that the claimant’s request for arbitration “omits to mention many facts of the case.”<sup>104</sup> Specifically, respondent argued that claimant, in selling its shares to Venezuela, had agreed to waive and release all of the covered claims asserted by the claimant in the present arbitration. Respondent also argued that claimant was not an investor within the meaning of the ICSID

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<sup>102</sup> *Id.*, para. 119.

<sup>103</sup> *Brandes*, para. 61, Claimant’s Authority 12.

<sup>104</sup> *Id.*, para. 18.

Convention, as it was only acting as an agent and not as an owner.<sup>105</sup> The tribunal rejected both arguments, concluding “that the answers to these questions necessitate the examination of complex legal and factual issues which cannot be resolved in these summary proceedings.”<sup>106</sup> In reaching that conclusion, the tribunal summarized the standard it applied in resolving the Preliminary Objection:

With respect to the merits of the claim, an award denying such claims can only be made if the facts, as alleged by the Claimant and which *prima facie* seem plausible, are not manifestly of such a nature that the claim would have to be dismissed. The Tribunal does not consider this to be the case.<sup>107</sup>

88. Notably, the *Trans-Global* and *Brandes* tribunals reached these conclusions without the language that appears in Article 10.20.4(c), *i.e.*, that “the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration.” That the standard under Rule 41(5) is based on “legal merit” was sufficient for both tribunals to conclude that they were required to accept the factual allegations as pled as true and that any review of fact matters was extremely limited. But the express requirement of Article 10.20.4(c) that the tribunal must take claimant’s factual allegations as true leaves no doubt that a proceeding on a Rule 10.20.4 objection is *not* the proper place for a respondent to assert its own or question a claimant’s factual arguments.

89. Respondent bases its burden-shifting argument concerning the introduction of evidence on the final phrase of Article 10.20.4(c), which states that the tribunal “may also consider any relevant facts not in dispute.” (Emphasis added). According to Respondent, that

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<sup>105</sup> *Id.*, paras. 19-20.

<sup>106</sup> *Id.*, para. 71.

<sup>107</sup> *Id.*, para. 73.

provision allows it to “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>108</sup>

90. Article 10.20.4(c) does not specify the manner in which “relevant facts not in dispute” are to be brought to the tribunal’s attention or how the tribunal is to consider them. However, especially given that this phrase appears in the same part of Article 10.20.4 that requires the tribunal to assume all of a claimant’s factual allegations to be true, the ability of a respondent to present “relevant facts not in dispute” must be extremely limited, and cannot include the use of extrinsic evidence in an effort to contradict or otherwise assail the claimant’s factual allegations. In any event, if the facts alleged by the respondent are disputed by the claimant, the tribunal must disregard these new allegations and accept the claimant’s characterization of the facts and their relevance for the purpose of deciding the objection.

91. The principal authority cited by Respondent for the proposition that it may introduce extrinsic evidence to demonstrate that there are “relevant facts not in dispute” – which would then shift the burden to the claimant to “introduce evidence . . . to dispute respondent’s facts” – is an article published by Ms. Aurélie Antonietti in the ICSID Review discussing a range of amendments to the ICSID Rules, including the addition of a Preliminary Objection under Rule 45(1), and which was cited by the tribunal in *Trans-Global*.<sup>109</sup> But Ms. Antonietti’s article does not support Respondent’s proposition. To begin with, Ms. Antonietti explains that the addition of “legal” to the phrase “without legal merit” “was introduced to avoid inappropriate discussions

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<sup>108</sup> Preliminary Objection, para. 29 (quoting CAFTA, 10.20.4, Respondent’s Authority 1).

<sup>109</sup> Aurélie Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REVIEW – FOREIGN INVESTMENT L.J. 427 (2006) (“Antonietti”), Respondent’s Authority 2; see also *Trans-Global*, para. 79, Respondent’s Authority 5.



on the facts of the case at this stage.”<sup>110</sup> In addition, Ms. Antonietti observes that “the question of whether facts and evidentiary issues can be discussed by a tribunal at [the Rule 41(5) stage] will be highly debatable.”<sup>111</sup> Significantly, Ms. Antonietti emphasizes the level of certainty concerning the claim’s lack of legal merit that would be required to sustain a Preliminary Objection. She provides two examples of a claim that might properly be dismissed at the Rule 41(5) stage, *viz.*, (1) a claim where the undisputed facts demonstrate that the claim arose wholly outside the temporal scope of the treaty; and (2) a claim where the undisputed facts showed that the claimant had waived in writing its right to bring the claim before an arbitral tribunal.<sup>112</sup> Thus, any “undisputed facts” considered by a tribunal in deciding a Preliminary Objection must be clear, straightforward, and not susceptible to competing interpretations.

92. In this case, by contrast, Respondent has submitted a substantial amount of extrinsic evidence – including selected excerpts from Claimant’ regulatory filings in El Salvador, multiple filings by the Claimant before the United States Securities and Exchange Commission, numerous pieces of correspondence, press clippings, and various other types of documents – in an effort to refute the allegations of the Notice of Intent and the Notice of Arbitration that Claimant complied with Salvadoran law and obtained certain rights under Salvadoran law. This voluminous evidence in no way demonstrates “undisputed” facts, let alone undisputed facts that are clear, straightforward, and not susceptible to competing interpretations, nor could any reasonable person believe them to do so. Respondent’s argument that under Article 10.20.4, its

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<sup>110</sup> Antonietti at 440, Respondent’s Authority 2.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, at 439. But as *Brandes* demonstrates, even a written waiver of a right to bring claims can raise issues of fact and law too complex to be decided in the context of a Preliminary Objection. *See Brandes*, para. 71, Claimant’s Authority 12.

extrinsic evidence and factual arguments now shift the burden to Claimant “to dispute respondent’s facts” is so entirely disconnected from any plausible reading of the law as to be frivolous itself.

93. Finally, Respondent argues that “[t]he 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),” principally because the former may provide longer time limits than the latter.<sup>113</sup> The argument is unconvincing at best.

94. First, the standards are governed by the language of the applicable provisions, not the time frames allowed for certain procedures. Second, unlike Article 10.20.4, Rule 41(5) contains no proscribed time limits for briefing and deciding the objection. Rule 41(5) provides only that “[t]he Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection.” As explained in Ms. Antonietti’s article: “The task of establishing a more

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<sup>113</sup> Preliminary Objection, paras. 32. Respondent’s other arguments in support of this proposition make little sense. First, Respondent argues that “the CAFTA procedure has no counterpart to the ICSID Rule 41(5) requirement that a claim be shown to be ‘manifestly without legal merit.’” *Id.* But as demonstrated above, the standard that, as a matter of law, a claim is not one “for which an award in favor of the claimant may be made” is virtually identical to “manifestly without legal merit.” Respondent offers nothing to distinguish them. Second, Respondent argues that “CAFTA expressly authorizes the tribunal to take into account relevant facts not in dispute.” *Id.* But Rule 41(5) obviously (if not explicitly) allows a tribunal to take account of relevant facts not in dispute, as demonstrated by Respondent’s own authorities. Thus, Respondent cites *Trans-Global* and Ms. Antonietti’s article – both addressing Rule 41(5) – for the proposition that a respondent could place new documents before the tribunal in order to show undisputed facts. Preliminary Objection, para. 29 n.14 (citing Antonietti at 439, Respondent’s Authority 2, and *Trans-Global*, para. 79, Respondent’s Authority 5). As stated, however, the consideration of any such additional documentation must necessarily be limited.

specific time-frame for such procedures was left to the tribunals to determine on an *ad hoc* basis.”<sup>114</sup>

95. In *Trans-Global*, the Preliminary Objection under Rule 41(5) were filed on 25 February 2008, and briefing was completed by 18 April 2008, a period of 52 days. In this case, Respondent filed its objections on 4 January 2010. Under the current schedule, briefing will be completed by 28 April 2010 – a period of 114 days. The difference between the briefing schedules in the two cases is roughly eight weeks – hardly enough time to turn this proceeding into a mini-trial on the factual allegations underlying a number of PRC’s claims. The instant schedule is, by any standard, a highly compressed time period for deciding whether a claimant’s case is going to be dismissed on the merits and an award issued against claimant – with all the attendant consequences that such an award would have. Such a compressed time frame does not allow for the claimant to develop and present its case under the written and oral procedures prescribed by the ICSID Arbitration Rules, including, for example, Rules 29, 31, 32, 33, 34, 35, and 36.<sup>115</sup>

96. Even assuming *arguendo* that the CAFTA’s expedited procedure for making a Preliminary Objection contemplates a more thorough analysis of *legal* issues than under Rule

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<sup>114</sup> Antonietti at 441, Respondent’s Authority 2.

<sup>115</sup> According to the tribunal in *Trans-Global*, given the consequences of a Rule 41(5) award against the claimant, it would be

a grave injustice if a claimant was wrongly driven from the judgment seat by a final award under Article 41(5), with no opportunity to develop and present its case under the written and oral procedures prescribed by Rule 29, 31 and 32 of the ICSID Arbitration Rules. ***In this regard, as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case . . . .***

*Trans-Global*, para. 92, (emphasis added), Respondent’s Authority 5. The *Trans-Global* tribunal’s observation with respect to the consequences of sustaining a Preliminary Objection under Rule 41(5) is equally applicable to a Preliminary Objection under Articles 10.20.4 and 10.20.5, as is the necessity of reserving such objections for “clear and obvious” cases.

41(5), there is nothing in the text of CAFTA (or anywhere else) to suggest that there can or should be “a more thorough analysis of the facts,” as argued by Respondent. To the contrary, the requirement that “the tribunal shall assume to be true claimant’s factual allegations” refutes any such notion.<sup>116</sup> As to the provision that “the tribunal may also consider any relevant facts not in dispute,” either the facts are disputed or they are not. It does not take much of an inquiry to make that determination. No reasonable construction of that phrase can support Respondent’s notion that there can be an evidentiary hearing on its Preliminary Objection, at which Claimant’s allegations of fact are assessed against Respondent’s counter-allegations of fact.

**B. Pleading Requirements under CAFTA**

97. Respondent asserts that “CAFTA Article 10.16.2(c) imposes a greater requirement to include the factual basis 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>117</sup> Respondent argues further that CAFTA Article 10.16.1 includes, in addition to an allegation of a 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 . . . .”<sup>118</sup> Based on Respondent’s characterization (or, more accurately, mischaracterization) of Article 10.16, Respondent goes on to assert: “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*.”<sup>119</sup>

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<sup>116</sup> CAFTA, Article 10.20.4(c), Respondent’s Authority 1.

<sup>117</sup> Preliminary Objection, para. 26.

<sup>118</sup> *Id.*, para. 27 (emphasis added) (quoting CAFTA, Article 10.16.1(a) (ii) and 10.16.1(b)(ii)), Respondent’s Authority 1.

<sup>119</sup> *Id.* (emphasis added).

98. Respondent's assertions have absolutely no support in the text of the provisions that Respondent cites. These provisions are devoid of any reference to "demonstrating" or making a "showing" of liability, damages, or causation. Like virtually all analogous pleading standards, the word used in Article 10.16 is not "demonstrate" or even "show," but merely "claim."

99. Given that Respondent does not bother to set out the text that it purports to analyze, it is worth setting it forth in full here. Article 10.16.1 provides in full:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A<sup>120</sup>,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

100. Again, there is nothing in these provisions from which one could conceivably construe a requirement to make any sort of "showing" or to "demonstrate" anything. The only

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<sup>120</sup> Section A of Chapter 10 sets forth the various investment protections afforded by the treaty, including National Treatment, Most-Favored-Nation Treatment, Minimum Standard of Treatment, and Expropriation and Compensation. *See* CAFTA, Chapter 10, Respondent's Authority 1.

requirement is to “claim” that one of several specified obligations has been breached and to “claim” that the claimant has incurred loss or damage by reason of, or arising out of, that breach.

101. As stated above, CAFTA Article 10.16.2 requires that, before submitting a claim to arbitration, the claimant must deliver to the respondent a written *notice* of intent.<sup>121</sup> Article 10.16.2 provides in full:

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:
  - (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
  - (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
  - (c) the legal and factual basis for each claim; and
  - (d) the relief sought and the approximate amount of damages claimed.

102. As described above, PRC delivered a Notice of Intent to El Salvador on 9 December 2008 that went far beyond these minimal requirements.

103. Under Article 10.16.3, “provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in” Article 10.16.1:

- (a) under the ICSID Convention and the ICSID Rules of Procedures [sic] for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

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<sup>121</sup> By definition, a “notice” is not intended to present a full factual and legal submission in respect of a party’s case.

- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or
- (c) under the UNCITRAL Arbitration Rules.<sup>122</sup>

104. The provisions set forth above are the *only* provisions in CAFTA addressing the requirements for submitting a claim to arbitration, and then only by reference to specified arbitral mechanisms. There can be no dispute that PRC's Notice of Intent and Notice of Arbitration satisfied the requirements under CAFTA Article 10.16.

105. Claimant in this case of course chose to submit its claim under the ICSID Convention and the ICSID Arbitration Rules, which, along with Rule 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), have minimal pleading requirements, and require limited documentation to accompany a request for or notice of arbitration. As Professor Schreuer writes, "[o]n most points a mere assertion in the request will suffice and the information thus given may be developed at a later stage."<sup>123</sup> The only pleading standards, therefore, that Claimant had to satisfy are those set out in the ICSID Convention and the Institution Rules, which are set forth below.

106. Article 36(2) of the ICSID Convention provides that a request for arbitration "shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings."

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<sup>122</sup> Respondent's Authority 1.

<sup>123</sup> Christoph Schreuer et al., *The ICSID Convention: A Commentary* 36:27, at 463 (2<sup>nd</sup> ed. 2009), Claimant's Authority 41.

107. Rule 2 of the Institution Rules further specifies the contents to be included in a request for arbitration:

(1) The request shall:

(a) designate precisely each party to the dispute and state the address of each;

(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;

(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

(d) indicate with respect to the party that is a national of a Contracting State:

(i) its nationality on the date of consent; and

(ii) if the party is a natural person:

(A) his nationality on the date of the request; and

(B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or

(iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;

(e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment; and

(f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.



(2) The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.

(3) “Date of consent” means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

108. Both Article 36(2) and Rule 2(1)(e) simply require that the request for arbitration “contain information concerning the issues in dispute” and do not require such information to be supported by documentation at this stage.

109. Based on the foregoing, there can be no dispute that PRC’s detailed Notice of Arbitration, supported by multiple exhibits, more than met all of the requirements under the ICSID Convention, the ICSID Arbitration Rules, and the ICSID Institution Rules. Nor can there be any dispute that PRC’s Notice of Intent and Notice of Arbitration satisfied the minimal requirements under CAFTA Article 10.16.

110. Although Respondent purports to base its pleading insufficiency argument at least in part on CAFTA Article 10.16, in reality, it finds no support in either Article 10.16 or any of the other relevant CAFTA or ICSID provisions. Instead, Respondent appears to be attempting an argument similar to that advanced by the respondent in *Trans-Global*, *i.e.*, that because of CAFTA’s Preliminary Objection provisions, the claimant must make sufficient factual allegations to support the legal merits of its claims, so as to enable the tribunal to perform, if necessary, the inquiry under ICSID Arbitration Rule 41(5). The Respondent in this case makes essentially the same argument with respect to Article 10.20.4.

111. In response to this argument when made by the respondent in *Trans-Global*, the tribunal observed that whatever logical force such argument has, “[it] remains the fact . . . that ICSID did not make any corresponding changes to [Institution] Rule 2, as it might have done

when promulgating the new Article 41(5), to include additional pleading requirements.”<sup>124</sup> Similarly, the drafters of CAFTA, knowing they were including provisions and procedures for a preliminary objections under Articles 10.20.4 and 10.20.5, could have enhanced the pleading requirements. They did not.

112. In *Trans-Global*, the tribunal ultimately did not rule on the respondent’s sufficiency-of-the-pleadings argument, finding that the claimant in that case had “submitted a somewhat full pleading of its claims, with its Request for Arbitration extending over 122 paragraphs and 27 pages, beyond any minimalist pleading required under the ICSID Conventions and Rules.”<sup>125</sup>

113. Here, PRC’s Notice of Intent and Notice of Arbitration together comprise 235 paragraphs and 70 pages of pleadings. Quantity, of course, cannot take the place of substantive allegations. However, as this experienced Tribunal has no doubt already recognized, PRC’s Notices more than satisfy any reasonable pleading standard associated with or required at this stage of initiating an arbitration. Moreover, in addressing Respondent’s specific arguments below, PRC demonstrates that each of its claims is supported by sufficient factual allegations for the Tribunal to conclude, as a matter of law, that each claim submitted is “a claim for which an award in favor of the claimant may be made.” Respondent has not come remotely close to meeting its burden of showing otherwise.

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<sup>124</sup> *Trans-Global*, para. 101, Respondent’s Authority 5.

<sup>125</sup> *Id.*, para. 102.

**IV. RESPONDENT’S ARGUMENT THAT “ALL CLAIMS RELATED TO THE APPLICATION FOR A MINING EXPLOITATION CONCESSION” SHOULD BE DISMISSED IS FRIVOLOUS**

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114. Respondent’s first and primary objection is that the Tribunal should dismiss all claims related to PRES’s application for a mining exploitation concession at the El Dorado site.<sup>126</sup> Respondent argues that (1) Claimant’s Notice of Intent and Notice of Arbitration does not provide “factual allegations, much less evidence, that PRES has submitted the other specified documents or complied with the other individual requirements to obtain the concession;”<sup>127</sup> (2) there are no “automatic rights to exploitation concessions;”<sup>128</sup> and (3) PRES’s application for an exploitation concession did not meet certain requirements of Salvadoran law.<sup>129</sup>

115. Respondent’s arguments, however, are patently frivolous, particularly when raised in the context of a Preliminary Objection – in which the respondent has the burden of proving that, as a matter of law, the claims at issue are not claims for which an award in favor of the claimant can be made.

116. First, as demonstrated below, Claimant has adequately pled that it met the requirements to obtain a mining concession under any reasonable standard (including the extent necessary to overcome a Preliminary Objection under Article 10.20.4). Second, it is manifestly inappropriate for Respondent to submit a Preliminary Objection that turns on complex issues of Salvadoran law (which are issues of fact for this Tribunal), concerning the level of discretion (if any) that MINEC has to approve Claimant’s application, and whether Claimant’s application complied with Salvadoran regulatory requirements. Moreover, Respondent’s arguments are

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<sup>126</sup> Preliminary Objection, paras. 36-91.

<sup>127</sup> *Id.*, para. 41.

<sup>128</sup> *Id.*, para. 40.

<sup>129</sup> *Id.*, para. 55-90.

based on a mischaracterization of PRC's claims, Salvadoran law, and the supposedly "undisputed facts" it presents to the Tribunal.

117. For each of these reasons, individually and collectively, the Tribunal should reject this Preliminary Objection.

**A. Claimant Has Adequately Pled That It Met All of the Requirements To Obtain an Exploitation Concession**

118. As discussed *supra* at Section III, Respondent has confused the standard by which this Tribunal must review Respondent's Preliminary Objection under Article 10.20.4 with the issue of pleading adequacy. The pleading requirements under CAFTA, the ICSID Convention, and the ICSID Institution Rules are minimal. Again, "[o]n most points, a mere assertion in the request will suffice and the information thus given may be developed at a later stage."<sup>130</sup> As for Article 10.20.4, the only issue is whether the Tribunal can determine, as a matter of law, that the claim submitted is not a claim for which an award for claimant may be made, based on the claimant's allegations and on any undisputed facts.

119. Claimant's Notice of Arbitration more than adequately pled that PRES met all of the requirements to obtain an exploitation concession. Nor is there any basis on which Respondent could sustain its burden of proving, as a matter of law, that PRC's claims concerning the exploitation concession are not claims on which an award for PRC may be made.

120. PRC's Notice of Arbitration devotes numerous pages to an overview of the legal framework for mining in El Salvador.<sup>131</sup> The Notice sets forth the requirements for obtaining

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<sup>130</sup> SCHREUER, THE ICSID CONVENTION at 463, Claimant's Authority 41.

<sup>131</sup> Notice of Arbitration, paras. 27-42.

and the obligations for holding an exploration permit;<sup>132</sup> the requirements for obtaining an environmental permit;<sup>133</sup> and the process for submitting an application to receive an exploitation concession.<sup>134</sup> The Notice also identifies the principal documents, which, under Article 37 of the Mining Law, must accompany an application for an exploitation concession. As stated in the Notice, those documents include:

- 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* (“Permit”) issued by MARN and accompanied by a copy of the corresponding *Estudio de Impacto Ambiental* (“EIA”);
- An *Estudio de Factibilidad Técnico Económico* (“Feasibility Study”); and
- A five-year *Programa de Desarrollo y Explotación* (“Development Plan”).<sup>135</sup>

121. Having provided an overview of the legal mining framework, and having described the requirements to obtain an exploitation concession in some detail, PRC repeatedly alleges that the Enterprises complied with all such requirements. For example:

- “[T]he Enterprises strictly complied with all of the requirements imposed on them under the Mining Law and its regulations, the Environmental Law and its Regulations, and all other applicable law to obtain the requisite exploration and exploitation environmental permits.”<sup>136</sup>

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<sup>132</sup> *Id.*, at paras. 29-37.

<sup>133</sup> *Id.*, at paras. 40-42.

<sup>134</sup> *Id.*, at para. 35.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*, at para. 42.

- “To ensure their entitlement to such a concession, the Enterprises have complied at all times with the provisions of the Mining Law, the Environmental Law, and all other relevant Salvadoran laws.”<sup>137</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>138</sup>

122. Thus, Claimant has provided “factual allegations” to support its claim that it satisfied all of the requirements under Salvadoran law to obtain an exploitation concession. Respondent’s assertion to the contrary is baseless.

123. Additionally, Respondent suggests that Claimant should have provided evidence “that PRES has submitted the other specified documents or complied with the other individual requirements to obtain the concession.”<sup>139</sup> The notion that Claimant is required to provide “evidence” with its Notice of Arbitration that it submitted such documents or “complied with the other individual requirements to obtain the concession” is frivolous.<sup>140</sup> There is absolutely no basis for suggesting that Claimant was under any such obligation. As stated by Professor Schreuer: “no proof is required at this stage.”<sup>141</sup> The Notice of Arbitration alleges repeatedly, and with more specificity than is required at this stage of the proceedings, that PRES complied with all of the applicable requirements of Salvadoran law. There is no requirement that a

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<sup>137</sup> *Id.*, at para. 53.

<sup>138</sup> *Id.*, at para. 65.

<sup>139</sup> Preliminary Objection, para. 41.

<sup>140</sup> ICSID Institutional Rule 2 contain no requirement with respect to documentation of the sort that Respondent claims should have been submitted by Claimant in support of its Request for Arbitration.

<sup>141</sup> SCHREUER, *THE ICSID CONVENTION* at 463, Claimant’s Authority 41.

claimant in a notice of arbitration must specify, with granular particularity, every individual requirement for obtaining a concession, let alone that a claimant must “produce evidence” of having done so. Moreover, as to the only two “individual requirements” that Respondent asserts PRES did not meet, Respondent is simply wrong that PRES did not satisfy them (as discussed further below).

124. Although under no obligation to do so at this stage, PRC is submitting herewith the documents which, under Article 37 of the Mining Law, must accompany an application for an exploitation concession, *viz.*: a description of the area for which the concession is requested;<sup>142</sup> a showing that the licensee owns or is authorized to use the real estate property where the mine project is located;<sup>143</sup> the EIA;<sup>144</sup> the Feasibility Study;<sup>145</sup> and the five-year Development Plan.<sup>146</sup> The volume and density of these documents demonstrate that, even if the Tribunal could assess disputed factual matters in the context of a Preliminary Objection under CAFTA Article 10.20.4 (which it cannot), this case involves issues of disputed fact that are far too complex to be determined at this stage. Respondent’s suggestion that PRC should have included these documents as exhibits to the Notice of Arbitration – and that its claims now fail because it did not do so – is preposterous.

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<sup>142</sup> Application: Conversion of El Dorado Norte and El Dorado Sur Licenses to an El Dorado Exploitation Concession (22 Dec. 2004) (“Exploitation Concession Application”), Claimant’s Exhibit 5.

<sup>143</sup> Annex 3 to Exploitation Concession Application: Proof of Ownership and Authorization for Use of Surface Land, (22 Dec. 2004), Claimant’s Exhibit 6; Attachment to letter from PRES to MINEC dated 8 Nov. 2006: Proof of Ownership and Authorization for Use of Surface Land, Claimant’s Exhibit 7..

<sup>144</sup> Environmental Impact Assessment (“EIA”) (Sep. 2005), Claimant’s Exhibit 8.

<sup>145</sup> Final Pre-Feasibility Study (“Pre-Feasibility Study”) Claimant’s Exhibit 9.

<sup>146</sup> *Programa de Desarrollo y Explotación*, Claimant’s Exhibit 10.

125. In sum, under any applicable standard, Claimant has adequately pled that it fulfilled all of the requirements for an exploitation concession for El Dorado.

**B. Respondent’s Arguments Based on Salvadoran Law Are Unavailing**

126. All of Respondent’s arguments in support of this objection are based on issues of Salvadoran law. To begin with, as a matter of international law, questions of municipal law are considered issues of fact, and are therefore entirely inappropriate for resolution in the context of a Preliminary Objection that is supposed to be decided as a matter of law. Moreover, the particular arguments that Respondent advances here are all unavailing for additional reasons, including Respondent’s numerous misstatements concerning the applicable Salvadoran law and the other applicable facts of the case.

**1. As a Matter of International Law, Questions of Municipal Law Are Questions of Fact**

127. It is well established as a matter of international law that questions of municipal law are considered questions of fact. As stated by the Permanent Court of Justice (“PCIJ”) in *German Interests in Polish Upper Silesia*:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States.<sup>147</sup>

Similarly, as the PCIJ stated in the *Brazilian Loans Case*, an international tribunal or court

is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which may be applied. And this it must do either by evidence

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<sup>147</sup> *German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (series A) No. 7, at 19 (May 25), Claimant’s Authority 19.



furnished it by the Parties or by means of any researches that the Court may think fit to undertake or cause to be undertaken.<sup>148</sup>

In the words of one eminent commentator, “national laws are treated as facts which are subject to proof in the same way as any other fact.”<sup>149</sup>

128. The principle that municipal law cannot be determinative of international law claims applies equally to the adjudication of claims arising under investment protection treaties. In the case of *Kardassopoulos v. Georgia*, for example, an ICSID tribunal was charged with adjudicating claims arising under the Energy Charter Treaty (“ECT”) and under a bilateral investment treaty (“BIT”), both of which contained an express choice of international law.<sup>150</sup> The respondent State objected to the tribunal’s jurisdiction on the basis that certain principles of Georgian law would preclude the adjudication of the claimant’s claims. In rejecting this objection, the tribunal first examined the choice of law provisions of the ICSID Convention, the ECT and the BIT, which it found to be “clear and prescriptive.”<sup>151</sup> On the basis of those

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<sup>148</sup> *Payment in Gold of Brazilian Fed. Loans Contracted in Fr.*, 1929 P.C.I.J. (series A) Nos. 20/21, at 124 (12 Jul. 1929), Claimant’s Authority 13.

<sup>149</sup> CHITTHARANJAN F. AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 54 (2005), Claimant’s Authority 31; *see also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 301 (1953), Claimant’s Authority 35; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39-41 (5th ed. 1998), Claimant’s Authority 32; *Heim et Chamant*, 3 Tribunal Arbitral Mixte Franco-Allemand 55 (25 Sep. 1922) Claimant’s Authority 21; *Cook v. United Mexican States*, UNRIAA 663 (5 Nov. 1930), Claimant’s Authority 18; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY 89 (2002), Claimant’s Authority 36; DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 390-396 (Rev. ed. 1975), Claimant’s Authority 39.

<sup>150</sup> The applicable law provision of the two treaties under consideration are almost identical to CAFTA, Article 10.22.1, Respondent’s Authority 1. *See* Energy Charter Treaty, 34 ILM 360 (1995) (“ECT”), Article 26(6), Claimant’s Authority 9; *see also* Bilateral Investment Treaty Between Greece and Georgia, Article 9(4) (1996), Claimant’s Authority 7.

<sup>151</sup> *Ioanis Kardassopoulos (Greece) v. Georgia*, Decision on Jurisdiction, ICSID Case No. ARB/05/18; IIC 294, 6 Jul. 2007, para. 144 (emphasis added), Claimant’s Authority 22. In this regard,

(continued...)

provisions, the tribunal concluded that it could not reject jurisdiction on the basis of Georgian law – notwithstanding its relevance as a matter of fact – since the claims at issue could be *decided* only in accordance with international law:

There is no doubt that a choice of international law by the Parties either in conjunction with a national law or on its own is valid and has to be respected by our Tribunal. While this Tribunal is not authorized to apply Georgian law, it is well established that there are provisions of international agreements that can only be given meaning by reference to municipal law.

In the present case, *Georgian law is relevant as a fact* to determine whether or not Claimant's investment is covered by the terms of the ECT and the BIT. But, whatever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law.<sup>152</sup>

129. That Respondent's arguments in support of this portion of its Preliminary Objection are all based on Salvadoran law by itself means that these arguments must fail. But, as set forth below, Respondent's arguments are also based on incorrect interpretations of Salvadoran law, distortions of PRC's claims, and incomplete and inaccurate characterizations of the evidence that Respondent presents to this Tribunal as "undisputed facts."

**2. PRC Does Not Allege That There Is An "Automatic Right" To a Mining Concession**

130. Respondent advances an entire argument premised on its uncontroversial assertion that there is no "automatic right" to a mining concession under Salvadoran law. Claimant does not dispute that proposition. In fact, PRES's right to a mining exploitation

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the tribunal examined Article 42(1) of the ICSID Convention; Article 26(6) of the ECT; and Article 9(4) of the BIT.

<sup>152</sup> *Id.*, paras 145-146 (emphasis added).

concession at El Dorado is founded upon the following: (1) its undertaking significant exploration (and expense) at the El Dorado site pursuant to its valid exploration licenses, and in full compliance with all the pertinent requirements of Salvadoran law;<sup>153</sup> (2) its discovery and demonstration of the existence of mineable ore deposits within the area covered by those licenses;<sup>154</sup> and (3) its submission of a concession application to MINEC, as required by law.<sup>155</sup>

131. Again, PRC is not required at this early juncture of the case to set forth its arguments concerning Salvadoran law, which will necessarily be done through one or more legal experts, as well as through the analysis of Salvadoran administrative and constitutional law and other relevant authorities. But to summarize, PRC's argument on this point is that various rights were conferred on its Enterprises when the Enterprises obtained exploration licenses under the Mining Law.

132. First, Article 19 of the Mining Law provides to an exploration licensee the right to undertake exploration activities and to localize deposits of mineral substance in specified areas in an exclusive way ("*facultad exclusiva*"). Second, Article 19 also gives the licensee the exclusive right to request the "respective concession" ("*derecho exclusivo de solicitar la concesión respectiva*"), *i.e.*, the exploration concession.<sup>156</sup> When the licensee exercises its exclusive right

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<sup>153</sup> Notice of Arbitration, para. 54.

<sup>154</sup> *Id.*

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

<sup>156</sup> Mining Law, Article 19, Claimant's Authority 5.

The Exploration License confers upon the Licensee the exclusive power to carry out mining activities, to locate the mineral deposits for which it was granted, within the boundaries of the licensed area and indefinitely in depth. In addition, it grants the Licensee the exclusive right to seek the respective concession.

The Spanish original reads:

(continued...)

to request (“*solicitará*”) the exploitation concession – and when it otherwise meets all of the requirements under the law – then, under Article 23,<sup>157</sup> the exploitation concession is to be given (“*se verificará*”) by the Minister of Mines through a unilateral administrative act (“*Acuerdo*”) that must be “accepted” by the prospective concessionaire pursuant to Article 34 of the Mining Regulations.<sup>158</sup>

133. Therefore, when a licensee has performed its obligations under an exploration license, when it has determined that there is “economic mining potential”<sup>159</sup> at a site, when it exercises its exclusive right to request an exploitation concession, and when it otherwise complies with all other requirements of the law, MINEC has virtually no discretion to deny the concession. Rather, the concession is “to be given” (“*se verificará*”).

134. Thus, Respondent’s assertion that PRES had no right other than to have its application “considered” by MINEC is not supported in the text of the Mining Law. Of course, PRES was denied even that right – in violation of the due process protections to which it is entitled under CAFTA, as well Salvadoran law. At the very least, MINEC was required to consider and act upon PRES’s application according to the regulatory and administrative framework of El Salvador – which, when PRES submitted its application, provided no basis on which to deny the application other than the lack of the environmental permit. And the only

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La Licencias de Exploración confiere al Titular la facultad exclusiva de realizar actividades mineras, para localizar los yacimientos de las sustancias minerales para las que ha sido otorgada, dentro de los límites del área conferida e indefinidamente en profundidad. Así mismo le confiere el derecho exclusivo de solicitar la concesión respectiva.

<sup>157</sup> *Id.*, Article 23.

<sup>158</sup> Mining Law Regulation, Article 34, Claimant’s Authority 6.

<sup>159</sup> Mining Law, Article 23, Claimant’s Authority 5.

reason that PRES did not have an environmental permit is because MARN refused to act on PRES's application for such a permit, in contravention of Salvadoran law and El Salvador's obligations under CAFTA.<sup>160</sup>

135. Respondent ignores Claimant's actual allegations and instead asserts that "[i]t is axiomatic that Claimant cannot receive redress in this arbitration for the breach of a right PRES did not have"<sup>161</sup> – *i.e.*, an "automatic right" to an exploitation concession. But perhaps because Respondent has devoted its entire argument to mischaracterizing PRC's allegation (so as to set up a strawman it can easily knock over), Respondent never explains how PRC's actual allegation, even if it were wrong as a matter of Salvadoran law (which it is not), would be fatal to any of its claims under CAFTA. PRC is therefore left guessing as to which of its actual CAFTA claims (if any) this objection is directed.

136. Under any applicable standard, however, PRC's allegations concerning Respondent's failure to grant or otherwise act on its application for an exploitation concession – whether due to Respondent's *de facto* ban on mining, MARN's failure to issue a mining permit (or otherwise act on Claimant's application for a permit), and/or other extra-legal factors – and the resulting destruction of PRC's investment in El Salvador, support all of PRC's CAFTA claims.

137. CAFTA Article 10.7 states that "[n]o Party may expropriate or nationalize a covered investment either directly *or indirectly through measures equivalent to expropriation or*

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<sup>160</sup> Although, as Respondent points out, there is a public comment period under Article 40, MINEC is required under Article 41 to dismiss any opposition that does not have a well-founded basis in the law ("declarándola sin lugar si no fuera fundada"). Moreover, since MINEC never acted on PRES's application, there never was such a public comment period.

<sup>161</sup> Preliminary Objection, para. 53.

*nationalization.*”<sup>162</sup> The definition of “investment” under CAFTA is extremely broad, and includes for example, “an enterprise;” “shares, stock, and other forms of equity participation in an enterprise;” “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;” and “other tangible or intangible, moveable or immoveable property, and related property rights, such as leases, mortgages, liens and pledges.”<sup>163</sup> As a matter of international law, it is well-established that when a State, through regulatory action or inaction, deprives an investor of a substantial benefit of its investment, that investment has been indirectly expropriated and compensation is due.<sup>164</sup> Based on the facts set forth above (and in the Notice of Intent and Notice of Arbitration), Claimant expressly premised its expropriation claim on, *inter alia*, “El Salvador’s substantial deprivation of PRC’s and the Enterprises’ investments, which has made them effectively worthless.”<sup>165</sup> Thus, PRC’s expropriation claim is hardly limited to Respondent’s expropriation of its rights conferred by domestic law which, in any event, go beyond solely the right to obtain an exploitation concession for El Dorado. Thus, even if the Tribunal determined (at the appropriate stage of the case) that PRC’s characterization of this particular right was wrong as a matter of Salvadoran law, such determination would have little (if any) effect on PRC’s expropriation claim under CAFTA.

138. CAFTA Article 10.5 (Minimum Standard of Treatment) guarantees “fair and equitable treatment” to covered investments. Fair and equitable treatment “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in

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<sup>162</sup> (Emphasis added), Respondent’s Authority 1.

<sup>163</sup> *Id.*, Article 10.28, Respondent’s Authority 1.

<sup>164</sup> See, e.g., *Metalclad Corp. v. United States*, Award, ICSID Case No. ARB(AF)/97/1, 30 Aug. 2000, paras. 102-112, Claimant’s Authority 24; *Middle East Cement Shipping & Handling Co. S.A. v. Egypt*, Award, ICSID Case No. ARB/99/6, para. 107 (12 Apr. 2002) Claimant’s Authority 26.

<sup>165</sup> Notice of Arbitration, para. 91.

accordance with the principle of due process embodied in the principal legal systems of the world . . . .” Here, PRC alleges that it invested tens of millions of dollars in El Salvador, in reliance on Salvadoran laws and the representations of high-ranking Salvadoran officials – only to have that investment destroyed when the legal regime on which it relied was effectively swept away by virtue of presidential pronouncements, and replaced by an extra-legal, *de facto* ban on mining. Similarly, MINEC’s and MARN’s failure to approve (or even address) the Enterprises’ applications pursuant to Salvadoran law violated the fair and equitable treatment standard. PRC was deprived of its legitimate expectations and due process by a government that acted in an arbitrary and capricious manner totally lacking in transparency.<sup>166</sup> These allegations (among others) state a claim under Article 10.5, and do not turn on how certain of the Enterprises’ rights may or may not be characterized under Salvadoran law.

139. In addition (and as discussed in further detail below), PRC also specifically alleges that by virtue of the facts set forth above (and in its Notice of Intent and Notice of Arbitration), it received treatment less favorable than like investors from El Salvador and from non-Parties, who have continued to receive the permits necessary to conduct their activities, many of which pose environmental risks far more substantial than those of the Enterprises’ proposed operations (the risks of which are in fact *de minimis* at worst). These allegations state claims under CAFTA Articles 10.3 and 10.4, and do not remotely turn on how certain of the Enterprises’ rights might be characterized under Salvadoran law.<sup>167</sup>

140. In sum, Claimant’s allegations concerning Respondent’s failure to grant (or otherwise act on) PRES’s application for an exploitation concession support all of its CAFTA

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<sup>166</sup> *Id.*

<sup>167</sup> *See* Discussion *infra* at Section V(B).

claims. Here, too, Respondent has failed to sustain its burden of demonstrating that, as a matter of law (*i.e.*, CAFTA and the international law contemplated thereunder, and *not* Salvadoran law<sup>168</sup>), these claims are not claims for which an award in favor of the claimant may be made.

**3. Respondent’s Factual Allegations That PRES Did Not Satisfy Two Requirements for Submitting an Application for an Exploitation Concession Are Wrong as a Matter of Salvadoran Law and the Other Relevant Facts of this Case**

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141. Respondent erroneously asserts that PRES did not meet two requirements for submitting an application for an exploitation concession. Specifically, Respondent argues that (1) PRES did not make a showing that PRES owns or is authorized to use the real estate where the mine project is located; and (2) PRES did not submit a “completed Feasibility Study.” Respondent’s arguments on these points rest entirely on issues of disputed fact and are therefore manifestly inappropriate in the context of a Preliminary Objection under Article 10.20.4. Moreover, they are simply wrong as a matter of Salvadoran law and the other relevant facts of this case.<sup>169</sup>

**a. The Surface Ownership Issue**

142. First, Respondent asserts as a matter of fact that PRES failed to comply with the provisions of Article 37 of the Mining Law concerning the documentary requirement for demonstrating land ownership or use authorization. Again, PRC specifically alleges in its Notice of Arbitration that PRES complied with this specific requirement of the Mining Law. Given that

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<sup>168</sup> As discussed in Section IV(B)(1) above, local law, here Salvadoran law, in the context of a dispute before an international tribunal that is charged with determining the parties’ rights under an international treaty is considered a question of fact.

<sup>169</sup> In addition, given that MINEC never invoked these arguments as bases for denying PRES’s application (because MINEC never denied PRES’s application), under well-accepted principles of both Salvadoran and international law, Respondent is estopped from raising such *ex post facto* rationalizations at this late date in the context of the defense to PRC’s CAFTA claim.



this is an intensely factual inquiry, for purposes of a Preliminary Objection under CAFTA Article 10.20.4, PRC's allegation should in itself put an end to the objection. Nonetheless, PRC will respond briefly to the substance of Respondent's argument, if for no other reason than to demonstrate how entirely inappropriate the argument is in this context.

143. Respondent's argument is that PRES failed to comply with this specific requirement because it did not provide MINEC with proof of ownership (or authorization granted by the owners) of the properties comprising *the entire surface area requested for the El Dorado concession*.<sup>170</sup> Respondent provides no support for this self-serving interpretation of Article 37, instead relying on the mere assertion that such a requirement is "plain and explicit" in the text of the provision. Of course, Respondent fails to place the text of Article 37 (not to mention the other relevant provisions of the Mining Law) before the Tribunal. As demonstrated below, the Mining Law does not require the applicant to provide ownership of, or authorization to use, the entire surface of the concession area. The requirement is limited to the real estate property within the concession area *where mining activities are to be conducted*, or, as stated in PRC's Notice of Arbitration, "where the mine project is located."<sup>171</sup>

144. Contrary to Respondent's assertions, it is not at all plain and explicit that Article 37 requires documentation that the applicant "own or have authorization to use *all* the property covering the area of the exploitation concession being requested."<sup>172</sup> The relevant portions of Article 37 provide that the following documentation must accompany an application for an exploitation concession:

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<sup>170</sup> Preliminary Objection, para. 61.

<sup>171</sup> Notice of Arbitration, para. 35.

<sup>172</sup> Preliminary Objection, para. 60 (emphasis added).

- a) Property location map *where activities shall be carried out*, map sheet of the area, topographic plan and the respective technical description, extension of the requested area conclusively establishing the location, boundaries and name of adjacent land;
- b) Notarial deed proving title to the real property or authorization granted by the owner as provided for in the law....<sup>173</sup>

145. Thus, the text of Article 37(2)(b), by itself, is ambiguous as to *which* real property the applicant must own or have authorization to use. Although the Tribunal should not be expected at this preliminary stage to undertake an extensive analysis of the Mining Law, or to reach a conclusion as to whether or not PRES's application complied with it, a brief review of the relevant provisions of the Mining Law (and other relevant Salvadoran legal authorities) demonstrates that Respondent's interpretation of Article 37 cannot be accepted.

146. To begin with, it must be remembered that the mining concession sought by PRES was for an underground mine rather than an open pit mine. It is a basic principle of Salvadoran law that the subsurface, and all mineral deposits therein, are the property of the State, not of individual landowners. As stated in El Salvador's Constitution:

The subsurface belongs to the State, which may grant concessions for its exploitation.<sup>174</sup>

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<sup>173</sup> Mining Law, Article 37, Claimant Exhibit 5. The Spanish original reads:

- a) Plano de ubicación del inmueble en que se realizarán las actividades, hoja cartográfica del área, plano topográfico y su respectiva descripción técnica, extensión del área solicitada donde se establezcan fehacientemente su localización, linderos y nombre de los colindantes;
- b) Escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario.

<sup>174</sup> Constitution of the Republic of El Salvador, Article 103, Claimant Exhibit 1. In Spanish, the Article reads:

El subsuelo pertenece al Estado, el cual podrá otorgar concesiones para su explotación.

147. That principle is reflected throughout numerous provisions of the Mining Law. The provisions reflecting that principle, when read together with Article 37, make clear that for an underground mine, the applicant only needs to demonstrate ownership of, or authorization to use, the limited surface area where mining activities are to be conducted – *i.e.*, where the entrance to the underground mine and the above-ground mining facilities are to be located. Ownership of (or authorization to use) the surface area under which minerals may be located – but which surface area is not to be used, disturbed, or impacted – is not required.

148. Thus, Article 2 of the Mining Law provides that “the State is the owner of all mineral deposits existing in the subsoil of the territory of the Republic, irrespective of their origin, form and physical state.” Article 10 establishes that mineral deposits existing in the subsoil constitute a real property distinct from the surface land under which they are located. Article 21 provides that authorization from third party landowners is required only for works to be performed on the soil surface. Article 54 provides that beneficiaries of mining rights can obtain a legal easement if use of a real property owned by a third party is necessary for the development of their mining activities, thereby confirms that ownership or authorization to use all of the surface area comprising a concession area for an underground mine is not necessary.

149. Because Articles 2 and 10 of the Mining Law provide that the State owns the minerals in the subsurface, it would make no sense for the applicant to have to obtain ownership of or authorization to use the surface land which may be located above the deposit, but which the applicant does not intend to use or disturb in order to mine the subsurface.

150. That is not to say that the Mining Law does not provide for the protection of the surface owner’s rights. Indeed, Article 21 of the Mining Law reveals a clear intent to protect the

rights of surface owners against any actual impact on their properties caused by mining activities. That provision reads as follows:

*Should the exploration area include land owned by third parties, authorization from the owner shall be necessary for works to be performed on the soil surface, and the Licensee shall be liable for obtaining such authorization.*

*Should any damage be caused to the property, the Licensee shall be obliged to compensate such damages upon mutual agreement with the owner of the land or pursuant to a decision by the competent Court.*<sup>175</sup>

These protections underscore that Article 37 only requires property ownership or authorization “for works to be performed on the soil surface” – not for the surface area overlaying underground deposits that *will not be affected* by the mining activities.

151. Respondent introduces evidence of another mining company, the Commerce Group, and alleges that its mining exploitation concession covered only 1.23 kilometers, and that the Commerce Group owned or obtained permission to use all of the land within the concession area.<sup>176</sup> Although this is another example of Respondent’s improper introduction of factual allegations in connection with a Preliminary Objection that must be decided as a matter of law based on Claimant’s allegations and undisputed facts – and although PRC has no reason to be familiar with the particular operations of an unrelated mining company<sup>177</sup> – PRC observes that the Commerce Group’s operation involves an *open-pit mine*. An open-pit mine, by definition,

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<sup>175</sup> Mining Law, Article 21, (emphasis added), Claimant’s Exhibit 5.

<sup>176</sup> Preliminary Objection, para. 69.

<sup>177</sup> To the extent that Respondent is suggesting that these are “undisputed facts” – when PRC has had no opportunity to investigate these factual assertions through, *inter alia*, the mechanisms provided by ICSID Arbitration Rules 33 and 34 – then Respondent’s suggestion should be rejected by the Tribunal as an unfair and improper tactic for these proceedings. Whether the facts concerning the Commerce Group are disputed, or whether they are even relevant to the instant proceedings, will have to be decided at a later juncture of this arbitration.

uses all of the surface area where the mining activities are located. By contrast, an underground mine does not. The surface land ownership issues for an open pit mine on the one hand, and an underground mine on the other, are entirely different.

152. Nor do the several letters introduced by Respondent (but presented in a highly selective, inaccurate, and misleading fashion) help its argument on this issue. According to Respondent, an 2 October 2006 letter from Ms. Gina Navas, the Director of the MINEC Bureau of Mines, notified PRES that it had to submit: “certified copies of the registered land purchases or authorizations for the land subject to the concession” within thirty days.<sup>178</sup> This is not an accurate characterization of Ms. Navas’s request. According to Respondent’s own translation of the exhibit, Ms. Navas requested “[c]ertified 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*”<sup>179</sup> – not the entire concession area.

153. Second, Ms. Navas’s letter asked for several categories of documents, most of which had already been submitted with PRES’s application nearly two years before. Nonetheless, Respondent is factually incorrect in asserting that PRES simply resubmitted the exact same documents that it had submitted before in response to the 2 October 2006 letter. To

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<sup>178</sup> Preliminary Objection, para. 62 (citing Letter from Bureau of Mines to Pacific Rim El Salvador, 2 Oct. 2006, Respondent’s Exhibit 4).

<sup>179</sup> Letter from Bureau of Mines to Pacific Rim El Salvador, 2 Oct. 2006 (emphasis added), Respondent’s Exhibit 4. The original Spanish reads:

Copias certificadas de los Testimonios de venta de los inmuebles debidamente inscritos o autorizaciones otorgadas en legal forma por los propietarios del area solicitada para la explotacion de la mina.

the contrary, with respect to the land ownership documents, PRES submitted, on 8 November 2006, updated documentation relating to ownership and authorization.<sup>180</sup>

154. Moreover, although Respondent attempts to bury the fact in a footnote, Ms. Navas responded to PRES's 8 November 2006 submission in a letter dated 4 December 2006, stating that PRES's submission "*partially complies*" with the request made in her 2 October 2006 letter.<sup>181</sup> *The only outstanding item set forth in Ms. Navas's 4 December 2006 letter was the environmental permit from MARN.* Thus, this letter supports Claimant's contention that the only open issue was the environmental permit. Furthermore, as Ms. Navas acknowledged in the December 4, 2006 letter, PRES did not have the permit only because MARN had failed to act one way or the other on PRES's application. Respondent tries to discredit Ms. Navas's 4 December 2006 letter, by asserting that it was "retrieved" and "withdrawn," and that, moreover, its issuance was merely part of a "preliminary review" rather than a "substantive review" of PRES's application.<sup>182</sup> Whether Respondent's factual allegations concerning Ms. Navas's 4 December 2006 letter are accurate (and if so, whether that has any significance to PRC's claims) will obviously have to await a later phase of this arbitration to be resolved.

155. But that Respondent is in the position of having to try to discredit its own official's letter by making unsupported factual assertions – when that letter has been tendered to the Tribunal as evidence of "undisputed facts" – demonstrates how far Respondent has ventured

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<sup>180</sup> Letter from PRES to MINEC, 8 Nov. 2006, Claimant's Exhibit 11. Attachment to Letter Submitted by PRES to MINEC on 8 Nov. 2006: Proof of Ownership and Authorization for Use of Surface Land, Claimant's Exhibit 7.

<sup>181</sup> Letter from MINEC to PRES (4 Dec. 2006), Respondent's Exhibit 6. Although Respondent's translation of the 4 Dec. 2006 letter refers to the 2 Oct. 2006 letter as "the warning notice," the Spanish term actually used is "*prevención*," which is perhaps better translated as "notification letter."

<sup>182</sup> Preliminary Objection, n. 38.

from the obvious purpose that proceedings under Article 10.20.4 are meant to achieve. No reasonable person could assert in good faith that these documents are evidence of “undisputed facts” that PRES had failed to comply with regulatory requirements involving land ownership and/or the Feasibility Study. Indeed, Ms. Navas’s 4 December 2006 letter is confirmation of Claimant’s understanding at the time (as well as presently) that the *only* outstanding regulatory obstacle for obtaining an exploitation concession was the absence of an environmental permit, which absence had been caused by MARN’s unjustified failure to act on PRES’s application. It further demonstrates that Respondent’s attempt in its Preliminary Objection to devise a *post hoc* rationalization for why it *might* have denied the permit, *if* it had denied the permit (which it did not), fails to find support even in Respondent’s own contemporaneous documents. The letter is in fact evidence that MINEC did not believe that either the land or ownership or feasibility study was at issue. Nor would PRES have had reason to try to correct these alleged “defects” – as was its right under Salvadoran law – if, as this correspondence indicates, PRES had no reason to believe that MINEC considered there to be any defects or deficiencies.

156. Finally, even assuming *arguendo* that MINEC believed that PRES was required to obtain ownership of or authorization to use all of the surface land in the concession area – a belief that would have been erroneous under Salvadoran law – that would hardly have been fatal to PRES’s application. If MINEC had actually taken that position as a grounds for denying PRES’s application, PRES could have asked for a formal reconsideration of the decision as provided for under Salvadoran law.<sup>183</sup> Or PRES and/or MINEC could have decided to reduce or

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<sup>183</sup> Mining Law, Article 43, Claimant’s Authority 5:

In the event the Minister deems the concession inadmissible, he shall issue the unfavorable Resolution; which may be subject to a Motion for Reversal (Recurso

(continued...)

otherwise alter the size of the area at issue, as they had done on at least several prior occasions.<sup>184</sup> The notion that Respondent’s argument on this issue is dispositive of any portion of PRC’s claims is utterly baseless.

157. In sum, Respondent’s argument that PRES did not comply with this requirement of Article 37 of the Mining Law in making its application for an exploitation concession is based on an incomplete, inaccurate, and misleading presentation of the relevant facts (including the facts concerning Salvadoran law and the facts concerning the relevant administrative record). Respondent’s argument – as well as its assertion that its argument is based on “undisputed facts” – is the frivolity here.

**b. The Feasibility Study Issue**

158. Respondent argues that as a matter of fact, PRES failed to comply with Article 37 of the Mining Law because PRES did not submit a “completed Feasibility Study.”<sup>185</sup> Again, PRC’s allegation that PRES did in fact comply with this requirement should end the inquiry for purposes of a Preliminary Objection. Nonetheless, PRC will briefly address the substance of Respondent’s argument.

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(continued)

de Reconsideración), that the interested party may file before the Minister, within three business days following the date of the relevant notice, and such motion shall be decided within fifteen days following filing thereof.

The Spanish original reads:

En caso de que considere improcedente la concesión, emitirá la Resolución desfavorable; la cual admitirá Recurso de Reconsideración, que podrá interponer el interesado ante el mismo Ministro, dentro de los tres días hábiles siguientes al de la notificación respectiva, recurso que será resuelto dentro de los quince días siguientes a su presentación.

<sup>184</sup> See Notice of Arbitration, paras. 57, 66.

<sup>185</sup> Preliminary Objection, para. 73.



159. PRES submitted a “Preliminary Pre-Feasibility Study” with its application for the exploitation concession in December 2004. It then submitted a “Final Pre-Feasibility Study” in January 2005.<sup>186</sup> Respondent complains that this “Final Pre-Feasibility Study” did not comply with the requirements of Article 37. Respondent states cryptically that “the difference between a Pre-Feasibility Study and a Feasibility Study is not merely in name.”<sup>187</sup> But it never enlightens the Tribunal as to what the claimed difference is. In reality, Respondent seems to have confused terms that have a meaningful distinction in the context of U.S. and Canadian securities laws, but have no significance in the context of an application for an exploitation concession.

160. Article 37 of the Mining Law requires an exploitation concession applicant to submit an “*Estudio de Factibilidad Técnico Económico, elaborado por profesionales afines a la materia*” – that is, a Study of Technical and Economic Feasibility, prepared by professionals with expertise in this area. In its Notice of Arbitration, Claimant provided a “shorthand” definition to refer to this document: a “Feasibility Study.”<sup>188</sup>

161. El Salvador’s Mining Law and Mining Regulations set forth minimal requirements for what is to be included in a Feasibility Study. Article 23 of the Mining Law (“Concession for the Exploitation of Mines”) provides that an application for a mining concession is made upon completed of exploration and “*existence of economic mining potential*

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<sup>186</sup> Pre-Feasibility Study, Claimant’s Exhibit 9.

<sup>187</sup> Preliminary Objection, para. 77.

<sup>188</sup> Notice of Arbitration, para. 35.

on the authorized area is proved.”<sup>189</sup> Article 23 further speaks of the “*verification of economic potential.*”<sup>190</sup>

162. Section 18 of the Mining Regulations (“Application for Exploitation Concessions”) states that:

[w]hen applying for a Mine Exploitation Concession after receiving an Exploration License, *proof of the existence of a deposit or deposits as described in Article 23 of the Law shall be provided* via documents that are congruent or consistent with the activities and studies that were executed during the term of this License, and the final report described in the preceding section.

[ . . . ]

When the concession is requested directly, as set forth in Section 23, paragraph 3, of the Law, documentation shall be based on information on expired mining rights or from Technical Studies carried out *that indicate the existence of minerals.*<sup>191</sup>

163. In the Preliminary Objection, Respondent itself confirms that the *Estudio de Factibilidad Técnico Económico* is intended to serve just this purpose. Specifically, Respondent refers to the purpose of the study in question as “allow[ing] 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.”<sup>192</sup>

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<sup>189</sup> Claimant’s Authority 5, (emphasis added).

<sup>190</sup> *Id.* (emphasis added).

<sup>191</sup> Claimant’s Authority 6, (emphasis added). The Spanish original reads:

Cuando se solicite Concesión para la explotación de una mina y haya precedido Licencia de Exploración, la demostración de la existencia del o de los yacimientos a que se refiere el Art. 23 de la Ley, se hará con documentos que sean congruentes o acordes con las actividades y estudios que fueron ejecutados

(continued...)

164. By these very terms, the Final Pre-Feasibility Study submitted by PRES plainly met or exceeded the requirements of the *Estudio de Factibilidad Técnico Económico*. Indeed, it is a remarkably thorough report, exceeding 200 pages and prepared by numerous professional firms under the coordination of SRK Consulting, one of the leading independent preparers of mining feasibility studies in the world. El Salvador’s Mining Law and Regulations do not define a “mineable deposit;” therefore, in preparing the Study, SRK utilized the definitions promulgated by the Canadian Institute of Mining, which are fully consistent with the purpose of Salvadoran law described above. Thus, as used in the Study, a “mineral resource” is defined as a resource “in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction.”<sup>193</sup> In turn, a “mineral reserve” is:

*the economically mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study. This Study must include adequate information on mining, processing, metallurgical, economic and other relevant factors that demonstrate, at the time of reporting, that economic extraction can be justified.*<sup>194</sup>

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(continued)

durante la vigencia de esa Licencia y el informe final a que se refiere el Artículo anterior.

[ . . . ]

Cuando la concesión se solicite directamente, como lo dispone el Art. 23, Inciso tercero de la Ley, la documentación estará basada en la información sobre derechos mineros caducados o en Estudios Técnicos llevados a cabo, que demuestren la existencia de los minerales.

<sup>192</sup> Preliminary Objection, para. 80 (emphasis added).

<sup>193</sup> CIM Definition Standards – For Mineral Resources and Mineral Reserves, CIM Standing Committee on Reserve Definitions, on Mineral Resources and Reserves: Definitions and Guidelines 4, 22 Nov. 2005 (emphasis added), Claimant’s Authority 33.

<sup>194</sup> *Id.* (emphasis added).

165. Consistent with these requirements, the Pre-Feasibility Study submitted by PRES includes a “Statement of Mineral Reserves,” totaling 535,586 gold equivalent ounces.<sup>195</sup> This conclusion alone is sufficient to show that an economically mineable deposit exists – even after taking into account the proposed mining method; metallurgical and processing methods; and other economic, legal, environmental, and other relevant factors which are discussed in detail throughout the comprehensive Study. Therefore, the Study submitted by Claimant plainly satisfies both the letter and intent of Article 37(2)(d).

166. Respondent appears (or perhaps attempts) to confuse the standards for an *Estudio de Factibilidad Técnico Económico* under El Salvador’s Mining Law, on the one hand, with those under the U.S. and Canadian securities laws for publicly trade mining companies, on the other. Again, under the mining regulatory framework of El Salvador (and most other countries), the purpose for a feasibility study is to show that there is a sufficient existence of economic mining potential in the authorized area as to justify exploitation activities. By contrast, in the context of the U.S. and Canadian securities laws, the purpose of such studies is to inform potential investors of how developed the financial model is for the mine. Under these securities laws, and guided by industry standards used to construe these laws, a “pre-feasibility study” must provide a degree of economic reliability that is within a range of 20% to 30%. The economic reliability of a feasibility study should be within 15%.<sup>196</sup>

167. It is difficult, if not impossible, to prepare a study with the level of economic reliability required under that standard for a “feasibility study” *before* an environmental permit

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<sup>195</sup> Pre-Feasibility Study, page iv, Claimant’s Exhibit 9

<sup>196</sup> R. Craig Johnson, Richard J. Angell, and Amy S. Thomas, *Bankable Feasibility Study – Oasis or Mirage for Mining Transactions*, 42 ROCKY MOUNTAIN MINERAL L. INST. 13, sec. 13.03 (1996) (hereafter, “Johnson *et al.*”), Claimant’s Authority 38.

and an exploitation concession have been issued. The timing alone of the issuance of the permit and concession could affect, for example, the costs of various commodities used to gauge the likely financial performance of a project. As explained to Respondent in PRES's application for the exploitation concession: "The studies related to a mining project are largely iterative and change according to the costs, metal prices, operating upgrades, available technology and exploration program results."<sup>197</sup>

168. Similarly, Respondent cites a 9 February 2009 press report quoting Tom Shrake, the President and CEO of Pacific Rim and the Manager of PRC, as stating the following with respect to the completion of a "feasibility study" for the El Dorado project:

We see no need to spend precious capital to complete a study with an already invalid cost basis. We will wait for clarity on the timing of our permit and stabilization of the prices for capital and operating inputs.<sup>198</sup>

Respondent apparently cites this article to support its argument that PRES did not submit an *Estudio de Factibilidad Técnico Económico* for purposes of Article 37 of the Mining Law. In reality, this exhibit further illustrates that, under the standards applicable in the securities context, PRES could not style the report a "Final Feasibility Study" while its applications were still pending.

169. But the fact that PRES could not label the report a "Final Feasibility Study" because of U.S. and Canadian securities laws does not mean that the "Final Pre-Feasibility Study" did not satisfy the requirements of El Salvador's Mining Law. To the contrary, the

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<sup>197</sup> Exploitation Concession Application at 6, Claimant's Exhibit 5.

<sup>198</sup> Liezel Hill, *Pacific Rim Freezes Study on El Salvador Gold Market Until Markets Stabilize* (12 Feb. 2009), available at <http://www.miningweekly.com>, Respondent's Exhibit 18.

requirements of a “Pre-Feasibility Study” under those standards is demanding, certainly high enough to meet the far less exacting standard of El Salvador’s Mining Law. For example, the Canadian Securities Administration (“CSA”), in promulgating “Canadian National Instrument (“CNI”) 43-101: Standards of Disclosure for Mineral Projects,” specifically defined a “pre-feasibility study” as:

***a comprehensive study*** of a mineral project that has advanced to a stage where the mining method, in the case of underground mining . . . has been established and an effective method of mineral processing has been determined, and includes a financial analysis based on the reasonable assumptions of technical, engineering, legal, operating, economic, social, and environmental factors and the evaluation of other relevant factors which are ***sufficient for a qualified person, acting reasonably, to determine if all or part of the mineral reserve may be classified as a mineral reserve . . .***<sup>199</sup>

Again, the definition of a “mineral reserve” means “***that economic extraction can be justified.***”<sup>200</sup>

170. Plainly, the requirements that PRES had to meet to satisfy that definition more than satisfied the minimal and general standards for an *Estudio de Factibilidad Técnico Económico* under El Salvador’s Mining Law.

171. Respondent’s arguments with respect to Ms. Navas’s correspondence on behalf of MINEC with the PRES at the end of 2006 – to the extent they are advanced with respect to the Feasibility Study issue – warrant the same response as set forth above. Ms. Navas’s 4 December 2006 letter could have cited any perceived deficiencies in the Feasibility Study submitted by

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<sup>199</sup> Canadian National Instrument 43-101: *Standards of Disclosure for Mineral Projects* at 2 (emphasis added), Claimant’s Authority 34.

<sup>200</sup> CIM Definition Standards (emphasis added), Claimant’s Authority 33.

PRES. It did not do so. Rather, it cited the environmental permit as the sole remaining issue in connection with PRES's application for an exploitation concession.

172. Finally, even assuming that MINEC believed that there were any deficiencies with respect to the Feasibility Study, MINEC was required to inform PRES and allow it to cure any such deficiencies.<sup>201</sup> After that process, to the extent that PRES disagreed with MINEC's conclusions, and MINEC still denied the application, PRES would have been entitled to pursue an appeal through the appellate process provided for by Salvadoran law. But MINEC, of course, never ruled one way or the other – effectively destroying Claimant's investment in the country, without leaving Claimant recourse to any of the procedural or substantive protections that Salvadoran law supposedly provided. Here, too, the notion that Respondent's argument on this issue is dispositive of any portion of PRC's claims is utterly baseless.

173. In sum, Respondent's argument that PRES did not comply with this requirement of Article 37 of the Mining Law in making its application for an exploitation concession – especially when made in the context of a Preliminary Objection under CAFTA Article 10.20.4 – is frivolous and should be rejected by the Tribunal.

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<sup>201</sup> Mining Law, Article 38, Claimant's Authority 5:

Upon submission of the application as provided for in the Law, an inspection shall be carried out by the Bureau's Representatives, and if favorable, such application will be admitted. In the event any statutory requirements are not met, the interested party shall be given a maximum 30-day term to cure any omissions; if, upon lapsing of such term, such party fails to cure them, the application shall be dismissed and sent to the archive.

The Spanish original reads:

Presentada en legal forma una solicitud, se practicará inspección por Delegados de la Dirección, y de ser favorable se admitirá. En caso de no presentarse con los requisitos de ley, se otorgará al interesado un plazo que no excederá de 30 días para que subsane las omisiones; si transcurrido dicho plazo no las subsanare, se declarará sin lugar la solicitud y se ordenará el archivo de la misma.

**V. CLAIMANT’S FACTUAL ALLEGATIONS SUPPORT ITS OTHER CAFTA CLAIMS UNDER ANY REASONABLE STANDARD**

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174. With respect to PRC’s other CAFTA claims, Respondent argues that PRC has not set forth a sufficient “factual or legal basis” to support them. Specifically, Respondent argues that PRC has not sufficiently pled: (1) claims concerning the Santa Rita site; (2) National Treatment or Most-Favored-Nation Treatment claims; and (3) claims pertaining to its investment authorizations.

175. As discussed above, there is no question that PRC has satisfied the pleading standards under CAFTA Article 10.16 and the ICSID Rules. The actual question before the Tribunal is whether Respondent has met its burden of showing that, as a matter of law, any of these claims is a claim for which an award in favor of the claimant may not be made. Once again, Respondent entirely fails to make such a showing.

**A. Claims Concerning the Santa Rita Site**

176. PRC’s claims concerning the Santa Rita site are a relatively small part of its overall case, and accordingly, are treated briefly in the Notice of Arbitration. However, PRC has plainly stated a claim that can sustain an award in its favor under CAFTA with respect to the Santa Rita site.

177. As set forth in the Notice of Arbitration, Claimant spent tens of millions of dollars under the exploration licenses for El Dorado Norte and El Dorado Sur.<sup>202</sup> Upon finding substantial deposits of gold at those sites, and having fulfilled all of the regulatory requirements of Salvadoran law, Claimant was entitled to receive a mining concession. However, the

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<sup>202</sup> Notice of Arbitration, paras. 49-53.



Government simply refused to act on Claimant's application for an environmental permit or on its application for the concession.<sup>203</sup>

178. Similarly, Claimant obtained exploration licenses for Huacuco, Pueblos, and Guaco. However, despite the fact that Claimant satisfied all of the requirements to obtain the environmental permits to pursue exploration of these sites, MARN refused to act on Claimant's applications, so that here, too, Claimant's investment in these sites was rendered worthless.<sup>204</sup>

179. The failure of the Government to act on Claimant's applications was not simply the result of bureaucratic delay or incompetence. Rather, it was the result of the imposition by El Salvador's President of a *de facto* ban on all mining activities in the country.<sup>205</sup> Then-President Saca (now followed by President Funes) made clear that there would be no mining allowed in the country. The extra-legal imposition of this mining ban has had a disastrous impact on Claimant's financial condition. Claimant has ceased its operations at Santa Rita, and has been gradually shutting down its other operations in the country. As stated in the Notice of Arbitration with respect to Santa Rita, "the Government's recent actions and current attitude towards mining has made any further development of this claim area impossible."<sup>206</sup>

180. Respondent's argument on the Santa Rita claim is based on the decision by PRES not to seek renewal of its exploration license when it expired on 14 July 2009 (after the Notice of

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<sup>203</sup> *Id.*, paras. 64-65.

<sup>204</sup> *Id.*, paras. 66-72.

<sup>205</sup> *Id.*, paras. 73-77.

<sup>206</sup> *Id.*, para. 53 n.42. Moreover, Claimant's employees at the Santa Rita site have encountered violence and threats of violence from residents and/or activists. In July 2008, for example, a group of masked perpetrators entered the property, burned down buildings, and chopped down trees that had been planted by the company. Especially since President Saca's announced ban on mining, the Government has failed to provide Claimant with full protection and security at the site. As explained above, (*supra* at Section III(B)) these are not the type of details required for a Notice of Arbitration.

Arbitration was filed).<sup>207</sup> Respondent argues that because “neither Claimant nor its Enterprises currently hold an exploration license in Santa Rita . . . Claimant does not have any rights in Santa Rita upon which to base any claims in this arbitration.”<sup>208</sup>

181. But once again, Respondent ignores the principal allegations of PRC’s claim. Long before PRES decided not to renew its Santa Rita exploration license in July 2009, the Government had destroyed the investment that Claimant had made there by making clear that – no matter what applications Claimant filed, nor what Claimant did – it would not be allowed to mine in El Salvador. An investor such as PRC does not have to continue compliance with a regulatory regime that the Government has effectively swept away in order to maintain a claim under CAFTA.<sup>209</sup>

182. In sum, through its illegal actions, the Government has made it impossible for Claimant to pursue its mining activities anywhere in the country, including Santa Rita. Respondent has not met its burden of showing that PRC’s claims based on Santa Rita are not claims on which an award may be made under CAFTA. Here, too, the Tribunal should reject Respondent’s Preliminary Objection.

**B. PRC’s National Treatment and Most-Favored-Nation Claims**

183. According to Respondent, “Claimant has failed to provide any factual bas[i]s for its claims of violation of CAFTA Articles 10.3 (National Treatment) and 10.4 (Most-Favored

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<sup>207</sup> Preliminary Objection, paras. 93-94.

<sup>208</sup> *Id.*

<sup>209</sup> “[I]nternational and domestic courts do not require futile attempts that will merely waste a claimant’s resources and fail to change an inevitable final decision” by the host State. *Glamis Gold Ltd. v. United States*, Award, Ad-hoc UNCITRAL Arbitration Rules, 14 May 2009, para. 333, Claimant’s Authority 20. See also *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Republic of Argentina*, Award, ICSID Case No. ARB/97/3, 20 Aug. 2007, para. 7.5.28 (a claimant is under no obligation to continue operations after the treaty has already been breached by the host State), Claimant’s Authority 14.

Nation Treatment).”<sup>210</sup> Respondent asserts further that “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.”<sup>211</sup>

184. Contrary to Respondent’s assertions, Claimant set forth the bases for its claims in its Notice of Intent. PRC alleged:

The Salvadoran Government’s discriminatory behavior toward the Enterprises is also reflected by the fact that other industries whose operations raise similar environmental concerns, such as power plants, dams, ports, and fishing operations, have received environmental permits during the same timeframe that the Enterprises’ applications have been pending. By, *inter alia*, refusing to grant the environmental permits to PRES and DOREX while issuing those permits to other companies, El Salvador has denied to PRC the same treatment that it is required to afford, and has afforded, to investments of its own nationals and to nationals of other states.<sup>212</sup>

185. Moreover, the *de facto* ban on mining activities in El Salvador appears to be limited to metallic mining.<sup>213</sup> In the meantime, non-metallic exploitation activities (which are conducted primarily by Salvadoran companies or companies of non-Parties) continue. These facts provide further support for Claimant’s National Treatment and Most-Favored-Nation (“MFN”) Treatment claims.

186. In *Corn Products v. Mexico*, a NAFTA tribunal set forth the requirements for demonstrating a breach of National Treatment (which are equally applicable to MFN Treatment

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<sup>210</sup> Preliminary Objection, para. 95.

<sup>211</sup> *Id.*

<sup>212</sup> Notice of Intent, para. 35; *see also* Notice of Arbitration, para. 91.

<sup>213</sup> *Funes rules out authorization of mining explorations and exploitations in El Salvador*, by EFE AGENCY, 27 Dec. 2009, Claimant’s Exhibit 2.

with respect to investors and investments of any other Party or of any non-party). The tribunal held:

First, it must be shown that the Respondent State has accorded to the foreign investor or its investment “treatment . . . with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition” of the relevant investments. Secondly, the foreign investor or investments must be “in like circumstances” to an investor or investment of the Respondent State (“the comparator”). Lastly, the treatment must have been less favourable than that accorded to the comparator.<sup>214</sup>

187. Claimant’s factual allegations meet each of these requirements. Claimant has identified a number of other investors in like circumstances, which continue to receive environmental permits and are otherwise allowed to continue operations, while Claimant’s operations have been denied permits and have been effectively shut down by a *de facto* ban.

188. Once again, Respondent has failed to meet its burden of showing that Claimant’s National Treatment and MFN Treatment claims are, as a matter of law, not claims for which an award in favor of Claimant may be made.

**C. Claims Relating to Claimant’s Investment Authorizations**

189. In both its Notice of Intent and Notice of Arbitration, PRC alleges that Respondent has breached CAFTA Article 10.16.1(b)(i)(B) with respect to its investment authorizations.<sup>215</sup> Specifically, PRC alleges that MINEC issued “investment authorizations” in the form of (1) resolutions granting exploration licenses to PRC’s Enterprises and (2) resolutions

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<sup>214</sup> *Corn Prods. Int’l, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, para. 117 (citing *United Parcel Service of America v. Canada*, Ad hoc – UNCITRAL Arbitration Rules, Award dated 24 May 2007, at para. 83), Claimant’s Authority 15.

<sup>215</sup> Notice of Intent, para. 3; Notice of Arbitration, para. 89.

from ONI authorizing the registration of PRC's investment in El Salvador. A number of these resolutions are attached to this Response.<sup>216</sup>

190. Respondent offers two arguments directed at Claimant's claims arising from its investment authorizations. First, Respondent argues that PRC has not identified the resolutions at issue with the requisite specificity.<sup>217</sup> But Respondent is well aware of what resolutions MINEC issued to the Enterprises. Moreover, elsewhere in the Notice of Arbitration, PRC identifies the resolutions with great specificity and includes a number of them as exhibits to the Notice.<sup>218</sup>

191. Second, Respondent argues that the resolutions granting exploration licenses and registering PRC's investments do not constitute "investment authorizations" within the meaning of CAFTA.<sup>219</sup> As is so often the case in Respondent's Preliminary Objection, a review of the text of CAFTA and relevant authorities (including El Salvador's Investment Law) demonstrates once again that Respondent's argument is utterly devoid of merit.

192. CAFTA Article 10.16.1 sets forth three different types of instruments, the obligations of which can form the basis for a claim under CAFTA. One of the instruments is CAFTA itself, specifically, the obligations set forth in Section A of Chapter 10.<sup>220</sup> Another is an "investment agreement," *i.e.*, a written agreement between a national authority of a Party and a

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<sup>216</sup> See, e.g., Resolutions No. 368-MR and No. 387-MR, Claimant's Exhibit 12, by which ONI authorized the registration of amounts invested by PRES in El Salvador; Resolutions No. 191 and No. 192, Claimant's Exhibit 13, by which MINEC extended PRES's exploration permits in the El Dorado site.

<sup>217</sup> Preliminary Objection, paras. 95-96 (citing Notice of Arbitration, para. 89 and Notice of Intent, para. 3).

<sup>218</sup> Notice of Arbitration, paras. 50-53.

<sup>219</sup> Preliminary Objection, para. 96.

<sup>220</sup> See CAFTA, Articles 10.16.1(a)(i)(A) and 10.16.1(b)(i)(A), Respondent's Authority 1.

covered investment or investor of another Party.<sup>221</sup> The third instrument – an “investment authorization”<sup>222</sup> – was meant to capture those instances where a State authorizes an investor to make investments within the State’s territory, but not through an investment agreement. The idea is that where, as in this case, the State has invited an investor of a Party to invest in the State through an investment authorization – and has conferred rights on the investor, in exchange for its investment – those rights should be enforceable under CAFTA.

193. Article 10.28 of 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>223</sup> Article 10.28 further defines an “investment” as including “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.” A footnote to this definition states:

Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset

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<sup>221</sup> See *id.*, Articles 10.16.1(a)(i)(C) and 10.16.1(b)(i)(C).

<sup>222</sup> See *id.*, Articles 10.16.1(a)(i)(B) and 10.16.1(b)(i)(B); see also *id.*, Article 10.28 (defining “investment authorization”).

<sup>223</sup> *Id.*, Article 10.28. Footnote 14 to this definition provides that “[f]or greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.” The drafters of CAFTA apparently wanted to make clear that certain actions taken by a State would not fall within this definition. For example, courts enforcing competition laws sometimes order a party found to be engaging in anticompetitive conduct to grant to its competitors a license to use the technology (for instance) that is being used in an anticompetitive manner. The footnote therefore indicates, at least indirectly, that licenses granted for reasons other than enforcing laws of general application – *e.g.*, to give a specific licensee the right to explore and develop a mining resource – *do* fall within this definition.

associated with the license, authorization, permit or similar instrument has the characteristics of an investment.<sup>224</sup>

194. As explained in detail *supra* in Sections I(C) and IV(B), and as specifically alleged in the Notice of Arbitration, the exploration licenses at issue conveyed substantial rights under Salvadoran law, including, specifically, the exclusive right to pursue an exploitation concession free from extra-legal changes to the regulatory framework. The resolutions at issue authorized licenses, which constituted covered investments under CAFTA. Hence, these resolutions (and the licenses granted by them) are investment authorizations.

195. Nor is there any question that these resolutions were issued by the “foreign investment authority of a Party.” MINEC is the authority under Salvadoran law charged with responsibility over foreign investment.<sup>225</sup>

196. Similarly, by registering its investments with ONI, a department of MINEC, the Enterprises received investment authorizations from MINEC. Article 17 of the Investment Law specifically requires that foreign investors “must register their investments at the ONI, which shall issue a Credential (“*una Credencial*”) granting the foreign investor status, and identifying the registered investment.” A foreign investor whose investment registrations are accepted at ONI are deemed authorized to do business in El Salvador and to enjoy all the rights and protections of the Investment Law. Article 26 provides that “[e]xisting foreign investment registers at the Ministry of Economy are recognized and their validity accepted, as long as they remain in good standing, for which they will automatically be afforded the guarantees and rights stipulated by this law, except on the subject of disputes arising before enforcement of this

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<sup>224</sup> *Id.*, Article 10.28, n.10.

<sup>225</sup> Investment Law, Article 16, Claimant’s Exhibit 4.

law.”<sup>226</sup> Thus, the resolutions issued by ONI authorizing the registration of PRC’s investments in El Salvador unambiguously constitute investment authorizations.

197. At least one other ICSID tribunal found no difficulty in concluding that similar permits and authorizations constituted “investment authorizations.” In *PSEG Global Inc v. Republic of Turkey*, the claimant invoked the provisions of the United States-Turkey bilateral investment treaty, which, similar to CAFTA, provided that an investment dispute could arise from (1) an investment agreement between a Party and a nation or company of the other Party; (2) an investment authorization granted by a Party’s foreign investment authority; or (3) the rights conferred by the BIT itself.<sup>227</sup> The claimant based its case on all three. The respondent argued that the claimant had never obtained an investment authorization, but the tribunal easily dispensed with that argument. The respondent’s Foreign Investment General Directorate had granted a permit in the form of a “Permission Certificate” to the claimant “to conduct its activities by having equal rights and responsibilities with local institutions acting in the same field.” It broadly allowed the claimant to “plan, construct and operate energy power plants, to exploit mining reservoirs, to trade electric energy and conduct all types of electricity, mining and other activities in accordance with the current related legislation.”<sup>228</sup> The tribunal had no trouble

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<sup>226</sup> *Id.*, Article 26. The Spanish original of this text reads:

Se reconoce la existencia y validez de los registros de inversión extranjera existentes en el Ministerio de Economía, los cuales quedan vigentes, por lo que gozarán automáticamente de las garantías y derechos señalados en esta ley, salvo en materia de controversias surgidas con anterioridad a la vigencia de la presente ley.

<sup>227</sup> *PSEG Global Inc v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction dated 4 Jun. 2004, para. 106 (citing United States-Turkey bilateral investment treaty, Article IV(1)), Claimant’s Authority 28.

<sup>228</sup> *Id.* para. 117 (quoting Permission Certificate No. 6014, 5 Jul. 1999).



concluding that the permit constituted an “authorization to invest” duly given by respondent’s foreign investment authority.<sup>229</sup>

198. Similarly, there is no question that the resolutions issued by ONI authorizing the capital invested by PRC in El Salvador, and the resolutions issued by MINEC allowing PRES to develop exploration activities in the country, constitute investment authorizations under CAFTA.<sup>230</sup> But that is not even the question before the Tribunal at this juncture of the case. Rather, the question is whether Respondent has met the burden of demonstrating that PRC’s claims with respect to investment authorizations are, as a matter of law, claims for which an award in favor of the claimant may be granted. Respondent has once again failed to meet that burden.

199. In sum, the Tribunal should reject all of Respondent’s arguments that PRC has not “adequately pled” its other CAFTA claims.

**VI. RESPONDENT’S ARGUMENT THAT THE TRIBUNAL IS NOT COMPETENT TO HEAR PRC’S CLAIMS UNDER THE INVESTMENT LAW IS FRIVOLOUS**

200. Respondent’s argument that the Tribunal is not competent to hear PRC’s claims is the only argument in its Preliminary Objection brought solely under Article 10.20.5. Article 10.20.5 provides that “any objection that the dispute is not within the tribunal’s competence” may be brought on an expedited basis, along with objections under Article 10.20.4.

201. Much has been written about whether “competence” and “jurisdiction,” as used in investor-state arbitration, are distinct terms. According to Professor Schreuer, to the extent that

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<sup>229</sup> *Id.* para. 118.

<sup>230</sup> *See, e.g.*, Resolutions No. 368-MR and No. 387-MR, Claimant’s Exhibit 12, by which ONI authorized the registration of amounts invested by PRES in El Salvador; Resolutions No. 191 and No. 192, Claimant’s Exhibit 13, by which MINEC extended PRES’s exploration permits in the El Dorado site.

they are distinct, “the distinction is of little consequence” and “[t]he two terms are frequently used interchangeably.”<sup>231</sup> Ultimately, the issue of a tribunal’s competence (like that of its jurisdiction) goes to the parties’ consent, *i.e.*, the particular types of claims or disputes that the parties have consented to submit to the arbitral tribunal.<sup>232</sup> Here, the parties have consented to ICSID arbitration both under CAFTA and El Salvador’s Investment Law.

202. CAFTA, Article 10.17.1 states:

Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

Article 10.16.1 provides that an investor may submit a claim alleging that a respondent has breached (1) an obligation under Section A of CAFTA Chapter 20; (2) an investment authorization; or (3) an investment agreement. Under Article 10.16.3, the claimant has several choices of where to submit a claim for arbitration, including ICSID arbitration or arbitration under UNCITRAL Rules.

203. Similarly, the Investment Law provides:

In the case of disputes arising among foreign investors and the State, regarding their investments in El Salvador, the investors may submit the controversy to:

The International Center for Settlement of Investment Disputes (ICSID), in order to settle the dispute by conciliation and arbitration, in accordance with the Convention on Settlement of

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<sup>231</sup> SCHREUER, *THE ICSID CONVENTION* at 532, Claimant’s Authority 41. In the context of the ICSID Convention, Professor Schreuer writes that “the word ‘jurisdiction’ refers to the requirements set out in Article 25, which are conditional for the power of a conciliation commission or arbitral tribunal. ‘Competence’ refers to the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*.” *Id.* at 41:56, at 531. But CAFTA provides for choices of arbitration other than under the ICSID Convention, so it is unclear whether this distinction would have any vitality with respect to the word “competence” as used in CAFTA, or whether such a distinction would have any practical consequence.

<sup>232</sup> See, e.g., Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INT’L INV. L.* 831 (Muchlinski et. al. eds. 2008), Claimant’s Authority 40.

Investment Disputes Among States and Citizens of Other States  
(ICSID Convention).<sup>233</sup>

204. Thus, by ratifying CAFTA and enacting the Investment Law, Respondent provided its consent to arbitrate claims under both CAFTA and the Investment Law before this Tribunal. By submitting its Notice of Arbitration asserting claims under both CAFTA and the Investment Law, Claimant has provided its consent to arbitrate the claims before this Tribunal. Claimant has not waived its right to arbitrate claims under CAFTA or under the Investment Law.

205. It is not entirely clear whether Respondent's argument is that CAFTA somehow bars claims for which the basis of consent is an instrument other than CAFTA, or whether PRC has waived its right to assert claims under the Investment Law, or both. But in either or both instances, Respondent's arguments are baseless.

206. Respondent asserts that the Tribunal lacks competence to hear PRC's claims under El Salvador's Investment Law, based on what Respondent calls the "exclusivity requirement in CAFTA."<sup>234</sup> Respondent contends that PRC's assertions of claims under the Investment Law in this arbitration 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."<sup>235</sup> Not only that, Respondent argues, but it would expose the Respondent to "double jeopardy."<sup>236</sup> According to

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<sup>233</sup> Investment Law, Article 15, Claimant's Authority 4.

<sup>234</sup> Preliminary Objection, para. 97.

<sup>235</sup> *Id.*, para 107 (emphasis added).

<sup>236</sup> *Id.*, para. 108. As far as PRC is aware, "double jeopardy" is a common law and constitutional concept relating to criminal prosecutions, which has no place in an investor-state arbitration brought under CAFTA and El Salvador's Investment Law. *See* BLACK'S LAW DICTIONARY AT 440 (defining "Double jeopardy" as a "[c]ommon-law and constitutional . . . prohibition against a second prosecution

(continued...)

Respondent, the “exclusivity requirement 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,” and that, therefore, the Tribunal should dismiss all “non-CAFTA” claims from this case.<sup>237</sup>

207. Once again, Respondent’s arguments demonstrate a remarkably tenuous relationship to the plain meaning of the words used in CAFTA, not to mention basic legal principles. To begin with, it is a basic principle of investor-state arbitration that cases may be based on more than one instrument of consent. According to Professor Hirsch, consent may be ascertained

- a. on the contractual level, in the investment agreement between the host state and the private investor;
- b. in the internal legislation of the host state;
- c. in international treaties between the host state and other states (usually, in a bilateral treaty with the home state of the private investor).<sup>238</sup>

As Professor Hirsch further observed: “[I]n many instances, a number of legal levels [of consent] will be involved in any agreement to arbitrate.”<sup>239</sup>

208. Indeed, there are numerous cases in which a single investor-state arbitration proceeding has been predicated on more than one type of consent. For example, in *Rumeli v. Kazakhstan*, the tribunal found it had concurrent jurisdiction under both the relevant BIT and

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after a first trial for the same offense”), Claimant’s Authority 42. If Respondent has a basis for asserting otherwise, it does not share it with the Tribunal.

<sup>237</sup> Preliminary Objection, para. 97.

<sup>238</sup> MOSHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES* 48 (1994), Claimant’s Authority 37.

<sup>239</sup> *Id.*

under the Kazakhstan Foreign Investment Law.<sup>240</sup> In *Duke v. Ecuador*, the tribunal considered two sets of claims, one under Ecuadorian law in relation to an arbitration clause in a Power Purchase Agreement, the other under the applicable BIT. As the tribunal in that case concluded, “there is no reason to rule out reliance upon different bases of jurisdiction for different claims brought in the same ICSID arbitration . . . .”<sup>241</sup>

209. To depart from this basic principle, of which the drafters of CAFTA were no doubt aware, would require clear and plain language in the treaty. But there is no such language in the treaty that remotely supports Respondent’s theory.

210. Respondent’s entire argument, and its invocation of a CAFTA “exclusivity requirement,” is based on Article 10.18.2. Respondent contends that, pursuant to Article 10.18.2, a claimant waives all “non-CAFTA” claims in pursuing a CAFTA case. But, like so many of its other contentions, Respondent’s position misconstrues the law. In fact, Article 10.18.2 provides only that a claimant waives its right to pursue “any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16” “*before any administrative tribunal or court*” or under “*other* dispute settlement procedures.”<sup>242</sup> Article 10.18.2 states in its entirety:

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

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<sup>240</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 21 Jul. 2008, paras. 331, 336, Claimant’s Authority 29.

<sup>241</sup> *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Arbitration No. ARB/04/19, Award dated 12 Aug. 2008, para. 162, Claimant’s Authority 16. *See also id.* paras. 156-161, 194-197.

<sup>242</sup> CAFTA, Article 10.18.2(b) (emphasis added), Respondent’s Authority 1.

- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- (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.<sup>243</sup>

211. The obvious purpose of this provision is to ensure that duplicative proceedings “with respect to any measure alleged to constitute a breached referred to in Article 10.16” are not pursued before a “local administrative tribunal or court” or under “*other* dispute settlement procedures.” The fact that claims under different legal instruments may be pursued before this Tribunal does not turn this case into “two proceedings related to precisely the same measures,”<sup>244</sup> as Respondent attempts to argue. Nor is there any language suggesting that a claimant waives a right to assert CAFTA and “non-CAFTA” claims in a single proceeding before a single tribunal.

212. Indeed, the plain terms of CAFTA refute the notion that claims under CAFTA must be limited to the claims set forth in the treaty, and that a claimant under CAFTA waives all “non-CAFTA” claims. As set forth above, Article 10.16 provides that a claimant may submit a claim to arbitration, on its own behalf or that of its enterprises, that the respondent has breached:

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<sup>243</sup> (Emphasis added), Respondent’s Exhibit 1.

<sup>244</sup> Preliminary Objection, para. 107.

- an obligation under Section A of CAFTA;
- an investment authorization, or
- an investment agreement.<sup>245</sup>

Thus, a claimant could plainly bring a claim that the respondent had breached an obligation under Section A of CAFTA *and* a provision of an investment agreement. Similarly, under the express terms of Article 10.16.1, PRC can bring a claim that Respondent breached obligations under Section A and the terms of the investment authorizations that the Enterprises received from MINEC. As explained above, under El Salvador’s Investment Law, Claimant registered its investments with ONI, and as a result, “automatically enjoy[s] the guarantees and rights stipulated by” the Investment Law,<sup>246</sup> including its provisions guaranteeing equal protection (Article 5), non-discrimination (Article 6), and compensation for expropriation (Article 8).<sup>247</sup>

213. Indeed, as Professor Schreuer writes, consent to ICSID jurisdiction is often given through host State legislation, in which the state makes a unilateral offer to arbitrate (subject, perhaps, to certain conditions, *e.g.*, registration with the foreign investment office), and which the investor perfects through the submission of a notice of arbitration.<sup>248</sup> Professor Schreuer specifically cites El Salvador’s Investment Law as an example of such host State legislation.<sup>249</sup>

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<sup>245</sup> See CAFTA, Article 10.16.1(a) and 10.16.1(b), Respondent’s Authority 1.

<sup>246</sup> Investment Law, Article 26, Claimant’s Authority 4.

<sup>247</sup> See Notice of Arbitration, para. 90.

<sup>248</sup> SCHREUER, THE ICSID CONVENTION at 196-205, Claimant’s Authority 41.

<sup>249</sup> *Id.* 25:391, at 195 (citing *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 Aug. 2006). In *Inceysa*, the tribunal described El Salvador’s Investment Law as a “unilateral offer to accept the jurisdiction of [ICSID] made by the Salvadoran State in its Investment Law.” *Id.* para. 258. However, the tribunal held that to accept that offer, the investor must comply with Salvadoran law, which the investor in *Inceysa* failed to do by obtaining the contract at issue through fraud, forgery and corruption. *Id.* paras. 258-264.

214. To the extent that an investor can waive its right to arbitrate under an instrument of consent, such as CAFTA or El Salvador's Investment Law, such waiver must be plain and explicit.<sup>250</sup> No such waiver of PRC's right to assert claims under the Investment Law can be discerned anywhere in the text of CAFTA. PRC duly submitted waivers with its Notice of Arbitration (as required by Article 10.18.2(b)) of its right to initiate or continue before any administrative tribunal 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.<sup>251</sup> But PRC did *not* waive its right to assert claims under the Investment Law, along with its claims under Section A of Chapter 10 of CAFTA, in this proceeding before this Tribunal.<sup>252</sup>

215. Respondent also argues that "there is an impermissible identity of measures complained about in the two sets of legal claims."<sup>253</sup> PRC is unaware of any prohibition against different legal claims being asserted with respect to the same measures, and observes that the assertion of different legal claims being asserted with respect to the same measures is commonplace in investor-state arbitration (and numerous other legal settings). To the extent that

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<sup>250</sup> *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Arbitration No. ARB/04/19, Award dated 12 Aug. 2008, para. 159, Claimant's Authority 16. *Aguas del Tunari SA v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, IIC 8, para. 117 (21 Oct. 2005), Claimant's Authority 11.

<sup>251</sup> See Notice of Arbitration, Exhibit 1.

<sup>252</sup> Respondent's assertion that this arbitration must be governed through the "exclusive use of the CAFTA procedures" (Preliminary Objection, para. 20) is misleading. CAFTA Article 10.16.5 provides that the arbitration rules chosen by Claimant for submission of its claims under Article 10.16.3 "shall govern the arbitration except to the extent modified by this Agreement." Thus, under Article 10.16.5, the ICSID Rules govern this arbitration except to the extent modified by CAFTA. Respondent is also wrong in its assertion that Claimant has taken "the position that it is entitled to use two different sets of procedures in the same arbitration." (Preliminary Objection, para. 16). However, the issue is not as simple as Respondent suggests. For example, the determination of when the ICSID Rules have been modified by the provisions of CAFTA may not always be clear, or at least may be the subject of disagreement between the parties.

<sup>253</sup> Preliminary objection, para. 112.



the Tribunal ultimately concludes that the protections granted under the Investment Law are already covered by Section A of Chapter Ten, then it can take the approach of the tribunal in *Rumeli* (for example), and decide the claims only under Section A.<sup>254</sup> PRC respectfully submits that it is far too early in these proceedings for the Tribunal to have to undertake such a determination.

216. In sum, Respondent's arguments that the Tribunal lacks competence to hear PRC's claims under the Investment Law are entirely without merit.

**VII. THE TRIBUNAL SHOULD AWARD PRC ITS COSTS AND ATTORNEYS' FEES INCURRED IN OPPOSING RESPONDENT'S FRIVOLOUS PRELIMINARY OBJECTION**

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217. The salutary purpose of a Preliminary Objection under CAFTA Article 10.20.4 and/or 10.20.5 is to provide an expedited means to dispose of frivolous claims, so that respondents do not have to spend time and money defending claims that are so lacking in legal merit that they can and should be disposed of on the face of the notice of arbitration. But the corollary is that respondents may not seek to impose delay and expense through the submission of a frivolous Preliminary Objection. Article 10.20.6 provides:

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>255</sup>

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<sup>254</sup> *Rumeli*, para. 336 ("the Tribunal has reached the conclusion that since the protection granted to foreign investors by the FIL [*i.e.*, the Foreign Investment Law] is fully covered by the provisions of the BIT, it needs not refer to it to decide the claims submitted by the parties in this arbitration."), Claimant's Authority 29.

<sup>255</sup> (Emphasis added).

218. When an award of costs and attorney's fees is requested by a claimant, therefore, the Tribunal must (*i.e.*, "shall") consider the objection was frivolous. As stated above, "frivolous" may be defined as "manifestly without legal merit" or "patently unmeritorious."<sup>256</sup> The concept of frivolity, in this context, also includes the notion that the claim was brought solely to impose expense or to cause delay.<sup>257</sup> There is no question that Respondent's Preliminary Objection falls squarely within these standards.

219. The arguments advanced by Respondent that are manifestly without legal merit include (without limitation):

- the argument that Respondent's 273 pages of extrinsic evidence and accompanying factual allegations constitute "undisputed facts," especially when those allegations are contradicted by correspondence included among the 273 pages (*e.g.*, Ms. Navas's 4 December 2006 letter);
- the argument that Respondent's proffered evidence constitute "undisputed facts," when Respondent feels it necessary to make unsupported allegations that Ms. Navas's 4 December 2006 letter was "retrieved" and "withdrawn" in an attempt to explain why the letter does not "really" contradict its other assertions;
- the argument that complex issues of Salvadoran regulatory law, and whether Claimant's submissions to Salvadoran regulatory agencies complied with Salvadoran regulatory requirements, could be decided in a Preliminary Objection that must be determined as a matter of law on an expedited basis, with the Claimant's allegations assumed to be true;

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<sup>256</sup> See, *e.g.*, *Trans-Global*, paras. 83-93, 105, Respondent's Authority 5.

<sup>257</sup> BLACK'S LAW DICTIONARY at 601, Claimant's Authority 42.

- the argument that Respondent’s proffered evidence and factual allegations could be used to “rebut” Claimant’s allegations that it complied with all of the applicable Salvadoran regulatory requirements, when, under Article 10.20.4(c), a tribunal must (“shall”) “assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration”;
- the argument that, as a matter of law and “undisputed fact,” “defects” in Claimant’s applications caused the loss of its investments in El Salvador, while ignoring Claimant’s allegations that the Government imposed a *de facto* ban on mining;
- the argument that CAFTA Article 10.16 requires a claimant to make a “showing” of liability, causation, and damages, when the word actually used in the article requires Claimant merely to “claim” liability, causation, and damages;
- the argument that Claimant was required to produce “evidence” with its Notice of Arbitration to support its allegations that it complied with Salvadoran regulatory requirements; and
- the argument that Claimant is trying to pursue “two proceedings” that would expose Respondent to “double-jeopardy” by virtue of asserting claims under both CAFTA and El Salvador’s Investment Law, and that accordingly the Tribunal lacks competence to hear PRC’s claims under the Investment Law.

220. These arguments are so far removed from the text of CAFTA and from established legal principles that it is impossible that any reasonable person (let alone Respondent’s experienced counsel) could believe that they have *any* legal merit. Whether taken

individually or as a whole, the arguments are patently frivolous, and cannot have been offered for any reason other than to delay the proceedings and impose cost on Claimant.

221. And indeed they have imposed cost. That the arguments offered by Respondent in its Preliminary Objection are so fact-intensive is part of what makes it completely frivolous in the context of an expedited proceeding whose purpose is to assess whether claims in a notice of arbitration (and assumed to be true) may, as a matter of law, support an award. But that they are fact-intensive has also made them expensive to investigate and respond to.

222. As stated at the outset, the fact that this is apparently the first time in which a Preliminary Objection under Article 10.20.4 has been made, and the first time that the expedited procedure of 10.20.5 has been invoked with respect to a Preliminary Objection under Article 10.20.4, should not dissuade the Tribunal from awarding PRC its costs and fees. Article 10.20.6 – which provides for an award of attorney’s fees and costs in “opposing” a Preliminary Objection that is “frivolous” – must also be read in light of CAFTA’s object and purpose, which included the creation of “effective procedures . . . for the resolution of disputes.”<sup>258</sup> In order to promote effective procedures – *i.e.*, procedures in which respondents do not routinely file a Preliminary Objection in order to add an extra layer of delay and expense to arbitration under CAFTA – the Tribunal should send a strong message that frivolous objections such as those submitted by Respondent here will not be tolerated.

223. The Tribunal should award PRC the attorney’s fees and arbitration costs expended in responding to this Preliminary Objection. In addition, to the extent Respondent decides to put forward a further objection to the Tribunal’s jurisdiction or competence, any such

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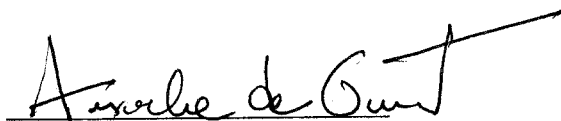
<sup>258</sup> CAFTA, Article 1.2.1(f), Claimant’s Authority 8.

objection should be joined to the merits of the dispute, so as to avoid any further delay of Claimant's case.<sup>259</sup>

### VIII. CONCLUSION

224. For the reasons stated above, the Tribunal should reject the Preliminary Objection asserted by Respondent; award Claimant its attorneys' fees and arbitration costs in opposing the objections; enter a procedural order for concluding the remainder of the case in a single phase; and grant such other relief as counsel may advise and that the Tribunal may deem appropriate.

Respectfully submitted,



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26 February 2010

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<sup>259</sup> See *Railroad Development Corp.*, at para. 44 (“the use of the expedited procedure as just an additional layer would hardly fit with the stated objective of CAFTA to create effective procedures for the resolution of dispute”), Respondent’s Authority 6.