

**IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE  
FOR SETTLEMENT OF INVESTMENT DISPUTES (“ICSID”)  
BROUGHT UNDER THE DOMINICAN REPUBLIC - CENTRAL AMERICA-UNITED  
STATES FREE TRADE AGREEMENT (“CAFTA”) AND THE INVESTMENT LAW OF  
EL SALVADOR  
(ICSID CASE NO. ARB/09/12)**

**BETWEEN:**

**PAC RIM CAYMAN LLC**

*Claimant*

**v.**

**THE REPUBLIC OF EL SALVADOR**

*Respondent*

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**AWARD**

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***THE TRIBUNAL:***

**Professor Dr. Guido Santiago Tawil;  
Professor Brigitte Stern; and  
V.V.Veeder Esq (President)**

***ICSID Tribunal Secretary:*  
Marco Tulio Montañés-Rumayor**

*Date of dispatch to the Parties: 14 October 2016*

**REPRESENTATION OF THE PARTIES**

Pac Rim Cayman LLC  
Mr R. Timothy McCrum  
Mr Ian Laird  
Mr George Ruttinger  
Ms Ashley Riveira  
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Republic of El Salvador  
Mr Douglas Meléndez  
Attorney General of the Republic of El  
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## *List of Selected Legal Materials*

### ***Treaties:***

The Dominican Republic-Central America-United States Free Trade Agreement of 2004 (“CAFTA”)

The ICSID Convention on the Settlement of Investment Disputes of 1965 (“ICSID Convention”)

The Vienna Convention on the Law of Treaties of 1969 (“Vienna Convention”)

### ***Salvadoran Laws:***

Constitution of the Republic of El Salvador (1983)

Investment Law, Legislative Decree No. 732, 14 October 1999

Mining Law, Legislative Decree No. 544, 14 December 1995, amended by Legislative Decree No. 475, 11 July 2001

Regulations of the Mining Law and its Amendments, Legislative Decree No. 47, 20 June 2003

Civil Code of El Salvador, Un-numbered Decree, published in the Official Gazette No. 85, Book 8, 14 April 1860, amended by Decree No. 512

### ***Decisions, Awards and Judgments:***

*ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No. ARB/03/16), Award (2 October 2006)

*Alan Craig v Ministry of Energy of Iran, et al.*, Award No. 71-34 6-3, (2 September 1983)

*Antoine Biloune, Marine Drive Complex Ltd. v Ghana Investments Centre, the Government of Ghana*, Award on Damages and Costs (30 June 1990)

*Autopista Concesionada de Venezuela, C.A. v Republic of Venezuela*, (ICSID Case No. ARB/00/05), Award (23 September 2003)

*Bernstein of Leigh v Skyviews & General Ltd*, [1978] 1 QB 479

*Bocardo SA v Star EnergyUK Onshore Ltd* [2011] 1 AC 380

*Case Concerning The Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962, 1962 ICJ Reports 101

*Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, Second Phase, 5 Feb. 1970, ICJ Reports 1970

*Československa obchodní banka A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction (1 December 2000)

*Chevron & Texaco v Ecuador*, UNCITRAL, Interim Award (1 December 2008)

*CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003)

*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, and Dissenting Opinion of G. Abi-Saab (10 March 2014)

*Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006)

*Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (12 August 2008)

*Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008)

*Electrabel S.A. v Hungary*, ICSID Case No. ARB 07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012)

*Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000)

*Gentini Case, Mixed Claims Comm. (Italy-Venezuela)*, 1903, 10 RIAA 551-561

*Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (3 July 2008)

*Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006)

*In The Matter of The Railway Land Arbitration (Singapore v Malaysia)* PCA Case No. 2012-01, Award (30 October 2014)

*Ioannis Kardassopoulos v. Georgia*, ICSID Case ARB/05/18, Decision on Jurisdiction (6 July 2007)

*Land Island and Maritime Frontier Dispute (El Salvador v Honduras)*, 1990 I.C.J. Reports 92

*LG&E Capital Corp., and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006)

*M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007)

*Middle East Cement Shipping & Handling Co SA v Egypt*, ICSID Case No. ARB/99/6, Award, (12 April 2002)

*Pious Fund Case (United States of America v Mexico)*, Award (14 October 1902)

*Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Second Decision on Objections to Jurisdiction, Award (18 May 2010)

*Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992)

*The Sabotage Cases, Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (USA) v Germany*, Decision (15 December 1933)

*Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012)

*United States v. Causby*, 328 US 256 (1946)

*Wena Hotels Ltd. v Arab Republic of Egypt*, ICID Case No. ARB/98/4, Award (8 December 2000)

*Wena Hotels Limited. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment of the Arbitral Award (5 February 2002)



## PART I: THE ARBITRATION

### A. *The Parties*

- 1.1. ***The Claimant:*** The named Claimant is Pac Rim Cayman LLC (also called “Pac Rim Cayman” or “PRC” and, occasionally, “Pac Rim”). It is a legal person organised under the laws of Nevada, USA, with its principal office at 3545 Airway Drive, Suite 105, Reno, Nevada 89511, USA. The Claimant was wholly owned by Pacific Rim Mining Corporation (also called “Pacific Rim” or “PRMC” and also, confusingly, “Pac Rim”). Pacific Rim is or was a legal person organised as a public company under the laws of Canada. At the beginning of these arbitration proceedings, the Claimant advanced several claims against the Respondent both on its own behalf and on behalf of its subsidiary companies, collectively described (below) as the “Enterprises.”
- 1.2. For ease of reference, save where the context requires otherwise, the Claimant and its parent company Pacific Rim are collectively described as “Pac Rim.”
- 1.3. ***The Claimant’s “Enterprises”:*** The “Enterprises” are legal persons organised under the laws of the Respondent, namely: (i) Pacific Rim El Salvador, Sociedad Anónima de Capital Variable (also called “PRES”), with its principal office at 5 Avda. Norte, No. 16, Barrio San Antonio, Sensuntepeque, Cabañas, El Salvador; and (ii) Dorado Exploraciones, Sociedad Anónima de Capital Variable (also called “DOREX”), with its principal office at the same address. PRES claims to be the owner of certain rights within the mining areas known as “El Dorado Norte”, “El Dorado Sur” and “Santa Rita” in El Salvador; and DOREX claims to be the owner of certain rights within the mining areas known as “Zamora/Cerro Colorado”, “Pueblos”, “Guaco” and “Huacuco” in El Salvador.
- 1.4. ***The Claimant’s Legal Representatives:*** Prior to 2 March 2012, the Claimant had designated its legal representatives as Arif H. Ali, Alexandre de Gramont, R. Timothy McCrum and Theodore Posner Esqs, all of Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, USA. By letter dated 2 March 2012, the Claimant advised the Secretary of the Tribunal that Messrs. Ali, de Gramont and Posner had changed law firm, and it submitted a Power of Attorney providing that the legal representatives for the Claimant henceforth be designated as Arif H. Ali, Alexandre de

Gramont and Theodore Posner, Esqs. of Weil, Gotshal & Manges LLP, 1300 Eye Street, N.W., Suite 900, Washington, D.C. 20005, USA; and R. Timothy McCrum, Ian A. Laird, Kassi D. Tallent, and Ashley R. Riveira of Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, USA. At the time of this Award, the Claimant's principal legal representatives as counsel were Mr McCrum, Mr Laird, Ms Riveira and Mr Ruttinger.

- 1.5. ***The Respondent:*** The Respondent is the Republic of El Salvador. Its executive branch includes the President of the Republic and two major ministries dealing with the present case: the Ministry of the Environment and Natural Resources, known as "MARN" (*Ministerio de Medio Ambiente y Recursos Naturales*); and the Ministry of the Economy, known as "MINEC" (*Ministerio de Economía*). The latter ministry included the Bureau of Hydrocarbons and Mines, known as the "Bureau of Mines" or the "Bureau" (*Dirección General de Hidrocarburos y Minas*).
- 1.6. ***The Respondent's Legal Representatives:*** The Respondent's legal representatives are Mr Douglas Meléndez, Attorney General of El Salvador; and Mr Aquiles Parada, Deputy Attorney General, Fiscalía General de la República, Edificio Primavera, Urbanización Madreselva 3, Antiguo Cuscatlán, La Libertad, El Salvador. Prior to 10 March 2012, the Respondent had also designated its legal representatives as Messrs Derek C. Smith, Luis Parada, Tomás Solís and Ms Erin Argueta, all of Dewey & LeBoeuf LLP, 1101 New York Avenue, N.W., Suite 1100, Washington D.C. 20005, USA. By letter dated 10 May 2012, the Respondent submitted a Power of Attorney providing that Messrs Smith and Parada, and Ms Argueta had moved to the law firm of Foley Hoag LLP, 1875 K Street N.W. Suite 800, Washington, D.C. 20006, USA; but that they continued to represent the Respondent in this arbitration. At the time of this Award, the Respondent's principal legal representatives were Mr Parada, Mr Smith and Ms Argueta, Foley Hoag LLP, 1717 K Street, N.W., Washington, D.C. 20006-5350.
- 1.7. This Award is the third major decision made by the Tribunal in these arbitration proceedings, following (i) the Tribunal's Decision of 2 August 2010 regarding the Respondent's Preliminary Objections; and (ii) the Tribunal's Decision of 1 June 2012 on Jurisdiction. Whilst this arbitration's procedure is summarised below, further reference

should be made to these two earlier decisions for the full account of this arbitration's procedural history, for which purpose both are incorporated by reference into this Award.

***B. The Arbitration Agreement***

1.8. This arbitration is taking place, as invoked by the Claimant, under the arbitration agreement provided by Article 15(a) of the Respondent's Investment Law.

1.9. Article 15(a) of the Investment Law provides (as translated by the Claimant from the original Spanish into English), in relevant part:

*“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: (a) The International Centre for Settlement of Investment Disputes (ICSID), in order to settle the dispute by ... arbitration, in accordance with the Convention on Settlement of Investment Disputes Between States and Investors of Other States (ICSID Convention) ...”*

1.10. The original Spanish text of Article 15 of the Investment Law provides, more fully:

*“En caso que surgieren controversias ó diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los tribunales de justicia competentes, de acuerdo a los procedimientos legales. En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en EI Salvador, los inversionistas podrán remitir la controversia: (a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI); ....”*

1.11. The Claimant is and has been since 13 December 2007 a national of a Contracting State to the ICSID Convention, namely the United States of America. The Respondent is and has been at all material times a Contracting State to the ICSID Convention.

### *C. The Arbitral Procedure*

- 1.12. On 30 April 2009, Pac Rim Cayman LLC as the Claimant submitted a Notice of Arbitration pursuant to Article 36 of the ICSID Convention and Article 15(a) of El Salvador's Investment Law (the "Notice" or "Request"). It also invoked CAFTA.
- 1.13. On 15 June 2009, the Acting Secretary-General of ICSID registered the Request, as supplemented by letter of 4 June 2009, in accordance with Article 36(3) of the ICSID Convention. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute a tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
- 1.14. The Claimant appointed as arbitrator by its Request: Professor Guido Santiago Tawil of M&M Bomchil, Suipacha 268, 12th Floor, C1008AAF, Buenos Aires, Argentina.
- 1.15. The Respondent appointed as arbitrator: Professor Brigitte Stern, 7 rue Pierre Nicole, Paris, 75005, France.
- 1.16. The Parties, pursuant to ICSID Convention Article 37(2)(a) and CAFTA Article 10.19, agreed to appoint as the President of the Tribunal: V.V. Veeder Esq of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.
- 1.17. On 18 November 2009, the Tribunal was formally constituted under the ICSID Convention, the Investment Law and CAFTA.
- 1.18. ***Preliminary Objections:*** On 4 January 2010, the Respondent filed Preliminary Objections pursuant to CAFTA Articles 10.20.4 and 10.20.5 (the "Preliminary Objections").
- 1.19. On 12 January 2010, a preliminary meeting was held with the Tribunal and the Parties (by telephone conference-call) to establish (*inter alia*) the time-table for addressing the Preliminary Objections on an expedited basis, the proceedings on the merits being suspended pursuant to CAFTA Articles 10.20.4(b) and 10.20.5.
- 1.20. On 26 February 2010, the Claimant submitted its Response to the Preliminary Objections (the "Response to Preliminary Objections"), in accordance with the procedural timetable fixed by the Tribunal following the preliminary meeting, as amended by order of the Tribunal.

- 1.21. On 31 March 2010, the Respondent submitted its Reply to the Response to Preliminary Objections (the “Reply on Preliminary Objections”).
- 1.22. On 13 May 2010, the Claimant submitted its Rejoinder to the Reply on Preliminary Objections (the “Rejoinder on Preliminary Objections”).
- 1.23. As requested by the Parties pursuant to CAFTA Article 10.20.5, the oral hearing on Preliminary Objections took place at the World Bank, Washington D.C., USA over two days on 31 May and 1 June 2010. It was recorded by English and Spanish stenographers; and, as expressly required by CAFTA Article 10.21(2), this hearing was made publicly available, contemporaneously broadcast by live-stream, in both English and Spanish languages, on ICSID’s website. It remains available on ICSID’s web site.<sup>1</sup> Present at this hearing were:

*The Tribunal:*

Mr V. V. Veeder  
Professor Brigitte Stern  
Professor Guido Santiago Tawil

*The ICSID Secretary to the Tribunal:*

Mr Marco Tulio Montañés-Rumayor

*The Claimant:*

Mr Tom Shrake	Pac Rim Cayman LLC
Mr Arif H. Ali	Crowell & Morning LLP
Mr Alexandre de Gramont	Crowell & Morning LLP
Mr R. Timothy McCrum	Crowell & Morning LLP
Mr Theodore Posner	Crowell & Morning LLP
Ms Ashley R. Riveira	Crowell & Morning LLP
Ms Érica Franzetti	Crowell & Morning LLP
Mr Ian Laird	Crowell & Morning LLP
Mr Luis A. Medina	Rusconi, Valdez, Medina & Asociados

*The Respondent:*

Mr Derek Smith	Dewey & LeBoeuf
Mr Aldo Badini	Dewey & LeBoeuf

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<sup>1</sup> See ICSID’s web-site: <http://icsid.worldbank.org>.

Mr Luis Parada	Dewey & LeBoeuf
Mr Tomás Solís	Dewey & LeBoeuf
Ms Erin Argueta	Dewey & LeBoeuf
Ms Paula Corredor	Dewey & LeBoeuf
Ms Mary Lewis	Dewey & LeBoeuf
Mr Eric Stanculescu	Dewey & LeBoeuf
Mr Aquiles Delgado	Consortium Centro América Abogados
Mr Oscar Samour	Consortium Centro América Abogados
Mr Benjamín Pleités	Secretary-General Office of the Attorney General of El Salvador
Mr Daniel Ríos	Legal Adviser Ministry of Economy of El Salvador
Ms Arely Elizabeth Mejía	Ministry of Economy of El Salvador
Ms Celia Beatriz Lizama	Ministry of Economy of El Salvador
Mr Enilson Solano	Embassy of El Salvador in Washington, D.C.
Mr Coalter Lathrop	Sovereign Geographic
Ms Stephanie McDonnell	DOAR Litigation Consulting
Mr Doug Briggs	DOAR Litigation Consulting
Ms Mimi Le	DOAR Litigation Consulting

*Non-Disputing Parties:*

Ms Kimberley Claman	USA Department of State
Mr Jeffrey Kovar	USA Department of State
Ms Lisa Grosh	USA Department of State
Mr Mark Feldman	USA Department of State
Ms Jennifer Thornton	USA Department of State
Ms Danielle Morris	USA Department of State
Mr Neale Bergman	USA Department of State
Mr John Balonze Balouziyeh	USA Department of State
Mr Hugh Carlson	USA Department of State

- 1.24. On 10 June 2010, the Tribunal issued an order concerning *amicus curiae* submissions. The order (which was made available on ICSID’s website) provided that:

“In accordance with Article 10.20.3 of the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA-US) and ICSID Arbitration Rule 37(2), the Tribunal invites any person or entity that is not a Disputing Party in these arbitration proceedings or a Contracting Party to DR-CAFTA-US to make a written application to the Tribunal for permission to file submissions as an *amicus curiae*.

All such written applications should:

- (1) be emailed to ICSID at [icsidsecretariat@worldbank.org](mailto:icsidsecretariat@worldbank.org) by Wednesday, 16 June 2010;
- (2) in no case exceed 20 pages in all (including the appendix described below);
- (3) be made in one of the languages of these proceedings, i.e. English or Spanish;
- (4) be dated and signed by the person or by an authorized signatory for the entity making the application verifying its contents, with address and other contact details;
- (5) describe the identity and background of the applicant, the nature of any membership if it is an organization and the nature of any relationships to the Disputing Parties and any Contracting Party;
- (6) disclose whether the applicant has received, directly or indirectly, any financial or other material support from any Disputing Party, Contracting Party or from any person connected with the subject-matter of these arbitration proceedings;
- (7) specify the nature of the applicant's interest in these arbitration proceedings prompting its application;
- (8) include (as an appendix to the application) a copy of the applicant's written submissions to be filed in these arbitration proceedings, assuming permission is granted by the Tribunal for such filing, such submissions to address only matters within the scope of the subject-matter of these arbitration proceedings; and
- (9) explain, insofar as not already answered, the reason(s) why the Tribunal should grant permission to the applicant to file its written submissions in these arbitration proceedings as an *amicus curiae*.

Pursuant to CAFTA Article 10.21.2, a webcast of the oral hearing on preliminary objections held on 31 May and 1 June 2010, is available at the Centre's website."

- 1.25. No such submissions were received under CAFTA Article 10.20(2); and no applications were received by the Tribunal pursuant to its order made under CAFTA Article 10.20(3) and ICSID Arbitration Rule 37(2).

- 1.26. ***Decision on Jurisdictional Objections:*** On 2 August 2010, the Tribunal issued its Decision on the Respondent’s Preliminary Objections. In Part X of the Decision (paragraph 266), the Tribunal decided that:
- (1) As to the Respondent’s Preliminary Objections under CAFTA Article 10.20.4, these objections were not granted by the Tribunal;
  - (2) As to the Respondent’s Objection under CAFTA Article 10.20.5, this objection was not granted by the Tribunal;
  - (3) As to costs, the Tribunal there made no order under CAFTA Article 10.20.6, whilst reserving all its powers as to orders for costs at the final stage of these arbitration proceedings; and
  - (4) As to all other matters, the Tribunal retained its full powers to decide any further matters in these arbitration proceedings, whether by order, decision or award.
- 1.27. ***Further Objections to Jurisdiction:*** On 3 August 2010, the Respondent submitted new objections to jurisdiction under ICSID Arbitration Rule 41(1).
- 1.28. On 1 September 2010, the Tribunal fixed the procedural calendar to address the new objections raised by the Respondent and disputed by the Claimant.
- 1.29. On 15 October 2010, the Respondent submitted its Memorial on its Objections to Jurisdiction (the Respondent’s “Jurisdiction Memorial”).
- 1.30. On 31 December 2010, the Claimant submitted its Counter-Memorial on the Respondent’s Objections to Jurisdiction (the Claimant’s “Jurisdiction Counter-Memorial”).
- 1.31. On 31 January 2011, the Respondent submitted its Reply Memorial on the Claimant’s Jurisdiction Counter-Memorial (the Respondent’s “Jurisdiction Reply”).
- 1.32. On 2 February 2011, the Tribunal invited “any person or entity that is not a Disputing Party to file written submissions in accordance with CAFTA Article 10.20.3 and ICSID Arbitration Rule 37(2).”
- 1.33. On 2 March 2011, the Claimant submitted its Rejoinder Memorial on the Respondent’s Jurisdiction Reply (the Claimant’s “Jurisdiction Rejoinder”).
- 1.34. On 10 April 2011, the Tribunal and the Parties held a pre-hearing conference to discuss the



logistical arrangements for the hearing on jurisdiction.

- 1.35. The oral hearing on the Respondent's further jurisdictional objections took place over three days, from 2 to 4 May 2011, at the World Bank, Washington D.C., USA, recorded by verbatim transcript. The hearing was made publicly available, contemporaneously broadcast by live-stream, in both English and Spanish languages, on ICSID's web site. (It remains available on that web site).<sup>2</sup> The hearing was attended by (*inter alios*) the following:

*The Tribunal:*

Mr V. V. Veeder  
Professor Brigitte Stern  
Professor Guido Santiago Tawil

*The ICSID Secretary to the Tribunal:*

Mr Marco Tulio Montañés-Rumayor

*The Claimant:*

Mr Arif H. Ali	Crowell & Moring
Mr Alexandre de Gramont	Crowell & Moring
Mr R. Timothy McCrum	Crowell & Moring
Mr Theodore Posner	Crowell & Moring
Ms Ashley R. Riveira	Crowell & Moring
Ms Marguerite C. Walter	Crowell & Moring
Ms Kassi Tallent	Crowell & Moring
Mr Timothy Hughes	Crowell & Moring
Ms Maria Carolina Crespo	Crowell & Moring
Ms Christina Ferraro	Crowell & Moring
Mr Stephen Duncan	Crowell & Moring
Ms Jessica Ferrante	Crowell & Moring
Mr Thomas C. Shrake	Pac Rim Cayman LLC
Ms Catherine McLeod-Seltzer	Pac Rim Cayman LLC

*The Respondent:*

Mr Derek Smith	Dewey & LeBoeuf
Mr Aldo Badini	Dewey & LeBoeuf
Mr Luis Parada	Dewey & LeBoeuf

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<sup>2</sup> See ICSID's web-site: <http://icsid.worldbank.org>.

Mr Tomás Solís	Dewey & LeBoeuf
Ms Erin Argueta	Dewey & LeBoeuf
Ms Mary Lewis	Dewey & LeBoeuf
Mr Albert Coto	Dewey & LeBoeuf
Ms Jamihlia Johnson	Dewey & LeBoeuf
Mr Oscar Samour	Consortium Centro América Abogados
Mr Benjamín Pleités	Secretary-General - Office of the Attorney General
Mr Daniel Ríos	Legal Adviser - Ministry of Economy of El Salvador
Mr René Salazar	Director General of Commercial Treaty Administration - Ministry of Economy of El Salvador
Ms Claudia Beltrán	Embassy of El Salvador in Washington, D.C.
Mr Enilson Solano	Embassy of El Salvador in Washington, D.C.
Ms Stephanie McDonnell	DOAR Litigation Consulting
Mr Doug Briggs	DOAR Litigation Consulting
Mr Frank Oliveras	DOAR Litigation Consulting

*Non-Disputing Parties:*

*On behalf of the USA*

Ms Lisa Grosh	USA Department of State - Office of the Legal Adviser
Mr Mark Feldman	USA Department of State - Office of the Legal Adviser
Ms Alicia Cate	USA Department of State - Office of the Legal Adviser
Mr Patrick Pearsall	USA Department of State - Office of the Legal Adviser
Mr David Bigge	USA Department of State - Office of the Legal Adviser
Ms Katharine Kelly	USA Department of State - Office of the Legal Adviser
Ms Karen Kizer	USA Department of State - Office of the Legal Adviser
Mr Lee Caplan	USA Department of State - Office of the Legal Adviser
Mr Jeremy Sharpe	USA Department of State - Office of the Legal Adviser
Mr Gary Sampliner	USA Department of Treasury
Ms Kimberley Claman	USA Trade Representative
Mr Chris Herman	USA Environmental Protection Agency

*On behalf of Costa Rica*

Mr José Carlos Quirce	Ministerio de Comercio Exterior
Mrs. Laura Dachner	Embajada de Costa Rica en Washington, D.C.

- 1.36. Following the jurisdiction hearing, the USA and Costa Rica each filed a written submission as a non-disputing party pursuant to CAFTA Article 10.20.2. Additionally, the Center for International Environmental Law (CIEL), filed an application as a non-disputing party

pursuant to ICSID Arbitration Rule 37(2).

- 1.37. On 10 June 2011, the Respondent and the Claimant respectively submitted their post-hearing written submissions (together with submissions on costs).
- 1.38. On 24 June 2011, the Parties submitted their reply submissions on costs.
- 1.39. **Decision on Jurisdiction:** On 1 June 2012, the Tribunal issued its Decision on Jurisdiction. In Part 7.1 of the Decision, the Tribunal decided that:
- (A) As to the Claimant’s CAFTA Claims:
- (1) the Tribunal dismissed the Respondent’s jurisdictional objections based on the “Abuse of Process” issue;
  - (2) the Tribunal dismissed the Respondent’s jurisdictional objections based on the “Ratione Temporis” issue;
  - (3) the Tribunal accepted the Respondent’s jurisdictional objections based on the “Denial of Benefits” issue; and
  - (4) the Tribunal accordingly declared that the International Centre for Settlement of Investment Disputes (“the Centre”) and this Tribunal had no jurisdiction or competence to decide such CAFTA Claims in these arbitration proceedings pursuant to CAFTA Articles 10.16, 10.17 and ICSID Convention Article 25(1);
- (B) As to the Claimant’s Claims under the Investment Law, the Tribunal dismissed the Respondent’s jurisdictional objections and declared that the Centre and this Tribunal had jurisdiction and competence to decide such Claims in these arbitration proceedings pursuant to ICSID Article 25(1);
- (C) As to Costs, the Tribunal there made no order as to any legal or arbitration costs, whilst specifically reserving in full its jurisdiction and powers as to all orders for costs at the final stage of these arbitration proceedings; and
- (D) As to all other matters, the Tribunal retained in full its jurisdiction and powers generally to decide such matters in these arbitration proceedings, whether by order, decision or award.<sup>3</sup>
- 1.40. **The Claimant’s Pleading:** In the reasons for its Jurisdiction Decision, the Tribunal recorded the Claimant’s pleading at the jurisdiction hearing as regards the accrued date of its claims against the Respondent (being a factor significant for issues of jurisdiction). As

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<sup>3</sup> Jurisdiction Decision, Part 7, page 1.

recorded in paragraph 2.108 of this Jurisdiction Decision, the Tribunal cited the Claimant’s counsel verbatim, as follows: “... *let me be very clear: with respect to our claim for damages, we are only asking for damages as a result of the breach that we became aware of and that we only could have become aware of in – as of March 2008 at the earliest ...*”; and “... *let me just emphasize in response to the Tribunal’s question as to whether the measure at issue is the same for the CAFTA claims and the Investment Law claims, it is. In both cases the measure at issue is the de facto mining ban [of 10 March 2008]. Also, as I said earlier, in both cases, Claimant is alleging damages only from the period from March 2008 forward and not from any earlier period.*”<sup>4</sup> This date of 10 March 2008 as the earliest relevant “measure” for the Claimant’s claims for damages against the Respondent under the Investment Law remains a significant factor material to the merits of such claims in this third phase of the arbitration, to which the Tribunal returns below.

- 1.41. **Merits:** On 21 June 2012, the Tribunal held a procedural meeting with the Parties by telephone conference to fix a timetable for the third “merits” phase of this arbitration.
- 1.42. On 12 October 2012, the Claimant requested an extension of 6 months to file its Memorial on the Merits and Quantum.
- 1.43. On 12 November 2012, the Tribunal granted the Claimant’s request for an extension of time to submit its memorial by 29 March 2013.
- 1.44. On 29 March 2013, the Claimant submitted its Memorial on the Merits and Quantum (the Claimant’s “Memorial”).
- 1.45. On 10 January 2014, the Respondent submitted its Counter-Memorial on the Merits and Quantum (the Respondent’s “Counter-Memorial”).
- 1.46. On 12 April 2014, the Claimant submitted its Reply on the Merits and Quantum (the Claimant’s “Reply”).
- 1.47. On 11 June 2014, the Respondent filed a Rejoinder on the Merits (the Claimant’s “Rejoinder”).

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<sup>4</sup> Jurisdiction Decision, Part 2, page 35, citing the Jurisdiction Hearing Transcript, D3.719 & 729 (see also D3.701).

- 1.48. On 25 July 2014, the Center for International Environmental Law (“CIEL”) submitted an application as a non-disputing party pursuant to ICSID Arbitration Rule 37(2). It was admitted by the Tribunal, as agreed by the Parties subject to their right respectively to file written observations (at the pre-hearing conference on 31 July 2014: see below).
- 1.49. On 31 July 2014, as indicated, the Tribunal held a pre-hearing conference with the Parties. During the conference, the Parties agreed to file written observations on the non-disputing party’s application.
- 1.50. On 2 September 2014, each Party filed its written observations on the non-disputing party’s application of 25 July 2014.
- 1.51. The hearing on the merits was held at the World Bank’s offices in Washington, D.C. from 15 September to 22 September 2014. Unlike the previous two hearings, the Parties did not agree to open the hearing to the public; and the Tribunal had no power or discretion to order otherwise under the Investment Law and the ICSID Convention. Accordingly, the Tribunal confirmed that this third hearing should not be open to the public, pursuant to ICSID Arbitration Rule 32 (2).
- 1.52. Present at the hearing were:

*The Tribunal:*

Mr V. V. Veeder  
Professor Brigitte Stern  
Professor Guido Santiago Tawil

*The ICSID Secretary to the Tribunal:*

Mr Marco Tulio Montañés-Rumayor

*The Claimant:*

Mr Ian Laird	Crowell & Moring LLP
Mr Robert Timothy McCrum	Crowell & Moring LLP
Mr George Ruttinger	Crowell & Moring LLP
Ms Ashley Riveira	Crowell & Moring LLP
Ms Kassi Tallent	Crowell & Moring LLP
Mr Jonathan Kallmer	Crowell & Moring LLP
Mr James Saulino	Crowell & Moring LLP

Mr Eduardo Mathison	Crowell & Moring LLP
Ms Staci Gellman	Crowell & Moring LLP
Ms Virginia Martin	Crowell & Moring LLP
Mr Alex Erines	Crowell & Moring LLP
Mr Stephen Diaz Gavin	Crowell & Moring LLP
Ms Karen Parsons	Crowell & Moring LLP
Ms Mariana Pendas Fernandez	Crowell & Moring LLP
Mr Wil Frank	Legal Technologies
Ms Ericka Colindres	OceanaGold Corporation
Ms Elizabeth Garcia	OceanaGold Corporation
Mr Darren Klinck	OceanaGold Corporation
Ms Liang Tang	OceanaGold Corporation
Mr William Gehlen	OceanaGold Corporation
Mr Thomas Shrake	Pacific Rim Mining Corp
Mr Arturo Fernandois	Pontificia Universidad Católica de Chile/Fernandois & Cía
Mr Neal Rigby	SRK Consulting
Mr Howard Rosen	FTI Consulting
Ms Jennifer Vanderhart	FTI Consulting
Mr Alexander Lee	FTI Consulting
Mr John Williams	Duncan & Allen

*The Respondent:*

Mr Derek Smith	Foley Hoag
Mr Luis Parada	Foley Hoag
Mr Kenneth Figueroa	Foley Hoag
Mr Alberto Wray	Foley Hoag
Ms Erin Argueta	Foley Hoag
Ms Oonagh Sands	Foley Hoag
Ms Christina Beharry	Foley Hoag
Ms Tafadzwa Pasipanodya	Foley Hoag
Ms Gisela Paris	Foley Hoag
Ms Madeleine Rodriguez	Foley Hoag
Ms Anna Toubiana	Foley Hoag
Ms Elizabeth Glusman	Foley Hoag
Ms Kathryn Kalinowski	Foley Hoag
Ms Gabriela Guillen	Foley Hoag
Mr Humberto Saenz	Sáenz y Asociados
Ms Geraldina Mendoza Parker	Sáenz y Asociados
Ms Manuela de la Helguera	Sáenz y Asociados
Mr Benjamín Pleités	Attorney General's Office of El Salvador

Mr Luis Martínez	Attorney General's Office of El Salvador
Mr Edgar Márquez	Attorney General's Office of El Salvador
Mr Roberto Avilés	Attorney General's Office of El Salvador
Mr Mauricio Yanes	Attorney General's Office of El Salvador
Dr. Ramón Iván García	Attorney General's Office of El Salvador
Mr Daniel Ríos	Ministry of Economy of El Salvador
Mr Enilson Solano	Embassy of El Salvador
Ms Claudia Beltrán	Embassy of El Salvador
Mr Hugo César Barrera Guerrero	
Ms Yolanda Mayora de Gavidia	
Ms Gina Mercedes Navas de Hernández	
Mr Silvio Antonio Ticay Aguirre	
Mr José María Ayala Muñoz	
Ms Karla Fratti de Vega	
Mr José Albino Arturo Tinetti Quiteño	
Mr José Roberto Tercero Zamora	
Mr Carlos Alberto Peñate Guzmán	
Mr James Otto	
Mr Bernard Guarnera	Behre Dolbear
Mr Robert Connochie	Behre Dolbear
Mr Baltazar Solano-Rico	Behre Dolbear
Mr Brent Kaczmarek	Navigant
Mr Kiran Sequeira	Navigant
Mr Peter Hakim	Foley Hoag
Ms Stephanie O'Connor	Foley Hoag
Mr Danis Brito	DOAR (Technical Support)
Mr Stuart Dekker	DOAR (Technical Support)
Ms Anna Pomerantseva	Navigant
Mr Ruben Rivas	Navigant
Mr Julio Vega	Local Legal Consultant

- 1.53. On 21 November 2014, the Parties filed their respective post-hearing briefs and submissions on costs.
- 1.54. On 5 December 2014, each Party filed observations on the other's submission on costs.
- 1.55. By letter dated 30 September 2015, the Respondent applied to the Tribunal for permission to adduce newly obtained evidence, namely (as described by the Respondent) a cable of December 2007 from the USA Embassy in El Salvador to the US State Department in the

USA relaying “comments and information provided to US embassy officials by Pacific Rim and Salvadoran government officials.” By letter dated 2 October 2015, having been provided with a copy of the cable by the Respondent, the Claimant took no position regarding the Respondent’s application, save to state that the cable “does not contain material new information”, nor raise any new argument not already raised by the Respondent. The Tribunal reserved at that time its decision on the Respondent’s application to this Award. Whilst the Tribunal has not seen the cable, the Tribunal has concluded that its content, as described by the Respondent, is not sufficiently relevant or material to the Tribunal’s decisions in this Award, nor sufficiently relevant or material to any review of its earlier two Decisions. Accordingly, for these reasons, the Tribunal dismisses this application by the Respondent.

- 1.56. In 2014-2015, these proceedings were significantly delayed as a result of certain health issues affecting one of its members (namely, the Presiding Arbitrator), for which that member here apologises to the Parties.

***D. The Formal Closure of the Proceeding***

- 1.57. Pursuant to ICSID Arbitration Rule 38(1), the Tribunal confirmed the closure of this proceeding by the ICSID Secretariat’s letter dated 1 September 2016.

***E. The Languages of the Award***

- 1.58. Pursuant to paragraph I of the Tribunal’s Procedural Order No. 13, this Award is issued in both the Spanish and English languages.



## PART II: THE PRINCIPAL LEGAL TEXTS

### A. Introduction

- 2.1 For ease of reference later below, the Tribunal sets out in this part the principal legal texts, firstly in the original Spanish and secondly in English translation. Certain of the latter are not agreed by the Parties. Where disputed, the Tribunal has set out the rival translations. Where disputed or not translated, the Tribunal has worked from the original Spanish text and, occasionally as set out below, produced its own translations for citation in the English language version of this Award. The texts cited in this Part are extracts from (b) the Constitution of El Salvador, (c) the Investment Law of El Salvador, (d) the Mining Law of El Salvador, (e) the Mining Regulations of El Salvador; (f) the Civil Code of El Salvador, (g) the ICSID Convention and (h) the ICSID Arbitration Rules.

### B. The Constitution<sup>5</sup>

#### 2.2 Article 1 of the Constitution:

*El Salvador reconoce a la persona humana como el origen y el fin de la actividad del Estado, que está organizado para la consecución de la justicia, de la seguridad jurídica y del bien común.*

*ASIMISMO RECONOCE COMO PERSONA HUMANA A TODO SER HUMANO DESDE EL INSTANTE DE LA CONCEPCION.(12)*

*En consecuencia, es obligación del Estado asegurar a los habitantes de la República, el goce de la libertad, la salud, la cultura, el bienestar económico y la justicia social.*

Respondent's English translation: El Salvador recognizes the human person as the origin and purpose of all activity of the State, which is established for the purpose of the attainment of justice, legal certainty and the common good.

IT ALSO RECOGNIZES A HUMAN PERSON AS ALL HUMAN BEINGS AS OF THE MOMENT OF CONCEPTION. (12)

Consequently, it is the obligation of the State to guarantee the inhabitants of the Republic the enjoyment of liberty, health, culture, economic wellbeing and social justice.

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<sup>5</sup> Translation portions are from Claimant's Legal Authority CLA-1\_translation and Respondent's Legal Authority RL-121(bis) unless otherwise indicated.

2.3 **Article 2 of the Constitution:**

*Toda persona tiene derecho a la vida, a la integridad física y moral, a la libertad, a la seguridad, al trabajo, a la propiedad y posesión, y a ser protegida en la conservación y defensa de los mismos.*

[...]

Disputed English Translations:

Claimant's English translation: Every person has the right to life, physical and moral well-being, liberty, security, work, property and possession, and to be protected in the conservation and defense of the same.

Respondent's English translation: Every person has the right to life, physical and moral integrity, liberty, security, work, property and possession, and to be protected in conservation and defense of the same.

2.4 **Article 11 of the Constitution:**

*Ninguna persona puede ser privada del derecho a la vida, a la libertad, a la propiedad y posesión, ni de cualquier otro de sus derechos sin ser previamente oída y vencida en juicio con arreglo a las leyes; ni puede ser enjuiciada dos veces por la misma causa.*

Respondent's English Translation: No one can be deprived of the right to life, freedom, property and possession, nor of any other rights without first being heard and judged in accordance with the law...

2.5 **Article 22 of the Constitution:**

*Toda persona tiene derecho a disponer libremente de sus bienes conforme a la ley. La propiedad es transmisible en la forma en que determinen las leyes. Habrá libre testamentificación.*

Claimant's English Translation: Every person has the right to dispose freely of his property in accordance with the law. Property may be transferred in the form determined by law. Wills may be freely made.

2.6 **Article 65 of the Constitution:**

*La salud de los habitantes de la República constituye un bien público. El Estado y las personas están obligados a velar por su conservación y restablecimiento.*

*El Estado determinará la política nacional de salud y controlará y supervisará su aplicación.*

Respondent's English Translation: The health of the inhabitants of the Republic constitutes a public good. The State and the people are obligated to see to its conservation and restoration.

The State shall set forth the national health policy and shall control and supervise its implementation.

## 2.7 **Article 103 of the Constitution:**

*Se reconoce y garantiza el derecho a la propiedad privada en función social.*

*Se reconoce asimismo la propiedad intelectual y artística, por el tiempo y en la forma determinados por la ley.*

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

Disputed English Translations:

Claimant's English Translation: The right to private property is recognized and guaranteed in view of its social role.

Likewise, intellectual and artistic property is also recognized, for the time and in the form determined by law.

The subsoil belongs to the State, which may grant concessions for its development.

Respondent's English Translation: The right to private property in the social interest is recognized and guaranteed.

Intellectual and artistic property is recognized for the period of time and form as established by law.

The subsoil belongs to the State, which may grant concessions for its exploitation.

## 2.8 **Article 105 of the Constitution:**

*El Estado reconoce, fomenta y garantiza el derecho de propiedad privada sobre la tierra rústica, ya sea individual, cooperativa, comunal o en cualquier otra forma asociativa, y no podrá por ningún concepto reducir la extensión máxima de tierra que como derecho de propiedad establece esta Constitución.*

*La extensión máxima de tierra rústica perteneciente a una misma persona natural o*

*jurídica no podrá exceder de doscientas cuarenta y cinco hectáreas. Esta limitación no será aplicable a las asociaciones cooperativas o comunales campesinas.*

*Los propietarios de tierras a que se refiere el inciso segundo de este artículo, podrán transferirla, enajenarla, partirla, dividirla o arrendarla libremente. La tierra propiedad de las asociaciones cooperativas, comunales campesinas y beneficiarios de la Reforma Agraria estará sujeta a un régimen especial.*

*Los propietarios de tierras rústicas cuya extensión sea mayor de doscientas cuarenta y cinco hectáreas, tendrán derecho a determinar de inmediato la parte de la tierra que deseen conservar, segregándola e inscribiéndola por separado en el correspondiente Registro de la Propiedad Raíz e Hipotecas.*

*Los inmuebles rústicos que excedan el límite establecido por esta Constitución y se encuentren en proindivisión, podrán ser objeto de partición entre los copropietarios.*

*Las tierras que excedan la extensión establecida por esta Constitución podrán ser transferidas a cualquier título a campesinos, agricultores en pequeño, sociedades y asociaciones cooperativas y comunales campesinas. La transferencia a que se refiere este inciso, deberá realizarse dentro de un plazo de tres años. Una ley especial determinará el destino de las tierras que no hayan sido transferidas, al finalizar el período anteriormente establecido.*

*En ningún caso las tierras excedentes a que se refiere el inciso anterior podrán ser transferidas a cualquier título a parientes dentro del cuarto grado de consanguinidad o segundo de afinidad.*

*El Estado fomentará el establecimiento, financiación y desarrollo de la agroindustria, en los distintos departamentos de la República, a fin de garantizar el empleo de mano de obra y la transformación de materias primas producidas por el sector agropecuario nacional.*

Respondent's English Translation: The State recognizes, promotes and guarantees the right to private property in rural land, whether it be individual, cooperative, communal or in any other associative manner, and it may not for any reason reduce the maximum extension of land that is established as a property right by this Constitution.

The maximum extension of rural land pertaining to a single natural or legal person may not exceed two hundred forty five hectares. This limitation shall not be applicable to cooperative or communal peasant associations.

The owners of land referred to in the second paragraph of this Article may freely transfer it, alienate it, partition it, divide it or lease it. The land owned by cooperative, communal peasant associations and beneficiaries of the Agrarian Reform shall be subject to a special system.

The owners of rural land with an extension greater than two hundred forty five hectares shall have the right to immediately determine the part of the land that they wish to retain, segregating it, and registering it separately with the corresponding Real Estate and Mortgages Registry.

Rural properties exceeding the limit established by this Constitution, and that are undivided may be subject to partition among the co-owners.

Any land exceeding the extension established under this Constitution may be transferred under any title to peasants, small farmers, and cooperative and communal farming societies and associations. The transfer referred to herein must be made within a three year period. A special law will determine the destination for any land that has failed to be transferred by the end of the period established above.

In no case may the excess lands referred to herein be transferred under any title to relatives within the fourth degree of consanguinity or the second degree of affinity.

The State shall promote the establishment, financing and development of agroindustry within the various departments of the Republic in order to guarantee the employment of labor and the transformation of raw materials produced by the national agricultural and livestock sector.

2.9 ***Article 117 of the Constitution:***

*ES DEBER DEL ESTADO PROTEGER LOS RECURSOS NATURALES, ASI COMO LA DIVERSIDAD E INTEGRIDAD DEL MEDIO AMBIENTE, PARA GARANTIZAR EL DESARROLLO SOSTENIBLE.*

*SE DECLARA DE INTERES SOCIAL LA PROTECCIÓN, CONSERVACIÓN, APROVECHAMIENTO RACIONAL, RESTAURACIÓN O SUSTITUCIÓN DE LOS RECURSOS NATURALES, EN LOS TÉRMINOS QUE ESTABLEZCA LA LEY.*

*SE PROHIBE LA INTRODUCCIÓN AL TERRITORIO NACIONAL DE RESIDUOS NUCLEARES Y DESECHOS TÓXICOS.(13)*

Respondent's English Translation: IT IS THE DUTY OF THE STATE TO PROTECT NATURAL RESOURCES, AS WELL AS THE DIVERSITY AND INTEGRITY OF THE ENVIRONMENT, TO ENSURE SUSTAINABLE DEVELOPMENT.

IT IS DECLARED TO BE IN THE INTEREST OF SOCIETY TO PROTECT, CONSERVE, RATIONALLY EXPLOIT, RESTORE OR REPLACE NATURAL RESOURCES, UNDER THE TERMS ESTABLISHED BY LAW.

NO NUCLEAR OR TOXIC WASTE MAY BE BROUGHT INTO THE COUNTRY. (13).

2.10 ***Article 174 of the Constitution:***

*La Corte Suprema de Justicia tendrá una Sala de lo Constitucional, a la cual corresponderá conocer y resolver las demandas de inconstitucionalidad de las leyes, decretos y reglamentos, los procesos de amparo, el habeas corpus, las controversias entre el Órgano Legislativo y el Órgano Ejecutivo a que se refiere el Art. 138 y las causas*

*mencionadas en la atribución 7a. del Art. 182 de esta Constitución.*

*LA SALA DE LO CONSTITUCIONAL ESTARA INTEGRADA POR CINCO MAGISTRADOS DESIGNADOS POR LA ASAMBLEA LEGISLATIVA. SU PRESIDENTE SERÁ ELEGIDO POR LA MISMA EN CADA OCASIÓN EN QUE LE CORRESPONDA ELEGIR MAGISTRADOS DE LA CORTE SUPREMA DE JUSTICIA; EL CUAL SERA PRESIDENTE DE LA CORTE SUPREMA DE JUSTICIA Y DEL ORGANO JUDICIAL.(1)*

Respondent's English Translation: The Supreme Court will have a Constitutional Chamber, which shall hear and resolve challenges of unconstitutionality of laws, decrees and regulations, amparo processes, habeas corpus, disputes between the Legislative and Executive Branches referred to in Article 138 and the reasons mentioned in the 7th power of Article 182 of this Constitution.

THE CONSTITUTIONAL CHAMBER SHALL BE COMPRISED OF FIVE LEGISLATURE APPOINTED JUDGES. ITS PRESIDENT WILL BE ELECTED BY THE SAME WHENEVER IT IS TIME TO ELECT JUDGES OF THE SUPREME COURT; HE WILL BE PRESIDENT OF THE SUPREME COURT AND THE JUDICIAL BRANCH.

### **C. *The Investment Law***<sup>6</sup>

#### **2.11 *Article 4 of the Investment Law:***

*Para efecto que las inversiones nacionales y extranjeras puedan ser fácilmente establecidas y desarrolladas, el Estado reconoce a sus titulares, procedimientos breves y sencillos para su formalización de conformidad a la ley; y además, en el caso de inversiones extranjeras, para que puedan ser repatriadas por sus titulares.*

*Los procedimientos y requisitos para el establecimiento y registro de las inversiones serán objeto del Reglamento de esta ley.*

Disputed English Translations:

Claimant's English Translation: In order to ease the establishment and development of local and foreign investments, the State grants brief and simple legal registration procedures to their owners; and also, in the case of foreign investments, for its repatriation by the owners.

The procedures and requirements for establishment and registration of investment shall be the subject of the Regulations to this law.

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<sup>6</sup> Translation portions are from Claimant's Legal Authority CLA-4\_translation and Respondent's Legal Authority RL-9(bis) unless otherwise indicated.

Respondent's English Translation: With the purpose of facilitating the establishment and development of national and foreign investments, the State shall provide to the investors brief and simple procedures for their formalization in accordance with the law; in addition, in the case of foreign investments, to be able to be repatriated by the owners.

The procedures and requirements for the establishment and registration of investments shall be the subject of the Regulations to this law.

2.12 **Article 5 of the Investment Law:**

*Los inversionistas extranjeros y las sociedades mercantiles en las que éstos participen, tendrán los mismos derechos y obligaciones que los inversionistas y sociedades nacionales, sin más excepciones que las señaladas por la ley, sin que puedan aplicárseles medidas injustificadas o discriminatorias que obstaculicen el establecimiento, administración, uso, usufructo, extensión, venta y liquidación de sus inversiones.*

Disputed English Translations:

Claimant's English Translation: Foreign investors and the commercial companies in which they participate, shall enjoy the same rights and be bound by the same responsibilities as local investors and partnerships, with no exceptions other than those established by law, and no unjustified or discriminatory measures which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of their investments, shall be applied to them.

Respondent's English Translation: Foreign investors and the commercial companies in which they participate shall have the same rights and obligations as national investors and companies, with no other exceptions save for those set forth by law, and may not be subjected to measures that are unjustified or discriminatory, which may hinder the establishment, administration, use, usufruct, extension, sale and liquidation of their investments.

2.13 **Article 6 of the Investment Law:**

*Cualquier persona natural o jurídica, nacional o extranjera, podrá efectuar inversiones de cualquier tipo en El Salvador, salvo las que se encuentren limitadas por ley, sin que puedan aplicarse discriminaciones o diferencias por razones de nacionalidad, domicilio, raza, sexo o religión.*

Disputed English Translations:

Claimant's English Translation: Any individual or legal entity, local or foreign, may make any type of investments in El Salvador, except those limited by law, and may not be

subjected to discrimination or differences due to their nationality, residence, race, sex or religion.

Respondent's English Translation: Any individual or legal entity, national or foreign, may make investments of any kind in El Salvador, except for those that are limited by law, and may not be subjected to discriminations or differences for reasons of nationality, domicile, race, gender or religion.

2.14 **Article 7 of the Investment Law:**

*De conformidad a lo establecido en la Constitución de la República y en las leyes secundarias, serán limitadas las inversiones en las actividades y términos siguientes:*

*a) El comercio, la industria y la prestación de servicios en pequeño, y específicamente la pesca de bajura en los términos señalados en la ley, son patrimonio exclusivo de los salvadoreños por nacimiento y de los centroamericanos naturales;*

*b) El subsuelo pertenece al Estado, el cual podrá otorgar concesiones para su explotación;*

*c) La propiedad de bienes raíces rústicos no podrá ser adquirida por extranjeros en cuyos países de origen no tengan iguales derechos los salvadoreños, excepto cuando se trate de tierras para establecimientos industriales;*

*d) La extensión máxima de tierra rústica perteneciente a una misma persona natural o jurídica, no podrá exceder de doscientos cuarenta y cinco hectáreas. Esta limitación no será aplicable a las asociaciones cooperativas o comunales campesinas, las cuales están sujetas a un régimen especial;*

*e) El Estado tendrá la facultad de regular y vigilar los servicios públicos prestados por empresas privadas, así como la aprobación de sus tarifas, excepto las que se establezcan de conformidad con tratados o convenios internacionales;*

*f) Se requerirá la concesión del Estado para la explotación de muelles, ferrocarriles, canales y otras obras materiales de uso público, en la forma y condiciones señaladas en la ley;*

*g) Las inversiones efectuadas en acciones de Bancos, Financieras y Casas de Cambio de Moneda Extranjera, estarán sujetas a las limitaciones señaladas en las leyes que rigen dichas instituciones.*

Disputed English Translations:

Claimant's English Translation: According to the stipulations contained in the Constitution of the Republic and auxiliary laws, investments shall be limited in the following activities and conditions:

a) Small scale trade, industry, and provision of services, most particularly coastal fishing as established by law, are the exclusive right of Salvadorans by birth and Central American nationals.



- b) The subsoil belongs to the State, which may grant concessions for its exploitation.
- c) Foreign nationals whose country of origin does not grant the same rights to Salvadorans shall not be allowed to acquire rural property, except in those cases when the land shall be used for industrial plants.
- d) No individual or legal entity shall own rural property in excess of two hundred forty five hectares. This limitation shall not be applicable to cooperative associations or peasants community associations, which are subject to a special regime.
- e) The State is entitled to regulate and overview public services provided by private companies, as well as to approve their rates, except those established in accordance with international treaties or agreements.
- f) State concession shall be required for the exploitation of piers, railways, channels, and other public infrastructure, under the terms and conditions stipulated by law.
- g) Investments in stock of Banks, Financial Institutions and Foreign Exchange Institutions, shall be bound by the limitations stated in the laws governing those institutions.

Respondent's English Translation: In accordance with the provisions of the Constitution of the Republic and secondary laws, investments will be limited in the following activities and terms:

- a) Small commerce, industry and services, specifically coastal fishing by small boats, in the terms set forth in the law, are the inalienable heritage of Salvadorans by birth and Central American nationals;
- b) The subsoil belongs to the State, which may grant concessions for its exploitation;
- c) The property of unimproved real estate may not be acquired by foreigners whose countries of origin deny the same rights to Salvadorans, except in the case of land for industrial establishments;
- d) The maximum extension of unimproved land belonging to one individual or legal entity may not exceed two hundred forty five hectares. This limitation shall not apply to peasant cooperative or communal associations, which are subject to a special regimen;
- e) The State shall have the power to regulate and oversee the public services provided by private companies, as well as the approval of their tariffs, save for those that are established in accordance with international treaties or agreements;
- f) The exploitation of piers, railroads, canals and other material works of public use shall require the concession of the State, in the form and under the conditions set forth in the law;
- g) The investments made in shares of Banks, Financial Institutions and Foreign Currency Exchange Bureaus shall be subject to the limitations indicated in the laws that govern such institutions.

2.15 **Article 8 of the Investment Law:**

*De conformidad a lo establecido en la Constitución de la República, la expropiación procederá por causa de utilidad pública o de interés social, legalmente comprobados, previa una justa indemnización.*

*Cuando la expropiación sea motivada por causas provenientes de guerra, de calamidad pública o cuando tenga por objeto el aprovisionamiento de agua o de energía eléctrica, o la construcción de viviendas o de carreteras, caminos o vías públicas de cualquier clase, la indemnización podrá no ser previa.*

*Cuando lo justifique el monto de la indemnización, el pago podrá hacerse a plazos, en cuyo caso se reconocerán los intereses bancarios que correspondan. Dicho pago deberá hacerse preferentemente en efectivo.*

Disputed English Translations:

Claimant's English Translation: According to the Constitution of the Republic, expropriation shall proceed, due to legally established cause of public need or social interest, following advance payment of fair indemnity.

When expropriation is caused or arises by reason of war, public disaster, or when required for the provision of water or electric energy, or the construction of housing or highways, streets or any type of public roads, the indemnity may not be paid in advance.

When justified by the amount of the indemnity, payment may be made in instalments, in which case the corresponding banking interest shall be paid.

Respondent's English Translation: In accordance with the provisions of the Constitution of the Republic, expropriations shall proceed for reasons of public utility or social interest that have been legally proven, following payment of fair compensation.

If the expropriation is due to reasons stemming from war, public calamity or if it is required for supplying water or power, or the construction of housing or public roads, streets or thoroughfares of any kind, the compensation may or may not be payable in advance.

If the amount of the compensation justifies it, the payment may be made in installments, in which case the corresponding bank interest shall be paid. Such payment must preferably be made in cash.

2.16 **Article 13 of the Investment Law:**

*De conformidad a lo establecido en la Constitución de la República, se reconoce y se garantiza al inversionista nacional y extranjero, la protección de su propiedad y el derecho a la libre disposición de sus bienes.*

Disputed English Translations:

Claimant's English Translation: The Constitution of the Republic, recognizes and guarantees local and foreign investors the protection of their property, and the right to freely dispose of their assets.

Respondent's English Translation: According with the provisions of the Constitution of the Republic, the national and foreign investors are guaranteed the protection of their property and the right to freely dispose of their assets.

2.17 **Article 15 of the Investment Law:**

*En caso que surgieren controversias o diferencias entre los inversionistas nacionales o extranjeros y el Estado, referentes a inversiones de aquellos, efectuadas en El Salvador, las partes podrán acudir a los Tribunales de Justicia, competentes, de acuerdo a los procedimientos legales.*

*En el caso de controversias surgidas entre inversionistas extranjeros y el Estado, referentes a inversiones de aquellos efectuadas en El Salvador, los inversionistas podrán remitir la controversia:*

*a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI);*

*b) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), con el objeto de resolver la controversia mediante conciliación y arbitraje, de conformidad con los procedimientos contenidos en el Mecanismo Complementario del CIADI; en los casos que el Inversionista extranjero parte en la controversia sean nacional de un Estado que no es parte contratante del Convenio del CIADI.*

Disputed English Translations:

Claimant's English Translation: Should disputes or differences arise among local and foreign investors and the State, regarding the investments made by them in El Salvador, the parties may resort to the corresponding courts of justice, in accordance with legal procedures.

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 Agreement on Settlement of Investment Disputes Among States and Citizens of other States (ICSID Agreement).

The International Center for Settlement of Investment Disputes (ICSID), in order to settle

the dispute by conciliation and arbitration, in accordance with the procedures contained in the ICSID Supplementary Mechanism; if the foreign investor involved in the dispute is a citizen of a State that has not adhered to the ICSID Agreement.

Respondent's English Translation: If controversies or differences arise between national or foreign investors and the State, regarding the investments they have made in El Salvador, the parties may resort to the competent courts of justice, in accordance with legal procedures.

In the case of disputes between foreign investors and the State, regarding their investments made in El Salvador, the investors may submit the dispute:

a) To the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of resolving the dispute through mediation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention);

b) To the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of resolving the dispute through mediation and arbitration, in accordance with the procedures contained in the ICSID Additional Facility, in those cases in which the foreign investor that is a party to the dispute is a national of a State that is not a signatory party to the ICSID Convention.

#### 2.18 **Article 23 of the Investment Law:**

*De toda resolución relacionada con el Registro de Inversión Extranjera emitida por la ONI, se admitirá recurso de apelación para ante el Ministro de Economía, el cual deberá interponerse dentro del plazo de tres días hábiles después de haberse notificado la resolución correspondiente; y quien deberá resolver dentro del plazo de ocho días hábiles siguientes.*

Disputed English Translations:

Claimant's English Translation: Any resolution related to Foreign Investment Registration issued by the ONI may be appealed before the Ministry of Economy within three working days after receiving the corresponding notice, and should be resolved within the next eight working days.

Respondent's English Translation: Any resolution related to Foreign Investment Registration issued by ONI may be appealed before the Minister of the Economy, which appeal must be filed within three business days after receiving notice of the corresponding resolution. The appeal must be decided within a term of eight business days after it is filed.

## **D. The Mining Law<sup>7</sup>**

### **2.19 Article 1 of the Mining Law:**

*La Ley de Minería tiene por objeto regular los aspectos relacionados con la exploración, explotación, procesamiento y comercialización de los recursos naturales no renovables, existentes en el suelo y subsuelo del territorio de la República; excepto los hidrocarburos en estado líquido o gaseoso, que se regulan en leyes especiales, así como la extracción de material pétreo de ríos, playas y lagunas que se regulará de acuerdo a la normativa ambiental existente; y la extracción de sal obtenida por procesos de evaporación de aguas marinas la cual se encuentra regulada en el Reglamento para el establecimiento de salineras y explotaciones con fines de acuicultura de los bosques salados.(1)*

Disputed English Translations:

Claimant's English Translation: The Mining Law has as its objective to regulate the aspects related with the exploration, exploitation, processing and commercialization of the non-renewable, natural resources existing in the soil and subsoil of the territory of the Republic; excluding hydrocarbons in liquid or gaseous state, which will be regulated by special laws, and the extraction of aggregate from rivers, beaches and lakes that will be regulated according to the existing Environmental Law; as well as the extraction of salt obtained by evaporative processes from marine waters which is regulated in the Regulation for the establishment of salineras and operations with aims of aquaculture within saltwater forests.

Respondent's English Translation: The Mining Law has the purpose of regulating the aspects related to the exploration, exploitation, processing and commercialization of the non-renewable natural resources found in the soil and subsoil of the territory of the Republic; except for the hydrocarbons that exist in a liquid or gaseous state, which are regulated by special laws, the extraction of rock material from rivers, beaches and lakes which will be regulated by current regulations, and the extraction of salt through the evaporation of seawater, which is regulated by the Regulations for the establishment of salt ponds and seawater forest aquaculture operations.

### **2.20 Article 2 of the Mining Law:**

*Son bienes del Estado, todos los yacimientos minerales que existen en el subsuelo del territorio de la República, cualesquiera que sea su origen, forma y estado físico; así como los de su Plataforma Continental y su territorio Insular, en la forma establecida en las leyes o en los Convenios Internacionales ratificados por él; su dominio sobre los mismos*

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<sup>7</sup> Translation portions are from Claimant's Legal Authority CLA-5\_translation and Respondent's Legal Authority RL-7(bis) unless otherwise indicated.

*es inalienable e imprescriptible.*

*Para los efectos de esta Ley, los yacimientos minerales se clasifican en metálicos y no metálicos, los primeros podrán ser llamados minas y los segundos canteras.(1)*

Disputed English Translations:

Claimant's English Translation: All mineral deposits that exist in the subsoil of the Territory of the Republic, whatever its origin, form and physical state; as well as those in its Continental Platform and its Insular Territory are property of the State, in the form established by the Law or by the International Treaties ratified by the State; its dominion over the deposits is inalienable and imprescribable.

For the effects of this Law, the mineral deposits are classified in metallic and non-metallic. The former would be called mines and the later quarries.

Respondent's English Translation: All mineral deposits existing in the subsoil of the territory of the Republic, regardless of origin, form and physical state, are the property of the State; as are those found in its Continental Shelf and Insular territory, in the manner established in the laws or in International Treaties ratified by it; its ownership thereof is inalienable and permanent.

For the purposes of this Law, mineral deposits are divided into metallic and nonmetallic, with the former referred to as mines, and the latter referred to as quarries.

## 2.21 **Article 3 of the Mining Law:**

*Para la exploración y explotación de minas y canteras, el Estado podrá otorgar Licencias o Concesiones, siempre que se cumpla con lo dispuesto en esta Ley y su Reglamento.*

Disputed English Translations:

Claimant's English Translation: For the exploration and exploitation of mineral deposits contained in the subsoil, as well as for quarries, the State can grant Licenses or Concessions, if the norms established by this Law and its Code of Regulations are fulfilled.

Respondent's English Translation: For the exploration and exploitation of mines and quarries, the State may Grant Licenses or Concessions, provided the provisions of this Law and its Regulations are met.

2.22 **Article 4 of the Mining Law:**

*El Órgano Ejecutivo en el Ramo de Economía en adelante denominado “El Ministerio”, es la Autoridad competente para conocer de la actividad minera, quien aplicará las disposiciones de esta Ley, a través de la Dirección de Hidrocarburos y Minas, que en adelante se identificará como “La Dirección”.*

Disputed English Translations:

Claimant’s English Translation: The Executive Organ of the Economic Branch, heretofore referred to as “The Ministry”, is the Competent Authority to be familiar with mining activity, and will apply the dispositions of this Law through the Direction of Hydrocarbons and Minas, that from hereon will be identified as “The Direction.”

Respondent’s English Translation: The Executive Branch, through the Ministry of the Economy, hereafter the “Ministry”, is the competent Authority to oversee mining activities and to apply the provisions of this Law, through the Bureau of Hydrocarbons and Mines, hereafter the “Bureau”.

2.23 **Article 5 of the Mining Law:**

*Para el cumplimiento de lo dispuesto en esta ley, el Ministerio dispondrá de las siguientes atribuciones:*

- (a) Definir las políticas, planes, programas y proyectos de investigación para el fomento y desarrollo de la minería;*
- (b) Otorgar las concesiones para la explotación de los recursos mineros y suscribir con los Titulares, los contratos respectivos;*
- (c) Conocer de los Recursos que le señala esta Ley;*
- (d) Emitir las disposiciones e instructivos relacionados con las actividades mineras, de conformidad a lo establecido en la presente Ley; así como licitar áreas especiales donde se localizan yacimientos con potencial económico investigado, en programas de cooperación Técnica internacional;*
- (e) Informar a la Fiscalía General de la República, cuando su Titular lo requiriese, sobre el efectivo cumplimiento de los requisitos, condiciones y finalidades establecidas en las concesiones a que se refiere esta ley; y*
- (f) Las demás que esta Ley y su Reglamento le confiera.*

Disputed English Translations:

Claimant’s English Translation: For the fulfilment of that decreed in this Law, the Ministry

will possess the following attributes:

- a) To define the policies, plans, programs and projects for the promotion and development of mining;
- b) To grant concessions for the exploitation of the mineral resources and to subscribe with the License Holders the respective Contracts;
- c) To know about the Resources that are mentioned in this Law;
- d) To issue resolutions, instructions and measures related to mining activities, in conformity with that established in the present Law; as well as promote bidding for special areas where deposits with economic potential are located in programs of Technical International cooperation.
- e) To inform the Office of the Attorney General of the Republic when it requires it, about the effective fulfilment of the requirements, conditions and finalities established in the concessions that are referred to by this Law; and
- f) All that this Law and its Code of Regulations bestow upon the Ministry.

Respondent's English Translation: To comply with what is set forth in this law, the Ministry shall have the following responsibilities:

- a) To define the policies, plans, programs and research projects for the promotion and development of mining activities;
- b) To grant concessions for the exploitation of mining resources and to execute the respective contracts with the Concession Holders;
- c) To hear the Appeals set forth in this Law;
- d) To issue the provisions and instructions related to the mining activities in accordance to what is established in this Law; and to bid out special areas where deposits with researched economic potential are located, in programs of international Technical cooperation;
- e) To inform the Office of the Attorney General of the Republic, when the Attorney General so requires, regarding the effective fulfilment of the requirements, conditions and purposes established in the concessions referred to in this law; and
- f) The others vested in it by this Law and its Regulations.

#### 2.24 **Article 7 of the Mining Law:**

*Los titulares de Licencias ó Concesiones Mineras, sean nacionales o extranjeros, quedan sujetos a las leyes, Tribunales y Autoridades de la República, no pudiendo de ninguna forma recurrir a reclamaciones por la vía de protección diplomática; debiendo establecerse en los contratos respectivos que en todo lo relativo a la aplicación, interpretación, ejecución o terminación de los mismos, renuncian a su domicilio y se someten a los Tribunales de San Salvador.*



Disputed English Translations:

Claimant's English Translation: The holders of Mining Licenses or Concessions, be they nationals or foreigners, are subject to the Laws, Tribunals and Authorities of the Republic. They can not in any way claim diplomatic immunity; having to establish in all the respective contracts that in everything related to the application, interpretation, execution or termination of the contracts, they renounce to their domicile and that they subject themselves to the Tribunals of El Salvador.

Respondent's English Translation: The Mining License or Concession Holders, be they national or foreign, are subject to the laws, Courts and Authorities of the Republic, and are absolutely precluded from resorting to claims in the diplomatic protection venue; and the respective contracts must establish that in everything related to the application, interpretation, performance or termination of the same, they waive their domicile and submit themselves to the Courts of San Salvador.

2.25 ***Article 10 of the Mining Law:***

*Los yacimientos a que se refiere esta Ley son bienes inmuebles distintos de los inmuebles que constituyen el terreno superficial; no así las canteras que forman parte integrante del terreno en que se encuentran, siempre que se localicen a flor de tierra; en consecuencia, la concesión es un derecho real e inmueble transferible por acto entre vivos, previa autorización del Ministerio; por consiguiente, la aludida concesión es susceptible de servir como garantía en operaciones mineras.*

Disputed English Translations:

Claimant's English Translation: The deposits that are referred to in this Law are a different Real Estate from that which forms the surface territory; but not the quarries, as they form an integral part of the terrain in which they are located, if they are located in the surface; in consequence, the concession is a real right and a transferable Real Estate by actions between two people, with the previous authorization from the Ministry; hence, the alluded concession is susceptible to serve as guaranty in mining operations.

Respondent's English Translation: The deposits referred to in this Law are real property that differ from the properties that constitute surface land; not so the quarries that are an integral part of the surface where they are found, provided they are located at the surface; consequently, a concession is a real property right that is transferrable by an inter vivos act, with the prior authorization of the Ministry; consequently, said concession is capable of being a security for mining operations. Regulations.

2.26 **Article 13 of the Mining Law:**

*Las Licencias de exploración de minas y de operación de plantas de procesamiento de minerales, las emitirá la Dirección por medio de resoluciones; las concesiones para la explotación de minas y canteras serán otorgadas mediante Acuerdo del Ministerio, seguido de la suscripción de un contrato en la forma prevista en esta Ley y su Reglamento.*

*La concesión que se otorgue para la explotación de minas o canteras, comprende el derecho del Titular para procesar y comercializar los minerales extraídos.*

*La Dirección podrá realizar directa o indirectamente actividades de exploración minera en áreas libres y por medio de proyectos de cooperación técnica internacional, para lo cual el Ministerio declarará áreas especiales mediante Acuerdo, previo dictamen de la Dirección.*

*Las áreas especiales de interés minero, se declararán con el propósito de contribuir a la investigación y evaluación técnica de los yacimientos existentes en ella y una vez conocido el potencial económico del yacimiento, el Ministerio podrá proceder a su licitación, cuyo procedimiento quedará establecido en el Reglamento de esta Ley.*

*También podrá la Dirección, conceder Licencias para el aprovechamiento comercial o industrial de sustancias minerales presentes en yacimientos de placeres, escombreras o antiguos botaderos mineros. Estas Licencias se otorgarán por resolución que contendrán las condiciones técnicas de explotación; dichas Licencias podrán ser renovadas siempre que se haya cumplido con las condiciones establecidas en la Licencia original.*

**Disputed English Translations:**

Claimant's English Translation: The mineral exploration licenses, as well as for the operation of a processing Plant, will be emitted by the Direction by means of Resolutions; the Concessions for exploitation via mines and quarries, will be granted through Ministry Accords, following the subscription of a Contract in the preordained form in this Law and its Regulation.

The Concession that is granted for the exploitation of mines and quarries, constitutes the Title Holder's right to process and commercialize the extracted minerals.

The Direction will be able to conduct, directly or indirectly, mineral exploration activities in open areas and by means of international programs of Technical Cooperation, so that the Ministry will declare special areas by means of an Agreement, subject to an opinion from the Direction.

The special areas of mining interest will be declared so with the idea to contribute to the investigation and technical evaluation of the existing deposits in such areas and once the economic potential of the deposit is known, the Ministry will be able to proceed with the licitation whose procedure will be established in the Regulations of this Law.

The Direction will also be able to concede Licenses for the commercial or industrial exploitation of mineral substances from placer deposits, always that it would be done by

washing or other similar processes. These Licenses will be granted by Resolution which will contain the technical conditions for exploitation based upon geologic, hydrogeologic and environmental aspects and will be granted for a period of up to one (1) year, which can always be renewed having fulfilled the technical conditions of exploitation established in the original License.

Respondent's English Translation: The Licenses to explore mines and operate mineral processing plants shall be issued by the Bureau through resolutions; the concessions for the exploitation of mines and quarries shall be granted by a Ministerial Resolution, followed by the execution of a contract in the manner set forth in this Law and its Regulations.

The concession granted for the exploitation of mines or quarries includes the Concession Holder's right to process and commercialize the extracted minerals.

The Bureau may directly or indirectly perform mining exploration activities in open areas and through international technical cooperation projects, for which the Ministry shall declare special areas through Resolution, upon recommendation from the Bureau.

The special areas of mining interest shall be declared with the purpose of contributing to the research and technical evaluation of the existing deposits thereon and once the economic potential of the deposit is known, the Ministry may proceed to bid it out, which procedure shall be established in the Regulations of this Law.

The Bureau may also grant Licenses for the commercial or industrial use of mineral substances present in "placer" deposits, debris dumps or former mining dumps. These Licenses shall be granted by resolution, which shall contain the technical conditions for the exploitation; such Licenses may be renewed provided the conditions established in the original License have been met.

## 2.27 **Article 14 of the Mining Law:**

*El Titular de Derechos Mineros, puede transferirlos en cualquier forma por acto entre vivos; por causa de muerte del Titular sólo es transferible en el caso de que se pruebe la calidad de herederos declarados y sean solicitados por éstos.*

*En ambos casos se necesitará autorización de la Dirección, previa comprobación de que el adquirente reúna iguales o mejores condiciones que el Titular; la transferencia se otorgará por el plazo que faltare para que concluya la Licencia o concesión original o su prórroga.*

Disputed English Translations:

Claimant's English Translation: The holder of the Mining Rights, can transfer them in any form by action between people; in the case of death of the Holder, (the Mining Rights) are only transferable when the quality of the declared heirs is proven and the mining rights are

solicited by them.

In both cases, an authorization by the Direction will be necessary, having previously proved that the acquiring person meets the same or better conditions than the Holder; the transference will be granted for the period of time that the License or original concession or its extension have to go until their conclusion.

Respondent's English Translation: The Mining Rights Holder may transfer them in any way by means of an inter vivos act; in the event of the death of the Holder, they are transferrable only to the proven declared heirs and only if they request such transfer.

In both cases, the authorization from the Bureau shall be required, after providing proof that the acquirer exhibits the same or better conditions as the Holder; the transfer shall be granted for the term remaining until the conclusion of the original License or concession or its extension.

#### 2.28 **Article 16 of the Mining Law:**

*Prohíbese realizar las actividades mineras a que se refiere esta ley, sin la correspondiente autorización; quien contraviniese esta disposición incurrirá en las sanciones establecidas en el presente Decreto, sin perjuicio de las que fueren aplicables por la legislación penal.*

Disputed English Translations:

Claimant's English Translation: It is prohibited to realize mining activities to which this Law is referring to, without the corresponding authorization; whoever violates this regulation will be subject to the sanctions mentioned in this law, without consideration to the sanctions that are applicable by the penal legislation.

Respondent's English Translation: It is forbidden to carry out the mining activities referred to in this law without the corresponding authorization; anybody in violation of this provision shall incur the penalties established in this Decree, without precluding the application of those set forth in criminal legislation.

#### 2.29 **Article 19 of the Mining Law:**

*La Licencia 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.*

*Si durante el proceso de exploración se encontrasen sustancias minerales diferentes a las*

*previstas en la Licencia de Exploración, la empresa deberá informar a la Dirección sobre el particular en el plazo de treinta días después de su descubrimiento. En el caso de que la empresa deseara explorar dichas sustancias, con el fin de una posible explotación, deberá solicitar una ampliación de la licencia a efecto de que se le incluya.*

*En el caso que la empresa no tuviere interés en dichas sustancias, deberá manifestarlo por escrito a la Dirección y de existir otra empresa interesada, aquella deberá permitir la exploración o explotación de las mismas, previa la licencia o concesión respectiva.*

*El Titular, además de los trabajos y operaciones propias de la exploración, podrá construir o retirar edificios, campamentos e instalaciones auxiliares que considere convenientes; siempre que se sujete a las prescripciones contenidas en esta Ley, su Reglamento y otras disposiciones que le fueren aplicables.*

*Las Licencias se otorgarán por un plazo inicial de cuatro años, que podrá ser prorrogado por períodos de dos años hasta llegar a ocho, siempre que el interesado justifique la prórroga solicitada. Para tal efecto deberá cancelar anticipadamente un canon superficial anual por kilómetro cuadrado o fracción de la manera siguiente:*

*Año U.S.\$por km<sup>2</sup> o fracción*

*1 25.00*

*2 50.00*

*3 75.00*

*4-6 100.00*

*7-8 300.00*

*El pago deberá realizarse en moneda de curso legal*

#### Disputed English Translations:

Claimant's English Translation: The Exploration License gives this Holder the exclusive faculty to execute mining activities, to localize the deposits of the mineral substances for which the License has been granted, within the limits of the area given and at an indefinite depth. It also gives the exclusive right to request the respective concession.

If during the process of exploration, mineral substances different to those in the Exploration License are found, the company will have to inform of it within thirty days of its discovery. In case that the company wishes to explore these substances with the goal of possible exploitation, it will have to request an expansion of the License so that these are included.

In the case that the company does not have an interest in these substances, it will have to express it in writing to the Direction. In the event that there is another company interested in them (additional resources), this company will have to allow the exploration or exploitation of these substances, prior to receipt of License.

The Holder, besides the works and the proper exploration operation, can build or remove buildings, camp sites and auxiliary installations that it considers necessary, provided that he obeys the regulations contained in this Law, its Code of Regulations and any other regulation that are applicable.

The License will be granted for an initial period of 4 years, which can be extended by the Direction, for periods of two to eight years, always that the interested justify the requested extension. If the interested wishes to continue exploring, he will be able to request a new License over the expired area, but will have to pay a superficial canon of the following nature:

Year	US\$ per Km <sup>2</sup> or fraction
1	25.00
2	50.00
3	75.00
4-6	100.00
7-8	300.00

The payment must be made in currency of legal course.

Respondent's English Translation: The Exploration License vests in the License Holder the exclusive power to perform mining activities, to locate the deposits of mineral substances for which it was granted, within the limits of the area conferred and to an indefinite depth. In addition, it confers the exclusive right to apply for the respective concession.

If during the exploration process, mineral substances other than those listed in the Exploration License are found, the company must inform the Bureau thereof within a term of thirty days after such discovery. If the company wishes to explore such substances, with the goal of a possible exploitation, it must request a license expansion to include such exploration.

If the company has no interest in such substances, it must state so in writing to the Bureau, and if another interested company exists, the License Holder must allow the exploration or exploitation of same, upon receipt of the respective license or concession.

The License Holder, besides the work and operations germane to the exploration, may build or remove buildings, campsites and auxiliary facilities it deems convenient; provided it is done in compliance with the provisions contained in this Law, its Regulations and other applicable provisions.

The Licenses shall be granted for an initial term of four years, which may be extended by two-year periods up to eight years, provided the interested party justifies the requested extension. For such purpose, it must pay an annual surface fee per square kilometer or fraction thereof, as follows:

Year	US\$ per km <sup>2</sup> or fraction thereof
1	25.00
2	50.00
3	75.00
4-6	100.00
7-8	300.00

Payment must be made in legal tender.

2.30 **Article 21 of the Mining Law:**

*Si el área de exploración comprendiere terrenos de propiedad ajena y los trabajos se realizaren en la superficie del suelo, será necesario un permiso del propietario, cuya obtención es responsabilidad del titular de la Licencia.*

*Si se causaren daños a la propiedad, el titular de la Licencia está en la obligación de resarcirlos de común acuerdo con el propietario del terreno o de conformidad a Sentencia de Juez competente.*

Disputed English Translations:

Claimant's English Translation: If the exploration area contains lands belonging to an outside party and the works to be realized are on the surface, permission from the owner will be necessary, in which the procurement is the responsibility of the Title Holder of the License.

If damages to the property are caused, the License Holder is obliged to indemnify, by joint agreement, the owner of the land or in agreement to the verdict of a competent judge.

Respondent's English Translation: If the exploration area includes third party properties and the works are performed on the surface of the land, a permit from the owner will be required, the securing of which is the responsibility of the License Holder.

If damages to the property are caused, the License Holder is under the obligation to compensate them as a result of a mutual agreement with the property owner, or in accordance with a Sentence from a competent Judge.

2.31 **Article 23 of the Mining Law:**

*Concluida 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.*

*Si en un plazo de un año contado desde la fecha de vigencia del contrato, el Titular no inicia las labores preparatorias a la explotación del yacimiento, se procederá a cancelar la concesión, siguiendo el procedimiento sumario; salvo por razones de caso fortuito o fuerza mayor, en cuyo caso se otorgará un plazo adicional que no excederá de un año.*

*Cuando se tratare de minas existentes, previa comprobación del potencial económico de*

*los minerales, se podrá solicitar directamente la concesión para su explotación sin necesidad de la Licencia de Exploración, cumpliendo con los requisitos de Ley para las concesiones.*

#### Disputed English Translations:

Claimant's English Translation: Once the exploration is concluded and the existence of economic mining potential on the authorized area is proved, the granting of the Concession for the exploitation and utilization of minerals is obtained by request; this will be verified through an Accord with the Ministry, followed by the granting of a Contract between the Ministry and the Holder, for a thirty (30) year term, which could be extended if the interested requests it, if at the judgment of the Direction and the Ministry, the requisites established by this Law are fulfilled.

If within a period of one (1) year from the signing date of the contract, the Title Holder has not initiated the construction labors for the exploitation of the deposit, the cancellation of the concession will proceed, following the procedural review; except for reasons of fortuitous cases or force majeure, qualified by the Direction, in which case it will grant an additional period which will not exceed one year.

When dealing with existing mines, with previous verification of economic potential of the minerals, it could apply directly for the Exploitation Concession without the necessity of an Exploration License, fulfilling the prerequisites of the Law for the Concession.

Respondent's English Translation: Upon conclusion of the exploration, and proof of the existence of the mining economic potential in the authorized area, the granting of the Concession for the exploitation and use of the minerals will be requested; the granting of such Concession shall materialize through a Resolution from the Ministry, followed by the granting of a contract between the Ministry and the License Holder for a term of thirty years, which may be extended at the request of the interested party, provided it complies with the requirements established in the Law, in the opinion of the Ministry.

If within a term of one year of the date of execution of the contract, the Concession Holder does not initiate the preparatory work for the exploitation of the deposit, the concession shall be cancelled, following the summary procedure; save for reasons of act of God or force majeure, in which case an additional term shall be granted, not to exceed one year.

In the case of existing mines, upon proof of the economic potential of the minerals, the concession for their exploitation may be requested directly, without the Exploration License, in compliance with the legal requirements for concessions.

#### 2.32 **Article 24 of the Mining Law:**

*La Concesión minera otorga a su Titular, el derecho a la explotación de los minerales previamente determinados, que se encuentran dentro de un sólido de profundidad indefinida limitado por planos verticales correspondientes a los lados de un polígono,*



*cuyos vértices están referidos a las coordenadas de la proyección cónica conformal de Lambert, o UTM, orientados Norte-Sur, Este-Oeste, límites internacionales o del litoral, debiendo además estar comprendida dentro del área señalada en la Licencia de Exploración, y su superficie será otorgada en función de la magnitud del o los yacimientos y de las justificaciones técnicas del titular.*

*El Titular de la concesión minera, pagará anualmente en forma anticipada en el primer mes de cada año, un canon superficial de U.S.\$ 300. Por Km<sup>2</sup> o fracción, por el plazo de la vigencia de la concesión, dicho canon se hará efectivo en moneda de curso legal.*

#### Disputed English Translations:

Claimant's English Translation: The mining Concession, granting the Title Holder the right to mineral exploitation previously determined, is encountered within a solid of indefinite depth, limited by vertical planes corresponding to the sides of a polygon, whose corners are delimited to by Lambert conical projection coordinates, oriented North-South and East-West, within international or coastal limits, besides having to be contained within the area indicated as the Exploration License, and its surface area will be determined according to the magnitude of the deposit and

The Holder of the Mining Concession will pay annually an advance in the first month of every year, a surface canon of U.S. \$300. per Km<sup>2</sup> or fraction for the life of the concession.

Respondent's English Translation: The mining Concession grants to the Concession Holder the right to exploit the previously determined minerals that are inside a solid of an undefined depth, limited by the vertical planes corresponding to the sides of a polygon, the vertices of which are referred to the Lambert or UTM conic conformal projection coordinates, oriented along North-South, East-West directions, and also limited by the international borders or the coast, which must also be located inside the area indicated in the Exploration License, and its surface area shall be granted based on the magnitude of the deposit or deposits, and the technical justifications given by the Concession Holder.

The mining Concession Holder shall annually pay, in advance, on the first month of each year, a surface fee of U.S.\$ 300. per km<sup>2</sup> or fraction thereof, for the effective term of the concession, which fee shall be paid in legal tender.

#### 2.33 **Article 30 of the Mining Law:**

*La concesión de explotación de canteras confiere al Titular, dentro de los límites de su área e indefinidamente en profundidad, la facultad exclusiva de extraer, procesar, transportar y disponer de las sustancias minerales para las cuales ha sido otorgada. La profundidad podrá limitarse, según las condiciones geológicas e hidrogeológicas contempladas en la factibilidad de explotación del yacimiento.*

*El área de concesión será otorgada en función de la magnitud del o los yacimientos y de las justificaciones técnicas del Titular, y será delimitado por coordenadas de proyección*

*cónica conformal de Lambert ó UTM, orientados Norte-Sur, Este-Oeste, límites internacionales o del litoral.*

*El área podrá ampliarse en terrenos adyacentes hasta en un quinto del área originalmente otorgada en los casos que el yacimiento continúe y sea factible su explotación.*

*El Titular podrá ejecutar todas las operaciones y trabajos necesarios convenientes que posibiliten el desarrollo de las actividades de explotación, siempre que se sujeten a las prescripciones de esta Ley y su Reglamento, su acuerdo y contrato de concesión.*

*El inmueble en que se encuentre la cantera objeto de la explotación, deberá ser propiedad de la persona que lo solicita o tener autorización de su propietario o poseedor otorgada en legal forma.*

#### Disputed English Translations:

Claimant's English Translation: The exploitation concession for quarries, grants the Title Holder, within the limits of the area and undefined in depth, the exclusive authority to extract, process, transport and sort mineral substances for which have been permitted. The depth may be limited, considering the geologic, hydrogeologic and environmental conditions considered in the corresponding Environmental Impact Study or Diagnostic.

The area of the Concession to be granted is a function of the magnitude of the deposit(s) and of the technical justification by the Title Holder, and will be defined by coordinates of Lambert conical projection or UTM, oriented north-south, east-west, and within international or coastal limits.

The area can be enlarged onto adjacent properties up to one-fifth of the original size granted in cases where the deposit continues and its exploitation is feasible.

The Title Holder can execute all operations and work deemed convenient to facilitate the development of the exploitation activities, as long as they are held to the prescriptions of this Law and its Regulations, its Accord and Concession Contract.

The real estate in which the quarry is located must be property of the person that solicits the Concession or have authorization from the owner or authorized holder in legal form.

Respondent's English Translation: The quarry exploitation concession vests in the Holder, within the limits of its area and indefinite as to depth, the exclusive power to extract, process, transport and dispose of the mineral substances for which it has been granted. The depth may be limited according to the geological and hydrogeological conditions contemplated in the deposit exploitation feasibility study.

The concession area shall be granted as a function of the magnitude of the deposit or deposits and the technical justifications of the Holder, and shall be bound by the Lambert or UTM conic conformal projection coordinates, oriented along North-South, East-West directions, and also limited by the international borders or the coast.

The area may be expanded into adjacent properties by up to one fifth of the originally granted area in the cases in which the deposit continues and its exploitation remains feasible.

The Holder may execute all the operations and works that are necessary and convenient to enable the development of the exploitation activities provided they adhere to the provisions of this Law and its Regulations, the resolution and the concession contract.

The property where the quarry the purpose of the exploitation is located must be the property of the person that requests it or have the authorization or its owner or possessor, granted legally.

#### 2.34 **Article 35 of the Mining Law:**

*El Titular de la concesión será dueño de los minerales extraídos, y como tal, podrá comercializarlos libremente, ya sea dentro o fuera del país, siempre que cumpla con las regulaciones que dicte el Ministerio; y estará sujeto al pago de todo tipo de impuestos.*

*Cuando se trate de comercialización de minerales cuyo uso sea privativo del Estado o de sus instituciones, ya sea por razones de seguridad o de protección ambiental, el Ministerio dictará disposiciones sobre la forma en que pueden ser adquiridos, mantenidos en depósitos, transportados, importados o exportados.*

Disputed English Translations:

Claimant's English Translation: The Holder of the Concession will be the owner of the extracted minerals, and as such, can commercialize them freely, either in or outside of the country; and will be subject to the payment of all taxes.

When dealing with the commercialization of minerals, the use of which is exclusive to the State or its Institutions, for reasons of security or for environmental protection, the Ministry will dictate ways in which they could be acquired, kept in deposits, transported, imported or exported.

Respondent's Translation: The Concession Holder shall be the owner of the extracted minerals, and as such, may freely commercialize them inside or outside the country, provided the regulations issued by the Ministry are met; and it shall be subject to the payment of all kinds of taxes.

In the case of the commercialization of minerals for the exclusive use by the State or its institutions, either for reasons of safety or environmental protection the Ministry shall issue the provisions on the form to acquire, maintain in storage, transport, import or export them.

2.35 **Article 37(2) of the Mining Law:**

*PARA CONCESION DE EXPLOTACION DE MINAS Y CANTERAS*

- 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;*
- c) Permiso Ambiental emitido por la autoridad competente, con copia del Estudio de Impacto Ambiental;*
- d) Estudio de Factibilidad Técnico Económico, elaborado por profesionales afines a la materia;*
- e) Programa de explotación para los cinco primeros años, firmado por un geólogo o profesional competente en la materia;*
- f) Los demás que se establezcan reglamentariamente;*

Disputed English Translations:

Claimant's English Translation: FOR THE CONCESSION OF EXPLOITATION OF MINES AND QUARRIES

- a) A location map of the real estate in which the activities are to be realized, a cartographic sheet of the area, a topographic map and its respective technical description, extent of the solicited area in which the location, borders and names of the adjacent properties are convincingly established;
- b) The property title for the real estate or authorized permission, in legal form, from the landowner;
- c) An Environmental Permit granted by the Ministry of the Environment and Natural Resources along with a copy of the Environmental Impact Study or Environmental Diagnostic;
- d) A Feasibility Study done by a geologist or professional in the subject matter;
- e) An exploitation program for the first five years, signed by a geologist or other competent professional in the matter;
- f) Along with the rest of which will be established in the regulations.

Respondent's English Translation: FOR THE CONCESSION FOR THE EXPLOITATION OF MINES AND QUARRIES

- a) Plot plan of the property where the activities will be carried out, a cartographic map of the area, topographic plan and its respective technical description, extension of the requested area where its location, boundaries and name of bordering properties are irrefutably established;
- b) The ownership deed of the property or the authorization legally granted by the owner;
- c) The Environmental Permit issued by the competent authority, with a copy of the Environmental Impact Study;
- d) The Technical-Economic Feasibility Study prepared by professionals engaged in the subject matter;
- e) The exploitation program for the first five years, signed by a geologist or a competent professional in the subject matter;
- f) The others established in the regulations;

**2.36 Article 38 of the Mining Law:**

*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.*

Disputed English Translations:

Claimant's English Translation: After the presentation of a legal application, the Direction will conduct an inspection, and if passed, the application will be admitted. In case that it is presented without meeting all the requirements of this Law, the person interested will be granted a term that will not exceed thirty (30) days in which to correct the omissions; if after transpiring this term, they are not corrected, the application will be declared out of place and the application will be sent to the Archives.

Respondent's English Translation: Upon the presentation in legal form of an application, it shall be reviewed by Delegates of the Bureau and admitted if the results are favorable. If it is not presented in compliance with legal requirements, the interested party shall be granted a term not to exceed 30 days to correct the omissions; if such term lapses and the omissions are not corrected, the application shall be rejected and ordered archived.

**2.37 Article 42 of the Mining Law:**

*Encontrándose firme la resolución que declara sin lugar la oposición o no habiéndose interpuesto, y transcurridos los quince días después de la última publicación a que se*

*refiere el inciso primero del artículo anterior; la Dirección ordenará los trabajos de mensura y amojonamiento de los límites del área objeto de la solicitud, los que deberán finalizar dentro del plazo hasta de SESENTA DIAS; dichos mojones deberán ser sólidamente construidos. Si por accidentes del terreno éstos no pudiesen ser construidos, se fijarán mojones adicionales en partes visibles del terreno, siempre que sea factible hacerlo; verificados dichos trabajos se emitirá el dictamen correspondiente y elevará diligencias al conocimiento del Ministro de Economía, quien procederá en la forma establecida en el artículo siguiente:*

Disputed English Translations:

Claimant's English Translation: Finding firmly that the opposition's resolution is without base or not able to be mediated, and after 15 days following the last publication referred to in the initial paragraph of the previous article; the Direction will order the surveying and location of monuments delineating the limits of the solicited area, this work will have to be finished within a period of SIXTY DAYS; said monuments will have to be solidly constructed. If the monuments are not able to be constructed for nature of the terrain, additional monuments will be located in visible parts of the property if it is feasible to do so; upon verification of these works a corresponding opinion will be emitted and will elevate diligences to the knowledge of the Ministry of Economy who will proceed in the manner established in the following article.

Respondent's English Translation: Once the resolution rejecting the objection is firm, or if no objection was filed, and upon the lapsing of fifteen days after the last publication referred to in the first section of the previous article, the Bureau shall order the surveying and demarcation of the boundary for the area covered by the application, which must be concluded within a term of no more than SIXTY DAYS; such boundary markers must be solidly built. If because of the topography, they are unable to be built, additional boundary markers shall be placed in visible parts of the property, provided it is feasible to do so. Upon the completion of such work, the corresponding opinion shall be issued and the record shall be submitted to the Minister of the Economy, who shall proceed in the manner established in the following article.

2.38 **Article 43 of the Mining Law:**

*Recibido el expediente a que se refiere el Artículo anterior, el Ministro podrá solicitar los informes y ordenará la práctica de diligencias que estime convenientes y dentro de los quince días hábiles siguientes al recibo, si es procedente, emitirá el Acuerdo correspondiente, el que deberá ser aceptado en el término de ocho días hábiles posteriores a la emisión del mismo, por el solicitante.*

*En caso de que considere improcedente la concesión, emitirá 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.*

*Esta Resolución no admitirá recurso alguno.*

Disputed English Translations:

Claimant's English Translation: Once the judgment mentioned in the previous article is received, the Minister can request the reports and will order the transcripts of the proceedings that he considers necessary. Within fifteen working days after receiving it, if it is justified, the Minister will issue the corresponding Accord, which will have to be accepted in a term of eight working days after being issued by the applicant.

In case that the Concession is considered inadmissible, a negative Resolution will be issued; which will permit a Petition of Reconsideration by the interested to be filed before the Minister within the three working days following the respective notification. This petition will be resolved within fifteen days following the presentation.

This Resolution will not admit any further recourse.

Respondent's English Translation: Upon receiving the record referred to in the previous Article, the Minister may request the reports and order the studies he or she deems convenient and within fifteen business days after their receipt, if warranted, he or she will issue the corresponding Resolution, which must be accepted by the applicant within a term of eight business days after its issuance.

If the concession is rejected, an unfavorable Resolution shall be issued; against which a Reconsideration Appeal may be filed by the interested party before the Minister himself, within three business days following that of the respective notification; which appeal shall be resolved within fifteen days after its filing.

This Resolution shall not admit any appeal.

### 2.39 **Article 50 of the Mining Law:**

*Además de los documentos mediante los cuales se otorgan Licencias o Concesiones a que se refiere esta Ley, deberán inscribirse en el registro de la Dirección, los siguientes:*

- a) Los gravámenes que pesen sobre el derecho a explorar o explotar o sobre las instalaciones de maquinaria y equipos mineros;*
- b) Las Servidumbres mineras;*
- c) Del embargo de los derechos de exploración, explotación o de cualquier providencia judicial que afecte tales derechos;*
- d) Las garantías constituidas por los Titulares de Licencias y Concesiones; Y*
- e) Las transferencias a que se refiere esta Ley y las ordenadas por sentencia judicial.*

Disputed English Translations:

Claimant's English Translation: Besides the documents through which the Licenses or Concessions are granted which are referred to in this Law, the following will have to be registered in the Direction Registry:

- a) The liens upon the rights to explore or exploit or over the installations of machinery or mining equipment;
- b) The Mining Easement;
- c) The seizure of exploration rights, exploitation rights or of any other judicial ruling that affects these rights;
- d) The guaranties established by the Holders of Licenses and Concessions; and
- e) The transference to which this Law refers to and those ordered by judicial sentence.

Respondent's English Translation: Besides the documents through which Licenses or Concessions are granted referred to in this Law, the following documents must be registered in the Bureau's registry:

- a) Any liens on the right to explore or exploit or over the mining machinery and equipment facilities;
- b) Mining easements;
- c) The attachment of the rights to explore, exploit or any other legal measure that affects such rights;
- d) The guarantees constituted by the License and Concession Holders; and
- e) The transfers referred to in this Law and those ordered by judicial sentence.

#### 2.40 **Article 53 (Voluntary Easements) of the Mining Law:**

*Los Titulares de Licencias o Concesiones mineras podrán convenir con los propietarios o poseedores de los terrenos que le sean necesarios para realizar sus actividades mineras, las servidumbres voluntarias que consideren convenientes.*

Disputed English Translations:

Claimant's English Translation: The Holders of Mining Licenses or Concessions could agree with the owners or holders of the lands that are necessary to fulfil their mining activities, the voluntary easements that are considered necessary.

Respondent's English Translation: The mining License or Concession Holders may agree with the owners or possessors of the properties that are necessary for the former to perform their mining activities, the voluntary easements that they deem convenient.



2.41 **Article 54 (Legal Easements) of the Mining Law:**

*Además de las Servidumbres Voluntarias, los Titulares gozarán de las Servidumbres Legales de Ocupación, Tránsito o Paso, Desagüe, Ventilación, Transmisión de Energía Eléctrica o de cualquier otra que beneficie directamente o requiera la actividad minera.*

*Las servidumbres mineras se regirán por las disposiciones de esta Ley y en lo no previsto, por las disposiciones del Código Civil.*

Disputed English Translations:

Claimant's English Translation: Besides the voluntary easement, the Holders will possess the Legal Easement of Occupation. Transit or Pass, Drainage, Ventilation, Transmission of Electrical Power or of any other that directly benefits or that is required by the mining activity. The mining easement will be governed by the regulations of this Law and in the items not covered by this then by the regulations of the Civil Code.

Respondent's English Translation: Besides the Voluntary Easements, the Holders shall enjoy the Legal Occupation Easements, Transit or Right of Way Easements, Drains, Ventilation, Power Transmission or any other easement directly benefiting or required by the mining activity. The mining easements shall be governed by the provisions of this Law and, wherever this Law is silent, by the provisions of the Civil Code.

2.42 **Article 58 of the Mining Law:**

*La servidumbre de ocupación faculta al concesionario para ocupar las zonas de terreno que sean estrictamente necesarias para sus construcciones, instalación de equipos y demás labores. Esta servidumbre comprende también, la facultad de abrir y mantener canales, tongas, socavones, accesos, galerías y demás obras de minería en sus diversas modalidades y sistemas de extracción; así como establecer cercas, señalamientos y protección de las zonas ocupadas.*

Disputed English Translations:

Claimant's English Translation: The easement of occupation authorizes the concessionaire to occupy the areas of the land that are strictly necessary for his constructions, equipment installations and other works. This easement also includes the authorization to open and keep channels, piles, tunnels, entrances, galleries and all other mining works in all their types and systems of extraction; as well as to establish fences, designation and protection of occupied zones.

Respondent's English Translation: The occupation easement enables the Concession Holder to occupy the zones of land that are strictly necessary for its constructions, installation of equipment and other tasks. This easement also includes the power to open and maintain canals, benches, shafts, accesses, galleries and other mining works in their extraction forms and systems; as well as to establish fences, signage and protection for the occupied zones.

2.43 **Article 69 of the Mining Law:**

*Constituyen infracciones a la presente Ley y su Reglamento, las acciones u omisiones cometidas por personas naturales o jurídicas, las cuales se clasifican, de acuerdo a la naturaleza y gravedad de las mismas, en menos graves y en graves.*

*Son menos graves las siguientes:*

- a) No presentar para su aprobación dentro del primer año de funcionamiento, el Manual de Seguridad Minera;*
- b) Incumplir sin causa justificada con las obligaciones contenidas en los literales a) del Artículo 22 y b) del Artículo 25 de la Ley de Minería;*
- c) No presentar en el plazo establecido o cuando la Dirección lo requiera, el informe a que se refiere el inciso primero del Art. 18 de la Ley de Minería;*
- d) No informar en el plazo establecido en el inciso segundo del Artículo 19 y Art. 46 de esta Ley, sobre el hallazgo de sustancias minerales diferentes a las previstas en la Licencia de Exploración otorgada por esta Dirección;*
- e) Violar las normas técnicas del Manual de Seguridad Minera, aprobado por la Dirección;*
- f) No renovar oportunamente la fianza de fiel cumplimiento para responder por los daños o perjuicios que se causen al Estado o a terceros;*
- g) No efectuar en el plazo establecido, el pago del canon superficial correspondiente.*

*Son graves las siguientes:*

- a) Realizar las actividades mineras a que se refiere esta Ley, sin la correspondiente autorización;*
- b) Obstruir las operaciones mineras a los Titulares de Licencias de Exploración y Concesiones de explotación de minerales, sin existir causa legal para ello;*
- c) Suministrar datos falsos en los informes que se establecen en la Ley de Minería y los que fuesen solicitados por la Dirección.*

Disputed English Translations:

Claimant's English Translation: Infractions to the resolutions of this Law and its Code of

Regulations, including the actions and omissions committed by natural or legalized persons and those resolutions in the License or Concession, will be sanctioned, according to the severity of the case, as follows: .

- a) Not presenting the Mining Security Manual for approval within the first year of operation;
- b) Non-compliance with the obligations contained within sections a) of Article 22 and b) of Article 25 of this Law;
- c) Not presenting within the established period or when required by the Direction, those reports which are referred to in the first section of Article 18 of this Law;
- d) Not informing within the period established in the first section of Article 19 and Article 46 of this Law, regarding the discovery of different mineral substances to those expressed in the Exploration License granted by this Direction;
- e) Violating the technical norms of the Mining Security Manual, approved by the Direction;
- f) Not renewing opportunely the ‘deposit of faithful compliance’ in response to the damages and injustices that are caused to the State or third parties; and
- g) Not effect in the established period the payment of the corresponding surface canon.

The following are grave infractions:

- a) Realizing mining activities referred to in this Law, without the corresponding authorization;
- b) Obstructing mineral-related operations of the Title Holders of an Exploration License or an Exploitation Concession without legal cause;
- c) Supply false information in the reports required by the present Law and those that solicited by the Direction;

Respondent’s English Translation: The actions or omissions committed by natural or legal persons, constitute violations to this Law and its Regulations, which are classified as less grave and grave, according to their nature and gravity.

The following are classified as less grave:

- a) A failure to submit for approval, within the first year of operation, the Mining Safety Manual;
- b) To fail to comply, without just cause, with the obligations contained in literals a) of Article 22 and b) of Article 25 of the Mining Law;
- c) A failure to present, within the established term, or when the Bureau requires it, the report referred to in the first section of Art. 18 of the Mining Law;
- d) A failure to report in the term established in the second section of Article 19 and Art. 46 of this Law, about the discovery of mineral substances other than those listed in the

Exploration License granted by this Bureau;

- e) A violation of the technical rules of the Mining Safety Manual approved by the Bureau;
- f) A failure to timely renew the performance bond to respond for the losses or damages caused to the State or third parties;
- g) A failure to make the payment of the corresponding surface fee within the established term.

The following are classified as grave:

- a) Performing the mining activities referred to in this Law without the corresponding authorization;
- b) Obstructing the mining operations of the mineral Exploration License and Exploitation Concession Holders without any legal reason therefor;
- c) Supply false information in the reports that are established in the Mining Law and in those that are requested by the Bureau.

### ***E. The Mining Regulations***<sup>8</sup>

#### **2.44 Article 7 of the Mining Regulations:**

*Los Titulares de Licencias o Concesiones mineras sean nacionales o extranjeros, quedan sujetos a las Leyes, Tribunales, Jueces y Autoridades de la República; en consecuencia, cualquier conflicto que surja con interesados o terceros, en relación o con motivo de los derechos mineros, que no pueda resolverse por mutuo acuerdo, deberá ventilarse ante los Tribunales correspondientes, a cuya sentencia deberán someterse.*

*Cuando el conflicto sea entre el Titular y el Estado, con motivo de la aplicación, interpretación, ejecución o terminación de un contrato de concesión minera que no pueda resolverse de común acuerdo de conformidad a la deberá someterse a los tribunales competentes de San Salvador.*

Disputed English Translations:

Claimant's English Translation: The Holders of Mining Licenses or Concessions, be they nationals or foreigners, are bound by the Laws, Tribunals, Judges and Authorities of this Country; consequently, any conflict that arises from interested or third parties, in relation to or motivated by Mining Rights, which cannot be resolved by mutual agreement, will have to be heard in the corresponding Tribunals, and will have to comply with the sentencing.

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<sup>8</sup> Translation portions are from Claimant's Legal Authority CLA-6\_translation and Respondent's Legal Authority RL-8(bis) unless otherwise indicated.

When the conflict is between the Title Holder and the State, with regards to the application, interpretation, execution or termination of a Mining Concession Contract which cannot be resolved by mutual consent conforming to the Law, it will be submitted to the competent Tribunals in San Salvador.

Respondent's English Translation: The Mining License or Concession Holders, whether national or foreign, are subject to the Laws, Courts, Judges and Authorities of the Republic; consequently, any conflict arising with interested parties or third parties, in relation to or because of the mining rights, which are unable to be resolved by mutual agreement, shall be decided in the corresponding Courts, the judgment of which shall be binding upon them.

If the conflict is between the Holder and the State, stemming from the application, interpretation, performance or termination of a mining concession contract unable to be resolved by mutual agreement in accordance with the Law, it must be submitted to the competent courts of San Salvador.

#### ***F. The Civil Code<sup>9</sup>***

##### **2.45 *Article 16 of the Civil Code:***

*Los bienes situados en El Salvador están sujetos a las leyes salvadoreñas, aunque sus dueños sean extranjeros y no residan en El Salvador.*

*Esta disposición se entenderá sin perjuicio de las estipulaciones contenidas en los contratos otorgados válidamente en país extraño.*

*Pero los efectos de los contratos otorgados en país extraño, para cumplirse en El Salvador, se arreglarán a las leyes salvadoreñas.*

Respondent's English Translation: Assets located in El Salvador are subject to Salvadoran laws, even if their owners are foreigners and do not reside in El Salvador.

This provision shall be understood without prejudice to the terms set forth in contracts validly executed in a foreign country.

However, the effects of contracts executed in a foreign country to be performed in El Salvador shall be subject to Salvadoran law.

##### **2.46 *Article 2231 of the Civil Code:***

*La prescripción es un modo de adquirir las cosas ajenas, o de extinguir las acciones y derechos ajenos, por haberse poseído las cosas o no haberse ejercido dichas acciones y*

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<sup>9</sup> Translation portions are from Respondent's Legal Authority RL-123(bis) unless otherwise indicated.

*derechos durante cierto lapso de tiempo, y concurriendo los demás requisitos legales.*

*Una acción o derecho se dice prescribir cuando se extingue por la prescripción.*

Respondent's English Translation: Prescription is a way to acquire other people's things, or to extinguish the actions and rights of others, for having held the things and not exercised those actions and rights for a certain period of time, when the other legal requirements are met.

An action or right is time-barred when it is extinguished by prescription.

**2.47 Article 2253 of the Civil Code:**

*La prescripción que extingue las acciones y derechos ajenos exige solamente cierto lapso de tiempo, durante el cual no se hayan ejercido dichas acciones.*

*Se cuenta este tiempo desde que la acción o derecho ha nacido.*

Respondent's English Translation: The prescription that extinguishes the actions and rights of others requires only that a certain period of time elapse during which said actions have not been exercised. The time limit is calculated from the time the action or right is born.

**2.48 Article 2083 of the Civil Code:**

*Las acciones que concede este título por daño o dolo, prescriben en tres años contados desde la perpetración del acto.*

Respondent's English Translation: Actions under this title for damages or fraud are shall lapse in three years from the perpetration of the act.

**G. The ICSID Convention**

**2.49 Article 41 of the ICSID Convention:**

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

2.50 ***Article 53 of the ICSID Convention:***

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

***H. The ICSID Arbitration Rules***

2.51 ***Rule 26 of the ICSID Arbitration Rules:***

(1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.

(2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

2.52 ***Rule 41 (1) of the ICSID Arbitration Rules:***

Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

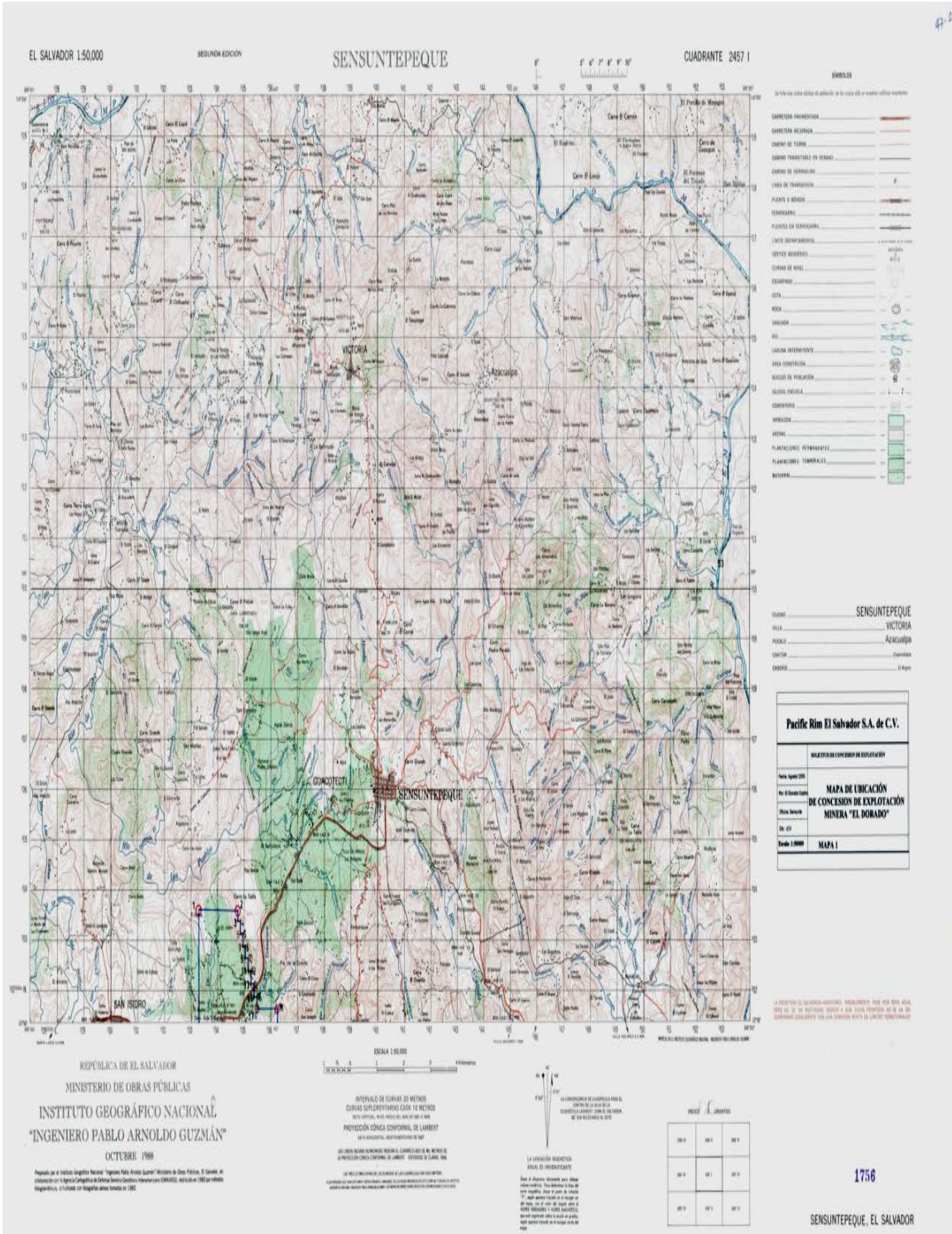
## **PART III: THE PARTIES' DISPUTE**

### ***A. Introduction***

- 3.1 The Parties' dispute as to the merits under the Investment Law of El Salvador is briefly summarised below, taken from the Parties' several written and oral submissions made in this third phase of the arbitration.
- 3.2 These summaries are necessarily incomplete and do little justice to the work and diligence of the Parties in what became from the outset a complicated, long and difficult case, as to both jurisdiction and merits. The fact that a particular submission or piece of evidence is not expressly described below (or addressed later in this Award) should not be taken as an indication that it has not been considered by the Tribunal in making its decisions in this Award. Moreover, the Tribunal, for the purpose of this Award (as will appear below), considers that the decisive issues have a narrower scope than the Parties' full dispute.
- 3.3 The Tribunal appends overleaf several maps of the El Dorado Project demonstrating the location of the exploration and concession areas in dispute between the Parties. The first shows El Dorado near Sensuntepeque [R-24]; the second shows the area of the El Dorado concession requested by the Claimant (by PRES) [R-29]; and the third shows the location of the Minita zones within that requested concession area, with surface infrastructures [R-51, including PRES' PFS of 21 January 2015, Figure 4.3, C-9, superimposed].



R-24, Map No. 1 Location of Concession:



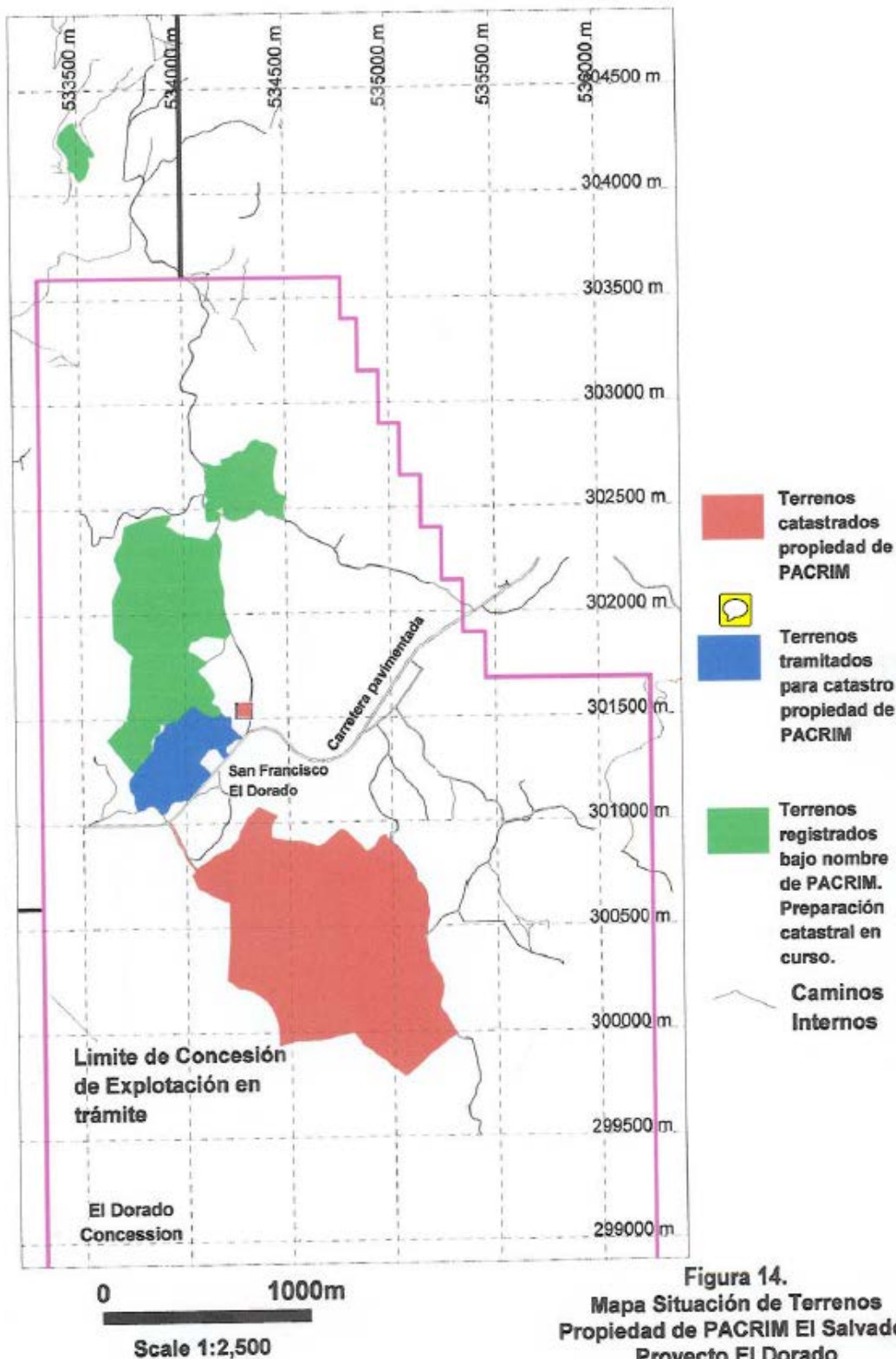
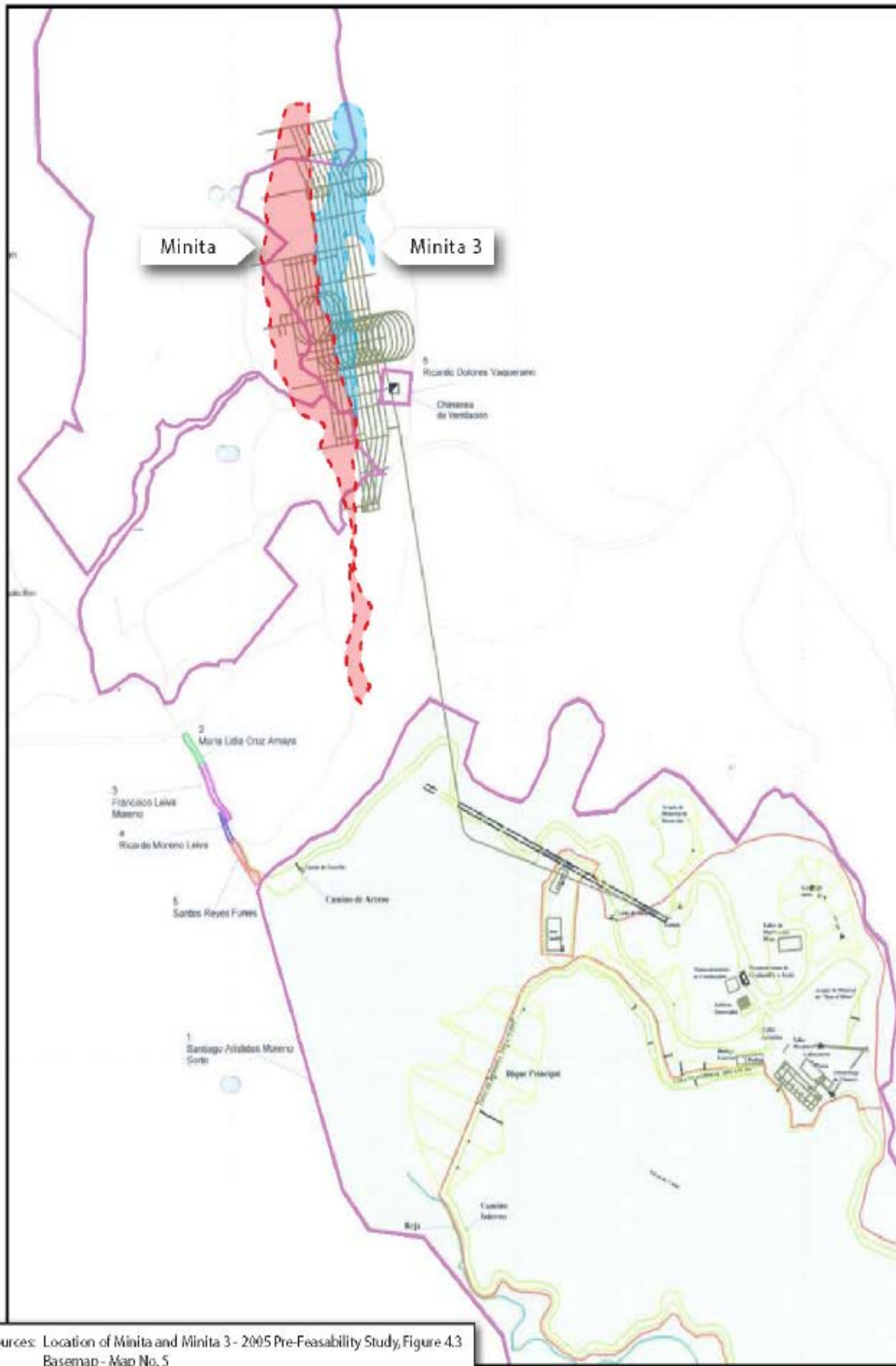


Figura 14.  
 Mapa Situación de Terrenos  
 Propiedad de PACRIM El Salvador  
 Proyecto El Dorado

Jan 13, 2009

R-51, (Demonstrative Exhibit) Minita Deposits Superimposed on Map 5:



Sources: Location of Minita and Minita 3 - 2005 Pre-Feasibility Study, Figure 4.3 Basemap - Map No. 5

## ***B. The Claimant's Case***

- 3.4 In summary,<sup>10</sup> pursuant to Article 15(a) of the Investment Law, the Claimant, on its own behalf and in respect of PRES and DOREX, advances claims for damages, interest and costs against the Republic of El Salvador as the Respondent.
- 3.5 The Claimant is a limited liability company incorporated under the laws of Nevada, USA. PRES and DOREX are companies incorporated under the laws of El Salvador and are wholly owned and controlled by the Claimant. As alleged by the Claimant, PRES was the owner of rights in “El Dorado Norte”, “El Dorado Sur” and “Santa Rita”; and DOREX was the owner of rights in “Zamora/Cerro Colorado”, “Pueblos”, “Guaco” and “Huacuco” (As already indicated, save where the context requires otherwise, the term “Pac Rim” is used to refer collectively to the Claimant, its subsidiaries and also, where appropriate, the Claimant’s former parent company, Pacific Rim).
- 3.6 According to the Claimant, this case is essentially very simple: El Salvador spent many years creating a legal framework designed to encourage the rule of law and to facilitate foreign investment in its mining industry; El Salvador’s representatives directly induced and encouraged Pac Rim to invest millions of US dollars between 2002 and 2008 in exploration and mining development in El Salvador; as a result, the Claimant reasonably believed that its mineral rights would be honoured by the Respondent and that it would be allowed to exploit minerals in its designated sites for the benefit of both its shareholders and of El Salvador; but then, with the announcement of a *de facto* ban on metallic mining by the Respondent’s President in March 2008, the Salvadoran Government illegitimately swept aside the legal and regulatory regime upon which the Claimant had relied, depriving it of the value of its significant investments in El Salvador.
- 3.7 The Claimant contends that, under the Mining Law of 1995 (as amended in 2001), the Respondent has consistently sought to attract mining investment generally and specifically to encourage the exploitation of the El Dorado Project located in Cabañas, one of the poorest regions in El Salvador. Pac Rim was precisely the kind of investor El Salvador was

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<sup>10</sup> This summary is largely taken from the Claimant’s Memorial, Reply, Post-hearing brief and oral submissions at the hearing.



looking for: a foreign investor with the funding, mining industry know-how and mineral exploration expertise necessary to bring the El Dorado Project into production. The El Dorado Project was Pac Rim's principal project in El Salvador.

- 3.8 Thus, from the time of Pac Rim's investment in 2002 until March 2008, senior officers of the Respondent's Government, including President Elías Antonio Saca and Vice-President Ana Vilma Escobar, welcomed Pac Rim with open arms. At that time, these senior officers of the Respondent consistently assured Pac Rim (including the Claimant) that the Government was supportive of its investment in the El Dorado Project and were enthusiastic about the economic benefits they knew would accrue to the Respondent from a profitable and environmentally sound mining operation. Pac Rim, for its part, was eager to set new standards in the Americas for environmental and socially sustainable mining. Thus, Pac Rim actively sought to integrate itself into the communities located near the El Dorado Project, hosting hundreds of informational meetings, arranging tours of its mining facilities and sponsoring educational programs, medical clinics and community sporting events. Pac Rim also sought tangibly to improve the standard of living of the local inhabitants in Cabañas by building roads, digging water supply wells and planting over 40,000 trees.
- 3.9 Throughout this period, Pac Rim engaged in the costly exploration work for which its team of seasoned mining specialists was uniquely qualified. Pac Rim's extensive exploration and development work established that the El Dorado Project contains a significant amount of high-grade gold reserves (over 1.4 million ounces) and demonstrated that the Project was technically and economically feasible. Thus, in 2004, PRES applied to the Respondent for the environmental permit and mining exploitation concession necessary to begin mineral extraction at El Dorado. PRES's applications complied fully with both Salvadoran laws and also international and North American good practices for engineering design and environmental management.
- 3.10 According to the Claimant, what followed was a bureaucratic morass at the Respondent's Ministry of Environment (MARN), which was charged with issuing all environmental permits in El Salvador. Over the following years, PRES's application for an environmental permit and later applications by DOREX in connection with its exploration licenses,

languished due to persistent personnel changes within MARN, understaffing and the inexperience of its technical staff charged with evaluating applications for environmental permits. Although Pac Rim was anxious to obtain the necessary permits, Pac Rim also understood that El Dorado was the first major modern mining project in the country; and it was therefore willing to be patient as it worked with MARN in the procedures for its environmental permit at El Dorado.

- 3.11 Throughout this time, Pac Rim maintained an active collaboration with the Respondent's Ministry of Economy (MINEC) and its Bureau. The Minister of Economy (Ms Yolanda de Gavidia) and the Respondent's Vice-President (Ms Escobar) assured Pac Rim that the Claimant's investment was fully supported and desired by the Respondent's executive branch and that the environmental permit and exploitation concession would be forthcoming from the Respondent in regard to El Dorado.
- 3.12 In June 2006, Mr Hugo Barrera, the Respondent's Minister of the Environment (MARN), unexpectedly announced his intention to use his ministry's authority as a means of impeding the development of the mining industry in El Salvador. Mr Barrera's conduct drew immediate criticism from higher authorities within the Respondent's executive branch, resulting in a public reversal of his position and in further administrative action on Pac Rim's pending environmental permit applications. In the meantime, Pac Rim expressed whole-hearted support for the legitimate desire of the Ministers of Environment and Economy (MARN and MINEC) to reform the existing Mining Law in order to increase royalties accruing to the Respondent and to supplement existing environmental protections for local communities.
- 3.13 In 2007, Pac Rim continued to work with the Ministry of Economy to advance reforms to the Mining Law, while maintaining constant contact with the Environment Ministry (MARN) in regard to its pending applications for environmental permits under the Mining Law. Unfortunately, however, these applications were again frozen after a new minister was appointed to MARN (Mr Carlos Guerrero) who instructed its officials not to take any action on applications relating to metallic mining. In April 2007, mining industry representatives were publicly notified by the Ministers of Environment and Economy (MARN and MINEC) that metallic mining would be put on hold until after completion of

a “strategic environmental assessment.”

- 3.14 Pac Rim, as it contends, was unsure how the announcement of this strategic assessment would (or could) impact its pending applications regarding the El Dorado Project. Thus, Pac Rim continued to collaborate with the Respondent’s executive branch regarding suggested reforms to the Mining Law; and these were introduced to the Respondent’s Legislative Assembly in November 2007. Over the next several months, these proposed mining law reforms remained under consideration by the relevant committee within the Assembly; and Pac Rim was informed that it would be considered by the full Assembly in the near future. At this point, Pac Rim had sought advice from the highest levels of power in El Salvador (up to and including President Saca). Thus, Pac Rim understood that the amending bill was supported both by the Legislative Assembly, as well as the Respondent’s President.
- 3.15 Then, on 10 March 2008 (publicly reported on 11 March 2008), so the Claimant contends, the Respondent’s President, President Saca, declared a *de facto* ban on all metallic mining projects in El Salvador, abruptly and effectively nullifying the valid legal and regulatory regime upon which the Claimant had relied in making its investment in El Salvador. According to the Claimant, this *de facto* ban eviscerated the Claimant’s rights under the Investment Law, the Constitution of El Salvador and also general principles of international law. It also destroyed the Claimant’s investment and nearly destroyed Pac Rim. According to the Claimant, there was no legal basis for the Respondent to deny Pac Rim’s pending applications for the environmental permits and exploitation concession for the El Dorado Project that were necessary for the Claimant to realize the benefits of its investment in El Salvador. To the contrary, the Respondent’s failure to issue these permits and the concession to Pac Rim can only be explained as an application of the unlawful, *de facto*, ban on metallic mining in El Salvador.
- 3.16 In conclusion, the Claimant contends that: (i) the Claimant (by PRES and DOREX) invested in El Salvador through its acquisition of property rights in relation to its El Dorado and other projects; (ii) the Claimant acted in reliance upon the Respondent’s legal regime for its investment; (iii) the Claimant had a legitimate expectation of achieving a particular economic purpose with its investment: principally, that of developing active mineral

exploitation at El Dorado; (iv) the Respondent's conduct at issue (that is, the implementation of the *de facto* ban by its executive branch from 10 March 2008 onwards) is a proven fact; (v) the *de facto* mining ban is wrongful; and (vi) the *de facto* ban breached the Respondent's obligations towards the Claimant under both the Investment Law and international law. The Claimant claims monetary damages of US\$ 284 million.<sup>11</sup>

### ***C. The Respondent's Case***

- 3.17 In summary,<sup>12</sup> according to the Respondent, this case is about a Canadian mining company that purchased exploration rights in El Salvador when time was running short to apply for a mining exploitation concession. The Canadian company then decided to make a big gamble and failed. Instead of accepting the consequences of its own decisions, the company, by the Claimant as its subsidiary, started this arbitration in order to force the Respondent to grant to the Claimant a gold mining concession at El Dorado to which it never had any legal right. The Claimant is now trying to convince this Tribunal to order the people of El Salvador to pay for the company's failed gamble and, in fact, to pay a windfall to the Claimant from the national treasury by awarding "lost profits" based on property rights which the Claimant never held (directly or indirectly).
- 3.18 The Respondent contends that, when Pac Rim (by its Canadian parent) came to El Salvador in April 2002, it knew that the two exploration licenses held by its predecessors for the El Dorado Project (Dayton Mining and Kinross), granted in 1996, would soon reach the eight-year statutory limit and could not be extended beyond 1 January 2005 under Salvadoran law. This meant that Pac Rim had only two and a half years to conduct the exploration work necessary to prepare an application for a mining exploitation concession within that area. Pac Rim could have made the reasonable decision to concentrate its time, money and effort on completing all the work necessary to apply for an exploitation concession for a small and well-understood area within the vast area originally licensed for exploration. It could then have focused on the "Minita" deposit at El Dorado, the only deposit in the

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<sup>11</sup> Claimant's Memorial, para. 692(1); as modified by Claimant's Reply, para. 458.

<sup>12</sup> This summary is largely taken from the Respondent's Counter-Memorial, Rejoinder, Post-hearing brief and its oral submissions at the hearing.



exploration areas for which Pac Rim was able to complete even a pre-feasibility study.

- 3.19 Instead, so the Respondent alleges, Pac Rim made a conscious decision to embark upon a risky and highly speculative “two-track strategy,” engaging in new exploration activities in the expiring license areas as it attempted to prepare the required documentary materials for a concession application at El Dorado. Pac Rim sought to stake its claim to as much land as possible for future exploration; it wanted to continue exploring the expiring licensed exploration areas by including large unexplored areas in its requested concession; and it tried to acquire new exploration licenses to engage in exploration activities elsewhere, even as it struggled to meet the requirements for its application for the exploitation concession at El Dorado that should have been the sole object of its attention.
- 3.20 As a result of its own decision to stake out as much land as possible for future exploration, the Respondent contends that Pac Rim submitted in December 2004 an incomplete application for an unreasonably large concession area at El Dorado, failing to fulfil the minimum documentary requirements to have its application admitted for consideration under the Mining Law. In fact, because of its risky and speculative “two-track strategy,” Pac Rim would not have been able to meet the requirements even for a smaller concession, covering only the Minita deposit in a small part of El Dorado.
- 3.21 According to the Respondent, Pac Rim was never interested in a small concession area: it wanted “everything.” Pac Rim expected the Respondent to grant it rights and permits regardless of its companies’ failure to comply with the Mining Law. It viewed Salvadoran law as a formality that could not stand in its way. Pac Rim also misunderstood the good will and good intentions of many Salvadoran governmental officials, at the Bureau and elsewhere, who went out of their way to help Pac Rim to complete its application for an exploitation concession at El Dorado. These officials allowed Pac Rim to submit an incomplete application for the concession on 22 December 2004 and to held the application without formal review for almost two years, so as to avoid triggering the Mining Law’s mandatory time limits to correct deficiencies in that application. This allowed Pac Rim additional time to try to complete the feasibility study required under the Mining Law; but Pac Rim still failed to do so. These same officials also tried to accommodate Pac Rim with another requirement it could not meet under the Mining Law, namely the requirement to

show land ownership or authorisation from the landowners for the requested concession area. The Ministry of Economy even attempted to have the Mining Law amended by the Legislative Assembly so that Pac Rim's application could comply with the requirements of the Mining Law, albeit with no success.

- 3.22 The Respondent contends that, instead of appreciating the extraordinary efforts that these Salvadoran officials made to help it, Pac Rim has acted as if these officials (with the Respondent's entire executive branch) had a legal obligation to do whatever was necessary, including changes in Salvadoran laws, so that Pac Rim could obtain the concession it wanted at El Dorado. These officials (not being legislators) were unable by themselves to change the relevant provisions of the laws as Pac Rim wanted. So, as the Respondent submits, Pac Rim then changed its strategy and itself drafted a proposed new law that reversed in its favour all the legal requirements which it could not meet under the Mining Law. Pac Rim hired lobbyists in El Salvador to gain legislative support for its proposed new law; and, from the USA, it put pressure on the Respondent to accommodate the company. Pac Rim also tried to enlist the assistance of President Saca for its proposed new law to be enacted by the Legislative Assembly. That proposed new law was never passed by the Assembly; and, as a result, Pac Rim's concession application remained subject to the existing requirements of the Mining Law in force at the time Pac Rim first came to El Salvador – legal requirements that Pac Rim could not and never did meet.
- 3.23 As submitted by the Respondent, what Pac Rim failed to understand was that it was always obligated to comply with the laws of El Salvador. Neither the Respondent nor any other sovereign State in the world has a legal obligation to change its laws simply to accommodate the demands of a foreign investor. As established in other ICSID arbitrations in which El Salvador has been a successful respondent, it is the foreign investor who has the legal obligation to make its investment in accordance with the laws of the host State. This self-evident legal principle is also recognized in the text of the Investment Law, which is the sole legal instrument under which this arbitration now proceeds in this arbitration's third phase.
- 3.24 Pac Rim comes to this Tribunal seeking an award of damages for almost US\$ 300 million, as the alleged value of all its underground gold and silver deposits. Pac Rim claims this

compensation based on a theory that it acquired property rights over unrecovered mineral deposits that are still underground, in expired exploration areas, even though Pac Rim never made an admissible or admitted application for a mining exploitation concession, much less awarded, to allow for their extraction under the Mining Law.

- 3.25 Like the Claimant, albeit for different reasons, the Respondent submits that this case is simple: Pac Rim was not legally entitled to any mining exploitation concession and acquired no rights in the exploration licenses included in its claims for damages; the Respondent breached no legal duty toward Pac Rim under the Investment Law; and the Respondent is not liable for any alleged damages as a result of not granting any concession and of not granting any environmental or other permits to Pac Rim.
- 3.26 Under the Tribunal's earlier Decisions, the Respondent emphasises that this arbitration has only been allowed to proceed under the Investment Law. Having invoked jurisdiction under the Investment Law and seeking its protection, Pac Rim cannot escape the consequences of that choice. According to the Respondent, the most important of these consequences are: (i) the only claims that may be brought in this arbitration are claims regarding the rights and obligations included in the Investment Law; (ii) Salvadoran law is the applicable substantive law in this arbitration; (iii) the Investment Law places limitations on investments related to mining activities with which Pac Rim had to comply, including the exclusive jurisdiction of the courts of El Salvador to decide disputes related to exploration licenses and exploitation concessions; and (iv) a three-year statute of limitations applies to the Claimant's claims related to the application for the El Dorado concession.
- 3.27 As a result of the applicable law and the evidence, so the Respondent concludes, all of Pac Rim's claims should be declared inadmissible or dismissed by the Tribunal on their merits.

#### ***D. The Amici Curiae***

- 3.28 As indicated in Part I above, the Tribunal admitted the application of CIEL (with its coalition of six communities and other organisations) as a non-disputing party under ICSID Arbitration Rule 37(2). In brief, CIEL (by its substantive written submissions dated 25 July 2014) primarily advanced a legal case that measures adopted by the Respondent regarding the Claimant's El Dorado Project (with other projects) were supported by the

Respondent's international obligations on human rights and the protection of a healthy environment.

- 3.29 CIEL's conclusions, submitted in the Spanish language, read as follows (pages 12-13 of its submission):

El derecho internacional contemporáneo consagra obligaciones de derechos humanos relativas a la protección ambiental. Estas obligaciones protegen el derecho a vivir en un medio ambiente sano, el derecho a la salud y la vida digna, el derecho a la propiedad y las tierras, y el derecho al agua y a la alimentación, entre otros derechos humanos. Estos derechos son fundamentales para la consecución del desarrollo sostenible del territorio y la protección de las comunidades locales que en él habitan.

La implementación por parte del Estado de un marco normativo diseñado para la protección de estos derechos frente a los riesgos generados por industrias extractivas se apoya en las obligaciones internacionales de derechos humanos. Especialmente en un país como El Salvador, que sufre de alta densidad poblacional y escasez de recursos hídricos, la aplicación de los requisitos legales y los procesos administrativos son herramientas indispensables para que el Estado pueda salvaguardar los derechos amenazados por las industrias extractivas.

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English translation (by the Tribunal): Contemporary international law enshrines human rights obligations relating to environmental protection. These obligations protect the right to live in a healthy environment, the right to health and a life of dignity, the right to property and lands, and the right to water and food, among other human rights. These rights are fundamental to the attainment of the sustainable development of the territory and to the protection of local communities that reside therein.

The implementation by the State of a normative framework designed to protect these rights against the risks posed by extractive industries is supported by international human rights obligations. Especially in a country like El Salvador, who suffers from high population density and scarcity of water resources, the application of legal requirements and administrative processes are indispensable tools for the State to safeguard the rights threatened by extractive industries.

- 3.30 For two reasons, the Tribunal considers it unnecessary here to summarise or address CIEL's case more fully. First, in the absence of the Parties' joint consent, CIEL was not

made privy to the mass of factual evidence adduced in this arbitration's third phase, including the hearing (which was not held in public, as explained in Part I above). Second, the Tribunal's decisions in this Award do not require the Tribunal specifically to consider the legal case advanced by CIEL: and, in the circumstances, it would be inappropriate for the Tribunal to do so.

***E. The Parties' Respective Prayers for Relief***

3.31 *The Claimant's Prayer for Relief:* The Claimant formally requests the Tribunal, as pleaded in paragraph 692 of its Memorial, to:

- (1) Declare that the Respondent has breached the terms of the Foreign Investment Law, the Constitution, and general principles of international law;
- (2) Award the Claimant monetary damages of not less than US\$ 314 million (Three hundred and fourteen million U.S. dollars) in compensation for all of its losses sustained as a result of the Respondent's illegal action and inaction and thus being deprived of its rights under the Foreign Investment Law, the Constitution and general principles of international law;
- (3) Award all costs (including, without limitation, attorneys' and all other professional fees) associated with any and all proceedings undertaken in connection with this arbitration, including all such costs undertaken to investigate this matter and prepare this and earlier submissions, and all such costs expended by Claimant in attempting to resolve this matter amicably with Respondent; plus further costs and expenses as the Tribunal may find are owed under applicable law;
- (4) Award pre-and post-judgment interest at a rate to be fixed by the Tribunal; and
- (5) Grant such other relief as counsel may advise or the Tribunal may deem appropriate.

3.32 *Respondent's Prayer for Relief:* The Respondent formally requests the Tribunal, as pleaded in paragraph 471 of its Counter-Memorial, to:

- (1) Issue an Award stating that it lacks jurisdiction under the Investment Law of El Salvador and dismissing all claims for lack of jurisdiction;
- (2) Should the Tribunal find that it has jurisdiction over any claim, for the reasons stated above, issue an Award dismissing all claims for lack of factual and legal

merit;

(3) Order Claimant to pay all costs and expenses of all phases of this arbitration, and reimburse El Salvador for its legal and expert fees and costs for all phases of this arbitration, plus interest from the time of the Award until payment is made, in an amount and at a rate to be established at the appropriate time; and

(4) Grant El Salvador any other remedy that the Tribunal considers appropriate.

## PART IV: THE PRINCIPAL ISSUES

### A. *Introduction*

- 4.1 The Tribunal identifies, for the purpose of this Award, the following principal issues derived from the Parties' written and oral submissions made during this third phase of the arbitration.

### B. *The Principal Issues*

- 4.2 This list is not exhaustive of the many issues that arose from the Parties' respective cases on the merits of their dispute. It is intended to serve only as a check-list of the principal issues arising from their cases. As will appear later below, the Tribunal does not find necessary to address or decide each of these principal issues in this Award.

#### (1) *Additional Jurisdictional Objections:*

- 4.3 The admissibility of and justification for the Respondent's "additional jurisdictional objections" made at the merits phase of this arbitration (beyond those already decided by the Tribunal's two earlier Decisions): These issues are addressed in Part V below.

#### (2) *Liability – El Dorado:*

- 4.4 The requirement and effect of Article 37(2)(b) of the Mining Law regarding ownership and authorisation from surface land-owners or occupiers – (i) legal interpretation and (ii) estoppel or *actos propios* on the facts for PRES' requested exploitation concession at El Dorado: These issues are addressed in Parts VI, VII VIII and X below.
- 4.5 The requirement, effect and application, on the facts, of Article 37(2)(c) of the Mining Law for an environmental permit in regard to PRES' requested exploitation concession at El Dorado: This issue is addressed in Part X below.
- 4.6 The requirement, effect and application, on the facts, of Article 37(2)(d) of the Mining Law for a feasibility study in regard to PRES' requested exploitation concession at El Dorado: This issue is addressed in Part X below.
- 4.7 The alleged breaches, on the facts, by the Respondent of the Investment Law and (as the Claimant contends) "applicable standards for the treatment of investors" towards the

Claimant (with PRES), resulting in damages regarding El Dorado: This issue is addressed in Part X below.

(3) *Liability – Other Mining Areas:*

4.8 The requirements, effects and application, on the facts, of the Mining Law regarding exploration licences or other rights (as alleged by the Claimant) held by DOREX and PRES at: (i) Zamora/Cerro Colorado, (ii) Guaco; (iii) Pueblos), (iv) Huacuco; and (v) Santa Rita (the “Other Mining Areas”): These issues are addressed in Parts IX and X below.

4.9 The alleged breaches, on the facts, by the Respondent of the Investment Law and (as the Claimant contends) “applicable standards for the treatment of investors” towards the Claimant (with DOREX and PRES), resulting in damages regarding the Other Mining Areas: These issues are addressed in Part X below.

(4) *Quantum:*

4.10 General principles regarding damages and quantum under the Investment Law, Salvadoran law and (as alleged by the Claimant) customary international law: This issue is addressed in Part X below.

4.11 The calculation of the quantum of damages under the applicable law(s): This issue is addressed in Part X below.

(5) *Interest:*

4.12 Pre-award interest, claimed by the Claimant as from 10 March 2008 to the date of this Award: This issue is addressed in Part X below.

4.13 Post-award interest, claimed by the Claimant from the date of this Award until payment: This issue is addressed in Part X below.

(6) *Legal and Arbitration Costs:*

4.14 The allocation as between the Parties, in whole or in part, of (i) Legal Costs and (ii) Arbitration Costs (as defined below): This issue is addressed in Part XI below.

4.15 The assessment of such Legal Costs: This issue is addressed in Part XI below.



## PART V: THE ADDITIONAL JURISDICTIONAL OBJECTIONS

### A. Introduction

5.1 The Tribunal here turns to the Respondent's additional objections to its jurisdiction under Article 15(a) of the Investment Law and the ICSID Convention. These comprise the first of its principal issues listed in Part IV above. The Tribunal first briefly summarises the Parties' submissions on these objections; and it then provides its analysis and decisions.

### B. The Parties' Submissions

#### (i) *The Admissible Scope of Claims in Light of the Applicable Law(s)*

5.2 *The Respondent's Case:* In summary, the Respondent submits that exclusively Salvadoran law applies to this arbitration, and that therefore certain claims of the Claimant exceed the jurisdiction of this Tribunal. First, the Respondent argues that Salvadoran law is the only law that applies because it would breach the principle of equality of Article 5 of the Investment Law if foreign investors could invoke broader interpretations and causes of action in international arbitration while domestic investors could only rely on Salvadoran law.<sup>13</sup>

5.3 Second, the Respondent submits that consistency demands that Salvadoran law be the applicable law, as this would be the applicable law if a dispute within the scope of Article 15 of the Investment Law were submitted to a Salvadoran court. According to the Respondent, consistency requires that the same law must be applied if the investor resorts to international arbitration, such as this arbitration under the ICSID Convention.<sup>14</sup>

5.4 Third, the Respondent submits that all investments located in El Salvador are subject to its laws and that therefore all investors agree that Salvadoran law applies to their investments and rights under the Investment Law.<sup>15</sup> It maintains that the Claimant, by invoking jurisdiction under the Investment Law, agreed to the application of Salvadoran law within

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<sup>13</sup> Counter-Memorial, paras. 283-286.

<sup>14</sup> *Ibid.* para. 288.

<sup>15</sup> *Ibid.* paras. 289-291 (invoking Article 16 of the Civil Code).

the meaning and scope of Article 42(1) of the ICSID Convention.<sup>16</sup>

- 5.5 Fourth, the Respondent submits that all investments related to mining rights in the subsoil are subject to Salvadoran law by virtue of Article 7(b) of the Investment Law, read together with Article 7 of the Mining Law, notwithstanding Article 15 of the Investment Law.<sup>17</sup>
- 5.6 Considering that Salvadoran law applies exclusively, the Respondent submits that the Claimant's claims based on general principles of international law must be rejected by the Tribunal. It argues that such claims transgress the rights and protections under the Investment Law and fall beyond the scope of Article 15.<sup>18</sup> It further maintains that this limitation of the Investment Law has been upheld by the tribunal in *Inceysa v El Salvador*<sup>19</sup> and similarly applies in this arbitration.<sup>20</sup>
- 5.7 In addition, the Respondent submits that the Claimant's request for the Tribunal to determine that the Respondent has breached its Constitution would exceed the Tribunal's jurisdiction under the Investment Law. The Respondent contends that the Investment Law does not grant an arbitral tribunal the authority to decide upon the constitutionality of actions of the Salvadoran Government, this being reserved only to the Salvadoran Supreme Court.<sup>21</sup>
- 5.8 *The Claimant's Response:* The Claimant submits that the Parties have not agreed to the application of any particular law and that Article 15 of the Investment Law does not contain any provision on applicable law.<sup>22</sup> Absent an agreement on the applicable law, the Claimant submits that the Tribunal should proceed under the second sentence of Article 42(1) of the ICSID Convention by applying the law of the Contracting State party to the dispute "and such rules of international law as may be applicable."<sup>23</sup> The Claimant therefore maintains that relevant domestic and international laws may both be applied and

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<sup>16</sup> *Ibid.* para. 279.

<sup>17</sup> *Ibid.* paras. 292-293.

<sup>18</sup> *Ibid.* paras. 266-267, 270-271.

<sup>19</sup> *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) [hereinafter *Inceysa v El Salvador*].

<sup>20</sup> Counter-Memorial, paras. 272-273.

<sup>21</sup> *Ibid.* para. 278 (invoking Article 174 of the Salvadoran Constitution).

<sup>22</sup> Memorial, para. 404.

<sup>23</sup> *Ibid.*

that international law prevails over any domestic law inconsistent with it.<sup>24</sup>

- 5.9 In addition, the Claimant submits that the provisions of the Investment Law on the treatment of investors and their property “are specifically intended to be consistent with international law.”<sup>25</sup> The Claimant submits that the Statement of Purpose of the Investment Law clarifies that this Salvadoran law is intended to reflect best practices in international investment law and should be interpreted in the light of such practices, including the principle of fair and equitable treatment and the protection of foreign investors’ legitimate expectations based on the existing legal framework (the so-called “FET standard”).<sup>26</sup>
- 5.10 The Claimant also contends that, alongside relevant international law and practice, the Constitution of El Salvador is “of fundamental importance in construing and applying the protections and guarantees provided to foreign investors under Salvadoran law, and particularly under the Investment Law.”<sup>27</sup> It argues that the Investment Law should be interpreted in accordance with certain principles (legality, non-arbitrariness, proportionality, economic freedom, protection of property right, due process, right to a response) established in the Salvadoran Constitution and also recognized in international investment law.<sup>28</sup>

(ii) *The Exclusive Jurisdiction of Salvadoran Courts under the Mining Law*

- 5.11 *The Respondent’s Case:* The Respondent maintains that Article 15 of the Investment Law is limited by Article 7(b), subjecting investments related to the exploitation of the subsoil to the Constitution and applicable secondary laws.<sup>29</sup> According to the Respondent, if a dispute arises under the Investment Law in relation to mining exploration licenses or exploitation concessions, such dispute is referred by Article 7(b) of this Law and Article 7 of the Mining Law to the exclusive jurisdiction of Salvadoran courts. The Respondent submits that this limitation overrides the general stipulation in Article 15 of the Investment Law and that the Tribunal therefore lacks jurisdiction over the Claimant’s claims.<sup>30</sup>

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<sup>24</sup> *Ibid.* para. 405.

<sup>25</sup> *Ibid.* para. 407.

<sup>26</sup> *Ibid.* para. 411.

<sup>27</sup> *Ibid.* para. 413.

<sup>28</sup> *Ibid.* para. 415.

<sup>29</sup> Counter-Memorial, paras. 292-301

<sup>30</sup> *Ibid.* paras. 295, 301 & 425-433; Zamora ER 1, paras. 70-82.

5.12 *The Claimant's Response:* The Claimant counters that this objection mistakenly asserts that it is raising claims for breach of a mining concession contract, or to obtain a license or concession or other form of administrative relief.<sup>31</sup> To the contrary, the Claimant maintains that it is claiming damages for the wrongful treatment of its investments in El Salvador, such treatment involving violations of the Respondent's obligations towards foreign investors, rather than entitlements under the Mining Law.<sup>32</sup>

5.13 Moreover, the Claimant asserts that the Respondent has consented to submit to arbitration all disputes that may arise between investors and the State regarding investments in El Salvador under Article 15 of the Investment Law.<sup>33</sup> The Claimant maintains that the Respondent's consent to arbitrate these disputes under the ICSID Convention amounts to an international obligation, which the Respondent cannot revoke by relying upon inconsistent provisions of its own domestic law.<sup>34</sup>

*(iii) The Applicability of a Three-Year Statute of Limitations to the El Dorado Claims*

5.14 *The Respondent's Case:* The Respondent submits that the timing of the Claimant's claims involving the application for an exploitation concession at El Dorado exceeds the applicable three-year time limit under the Salvadoran Civil Code.<sup>35</sup> The Respondent contends that this three-year period commenced at the moment upon which the alleged wrongful act occurred,<sup>36</sup> and that this time limit cannot be evaded by bringing the claims to an ICSID tribunal.<sup>37</sup>

5.15 The Respondent submits that the act that allegedly harmed the Claimant – the failure to decide on the application within the time limit established by law – occurred in or about December 2004. In its submission, given that the Claimant had a claim regarding its request for an exploitation concession for the El Dorado Project in December 2004, the three-year time limit expired in or about December 2007. Accordingly, the Respondent argues that by April 2009, when this arbitration was commenced by the Claimant, its claims in relation to

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<sup>31</sup> Reply, para. 439.

<sup>32</sup> *Ibid.* para. 440.

<sup>33</sup> *Ibid.* para. 441.

<sup>34</sup> *Ibid.*

<sup>35</sup> Counter-Memorial, paras. 434-440 (w. ref. to Art. 2083 Civil Code); Rejoinder, paras. 437-442.

<sup>36</sup> Counter-Memorial, paras. 434-435, w. ref. to Art. 2253 Civil Code.

<sup>37</sup> Rejoinder, paras. 438-440 (with ref. to the principle of equality under Article 5 of the Investment Law).

the El Dorado Project were clearly time-barred under Salvadoran law.<sup>38</sup>

5.16 *The Claimant's Response:* The Claimant denies that its claims are time-barred. It submits that the Respondent's objection to that effect rests on the mistaken assumption that its claims are based upon the Bureau's non-issuance of the exploitation concession within the time limit under the Mining Law. The Claimant contends that its claims are not based on the Bureau's failure to meet such deadline, but rather upon President Saca's *de facto* mining ban of 10 March 2008 and his subsequent refusal to allow the Respondent's relevant governmental agencies to permit mining projects in El Salvador.<sup>39</sup> Moreover, the Claimant maintains that the environmental permit (necessary for PRES' application for a concession) had not been denied by the Respondent: the Ministry of Environment (MARN) was still corresponding with PRES in December 2008 and had informed it that, once additional documents were presented by PRES, its application for the environmental permit could be resolved.<sup>40</sup>

5.17 In addition, the Claimant maintains that domestic statutes of limitations do not apply to claims raised before international tribunals, including ICSID tribunals.<sup>41</sup> It submits that this arbitration remains international in character, even though its jurisdiction derives from the Investment Law; and that this Law does not require the Tribunal to apply only domestic law rules on the interpretation of the Respondent's consent to ICSID jurisdiction.<sup>42</sup>

*(iv) The Request for Reconsideration of the Tribunal's Decision on the Abuse of Process Objection*

5.18 *The Respondent's Case:* The Respondent also requests the Tribunal to reconsider its decision on the abuse of process objection made by the Respondent regarding Pac Rim's nationality change in December 2007 (namely the Tribunal's Decision on the Respondent's Jurisdictional Objections of 1 June 2012). The Respondent maintains that the Claimant "made a material misrepresentation to the Tribunal"<sup>43</sup> in having stated at the jurisdiction hearing that, until March 2008, the Claimant had not been aware that a dispute with the

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<sup>38</sup> Counter-Memorial, paras. 439-440; Rejoinder, paras. 440-442; Tr. D7.2024.

<sup>39</sup> Reply, paras. 436-437.

<sup>40</sup> *Ibid.* paras. 436-437.

<sup>41</sup> *Ibid.* para. 438.

<sup>42</sup> *Ibid.*

<sup>43</sup> Tr. D7.2057; cf. Respondent's Post hearing brief, para. 13.

Respondent existed or was foreseeable. Yet, the Claimant now admits having been aware of a moratorium imposed by the Respondent in May 2007.<sup>44</sup> The Respondent submits that the Tribunal relied upon the Claimant's misrepresentation in its Decision,<sup>45</sup> and that the new admission from the Claimant now requires the Tribunal to reconsider the Respondent's objection as to abuse of process.<sup>46</sup> The Respondent maintains that this part of the Tribunal's Decision is not *res judicata* until it is incorporated in an Award and that the Tribunal "is not only empowered to reopen its prior decision on jurisdiction, but is also required to do so in the interest of justice."<sup>47</sup>

5.19 The Respondent also submits that such reconsideration would affect the Tribunal's decision on the objection regarding the piercing of Pac Rim's corporate veil.<sup>48</sup> It maintains that the Tribunal took note of the submissions on this point; but failed to address them,<sup>49</sup> and requests the Tribunal to take into account that the Claimant was aware of a moratorium in May 2007 in order to "revisit its Decision on Jurisdiction regarding Abuse of Process and how that is linked to the piercing of the corporate veil."<sup>50</sup>

5.20 *The Claimant's Response:* The Tribunal observes that the Claimant has not directly addressed the Respondent's request for reconsideration. However, the Tribunal notes the relevance of the Claimant's submissions on *res judicata*<sup>51</sup> and the earlier submissions on abuse of process and the piercing of the corporate veil.<sup>52</sup>

(v) *The Res Judicata Effect of the Decision on Jurisdiction*

5.21 *The Respondent's Case:* Aside from its request for reconsideration, the Respondent maintains that it does not request the Tribunal to amend its earlier decision on jurisdiction and that *res judicata* considerations therefore do not apply. It contends that it is requesting the Tribunal to issue a new decision based on new submissions, rather than to revise what

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<sup>44</sup> Tr. D7.2058-2059; (ref. to Memorial, paras. 298, 300); Respondent's Post hearing brief, para. 13.

<sup>45</sup> Tr. D7.2058 (ref. to Jurisdictional Decision of 1 June 2012, para. 2.109).

<sup>46</sup> Tr. D7.2059-2060; Respondent's Post hearing brief, para. 13.

<sup>47</sup> Respondent's Post hearing brief, para. 15.

<sup>48</sup> Tr. D7.2061-2064.

<sup>49</sup> *Ibid.* 2064.

<sup>50</sup> *Ibid.* 2064-2065.

<sup>51</sup> See paras. 5.23-5.24.

<sup>52</sup> Rejoinder Jurisdiction, paras. 46-127, 336-356; Claimant's Post-Hearing Submission on Jurisdiction, paras. 63-90 & 102-104.

it has decided previously.<sup>53</sup>

- 5.22 The Respondent also submits that the principle of *res judicata* would not apply at this stage, since a decision on jurisdiction by an ICSID tribunal is not final until it is incorporated in the award.<sup>54</sup>
- 5.23 *The Claimant's Response:* The Claimant submits that the Tribunal's Decision on Jurisdiction is *res judicata* and should lead the Tribunal to refuse to consider the Respondent's additional jurisdictional objections.<sup>55</sup> The Claimant also suggests that the present case meets the criteria for the application of *res judicata*, as this arbitration: (i) involves the same parties; (ii) has the same relief sought; and (iii) concerns causes of action involving the same questions of fact.<sup>56</sup>
- 5.24 In addition, the Claimant submits that the need for efficiency, finality and the avoidance of parallel proceedings support the view that *res judicata* applies to this arbitration.<sup>57</sup> It also maintains that the structure of the ICSID Convention and 'equality of arms' considerations would be consistent with upholding the finality of the Tribunal's previous Decision.<sup>58</sup>

(vi) *The Admissibility of the Additional Objections under the ICSID Arbitration Rules*

- 5.25 *The Respondent's Case:* The Respondent submits that it raised its additional objections within the time limits set by ICSID Arbitration Rule 41(1). It maintains that the objections are new in that: (i) they concern the scope of consent rather than its existence; (ii) they were raised as early as possible; and (iii) they were not filed after the expiration of the deadline for the filing of the Respondent's Counter-Memorial.<sup>59</sup> It argues that since its objections are timely, the Tribunal is required to consider them before it can decide on the merits of the Parties' cases.<sup>60</sup>
- 5.26 The Respondent also maintains that ICSID Arbitration Rule 41(1) establishes the deadline

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<sup>53</sup> Tr. D7.2054-2055.

<sup>54</sup> *Ibid.* 2060; Respondent's Post hearing brief, para. 15.

<sup>55</sup> *Ibid.* 1887 & 1888; Claimant's Post hearing brief, para. 47.

<sup>56</sup> Tr. D7.1894-1895.

<sup>57</sup> *Ibid.* 1901.

<sup>58</sup> *Ibid.* 1901; Claimant's Post hearing brief, para. 47.

<sup>59</sup> Respondent's Post hearing brief, para. 6.

<sup>60</sup> Tr. D7.2053-2054 (w. ref. to Art. 41(2) of the ICSID Convention).

of the counter-memorial as the time limit for a respondent's jurisdictional objections, and that the objections raised in the Respondent's Counter-Memorial meet this time limit.<sup>61</sup> It submits that previous ICSID decisions support this interpretation in deciding that: (i) the deadline is met when objections are filed with the counter-memorial; (ii) objections to jurisdiction are examined even if considered untimely; and (iii) respondents are allowed to file two sets of objections to jurisdiction (without considering that the right to make such further objections had been waived).<sup>62</sup>

5.27 As to the requirement that objections should be raised as early as possible, the Respondent explains that it had only identified the additional objections when the Claimant contended in its Memorial (on the merits) that there was no agreement on the applicable law.<sup>63</sup> The Respondent submits that, since its earlier objections had aimed at denying consent rather than determining the scope of such consent in the light of the applicable law, there had been no reason for it to have identified its objections relating to the scope of consent under Article 15 of the Investment Law prior to the filing of the Claimant's Memorial.<sup>64</sup>

5.28 Moreover, the Respondent maintains that when it raised objections to jurisdiction in 2010, which the Tribunal decided with its Decision on Jurisdiction of 1 June 2012, it reserved the right to raise additional objections.<sup>65</sup> It maintains that the Claimant did not object to this reservation of rights. The Claimant therefore should be considered to have waived any right to object now to such objections.<sup>66</sup>

5.29 *The Claimant's Response:* The Claimant submits that, under the ICSID Arbitration Rules, the Respondent is now precluded from raising the additional objections.<sup>67</sup> It maintains that the governing principle in ICSID Arbitration Rule 41(1) is that such objections shall be made by a respondent as early as possible.<sup>68</sup> As to the stipulation that they shall be filed no later than the expiration of the time limit for the filing of the respondent's counter-memorial, the Claimant submits that this is not an exception to the requirement to submit

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<sup>61</sup> Tr. D7.2045.

<sup>62</sup> *Ibid.* 2051-2052; Respondent's Post hearing brief, paras. 7-8.

<sup>63</sup> Counter-Memorial, para. 441; Tr. D7.2044-2047; Respondent's Post hearing brief, para. 6.

<sup>64</sup> Tr. D7.2046-2047; Respondent's Post hearing brief, para. 6.

<sup>65</sup> Counter-Memorial Merits, para. 441; Tr. D1.259.

<sup>66</sup> Tr. D7.2046; Respondent's Post hearing brief, para. 6.

<sup>67</sup> Tr. D7.1888-1892, & 1903-1910.

<sup>68</sup> *Ibid.* 1903.



them “as early as possible”.<sup>69</sup> Moreover, the Claimant maintains that the Respondent’s additional jurisdictional objections are not new but merely repetitions of earlier ones, or objections that could have been raised earlier; and that this factor “eliminates the Tribunal’s limited authority to address new matters under ICSID Arbitration Rule 41.”<sup>70</sup>

- 5.30 The Claimant further submits that jurisdictional objections have already been dealt with in this arbitration’s jurisdiction phase, with the Parties’ agreement to address matters of jurisdiction prior to the merits. It contends that the procedure set out in ICSID Arbitration Rule 41(3) has already been completed, resulting in the objections being dealt with in full conformity with Rule 41(1) while the proceedings on the merits were suspended.<sup>71</sup>
- 5.31 The Claimant also maintains that ICSID Arbitration Rule 26 requires the Tribunal to disregard the Respondent’s additional jurisdictional objections. It submits that this would be mandatory, unless there are special circumstances, of which there are none in this case.<sup>72</sup>
- 5.32 In addition, the Claimant interprets ICSID Arbitration Rule 27 as support for the proposition that if the Respondent believed that its additional objections were critical, it should have raised them earlier; and not nearly three years after the end of this arbitration’s jurisdictional phase. It maintains that the Respondent’s failure to have done so should be seen as a waiver of any right the Respondent might have had to raise further additional jurisdictional objections.<sup>73</sup>

### ***C. The Tribunal’s Analysis***

#### *(i) The Admissibility of the Additional Jurisdictional Objections*

- 5.33 *(i) The Competence of the Tribunal:* International tribunals, including this Tribunal, possess full and inherent authority to determine their own competence. As confirmed by Article 41(1) of the ICSID Convention, the Tribunal “shall be the judge of its own

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<sup>69</sup> *Ibid.* 1903.

<sup>70</sup> Claimant’s Post hearing brief, para. 47 (n. 36).

<sup>71</sup> Tr. D7.1904-1906; Claimant’s Post hearing brief, para. 47. (ICSID Arbitration Rule 26(3) provides: “Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.”)

<sup>72</sup> Tr. D7.1906-1907; Claimant’s Post hearing brief, para. 47.

<sup>73</sup> Tr. D7.1907-1908; Claimant’s Post hearing brief, para. 47. (ICSID Arbitration Rule 27 provides: “A party which knows or should have known that a provision of ... these Rules ... has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.” Article 45 of the ICSID Convention is not here relevant).

competence.” In other words, the Tribunal has jurisdiction to examine its own jurisdiction, i.e. “Kompetenz-Kompetenz”, subject to Article 52(1)(a) of the ICSID Convention. Faced now with additional objections presented long after its Decision on the Respondent’s Jurisdictional Objections (which completed the second jurisdictional phase of this arbitration on 1 June 2012), this Tribunal must first establish whether it can entertain any new objections to its jurisdiction despite the advanced stage of this arbitration.

- 5.34 Article 41(2) of the ICSID Convention stipulates that any jurisdictional objection by a party to the dispute “shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.” This provision specifies that the Tribunal shall make such determination, without restricting its general competence to decide on any objections subsequently raised. In this respect, under Article 41(1) of the ICSID Convention and ICSID Arbitration Rule 41(2), this Tribunal has the duty, right and competence to satisfy itself that all jurisdictional requirements are fulfilled, regardless of the particular stage of the arbitration.
- 5.35 The Tribunal therefore decides upon its competence to entertain the Respondent’s additional objections to its jurisdiction notwithstanding its Decision on Jurisdiction of 1 June 2012. In the exercise of this competence, it next determines whether the Respondent’s additional objections are admissible.
- 5.36 (ii) *The Effect of the Tribunal’s Jurisdiction Decision on The Respondent’s Jurisdictional Objections:* Article 53(1) of the ICSID Convention provides that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” In accordance with Article 48(3) of the ICSID Convention, an award must deal with every question submitted to the Tribunal. Since decisions affirming jurisdiction are limited to the settlement of jurisdictional questions prior to issues as to the merits, they do not have the status of an award under the ICSID Convention until their incorporation into the award that addresses all questions and thus decides the parties’ dispute.<sup>74</sup> In an ICSID arbitration, there can only be one award. Article

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<sup>74</sup> Cf. Art. 48(3) ICSID Convention and ICSID Arbitration Rule 47(1)(i); *Electrabel S.A. v Hungary*, ICSID Case No. ARB 07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 10.1 [hereinafter: *Electrabel v Hungary*]; C.H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edition, Cambridge Univ.

51 on revision and Article 53(1) on annulment of the ICSID Convention therefore do not apply to preliminary decisions affirming jurisdiction until their incorporation in the later award. This is only different when an ICSID tribunal denies all jurisdiction, since such a decision does bring the arbitration to an end and must therefore take the form of an award in accordance with ICSID Arbitration Rule 41(6).<sup>75</sup>

5.37 These considerations need not preclude an ICSID tribunal from determining that its earlier decision on jurisdiction should, by analogy with Article 53(1) of the ICSID Convention or otherwise, be considered final at a later stage of the arbitration. It would be detrimental to the effectiveness of ICSID arbitration and to the proper administration of ICSID arbitrations if significant decisions could be subject to change at any time prior to the award, upon the request of an aggrieved party. With this in mind, the question arises whether the Tribunal's previous jurisdictional decision, by which it affirmed its jurisdiction under the Investment Law (but not CAFTA), does constitute a final determination on the matter of its jurisdiction under Article 15(a) of the Investment Law and the ICSID Convention.

5.38 A positive view to this question was expressed by the ICSID tribunal in *Electrabel* in relation to its earlier decision on jurisdiction, applicable law and liability: "Although necessarily described as a 'Decision' and not an 'Award' under the ICSID Convention and ICSID Arbitration Rules, the several decisions and reasons contained in this Decision are intended by the Tribunal to be final and not to be revisited by the Parties or the Tribunal in any later phase of these arbitration proceedings."<sup>76</sup> The Tribunal is also aware of the debate generated by the *ConocoPhillips* procedural decision and the dissent concerning its *res judicata* effect<sup>77</sup>, and that other ICSID and other tribunals faced with additional objections to their jurisdiction have examined these later objections without considering that their

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Press, 2009) 535-536, 812-813 & 1114; E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law Intl. 1999) 739-740.

<sup>75</sup> ICSID Arbitration Rule 41(6) provides: "If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect."

<sup>76</sup> *Electrabel v Hungary*, para. 10.1.

<sup>77</sup> *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration, and Dissenting Opinion of G. Abi-Saab (10 March 2014).

earlier decisions had *res judicata* or final effect.<sup>78</sup> The latter is particularly the case where a party is guilty of material fraud, perjury or other improper means used to procure the impugned earlier decision from an international tribunal.<sup>79</sup>

5.39 However, this Tribunal prefers in the present case not to invoke any principle of *res judicata* or finality, by analogy with Article 53(1) of the ICSID Convention or otherwise. In its view, the question can here be decided more easily, as a practical matter, by direct reference to other provisions of the ICSID Convention and the ICSID Arbitration Rules.

5.40 (iii) *The Admissibility under the ICSID Convention and ICSID Arbitration Rules*: The Respondent first raised its “new” additional objections in its Counter-Memorial on the Merits of 10 January 2014. This occurred more than one-and-a-half years after the Tribunal’s Jurisdictional Decision of 1 June 2012 that followed its order of 1 September 2010 to suspend the proceedings on the merits in order to deal separately with questions of jurisdiction.<sup>80</sup> The Tribunal also notes that these additional objections were raised more than three-and-a-half years after the Respondent submitted its objections to jurisdiction under ICSID Arbitration Rule 41(1) on 3 August 2010.

5.41 Jurisdictional objections are preliminary in nature and, as a general principle, must be raised as early as possible. ICSID Arbitration Rule 41(1) provides that: “Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made *as early as possible*. A party shall file the objection with the Secretary-General *no later than the expiration of the time limit fixed for the filing of the counter-memorial*, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—*unless the facts on which the objection is based are unknown to the party at that time*.” (Emphasis added by the Tribunal).

5.42 The Tribunal considers that the ordinary meaning of this provision establishes as the

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<sup>78</sup> See *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (3 July 2008); *Československa obchodní banka A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent’s Further and Partial Objection to Jurisdiction (1 December 2000).

<sup>79</sup> For example, see *The Sabotage Cases, Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (USA) v. Germany*, Decision, 15 December 1933, VII RIAA, p. 160; and *Antoine Biloune, Marine Drive Complex Ltd. v Ghana Investments Centre, the Government of Ghana*, Award on Damages and Costs, 30 June 1990, paras. 33-34 (following an earlier interim award on jurisdiction and liability).

<sup>80</sup> Letter to the Parties on behalf of the President of the Tribunal dated 1 September 2010, point (1).

primary rule that jurisdictional objections must be made as early as possible. This rule is subject to the further condition that any such objection may not exceed the time limit for the counter-memorial. The imposition of this time limit is an additional condition, not an alternative requirement. In other words, the indicated deadline does not negate the primary obligation to raise jurisdictional objections as early as possible. The exception to the time limit for objections based on facts that were unknown at that time further confirms that the governing condition remains that they should be raised “as early as possible.”

- 5.43 This interpretation is consistent with the approaches taken by other ICSID tribunals. Faced with objections to jurisdiction raised on the last day of the time limit fixed for the counter-memorial, the tribunal in *Desert Line v Yemen* observed that: “The fact that objections shall be filed with ICSID ‘no later’ than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were or ought to have been already manifest, in view of the ‘as early as possible’ requirement ...”.<sup>81</sup> Similarly, the tribunal in *Urbaser v Argentina* characterised the requirement to raise the objections as early as possible as the “primary rule”, and the condition that they shall be raised no later than the time limit for the counter-memorial as “the secondary rule.”<sup>82</sup>
- 5.44 Given these considerations, the Tribunal decides that it must next examine whether the additional jurisdictional objections have been raised as early as possible by the Respondent, even though they were raised before the expiration of the deadline for the filing of its Counter-Memorial.
- 5.45 Based on a review of the Parties’ pleadings throughout these proceedings (including the preliminary and jurisdictional phase, as well as the Notice of Arbitration), the Tribunal rejects the Respondent’s submissions as to the timeliness of its objections, as jurisdictional objections to the Claimant’s claims, in regard to: (i) the exclusion of claims beyond the scope of the Investment Law; (ii) the exclusive jurisdiction of the Salvadoran courts; and (iii) the application of the Salvadoran statute of limitations. The Respondent has submitted that these objections could not have been anticipated before the Claimant’s Memorial on

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<sup>81</sup> *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008), para. 97.

<sup>82</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012), para. 257.

the Merits and concern issues that had not been raised in El Salvador's previous ICSID arbitrations or earlier in this arbitration.<sup>83</sup> However, as explained below, the Tribunal considers that these jurisdictional objections could and should have been raised by the Respondent earlier in this arbitration.

5.46 As to the objection regarding the exclusion of claims beyond the scope of the Investment Law, the Tribunal notes that it does not rest upon any new facts or submissions put forward by the Claimant in the merits phase of this arbitration. Already at the first phase of this arbitration, the Claimant submitted that rules of international law applied to its claims under the Investment Law; and it referred to the Respondent's obligations under international law as well as to those under the Salvadoran Constitution.<sup>84</sup> The Tribunal therefore decides that the Respondent has not raised its objection at the earliest possibility as required under the "primary rule" imposed by the ICSID Convention and the ICSID Arbitration Rules.

5.47 The objection as to the exclusive jurisdiction of Salvadoran courts under Article 8 of the Mining Law in regard to the Claimant's claims concerns legislation already actively referred to in this arbitration's earlier jurisdictional phase.<sup>85</sup> It is directly pertinent to the jurisdictional question of the Respondent's consent to ICSID Arbitration under Article 15(a) of the Investment Law; and, as such, it should have been raised by the Respondent in that jurisdictional phase. Therefore, the Respondent's additional jurisdictional objection is not a response at the earliest possible time to a new matter arising from the Claimant's pleadings. Moreover, the Respondent's denial at having faced a similar issue in previous arbitrations does not establish that the objection was raised as early as possible; nor does it exonerate the Respondent from the requirement to do so under the ICSID Convention and the ICSID Arbitration Rules.

5.48 In regard to the objection concerning the Salvadoran statute of limitations, the Tribunal notes that the objection does not rest upon any new facts or submissions by the Claimant's

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<sup>83</sup> See paras. 5.25-5.27 above.

<sup>84</sup> Notice of Arbitration, paras. 82, 90 & 123.

<sup>85</sup> Respondent's Memorial on Objections to Jurisdiction, para. 61; Jur Tr. D1.34, 37-40, 42-43, 51-52, 52 & 62-63 Respondent's Post-hearing Brief on Objections to Jurisdiction, paras. 131 & 137; Respondent's Preliminary Objections under Articles 10.20.4 and 10.20.5 of the CAFTA, paras. 36-58, 68, 70 & 89.

Memorial on the Merits. Rather, it concerns the invocation of the Respondent's own legislation. The Claimant has advanced submissions in regard to the El Dorado Project and the Investment Law since the very start of this arbitration in April 2009.<sup>86</sup> The Tribunal therefore decides that the Respondent could and should have raised its jurisdictional objection that is based on its own Civil Code much earlier in the proceedings (assuming, in the Respondent's favour, that such an objection can found an objection to the Tribunal's jurisdiction).

- 5.49 The Tribunal therefore concludes that the Respondent has failed to fulfil the "as early as possible" requirement of ICSID Arbitration Rule 41(1) in regard to its additional jurisdictional objections to the Claimant's pleaded claims on: (i) the exclusion of all claims beyond the scope of the Investment Law; (ii) the exclusive jurisdiction of the courts of El Salvador; and (iii) the application of the Salvadoran statute of limitations. These objections have not been raised at the earliest possibility, even if they were raised before the expiration of the time limit for the Respondent's Counter-Memorial (on the merits).
- 5.50 At the same time, the Tribunal is also aware of its mandate under Article 41(1) of the ICSID Convention and of its power under ICSID Arbitration Rule 41(2) to consider, "at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence."<sup>87</sup> With this in mind, the Tribunal has the power to examine, upon its own initiative at any time, any jurisdictional question it considers pertinent, even if it entails a matter that was raised belatedly by a party or not raised by any party at all. Within this limited scope, upon its own initiative, the Tribunal will address later below the additional jurisdictional objections belatedly raised by the Respondent.
- 5.51 Finally, as to the request for reconsideration of the Tribunal's Jurisdiction Decision regarding the Respondent's objection based upon alleged abuse of process and misrepresentation by the Claimant, the Tribunal observes that this request is based on new information arguably first made available by the Claimant in its Memorial on the Merits, thus making the Respondent's Counter-Memorial the first opportunity for the Respondent

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<sup>86</sup> See Notice of Arbitration, paras. 54-65.

<sup>87</sup> ICSID Arbitration Rule 41(2). Cf. also Article 41(1) of the ICSID Convention.

to respond to it. Since the Respondent first raised this jurisdictional objection in its Counter-Memorial on the Merits, the Tribunal considers that it may have been raised timeously, “as early as possible” in accordance with ICSID Arbitration Rule 41(1). However, as with the Respondent’s other objections, the Tribunal prefers to address also this objection upon its own initiative under ICSID Arbitration Rules 41(1) and (2).

*(ii) The Consideration of the Additional Objections to the Jurisdiction of the Tribunal*

5.52 *(ii) Abuse of Process Objection:* In its Decision on the Respondent’s Jurisdictional Objections of 1 June 2012, the Tribunal decided, based upon the Parties’ respective cases at that time, that:

“... the de facto ban forming the legal and factual basis pleaded for [the Claimant’s] CAFTA claims [...] became known to the Claimant only from the public report of President Saca’s reported speech on 11 March 2008; and that, also as such, it was not known to or foreseen by the Claimant before 13 December 2007 as an actual or specific future dispute with the Respondent under CAFTA.”<sup>88</sup>

5.53 After considering all relevant aspects, the Tribunal reached the following decision on the Respondent’s abuse of process objection to the Claimant’s claims:

“For these reasons, in the circumstances of the present case, taking into particular consideration the Claimant’s claims as finally pleaded and explained to this Tribunal, the Tribunal determines that the change in the Claimant’s nationality on 13 December 2007, on all the evidential materials adduced by the Parties in these proceedings, is not proven to have been an abuse of process precluding the exercise of the Tribunal’s jurisdiction to determine such claims under CAFTA and the ICSID Convention; and the Tribunal therefore rejects the Respondent’s case on the Abuse of Process issue.”<sup>89</sup>

5.54 In rejecting the Respondent’s objection, the Tribunal also observed:

“However, the Tribunal considers that the Abuse of Process issue does not apply to the Claimant’s claims under the Investment Law which are not made under CAFTA and made with an independent right to invoke ICSID Arbitration.”<sup>90</sup>

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<sup>88</sup> Decision on the Respondent’s Jurisdictional Objections, para. 2.109.

<sup>89</sup> *Ibid.* para. 2.110.

<sup>90</sup> *Ibid.* para. 2.111.



- 5.55 The Respondent now requests the Tribunal to reconsider its rejection of the abuse of process objection in the light of a new fact relating to the Claimant's awareness of a (foreseeable) dispute prior to its nationality change. However, the Tribunal has already denied jurisdiction over the CAFTA claims pleaded by the Claimant. It is only in relation to those CAFTA claims that the question arose of whether the nationality change constituted an abuse of process. For the non-CAFTA claims at issue under the Investment Law, it is without consequence whether the nationality change occurred with or without knowledge by the Claimant of any (foreseeable) dispute.
- 5.56 Given that both the United Kingdom and the United States of America were (and remain) Contracting Parties to the ICSID Convention (unlike CAFTA), the Claimant could have invoked Article 15(a) of the Investment Law without any need to change its nationality from the Cayman Islands (as a British Overseas Territory) to the United States of America.<sup>91</sup> The consequences of the Claimant's nationality change and the reasons for it were therefore at the time and remain a moot point in relation to the Tribunal's jurisdiction under the Investment Law, as invoked by the Claimant.
- 5.57 Accordingly, for these reasons, the Tribunal declines to revise its Jurisdiction Decision of 1 June 2012 on the rejection of the abuse of process objection made by the Respondent. In short, that objection was relevant to the Claimant's claims under CAFTA; and those claims are no longer present in this arbitration as a result of the Tribunal's Decision. This particular objection is not relevant or material to the Claimant's surviving claims under the Investment Law.
- 5.58 (ii) *Piercing the Corporate Veil*: The Respondent also submits that its requested reconsideration requires the Tribunal to reconsider its objection relating to the piercing of the Claimant's corporate veil.<sup>92</sup> The Tribunal rejects this further submission. It is not convinced that the piercing of the corporate veil would be appropriate or necessary. In order for it to be justified, as an exception to determining the nationality of a company by reference to its incorporation or seat, there must be specific factors or compelling reasons

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<sup>91</sup> As already observed in the Decision on the Respondent's Jurisdictional Objections, para. 5.43.

<sup>92</sup> Cf. Decision on the Respondent's Jurisdictional Objections, paras. 5.12 and 5.26.

that call for an inquiry into the company's actual ownership and control.<sup>93</sup> These are absent in the present case. The mere fact that the Claimant (with PRES and DOREX) is or was an associated company of Pacific Rim Mining Corporation (or any other company) does not constitute a misuse or abuse of its corporate structure. Moreover, without more, the ICSID Convention does not require such an inquiry into a claimant in order to establish its nationality under Article 25(1).<sup>94</sup> Nor does the Investment Law require such an examination. Accordingly, there is here no legal requirement or reason for the Tribunal to pierce the corporate veil of the Claimant.

5.59 Based on these considerations, the Tribunal declines to revise its Jurisdiction Decision of 1 June 2012 in regard to the questions of piercing of the Claimant's corporate veil.

5.60 (iii) *Applicable Law(s)*: In conformity with Article 42(1) of the Convention, the Tribunal is to decide the Parties' dispute in accordance with such rules of law as agreed by the Parties, or, in the absence thereof, Salvadoran law as the law of the Contracting State party to the dispute "and such rules of international law as may be applicable." The Parties disagree on: (i) whether there is any agreement on the applicable law or laws; and (ii) whether Salvadoran law applies to the exclusion of relevant rules of international law.<sup>95</sup>

5.61 As to the existence of any agreement between the Parties on the applicable law(s), the Tribunal observes that the Investment Law does not contain a provision that specifies the law to be applied to disputes that might arise thereunder between the Respondent and a foreign investor. There is no other agreement on applicable law between the Parties. Therefore, in accordance with the second sentence of Article 42(1) of the ICSID Convention, the Tribunal decides that it must apply Salvadoran law, being the law of the Contracting State party to this arbitration, and also such rules of international law as may be applicable to the Parties' dispute.

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<sup>93</sup> Cf. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, Second Phase, 5 Feb. 1970, ICJ Rep. 1970, paras. 56-63; E.C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders', P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford Univ. Press 2008) 75-80; C.H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edition, Cambridge Univ. Press, 2009) 281, including the decisions cited to this effect.

<sup>94</sup> Cf. C.H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edition, Cambridge Univ. Press, 2009) pp 165ff, including the arbitral decisions cited to this effect.

<sup>95</sup> See paras. 2-10.

- 5.62 Having decided that Salvadoran and (if and to the extent relevant) rules of international law apply, the Tribunal cannot accept the Respondent’s submission based on its domestic law to the effect that claims relying on principles of international law must be rejected as a matter of jurisdiction. It is well established that a State cannot justify the non-observance of its international obligations in an international arbitration by invoking provisions of its domestic law.<sup>96</sup> Moreover, arbitral practice under and scholarly commentaries on Article 42(1), second sentence, of the ICSID Convention confirm the parallel application and corrective function of international law in relation to domestic law.<sup>97</sup> The Tribunal accepts, as was held in the award in *Inceysa*, that “in order to invoke the arbitration jurisdiction provided in the Investment Law, there must be a claim with substantive grounds in said law.”<sup>98</sup> However, this approach does not mean that such law can exclude applicable rules of international law in the absence of a choice of law clause to that effect.
- 5.63 The Tribunal therefore decides that the establishment of its jurisdiction under the Investment Law does not require it to dismiss claims pleaded by the Claimant, without regard to the merits, that also rely on rules of international law that may be applicable.
- 5.64 For similar reasons, the Tribunal also rejects the Respondent’s submission that claims relying on provisions of the Constitution of El Salvador exceed the jurisdiction of the Tribunal under the Investment Law.<sup>99</sup> The Constitution is an indispensable part of Salvadoran law as the law applicable to the merits of the dispute, alongside applicable rules of international law. Moreover, the Constitution is explicitly referred to in various

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<sup>96</sup> Cf. Art. 3, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. General Assembly Resolution 56/83 (12 Dec. 2001), UN Doc. A/RES/56/83, Annex; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Rep. 1988, para. 57; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 94.

<sup>97</sup> *M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), para. 218; *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006), para. 162; *Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/05, Award (23 September 2003), paras. 102-105; *Wena Hotels Limited. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment of the Arbitral Award (5 February 2002), para. 40 [hereinafter *Wena v Egypt - annulment*]. Cf. also E. Gaillard and Y. Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington [ICSID] Convention: The Role of International Law in the ICSID Choice of Law Process’ (2003) 18 *ICSID Review* 375 at 403-411.

<sup>98</sup> *Inceysa v El Salvador*, para. 333.

<sup>99</sup> *Ibid*, see para. 7.

provisions of the Investment Law.<sup>100</sup> The Tribunal therefore decides that the claims pleaded by the Claimant that invoke the Constitution of El Salvador alongside the Investment Law are within the scope of its jurisdiction.

5.65 For the above reasons, the Tribunal dismisses the jurisdictional objection that the claims relying on rules of international law and the Constitution of El Salvador are beyond the scope of the jurisdiction of the Tribunal.

5.66 (iv) *Exclusive Jurisdiction of Salvadoran Courts*: In its Jurisdiction Decision of 1 June 2012, the Tribunal decided:

“... that the wording of Article 15 of the Investment Law contains the Respondent’s consent to submit the resolution of disputes with foreign investors to ICSID jurisdiction; that such intention appears unambiguously from the text of Article 15; and that it is confirmed from the context, the circumstances of its preparation and the purposes intended to be served by Article 15, read with Article 25 of the ICSID Convention.”

5.67 Notwithstanding this decision, the Respondent has now submitted that Article 7(b) of the Investment Law,<sup>101</sup> read with Article 7 of the Mining Law (the latter establishing the exclusive jurisdiction of Salvadoran courts)<sup>102</sup> negates the jurisdiction of the Tribunal under the Investment Law and the ICSID Convention.

5.68 However, questions of jurisdiction over a claimant’s claims are not (in the absence of a specific agreement to that effect) necessarily governed by the same law that applies to the merits of the parties’ dispute. Article 42(1) of the ICSID Convention addresses the law that applies to the merits of the dispute, not to decisions on jurisdiction.<sup>103</sup> Determining the existence and scope of the consent to the jurisdiction of the Centre and this Tribunal under

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<sup>100</sup> See Articles. 7, 8 and 13 of the Investment Law.

<sup>101</sup> Article 7, chapeau and (b), of the Investment Law (as translated in RL-9bis) provides: “In accordance with the provisions of the Constitution of the Republic and secondary laws, investments will be limited in the following activities and terms: [...] (b) The subsoil belongs to the State, which may grant concessions for its exploitation; [...]” (see the full text in Spanish in Part II).

<sup>102</sup> Article 7 of the Mining Law (as translated in RL-7bis) provides: “The Mining License or Concession Holders, be they national or foreign, are subject to the laws, Courts and Authorities of the Republic, and are absolutely precluded from resorting to claims in the diplomatic protection venue; and the respective contracts must establish that in everything related to the application, interpretation, performance or termination of the same, they waive their domicile and submit themselves to the Courts of San Salvador” (see the full text in Spanish in Part II).

<sup>103</sup> Cf. *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003), para. 88; C.H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edition, Cambridge Univ. Press, 2009) 551.

Article 15(a) of the Investment Law is a question to be decided by the Tribunal in accordance with Articles 25 and 41(1) of the ICSID Convention. The Tribunal is not bound by the State's own interpretation of Article 15(a); nor will it apply other legislative provisions that would override an expression of jurisdictional consent that is valid, clear and unambiguous as a matter international law.<sup>104</sup>

- 5.69 The Tribunal therefore cannot accept that the exclusive jurisdiction of Salvadoran courts under Article 7 of the Mining Law would negate automatically its jurisdiction under Article 15 of the Investment Law, in regard to all claims pleaded by the Claimant in this ICSID arbitration. There is a further reason: the Claimant itself was never a licensee or applicant under the Mining Law for any licence or permit (whether for exploration or exploitation concession). It had no standing by itself to commence legal proceedings against the Respondent before a Salvadoran Court under Article 7 of the Mining Law. That possibility was confined to PRES and DOREX, both Salvadoran companies, a point to which the Tribunal returns below. Accordingly, Article 7 of the Mining Law could not impede the Claimant's own invocation of Article 15(a) of the Investment Law in regard to its own pleaded claims, as a matter of jurisdiction under the Investment Law and the ICSID Convention.
- 5.70 Based on these reasons, the Tribunal finds no good reason to revise its Decision of 1 June 2012 in regard to its jurisdiction over the Claimant's claims pleaded under the Investment Law. The Tribunal accordingly confirms its jurisdiction under Article 15(a) of the Investment Law and Article 25 of the ICSID Convention.
- 5.71 (v) *Salvadoran Statute of Limitation*: The Respondent has also belatedly invoked provisions of the Salvadoran Civil Code as a basis for its objection that the Claimant's El Dorado claims are time-barred under Salvadoran Law and therefore should be rejected by the Tribunal as a matter of jurisdiction: namely, Articles 2231(2), 2253 and 2083 of the Civil Code. The Tribunal finds no merit in this jurisdictional objection. As decided above, the fact that a provision of Salvadoran legislation provides the consent to arbitration does not mean that the Tribunal's decisions on jurisdiction are governed by Salvadoran law.

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<sup>104</sup> Cf. also *Wena v Egypt - annulment*, para. 41; *Southern Pacific Properties (Middle East) Limited. v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 April 1988), paras. 38-39.

Domestic law cannot automatically negate the Respondent's international obligation that has been established by its consent to ICSID arbitration under Article 15(a) of the Investment Law and the ICSID Convention.

5.72 Moreover, international investment tribunals are not necessarily bound to apply domestic statutes of limitations.<sup>105</sup> While a tribunal may decide to take such limitations into account in deciding whether a claim has been unreasonably delayed in a particular case, neither the Investment Law nor the ICSID Convention require this Tribunal to do so. In the present case, the Tribunal sees no need for it to exercise a discretion in this regard in favour of the Respondent as a matter of jurisdiction. This is even more so taking into account the Respondent's failure to raise its objection in a timely manner, over three-and-a-half years after the submission of its objections to the jurisdiction of this Tribunal on 3 August 2010, and one-and-half years after the Tribunal's Jurisdictional Decision of 1 June 2012. Further, even if applicable, the Tribunal is not persuaded that the Respondent's plea of limitation under the Salvadoran Civil Code operates, in any event, as a bar to the Claimant's claims as a matter of jurisdiction (as opposed to merits).

5.73 Based on all these considerations, the Tribunal decides that the three-year statute of limitation under the Salvadoran Civil Code does not require the Tribunal to reject the El Dorado claims pleaded by the Claimant, as a matter of jurisdiction.

#### ***D. The Tribunal's Decision***

5.74 For the reasons set out above, in regard to the first of the principal issues listed in Part IV above, the Tribunal dismisses the Respondent's additional jurisdictional objections. Accordingly, the Tribunal re-affirms its jurisdiction pursuant to Article 15(a) of the Investment Law and Article 25(1) of the ICSID Convention to decide the Claimant's claims at issue in this merits phase of the arbitration; and the Tribunal confirms its Decision of 1 June 2012 (which, as already indicated, is incorporated in and therefore forms part of this Award).

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<sup>105</sup> *Wena Hotels Ltd. v Arab Republic of Egypt*, ICID Case No. ARB/98/4, Award (8 December 2000), paras. 106-107; *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000), para. 93; *Alan Craig v Ministry of Energy of Iran, et al.*, Award No. 71-34 6-3, 2 Sept. 1983, 3 Iran-U.S. CTR (1984), 280 at 287; *Gentini Case, Mixed Claims Comm. (Italy-Venezuela)*, 13 February 7 May 1903, 10 RIAA 551-561. Cf. *Pious Fund Case (United States of America v Mexico)*, Award, 14 October 1902, 9 RIAA 1 at 13.

## **PART VI: THE TRIBUNAL’S FACTUAL CHRONOLOGY – EL DORADO**

### ***A. Introduction***

6.1 *Introduction:* The Tribunal here addresses the factual background to the Claimant’s claims in regard to the El Dorado Project. It largely confines those facts, for reasons to become apparent later below, to those relevant to the second principal issue identified in Part IV(B)(2) above under Article 37(2)(b) of the Mining Law. As regards the first sub-issue of this statutory provision’s legal interpretation, the primary facts are relatively few and mostly (but not completely) undisputed between the Parties. However, as regards the second sub-issue of “estoppel” or “actos propios”, it is necessary to explain the full factual context in which the Parties’ dispute arose under Article 37(2)(b) of the Mining Law, which are much in dispute between the Parties. It is appropriate to recite this context in the form of the evidential chronology which follows below, citing much of the contemporary documentation as also explained by the Parties’ witnesses in their written evidence and their oral testimony at the hearing.

### ***B. 1995***

6.2 *1995:* The chronology begins with the Respondent’s Mining Law of 14 December 1995. It was a new mining code, later amended in 2001 (the “Mining Law”, also sometimes called “the Mining Law of 1996”, the year in which it came into legal effect).<sup>106</sup> This was not the Respondent’s first mining law: it had enacted Mining Codes in 1881 and 1922. The 1922 Mining Code had been influenced by the mining laws of other mining countries, including Argentina, Peru, Mexico, Spain, France and the USA.<sup>107</sup> By 1911, the Respondent’s Bureau of Statistics recorded 180 mineral mines in El Salvador.<sup>108</sup> At this time, mineral mining in El Salvador (including gold) involved surface outcrops and excavation work proceeding from the surface: it was not underground mining.<sup>109</sup> The Respondent had also enacted the Complimentary Law of 1953, affecting the 1922 Mining Code.

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<sup>106</sup> RL-7 (bis).

<sup>107</sup> CLA-207.

<sup>108</sup> C-297, Table at page 185.

<sup>109</sup> Williams ER 1, page 11.

### **C. 2001-2002**

- 6.3 *2001*: The 1995 Mining Law pre-dated the Claimant’s acquisition of its exploration licences upon its amalgamation (or merger) with Dayton Mining in April 2002.<sup>110</sup> The text of this Mining Law formed part of Pac Rim’s due diligence for its amalgamation, as recognised by the Claimant in this arbitration in its written pleadings: “In connection with its due diligence for the Dayton merger, Pacific Rim of course studied and relied upon the new Mining Law and Mining Regulations that had been enacted in 1996, as well as the 2001 amendments. While those amendments – which extended the number of years for which exploration licenses could be granted – were under review, on June 28, 2001, the Government issued Decree No. 456. This decree extended the validity of all exploration licenses due to expire in 2001 until the end of the year, in order to allow the Legislative Assembly sufficient time to promulgate the amendments to the Mining Law that were necessary to allow for further extensions of the relevant licenses.”<sup>111</sup> In his testimony, Mr Shrake confirmed that Pac Rim had conducted legal due diligence for its amalgamation with Dayton in 2002; and that this exercise had included a study of the Mining Law and the Mining Regulations.<sup>112</sup>
- 6.4 It can thus be readily assumed that the Claimant, assisted by its several legal advisers and mining specialists, was familiar with the texts of the Mining Law and associated Mining Regulations before its indirect acquisition of the exploration licences to be held by PRES. It is also to be noted that, from the outset, the Claimant, with its senior executives (particularly Ms McLeod Selzer and Mr Shrake) had significant experience, expertise and practical knowledge of gold mining, including underground mines.
- 6.5 The Claimant’s senior executives were also skilled at international business, in its broadest aspects, including dealings with the Respondent’s Government and Legislative Assembly. Prior to its amalgamation with Dayton Mining in April 2002, the Claimant “had a hand in helping the Government draft” the 2001 amendment to the 1995 Mining Law “so that El

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<sup>110</sup> C-230 (As explained in Part I above, the Claimant and its parent company Pacific Rim are collectively described as “Pac Rim”).

<sup>111</sup> Request, para. 45.

<sup>112</sup> Tr. D2.307-308.



Salvador would be open and receptive to mining investment and allow deposits to be developed in a timely way”, according to a public statement made in 2004 to the “Wall Street Transcript” by Ms McLeod Seltzer (of the Claimant).<sup>113</sup> She there also described El Salvador as having “very friendly mining laws.”

- 6.6 2002: This chronology addresses Pac Rim’s El Dorado Project, acquired and evolved from Dayton Mining and Kinross in the form of exploration licences. This project lay in the San Isidoro District, some 7.5 km south west of the city of Sensuntepeque.<sup>114</sup> The exploration area was comprised of “El Dorado Norte” and “El Dorado Sur.” The smaller concession area was to be called “El Dorado.” It was to include smaller areas known as “Minita” and “Minita 3” (see the maps in Part III).
- 6.7 Following their acquisition in April 2002, the exploration licences now held indirectly by the Claimant (through PRES) had less than three years to run, being set to expire on 1 January 2005 unless converted into an exploitation concession under the Mining Law. From the outset, the Claimant understood the importance of this statutory deadline: Mr Gehlen (for the Claimant) had noted this deadline as an “important issue” during the Claimant’s due diligence exercise in 2002: “... Exploitation needs to go forward in 3 years or loose [sic: lose] concession at El Dorado (under new mining law and regulations, 3 years out of 8 years remain).”<sup>115</sup> This statutory deadline of 1 January 2005, non-extendable, was to have an important effect on subsequent events.
- 6.8 The Claimant’s due diligence, prior to the amalgamation in 2002, included the Respondent’s earlier mining study of February 1998, prepared by its Ministry of Environment and Natural Resources (MARN) on “the Development and Perspectives of Mining Activity in El Salvador.” It included the following passages:<sup>116</sup> “The current Law on Mining [i.e. the Mining Law of 1995], unlike the repealed Code [the old Mining Law of 1922], does not consider the mining industry to be of public interest, and therefore this Law does not contemplate the concept of expropriation. Any person who requests a mining concession must first prove the availability of the property which the concession will affect,

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<sup>113</sup> C-336.

<sup>114</sup> C-613.

<sup>115</sup> C-618.

<sup>116</sup> C-622, pp 23-25.

which must be done by means of an instrument of ownership of the property or authorization legally granted by the owner. ....”; and “... [The] Law on Mining treats surface ownership in a very different manner from civil law. For [the] Law on Mining, the subsurface is something that is fundamental, and so the surface is generally of little importance because of the very nature of mining activity.”

6.9 The Tribunal considers these passages materially ambiguous as to the requirement of the Mining Law for the applicant’s ownership or authorization regarding the surface area of the ‘affected property’.<sup>117</sup> There was also a linguistic dispute between the Parties at the hearing as to the accurate translation of these passages into English.<sup>118</sup> Hence the Tribunal has here worked directly from the original Spanish text. In this Spanish text, however, the wording leaves the question open as to how and what surface area is affected by underground mining; and the later reference to the surface being generally of little importance for mining provides little useful guidance. With hindsight, it is possible to infer that the affected property was here to extend beyond the surface area actually occupied by the mine’s infrastructure; but, equally, that it might not extend to the full surface area of the concession. Moreover, the Tribunal notes that the study’s named author (Mr Ticay) was a geologist and not a Salvadoran lawyer (although, as Mr Ticay testified, he had access to Dr Méndez, a lawyer who had participated in drafting the 1995 Mining Law).<sup>119</sup> Accordingly, for all these reasons, the Tribunal does not accept the Respondent’s submission that this is a “very clear statement published to the mining community in 1998 before [the] Claimant ever invested.”<sup>120</sup>

6.10 In any event, there is no evidence adduced in this arbitration that representatives of the Claimant or PRES so understood this passage before the Claimant indirectly acquired its exploration licences upon the amalgamation with Dayton in 2002. Mr Shrake testified that he only had “a vague recollection” of the publication.<sup>121</sup>

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<sup>117</sup> In the original Spanish text: “... la disponibilidad del inmueble sobre la cual recaerá la concesión”; C-622, p 23.

<sup>118</sup> Contrast Tr. D4.834-835 (The Claimant prefers “... ‘that will be affected by the Concession’ ) and Tr. D.7.1955-1956. (The Respondent prefers “... ‘which will be covered by the Concession’ ... that means the area of the concession”).

<sup>119</sup> Tr. D4.860.

<sup>120</sup> Tr. D1.193.

<sup>121</sup> Tr. D2.326.

- 6.11 In its Annual Technical Report for 2002 submitted to the Respondent's Department of Mines, Kinross (later named PRES) had described the El Dorado Project.<sup>122</sup> Section 3 entitled "Description of the Project" (page 6, paragraph 3, last sentence) read: "Also, the land where it would conduct additional discovery activities requiring out surface works must be purchased." The Claimant contends that it understood from this report at the time of its investment, in the words of its counsel at the hearing, that "it needed to obtain ownership or authorization only over the land where it would be carrying out surface works, a reasonable understanding and one consistent with the experience of the Company's staff in other jurisdictions."<sup>123</sup> In the Tribunal's view, this report (including the passage cited above) could not reasonably have influenced the Claimant at the time in the manner alleged by its counsel; and there is no cogent evidence from any of its witnesses that it did.
- 6.12 At that time, the Chief Executive Officer ("CEO") of Pacific Rim, was Mr Tom Shrake (a post he had held since 1997). Mr Shrake testified that he was the executive ultimately responsible for all of the decisions made with respect to its Salvadoran companies (PRES and DOREX). The President of PRES, answerable to Mr Shrake, was Mr Earnest (until September 2006). Mr Earnest was not called by the Claimant as a witness in this arbitration. Mr Earnest was succeeded at PRES by Mr Gehlen. Mr Shrake and Mr Gehlen testified in this arbitration, both in writing and orally at the hearing.

#### ***D. 2004***

- 6.13 *December 2004:* By 2004, as Mr Shrake testified, the Claimant and PRES had verified substantial gold deposits within the license areas for El Dorado Norte and El Dorado Sur.<sup>124</sup> On 22 December 2004, PRES applied to the Ministry of Economy to convert its two exploration licences for El Dorado Norte and El Dorado Sur into an exploitation concession for El Dorado.<sup>125</sup> This written application was submitted by Mr Earnest for PRES to Ms Gina Navas de Hernández as the Director of the Ministry's Bureau of Hydrocarbons and

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<sup>122</sup> C-349.

<sup>123</sup> Tr. D1.145, re Slide 4.71.

<sup>124</sup> Shrake 1 WS, para. 71.

<sup>125</sup> C-5, R-2, C-181, C-6; C-10.

Mines (the “Bureau”).

- 6.14 The date of this application was significant: PRES’ two existing exploration licences for El Dorado Sur and El Dorado Norte, upon which PRES’ application for an exploitation concession rested under the Mining Law, were about to expire on 1 January 2005 with no further possibility for PRES to extend them under the Mining Law. The explanation is complicated; but it does not appear to be materially disputed between the Parties. On 10 July 1996, Kinross obtained a 3-year exploration license for El Dorado Norte and on 23 July 1996 a 3-year exploration license for El Dorado Sur.<sup>126</sup> On 15 July 1999, Kinross obtained 2-year extensions for both El Dorado exploration licenses, bringing the total periods for both licenses to 5 years (the statutory maximum at that time), expiring in July 2001.<sup>127</sup> On 11 July 2001, the Salvadoran Legislative Decree No. 456 extended all exploration licenses for that year until 31 December 2001.<sup>128</sup> On 11 July 2001, the 1991 Amendment to the 1995 Mining Law also extended the statutory maximum period for exploration licences from 4 years to 8 years.<sup>129</sup> On 10 December 2001, pursuant to this 1991 Amendment, Kinross obtained second 2-year extensions for both El Dorado exploration licenses.<sup>130</sup> On 18 December 2003, PRES (having changed its name from Kinross upon the Claimant’s amalgamation with Dayton Mining) obtained further 1-year extensions of the two El Dorado exploration licenses, beginning on 1 January 2004. These extensions brought the total periods of the two exploration licenses to eight years, being the new statutory maximum, thereby finally expiring on 1 January 2005 under the Mining Law.<sup>131</sup>
- 6.15 The original application by PRES of 22 December 2004 recorded the area of the two existing exploration licences as 29.87 sq. km and 45.13 sq. km (totalling 75 sq. km). The geographical limits of the requested exploitation concession were shown in the attached maps, marked “Map 1” and “Map 2”. The total concession area was said to be 12.75 sq.

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<sup>126</sup> C-326 & C-317.

<sup>127</sup> C-329, C- 330.

<sup>128</sup> CLA-211.

<sup>129</sup> CLA-212.

<sup>130</sup> C-268, C-269.

<sup>131</sup> C-13.

km.<sup>132</sup> Mr Shrake confirmed, during his testimony, that this was and remained the total area of the concession requested by PRES in its application to the Bureau under the Mining Law.<sup>133</sup> Sensuntepeque and San Isidro, the nearest towns, were located some 12 kilometres from the El Dorado site, outside the requested concession area.

- 6.16 It appears from the evidence that the outer contours of this total area of 12.75 sq. km were later adjusted, in or about August 2005, by agreement between PRES and the Bureau. In PRES's project report of 31 August 2005, eight months after PRES' original application, Mr Earnest reported to the Claimant: "At the same time as the requests were made for the new exploration licenses in the name of [DOREX], new documents were presented for the conversion of the El Dorado North and South exploration licenses to the El Dorado Exploitation Concession. The area of the concession is now 12.75 km<sup>2</sup> and is contiguous to the limits of the three new exploration licenses."<sup>134</sup> As the Claimant itself acknowledges, "the documentary record is not entirely clear."<sup>135</sup> It may only be that the precise contours of PRES' requested concession were modified to fit with the areas of the three new exploration licences for Pueblos, Guaco and Huacaco granted to DOREX by the Bureau in late September 2005. In any event, such minor modifications are not material to the issues addressed in this Award. The total area of 12.75 sq.km remained the same, as appears to be common ground between the Parties. It may also be that, as Mr Gehlen testified, the change in August 2005 was only the product of PRES' data being converted to the Cartesian co-ordinate system used by the Bureau,<sup>136</sup> (The Tribunal returns separately to these exploration licences for Huacaco, Pueblos and Guaco in Part IX below).
- 6.17 The original application by PRES of 22 December 2004 included documentation said by PRES to comply with Article 37(a) to (f) of the Mining Law, including "Deeds or Legal Authorizations." That documentation, with Sections 3 and 4 of the application, was said to comprise "a description of the surface lands that will be directly affected by the construction and operation of the mine and the plant. There are a total of six properties. All have been purchased, except for the property of Mr [SM], who has an agreement with

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<sup>132</sup> R-2, p.9.

<sup>133</sup> Tr. D2.319 & D2.351.

<sup>134</sup> C-288.

<sup>135</sup> Memorial, para. 210.

<sup>136</sup> Gehlen WS, para. 109.

Pacific Rim for a future purchase under a lease with an option to buy.” The area of these six properties (5 purchased and 1 leased) was shown in the attached “Map 5.”

- 6.18 It is self-evident from this latter map that the surface area of these six properties is significantly smaller than the total surface area of the requested concession. It related only to that part of the surface area said by PRES to be directly impacted by the requested concession, including the plant, tailings dam, ramp portal, the road and the opening of the ventilation stack of the proposed underground mine. It did not include, therefore, the remaining surface area of the requested concession.
- 6.19 Mr Shrake acknowledged during his testimony that PRES had not provided documentation, as to authorizations or ownership, for the entire surface area of the requested concession, but only “for the areas that we were going to disturb on the surface.”<sup>137</sup> Of the entire surface area of 12.75 sq. km, the disturbed surface area was thus less than 13% of the total area requested, equating to less than 2 sq. km out of 12.75 sq. km.
- 6.20 As Ms Navas testified, upon her Bureau’s receipt of PRES’ application: “ ... they [PRES] did not have all of the permits to be granted by the landowners or the permits that proved ownership of the Concession land. If my memory serves me right, they only presented or submitted five documents that showed that they were the owners of the land, and another one that was being leased. I don’t think that that even accounted for 13 percent of the total area requested ... I added up [on the morning of her testimony] the area covered by the land that they – that had been presented by them with a title. But to be truthful, it was 12.65 percent.”<sup>138</sup> As Mr Ticay (of the Bureau) also testified, in writing and orally at the hearing, “Neither myself nor anybody else at the Bureau of Hydrocarbons and Mines who reviewed the Pacific Rim concession application had any doubt that the Pacific Rim application failed to comply with this requirement”, that requirement being “the ownership requirements” of Article 37(2)(b) for the full surface area of the requested concession.<sup>139</sup> (Mr Ticay had worked at the Bureau as a geologist from April 1997; and he had drafted the 1998 study described above).

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<sup>137</sup> Tr. D2.359-360.

<sup>138</sup> Tr. D3.694.

<sup>139</sup> Ticay WS, para. 6; Tr. D4.828-829.

- 6.21 Also, PRES' application did not contain any environmental permit, as required by Article 37(2)(c) of the Mining Law. Earlier, in March 2004, PRES had applied for such a permit to MARN; and PRES was also working on its Environmental Impact Statement ("EIA") for submission to MARN.<sup>140</sup> No environmental permit could be submitted with PRES' application because of delays caused by MARN. However, the Bureau had earlier assured PRES, by Ms Navas' letter dated 25 August 2004, that its omission would not preclude PRES' application for an exploitation concession: "I hereby refer to your letter dated August 23 of this year [2004], in which you inquire if your rights to seek the concession for El Dorado North and El Dorado South would be affected in the case Environmental Permit is not awarded by December 31st [2004]. To answer your question, when the company presents documentation showing that the MARN (Ministry of the Environment and Natural Resources) has not awarded the permit, and provided that it doesn't take too long, your rights will not be affected."<sup>141</sup> It is thus unnecessary for present purposes to describe the further difficulties experienced by PRES with MARN over the required environmental permit: that omission plays no material part below in the Tribunal's analyses and decisions.
- 6.22 One of the documents referenced in PRES' application was the SRK Preliminary Feasibility Study, submitted by PRES (subject to revision) ostensibly under Article 37(2)(d) of the Mining Law.<sup>142</sup> That document was to generate considerable controversy, particularly as to whether it met the statutory requirement for a "Technical-Economic Feasibility Study." Again, it is unnecessary for present purposes to describe the further difficulties experienced by PRES over this further requirement: those difficulties, whether resolved one way or the other, play no material part below in the Tribunal's analyses and decisions.
- 6.23 Another document submitted in support of PRES' application was the Environmental Impact Assessment (EIA) submitted by PRES ostensibly under Article 37(2)(c) of the Mining Law.<sup>143</sup> That document was also to generate considerable controversy. Again, it is

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<sup>140</sup> Shrake 1 WS, para. 71.

<sup>141</sup> NoA, Exhibit 6.

<sup>142</sup> C-5.

<sup>143</sup> C-5.

unnecessary for present purposes to describe the further difficulties experienced by PRES over this further requirement: those difficulties, whether resolved one way or the other, play no material part below in the Tribunal's analyses and decisions.

**E. 2005**

- 6.24 *January 2005*: On 1 January 2005, having come to the end of their respective maximum terms, PRES' exploration licences for El Dorado Norte and El Dorado Sur expired under the Mining Law. However, PRES had now pending with the Bureau its application for an exploitation concession for 12.75 sq. km of the previously licensed area of 75 sq. km. That application being supported by the Ministry of Economy, PRES was permitted to continue drilling at El Dorado without hindrance from the Respondent, notwithstanding the absence of any extant exploration licence or exploitation concession. As the Respondent's counsel recognised at the hearing, "... there can be no doubt that this drilling was not in conformity with Salvadoran law."<sup>144</sup> The Respondent's counsel also explained that: "... It was part of the understanding of the Bureau of Mines that it was giving time to Pacific Rim to complete the requirements [as regards its feasibility study], that was a necessary part of that intention to allow them to continue drilling."<sup>145</sup>
- 6.25 *March 2005*: On 18 March 2005,<sup>146</sup> by email message to Mr Shrake in the USA, Mr Earnest informed the Claimant that Ms Gina Navas (the Director of the Bureau) had informed him earlier that morning that: "we [PRES] are going to have to get the authorization of all the surface owners within the area of the concession." This was a reference to the requirement under Article 37(2)(b) of the Mining Law.
- 6.26 From the heading to his email, this news appears to have come to Mr Earnest as an unpleasant surprise. Mr Earnest had told Ms Navas that she was "absolutely wrong." He advised Mr Shrake: "I agree with the interpretation that in cases of surface impact, ownership, leasing or legal authorization is required, but in non-impacted areas it is dead wrong. It gives the 'Juan Embra'<sup>147</sup> the final say as to whether the state minerals can be

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<sup>144</sup> Tr. D7.1977.

<sup>145</sup> Tr. D7.1979.

<sup>146</sup> C-713.

<sup>147</sup> As Mr Shrake testified, this Spanish term equates colloquially to the English "John Smith": Tr. D2.335.



developed or not. She [Ms Navas] said she would discuss the matter with the lawyers to see ‘IF’ a solution was possible. I told her that there was no IF. There has to be a way, otherwise this country is not really in favor of developing its resources. I reiterated that there has to be a solution to this problem, because the interpretation is contrary to the intent of the law. She is to call me back after ‘semanta santa’ [i.e. Holy Week] to talk more after she has spoken to their lawyer ...” It appears from the same email message that Mr Earnest was also in contact with Mr Luis Medina, PRES’ lawyer in El Salvador. Ms Navas’ reference to discussing the matter with their lawyers referred, of course, to the Ministry’s own lawyers. Ms Navas is not a lawyer; nor is Mr Earnest.

6.27 As Ms Navas testified, whilst other applications for larger exploitation areas were later raised by PRES and discussed with the Ministry of Economy, PRES’ application for an exploitation area measuring 12.75 sq. km was never reduced.<sup>148</sup> Ms Navas also testified: “I personally informed Pacific Rim’s representatives that what Pacific Rim should do is reduce the size of the concession requested to the area that could be justified based on the size of the deposit, which had undergone more technical and economic study (Minita) and that could also comply with the requirement concerning ownership of the surface area. However, Pacific Rim’s representatives expressed to me that Pacific Rim was not interested in applying for such a small concession.”<sup>149</sup> In her oral testimony, Ms Navas further explained: “I told [PRES] that if they did not have the capacity to submit the documents proving the ownership of all the property under the Concession, or the permits – the legally provided permits, they could reduce the area to the area for which they had property titles or permits. That’s what I said.”<sup>150</sup>

6.28 The Tribunal attaches much significance to the informal and amicable manner in which the Bureau approached PRES. It was clearly intended to assist PRES and the Claimant. The Bureau could have sent, instead, a formal letter to PRES under Article 38 of the Mining Law (as it did much later, on 2 October 2006). However, such a formal letter would have started the thirty-day time limit under the Mining Law. That inevitably would have brought PRES’ application to an abrupt end under the Bureau’s interpretation of Article 37(2)(b)

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<sup>148</sup> Tr. D3.691-692.

<sup>149</sup> Navas WS, para. 48.

<sup>150</sup> Tr. D3.700.

of the Mining Law. (The Tribunal here leaves aside for present purposes, as already indicated, other issues relating to the environmental permit and technical feasibility study required of PRES under Articles 37(2)(c) and (d) of the Mining Law).

- 6.29 Mr Shrake testified: "... in March 2005, we were informed that some of the people in the Department of Mines held the view that PRES was required to acquire ownership or authorization to use the land surface overlaying the entire area of the concession ... we disagreed with this view (as did our legal counsel), and were unsure how landowners who would not be impacted by our activities could give any 'authorization' for us to use the subsoil. After exchanging views with MINEC officials about this issue, we expected that it could be resolved, and proceeded to work with them to reach a solution."<sup>151</sup> He also testified: "... In consultation with our legal counsel in El Salvador, we had studied this issue closely. We believed that the Mining Law did not require ownership of or authorization to use the entire land surface overlaying the concession, and, moreover, that such a requirement was nonsensical for a variety of legal and practical reasons. Many of the Salvadoran officials with whom we spoke seemed to share our views. Even those officials who did not share our view that the language of the Mining Law was clear on this issue thought that a contrary reading of the law made no sense."<sup>152</sup>
- 6.30 *April 2005*: In PRES' monthly report of 30 April 2005 to the Claimant,<sup>153</sup> Mr Earnest reported as follows: "Various conversations have been held to discuss the surficial extent of the exploitation concession and an area agreeable to the government and workable from our point of view has been defined. The 'Dirección de Minas' [the Bureau] has interpreted the law to imply that we must obtain authorization from every surface owner within the limits of the proposed concession. We are currently engaged in discussions with the 'Dirección de Minas' and will be presenting a legal brief for their consideration on May 5 [2005]. The Minister of Economy [Ms Yolanda de Gavidia] will be returning to the country in the following days, and if necessary, a meeting will be scheduled with her to advance this topic to resolution ..."

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<sup>151</sup> Shrake 3 WS, paras. 32 & 33 (footnotes omitted).

<sup>152</sup> Shrake 2 WS, para. 85.

<sup>153</sup> C-290 (re-submitted).

6.31 *May 2005*: On 5 May 2005, PRES’s Salvadoran lawyer, Mr Luis Medina, submitted a memorandum to the Ministry of Economy, entitled “Interpretation of Mining Law”, at the direction of the Claimant and PRES.<sup>154</sup> It is a significant document for the Claimant’s case; and, for the sake of completeness, it is here cited in full (with paragraph numbers marked thus [...], here added for ease of reference):

*“[1] This legal opinion has been prepared based on the following questions regarding the Mining Law.*

*[2] How should the requirement established in Article 37 No. 2 b) be interpreted?*

*[3] If the exploitation concession for an underground mine covers more land than the land occupied by its aboveground facilities (which is owned by the concession holder) the question is: ‘Will permission from the adjacent landowners be needed?’*

*[4] It should be noted that the article in question (Article 37 No. 2 b)) includes in a single chapter the requirements for both metallic mineral deposits (mines) and non-metallic mineral deposits (quarries), and its proper interpretation will be arrived at by studying other provisions of the Mining Law as a whole. Indeed, as the analysis of the law progresses, the most appropriate interpretation emerges.*

*Section I. Basic Definitions:*

*[5] To begin, we must specify several definitions, for which purpose Article 2 of the Mining Law Regulations entitled Definition of Terms offers the following:*

*10. Exploration: ‘Surveying, prospecting and evaluation of mineral deposits using ecological, geochemical and geophysical methods, by means of excavating boreholes, tunnels and ditches; by drilling or any other geological research method that makes it possible to establish the economic value of the deposit and its characteristics.’*

*11. Exploitation: ‘The aboveground or underground construction and work used for preparation and development of the area that contains the mineral deposit, as well as the work aimed at detaching and extracting the mineral products existing therein.’*

*12. ‘Open Pit Mining: System by which the mineral fields or deposits are mined from the surface. In development and exploitation, underground works such as holes or shafts and galleries or tunnels are not used; instead, roads are built for the transportation of machinery, equipment and automotive vehicles.’*

*14. Galleries or Tunnel: ‘Horizontal excavation done for mining work.’*

*17. Mine: ‘Physical ‘location, either aboveground or underground, where mineral*

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<sup>154</sup> Shrake 2 WS, para. 110; R-30; R-31.

*substances are extracted.’*

29. *Subsoil: ‘Geologically, the layer situated under the soil.*

30. *Soil: ‘Exterior layer of the earth’s crust in decomposition, consisting of fragments or remains of physically or chemically decomposed rocks and organic remains of plants and/or animals living in or on it’.*

## *Section II. Declaration of Ownership:*

*[6] The mineral deposits contained in the subsoil of the Republic's territory, its continental platform and insular territory are the property of the State. Therefore, pursuant to Article 103 of the Salvadoran Constitution, the subsoil is property of the State [original emphasis]; and the exploration, exploitation, and processing of the same requires State authorization, whether for metallic mineral deposits (mines) or non-metallic deposits (quarries).*

*[7] This same constitutional concept is, in turn, mentioned in Article 2 of the Mining Law (the Law), which establishes: ‘All mineral deposits that exist in the subsoil of the territory of the Republic are State property, whatever their origin, form and physical state; as well as those in its continental shelf and insular territory, as established in the laws or international conventions ratified by the State. State ownership of these deposits is inalienable and is not subject to a statute of limitations.’ Next, the same Article 2 explains: ‘For the purposes of this Law, mineral deposits are classified into metallic and nonmetallic; the first shall be called mines, and the second, quarries.’*

*[8] Article 10 establishes: ‘The deposits to which this Law refers are real properties different than the real properties that constitute the surface land; this is not true of the quarries, which form an integral part of the land in which they are found, provided they are located flush with the ground.’*

*[9] The Salvadoran Constitution and the Mining Law clearly establish that:*

*(1) The mineral deposits are State property, and State ownership of them is inalienable and is not subject to a statute of limitations;*

*(2) Metallic mineral deposits are real property different than the real property constituting the surface land; and*

*(3) Non-metallic mineral deposits are real property that form an integral part of the surface land in which they are found.*

## *Section III Treatment of Permissions in the Mining Law:*

*[10] The first call to obtain permission from landowners is found in Article 21 of the Law entitled ‘Permissions’.*

*[11] According to this article, the exploration license holder is responsible for obtaining the property owner’s permission provided the following two requirements are met:*

*(a) The work to be done involves land owned by others; and*

*(b) The work to be performed is done on the surface of the soil.*

[12] This means that if the work to be done is carried out on land owned by the license holder or if, to the contrary, this work is carried out underground, i.e. in the subsoil (in other words, without involving work on the surface of the soil owned by third parties), **NO PERMISSION IS REQUIRED FROM ANY LANDOWNER WHATSOEVER**, but only the permission of the State intrinsic to the very authorization of the exploration license (or exploitation concession, as we will see).

[13] In the case of the exploration license and if the two above requirements are met, the landowner's permission is required (except in the event that we will explain in Section V), because exploration work usually involves work conducted from the soil surface.

[14] In turn, it is to be understood that for the exploitation phase, the holder will be responsible for obtaining the same permissions, whenever the two requirements mentioned above are met, except in the event that we will mention in Section V.

[15] The second [requirement: "llamado"] to obtain permission from landowners is found in Article 30 of the Law entitled 'Exploitation Concession for Quarries'.

[16] In the case of QUARRIES, as a clarification of what is found in Article 10, Article 30 provides that for the property where the quarry is located 'the person requesting the concession must own the requested property or have the legally granted authorization from its owner or occupant' (Article 30).

#### Section IV. Legal Differentiation Between Mines And Quarries:

[17] The Law has given different characteristics to metallic mineral and non-metallic mineral deposits, which are mined in the form of mines and quarries, respectively. Up to Article 37, these deposits are treated separately in the Law, but in Article 37 No. 2, the requirements for an exploitation concession for mines and quarries are combined. Letters a), c), d) and f) are easily combinable for the two types of deposits, but letter b) establishes the same obligation for mines and quarries, irrespective of the distinct characteristics recognized in all other parts of the Law.

[18] Article 37, No. 2 b) provides that for a mining or quarry exploitation concession the 'Deed to the property or legally granted authorization from the owner' is always required, and by reason of Articles 2, 10, 21 and 30 cited above, these requirements must be considered separately, as follows:

[19] An application for a QUARRY concession: always requires the 'Deed to the property or legally granted authorization from the owner' because this is required by Article 30 and previously established by Article 10.

[20] An application for a MINING exploitation concession (except in the event that we will explain in Section V) requires:

(a) the landowner's permission in the event that the concession involves work on the surface (consequence of Article 21); or

(b) the permission of the owner of surface lands in the places where underground mines involve surface work (consequence of Article 21).

[21] The exploitation of any deposit (of metallic or non-metallic minerals) requires the

*permission that must be given in all cases by the State, owner of the subsoil, which is embodied within the limits of the granted exploitation concession (consequence of Articles 2, 10 and 103 of the Constitution).*

*[22] The Salvadoran Constitution and the Mining Law recognize and safeguard the rights of the owners of surface land. The Law grants the owner of surface land the right to be compensated for damages caused by exploration activities and, consequently, by exploitation activities (Article 21), a circumstance extending throughout the entire Law.*

*[23] Requesting the permission of the owner of the soil (surface land) to conduct exploration or exploitation on the surface (when applicable, as we will see below) is logical, due to the rights given to landowners. On the other hand, it would be illogical to request the surface owner's permission when the exploitation does not affect the surface land and will be done in the subsoil, which is not the landowner's property and over which the has no in rem or personal rights whatsoever.*

*[24] Accepting that the surface owner must grant permission to do work in the subsoil when the work is not done on the owner's surface land would mean affording the landowner the ownership of things outside commerce (res extra commercii) because these are goods owned by the State, pursuant to the express provisions contained in the Salvadoran Constitution and the Mining Law.*

#### *Section V. Interpretation on Permissions*

*[25] The above notwithstanding, it should be noted that if we continue to read the articles of the Mining Law, the complete interpretation of the meaning of the requirement in Article 37 No. 2 b) is derived after reading Chapter VIII of the Law.*

*[26] That chapter presents us with a different view with respect to whether or not the requirement is actually applicable for metallic mineral deposits.*

*[27] The requirement is unquestionably applicable to Quarries, but for Mines, it is only applicable in exceptional cases, and we believe that it would only be applicable in the event that voluntary easements have been arranged with the surface landowners during the exploration phase. Why is this?*

*[28] Under the whole system of easements established in Chapter VIII, along with authorizing the holders of mining Licenses or Concessions to arrange the voluntary easements they deem suitable with the owners or occupants of the land, the law establishes for the benefit of such Holders the legal easements for occupation, transit or passage, drainage, ventilation, transmission or electricity or any other that directly benefits or is required by the mining activity. Those easements, defined in the respective articles, are sufficient in and of themselves for conducting exploitation activities in all their complexity. The law has established an encumbrance on the properties included in the mining area and the owners cannot challenge this, to the degree that the Holder can petition the courts to set the amount of the compensation, as the encumbrance exists by the sovereign will expressed in the body of law in question.*

*[29] Therefore, if the State has established an encumbrance on the mining areas, it is counterproductive to think that it is necessary to obtain the landowners' permission as a*

*requirement for entering into the exploitation phase.*

*[30] Therefore, what does the requirement established in No. 2 b) refer to in the case of Mines?*

*[31] The only possible interpretation is that it refers to voluntary easements, which require an agreement with the owner. In fact, if voluntary easements were arranged during the exploration phase and are needed for continuing on to the exploitation stage, such permissions must be attached to the application. Otherwise, permission is not necessary.*

*Section VI. Conclusions:*

*[32] As we can see, in the case of mines, the practical effect of the requirement in Article 37, No. 2 b) is quite limited and it is more relevant for Quarries.*

*[33] It is clear that the State has complete control over the mineral deposits within the mining activities, in turn safeguarding the rights of the surface landowners through compensation mechanisms, if the owners were to be impacted.*

*[34] The landowner's rights cannot supersede the rights of the State; therefore, making a different interpretation would precisely ignore the obvious meaning of the Constitution and the Mining Law determined by consulting their spirit or resorting by analogy to any other legal interpretation with a different approach to observance of the law.*

*[35] One of the rules of legal interpretation is that no interpretation can lead us to the absurd, and it would be absurd to require the permission of a third party unrelated to the ownership of the property where the work requiring permission will be carried out. Moreover, it would be absurd to give preference to the landowner's rights when the State has already regulated the scope of these rights.*

*[36] In practice, the predominance of the State's rights over metallic mineral deposits materializes through the granting of the Concession itself.*

*[37] When the State defines the area for exploitation, it must establish the concession applicant's right to enjoy legal easements (Article 54), and make certain to order the mechanisms deemed necessary to guarantee the concession holder's responsibility to compensate the owners of the soil."*

- 6.32 In the Tribunal's view, this memorandum was clearly stated and powerfully argued as regards the limited scope of the requirement imposed on PRES under Section 37(2)(b) of the Mining Law. First, from a textual analysis of the Mining Law, the required authorization or ownership was effectively confined to quarries and, as regards underground mining, to those surface areas occupied by the mine's above-ground facilities. Second, from a teleological perspective, the same interpretation followed so as to avoid 'absurdities' as regards the surface of areas unaffected by underground mining. Third, an owner or occupier of surface land suffering legal injury caused by a concessionaire's

underground mining activities had a remedy for compensation under Article 21 of the Mining Law. Lastly, the issue of legal and voluntary easements was introduced, by references to Articles 53 and 54 of the Mining Law. Given that title to sub-surface mineral deposits was held by the State (under Article 103(3) of the Constitution and Article 2(1) of the Mining Law); and it was only the State that granted a concession to an applicant for underground mining, legal easements would ensure that exploitation activities could be conducted “in all their complexity”, without the necessity for authorization from surface owners (subject always to the payment of compensation in the event of legal injury).

- 6.33 All this meant, according to Mr Luis Medina’s legal opinion and contrary to Ms Navas’ stated position, that PRES was *not* required to submit any further authorization or ownership documentation in support of its pending application for an exploitation concession. In Mr Medina’s view, the Bureau’s interpretation of Article 37(2)(b) was “illogical” and “absurd.” At this point, therefore, these different views lay at opposite incompatible extremes.
- 6.34 On 25 May 2005, by a written memorandum, Ms Navas requested a legal opinion from the Legal Counsel to the Ministry of Economy, Dr Marta Angélica Méndez.<sup>155</sup> Her memorandum read, in material part, as follows:

“I am hereby making a special request for your written opinion with respect to the following matter: We are processing an application for a minerals concession in the municipality of San Isidro, Cabañas. The company will do a type of underground mining and says that for underground work it does not need to furnish proof of the availability of the property corresponding to the surface area that will be covered by the concession. The company is owner of the surface area where the plant will be installed, but not the rest of the area, and they believe that it is impossible to obtain all the permissions because there are many owners. This Bureau has explained to the company that, according to Article 37 of the Mining Law, the requirement in paragraph b) for an EXPLOITATION CONCESSION FOR MINES AND QUARRIES states that the following must be submitted: ‘b) Deed to the property or legally granted authorization from the owner.’ The company’s argument is that they will be mining the subsoil and the subsoil belongs to the State; and if they request permission from the landowners, it would amount to saying that the owners of the surface land are also owners of the

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<sup>155</sup> R-31.



subsoil. The company's attorney has sent an interpretation of the Law, according to which we should not require such permissions. I attach the interpretation sent by the lawyer Luis Alonso Medina, representative of the company."

The attached "interpretation" was the memorandum, cited above, prepared by Mr Luis Medina for PRES. The Tribunal notes Ms Navas' contemporary reference to PRES' belief that it was "impossible" to obtain all the permissions of the full surface area of the requested concession "because there are many owners." This information can only have come to her from Mr Earnest, as also described in her testimony below.

6.35 On 31 May 2005, pursuant to the request from Ms Navas, Dr Marta Angélica Méndez, as Legal Secretary to the Ministry, advised Ms Navas as the Director of the Bureau on the interpretation of Article 37(2)(b) of the Mining Law.<sup>156</sup> Whilst Ms Navas is not a lawyer, Dr Méndez had been responsible within the Ministry (as a legal adviser) for preparing the Mining Law in 1995, together with the Bureau (which at that time already included Ms Navas).<sup>157</sup>

6.36 Dr Méndez' legal opinion reads, in material part, as follows:

*"[1]. Article 103 paragraph three of the Constitution establishes that the subsoil belongs to the State, which may grant exploitation concessions. This mandate has been further regulated in the Mining Law.*

*[2]. The Mining Law establishes the provisions and conditions that must be met in order to obtain such concessions. Thus, Article 3 stipulates that the State may grant Licenses or Concessions for the exploration and exploitation of mines and quarries provided that the applicant complies with the provisions of the Mining Law and its Regulations. This is reiterated by Article 8, when it establishes that in order to obtain mining rights, the person must be capable and suitable, and provided such person complies with the rules established by the Law and the Regulations [emphasis in original].*

*[3]. Among these provisions that must be met is Article 37 No. 2 (b), which stipulates that the party interested in obtaining a mining exploitation concession is under an obligation to submit the Property Deed for the property or legally granted authorization from the owner.*

*[4]. With regard to making use of land belonging to others, in addition to establishing the above provision for exploitation concessions, the Mining Law establishes the same for exploration in Article 21, for quarries in Article 30 paragraph three, and for arranging*

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<sup>156</sup> R-32.

<sup>157</sup> Navas WS, para. 7.

*voluntary easements in Articles 53 and 56. In other words, the law requires that one be the property owner or have the owner's authorization for both underground and aboveground mining operations.*

*[5]. The Constitution recognizes the right to own property in Articles 2, 11 and 103. Moreover, Article 2 establishes the right to security and the right to be protected in the preservation and defense of those rights. Due to their very nature, mining operations pose dangers that may have an impact on peoples' lives, health or assets.*

*[6]. Since the subsoil belongs to the State according to the Constitution and the Mining Law, concessions for exploitation can be granted to both the owners of the property where the deposits are found or to third parties, provided they furnish evidence that they are the owner or have been authorized by the owner by means of the corresponding public document. In this regard, the Bureau of Hydrocarbons and Mines must require applicants to submit this document and all others required by law so that, once the process indicated in the law is concluded, the Bureau may send the proceedings to the Ministry for the purpose of having it issue the corresponding Concession Resolution.*

*[7]. From the moment that the Constitution establishes that a concession is required for underground mining, the secondary law regulating a certain type of concession – in this case for mines and quarries – must bear in mind respect for people's fundamental rights, such as the right to own property and the right to security. Therefore, the fact that the subsoil belongs to the State does not mean that the State will permit excavation under private property without the owner's authorization.*

*[8]. Finally, it should be pointed out that, according to case law from the Constitutional Court, the right to security set forth in Article 2 of the Constitution has two dimensions: material security and legal certainty. In the material dimension, this means the right to peace of mind, i.e. the right of each individual to enjoy the property that he or she owns without risks, disturbance or fears, or the peace of mind that the State will take the appropriate preventive measures to ensure that owners suffer no damage or disruption.*

*Consequently, whoever wishes to exploit non-renewable natural resources in the subsoil must obtain the respective concession after complying with the provisions of the Constitution and the Mining Law, including Article 37, No. (2 b) of the latter; and the interpretation contained in the attached document [a reference to Mr Medina's memorandum] is not consistent with what the primary law and the Mining Law provide. Moreover, if the Bureau of Hydrocarbons or the Minister of Economy were to proceed as described in that document, they would be violating the Principle of Legality also established by the Constitution. ...”*

6.37 In the Tribunal's view, this second legal opinion is equally clear and well-argued as regards three significant factors regarding the legal interpretation of Article 37(2)(b) of the Mining Law. First, the statutory requirement as to ownership or authorization applied to the whole surface area of the requested concession and not merely to that part of its surface area 'directly impacted' by the requested concession; second, that requirement applied to a

concession for underground mining (such as PRES' application) and not merely to quarries or open-pit mining; and third, the Ministry of Economy could not lawfully process PRES' application unless PRES had first satisfied the statutory requirement imposed by Article 37(2)(b) of the Mining Law. The Tribunal also notes the references to "material security" and the dangers posed by mining "that may have an impact on peoples' lives, health or assets." This second legal opinion clearly supported the Bureau's legal interpretation of Article 37(2)(b) of the Mining Law; but the Ministry of Economy did not stop there.

6.38 *June 2005*: On 20 June 2005, pursuant to a request from the Minister of the Economy (Ms Yolanda de Gavidia) dated 25 May 2005 (enclosing a copy of Mr Medina's memorandum cited above),<sup>158</sup> Dr Luis Mario Rodríguez R. (the Secretary for Legislative and Legal Affairs in the Office of the President), sent to the Minister (who was not a lawyer) the Secretariat's legal opinion, in writing, on the interpretation of Article 37(2)(b) of the Mining Law.<sup>159</sup>

6.39 In his covering letter, Dr Rodríguez' confirmed to the Minister of Industry: "The analysis concludes that for these applications for Mining Concessions, the Ministry of Economy must require the applicants to submit documents proving ownership of the land on the surface, which must be defined in the official document granting the concession, and in the event that the applicant is not the owner, the Ministry should require the documents proving the consent of the third parties who are the owners."

6.40 The Secretariat's enclosed legal opinion merits citation at length. It reads, in material part, as follows (with footnotes here omitted and paragraph numbers marked thus [...] added here for ease of reference):<sup>160</sup>

*"[1] Pursuant to Article 13 of the Mining Law, exploitation concessions for mines and quarries will be granted by Resolution of the Ministry of Economy [Footnote 1]. This provision is supplemented by the content of Article 23 paragraph one of the Law, which states that this resolution shall precede the signing of a contract [Footnote 2].*

*[2] In order to reach a conclusion on the requirements to be met by the applicants for this type of concession, we will study several provisions of the law in question that apply*

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<sup>158</sup> R-30.

<sup>159</sup> R-32.

<sup>160</sup> R-33.

*starting with the exploration license that precedes the concession per se.*

*[3] When dealing with the scope of the exploration license - prior to the concession - the legislature has determined that it '(...) grants the Holder the exclusive power to conduct mining activities to locate the deposits of the mineral substances for which it has been granted, within the limits of the area conferred and indefinitely in depth. [emphasis in the original]. It also grants the exclusive right to request the respective concession' (Article 19, paragraph 1).*

*[4] From this provision, it is deduced that the official document granting the exploration license must contain a definition of the limits of the area in which the mining exploration activities will be conducted. Such limits refer to the surface area because, in depth, there is no limit to be defined by the authority, as seen from this provision.*

*[5] In relation to this same issue, Article 21 paragraph 1 states that 'If the exploration area includes land owned by others and the work is to be done on the surface of the land, permission from the owner shall be necessary, and obtaining it is the license holder's responsibility.'*

*[6] In view of the fact that the official document granting the exploration license must make reference to surface limits, it is essential to have the consent of the owners of such surface area, be it the applicant for [the] license itself or the respective third parties. Otherwise, the Government would not have the power to authorize exploration within those surface limits.*

*[7] Once exploration has concluded, the interested party must proceed to apply for the respective concession, and in the act that confers it, the competent authority must also make reference to the surface limits: 'Article 24 paragraph 1. - "The mining Concession grants the Holder the right to extract the previously determined minerals that are found inside a solid of indefinite depth limited by vertical planes corresponding to the sides of a polygon, whose corners are referenced to the coordinates of the Lambert conformal conic projection, or UTM, oriented North-South, East-West, international or coastal limits, which must also be included in the area indicated in the Exploration License, and its surface area shall be granted based on the size of the deposit(s) and the holder's technical justifications' [emphasis in the original].*

*[8] In addition, in the act granting the concession, it is essential to define the surface limits, and to do so, the consent of the owners of the land included in such surface limits is required. If consent is not obtained from the third parties, the State could proceed to expropriate the land if it so deemed necessary [Footnote 3].*

*[9] The position taken here is supported by the fact that the legislature required the competent authority to order the surveying and demarcation of the limits of the area covered by the application: 'Article 42: Once the decision declaring the objection inadmissible is final and conclusive, or if no objection has been filed, and once the fifteen days after final publication mentioned in the first paragraph of the preceding article have elapsed, the Bureau shall order the surveying and demarcation of the limits of the area covered by the application, which shall be completed within a term of up to sixty days [emphasis in the original]. The posts used for demarcation shall be solidly built. If they*

*cannot be built due to adversities of the terrain, additional posts shall be fixed in visible parts of the land, provided it is feasible to do so. Once said work has been finalized, the corresponding opinion shall be issued and the case file submitted to the Ministry of Economy, who shall proceed as established in the following article (....)’ [Footnote 4].*

*[10] For exploitation concessions for mines and quarries, when regulating the procedure for submitting applications and attached documents, the legislature has required that the following documents, among others, must be submitted: a) Site plan of the property in which the activities will take place, cartographic map of the area, topographical drawing and its respective technical description, size of the requested area irrefutably establishing its location, boundaries and name of the adjacent properties; b) Deed to the property or authorization legally granted by the owner;” (Article 37, No. 2 a) and b)).*

*[11] This Secretariat is of the opinion that, according to all the provisions cited above, when the word ‘property’ is used, it can only refer to the property of the surface area for which the concession will be granted.*

*[12] To finish this analysis, it should be taken into account that license or concession holders are able to arrange voluntary easements with other landowners; and also enjoy legal easements, which include the easement for occupation [Footnote 5]. This easement ‘authorizes the concessionaire to occupy the areas of land strictly needed for construction, equipment installation and all other work. This easement also includes the authority to build and maintain channels, tiers, excavations, accesses, galleries and all other mining works in their different modalities and extraction systems; as well as to establish fencing, signage and protection for the occupied areas’ (Article 58).*

*[13] Due to its nature, this occupation easement will encumber land not included in the surface area specified by the authority in the pertinent resolution.*

*[14] With regard to the compensation for any damages and losses caused to third parties as a result of exercising the rights arising from the easements, the legislature has provided that this situation must be established in the document creating those in rem rights [Footnote 6].*

*[15] It should be clarified that only the license or concession holders can come to enjoy the easements in question. Therefore, it cannot be thought that in order to grant exploitation concessions, the legislature requires applicants to submit documentation proving that the respective easements have been created as a requirement for granting the concession.*

*[16] Thus, it cannot be concluded that when the law requires the applicant to submit a document proving the consent of the third party owners of the property (in Article 37, Nos. 2 a and b), this refers to the cases in which voluntary easements have been created, as maintained in the document attached to the request for an opinion from the Minister of Economy [This “document” was Mr Medina’s memorandum].*

*[17] General Conclusion: Based on all the above, we conclude that in the cases of applications for exploitation concessions, the Ministry of Economy must require that documents be submitted proving ownership of the land included on the surface, which must be defined in the official document granting the concession [emphasis in the original]. In*

*the event that the applicant itself is not the owner, then the applicant must be required to submit the documents proving the consent of the third parties who are the owners.”*

- 6.41 In the Tribunal’s view, this third legal opinion by the Presidential Secretariat is also clear and well-argued as regards the three crucial issues on the legal interpretation of Article 37(2)(b) of the Mining Law. First, the statutory requirement as to ownership or authorization applies to the whole of the surface area of land comprising the requested concession; second, that requirement applies to both mines and quarries; and third, as confirmed by the covering letter from Dr Rodríguez, the Ministry of Economy could not process an application for an exploitation concession under the Mining Law unless the applicant has first satisfied the statutory requirement imposed by Article 37(2)(b) of the Mining Law. In particular, the Tribunal notes the Secretariat’s opinion that the word ‘property’ used in Article 37(2)(b) could only refer to the property of the surface area for which the concession would be granted by the Ministry of Economy; i.e. the whole of that surface area. This legal opinion clearly supported the position taken by the Bureau towards PRES, under Article 37(2)(b) of the Mining Law.
- 6.42 The Ministry of the Economy (including the Bureau) recognised that this was a very important matter for PRES and the Claimant. As Ms Navas testified: “This was an absolutely crucial point in making a determination on Pacific Rim’s concession application, since the company had admitted that it was impossible for it to comply with this requirement, either at that time or in the future. On the one hand, there were several property owners within the requested concession area, and on the other, some of those owners did not wish to sell their land or give Pacific Rim permission to have a concession that would include the subsoil beneath their properties, or they asked for too much money.”<sup>161</sup>
- 6.43 *June 2005*: On 28 June 2005, by a memorandum to Mr Shrake dated 28 June 2005 entitled “Surface Owner Authorisation Issue”, Mr Earnest wrote as follows:<sup>162</sup>
- “... On Friday, June 24 [2005], I met with Gina Navas [the Director of the Bureau], at her invitation, to discuss the matter of the surface owner

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<sup>161</sup> Navas WS, para. 45.

<sup>162</sup> C-291.

authorizations. Gina informed me that the office of the Secretariat for Legislative and Judicial Affairs had reviewed the mining law and was in agreement with the interpretation of the Ministry of Economy and the Division of Mines. I asked for a copy of the opinion and was informed that it was an internal Ministry document and that their lawyer had advised that it not be shared. I indicated that this made it pretty difficult to seek any compromise and that it was akin to fighting against a ghost. We discussed the pros and cons of pushing for a formal declaration on this point and agreed that now is not the time. There are two main things that are lacking in our request for the exploitation concession at this time: the environmental permit and the authorization of the landowners. The environmental permit process is clearly out of our hands and the latter is a nearly (if not totally) impossible task. Pushing for a formal declaration would start a 30-day clock, requiring the presentation of the environmental permit and the authorizations [This was an implicit reference to Article 38 of the Mining Law]. Given that the Division of Mines is sympathetic to our status in regards to the environmental permit, this buys us time. Near the close of the meeting I asked what kind of authorization was required, suggesting something along the lines of ‘I, John Doe, authorize the Republic of El Salvador to grant an exploitation concession to Pacific Rim El Salvador . . .’. This was immediately rejected with the argument that the government didn’t need any authorization to grant the concession. Gina then indicated that it was an authorization for us to use the land, to which I replied that we already have all of the authorizations for the land that will be occupied by the project. She became very reflective (almost as though she was beginning to see the point), but offered no further suggestions.”

6.44 In the Tribunal’s view, although the Ministry of Economy did not show either of the two legal opinions to him, Mr Earnest clearly understood the issue on the interpretation of Article 37(2)(b) of the Mining Law, namely that PRES could comply with its requirement as to only a part of the surface area of the requested concession area and hence it could not comply with Article 37(2)(b), as interpreted by the Ministry of Economy and the Presidential Secretariat. Mr Shrake testified that the Claimant realized that it needed to push for a different interpretation.<sup>163</sup> As the Claimant’s counsel rightly acknowledged at the hearing, PRES “was aware obviously of the surface rights, of what the Government’s interpretation at that time was of the surface rights issue; and they [PRES and the Claimant] understood that the Government was pursuing different options for how they were going

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<sup>163</sup> Tr. D2.343.

[to] approach this, either there was going to be an authentic interpretation that was going to be made [part] of the law or they were going to seek to amend the law.”<sup>164</sup>

6.45 What is also significant, notwithstanding the Ministry’s interpretation (confirmed by the Presidential Secretariat), is the continued ‘sympathetic’ approach taken by the Bureau and the Ministry of Economy to PRES’ application, as here noted by Mr Earnest. Notwithstanding Article 38 of the Mining Law and much welcomed by PRES, the Bureau was here seeking positively to assist PRES and the Claimant. That approach was shared by the Minister herself, subject (as always) to complying with the rule of law: Ms Yolanda de Gavidia testified: “ ... it is true that I as well as other officials in the Salvadoran Government expressed our support to Pacific Rim of its project in El Salvador. However, that support necessarily had to be in framed [sic] within compliance with the laws of El Salvador. At no time was I willing to grant Pacific Rim, or any other company, a concession to which it was not entitled under the laws of El Salvador.”<sup>165</sup>

6.46 The Tribunal also refers to Mr Earnest’s statement regarding PRES’s “nearly (if not totally) impossible task” in complying with the requirement of Article 37(2)(b), as interpreted by the Ministry. As explained by Ms Navas in her written testimony:<sup>166</sup>

“[38]. In particular, there was one requirement that Pacific Rim did not and could not meet, as they themselves admitted to us. This requirement was to show ownership of the entire surface area requested for the concession, or legal permission from the owners.

[39]. Pacific Rim’s representatives, both its local counsel as well as those in charge of the company in El Salvador, told us that certain property owners did not wish to sell, and those that had offered to sell wanted to sell for far too much.

[40]. Faced with the impossibility of obtaining ownership over the entire surface area requested for the concession, Pacific Rim’s representatives argued that the requirement should be interpreted differently for underground mines, being restricted in those cases to the surface areas where the concession holder would need to drill or perform work on the land’s surface.

[41]. However, my response was always that the Mining Law did not establish any difference between the requirements for open-pit mines and underground

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<sup>164</sup> Tr. D7.1941-1942.

<sup>165</sup> Yolanda de Gavidia WS, para. 7.

<sup>166</sup> Navas WS, paras. 39-42.



mines; consequently, the requirements for both types of mines were the same, and therefore Pacific Rim needed to comply with them. Technical specialists within the Bureau provided that same response to Pacific Rim.

[42]. As a result, what Pacific Rim asserts – that we in the Ministry of Economy or in the Bureau of Hydrocarbons and Mines had doubts about whether confirmation of ownership or legal permission from the owners for the entire area requested for the concession in the case of underground mining was necessary – is untrue. No one in the Bureau of Hydrocarbons and Mines had any doubt as to this requirement because the Mining Law is clear in this regard.”

6.47 Mr William Gehlen (of PRES) testified that PRES’ predicament was a “pragmatic difficulty” caused by the large number of landowners in the area of the requested concession. Mr Gehlen worked as geologist for the Claimant and its companies from March 1997 to December 2012 in various senior capacities. In his witness statement, he disputed Ms Navas’ testimony, as follows [with footnotes here omitted]:<sup>167</sup>

“[190]. ... there are hundreds (actually more than a thousand by my estimate) people with surface rights of some kind within the concession area. Many of them do not have their lands registered, and many cannot read or write. We were therefore unwilling to go through the process of obtaining ‘authorization’ from all of these people without knowing exactly what it was that we were hoping to achieve through this process. Contrary to what Ms Navas is indicating in her witness statement in this arbitration, it was never ‘understood’ what form the ‘authorization’ should take. If this was ‘understood’, it was understood only by Ms Navas. I am certainly not aware that it was communicated to the company or to anyone else that would have communicated it to us.

[191]. Since Pac Rim itself never tried to obtain these ‘authorizations’, I do not know how Ms Navas could say that the landowners ‘did not wish to ... give Pacific Rim permission to have a concession’, or that they ‘asked for too much money’. I seriously doubt that Ms Navas ever spoke to all (or even most) of the people living in the concession area, much less asked them whether they would give Pac Rim ‘permission’, or how much money they would ask for to do so.

[192]. In light of Ms Navas’ statements about this issue, I would just like to clarify that, from Pac Rim’s perspective, the difficulty in obtaining ‘authorization’ from the surface landowners in the area of the requested concession was largely a pragmatic difficulty relating to the issues I have

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<sup>167</sup> Gehlen WS, paras. 190-193.

identified above: namely, the fact that there are many people occupying these lands; many of the properties are not properly registered (which also makes the occupants reluctant to reveal their identities or sign formal documents); and many of them cannot read or write, which also significantly complicates the process of obtaining written agreements. For these reasons, Pac Rim's ordinary practice with regard to exploration activities was to use very simple documents to record the landowners' agreement and/or their receipt of payment from the company for damages to their land. This was the same practice that had been followed by Kinross for many years prior to our investment.

[193]. I would note that Pac Rim has never had any difficulties in obtaining permission from landowners to carry out surface works on the area of the requested concession, including sampling, trenching, construction of drill pads and access roads, and drilling. Over the years, we have worked on pretty much all corners of this area and have never faced opposition from the landowners. Occasionally, a landowner will ask us to wait to construct a certain drill pad until the corn has been harvested on a particular plot of land (which, of course, we do). That is about the biggest 'issue' we have ever really faced in dealing with these surface owners."

- 6.48 As regards Mr Gehlen's testimony in the passage cited from paragraph [190] above, it will be recalled that Ms Navas' information regarding PRES' difficulties in procuring consents from surface owners and occupiers at El Dorado had come from Mr Earnest, not Mr Gehlen. (As already indicated, Mr Earnest was not called as witness in this arbitration by the Claimant).
- 6.49 *August 2005*: In his El Dorado Project Report of 31 August 2005,<sup>168</sup> Mr Earnest of PRES reported to the Claimant that the Bureau, at the time that the new documents were presented for DOREX's applications regarding Guaco, Pueblos and Huacuco on 26 August 2005, had requested from PRES (*inter alia*) "certified copies of the documents that demonstrate ownership of the surface property in the area of the old El Dorado mine." Mr Earnest added: "... In the matter of the interpretation of the law regarding the need to obtain the authorization of the surface owners, the 'Ministra de Economía' has acknowledged that something needs to be done. Meetings have been held with political consultants to determine the best course of action should it become necessary to seek an

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<sup>168</sup> C-288.

authentic interpretation or a change in the law. It is hoped that a course of action will be clear after the meetings to [be] held during Tom Shrake’s visit in September [2005].” This “request” by the Bureau by reference to Article 37(2)(b) of the Mining Law was informal and amicable, outwith Article 38 of the Mining Law; and, as such, it was not unwelcome to the Claimant and PRES: something clearly did need “to be done.”

6.50 *September 2005:* On 13 September 2005, on behalf of the Minister of the Economy, Ms Navas (of the Bureau) requested an “urgent” legal opinion from the Ministry’s lawyer, Mr Eli Valle, on proposed legislative changes to the Mining Law. These were cast as proposed amendments to the Mining Law, as distinct from the interpretation of the existing provisions of the Mining Law, with the main purpose of not requiring land authorizations for underground exploitation but “only from those who will be affected on the surface.”<sup>169</sup> Ms Yolanda de Gavidia testified that (as the Minister of the Economy) she had asked Ms Navas “to present a proposal for the amendment of the law so that we could support the investor, do what they said it was impossible to do.”<sup>170</sup>

6.51 These proposed changes included three provisions limiting the scope of Article 37(2)(b), accommodating PRES: First, “1. [re Article 24] ... In the case of underground mines, the applicant must only show the legal availability of the property or properties where the necessary infrastructure will be installed for operation of the mine, mineral processing and disposal of mining waste, but not for the area corresponding to the deposit or deposits to be exploited.” Second, as regards documentation required of an applicant for a concession: “2(4)(h). [re Article 37(2)(b)] For underground mines, the deed of title to the property or authorization legally issued by the owner of the areas where the necessary infrastructure will be located for operation of the mine, for mineral processing and disposal of mining waste, but not for the area corresponding to the deposit or deposits to be exploited.” Third, the “transitory provision”: “The persons who upon entry into force of these amendments, have submitted Concession applications for the exploitation of open-pit and underground mines, for which a final determination has not yet been made, shall be subject to the above

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<sup>169</sup> R-35.

<sup>170</sup> Tr. D3.646.

amendments to this Law.”<sup>171</sup>

6.52 On 20 September 2005, by email message of that date entitled “Re: Authentic Interpretation”, Mr Luis Medina (as PRES’ lawyer) wrote to Mr Ricardo Suarez (of the Presidential Office), as follows: “Following up on last week’s meeting with the vice-president’s office, I’m enclosing a draft of the kind of authentic interpretation that we need for the mining project to move forward ...” This draft took the form of a decree to be made by the Legislative Assembly, in the form of an “authentic interpretation” of Article 37(2)(b) of the Mining Law.

6.53 The attached draft decree prepared by Mr Medina read, in part, as follows: “Section 1 – [Article] 37(2)(b) [of the Mining Law] shall be authentically interpreted, meaning that in the case of metallic mineral exploitation, authorization must be acquired from the owners of those properties located inside the projected concession area and/or where the work to be carried out is at the soil surface; therefore, it will not be necessary to acquire permission from owners whose surface rights are not being affected, even when these lands are located inside the projected exploitation area. In non-metallic mineral exploitation, the property where it is to be carried out must in all cases be owned by the person making the application, or legal authorization from the landowner or possessor must be acquired.”

6.54 On 23 September 2005, Mr Suarez (of the Presidential Office) replied by email message to Mr Medina (again, as PRES’ lawyer):<sup>172</sup>

“We share your opinion that the legal requirement that surface landowners authorize subsurface mining is not consistent with the ownership practice enshrined in our legal system, since according to the latter the owner of the subsoil is the State. In any case, surface landowners’ rights are protected, if damages occur, the party carrying out building work would be obligated to repair them or provide compensation.

However, that is the current legal text, and the one that must be observed.

Regarding how to reconcile that text with State ownership, and specifically as relates to the ‘authentic interpretation’ proposal that you have prepared [see the draft cited above], it appears to us that in contrasting the current text of [Article]

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<sup>171</sup> R-35.

<sup>172</sup> C-289.

37 with the text of the proposed interpretation, rather than clarifying an opaque passage of the law, you would be changing its meaning, assigning a different scope – although logical and desirable – to the text. This would mean that rather than an interpretation, we are dealing with a *reform* of the text under the guise of an interpretation, something allowed for neither in our legal system, nor in the doctrine that inspires it [emphasis in the original].

Therefore, although we share your view regarding the problems posed by the current wording of [Article] 37 and the advisability of making it consistent with the Constitution after analyzing the text of the proposed interpretation, we do not believe that the proposed authentic interpretation is the correct legal approach.

Please let us know how we can be of further assistance.”

6.55 In the Tribunal’s view, this response from the Presidential Secretariat was broadly sympathetic to the PRES’ predicament. However, Mr Suarez did not agree with PRES’ suggestion as to how that predicament could be resolved: it needed a substantive reform to the Mining Law with a true amendment, rather than an “authentic interpretation” of an existing provision decreed by the Legislative Assembly. Without such a statutory reform, the current legal text, contrary to PRES’ suggested interpretation, was the one that “must be observed”, as unequivocally stated by Mr Suarez. There could have been at the time no misunderstanding by Mr Medina as to this statement; and, in the circumstances, that understanding is attributable to the PRES and the Claimant. Indeed, even without this statement, the Tribunal considers that any contrary understanding could not reasonably have been held by either of them.

6.56 In fact, Mr Shrake testified that this was also his understanding: “... I’m really not a lawyer. I can tell you that my understanding at this time was the same – we were working with the Government of El Salvador hand to hand. Our understandings were basically the same. They understood that there was a problem in the law, that the law did not address underground mines when they stipulated the requirement for permissions to access the surface, so, we had various communications with various people ... One of the solutions was to reform the Mining Law ... The relationship was always interactive and transparent and very supportive on both sides.”<sup>173</sup>

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<sup>173</sup> Tr. D2.348-349.

- 6.57 On 28 September and 29 September 2005, the Bureau granted exploration licences to DOREX (the Claimant's subsidiary) pursuant to its applications made on 25 August 2005 for Guaco, Pueblos and Huacuco.<sup>174</sup> (These are addressed in Part IX below, as already indicated). Whatever the legal effect of these three licences under the Mining Law, their grant to DOREX at this time can only be understood as further active support by the Bureau and the Ministry of Economy for the Claimant and PRES in regard to PRES' application for an exploitation concession at El Dorado.
- 6.58 *October 2005:* By letter dated 6 October 2005, Mr Rodriguez (the Secretary for Legislative and Legal Affairs in the Presidential office) wrote to the Minister of the Economy (Ms Yolanda de Gavidia), commenting adversely on the suggestion that Article 37(2)(b) of the Mining Law should be clarified with an "authentic interpretation." This suggestion had come from the Ministry, as testified by Ms Yolanda de Gavidia.<sup>175</sup> The Secretary's letter concluded: "3. In any event, we would have serious doubts about the constitutionality of the authentic interpretation: A – Would this be an authentic interpretation, or is it essentially a true amendment? We believe that in reality, it is the latter, in which case it would be unconstitutional, being an amendment intended to have retroactive effect. B – The content, even if done as an amendment, would affect property rights without having allowed the participation of the affected surface land owners."<sup>176</sup>
- 6.59 On 18 October 2005, there was an exchange of emails between Mr Earnest (of PRES) and PROESA, the Respondent's Agency for the Promotion of Exportation and Investment.<sup>177</sup> Mr Earnest had inquired as to the status of the proposed change to the Mining Law. PROESA's legal adviser responded: "... the Minister of Economy has referred the matter to the Legal Department in the Office of the President, where the pertinent analyses are being made about what would be the best way to bring out change in the law, either by reform or by proper [authentic] interpretation thereof."
- 6.60 At about this time, the Presidential Secretariat, with the Ministry of Economy, decided upon a proposed legislative amendment to the requirement of Article 37(2)(b) of the

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<sup>174</sup> C-43; C-44; C-45.

<sup>175</sup> Tr. D3.654.

<sup>176</sup> R-34.

<sup>177</sup> C-292.

Mining Law, along with other amendments. There was to be no further attempt to procure any “authentic interpretation.”

- 6.61 On 24 October 2005, the Bureau sent by fax to PRES the text of a draft decree, amending the Mining Law.<sup>178</sup> There was to be, *inter alia*, a new Article 24 amending Article 37(2)(b) of the Mining Law. Entitled “Designation of the Area to be Exploited”, the draft amendment read as follows:

“24 The Mining Concession grants the holder the right to exploit the previously determined minerals that are found within a solid substance of indefinite depth limited by vertical planes that correspond to the sides of a polygon, of which the vertices coincide with the coordinates of the Lambert conformal conic projection, or the UTM, oriented North-South, East-West, with international or coastal limits; and which must also be situated within the designated area of the Exploration License, and its surface will be granted in accordance with the magnitude of the deposits and the technical justification of the rights holder.

When an underground mine is in question, the applicant must demonstrate title of ownership, or legal authorization granted by the owner of the property or properties upon which all of the infrastructure necessary for the development of the mine will be installed. This includes the mineral processing plant and the location of mineral wastes. Additionally, the necessary easement rights must also be verified.

When an open-pit mine is in question, the requirements established in the previous subsection must be fulfilled, and proof of ownership or of legal authorization granted by the owner of the property or properties to be exploited must be submitted ...”

- 6.62 It is clear that the second paragraph of this draft Article 24, addressing underground mines (to be distinguished from open-pit mines in the third paragraph) was calculated to assist PRES in regard to the existing requirement of Article 37(2)(b) of the Mining Law, as interpreted by the Bureau and the Ministry of Economy.
- 6.63 On 25 October 2005, the Claimant (with PRES) examined these proposed legislative amendments to the Mining Law. By email message dated 25 October 2005 to Mr Shrake (with others), these proposed changes were described by Mr Earnest (of PRES), *inter alia*,

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<sup>178</sup> C-406.

as follows:<sup>179</sup>

“... Yesterday afternoon I received a copy of the document that will be presented to the legislature for approval. The following is a summary of the changes.

Article 24 - clarifies that for underground operations, the company must be the owner or have legal authorization for the use of the land where surface installations are to be constructed. Furthermore [it] states that in the case of open pit mines, the company must be [the] owner or have legal authorization for the use of the land to be disturbed by mining activities ...

Our analysis (Luis Medina and I) is as follows: *Article 24 is exactly what we need.* [emphasis supplied]

... We are trying to get a meeting with the Minister of Economy to discuss these issues.”

6.64 In the Tribunal’s view, this draft legislation amending Article 37(2)(b) of the Mining Law, as proposed by the Ministry, speaks for itself. The Ministry was acting in support of PRES; it was seeking, by a legislative amendment to the Mining Law, a new substantive distinction between underground mining and open-pit mines (akin to quarries); and, for the former, the proposed amended requirement for ‘ownership’ and ‘authorizations’ would be limited to the surface area “where [surface] installations are to be constructed.” The Ministry’s proposal did not mean that it now agreed with PRES’ interpretation of the current law. To the contrary, because the Ministry proposed an amendment to the existing law, the need for such a substantive change was consistent only with its own interpretation (adverse to that previously advanced by PRES), as also supported by the Respondent’s two legal opinions of May and June 2005. However, to this extent, the Ministry of Economy (including the Bureau) and the Claimant (with PRES) were now working together towards a common objective of an appropriate legislative amendment to, *inter alia*, Article 37(2)(b) of the Mining Law. As Mr Shrake testified: “The reality is that Pac Rim’s participation in mining law reform efforts in El Salvador was undertaken upon the suggestions of or in collaboration with the Government.”<sup>180</sup>

6.65 *November 2005*: By email dated 3 November 2005, Mr Earnest (of PRES) reported to Ms

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<sup>179</sup> C-400.

<sup>180</sup> Shrake 3 WS, para. 31.



Lorena Aceto (of PROESA):<sup>181</sup> “Luis Medina and I have reviewed the proposed reform to the mining law. We have met with Gina Navas de Hernández and proposed some very minor changes to clarify one of the concepts of the reform. She agreed to pass the proposed modifications on to the office of the Secretariat Tecnica. Is there any way of following up on the document to see if the suggestions were accepted?”

6.66 At this point, by late 2005, PRES had potentially a legal remedy readily at hand under Article 7 of the Mining Regulations. For several months, since March 2005, there had existed an incompatible difference between PRES and the Bureau regarding the correct legal interpretation of Article 37(2)(b) of the Mining Law; that difference had crystallised with the parties’ respective legal opinions; the Bureau, supported by the Ministry and the Presidential Secretariat, was standing firm behind its legal interpretation of the statutory requirement regarding authorizations and ownership of surface land; and that interpretation alone (even disregarding all other current difficulties facing PRES) was sufficient to thwart PRES’ application for an exploitation concession at El Dorado, now almost 12 months old. As Mr Earnest had implicitly informed Mr Shrake in his email message of 28 June 2005, PRES could have triggered proceedings against the Bureau and the Ministry of Economy so as conclusively to resolve their difference of legal interpretation. PRES still did not so. PRES had chosen, with the Claimant, to pursue a different solution. There would doubtless have been, of course, good reasons to do so; but it was their choice. Rather than pursue their own benign interpretation of Article 37(2)(b) of the Mining Law by litigation in El Salvador, the Claimant and PRES had committed themselves to securing a legislative amendment to Article 37(2)(b) of the Mining Law, actively supported by the Bureau and the Ministry of Economy. Henceforth, the Salvadoran litigation route seems not to have been considered by the Claimant and PRES, on the evidence adduced before this Tribunal.

***F. 2006***

6.67 Eventually, as recited below, these proposed amendments to the Mining Law, including Article 37(2)(b) of the Mining law, were not to be enacted by the Legislative Assembly in 2006. That failure was not attributable to a decision by the Ministry of Economy (or the

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<sup>181</sup> C-294.

Bureau). As Ms Yolanda de Gavidia explained in her testimony: “We, at the Ministry, had the initiative, but we could not assure the investor that the reform was going to take place because this was in the hands of the legislative branch of Government [...]”<sup>182</sup> Under the Constitution, the Ministry of Economy, as part of the Respondent’s executive branch, could not amend the Mining Law by itself: that constitutional power was reserved to the Legislative Assembly, as the Claimant and PRES understood.

6.68 *February 2006*: In the meantime, by email message dated 15 February 2006 to Mr Shrake,<sup>183</sup> Mr Earnest (of PRES) passed on the written report of a meeting held by a professional colleague with the Minister of Economy (Ms Yolanda de Gavidia) on the project to reform the Mining Law. He wrote: “... This is really good news.” In the English translation of the report, his message reads: “... she [the Minister] confirmed that it is the President’s instructions to present the project after March 12<sup>th</sup> [2006] for reasons of electoral strategy, to not stir up opposition to the reform project. She said that today (Tuesday) [i.e. 14 February 2006] she would be visiting the President to jointly sign and have the initiative ready. The documents have now been signed and are ready to be presented on the indicated date. This demonstrates that there is no opposition on the part of the Government and the auxiliary organisations. Based on this, we have sought and obtained the commitment of support for the project from the PCN (one of the moderate parties – their vote along with ARENA will ensure the reform passes). With a great deal of satisfaction, I can inform you that we are ready in the legislative arena, which confirms our perception that the resistance was more than anything electoral concerns ....”

6.69 *March 2006*: Legislative elections to the Legislative Assembly took place in El Salvador on 12 March 2006.

6.70 *May 2006*: In May 2006,<sup>184</sup> the Claimant prepared power point slides for an internal meeting. The third slide marked “Legal” reads as follows: “\* Conversion of Exploration License to Exploitation Concession – pending environmental permit & change of mining law (Plan A) or “authorization” of surface land owners (Plan B). \* Cadastral Survey of

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<sup>182</sup> Tr. D3.679.

<sup>183</sup> C-295.

<sup>184</sup> C-711.

surface properties overlying the underground operations and properties affected by surface installations has been ordered.” The fourth slide reads: “Lease w/option to purchase was renewed with [TM] in April [2006] (12 months). \* Negotiations with [A] in La Trinidad have been delayed by fallout from the incident in the community and subsequent threats.” The first of these properties had been one of the six properties to be directly affected by PRES’ requested concession, which had been identified in PRES’ application of 22 December 2004 as having not been purchased by PRES, but leased with an option to buy.<sup>185</sup> The second property was not expressly identified in PRES’ application.

6.71 To distinguish henceforth between the two solutions proposed by the Claimant and PRES, the Tribunal has here adopted the Claimant’s same shorthand, “Plan A” denoting a material legislative amendment to Article 37(2)(b) of the Mining Law and “Plan B” denoting the ownership or authorization by PRES of the full surface area required by the existing (unamended) Article 37(2)(b) of the Mining law, as interpreted by the Bureau and Ministry of Economy. The Claimant and PRES were not considering a third option; namely: to shrink the size of the requested concession to the lesser area for which PRES had submitted the documentation required by Article 37(2)(b).<sup>186</sup> That option would have been a drastic solution; and it would have required an amended application by PRES to the Bureau. For reasons not entirely clear from the evidence, it was not pursued by PRES. In any event, as Mr Shrake testified, Plan A was “the preferred option, I think, for everybody involved.”<sup>187</sup> Again, that was a decision made by the Claimant and PRES: it was not a decision made or procured by the Ministry of Economy or the Bureau, still less imposed on the Claimant or PRES.

6.72 As at May 2006, neither Plan A nor Plan B was in effect. Hence, as the existing law stood, with the Respondent’s interpretation of Article 37(2)(b) of the Mining Law (if correct), PRES’ application of 22 December 2004 was non-compliant. It had been non-compliant for 17 months, far exceeding any 30-day deadline under Article 38 of the Mining Law.

6.73 *June 2006*: Mr Shrake testified that, at about this time, “... we were unsure whether any

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<sup>185</sup> R-2, para. 4.2.

<sup>186</sup> Tr. D2.350, 353 & 368.

<sup>187</sup> Tr. D2.369.

reform of the mining law would even be necessary to resolve the surface rights issue, but we nevertheless proposed to the Minister of Economy and to the Vice-President that the mining law be reformed for the express purpose of strengthening the relevant environmental protections.”<sup>188</sup> This took place at a meeting between, *inter alios*, the Vice-President, Ms Yolanda de Gavidia, Mr Suarez, Mr Shrake and Ms McLeod-Seltzer.<sup>189</sup> In PRES’ weekly summary for the El Dorado Project for the week ending 2 June 2006,<sup>190</sup> it was reported in regard to this meeting: “ ... The Vice-President indicated that the Government understands the importance of the project and is pleased with the strength that the Pacific Rim team brings to the country. Tom [Shrake] proposed that the mining law need[s] to be improved to provide stronger environmental requirements. A task force will be formed with Yolanda [de] Gavidia in the chair ...”

6.74 In response to this meeting, by letter dated 13 June 2006 to the Minister of Economy (Ms Yolanda de Gavidia),<sup>191</sup> Mr Shrake suggested (*inter alia*) that the Mining Law be amended by bolstering environmental protections, levying new taxes on mining and requiring legacy funds for the consequences of mine closures. He then foresaw, expressed in highly optimistic terms, a bright future for the Claimant’s mining operations in El Salvador, both for itself and for the people of El Salvador. He did not specifically refer to amending Article 37(2)(b) of the Mining Law.

6.75 On 30 June 2006, the Minister for the Environment, Mr Barrera, was reported in the press as indicating that he thought mining was not “convenient” for El Salvador (in the original Spanish: “*no conveniente*”).<sup>192</sup> This unexpected announcement caused Mr Shrake and Mr Earnest to meet with both Mr Barrera and Ms Yolanda de Gavidia as Ministers of MARN and the Ministry of Industry (MINEC).<sup>193</sup> As Mr Shrake testified: “Minister de Gavidia assured me that Mr Barrera’s statements represented only his personal views; that those views were at odds with Administration policy; that the Administration fully supported the [El Dorado] project and intended to comply with El

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<sup>188</sup> Shrake 3 WS, para. 35.

<sup>189</sup> Shrake 2 WS, para. 115.

<sup>190</sup> C-296.

<sup>191</sup> C-15.

<sup>192</sup> C-46.

<sup>193</sup> Shrake 3 WS, para. 37.

Salvador's applicable laws; and that Mr Barrera no longer remained in good standing within the Administration. I also met personally with Mr Barrera himself, who downplayed the remarks that were reported in the press and said they did not represent official policy. In any event, Mr Barrera proceeded to depart MARN by the end of 2006 (i.e. within about six months after his remarks had been reported by the press)."<sup>194</sup>

6.76 *July 2006*: In the El Dorado Project weekly summary for the week ending 7 July 2006, PRES reported to the Claimant:<sup>195</sup> “ ... Government Related Issues – Tom [Shrake] and Fred [Earnest] met with many government leaders, political advisors, diplomatic representatives, private industry leaders and generators of public opinion the first four days of the week. The most productive meeting was with the Vice President of the Republic and the Minister of Environment. The tone of messages coming out of MARN changed significantly after the meeting.”

6.77 On or about 3 July 2006, the Ministry of Economy announced that it would be inviting a consultant from Peru, Dr Manuel Pulgar-Vidal, to review and advise the Ministry of Economy upon the laws relating to mining in El Salvador.<sup>196</sup> His terms of reference stated: “To advise the Ministry of Economy in identifying mechanisms to determine the suitability of mining exploitation in view of the sector's current situation and country conditions, and to identify the aspects that should be modified in the Mining Law such that the mining sector develops as an industry that utilizes proper mining practices to avoid environmental degradation and also provides the benefits of economic and social development to the communities involved.”<sup>197</sup>

6.78 On 8 July 2006, by email to Mr Shrake, Mr Earnest reported upon an earlier meeting with the Minister of Economy:<sup>198</sup> “Ministra Gavidia indicated that they are contemplating freezing the issuance of new exploration licenses until the mining law can be reviewed. She also indicated that they are going to bring in a Peruvian to review the law. We should urge them to consider a Chilean (there are arguments both ways) ...”. By this time, the

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<sup>194</sup> Shrake 1 WS, para. 93.

<sup>195</sup> C-717.

<sup>196</sup> C-716.

<sup>197</sup> R-129.

<sup>198</sup> C-716.

Ministry of Economy had already appointed Dr Pulgar-Vidal (from Peru): see above.

- 6.79 On 12 July 2006, by email message to a professional colleague, Mr Earnest reported the following in regard to meetings between Mr Shrake, himself, MARN and the Respondent's Vice-President:<sup>199</sup>

“... Yesterday we were surprised to arrive at the office of Hugo Barrera [the Environment Minister] and find the Vice-President there for our meeting. The meeting was very productive. We explained that much of what the ministry has been hearing is greatly exaggerated and in many instances simply not true. We invited them to visit Newmont's Ken Snyder mine in Nevada which is geologically very similar and process recovery-wise identical to what we propose for El Dorado. We explained that a mine can be compliant and not present risks to the environment. We further reiterated our commitment to water purification, and to responsible environmental stewardship. Tom [Shrake] explained our goal of building a model mine that will be looked at as a new standard for mines in the Americas and explained that not all mining companies are as responsible as Pacific Rim (note that compliance will allow us to gain the confidence of the gov't). We also explained that we are not afraid of regulation and control, in fact we are accustomed to working in that kind of an environment. The government is not going to publish a message to retract what the minister has already said. It is simply not going to happen as there is too much at risk with the millennial challenge fund. We felt that our meeting opened the door to further dialogue and cooperation, but we realize that there is a lot of work to do.

This morning we were at a breakfast in which the VP [the Vice-President] was the invited speaker and had the opportunity to talk with her afterwards. She indicated that she will find a way to send a couple of people from MARN to visit the mine and expressed her general optimism that this will all work out for us and El Salvador, however, she reiterated that we must stay off the radar screen as much as possible and not do anything to jeopardize the millennial challenge fund .....

- 6.80 On 23 July 2006, it was reported in the press that the Respondent's Environment Minister and Minister of the Economy were intending to present to the National Assembly the proposed amendments to the Mining Law before the end of 2006.<sup>200</sup> These reforms included, mirroring Mr Shrake's letter above, the levying of new mining royalties and

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<sup>199</sup> C-299.

<sup>200</sup> C-409.

“closing down” plans. The list did not expressly include any amendment to Article 37(2)(b) of the Mining Law.

- 6.81 *August 2006*: On 22 August 2006, in his updated report to Pac Rim’s Board of Directors,<sup>201</sup> Mr Shrake wrote: “The government continues to work on changes to the mining law and has openly sought our input. They have hired a Peruvian consultant to help in this effort and we have had two private meetings with him. Changes will include tightening the environmental requirements, increasing the taxes and reducing the permit burden for exploration projects. These changes are all in an effort to initiate environmentally sound mining in El Salvador.” The Tribunal notes that the Claimant (with PRES) had already expressed strong support for these changes.
- 6.82 *September 2006*: The evidence is neither clear nor complete as to precisely what happened between August and September 2006. On the side of the Claimant and PRES, nothing changed materially: Plan A remained their preferred option. On the Respondent’s side, the Ministry of Economy had received the written report of its Peruvian mining consultant, Dr Manuel Pulgar-Vidal.<sup>202</sup> In that report dated 11 August 2006 (of some 94 pages), Dr Pulgar-Vidal had concluded that El Salvador required substantial reforms to the practice of mining and the granting of mining licences, especially as regards environmental and social protections.
- 6.83 This report, whilst also addressing other deficiencies in the Mining Law, did not specifically deal with the current issue under Article 37(2)(b) of the Mining Law. It did address the issue of surface land more generally in a section addressing the direct impacts of mining. In paragraph 6.1.1.1, “Access to Land”, it read (with paragraphs here marked thus [...] for ease of reference):

[1] “Access to land has historically been one of the more contentious issues surrounding the development of an activity such as mining. The fact that our legal systems distinguish between rights to subsoil resources and rights regarding surface usage make it so that access must be granted through some legal means, such that the owner of the surface consents to grant a right to the concession holder to access mineral resources.

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<sup>201</sup> C-720.

<sup>202</sup> R-129.

[2] The customary form recognized in mining law for this type of situation is the mining easement, but under some legislation this can be done through sale purchase agreements and possibly through expropriation of areas when the activity has been prioritized by the State.

[3] In the case of El Salvador, this operates through an easement, but there is no procedure for this; rather the operator must necessarily obtain an authorization from the owner. This can be an advantage, in that this authorization is compulsory, and if denied would impede development of the activity based on a decision by the owner of the land. Yet in the absence of a complementary regulation, this could result in arbitrary acts based on disparity of information.

[4] Furthermore, with regard to this, it should be considered that a contradiction eventually arises in the Mining Law due to the fact that on the one hand authorization from the owner is required in the case of exploration and subsequently, in another article, an easement is required in the case of licenses or concessions.

[5] In practice there would seem to be no conflicts in El Salvador based on the issue of access to land and that could be the result of two situations at work:

- There is no operation currently in the exploitation stage and therefore the permits have only been for exploration activities, which do not result in a substantial change to the surface.
- Owners do not have any information about the activity, how it will be carried out, and the impacts that can occur.

[6] This last element is key, as the extent to which the owner of the surface could eventually and permanently lose the land will greatly depend on how mining activity is carried out. Obviously an open-pit operation entails such an alteration to the surface that the land loses its conditions for development of the activities that are typically carried out on it.

[7] Access to land can involve situations of relocation and migration, and that can be a result of performance of the activity itself or the environmental impacts it causes.

[8] Many countries have sought to regulate the issue of displacement and in any event address it based on practices used by multilateral organizations that have dealt with this subject, such as the World Bank.”

6.84 The publication of Dr Pulgar-Vidal’s report generated a political reaction, not limited to the Salvadoran legislature. This reaction was generally unfavourable to mining, including the mining activities proposed by the Claimant and PRES. The Tribunal notes also the



reference in paragraphs [5] and [6] above to the effect that surface landowners (and also, presumably, occupiers) did not have sufficient information about underground mining activity, how it would be carried out and the impacts that can occur.

6.85 *October 2006*: On 2 October 2006, almost two years after PRES' application for an exploitation concession, Ms Navas, as the Director of the Ministry of Economy's Bureau of Hydrocarbons and Mines, wrote a first warning letter to PRES under Article 38 of the Mining Law:<sup>203</sup>

“The Bureau, in order to better reach a decision, WARNS the company ‘[PRES]’ through its Legal Representative, who must furnish evidence of his legal capacity, and as established in Articles 36, 37 numeral 2 and 38 of the Mining Law, that within THIRTY DAYS it must submit the following documentation:  
1. Certified copies of the duly recorded official transcripts of the property sales agreements or legally executed authorizations from the landowners in the area requested for mining exploitation ....”

6.86 In her written testimony, Ms Navas explained her reasons for sending this first warning letter:<sup>204</sup> “... having consulted with the Minister of Economy, we decided that it was time to initiate the formal procedure to provide a period of no more than 30 days so that the concession application that had been submitted in an incomplete form in December 2004 could be completed. This was done in order to end the process and close out the case file completely. Therefore, in October 2006, I sent the formal warning letter to Pacific Rim [PRES] indicating the missing information and documents, including the environmental permit, evidence of ownership or permission regarding the entire surface area of the property requested for the concession, and the Feasibility Study.”

6.87 In the Tribunal's view, this was a significant watershed in the treatment by the Respondent of the Claimant and PRES in regard to the latter's application for an exploitation concession. Until this time, the Ministry (with the Bureau) had supported the Claimant in the hope that, somehow, PRES could be helped to surmount its difficulties. These difficulties were several, both with the Ministry of Economy and MARN; but they had

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<sup>203</sup> R-4.

<sup>204</sup> Navas WS, paras. 67-68.

always included Article 37(2)(b) of the Mining Law. Until about September 2006, as he testified, Mr Shrake believed that “[...] both MINEC and MARN continued to indicate that they supported legal reform to permit the industry, while also affirming that they were responsible for upholding the existing laws.”<sup>205</sup> However, this first warning letter of 2 October 2006 was a new development because it triggered, for the first time, the statutory deadline of 30 days under Article 38 of the Mining Law, as was made explicit in the letter itself.

6.88 Mr Gehlen testified that he received the Bureau’s warning letter at PRES, although he understood it to mean that PRES was only being ordered to resubmit “all the documents that had been attached to the original Concession Application, together with some additional materials.”<sup>206</sup> (Mr Earnest had left PRES in September 2006). Somewhat surprisingly, Mr Shrake testified that he had not seen or known of this warning letter before the hearing in this arbitration.<sup>207</sup> However, its contents with a copy of the letter were notified to him at the time by two email messages dated 10 October 2006 from Mr Gehlen.<sup>208</sup> Hence, for one reason or another, the warning letter’s significance can be assumed to have been missed at the time by Mr Shrake, if not also Mr Gehlen. This was unfortunate, particularly as regards PRES’ compliance with Articles 38 and 37(2)(b) of the Mining Law.

6.89 Moreover, Mr Shrake had always considered the wording of Article 37(2)(b) to be, in his words, no more than a “glitch” and a “snafu.”<sup>209</sup> He had also received legal advice from PRES’ Salvadoran lawyer (Mr Medina) that the Bureau’s interpretation was nonsense and illogical (see above). He also testified, based upon his extensive practical experience as a miner: “The reality is that most mines are open-cast mines. They’re open-pit mines, and nobody would mine an open-pit mine without surface permissions, whether you acquired the land yourself or whether you sought permissions from the owners of the land. But in an underground mine, in many places you would never have to get permission from the

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<sup>205</sup> Shrake 3 WS, para. 38.

<sup>206</sup> Tr. D2.493.

<sup>207</sup> Tr. D2.354-357.

<sup>208</sup> C-693.

<sup>209</sup> Tr. D2.362, 364 & 479.

surface landowner for being underneath his land.”<sup>210</sup> Mr Shrake, it will be recalled, is not a lawyer.

- 6.90 The Tribunal concludes that the Claimant and PRES were unreasonably mistaken in so readily underestimating PRES’s predicament in meeting the requirement of Article 37(2)(b), particularly after the Bureau’s first warning letter. By now, unless resolved with Plan A or Plan B, this predicament jeopardised the whole of the Claimant’s El Dorado Project. There was, it will be recalled, no other plan.
- 6.91 On 19 October 2006, it was reported in the press that the Minister of the Economy (Ms Yolanda de Gavidia) considered that the Mining Law should be reformed to increase taxes and to make environmental regulatory norms more rigorous.<sup>211</sup> This was, in the circumstances, a general endorsement of the recommendations made in Dr Pulgar-Vidal’s report. There was no reference to reforming Article 37(2)(b) of the Mining Law.
- 6.92 *November 2006:* On 9 November 2006, by a press release signed by Mr Shrake, the Claimant publicly summarised its understanding of the current situation regarding the Mining Law, acknowledging that PRES might not now be able to get its concession until the Mining Law was amended.<sup>212</sup> Headed “Mining Law and Permitting Update”, the relevant passages read (with paragraph numbers here added):

“[1] El Salvador's current Mining Law was enacted in 1996, since which time numerous Exploration Licenses (which are equivalent to exploration claims) have been granted. Pacific Rim Mining Corp. has applied for an Exploitation Concession (which is equivalent to a mining permit) for a portion of its El Dorado gold project, the first advanced-stage exploration project to have gotten to this point under El Salvador’s current Mining Law. Moving this project through the application process has identified shortcomings in the current law that would benefit from reform.

[2] El Salvador's governing party (ARENA), the primary opposition party (FMLN), most minority parties (PCN, PDC, & CD) and importantly, Pacific Rim Mining Corp. are in favour of reforming the El Salvadoran Mining Law. In considering the potential modifications, the El Salvador government is reviewing the laws of countries with established mining industries and well-regarded

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<sup>210</sup> Tr. D2.479-480.

<sup>211</sup> C-694.

<sup>212</sup> C-309.

mining laws including Chile, Peru, Canada and the USA, is considering the positions of all sides of the political spectrum and is consulting with various mining companies including Pacific Rim Mining Corp. The current Salvadoran administration has proven during its past 10 years in government to be an administration that is committed to attracting foreign investment in order to advance their economy. In fact, the Economic Freedom Rankings of the Heritage Foundation placed El Salvador second only to Chile as the freest economy in Latin America. Pacific Rim is fully supportive of reforms to the Mining Law, believing that El Salvador has the opportunity to become the model for framing a responsible mining industry and looks forward to providing input on the reformed law and working with all parties involved.

[3] Pacific Rim's Exploitation Concession application for the El Dorado project remains in process. However it is uncertain whether the El Dorado Exploitation Concession will be granted prior to the forthcoming reformation of the El Salvadoran Mining Law. The Company's application for an Exploitation Concession requires several documents, including an Environmental Permit that is expected to be granted upon final approval of the Company's El Dorado project Environmental Impact Study ("EIS") by the Environmental and Natural Resources Ministry ("MARN"). The EIS, originally submitted in September 2004, received technical approval in September 2005, and was published for public comment in late 2005. In March 2006, Pacific Rim received from MARN a list of issues raised during the public comment period and was asked to amend the EIS to address these issues. The amended EIS was resubmitted to MARN, which recently requested clarification on a number of items. The Company's responses to these requests have been provided. A timeframe for final approval of the El Dorado EIS has not been assigned. As such, and further considering the impending changes to the Mining Law, the Company is unable to provide a definitive timeframe as to when its El Dorado Exploitation Concession will be granted.

[4] Pacific Rim has received tremendous support in its endeavors from the El Salvadoran government, particularly the Ministry of Economy, which is responsible for granting Exploitation Concessions. The government has demonstrated itself to be supportive of mining and Pacific Rim is working diligently with the administration, opposition parties, business groups and civil society to secure its mining permit for El Dorado as soon as possible."

6.93 The Tribunal notes that Mr Shrake here concentrated on PRES' difficulties with MARN over its missing environmental permit and the need for amendments to the Mining Law in

that regard. There was no express reference to PRES' specific difficulties with the Bureau and the Ministry of Economy regarding Article 37(2)(b) of the Mining Law on surface ownership and authorizations, requiring no less an amendment to the Mining Law under the Claimant's preferred Plan A.

6.94 On 8 November 2006 (prior to Mr Shrake's press release above), Mr Gehlen, as PRES' legal representative, responded by letter dated 7 November 2006 to the Bureau, in material part as follows:<sup>213</sup> "The company has been notified of the resolution dated October second, two thousand six granting it a term of THIRTY DAYS to submit the documentation listed therein to this Bureau. In response to that notice, we are attaching the following: 1. Certified copies of the following documents: [there here follows a list of documents lettered (a) to (h) describing 6 purchase-sale agreements, 1 lease agreement with an option to buy and 1 land owned by PRES] ..."

6.95 As Mr Gehlen testified:<sup>214</sup> "With regard to these other documents [i.e. including those under paragraph "1" above], I did not interpret the Notice as implying anything about the sufficiency of the materials that we had previously submitted. From my reading, the Notice was just ordering us to resubmit *all* the documents that had been attached to the original concession application, together with some additional materials ..." [emphasis in the original]. These additional materials did not therefore include new authorizations or ownerships regarding the surface area of the requested concession.

6.96 Accordingly, so the Tribunal finds, the Bureau now received from PRES on 8 November 2006 only what it had already received with PRES' application on 22 December 2004 as regards the documentation required under Article 37(2)(b) of the Mining Law. As already noted above, this documentation covered less than 13% of the total surface area of the requested concession. PRES could not therefore satisfy the requirement of Article 37(2)(b) as interpreted by the Bureau, the Ministry of Economy and the Presidential Secretariat; nor did PRES meet the demands of the Bureau's first warning letter.

6.97 Mr Gehlen's testimony continued, by way of explanation: <sup>215</sup>

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<sup>213</sup> R-5.

<sup>214</sup> Gehlen WS, para. 178.

<sup>215</sup> Gehlen WS, paras. 181-183.

[181]. With regard to the item of the Notice relating to ownership or authorization for surface property, I knew that in 2005 Ms. Navas had discussed this with Mr Earnest and had proposed making a reform to the mining law that would clarify this issue. However, presentation of the reform proposal was delayed at the request of President Saca until the Summer of 2006, at which time the Ministers of MINEC and MARN had jointly proposed a broader legislative reform related to mining. As I mentioned above, this mining law reform was being discussed in November 2006, at the time that we were presenting our responses to the Department of Mines. Therefore, from the company's perspective, the issue of surface ownership or authorization remained unclear. We were not sure whether this would end up being clarified as part of the legislative reform process or, if not, what the position or instructions of the Department of Mines would ultimately be.

[182]. One way or another, we were willing to work cooperatively with the Government, as we always had, and to let the Department of Mines take the lead in suggesting the way forward on this issue. Although I know that the Government has now tried to put a lot of importance on this issue in the arbitration, I think I can speak for everyone in the company when I say that we never viewed this as a determinative factor in our ability to proceed with our mining project. On the other hand, the company already owned all the land that we were going to use or disturb for the project, so we were obviously reluctant to start buying up additional tracts of land which we would not have any use for. We certainly did not want to displace or interfere with the people who owned the lands when we had no reason to do so, nor did we necessarily want to assume responsibility for administering or maintaining them. Further, as I discuss further below, we did not know what kind of 'authorization' we would or could be expected to obtain in lieu of buying or leasing the property outright, and although Mr Earnest had raised this with the Department of Mines, they had not yet provided us with any advice about this matter.

[183]. In any event, as I also discuss further below, the company has never had any problems obtaining authorization from the local landowners to carry out surface works in the El Dorado project area, and I had no reason to doubt that we would be able [to] obtain whatever additional 'authorizations' that we could reasonably be expected to obtain. In the meantime, we simply submitted to the Department all the deeds and contracts that we had in relation to our surface rights. Again, we were never told or received any communication from the Department after our submission indicating that what we had submitted was insufficient."

6.98 The Tribunal does not accept this explanation. Mr Gehlen (with Mr Shrake) should have understood better the imminent threat posed by the Bureau’s first warning letter as regards PRES’ non-compliance with the requirement of Article 37(2)(b) of the Mining Law. The Claimant and PRES were by now firmly committed to Plan A. However, after many months, Plan A remained still only a plan. As regards Plan B, it remained a significant practical difficulty for PRES, for the several reasons earlier explained by Mr Earnest to Ms Navas. It was also not the task of the Bureau or the Ministry of Economy to advise the Claimant or PRES on how to overcome any of its difficulties. It appears that the Bureau had little practical experience in the implementation of Article 37(2)(b) in regard to a major concession for an underground mine. With their advisers and other resources, the Claimant and PRES could have considered Plan B much further, if only as a contingency. However, by now, the Claimant and PRES had effectively put ‘all their eggs in one basket’: it was to be Plan A – and only Plan A.

6.99 *December 2006:* On 4 December 2006, Ms Navas, as the Director of the Bureau, replied to PRES with a second warning letter, as follows;<sup>216</sup> “... Having received on the eighth of November, two thousand six the document and attachments whereby Mr William Thomas Gehlen, Legal Representative of the Company “[PRES]” partially complies with the warning notice dated the second of October, two thousand six, and also requests that the deadline for the presentation of the documentation relating to the environmental permit be suspended and that the company be granted three days from the delivery of the permit by the corresponding Authority to submit it in turn to this Bureau ...” The Bureau then warned PRES to submit the Environmental Permit and the EIS within 30 business days.

6.100 Nothing more was here said expressly in regard to Article 37(2)(b) of the Mining Law. However, there should have been no misunderstanding by PRES. With documentation covering only about 13% of the surface area of the requested concession, Mr Gehlen (for PRES and the Claimant) knew that the proffered documentation did not meet the statutory requirement as interpreted by the Bureau, the Ministry of Economy and the Presidential Secretariat. The Tribunal does not accept Mr Shrake’s testimony to the contrary, namely: “As of December 2006, PRES believed it had submitted all of the documentation required

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<sup>216</sup> R-6.

for an exploitation concession at El Dorado, except for the environmental permit.”<sup>217</sup> It will be recalled that Mr Shrake denied having seen the Bureau’s first warning letter, although Mr Gehlen sent it to him at the time and knew its contents (see above). Mr Gehlen certainly saw both warning letters.

6.101 In her written statement, Ms Navas testified as follows in regard to this second warning letter:<sup>218</sup>

“[69]. Pac Rim [PRES] partially responded to the warning letter in November 2006, claiming to submit documents and information that fulfilled the request in the warning letter, except for the environmental permit, with regard to which it argued a just impediment to submitting it, and asked for the deadline to be extended indefinitely, citing provisions of the Code of Civil Procedure to that end.

[70]. It must be kept in mind that the preliminary review stage of a concession application only seeks to determine whether the application is complete. This preliminary review does not fully evaluate whether the documents and information submitted are in fact sufficient to establish material compliance with the requirements.

[71]. Taking the above into account, as well as the fact that Pacific Rim [PRES] admitted in its November 2006 reply that it did not have the environmental permit, but argued a just impediment regarding this, and having consulted with the Ministry’s legal advisor, it was decided to send a second warning letter focused solely on the environmental permit because just impediment had been argued. Just impediment was not argued for the other requirements requested; consequently they remained outstanding. This second warning letter, though not contemplated under the Mining Law, was justified under the Code of Civil Procedure, given that even though the concept of just impediment was accepted, Pacific Rim [PRES] was only granted an additional 30-day period within which to submit the environmental permit.

[72]. The fact that the second warning letter states that Pacific Rim partially addressed the first warning letter, and that it only references the missing environmental permit, does not reflect that all the other missing requirements cited in the first warning letter had been favorably fulfilled. The only thing that means is that Pacific Rim submitted some new documents, that it argued that those documents were the missing requirements, and it only admitted that it

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<sup>217</sup> Shrake 1 WS, para. 88.

<sup>218</sup> Navas WS, paras. 69-75; Tr. D3.705-706 & 710.



lacked the environmental permit and claimed just impediment only with regard to that requirement. ... “

“[74]. There is one remaining fact that must be clarified with regard to the second warning letter sent to Pacific Rim in December 2006. After Pacific Rim had been formally notified of the second warning letter, the Minister of Economy, for reasons I will explain below, ordered me to withdraw it.

[75]. Yolanda de Gavidia, the Minister of Economy, ordered me to withdraw the second warning letter because she told me she had spoken with the President of the Republic [President Saca] about finding another solution to the situation, and that was to present a Moratorium Law for Metallic Mining while the Strategic Environmental Assessment study on Mining in El Salvador was completed. As a result she directed that we proceed in another way with the warning letter issued to Pacific Rim.”

6.102 In the Tribunal’s view, the Bureau’s second warning letter did not replace its first warning letter. The second letter affected the time-limit imposed under Article 38 of the Mining Law; but it left intact the formal warning as to paragraph 1 of the first letter regarding the missing documentation required Article 37(2)(b) of the Mining Law.

6.103 On 18 December 2006, a meeting took place between PRES, the Bureau and the Ministry of Economy. By an email message dated 18 December 2006 from Mr Rodrigo Chavez (of PRES) to Mr Shrake, PRES described its content as follows:<sup>219</sup>

“ ... This morning we had the meeting with the Minister of Economía, Yolanda de Gavidia. The meeting was attended by Fidel Chavez, Francisco Escobar, Rodrigo Chavez, Gina Navas and Yolanda de Gavidia. She [the Minister] agreed with nearly all of the recommendations we had, regarding the changes in the mining law. She only stressed that 1% of the royalties be used for the closure of the mine. Additionally, she wants to eliminate the prerogative that the current law has of designating certain areas for the development of government projects related to the mining industry. However, it is clear that her margin of manoeuver is not very big. She is still waiting for instructions of her superiors. She agreed that getting the other two political parties, PDC and PCN, on board was key, in order to give the Administration the support it needs to move forward. She also said that she was willing to fight the new initiative to ban mining and that she expected our help in this regard. She also mentioned that she has plenty of problems with the companies exploring in Chalatenango and that we should

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<sup>219</sup> C-727.

make some kind of united front as an industry or at least have a unified position on important aspects. In general terms, the meeting was positive. At the moment, the priority is to continue to gain ground with the FMLN and get the support of the PCN. Additionally, once this is more advanced, we would need to talk to the No.1 Decision maker (the president) and his closest advisers .....

- 6.104 Mr Fidel Chávez was a Salvadoran politician, a former Foreign Minister of the Respondent and President of the Organization of American States whom Mr Shrake had engaged as an adviser earlier in the year.<sup>220</sup> Mr Rodrigo Chávez, his son, was by now a Vice-President of PRES. Mr Francisco Escobar was one of several professional lobbyists engaged by PRES. He was the brother-in-law of the Vice-President, Ms Ana Vilma de Escobar.<sup>221</sup>
- 6.105 On 21 December 2006, by a written memorandum, the Minister of the Economy (Ms Yolanda de Gavidia) proposed to the President (President Saca) a three-year moratorium on metallic mining. The moratorium was intended (by proposed new legislation) to preclude the grant of metallic mineral concessions, including those currently pending.<sup>222</sup> It was thus intended to affect, when implemented, PRES' pending application for a concession.

### **G. 2007**

- 6.106 *January 2007:* In January 2007, according to the Respondent's case in this arbitration, the thirty-day corrective period ended under Article 38 of the Mining Law, as cited in the Bureau's two warning letters. As calculated by the Respondent, that thirty-day period had begun to run upon PRES' receipt of the Bureau's second warning letter dated 21 December 2006. The Tribunal does not accept this calculation.
- 6.107 The evidence shows that this second letter was informally treated by the Bureau as having been 'withdrawn', as was made known to PRES at the time. It was treated by the Ministry of Economy as never having been sent to PRES. The reasons for this are not clear on the evidence adduced before the Tribunal in this arbitration. The Bureau's first letter was not, however, withdrawn by the Bureau or the Ministry of Economy. It thus remained open to PRES to force the issue under Article 37(2)(b) of the Mining Law with legal proceedings

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<sup>220</sup> Shrake 3 WS, para. 39.

<sup>221</sup> Tr. D2.454-456.

<sup>222</sup> R-167.

under Article 7 of the Mining Regulations; but it did not do so.

6.108 In January 2007 (albeit announced a month earlier), Mr Carlos Guerrero became the new Minister of the Environment (replacing Mr Hugo César Barrera).<sup>223</sup> The Minister of Economy remained Ms Yolanda de Gavidia. She was to resign later in 2008.

6.109 *May 2007*: On 3 May 2007, by internal email, Mr Shrake reported to his senior colleagues:<sup>224</sup> “... Mark May 2 on your calendar. It’s the day the tide changed. The president has instructed the head of the party and his chief political advisor to meet with us to discuss a pro-mining documentary in ES [El Salvador]. He has seen the light ...”

6.110 On 5 May 2007, by an internal email to Mr Shrake and Mr Neilans,<sup>225</sup> PRES (Mr Rodrigo Chávez) reported on this meeting with President Saca: “... Saca said that he was not anti-mining but worried about the social conflict that could arise. He said that we should work with the two people he had mentioned on Wednesday (Silvia Aguilar and Tomás López) so we could sort the issues out. As for the law reform, he said he had to see the document that we proposed before he agreed upon it. He then said he would give my father a formal meeting only on mining to discuss the details of this, after we have spoken to Silvia Aguilar and Tomás López ...” This reference to “Wednesday” referred to the earlier meeting with President Saca on Wednesday, 2 May 2017 described by Mr Shrake above.

6.111 On 7 May 2007, at a meeting of mining companies (including Ms Colindres, now of PRES) addressed by Mr Guerrero (as the new Minister of the Environment) and Ms Yolanda de Gavidia (still as the Minister of Economy), the mining companies were informed that all mining activity in El Salvador would be halted until such time as the Government completed a ‘Strategic Environmental Assessment’.<sup>226</sup> This was the implementation, *de facto*, of the moratorium considered earlier in mid-December 2006. However, no law implementing such a moratorium was enacted by the Legislative Assembly. Hence, the Mining Law remained in full force and legal effect.

6.112 As Ms Navas testified, this *de facto* moratorium benefited the Claimant: “[PRES] would

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<sup>223</sup> C-47.

<sup>224</sup> C-305.

<sup>225</sup> C-739.

<sup>226</sup> Colindres 1 WS, para. 146; Shrake 2 WS, para. 127.

continue to explore the area under Concession because it needed more information to complete its Feasibility Study. This would have given it the time to complete the Feasibility Study in order for it to obtain permits or to buy the land it was missing.”<sup>227</sup> (Ms Navas later resigned from the Bureau in or soon after May 2007).

6.113 On 24 May 2007, by internal email, Mr Shrake reported to his colleagues on his recent visit to El Salvador, *inter alia*, as follows<sup>228</sup>: “... I’m optimistic that barring any atmospheric changes within the country, the law will be reformed in July [2007]. This will set the stage for our permit sometime afterwards ....” (The latter was a reference to the environmental permit requested of MARN).

6.114 *June 2007*: On 14 June 2007, it was reported in the press that the Minister of the Environment, Mr Guerrero, and the Minister of the Economy would send the proposed amendments to the Mining Law “before the end of the year.”<sup>229</sup>

6.115 *July 2007*: In his updated report to Pac Rim’s Board of Directors dated 5 July 2005, Mr Shrake wrote: “... Momentum continues to build for the mining law reform which will precede the issuance of our permit. A macro-economic study of the impact of mining was presented to the government and the public and was well received. That and our radio programming continue to positively affect public opinion. Two members of the cabinet are championing our cause: within the administration: Vice President Escobar and the Technical Director Zablah. We understand that the PCN party has been negotiating with President Saca over a variety of political issues and has gotten the okay from the administration to proceed with the introduction of the mining law reform in July. The administration just needs the time to review the law which they started last week in a three hour meeting with our people. The board that oversees MARN (the ES environmental regulatory agency) has also come around to understand that what we are proposing is not environmentally risky. It appears as though we have turned the tide and I expect to see the law reform completed before the end of August [2007], hopefully sooner ....”

6.116 On 18 July 2007, by email to Mr Shrake, Mr Neilans (of Pac Rim) relayed a written report

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<sup>227</sup> Tr. D3.732.

<sup>228</sup> C-728.

<sup>229</sup> C-741.

from PRES (Mr Rodrigo Chavez), under the heading “Mining Law update”:<sup>230</sup>

“... As discussed, the mining law will be introduced when the President is on board. The most recent date for introduction, next week, will likely pass (again) as we have not been summoned to present to him yet. This is dependent on Zablah recommending the pursuance of mining to the President, which he hasn’t done as of yet. Rodrigo thinks that with the President’s return to the country Tuesday this week that the Zablah-Saca [meeting] may happen late this week or early next week. At an unrelated social event, Fidel and Rodrigo spoke with the President and were told to contact him early next week to set something up. Zablah has been briefed now on the economics (Hinds)<sup>231</sup>, the law (Fidel), the socio-political, the geology and the environment (by Rodrigo et al) and so has the full complement of details. The Ministry of Economy has also been briefed and is apparently on board; Rodrigo, Francisco, Manuel and Fidel met with the Directorate of Minerals and gave them the full briefing. Between the 4 of them they have follow-up meetings with many of the public figures again next week. Arévalo, Environmental Commission, has told Rodrigo that he wants the law introduced ASAP and will be sending a letter to the Executive Branch next week asking for a new law to be introduced within 8 working days. This would put it near the break for the recess or just after, if it occurs on his suggestion. It is not certain whether the Arena party would introduce it, or one of the minority parties, but that isn't a critical issue. Zablah has read the proposed law with his advisors and they are generally in agreement. Rodrigo doesn't see that it would require any major revisions from Zablah's perspective. I am not sure when the final draft will be ready but I believe we are looking at early next week. I have asked that Sandra Orihuela have a quick review of it if she has time.”

6.117 *August 2007*: By internal email dated 14 August 2007,<sup>232</sup> Mr Shrake informed his colleagues that the head of the Partido de Concertación Nacional [the PCN] “has informed us that the president has agreed to move forward on mining and our permit. We have received the same news from President Saca who has appointed his cousin Herbert Saca as his point man. Fidel Chavez, our leading lobbyist and political strategist will meet with Herbert this week to discuss details for getting this done ASAP. I’ll wait until the permit is in hand to pop the champagne but I think it’s time to get it on ice.”

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<sup>230</sup> C-740.

<sup>231</sup> Mr Manuel Hinds, a former Minister of Finance of the Respondent, was engaged as an adviser to PRES (Shrake 3 WS, para. 43).

<sup>232</sup> C-307.

6.118 *November 2007*: On 20 November 2007, draft amendments to the Mining Law were presented to the Legislative Assembly by members of the PCN.<sup>233</sup> These proposed drafts included amendments modifying the existing scope of Article 37(2)(b) of the Mining Law. As there proposed, there was now to be a new Article 54(e). It read:

“Art 54. The concessionaire wishing to commence the Exploitation phase, as provided in the first paragraph of Article 38 of this Law, shall attach the following documentation to its application: ... (e) For Underground mining, the applicant shall provide a notarized copy of the deed showing title in its name, or of the legally granted authorization and in which it is clearly specified that the owner of the property or properties on which all of the necessary infrastructure for operation of the mine will be located also authorizes that the mineral processing plant and mining waste disposal be included thereon; ....”

As proposed, this wording was to limit the required ‘title’ to the surface area affected by the mine’s infrastructure (i.e. “on which”). Hence, PRES’ predicament under Article 37(2)(b) would be resolved.

6.119 As regards applications in progress (such as PRES’ application for a concession), there was to be a new Article 98 of the Mining Law. It read: “Without prejudice to the provisions of the preceding article, exploration license holders or those who have, during the term of an exploration license, applied to the Bureau of Mines and Hydrocarbons of the Ministry of Economy for a mineral Exploitation and Usage Concession, who have demonstrated as of the entry into force of this Law the existence of mining potential in the authorized area pursuant to the submission of a pre-feasibility study, shall continue with their application processing. Applications will be decided by the Minister of Economy via Ministerial Resolution, in accordance with the provisions of this Law. ... Upon satisfaction of the legal requirements, the Minister of Economy shall grant acknowledgment of the mining concession and the authorization to commence the exploitation phase, in the maximum term of sixty days.” Hence, again, PRES’ predicament under Article 37(2)(b) would be resolved as to any retrospective issue of timing.

6.120 The Claimant (with PRES) had contributed to these legislative proposals. Mr Shrake

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<sup>233</sup> C-743.

testified: “[t]his bill was prepared with input from my advisors, and with indirect input from Pac Rim.”<sup>234</sup> As pleaded in the Claimant’s Reply, “[a]lthough company officials did not participate directly in discussions with the PCN about the bill, the draft did contain input from several of the company’s consultants.”<sup>235</sup> At the hearing, the Claimant’s counsel acknowledged that PRES (with the Claimant) was participating in January 2008 in meetings at the Legislative Assembly on these proposals.<sup>236</sup> Ms Yolanda de Gavidia testified that the Ministry of Economy had not been involved in the preparation and promotion of this draft law (she was to leave office in June 2008).<sup>237</sup>

6.121 Mr Shrake testified that, from his company’s perspective, “... the mining law reform effort [in November 2007] had three main goals: (1) to provide ‘political cover’ to the Administration to publicly support mining, by creating a break with the past and implementing a new and more restrictive regime for the industry; (2) to ensure that Pac Rim would be subject to all the requirements of the new law (such as higher royalties and more stringent environmental standards), without prejudicing the legal rights that we had acquired under the old law, *i.e.*, the right to be granted the concession; and (3) to ensure that the mining industry would be regulated by better-funded and organized regulatory agencies, and that mining royalties would be channelled to institutions who would be required to use them for the public benefit. These were the concepts that I conveyed to my advisors, who, at least as far as I know, conveyed them to the congressmen they were working with to garner support for the reform bill.”<sup>238</sup> These were not, however, Mr Shrake’s only goals. It is clear from the wording of these legislative proposals that these goals included an amendment to Section 37(2)(b) of the Mining Law.

6.122 The legislative proposals were not enacted by the Legislative Assembly. As Mr Shrake testified: “After its presentation to the *Asamblea* on 22 November 2007, the reform bill was referred to the Committee of Agriculture and Environment for further consideration and a recommendation. On 11 December 2007, the Committee of Environment and Agriculture of the *Asamblea Legislativa* hosted a forum in San Salvador with the goal of discussing the

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<sup>234</sup> Shrake 3 WS, para. 47.

<sup>235</sup> Reply, para. 456.

<sup>236</sup> Tr. D7.1925-1926.

<sup>237</sup> Yolanda de Gavidia WS, para. 14; Tr. D3.648-649.

<sup>238</sup> Shrake 3WS, para. 47.

possible economic, social and environmental impacts of metallic mining in the country. Various presentations were given by anti-mining NGOs, representatives of Pac Rim, and mining law specialists from Perú and Chile. [...] Over the next two months, the mining law reform remained under consideration by the relevant congressional committee, and Pac Rim understood that it would be recommended for reconsideration by the full *Asamblea* at some point soon.”<sup>239</sup>

## **H. 2008**

6.123 *January 2008*: Mr Shrake visited El Salvador in January 2008. He testified: “... I again met with senior officials of the Government, including Mr Guillermo Gallegos ... Mr Gallegos was, at the time, the Majority Leader in Congress ... Mr Gallegos told me he was confident that MARN would issue the [environmental] permits, and, moreover, that the proposed amendments to the Mining Law (which included clarification of any outstanding issue concerning the surface property issue) would be approved in February of 2008.”<sup>240</sup>

6.124 *February 2008*: The proposed amendments were not enacted by the Legislative Assembly in February 2008.

6.125 *March 2008*: On 11 March 2008, President Saca was publicly reported, in the press, as having stated on 10 March 2008 that ‘in principle’, he was against the granting of permits for new mining exploitations and was asking the Legislative Assembly to review the issue in depth. There were at that time, so it was also reported, about 26 mining projects awaiting exploitation permits.<sup>241</sup> The next day, it was reported that President Saca had stated that he was only willing to work with the Legislative Assembly on the mining issue after it had been demonstrated to him, through studies from the Ministry of the Environment (MARN) and the Ministry of the Economy, that “gold can be exploited to boost the economy without damaging resources.”<sup>242</sup> These announcements came as an unpleasant shock to the Claimant and PRES. They had still expected that the Mining Law, including Article

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<sup>239</sup> Shrake 3WS, paras. 51 & 52 (footnotes omitted).

<sup>240</sup> Shrake 1 WS, para. 101.

<sup>241</sup> C-1.

<sup>242</sup> R-125.



37(2)(b), would be amended by the Legislative Assembly. (In this arbitration, as earlier indicated, the Claimant describes President Saca's reported statements of 11 March 2008 as a "*de facto* mining ban in El Salvador").

6.126 As Mr Shrake testified: "... these statements [by President Saca] were surprising and extremely disappointing to me. The majority party in Congress was the ARENA party, and President Saca was the president of that party. It was my understanding from my advisors that the ARENA party was largely in support of the PCN's proposal to pass a new mining law that would create a more responsible and regulated industry, with a greater share of revenues going to the Government, thereby facilitating the granting of Pac Rim's permits. I had also understood from my advisors up until the date of President Saca's statements that he would not oppose the mining law reform proposed by the PCN, which at that point we expected to be ratified in the short term."<sup>243</sup>

6.127 There never was to be any legislation by the Legislative Assembly amending Article 37(2)(b) of the Mining Law. The wording of Article 37(2)(b) thus remained exactly as it had been since 1995, before the Claimant became interested in mining in El Salvador. As a result of the Bureau's interpretation of Article 37(2)(b), as Ms Navas testified, PRES' application for a concession "did not comply with two other requirements the Mining Law establishes as necessary in order for the concession application to be admitted."<sup>244</sup> As Ms Yolanda de Gavidia also testified: PRES was not able to meet "the requirement in connection with the ownership of the land covered by the Concession."<sup>245</sup> Accordingly, the Claimant's Plan A had come to nothing, leaving its predicament unresolved as at 10 March 2008, just as it had been from 22 December 2004 onwards.

6.128 The date of 10 March 2008 is procedurally significant for the Claimant's case, as already recited above in Part 1 of this Award. It is the date before which the Claimant (with PRES and DOREX) foreswore any claim for damages against the Respondent in this arbitration.

## ***I. 2009***

6.129 *February 2009*: On 26 February 2009, President Saca was publicly reported, in the press,

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<sup>243</sup> Shrake 3 WS, para. 54; see also Shrake 1 WS, para. 116.

<sup>244</sup> Navas WS, para. 59.

<sup>245</sup> Tr. D3.672.

as stating the he would grant no mining concession to Pacific Rim; that he would rather face an arbitration and its consequences than permit the company's operations; and that "[a]ccording to my legal advisors, we have no obligation to grant the exploitation permit, even though they have the exploration permit [.]"<sup>246</sup>

6.130 *April 2009:* On 30 April 2009, the Claimant submitted its Notice of Arbitration in these arbitration proceedings, having previously served its Notice of Intent upon the Respondent on 9 December 2008.

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<sup>246</sup> C-4.

## PART VII: LIABILITY – EL DORADO – THE PARTIES’ SUBMISSIONS

### A. Introduction

- 7.1 In summary,<sup>247</sup> the Claimant contends that its primary claim regarding El Dorado arises under Salvadoran law, which (so it submits) provides protections under its Investment Law that were equal to or greater than the protections provided to a foreign investor under customary international law. The Claimant also claims the protections afforded under customary international law. To these ends, it invokes Article 42(1) of the ICSID Convention. It does not invoke Article 42(3) of the ICSID Convention (nor could it in this arbitration).
- 7.2 The Claimant first contends, as summarised in Part III above, that PRES complied with all the requirements of the Mining Law for the purpose of having the Respondent accept its application for an exploitation concession under the Mining Law for El Dorado, within the 12.75 sq. km area identified in PRES’ application for a concession submitted to the Bureau at the Ministry of Economy on 22 December 2004. Alternatively, if and when it did not so, the Claimant contends that the Respondent is estopped or precluded from contending otherwise in this arbitration under international law or, under Salvadoran law, under the doctrine of *actos propios*.
- 7.3 Under the Investment Law, in failing to grant the El Dorado exploitation concession, the Claimant submits that the Respondent violated: (i) the right to efficient legal procedures under Article 4; (ii) the right to appropriate treatment in accordance with law under Article 5; (iii) the prohibition of arbitrary and discriminatory measures under Article 6; (iv) the prohibition of expropriation without compensation under Article 8; and (v) the right to protection of property under Article 13 of the Investment Law.<sup>248</sup> (These Articles of the Investment Law are recited in Part II above). The Claimant also contends that the Tribunal has the right and duty to apply rules of customary international law to the Parties’ dispute.

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<sup>247</sup> This summary, here and below, is largely based on the Claimant’s oral submissions at the hearing and its Post hearing brief.

<sup>248</sup> CL-4.

7.4 In summary,<sup>249</sup> the Respondent contends that the Claimant has failed to show that PRES met the requirements of Article 37(2) of the Mining Law in several material respects, as regards (i) land ownership and authorisation; (ii) a complete exploitation plan; (iii) a feasibility study; and (iv) an environmental permit. Without meeting all those statutory requirements, so the Respondent contends, PRES had no legal right to obtain and the Respondent no legal obligation to grant the requested concession under the Mining Law (or otherwise) as a matter of Salvadoran law. The Respondent also contends that no form of estoppel or *actos propios* arises in favour of the Claimant in regard to Article 37(2) of the Mining Law. Hence, according to the Respondent, these are threshold matters necessary to establish the Claimant's claims without which all such claims must fail *in limine*.

7.5 In these circumstances, it is appropriate for the Tribunal to address the first principal issue listed in Part IV above in regard to the ownership and authorisation of surface land under Article 37(2)(b) of the Mining Law. As explained by the Tribunal later below, it is a threshold issue for the Claimant's claim as regards the Respondent's liability for damages in regard to the El Dorado Project (being also relevant to certain of its claims regarding Other Mining Areas). It is also appropriate for the Tribunal to treat separately the sub-issues arising from: (i) the Parties' different legal interpretations of Article 37(2)(b) of the Mining Law and (ii) the Parties' different cases on estoppel or *actos propios* (in the event that the Claimant's case should not prevail on the first sub-issue of interpretation).

#### ***B. The Interpretation of Article 37(2)(b) of the Mining Law***

7.6 The Parties agree that, for the interpretation of the Mining Law, the applicable law is the law of El Salvador.<sup>250</sup> (The Claimant also pleads the related question of estoppel as a matter of international law; but that is not relevant to this first sub-issue of statutory interpretation). Under Salvadoran law, the interpretation and application of the Mining Law may involve the Constitution,<sup>251</sup> the Environmental Law,<sup>252</sup> the Mining Regulations<sup>253</sup> and

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<sup>249</sup> This summary, here and below, is largely based on the Respondent's oral submissions at the hearing and its Post-hearing brief.

<sup>250</sup> Tr. Day 1.117:3; Tr. Day 5.1131–1133; Tr. Day 5.1144– 45

<sup>251</sup> CLA-1.

<sup>252</sup> CLA-2.

<sup>253</sup> CLA-6.

general principles of administrative law.<sup>254</sup>

- 7.7 The Mining Law was enacted on 14 December 1995; it came into force on 24 January 1996; it was amended on 11 July 2001; and it was not amended thereafter. Accordingly, at all material times, its legislative text was the law in effect prior to and during the Claimant's relevant activities (with PRES and DOREX) in El Salvador.
- 7.8 The Mining Law's objective (as stated in its preamble) was to regulate the exploration, exploitation, processing and commercialization of non-renewable natural resources in El Salvador.<sup>255</sup> Chapter VI of the Mining Law sets out the "Procedure for the Presentation of Applications and Annexed Documents" required from persons interested in obtaining licences and concessions from the Respondent. This principal issue concerns PRES' application for an exploitation concession on 22 December 2004 for El Dorado. It was already the holder of exploration licences at El Dorado.
- 7.9 Article 36 of Chapter VI of the Mining Law is drafted in mandatory language ("... will have to present to the Direction a written application with at least the following requirements [with list of such requirements (a) to (f)]". Article 37 addresses the "Annexed Documents", in similar mandatory language ("... will also have to be presented.") Three lists follow, the first in regard to an "Exploration Licence; the second in regard to a "Concession of Exploitation of Mines and Quarries"; and the third in regard to "Processing Plants."
- 7.10 This second list regarding an exploitation concession has been cited as Article 37(2) of the Mining Law. It comprises of sub-paragraphs (a) to (f). It is appropriate here to cite this list in full, as follows:

"37(2)

- a) A location map of the real [e]state in which the activities are to be realized, a cartographic sheet of the area, a topographic map and its respective technical description, extent of the solicited area in which the location, borders and names of the adjacent properties are convincingly established;*
- (b) The property title for the real estate or authorized permission, in legal form, from the landowner;*

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<sup>254</sup> Fernando ER 1, pp. 44-50.

<sup>255</sup> CLA-5.

- (c) *An Environmental Permit granted by the Ministry of the Environment and Natural Resources along with a copy of the Environmental Impact Study or Environmental Diagnostic;*
- (d) *A Feasibility Study done by a geologist or professional in the subject matter;*
- (e) *An exploitation program for the first five years, signed by a geologist or other competent professional in the matter;*
- (f) *Along with the rest of which will be established in the regulations.”*

7.11 For the present issue, it is Articles 37(2)(a) and 37(2)(b) which are relevant, particularly the latter.<sup>256</sup> In short, as a matter of statutory interpretation, does its requirement regarding the presentation of “title” or “authorized permission” (as attachments to an application for an exploitation concession) apply to the *whole* of the surface area on and under which the activities are to be realized by the applicant; or is it limited to only that *part* of its surface area affected by the applicant’s activities?

### ***C. The Claimant’s Submissions on Interpretation***

7.12 In summary,<sup>257</sup> the Claimant contends that PRES submitted authorisations from all the surface landowners for the surface area to be affected or likely to be affected during the period of the requested concession at El Dorado; that PRES did have rights over all surface areas that would be occupied or disturbed by its development of a mine for the Minita deposits; and that PRES had executed a lease agreement with an option to buy all the real estate that is or would be occupied by the mine infrastructure, including the tailings storage facility, the process plant and related infrastructure, the entrance to the underground mine ramp and the administrative headquarters and drill core storage areas.<sup>258</sup> The Claimant also contends that PRES acquired ownership of the real estate on which it would carry out its planned expansion and improvement of the main access road<sup>259</sup>; and also where it would

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<sup>256</sup> CLA-5. As noted in Part II above, the Respondent translates these provisions into English as follows: “(a) Plot plan of the property where the activities will be carried out, a cartographic map of the area, topographic plan and its respective technical description, extension of the requested area where its location, boundaries and name of bordering properties are irrefutably established; (b) The ownership deed of the property or the authorization legally granted by the owner; ...” [RL-7(bis)]. The Tribunal does not consider these minor linguistic differences in the English translations to be of any material significance to the present issue.

<sup>257</sup> Tr. D1.145ff; Ct PHB, pp 2ff.

<sup>258</sup> C-6; C-7A.

<sup>259</sup> C-6 at 8-18, 23-31, 33-37; C-7A at 14-22.

sink the ventilation shafts for the mine.<sup>260</sup>

- 7.13 The Claimant contends that PRES presented all required documents demonstrating its legal rights over these parcels of real estate with its concession application to the Respondent on 22 December 2004<sup>261</sup> and, again, on 8 November 2006.<sup>262</sup> Further, according to the Claimant, the Respondent itself acknowledged in its own internal correspondence from 2005 that PRES owned the area on which the surface facilities for the mine would be located by PRES.<sup>263</sup>
- 7.14 The Claimant contends that PRES (with the Claimant) did not expect its planned mining operations to cause any disturbances to real estate that would *not* be used or occupied by its surface works, including the access road and the ventilation shafts.<sup>264</sup> PRES' expectation was supported by its practical experience in the mining industry and by technical studies that were submitted together with PRES' concession application. The rock mechanics study carried out in 2004 in relation to the planned underground mine demonstrated that the mine would *not* be susceptible to subsidence, particularly given the bench-and-fill mining method chosen for the El Dorado Project.<sup>265</sup> Empirical evidence, according to the Claimant, confirms this conclusion: the Minita deposits had already been subject to underground mining; the area over this mine did not suffer any subsidence during these historical mining operations, and it had not done so during the intervening period.<sup>266</sup> As noted by Mr Ticay (of the Bureau), so the Claimant submits, subsidence in hard rock mines can generally only pose a risk when there are "very unfavorable" geological conditions *and* there is also mismanagement of the mining operations.<sup>267</sup> The Claimant contends that no such factors were present at El Dorado. Notably, Behre Dolbear's expert reports (adduced by the Respondent) mention the issue of subsidence as a general matter; but these do not indicate if or how it could have been

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<sup>260</sup> C-6 at 40-46.

<sup>261</sup> C-181, Sec. 3.0 and Annex 3.

<sup>262</sup> C-11.

<sup>263</sup> R-30; R-31.

<sup>264</sup> C-712: "The title and legal authorization documents ... cover only those areas of the project where surface disturbances related to the project will occur." (emphasis added by the Claimant); and C-713: implying that "surface impact" was the test that had been employed by the Claimant in preparing to apply for the concession.

<sup>265</sup> C-18 at 2-1, 5-1-5-2; Tr. D6.1480-1481; Rigby, para. 104.

<sup>266</sup> C-18 at 3-1 to 6-1.

<sup>267</sup> Tr. D4.865-866.

a risk for the El Dorado Project.<sup>268</sup>

- 7.15 Moreover, so the Claimant submits, PRES' environmental impact study (EIS) contained a comprehensive assessment of all the other impacts that the planned mining operations could be predicted to have on the surrounding environment, including water sources, vibrations, noise and light pollution etc.<sup>269</sup> MARN never rejected the EIS; and, in fact, the EIS received a favourable opinion from MARN's technical staff.<sup>270</sup> The Respondent declined to cross-examine at the hearing Mr Mathew Fuller or Ms Ericka Colindres as oral witnesses (being respectively the EIS's author and the MARN technical officer in charge of reviewing the EIS). Even the experts engaged by the Respondent to assess the EIS for the purposes of this arbitration have never challenged the study's principal conclusion that all the impacts of the Project could in fact be satisfactorily avoided, controlled or mitigated.<sup>271</sup>
- 7.16 The Claimant acknowledges that the Final Pre-Feasibility Study of 21 January 2005 (or "PFS") was not submitted to support a concession covering only the Minita and Minita 3 deposits.<sup>272</sup> (This PFS covered a much larger area). Accordingly, so the Claimant submits, the PFS and its supporting technical studies expressly took into account the expansion of the project within the requested concession area. Thus, while the PFS only classified economically minable "reserves" for Minita and Minita 3, other deposits within the study area were analysed in the PFS and supporting studies.
- 7.17 With regard to the exploitation of deposits other than Minita and Minita 3, the Claimant submits that account must be taken of the highly prospective nature of the requested concession area and the stipulated thirty-year term of the concession.<sup>273</sup> A significant expansion of underground mining operations within the concession area may well have been feasible during this long period. Indeed, the Respondent acknowledged that 12.75 sq. km. was an appropriate size for the Claimant's concession in 2005, with full

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<sup>268</sup> BD1, para. 50.

<sup>269</sup> Cl. Cl. Pres., "Tribunal Questions," Slides 13-14, concluding that all such impacts could be satisfactorily avoided, controlled or mitigated; C-8A at 1-19-1-25, 1-30-1-31; Fuller, paras. 72-107; Colindres 2 WS, paras. 13-43; M&H1 at 19-23; and M&H2 at 10-22, 26-30.

<sup>270</sup> Colindres 1 WS, paras. 102-04; Rep., para. 254.

<sup>271</sup> BD1, BD2.

<sup>272</sup> Ct PHB, para. 11; Tr. D7.1901-1903; Cl. Cl. Pres "Tribunal Questions", Slides 4-8.

<sup>273</sup> Cl. Op. Pres. "Rights at Issue," Slide 53; C-653; Tr. D2.410 & 413-416.



knowledge that the Claimant planned to expand its mining operations to cover numerous deposits within that area. The full extent and nature of the possible expansion could not therefore be accurately predicted by the Claimant or the Respondent as at 22 December 2004.

- 7.18 Further, the Claimant emphasises that it is “very unlikely” that the mid-term expansion of mining operations contemplated by the Claimant (with PRES) as at March 2008, incorporating the South Minita, Bálsamo and Cerro Alto deposits, would have increased the area of surface impact. According to the Claimant, these are all deep underground deposits, characterised by the same geological conditions as those of the Minita deposits, which the Claimant could reasonably have expected to access through underground tunnels leading off the main ramp for the Minita mine.<sup>274</sup> Moreover, the Tailings Storage Facility (“TSF”), by far the main source of surface impact, was designed with a capacity to accommodate increased production from additional deposits.<sup>275</sup>
- 7.19 In conclusion, as regards the El Dorado Project, the Claimant contends that it met (with PRES) the requirements of Article 37(2)(b) of the Mining Law, both as a matter of legal interpretation (as supported by its expert legal witnesses) and also as a practical matter. (The Tribunal returns to the testimony of the Claimant’s legal expert witnesses in Part VIII below).

#### ***D. The Respondent’s Submissions on Interpretation***

- 7.20 In summary,<sup>276</sup> the Respondent contends that the legal requirement of Article 37(2)(b) of the Mining Law applies to all surface property to be covered by the requested exploitation concession; that there is no limiting language in this legislative provision; it is not therefore limited to surface properties which the applicant’s concession is to affect directly; and the requirement applies to both metallic and non-metallic concessions and also to both mines and quarries. The Respondent also denies that the requirement under Article 37(2)(b) is unconstitutional under the Respondent’s Constitution, general principles of administrative law or other Salvadoran laws.

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<sup>274</sup> Tr. D2.390-391, 523, D6.1552-1553, 1564-1565; Gehlen WS, paras. 127-128,142-154; Shrake 3 WS, paras.16-23.

<sup>275</sup> Gehlen WS, paras.127-128; C-590; C-611; Tr. D2.523; C-590; C-611.

<sup>276</sup> Resp Counter-Memorial, paras. 79ff; and Resp Rejoinder, paras. 98ff.

- 7.21 According to the Respondent, the Claimant's case on the interpretation of Article 37(2)(b) is wrong for three main reasons. First, the Claimant's interpretation is not supported by the text of Article 37 of the Mining Law, read as a whole. Two provisions in Article 37(2) of the Mining Law use the Spanish term "inmueble." Article 37(2)(a) requires an applicant to provide detailed information, such as a location map, a technical description, coordinates and boundaries, for the "inmueble en el cual se realizarán las actividades" or "property where the activities will be carried out." Article 37(2)(b) requires that the applicant must prove ownership or authorization for the "inmueble" or "property." Unlike Article 37(2)(a), this provision does not contain the qualifying phrase: "where the activities will be carried out" after the term "inmueble."
- 7.22 According to the Respondent, the Claimant badly misinterprets Article 37(2)(b). It seeks wrongly to import the qualifying phrase from Article 37(2)(a) into Article 37(2)(b) even though the latter has no language qualifying the general word "property." The Claimant also seeks wrongly to force a meaning upon the phrase: "where the activities will be carried out", being the language of Article 37(2)(a) that is not in the text of Article 37(2)(b). Even if the text of 37(2)(a) were applicable to the latter's ownership or authorization requirement (which it is not), there would be no basis for limiting the reference to "activities" to "surface activities." The Claimant's interpretation ignores the fact that activities can occur both on the surface and underground.
- 7.23 Second, at the time PRES submitted its application to the Bureau on 22 December 2004, the Claimant (with PRES) understood the phrase "where the activities will be carried out" to refer to the entire area of the requested concession. In compliance with Article 37(2)(a) of the Mining Law, PRES submitted the coordinates and maps covering the entire area of the requested concession with its application, not just those parts where surface activities would take place. According to the Respondent, PRES' application with its description of the "property where the activities will be carried out" thus leaves no doubt that, for the purposes of that application, the "inmueble" or "property" under Article 37(2)(a) and by necessary implication also Article 37(2)(b) was the entire area requested for the concession. The Claimant's own contemporaneous actions in submitting detailed mapping, coordinates and other information for the entire concession area in response to the requirement of

Article 37(2)(a) demonstrate that the phrase “where the activities will be carried out” described the entire concession area of 12.75 sq. km requested by PRES and not just as small part of it.

7.24 Third, the Claimant’s submission, that the explicit requirement to own or have authorizations for the surface area of the entire concession requested should be ignored for underground mines, forces a distinction that is not found in the Mining Law. The drafters of the Mining Law could have distinguished underground mines from open-pit mines, but reasonably chose not to do so. Indeed, the drafters specifically defined “Mine” as: “The physical place, whether at the surface or underground, where the extraction of mineral substances is carried out” (Article 2 of the Mining Regulations). The drafters purposefully required ownership or authorization from all landowners in the entire concession area for either type of mine. Further, according to the Respondent, it is worth noting that, given the Claimant’s “preliminary” plans and its desire to expand its operations after obtaining the concession, it was even impossible for the Claimant (with PRES) to have known on 22 December 2004 what surface property would be affected, physically, by its eventual surface works.

7.25 In conclusion, the Respondent submits that the Claimant’s case on Article 37(2)(b) of the Mining Law fails on the issue of interpretation, supported both by the contemporary materials and the evidence of its legal expert witnesses on Salvadoran law. (The Tribunal returns to the testimony of the Respondent’s legal expert witnesses in Part VIII below).

#### ***E. The Claimant’s Submissions on Estoppel***

7.26 In summary,<sup>277</sup> the Claimant contends that the Respondent’s conduct amounted to clear and unequivocal representations by the Respondent that Article 37(2)(b) of the Mining Law did not provide a legitimate or sufficient basis to deny PRES its requested concession for the El Dorado Project. The Claimant contends that, both as a matter of international law and Salvadoran law, the Respondent is estopped or precluded under the doctrine of *actos propios* from contending otherwise in this arbitration.

7.27 The Claimant contends that the Respondent’s approval of PRES’ concession application

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<sup>277</sup> Ct PHB, pp 18ff.

was, after November 2005, at all times subject only to further actions to be taken by Respondent itself; that the Claimant maintained a legitimate interest in the concession at all times up to 10 March 2008; and that there was no legitimate basis to deny the concession to PRES. The Claimant contends that it relied upon these representations by continuing to invest in the El Dorado Project, thereby generating substantial benefits for the Respondent; and by not pursuing further actions in relation to the legal requirements for the granting of the concession (other than the requirement to present the environmental permit). By going against these representations, so the Claimant submits, the Respondent has unfairly betrayed the Claimant's legitimate trust in the Respondent.

7.28 As to facts alleged to support the Claimant's case on Article 37(2)(b) of the Mining law, the Claimants asserts the following, here necessarily abbreviated given that the disputed factual events have been addressed already by the Tribunal in Part VI above.

7.29 According to the Claimant, it understood from the time of its investment in 2002 that it would only need to acquire real estate where "surface works were required."<sup>278</sup> This understanding was in keeping with ordinary and prudent mining practice, and also with Pac Rim's reasonable understanding of what could be required under the Mining Law.<sup>279</sup> On 22 December 2004, the Claimant duly presented documents with PRES' concession application to the Respondent, demonstrating PRES' ownership or authorizations over all surface real estate that would be used or occupied by its near-term to mid-term mining operations, being a period which was co-terminous with that which could reasonably be expected to be disturbed by its proposed mining operations at El Dorado.<sup>280</sup>

7.30 Following the submission of PRES' application, the Respondent informed the Claimant in March 2005 that it interpreted the law to imply that the Claimant must obtain authorization from every surface owner within the limits of the proposed concession area. The Claimant disagreed with the Respondent's interpretation.<sup>281</sup> The Respondent took the Claimant's

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<sup>278</sup> C-349.

<sup>279</sup> Williams ER 1 at 15, 32-35; Williams ER 2 at 2-21; Rigby, paras. 102-03; Memorial paras. 561-76; Reply, paras. 377-404; Gehlen WS, paras. 123-28

<sup>280</sup> C-181; C-6; C-713.

<sup>281</sup> see, e.g., C-286; C-290; R-30 (attachment).

observations seriously: “Given the importance of the matter, the Minister [of Economy] agreed to ask for an interpretation of the law from the Office of the Secretary of Legislative and Judicial Matters in the Office of the President.”<sup>282</sup> Indeed, notwithstanding the confusion over the requirement meant by Article 37(2)(b) of the Mining Law, the Claimant “expect[ed] that this issue can be resolved”;<sup>283</sup> and the Parties cooperated in seeking a resolution to that issue over the following months.

7.31 From the factual record, so the Claimant submits, the Respondent clearly had doubts concerning the practical implementation of its own interpretation of Article 37(2)(b) of the Mining Law. The Respondent undertook to “reach a consensus” with the Claimant regarding “what actions should be taken”; and the Respondent determined that its own preferred course of action (with which the Claimant agreed) was to seek a legislative amendment to the existing Mining Law. Following the Respondent’s communication of the proposed amendment to the Claimant in late October 2005<sup>284</sup> and the Claimant’s positive response<sup>285</sup>, the requirement of Article 37(2)(b) was never again mentioned in correspondence between the Parties, until late 2006.

7.32 In the meantime, in early November 2005, the Respondent represented to the Claimant that the Claimant (with PRES) was not required to take any further actions in relation to Article 37(2) of the Mining Law, including but not limited to Article 37(2)(b), since the Parties’ preferred course of action was to be implemented by the Respondent. In reliance upon this representation, the Claimant did not take any further action in relation to the requirement of Article 37(2)(b) over the coming months. The Claimant continued reasonably to rely upon the Respondent’s representation.

7.33 In February 2006, the Minister of Economy (Ms de Gavidia) informed the Claimant that it was “the [P]resident’s instructions to present [the mining law reform] after March 12 [2006] for reasons of election strategy.”<sup>286</sup> Then, in June 2006, the Respondent publicly announced a planned reform to the Mining Law, which would also include provisions

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<sup>282</sup> C-290; C-713.

<sup>283</sup> C-712.

<sup>284</sup> R-35.

<sup>285</sup> C-400; C-294.

<sup>286</sup> C-295.

increasing royalties and strengthening environmental protections.<sup>287</sup> The Claimant supported this initiative in good faith. The Ministry of Economy continued actively to pursue it until at least the latter part of 2007.<sup>288</sup> Throughout this time, however, it also became increasingly clear that the outcome of the legislative reform process depended upon the approval of President Saca.<sup>289</sup>

7.34 Finally, by early 2008, the Claimant understood that President Saca's support to move forward on mining reform (including the proposed legislative reform) had been secured; the amendment bill had been presented to the Legislative Assembly; and the Claimant was participating in sessions of its committee where the bill was under consideration by legislators.<sup>290</sup> Then, on 10 March 2008, President Saca announced (contrary to what had been previously communicated to the Claimant) that he would not work with the legislature to reform the Mining Law until further studies were produced by the relevant ministries; and, ultimately, the proposed amendment to Article 37(2)(b) did not take place for reasons unconnected with the Claimant.<sup>291</sup>

7.35 Why did the Claimant, between March 2005 and March 2008, not obtain additional surface authorizations regarding Article 37(2)(b) when the legislative reform was delayed? The Claimant's answer is that the Respondent had represented to the Claimant that no further action was necessary on the Claimant's part in relation to any such authorizations; and the Respondent's representation that legislative reform was its preferred course was continually re-affirmed by the Respondent to the Claimant until the *de facto* mining ban on 10 March 2008. The Claimant contends that it was at all times reasonable for the Claimant to rely upon the Respondent's representation that the Claimant was not required to take further action in relation to Article 37(2)(b) of the Mining Law.

7.36 The Claimant refutes the Respondent's case that it was unreasonable for the Claimant to act in reliance upon any promise of legislative reform made by the Respondent's executive

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<sup>287</sup> C-301; C-409; C-410; C-395; C-206 Mem., paras. 306-14; Rep. para. 450.

<sup>288</sup> See, e.g., Tr. D2.367-368; 438-439; 445; D3.657:658; C-15; C-435; C-296; C-754; C-743; C-307; C-564; C-719; C-720; C-722; C-509; C-723; C-172; Memorial, paras. 313-14, 383-85; Reply, paras. 450-57; Shrake 3 WS, paras. 31-53; Shrake 1 WS, para. 87; Shrake 2 WS, paras. 111-33; also C-749; C-750.

<sup>289</sup> See, e.g., C-305; C-307; C-728; C-564; C-740; Rep., para. 291.

<sup>290</sup> C-808; C-752; Shrake 3 WS, para. 51; Colindres 2 WS, para. 79; Tr. Juris. 425:16-22, 427:10-428:5.

<sup>291</sup> C-1; R-125; Tr. D2.447-448; Juris Tr. 427-431; Shrake 3 WS, para. 53; Ct. PHB, footnote 26.

branch.<sup>292</sup> The Claimant does not rely upon the promise of legislative reform by the executive branch as the basis for its estoppel. Rather, the Claimant submits that the Respondent is estopped from arguing that the Claimant had not done everything that was required or expected of it in relation to the issue over surface rights under Article 37(2)(b). According to the Claimant, this estoppel arises not from a promise of legislative reform by the Legislative Assembly, but rather from a representation that such reform was the Respondent's preferred course of action, thus requiring no further action from the Claimant. According to the Claimant, there was nothing illegal (or even out of the ordinary) about such representation by the Respondent.

7.37 The Claimant's further case on estoppel is that the Respondent's conduct amounted to a representation that Article 37(2)(b) of the Mining Law did not provide any legitimate or sufficient basis for the Respondent to deny the concession to the Claimant. To that end, the Claimant invokes the following matters.

7.38 As of November 2005, according to the Claimant, it understood that legislative reform was the Respondent's preferred course of action in relation to surface rights under Article 37(2)(b); it reasonably expected this reform to be made by the legislature; but, if the reform had not come to fruition, the Claimant would not have been deprived of its ability to obtain the concession. The Respondent represented to the Claimant at all times after November 2005 that the surface rights issue was not the critical path for the concession. Following that date, according to the Claimant, the evidential record demonstrates that the Parties continued to communicate frequently and at all levels about two other significant matters: the approval of the pending environmental permit and the importance of concluding legislative reforms to increase environmental protections and achieve the administration's other goals. The issue over the surface rights issue under Article 37(2)(b) was never again mentioned between them.

7.39 Throughout this same time period, according to the Claimant, the Respondent continued to engage in conduct that gave all appearances of a continuing legal relationship with the Claimant under the Mining Law in relation to the area of the concession application. These

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<sup>292</sup> Tr. D7.1997-1998.

included (*inter alia*): the formal presentation and acceptance of annual reports that were submitted to the Bureau, “in order to 100% justify [the Claimant’s] presence in the El Dorado Mining Area”;<sup>293</sup> field inspections by the Bureau to “verify” the Claimant’s continued activities in the area;<sup>294</sup> other correspondence between the Claimant and the Bureau concerning the Claimant’s activities at El Dorado and how they would be carried out in the future<sup>295</sup>; and visits to the Project site by members of the Salvadoran legislature.<sup>296</sup> The Claimant submits that these activities alone amounted to a clear and unequivocal representation by the Respondent that, at the very least, the Claimant (with PRES) maintained legal rights in the El Dorado Project and had a legitimate interest in the granting of the concession by the Respondent. The Claimant refutes the Respondent’s contention that all this was illegal under the Mining Law.<sup>297</sup>

7.40 In these circumstances, according to the Claimant, the Respondent’s resounding silence with regard to the issue of surface rights under Article 37(2)(b) amounted to a clear representation by the Respondent that the issue did not provide a legitimate or sufficient basis to impede the Claimant’s development of the El Dorado Project as a concession.

7.41 Moreover, so the Claimant submits, it was reasonable for the Claimant to rely upon this representation because there were various other legitimate pathways by which the issue of surface rights could ultimately have been resolved, such that the Claimant’s development of the El Dorado Project could move forward. Most easily, the Respondent could have advised the Claimant to take further specific actions to conform its application to the Bureau’s initial interpretation of Article 37(2)(b) of the Mining Law. The Claimant contends, it would have taken such actions had it been advised to do so. There were also other pathways.

7.42 First, in May 2006, just weeks before the legislative reform initiative commenced in earnest within the Legislative Assembly, the Claimant was willing and able to pursue a plan whereby the Claimant would obtain “authorization” from additional surface landowners.<sup>298</sup>

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<sup>293</sup> C- 680, Introduction; C-351, Introduction; R-100, Introduction; cf. R-102, Introduction.

<sup>294</sup> C-684; C-683; C-682.

<sup>295</sup> C-685; C- 686; C-687; C-688; Gehlen WS paras. 157-60.

<sup>296</sup> C-509; Garcia WS, para. 60.

<sup>297</sup> Tr. D7.1959-1961.

<sup>298</sup> C-711.



However, the Claimant did not know what such “authorization” could entail until it received further guidance from the Respondent (which were not forthcoming).<sup>299</sup>

7.43 Second, the Claimant was prepared to reduce the size of the requested concession to the surface area where it could obtain legal rights, had that ultimately been the path it was required or advised to take by the Respondent.<sup>300</sup> Indeed, the Claimant already owned all the real estate overlying the Bálamo and Cerro Alto deposits.<sup>301</sup> The Claimant could and would have purchased or leased the real estate overlying the Minita deposits.<sup>302</sup> Moreover, the real estate overlying the South Minita deposit was almost entirely owned by the same large landowner from whom the Claimant had already leased the real estate for the planned TSF and processing plant, and with whom the Claimant continued to maintain excellent relations.<sup>303</sup> Thus, while it was obviously not the Claimant’s preference substantially to reduce the size of the requested concession, there is no reason to think that development of the project could not have gone forward if the concession had been reduced to lesser surface areas than the Claimant was willing and able to lease or purchase outright.

7.44 Third, so the Claimant submits, the Respondent might have applied the requirement differently from the manner in which the Bureau had initially interpreted the requirement of Article 37(2)(b) of the Mining Law. There is no reason why the Respondent could not have legitimately done so. Substantial legal expert testimony has been adduced in relation to this requirement in this arbitration. The meaning of Article 37(2)(b) is not clear and unambiguous. The Claimant’s legal expert witnesses have advanced reasonable alternative interpretations of Article 37(2)(b), which are in harmony under Salvadoran law with the constitutional principle of proportionality, systematic interpretation and the stated purpose of the Mining Law.<sup>304</sup> Not only could the Bureau have legitimately changed its initial interpretation of Article 37(2)(b), the Claimants submits that it should have done so.

7.45 Lastly, the Claimant contends that the Respondent confirmed to the Claimant that it had no

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<sup>299</sup> C-291; Tr. D2.331, 509-510; Shrake 2 WS, para. 111; Gehlen WS, paras. 190-94; Jur Tr. 439-443.

<sup>300</sup> Shrake 1 WS, para. 86; Juris Tr. 438-440; Tr. D2.366 & 369.

<sup>301</sup> C-32 at 2; (According to the Claimant, this shows the Bálamo deposit underlying the TSF, the entire surface area of which is undisputedly owned by the Claimant; and the Cerro Alto deposit is immediately parallel to Bálamo and also underlying the TSF).

<sup>302</sup> Gehlen WS, paras. 188-93; Tr. D2.369-370; C-6; C-11; C-609; C-648; C-649; C-660; C-661.

<sup>303</sup> Tr. D2.369-370.

<sup>304</sup> See, e.g., Williams ER 1 at 32-35; Williams 2 at 2-21; Fermandois 2 at 57-65.

basis to deny its concession application on 18 December 2006; namely, that the surface rights issue was not considered to be a sufficient or legitimate basis not to approve the Claimant's application.<sup>305</sup>

7.46 In conclusion, the Claimant submits that, even if its case on Article 37(2)(b) of the Mining Law does not succeed on the first sub-issue of legal interpretation, the Claimant should nonetheless prevail on the second sub-issue of estoppel or *actos propios* under international law or, alternatively, Salvadoran law.

***F. The Respondent's Submissions on Estoppel***

7.47 In summary, the Respondent contends that, under Salvadoran law as the applicable law, a specific legal act is required to invoke the doctrine of *actos propios* (as with estoppel). That act must be clear and unequivocal; there can no doubt as to the actor's intent; and the act must accord with the existing law.<sup>306</sup> An officer of the Government would thus have no power to offer something to the Claimant (or PRES) that was not allowed by the law.

7.48 The Respondent also contends that, on the evidence, the Claimant has failed to identify and prove any such act. In particular, so the Respondent submits, the Ministry of Economy's efforts to accommodate the Claimant cannot support any estoppel: these were not unequivocal acts and, in any event, the Ministry's officers could not excuse the Claimant from complying with the existing requirements of the Mining Law.

7.49 To the contrary, according to the Respondent, the Respondent's executive branch consistently interpreted Article 37(2)(b) as applying to the entire surface area of the exploitation concession requested by the Claimant. The Claimant's contrary case, so the Respondent submits, ignores the many documents showing what its officers and officials actually believed at the time; the Minister of Economy's explanation that she considered amending the law solely to help the Claimant; and the fact that the proposed legislative amendment was never enacted by the Legislative Assembly, leaving unchanged the existing Mining Law.

7.50 The Respondent also contends that there was never any doubt that the Mining Law required

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<sup>305</sup> R-4, C-11, R-6; Reply, paras. 347-54/

<sup>306</sup> RPHB, paras. 56-58.

ownership or authorization for the entire surface area of the requested concession. The issue that the Ministry of Economy considered was whether that legal requirement could be amended by the Legislative Assembly, as the Claimant advocated, for underground mines. As the Claimant well understood at the time, this change would be for the Claimant's benefit and not for the Respondent. The Respondent submits that the Claimant's case on the Ministry's motivation finds no support and is, in fact, flatly contradicted by the evidential record. It is also unsustainable given the Claimant's failure to present in this arbitration any testimony from Mr Earnest, the Claimant's representative responsible for dealing with all communications with the Bureau regarding the relevant legal requirements from 2004 until late 2006.

- 7.51 The Respondent further contends that the Claimant cannot sustain its assertion that, as of October 2005, the Claimant had reached an agreement with the Ministry of Economy that the requirement of Article 37(2)(b) would not be used as a basis to prevent the conversion of PRES' exploration licenses into an exploitation concession. The Claimant's own PowerPoint presentation of May 2006 belies this assertion, stating that the Claimant's concession application needed a "change of mining law (Plan A) or 'authorization' of surface landowners (Plan B)."<sup>307</sup> The Power Point presentation confirms that, in mid-2006, the Claimant still knew that it had either to procure a change in the existing law or to obtain the required authorizations or ownerships. There was no agreement with or "act" by the Respondent otherwise.
- 7.52 The Claimant is also wrong, so the Respondent submits, to contend that in June 2006 onwards (to 2007) the position changed, with conversations between the Claimant and the Ministry of Economy regarding reforms to the Mining Law. The Respondent asserts, to the contrary, that: (i) the Respondent's executive branch had indeed considered amending the law in 2005, but that effort went nowhere. Later efforts to change the law in 2007 were driven by the Claimant; (ii) the Claimant assigns undue importance to its own internal emails and conversations, as indicating what it was that the Respondent's executive branch was communicating to the Claimant and what the Claimant understood; and (iii) the Claimant thereby ignores the many direct communications from the Respondent's

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<sup>307</sup> C-711.

executive branch in 2005 and 2006 informing the Claimant that it had to comply with the requirements of the Mining Law. The Claimant's internal communications cannot therefore form the basis of any unequivocal representations from the Respondent, as alleged by the Claimant.

7.53 For example, according to the internal weekly activity summary for June 2006 cited by the Claimant, mining law reform was shown as "taking off." The Claimant had a meeting with (*inter alios*) the Vice President and the Minister of Economy. At that meeting, Mr Shrake (for the Claimant) proposed that the Mining Law needed to be improved. The Claimant's own contemporary documents show that the Claimant knew that it had to devote more efforts from June 2006 onwards in order to convince the Respondent to change the law. There is nothing in these internal documents, so the Respondent concludes, that even suggests and much less amounts to an unequivocal statement by the Respondent that the Claimant's application could be admitted by the Respondent's executive branch without complying with the Mining Law.

7.54 The true position was in fact the opposite. According to the Respondent, it was expressed in the direct official communication from the Bureau to PRES of 2 October 2006.<sup>308</sup> It was the first warning letter notifying PRES that it had 30 days to provide documents missing from its concession application, in accordance with Articles 36, 37 and 38 of the Mining Law. According to Article 38, if an incomplete application is submitted, the applicant will be notified and given 30 days "to correct the omissions;" otherwise, "the application shall be rejected and ordered archived."<sup>309</sup> The Respondent contends that there is no way to understand this warning letter as anything other than as identifying defects in PRES' application of 22 December 2004. In fact, so the Respondent continues, by memorandum of 18 June 2005,<sup>310</sup> Mr Fred Earnest had told Mr Tom Shrake exactly what such a notification would mean: it meant 30 days to provide the missing documentation or else the application would be rejected by the Respondent. Despite the obvious importance of this notification from the Ministry, Mr Shrake sought to deny in his testimony having ever

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<sup>308</sup> R-4.

<sup>309</sup> RL-7bis.

<sup>310</sup> C-291.

seen its content before this arbitration.<sup>311</sup>

- 7.55 In conclusion, on this second sub-issue of estoppel or *actos propios*, the Respondent rejects the Claimant's case on the factual evidence: (i) the Respondent denies that the Claimant relied upon any unequivocal statements by the Respondent; the Claimant's evidence is based, at most, upon on its own internal communications falling far short of the requirements of Salvadoran law; and (ii) the Respondent asserts further that all the Claimant's factual allegations ignore the official communication to the Claimant explicitly notifying the Claimant of omissions in its application and starting the 30-day deadline for PRES to provide the missing documentation. Either way, so the Respondent submits, the Claimant has failed to prove its factual case. As for the Claimant's submissions based on estoppel under international law, the Respondent denies the application of international law; but also that, if it did apply, the Claimant's case would likewise fail for want of factual evidence.
- 7.56 For these reasons, the Respondent submits that the Claimant's case on Article 37(2)(b) of the Mining Law fails both on the first sub-issue of legal interpretation and on the second sub-issue of estoppel and *actos propios*.

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<sup>311</sup> Tr D2.353, 354 & 357.

## **PART VIII: LIABILITY – EL DORADO – THE TRIBUNAL’S ANALYSES**

### ***A. Introduction***

- 8.1. It is appropriate to consider separately (i) the first sub-issue of the legal interpretation of Article 37(2)(b) of the Mining Law under Salvadoran law; and (ii) the second sub-issue of estoppel or *actos propios* under Salvadoran law and international law.

### ***B. The Issue of the Interpretation of Article 37(2)(b)***

- 8.2. As to legal interpretation, the Tribunal’s starting point rests on the two-stage process applicable to the Claimant’s mining project at El Dorado, first as “exploration” in the form of the exploration licences and second as “exploitation” in the form of an exploitation concession, under the Mining Law.
- 8.3. The Parties’ dispute concerns only this second stage, namely PRES’s application for an exploitation concession under the Mining Law, having already qualified as an exploration licensee under the first stage. Under Article 9 of the Mining Law, a foreign person (being legally authorised to carry out commercial activities in El Salvador), who has proved its technical and financial capacity to develop mining projects, is qualified to acquire mining rights, subject to the Mining Law.<sup>312</sup> There was at the time no issue as to PRES’ status, ultimately owned and controlled by the Claimant, to make an application for a concession under the Mining Law (not until after this arbitration had commenced). Further, as the existing exploration licensee at El Dorado, PRES had an exclusive right under the Mining Law to apply for an exploitation concession within the area of its exploration licences at El Dorado.
- 8.4. The basic legal texts applicable to PRES’ application for a concession are relatively uncontroversial (as are the linguistic differences between the Parties’ English translations). Article 13 of the Mining Law provides: “Licenses for mine exploration and mineral processing plant operations shall be issued by the Bureau by means of resolutions; exploitation concessions for mines and quarries shall be granted by means of Ministerial Resolution, followed by the signing of a contract in the form provided in this Law and its

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<sup>312</sup> RL-7(bis).

Regulations.” Article 23 of the Mining Law provides (*inter alia*): “Once the exploration is concluded and the existence of economic mining potential on the authorized area is proved, the granting of the Concession for the exploitation and utilization of minerals shall be requested; which Concession will be verified through an Accord with the Ministry [of Economy], followed by the granting of a Contract between the Ministry and the Holder, for a thirty (30) year term, which may be extended if the interested party requests it, if in the judgment of the Department [of Mines: i.e. the Bureau] and the Ministry, the requisites established by this Law are fulfilled.” Article 24 of the Mining Law requires the mining concession to be granted by the Ministry of Economy to be “located inside the area indicated in the Exploration License; and its surface area shall be granted based on the magnitude of the deposit or deposits, and the technical justifications given by the Concession Holder.”<sup>313</sup>

8.5. Under Article 37(2) of the Mining Law, already fully cited above in Parts II and VII, the application for an exploitation concession to be granted by the Ministry of Economy must be accompanied by (*inter alia*) the following documentation:

“(a) Plot plan of the property where the activities will be carried out, a cartographic map of the area, topographic plan and its respective technical description, extension of the requested area where its location, boundaries and name of bordering properties are irrefutably established;

(b) The ownership deed of the property or the authorization legally granted by the owner; ...[or, as differently translated into English, the property title for the real estate or authorized permission, in legal form, from the landowner];”<sup>314</sup>

8.6. This statutory language imposes a mandatory obligation on the applicant under the Mining Law to produce the documentation as to ownership or authorization regarding the property (i.e. “*shall* ... be submitted”). It is thus a legal pre-condition to the admissibility of the application submitted by an applicant to the Bureau for an exploitation concession under the Mining Law.

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<sup>313</sup> RL-7(bis).

<sup>314</sup> In the original text, this provision reads: “Escritura de propiedad del inmueble o autorización otorgada en legal forma por el propietario; ...”

- 8.7. The Bureau is not the sole judge of the admissibility of an application. As already indicated, Article 7 of the Mining Regulations, entitled “Jurisdiction”, provides: “The Mining License or Concession Holders, whether national or foreign, are subject to the Laws, Courts, Judges and Authorities of the Republic; consequently, any conflict arising with interested parties or third parties, in relation to or because of the mining rights, which are unable to be resolved by mutual agreement, shall be decided in the corresponding Courts, the judgment of which shall be binding upon them. If the conflict is between the Holder and the State, stemming from the application, interpretation, performance or termination of a mining concession contract unable to be resolved by mutual agreement in accordance with the Law, it must be submitted to the competent courts of San Salvador.”<sup>315</sup> Article 7 of the Mining Law, in similar terms, subjects holders of mining licences and concessions to the jurisdiction of the Courts of San Salvador. Thus, PRES, as a holder of exploration licences and applicant for an exploitation licence, had a legal remedy to address any perceived wrong by the Bureau over its application for an exploitation concession before the Salvadoran Courts in the event that the Bureau (or the Ministry of Economy) misconstrued or improperly exercised their powers under Article 37(2)(b) of the Mining Law. (This legal remedy stands legally apart from the Claimant’s own remedy under Article 15(a) of the Investment Law giving rise to this arbitration, as separately considered in Part V above).
- 8.8. At the Claimant’s direction, PRES applied for an exploitation concession under the Mining Law on 22 December 2004.<sup>316</sup> As to the “requisites”, or statutory requirements for an exploitation concession under Article 23 of the Mining Law, it is the Claimant’s case that, as a result of the Respondent’s wrongful acts or omissions to act, PRES was not granted the exploitation concession to which it was legally entitled and which it legitimately expected to receive under the Mining Law: the Claimant contends that “PRES has met all of the requirements to receive the concession” [apart from the environmental permit].<sup>317</sup>
- 8.9. As to that environmental permit, the Claimant alleges that the permit was unreasonably withheld by the Respondent, namely by its Ministry of Environment (“MARN”). That raises a separate and distinct issue which does not arise for consideration under Article

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<sup>315</sup> RL-8(bis); see also CLA-6\_translation.

<sup>316</sup> R-2.

<sup>317</sup> Notice of Arbitration, para. 65.



37(2)(b) of the Mining Law; and, as already indicated above, that issue is here set aside by the Tribunal for the purpose of this Award.

- 8.10. The Tribunal here turns to the different statutory requirement, alleged by the Respondent never to have been met by PRES, as to its property rights in the surface area of the exploitation concession requested of the Respondent, under Article 37(2)(b) of the Mining Law.<sup>318</sup> Under Article 103 of the 1983 Constitution, the right to private property in the social interest is guaranteed; but “[t]he subsoil belongs to the State, which may grant concessions for its exploitation.”<sup>319</sup> The State’s ownership of the subsoil (including mineral deposits) is confirmed in Article 2 of the Mining Law and Article 7(b) of the Investment Law. Hence, the Respondent’s allegation does not relate to ownership or possession of the sub-surface of the area of the exploitation concession requested by PRES. It concerns only private property rights at the surface.
- 8.11. The Parties’ dispute raises threshold issues of legal interpretation. The first is whether the requirements of Article 37(2)(b) of the Mining Law apply to the full surface area of the requested concession. The second is whether Article 37(2)(b) applies to any mining concessions, as opposed to quarries or open-pit mines. The latter, being open excavations, must inevitably interfere with the use and enjoyment by occupiers of the surface-land. On the other hand, underground mining, depending on certain factors, need not do so.
- 8.12. It is common ground that the disputed interpretation of Article 37(2)(b) is a matter of Salvadoran law. At the time (before this arbitration), two distinct opinions emerged as to the correct scope of Article 37(2)(b). The Claimant and PRES saw no good sense or rational purpose in having its scope extend to the full surface area of an underground mine, whilst the Respondent (by the Bureau and the Ministry of Economy) interpreted the statutory wording more literally: it applied to underground mining and to the full surface area of the requested concession.
- 8.13. Yet, the Respondent’s officers were at one in seeking consistently to apply the correct legal interpretation of Article 37(2)(b), whatever that interpretation might be. As Mr Shrake

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<sup>318</sup> CLA-5.

<sup>319</sup> RL-121(bis).

frankly acknowledged at the jurisdiction hearing, the Claimant never received any assurances from the Respondent's several officers that PRES's concession application would be approved by the Respondent if the application did *not* comply with the existing laws of the Respondent, correctly interpreted.<sup>320</sup> Conversely, there is no evidence before this Tribunal that either the Claimant or PRES ever requested the Respondent (including the Bureau and the Ministry of Economy) to ignore whatever Article 37(2)(b) required, correctly interpreted (subject to legislative amendment).

- 8.14. Moreover, Article 16 of the Mining Law expressly prohibited any departure from the Mining Law: "It is forbidden to carry out the mining activities referred to in this [Mining] law without the corresponding authorization; anybody in violation of this provision shall incur the penalties established in this Decree [Law], without precluding the application of those set forth in criminal legislation."<sup>321</sup> Article 69(2)(a) of the Mining Law classified as a "grave" violation: "Performing the mining activities referred to in this Law without the corresponding authorization."<sup>322</sup> Neither side were looking to commit or to be induced to commit, criminal offences under Salvadoran law on a permanent basis.
- 8.15. The threshold question was what was the correct interpretation of Article 37(2)(b) of the Mining Law; and, as regards the Claimant, if that interpretation was adverse to its interests, could that part of the Mining Law be amended by the Respondent's legislature in a manner favourable to PRES's application for an exploitation concession. Given the facts recited in Part VI above, the Tribunal finds that this question was addressed by both the Claimant and the Respondent, from December 2004 to October 2006, in good faith and with mutual goodwill. There is no cogent evidence to the contrary.
- 8.16. The Tribunal has heard much expert evidence from the Parties' respective legal witnesses relevant, directly or indirectly, to this issue of legal interpretation. As described below, there were in all seven expert witnesses with 12 lengthy expert reports and a transcript of their oral testimony numbered in hundreds of pages. The Tribunal is deeply grateful for the scholarship and industry of all these expert witnesses. For present purposes, however,

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<sup>320</sup> Tr. Juris D2.472-473.

<sup>321</sup> RL-7(bis).

<sup>322</sup> RL-7(bis)

although the Tribunal has nonetheless considered their expert evidence in full, it will not be necessary to address all their points *seriatim* in this Award.

- 8.17. The Claimant submitted two expert reports on Salvadoran law by Professor Arturo Fernandois Vöhringer, in addition to calling him as an oral witness at the hearing.<sup>323</sup> Professor Fernandois is Senior Professor of Constitutional Law, School of Law, at the Pontificia Universidad Católica de Chile (the Pontifical Catholic University of Chile). He is also an attorney, Master of Public Administration (Harvard University) and a partner at Fernandois, Evans & Cia. He is not a Salvadoran lawyer. In his first expert report, Professor Fernandois testified that, whilst he was not an expert in Salvadoran administrative law, the existence of general principles of public law and administrative rules characteristic of Latin America, expressly included in the Constitution and legislation of El Salvador, provide tools, which so he believed, sufficed for his analysis of the legal questions addressed by him.<sup>324</sup> The Tribunal is content to receive his expert opinions as helpful as to Salvadoran law on the issue of legal interpretation.
- 8.18. The Claimant also submitted two expert reports on mining laws by John Williams Esq, in addition to calling him as an oral witness at the hearing.<sup>325</sup> Mr Williams is a practising attorney from Washington D.C., USA. He is not a Salvadoran lawyer. He has, however, extensive experience on mining laws as a consultant to (amongst others) the World Bank; and he has published many works on comparative mining legal regimes, including part of the World Bank's *Mining Strategy for Latin America and the Caribbean* (1996). As a practical and comparative legal specialist, but not as a legal specialist on Salvadoran law, the Tribunal is content to receive his expert evidence, where relevant.
- 8.19. The Respondent submitted two expert reports on Salvadoran law by Professor José Roberto Tercero Zamora, in addition to call him as an oral witness at the hearing.<sup>326</sup> Professor Tercero is a Salvadoran attorney, having practised for over 20 years; and he was also Professor of Constitutional Law and Administrative Law, Levels II and III, at the Universidad Centroamericana José Simeón Cañas from 2002 to 2005. The Tribunal is

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<sup>323</sup> Fernandois ER 1 (dated 21 March 2013); Fernandois ER 2 (dated 4 April 2014); and oral testimony: Tr. D4.878ff.

<sup>324</sup> Fernandois ER 1 5-6.

<sup>325</sup> Williams ER 1 (dated 27 March 2013); Williams ER 2 (dated 4 April 2014); and oral testimony: Tr. D5.1226ff.

<sup>326</sup> Tercero ER 1 (dated 9 December 2013); Tercero ER 2 (dated 20 June 2010); and oral testimony: Tr. D5.1143ff.

content to receive his expert opinions on Salvadoran law relevant to the issue of legal interpretation.

- 8.20. The Respondent submitted also two expert reports on Salvadoran constitutional law by Professor Albino Arturo Tinetti Quiteño (known as José Albino Tinetti), in addition to calling him as an oral witness at the hearing.<sup>327</sup> Professor Tinetti has a doctorate in Jurisprudence and Social Sciences and a degree as a Master of Education. He is the Dean of Jurisprudence at the Superior School of Economy and Business (ESEN) in El Salvador, where he has been teaching constitutional law since 2003. He has also been the Director of the Legal Training School of El Salvador. He is, of course, a Salvadoran lawyer. The Tribunal is content to receive his expert opinions on Salvadoran law relevant to the issue of legal interpretation.
- 8.21. The Respondent submitted two expert reports on Salvadoran administrative law by Professor José María Ayala Muñoz and Ms Karla María Fratti de Vega, in addition to calling them both as oral witnesses at the hearing.<sup>328</sup> Professor Ayala is a former Professor of Salvadoran Administrative Law at the Universidad José Simeón Cañas, UCA, of San Salvador and Professor at the Universidad Pontificia de Comillas, Madrid. He is also an attorney and acted as Government Counsel of the Kingdom of Spain. Ms Fratti is a Salvadoran attorney. She has a Master's Degree in Constitutional Law from the Universidad de Castilla La Mancha, Spain and has been teaching as a Professor of Administrative Law for more than 10 years. The Tribunal is content to receive their expert opinions on Salvadoran administrative law relevant to the issue of legal interpretation.
- 8.22. The Respondent submitted two expert reports on mining laws by Mr James M. Otto, in addition to calling him as an oral witness testifying at the hearing.<sup>329</sup> Mr Otto is an expert on mining laws, practising as an independent consultant in natural resources law and economics. Mr Otto is not a Salvadoran lawyer. As a practical and comparative legal specialist, but not as a legal specialist on Salvadoran law, the Tribunal is content to receive

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<sup>327</sup> Tinetti ER 1 (dated 9 December 2013); Tinetti ER 2 (dated 20 June 2010); and oral testimony: Tr. D4.1001ff.

<sup>328</sup> Ayala & Fratti ER 1 (dated 20 December 2013); Ayala & Fratti ER 2 (dated 20 June 2014); and oral testimony: Tr. D4.1039ff & Tr. D5.1086.

<sup>329</sup> Otto ER 1 (dated 19 December 2013); Otto ER 2 (dated 24 June 2014); and oral testimony: Tr. D5.1372.

his expert evidence, where relevant.

- 8.23. Last, but far from least, the Tribunal has had the benefit of the three contemporary legal opinions, set out in Part VI above, from Mr Luis Medina (of 5 May 2005), Dr Marta Angélica Méndez (of 25 May 2005) and the Presidential Secretariat (of 20 June 2005).
- 8.24. The basic facts relevant to the issue of interpretation can be shortly stated. At the time when PRES submitted its application for an underground mine to the Bureau on 22 December 2004, PRES did not submit any documentation under Article 37(2)(b) for the full surface area of its requested concession (12.75 sq. km), beyond that smaller area directly affected by its proposed infrastructure on the surface (being an area of less than 2 sq. km). That full surface area of 12.75 sq. km might have been reduced by PRES to a much lesser area; but it never was, for the Claimant's own reasons.
- 8.25. Whilst it was always theoretically possible for PRES to procure the relevant documentation as to ownership or authorisations for the balance of the full surface area (over 10 sq. km), that would have been extremely difficult for PRES as a practical matter; and, even if practically possible, it would have required much time, effort and cost by the Claimant (with PRES). That was never attempted, not even as to any part of this balance, also for the Claimant's own reasons.
- 8.26. It is thus common ground between the Parties that PRES did not present to the Bureau documentation regarding ownership or authorisations for the full surface area of its requested concession at any time between 22 December 2004 and early March 2008. It is also, of course, common ground that the requested concession was for an underground mine and not a quarry or open-pit mine.
- 8.27. The Tribunal accepts that the Claimant and PRES genuinely believed, in good faith, that their proposed underground mining activities would *not* adversely affect any owners or occupiers of the surface area of the requested concession area (unless directly affected by the mine's surface infrastructure). It should not be overlooked that the Claimant's officers and employees included mining specialists of long experience and great expertise, especially Mr Shrake. In the Environmental Impact Assessment (or "EIA") of September 2005 submitted by PRES to the Ministry of Environment (MARN), Table 4.6-1

summarised the area to be occupied by the requested concession and, as to the sub-soil, it there stated in footnote 1: “the underground mine has no impact on the surface. Source Pacific Rim 2004.”<sup>330</sup> However, whilst appropriate to record that here (given the controversies this case has engendered), the Claimant’s own beliefs and good intentions are not directly relevant to the issue of legal interpretation under Salvadoran law.

- 8.28. It is also equally appropriate to record here that, in the Tribunal’s view, the Bureau and the Ministry of Economy, including especially Ms Navas and Ms Yolanda de Gavinda, were equally sincere in regard to the views they held as to the correct interpretation of Article 37(2)(b) of the Mining Law, supported by the two legal opinions from Dr Marta Angélica Méndez and the Presidential Secretariat. Similarly, however, their views and good faith are not directly relevant to the issue of legal interpretation under Salvadoran law.
- 8.29. The Tribunal has arrived at a particular conclusion regarding Article 37(2)(b) of the Mining Law for the purpose of deciding the Parties’ dispute by this Award. However, the Tribunal’s three members, in reaching that same result, have been influenced by three different factors, to a greater or lesser extent. One member finds the first factor decisive; another member the first and second factors; and the other all three factors. However, the members of the Tribunal are agreed as to the result, unanimously.
- 8.30. The first factor is acquiescence by PRES, with the Claimant. By 8 November 2006, as described in Part VI above, the Claimant (with PRES) had effectively put all their eggs in one basket: namely Plan A requiring an amendment by the Legislative Assembly to Article 37(2)(b) of the Mining Law. By their own choice, as found in Part VI above, the Claimant and PRES did not pursue Plan B or any other plan. Further, PRES did not initiate legal proceedings against the Bureau or the Ministry of Economy, as it was entitled to do under Article 7 of the Mining Regulations (with Article 7 of the Mining Law), so as to test its interpretation of the statutory provision in a timely manner before the Respondent’s Courts. That was again PRES’ own choice. The Claimant and PRES maintained their choice for Plan A only, from November 2006 to March 2008. During this period, it is manifest that the Claimant and PRES acquiesced and accepted for all practical purposes the adverse

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<sup>330</sup> C-8A, Volume 1, Para. 4.6, footnote in Chart 4.6-1: Summary of the Area Occupied by the Project.

interpretation of Article 37(2)(b) made by the Bureau and the Ministry of the Economy. They were confident that amending legislation would see them right. In this regard, they were mistaken. They were then left with only the adverse interpretation.

- 8.31. The second factor is the element of deference. As a general approach, deference should be given by an international tribunal to the unanimous interpretation of its own laws given in good faith by the responsible authorities of a State at a time before the emergence of the parties' dispute. There is a significant distinction to be drawn between an interpretation by the responsible bodies entrusted with governmental powers to be exercised at the time and non-authoritative interpretations, particularly when given by academic lawyers in a later arbitration. The former requires an element of deference, albeit that such deference does not preclude or exhaust the jurisdiction of an international tribunal. It operates only as a rebuttable presumption. Applying this factor to the present case, there is no sufficient reason to prefer the Claimant's non-authoritative interpretations, as opposed to the two legal opinions of Dr Méndez and the Presidential Secretariat; and accordingly the Claimant's case on Article 37(2)(b) must fail.
- 8.32. The third factor is teleological. As a matter of language, the wording of Article 37(2)(b) is unclear. Read literally, it can be stretched to describe the full surface area of the requested concession. However, applied to underground mining conducted under modern mining practices (even if assessed as at 1995 or 2001), that literal interpretation does not seem to make much practical sense, whether viewed from the perspective of the proposed concessionaire, the Respondent (as the owner of the sub-soil) or the individual owners and occupiers of the full surface area. Equally, also as a matter of practical sense, it would unduly truncate the wording to limit its application to only that part of the surface area directly impacted by the proposed mining infrastructure at the surface. What matters, in practice, are the potential risks posed to surface owners or occupiers; and, inevitably, those risks may not be the same over the full surface area of the requested concession, particularly over the full 30-year period of the requested concession.
- 8.33. There were clearly potential risks from underground mining to the use and enjoyment of surface land within the full area of the requested concession at El Dorado. Mr Ticay (the Bureau's geologist) testified that the underground mining of the Minita vein, forming part

of the requested concession area, meant that there was “a potential risk”: “This is an underground mine, and this may impair the surface because of a collapse, for example ... Yes, there is a potential risk, if a mine, when it is technologically developed, well, if that development is not handled technologically correctly and the geological conditions are very unfavourable, there can be risk at the surface, perhaps there are collapses, there are problems with the aquifers and the water table, and this may impair the surface and the owners of the surface lands may be affected.”<sup>331</sup>

8.34. In his expert report, Professor Tinetti testified that, in his view, it was constitutional to interpret Article 37(2)(b) of the Mining Law as imposing an obligation upon any person seeking to obtain a mining exploitation concession to submit documents evidencing ownership or legal authorization from the owners of the surface of the area to be included in the concession, even for underground mines “because such activities may pose risks to the owner of the surface layer and to free, unobstructed exercise of the ownership or property rights.”<sup>332</sup> As to such “risks”, Dr Tinetti testified:

“I have consulted the geology and mining activities experts retained by the State for this case about the potential risks that the owners of the surface could face if any mining activity were conducted in the subsoil, [footnote here omitted, but see citation below] and the following is a summary of the answers to my questions regarding such risks:

- (1) Surface subsidence.
- (2) Noise.
- (3) Vibration.
- (4) Underground explosion when gas is released.
- (5) Need to excavate an access tunnel if any miners were trapped.
- (6) Aquifer depletion.
- (7) Outcropping of the deposit veins to the surface, clearly disturbing the surface area on and around the vein. This is a consequence of using a diamond drilling program.
- (8) Infrastructure requirements, since it may be necessary to build ventilation systems, escape routes, expansion of internal conduits or others, the need

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<sup>331</sup> Tr. D4.869-872.

<sup>332</sup> Tinetti 1 ER, para. 62.



for which will be known as opportunities arise throughout the production phase of the mine.”<sup>333</sup>

- 8.35. Professor Tinetti’s footnote refers to part of the first expert report of Behre Dolbear (adduced by the Respondent). That report reads, in material part:

“[50]. There are a number of reasons for controlling the surface above the deposits and underground mine openings. A mining operation evolves over time and may need to use the land over the veins and mine for operational needs in the future. Other issues include potential subsidence, [footnote omitted] possible mining of the vein to the surface, blasting vibrations during operations, noise from ventilation fans that may one day be needed in the surface area, and road infrastructure for continued field exploration. In some cases, ground water above the veins may be diverted into the mine due to mining operations, which could impact farming and wells.

[51]. In general, it is considered wise for the operator of a mine to secure control of all the surface lands encompassed by the operation through either purchase or usage agreements with existing land owners. Mine deposits can vary widely in type from non-metallic, such as coal and industrial minerals to metallic such as gold, silver, copper, lead, and other metals. Each deposit type may carry additional requirements than those general issues identified above for the El Dorado Project.

[52]. For instance, an underground coal deposit may require more ventilation rises to the surface to remove explosive methane gasses from the mine for safety reasons during operations. In the event of mine rescue efforts to reach and evacuate trapped miners, additional mine openings may have to be driven, or drilled as rescue raises on those lands from the surface to reach those miners. Such a situation occurred in Chile several years ago, where underground miners were trapped for over a month until a rescue raise was drilled from the surface to their underground location.”<sup>334</sup>

- 8.36. Professor Tinetti’s approach is mirrored by the approach taken in Dr Méndez’ legal opinion of 31 May 2005, cited in Part VI above. That opinion likewise referred to the nature of mining operations posing “dangers that may have an impact on people’s lives, health or assets”; the legal right to “material security and legal certainty;” “the right to peace of mind,

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<sup>333</sup> Tinetti 1 ER, para. 18

<sup>334</sup> BD 1 ER (dated 6 January 2014), paras. 50-52.

i.e. the right of each individual to enjoy the property that he or she owns without risks, disturbance or fears, or the peace of mind that the State will take the appropriate preventive measures to ensure that owners suffer no damage or disruption” (paragraphs 5 and 8). It will be recalled that Dr Méndez had been partly responsible in 1995 for preparing the text of the Mining Law.

- 8.37. In his oral testimony, subject to one important factor, Professor Fernandois agreed with Dr Tinetti upon the constitutionality of Article 37(2)(b) of the Mining Law. Professor Fernandois accepted that: “it is logical to attempt to secure protection for the owners or owner impacted.” His difference with Dr Tinetti at the hearing was based on the use of proportionality as constitutional factor affecting the issue of interpretation: “... I accept that the requirement of consent of the owners who might be affected ... as I said earlier, that all the owners who might presumably be affected with some degree of plausibility, must give their consent for the mining operations.”<sup>335</sup> This testimony at the hearing seemed to be a material development from the opinions earlier recorded in Professor Fernandois’ written expert reports.
- 8.38. This constitutional principle of proportionality was addressed by the Supreme Court of El Salvador in its Judgment of 14 December 2004 (Ref 42-2003) as follows: “It is possible to formulate proportionality as a just criterion for [establishing] an appropriate relationship between means and ends in the event of alleged infringement of fundamental rights by the authorities; in other words, for it to serve as a yardstick by which to control any excessive decision by comparing motive with consequences. It is therefore a barrier against interference by the authority in the exercise of fundamental rights by citizens. But it also constitutes a limit on the exercise of rights when in the scope of the same there is the potential to undermine or injure other constitutional rights, principles or values.”<sup>336</sup>
- 8.39. Professor Fernandois, whilst deploying the principle of proportionality so as to preclude the requirement of consent in respect of the whole surface area of a requested concession, accepted the legitimacy of required consent by surface owners and occupiers “who *might* presumably be affected with some degree of plausibility” by underground mining

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<sup>335</sup> Tr. D4.990-992.

<sup>336</sup> CLA-290, as cited in English translation in Reply, para. 399.

(emphasis supplied). In different words, this is the difference between the existence of a potential risk and the absence of risk. There is no rational relationship between “means and ends” (to use the Supreme Court’s phrase) in applying the requirement for consent under Article 37(2)(b) to a surface owner or occupier whose use and enjoyment of surface land faces no risk from underground mining. Conversely, there is a rational relationship in regard to a different surface owner or occupier who faces a potential (or actual) risk. Professor Fermandois and Professor Tinetti both agreed that consents could be legitimately required under Article 37(2)(b) from those facing potential or actual risks, but not (at least as regards Professor Fermandois) from those facing no risks at all. Whilst incomplete, a material consensus was thus reached between Professor Tinetti and Professor Fermandois in their testimony at the hearing.

- 8.40. Given the potential risks of underground mining, the high population density of land in El Salvador, its historical susceptibility to generate social conflicts and the long-term 30-year period of statutory concessions stretching inevitably into an uncertain future, this consensus reached between the Parties’ legal expert witnesses on Salvadoran law serves as a powerful guide to the correct interpretation of Article 37(2)(b) of the Mining Law. Both legal experts were impressive witnesses.
- 8.41. Such an interpretation of Article 37(2)(b) not only meets the requirements of the Constitution (as Professor Fermandois confirmed), but it also allows for a rational distinction in this case between different surface owners or occupiers who faced potential or actual risks from PRES’ requested concession and those who faced no risks at all. This interpretation also removes the need, as asserted by the Claimant and certain of its expert witnesses (especially Mr Williams), to distinguish between underground mines on the one hand and quarries or open-pit mining on the other. The wording of Article 37(2)(b) must apply to all three, albeit limited to potential or actual risks as required by the principle of proportionality under the Constitution.
- 8.42. It would be possible to continue this analysis much further. The Claimant also invoked several other legal arguments based on systemic interpretation, semantic analyses of the Mining Law, the requirement for a bond under Article 14 of the Mining Regulations, the role played by voluntary and legal easements under Articles 53 and 54 of the Mining Law

and a comparison between the several legal opinions of 2005 to support its case on the interpretation issue. The Respondent countered with contrary arguments pointing to a very different result. The Parties' two interpretations lie at opposite ends of the spectrum. In the circumstances, with the paramount principle of proportionality expressed by the Supreme Court of El Salvador, it would serve no purpose here to go through each of the Parties' other arguments and to reject them in turn.

8.43. As regards the application of this intermediate interpretation (as between the Parties) to the relevant facts, it must follow that PRES never complied in full with the documentary requirements of Article 37(2)(b) of the Mining Law in support of its application for an exploitation concession at El Dorado. At the relevant time, PRES limited its compliance, on 22 December 2004, again in August 2005 and yet again on 8 November 2006, to that small area comprising the proposed mine's surface infrastructure. Whilst it is improbable that the full surface area of the requested concession was equally exposed to potential risks from underground mining, the risks identified by Mr Ticay, Behre Dolbear and Professor Tinetti included, inevitably, potential risks to parts of that full surface area for which PRES never presented the required documentation at the relevant time. Moreover, PRES took no steps to identify to the Bureau any such areas that were or were not subject to such potential risks. It adhered to the view that there were no potential risks at all. In this regard, it was mistaken.

8.44. In conclusion, taken alone or together, these three factors (particularly the first) are sufficient for the Tribunal to conclude that the Claimant's case cannot succeed in regard to Article 37(2)(b) of the Mining Law: PRES' application for an exploitation concession in regard to El Dorado did not and never did comply with the documentary requirements of Article 37(2)(b) of the Mining Law.

### ***C. The Issue of Estoppel or Actos Propios***

8.45. *Applicable law:* The Claimant advances its case on "estoppel" or "*actos propios*" under both Salvadoran law and international law. The Respondent submits that the only applicable law for any form of estoppel or *actos propios* is the law of El Salvador.<sup>337</sup> It is

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<sup>337</sup> Tr. Day 1.229.

not therefore, according to the Respondent, international law. As to Salvadoran law, according to the Respondent, there is no concept of estoppel as such; but the Respondent relies upon analogous concepts to produce the same adverse result for the Claimant.<sup>338</sup>

- 8.46. As to the relevant principles of international law, the Parties have both referred to the dissenting opinion of Judge Spender in the ICJ *Case Concerning The Temple of Preah Vihear (Cambodia v Thailand)*.<sup>339</sup> The Claimant also cited Professor Bing Cheng’s well-known work;<sup>340</sup> and several arbitration awards: *Duke v Peru*; *ADC v Hungary*; *Desert Line v Yemen*; *Kardassopolous v Georgia*; *SPP v Egypt* and *Middle East Cement v Egypt*.<sup>341</sup> The Respondent cited Professor Brownlie’s *Principles of Public International Law*,<sup>342</sup> Cottier & Müller’s contribution to the *Max Planck Encyclopedia of Public International Law*,<sup>343</sup> the ICJ judgment in *Land Island and Maritime Frontier Dispute (El Salvador v Honduras)*<sup>344</sup> and the award in *Chevron & Texaco v Ecuador*.<sup>345</sup>
- 8.47. For present purposes, it suffices to cite two relevant passages, the first from *Brownlie*, to the effect that two essential elements of estoppel under international law include, first, “a statement of fact which is clear and unambiguous” and, second, reliance “in good faith” by the representee. The Tribunal would only add, by way of explanation, that reliance in good faith includes reasonableness and, further, that a statement of fact can be made by a representor to a representee in several ways, including words, writings or conduct (or a combination of all three). However, whatever its form, the representation must be “clear and unambiguous” or “unequivocal”, as appears from the second passage, cited from *Duke*

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<sup>338</sup> Tr. Day 1.231-232.

<sup>339</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962, 1962 I.C.J. Reports 101, 143-144; RL-192

<sup>340</sup> Bin Cheng, *General Principles of Law*, pp. 141-149; CLA-329.

<sup>341</sup> *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru*, ICSID Case No. ARB/03/28, Award (18 August 2008), paras. 245-251, CLA-309; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16 Award (2 October 2006), paras. 464-475, RL-104; *Desert Line Projects LLC v Republic of Yemen*, Award (6 February 2008), paras. 116-123, RL-186; *Ioannis Kardassopolous v Georgia*, Decision on Jurisdiction (6 July 2007), paras 191-194, CLA-22; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on Merits (20 May 1992), paras 81-85, RL-166; and *Middle East Cement Shipping & Handling Co SA v Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002), para. 135, CLA-26.

<sup>342</sup> RL 136(bis).

<sup>343</sup> Cottier & Müller, *Max Planck Encyclopedia of Public International Law*, para. 1, RL-194.

<sup>344</sup> *Land Island and Maritime Frontier Dispute (El Salvador v Honduras)*, 1990 I.C.J. Reports 92, 118, RL-193.

<sup>345</sup> *Chevron Corp and Texaco Petroleum Corp v Ecuador*, UNCITRAL Interim Award, 1 December 2008, para. 143, CL-75.

*v Peru* (2008), at paragraph 249: “... for the conduct or representation of a State entity to be invoked as grounds for estoppel, it must be unequivocal, that is to say, it must be the result of an action or conduct that, in accordance with normal practice and good faith, is perceived by third parties as an expression of the State’s position, and as being incompatible with the possibility of being contradicted in the future.” Whilst uncontroversial under international law, the Tribunal notes that this orthodox approach is confirmed by the recent award issued *In The Matter of The Railway Land Arbitration (Singapore v Malaysia)*, where the tribunal rejected the claimant’s case on estoppel for want of sufficient proof of any unequivocal representation by the respondent.<sup>346</sup>

8.48. The Respondent also invokes the legal burden of proof to be discharged by the Claimant in making its factual allegations in regard to its alleged estoppel, both under international law and Salvadoran law. The Respondent contends that the Claimant has not discharged this burden.<sup>347</sup> As the Party asserting estoppel, the Tribunal accepts that it is for the Claimant to discharge the burden of proving, on the evidence, the facts necessary to support its case on estoppel under both international law and Salvadoran law.

8.49. It is necessary to recall the factual representations alleged by the Claimant. In its written pleadings, its case was pleaded on the basis of the Respondent’s conduct between 2004 and 2008 that “consistently confirmed that Claimant *was* entitled to the concession [original emphasis]”; and it was also pleaded on the basis of the Respondent’s representation by conduct (including silence) that Article 37(2)(b) did not provide any legitimate or sufficient basis for the Respondent to deny the concession to PRES.<sup>348</sup> The Tribunal has examined in detail the Respondent’s conduct towards the Claimant (with PRES) during this period, as set out above in Part VI. There is no cogent evidence that the Bureau or the Ministry of Economy ever represented to the Claimant, by any words or any conduct (or any combination of both), that PRES’ application for a concession had met or would be treated as having met the requirements of Article 37(2)(b) of the Mining Law. To the contrary, the Bureau informed PRES from the outset (in March 2005) that it had not, hence the need for

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<sup>346</sup> *In The Matter of The Railway Land Arbitration (Singapore v Malaysia)*; Award (30 October 2014); PCA Case No. 2012-01 (Phillips, Gleeson, Simma); para. 199.

<sup>347</sup> Tr. Day 7.1970.

<sup>348</sup> Reply, para. 320.

the three contemporary legal opinions and the proposed amending legislation. The Bureau did so again in August and October 2006. As to such a legislative amendment, whilst the proposal was supported by the Bureau, the Minister for Industry and also President Saca (until March 2008), there was never any representation by the Respondent's executive branch that the executive branch, still less the Respondent, would ensure that the Respondent's legislature would enact such an amendment. Indeed, the Claimant does not allege any such representation or promise of legislative reform by the Respondent's executive branch. It would have been manifestly unconstitutional; and if made, it could not reasonably have been relied upon by the Claimant in good faith.

- 8.50. At the hearing, as summarised in Part VII above, the Claimant put its case somewhat differently. It contended that the Respondent had represented to the Claimant that no further action was necessary on the Claimant's part in relation to procuring any further authorisations from surface owners and occupiers. Whilst both Parties were working towards a solution based upon a legislative amendment, there was indeed a benevolent acquiescence by the Bureau and the Ministry of Industry towards PRES as regards its deficiencies in meeting (as they saw it) the requirements of Article 37(2)(b) of the Mining Law. It was, moreover, a generous benevolence, not only in extending time to PRES from January 2005 to October 2006 to meet those requirements, but also in regard to PRES' continuing activities in El Dorado without any exploration licence or exploitation concession, as required under the Mining Law.
- 8.51. Having considered in detail the evidence regarding this alleged representation, as found in Part VI above, the Tribunal does not consider that all that was said and done by the Respondent (or not done or left unsaid) was ever sufficiently clear and unambiguous to support the Claimant's alleged representation. There is a much more simple explanation. From December 2004 to about September 2006, the Bureau and the Ministry of Industry wanted PRES' application to succeed, provided that PRES could meet the requirements of the law, whatever those requirements were. Whilst it still seemed that the Mining Law might be amended (as PRES required), this Ministry sought to help and accommodate PRES as best it could. There was however no representation by the Respondent that, if the law was not amended, PRES would be treated without more by the Respondent as having

already satisfied the requirement of Article 37(2)(b) of the unamended Mining Law. As cited above, Mr Shrake's testified to the opposite effect: the Claimant never received any assurances from the Respondent that PRES's concession application would be approved by the Respondent if the application did not comply with the existing laws of the Respondent. The Tribunal therefore rejects the Claimant's conclusion that the Ministry's indulgence towards its drilling and other activities at El Dorado "unequivocally demonstrate the Respondent's recognition of [PRES'] legal right to eventually obtain the concession."<sup>349</sup>

8.52. As regards Salvadoran law, it is possible to decide the issue succinctly. The Tribunal accepts the Respondent's case that its analogous doctrine of *actos propios* likewise requires, *inter alia*, a clear and unambiguous act by the Respondent and reliance in good faith by the Claimant. Accordingly, the Claimant's case on *actos propios* fails under Salvadoran law as a matter of evidence, as does its case on estoppel under international law.

#### ***D. Other Legal Materials***

8.53. It is self-evident that the Parties and their expert witnesses struggled to find the correct answer, for the right reasons, to the issue of legal interpretation under Salvadoran law. Moreover, this was never an issue which, in the Tribunal's view, could be decided summarily, without the benefit of any factual or expert testimony on Salvadoran law. It thus could not be decided in the early stages of this arbitration (as the Respondent advocated); and, even if it could, the issue of estoppel (or *actos propios*), as to which a mass of disputed factual evidence was required for the merits stage, would have precluded any final early answer by the Tribunal.

8.54. As regards the Tribunal, in regard to the third factor above, it has based its decision on the issue of legal interpretation under Salvadoran law. However, the Tribunal has taken comfort from other legal materials lending support to that decision.

8.55. The Guatemalan Mining Law of 21 December 1993 contained a similar statutory

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<sup>349</sup> Reply, para. 322.



requirement to Article 38 of the Mining Law. It provided:<sup>350</sup>

“Article 38. Requirements for mining rights applications. Mining rights applications shall be submitted to the Bureau ... and shall meet the following requirements: ... (i) Area requested, indicating location on original cartographic map or photocopy, with a scale of 1:50 000, or the scale which may be appropriate, preferably North-South, East-West orientation. ... The application shall be accompanied by: ... (3) In the event the applicant is the owner or holder of the designated land, certified copy of the document evidencing the ownership or possession of the land; otherwise, original or certified copy of the document containing authorization or consent of the owner or holder of the land subject to the application.”<sup>351</sup>

- 8.56. This provision in the 1993 Law was understood to mean, under Guatemalan law, that an applicant was required to submit documentation evidencing authorizations or consents from owners or occupiers of the *full* surface area of the requested concession. In 1997, this requirement was amended by the Guatemalan legislature. The amendment was explained in paragraph 4 of the 1997 Report from the Guatemala Commission of Energy and Mines, as follows:<sup>352</sup> “With the current legislation [of 1993], domestic and foreign investors have no motivation or interest to develop mining exploration and exploitation projects, since the law requires permission from the owners and holders of the designated land, Guatemala being the only Latin American country which has this requirement; .... [sic]” As understood by the Tribunal, the Guatemalan legislature amended the 1993 Law to remove an applicant’s obligation in regard to the full surface area of a requested concession. The Tribunal notes the Report’s reference to Guatemala being the “only” Latin American country to have imposed such an obligation (as at 1997, after the Respondent’s Mining Law of 1995). It attributes no material significance to this over-generalisation.
- 8.57. Mr Williams testified to the same effect: “They [the Guatemalan legislature] changed the law and they eliminated the requirement to – that an Applicant for mineral rights would have to produce evidence of ownership of the land or the consent of the landowners in

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<sup>350</sup> R-156.

<sup>351</sup> In the original Spanish, this last passage reads: “... en caso contrario documento original o copia legalizada que contenga autorización o consentimiento del propietario o poseedor del terreno afecto a la solicitud.”

<sup>352</sup> R-157.

order – with their application for mineral rights.”<sup>353</sup> Mr Williams also confirmed that, to his knowledge, he was not aware of “any other Latin American country that has that ownership requirement in its Mining Law.”<sup>354</sup>

- 8.58. The Tribunal notes three factors in the materials regarding Guatemala. First, the Respondent’s legal interpretation of Article 37(2)(b) of the Mining Law had, at least, a respectable precedent in the legislative text of another Latin American State: the Respondent’s interpretation was not therefore quixotic or perverse as applied to PRES in 2005 onwards. Second, the Guatemalan 1993 Law was amended by legislation in 1997: it was not modified by judicial or other interpretation; and the Claimant was therefore right to pursue, as its Plan A, a legislative amendment to Article 37(2)(b) of the Mining Law. Third, the extreme requirement for consent for the *full* surface area of the requested concession is indeed awkward and out-dated for modern methods of underground mining.
- 8.59. The Tribunal has also taken some comfort from other comparative and historical materials. Whilst these further legal materials were not submitted by the Parties, it seems appropriate to describe them briefly here. The Tribunal stresses that none of these materials played any part in its decisions; but they may help the Parties to understand that the intermediate interpretation decided above, as between their opposite cases on legal interpretation, is not devoid of legal logic.
- 8.60. The starting point is the old and well-known Latin maxim: “*cuius est solum, eius est usque ad coelum et ad inferos*.”<sup>355</sup> This was not a maxim in classical Roman law but, rather, in a later formulation, first recorded by the Bolognese scholar Accursius in Italy during the 13th century (whose son later lectured at Oxford University). It was restated by Cinus of Pistoia in the 14<sup>th</sup> century and later adopted by Blackstone (the English legal historian) in

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<sup>353</sup> Tr. D5.1334.

<sup>354</sup> Tr. D5.1336.

<sup>355</sup> Often translated into English, as: “He who owns the land owns everything reaching up to the very heavens and down to the depth of the earth.”

the 18th century,<sup>356</sup> with others elsewhere.<sup>357</sup> The maxim was readily accepted in many legal systems, both civilian and common law. It was traditionally used to assert that, *prima facie*, the rights of the surface landowner extended ordinarily both to everything above it ‘upwards to the heavens’ and everything below it ‘downwards to the centre of the earth’.

- 8.61. It is significant that, in these early times, it was generally thought that the earth was flat and not a sphere. In regard to the earth as a sphere, it is manifestly absurd to consider that a surface-landowner is entitled absolutely to “everything below”, given that as such property rights approach the centre of the earth over 3,900 miles below the surface, that property must become infinitely small with an increasing number of neighbourly rights measured in millions. Moreover, no such property right could penetrate beyond the earth’s centre without infringing like property rights arriving from opposite parts of the earth’s surface. Conversely, a surface landowner entitled to everything “up to the heavens” would see such absolute property rights expand to an ever-broadening extent up to the nearest star, if not still further. The Latin maxim, literally applied upwards, would make every landowner occupy only the very tiny tip of a huge inverted cone or pyramid, stretching light years into the outer cosmos. That is also, of course, manifestly absurd.
- 8.62. It is also significant that, in these early post-classical times, the earth’s geology was little known and that mining technology did not permit deep mining but, rather, only primitive excavations close to the surface of the earth, such as open or shallow mines, water-reservoirs and catacombs. Almost invariably, these excavations disturbed directly the rights of the owner or occupier of the land at the surface. It was only with modern mining technology that underground mining could take place without interfering with the adjacent surface. Conversely, whilst overhanging trees and buildings could disturb directly the rights of the surface landowner, it was only with the invention of aircraft that overflying a land surface could take place without the risk of such disturbance. In modern times,

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<sup>356</sup> *Blackstone’s Commentaries II* (21st ed) 1844), C.2, p.181: “Land hath also, in its legal significance, an indefinite extent, upwards as well as downwards. *Cuius est solum, eius est usque ad coelom* ... therefore no man may erect any building, or the like, to overhang another’s land .... So that the word “land” includes not only the face of the earth but everything under it, or over it.”

<sup>357</sup> See: John G Sprankling, “Owning the Center of the Earth”, (2008) 55 *UCLA L Rev* 979; Jean Howell, “‘Subterranean Land law’: Rights below the Surface of Land”, (2002) 53 *Northern Ireland Legal Quarterly* 268; Francis Lyall, “The maxim *cuius est solum* in Scots Law” [1978] *JR* 147; and Lord McNair, *The Law of the Air* (1964; ed. Kerr and Evans), p 97.

commercial aircraft flying high in the sky, still less orbiting satellites in space, do not usually disturb the rights of a surface landowner to use and enjoy his land.

- 8.63. In *United States v Causby* (1946),<sup>358</sup> the US Supreme Court held that it was unlawful for frequent and regular flights of the US armed forces to fly at low altitudes over private land, causing loss to a chicken farmer. However, the Court rejected the suggestion that trespass would be committed by aircraft flying at higher altitudes. As expressed by the Supreme Court (Justice Douglas): “The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.” In *Bernstein v Skyviews & General Limited* (1978),<sup>359</sup> the English High Court (Mr Justice Griffiths, later Lord Griffiths) decided that it was not an unlawful trespass for an aircraft to overfly the plaintiff’s land at a height which in no way affected the ordinary use and enjoyment of that land and that, at such a height, the surface landowner had no property rights to prevent aerial photographs of his land: “The academic writers speak with one voice in rejecting the uncritical and literal application of the [Latin] maxim .... The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space.” In *Didow v Alberta Power Ltd* (1988)<sup>360</sup>, the Alberta Court of Appeal in Canada took the same approach, adopting the reasoning of Mr Justice Griffiths. As regards celestial bodies in space, several international conventions effectively preclude the existence of private property rights under national laws.<sup>361</sup>

- 8.64. It appears that these common sense approaches ‘upwards’ have not been similarly applied

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<sup>358</sup> *US v Causby* 328 US 256 (1946), 261.

<sup>359</sup> *Bernstein v Skyviews & General Ltd* [1978] 1 QB 479, 487-488.

<sup>360</sup> *Didow v Alberta Power Ltd* [1988] 5 WWR 606 at p. 613.

<sup>361</sup> For example, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies agreed by 102 States (including El Salvador), 610 U.N.T.S 2015; and the 1984 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies agreed by 20 States, 1363 U.N.T.S 22. Under the Moon Agreement 1979 made by 17 States (including, but not the USA), there can be no private ownership of a property on the Moon. However, under the US Commercial Space Launch Competitiveness Act 2015, the USA expressly disclaimed any “assert[ion] [of] sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body” (Section 403)

‘downwards’ to the sub-surface by US, English and other Courts, although legal logic would require a similar approach. Professor Sprankling, in his 2008 article (see the footnote above), acknowledged that the ‘centre of the earth’ theory continues to prevail at common law before most US courts and in many US legal texts, subject to statutory modifications. However, in his proposals for a more rational theory at common law, whilst he accepts that a surface landowner should ordinarily enjoy sub-surface rights, he examines the question as to how deep into the earth should those rights reach, beyond the right of support. He dismisses the unqualified Latin maxim as poetic hyperbole (not law), blindly imitating the past; and he arrives at a downward depth of 1,000 feet (with an exception for mineral rights), by analogy to the demise of the *ad coelum* approach to airspace. Hence, according to this legal commentator, the surface landowner would have a legal interest in the sub-surface to a depth of 1,000 feet, but no deeper.

- 8.65. In *Bocado SA v Star Energy UK Onshore Ltd* (2011),<sup>362</sup> the United Kingdom’s Supreme Court decided that surface landowner has a legal interest in the strata beneath the surface up to at least 2,800 feet (being the depth at issue for diagonally drilled wells by the defendant), unless there had been an alienation of that strata by a conveyance, at common law or by statute to someone else (such as the State). Lord Hope held: “There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, are far from being so deep as to reach the point of absurdity. Indeed the fact that the strata can be worked upon at those depths points to the opposite conclusion.” Earlier in his judgment, Lord Hope noted that anything drilled below a depth of 14 km would be crushed by the earth’s pressure of 50,000 pounds per square inch and vaporised by a temperature of 1,000 degrees Fahrenheit. It would therefore seem likely that Lord Hope would extend the protected depth beyond 2,800 feet (i.e. 853 metres), but certainly not to the earth’s centre. At the centre of the earth, below the earth’s crust of 25 km (at its thickest), the temperature exceeds 6,700 degrees Centigrade with pressure about 50 million pounds per square inch, making private property rights irrelevant.

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<sup>362</sup> *Bocado SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380, 399 [27] and 395-396 [19].

- 8.66. More recently, in several countries, the proposed use of lateral drilling for fracking (downwards) and low-flying private drones (upwards) have contributed to the academic debate; and certain legislatures (including the United Kingdom) have enacted legislation intended to derogate from the traditional legal position founded upon the Latin maxim now more than 800 years old. The United Kingdom's Infrastructure Act 2015, as regards fracking, precludes a surface landowner's property rights below 300 metres. This statute amends the common law position decided by the U.K. Supreme Court in *Bocado*; but it maintains the surface landowner's legal interests to a depth of 300 metres (equivalent to 984.25 feet)
- 8.67. These legal materials as to sub-surface interests confirm that the qualified Latin maxim, accepted by eminent scholars and courts over many centuries, is not the idiosyncratic feature of an isolated legal system. Equally, however, these materials confirm that the legal principle encapsulated in the maxim is subject to a pragmatic rule of reason which limits its application to cases where the particular height or depth of the alleged infringement is such that it could or might materially interfere with the surface landowner's ordinary use and enjoyment of that surface-land. In modern times, the old Latin maxim is qualified in its application; but the general principle remains, protecting the owner and occupier of the surface-land.
- 8.68. In the present case, the sub-soil is owned by the Respondent under Article 103(3) of its Constitution (as re-stated by Article 2(1) of the Mining Law and Article 7(b) of the Investment Law); and Articles 103(1) and 105 of the Constitution recognise the right to private property at the adjacent surface, including rural lands. Such rights include the reasonable use and enjoyment of the surface land by its owners and occupiers. The experience of Guatemala and the indirect influence of the qualified Latin maxim provide the historical background to Article 37(2)(b) of the Mining Law. That background is consistent with the intermediate interpretation of Article 37(2)(b), applied to PRES's application for a concession. Accordingly, if and to the extent relevant, the Tribunal concludes that Article 37(2)(b), as here interpreted, is not to be regarded as an outlier from other comparative legal systems and traditions.

***E. The Tribunal's Decisions***

8.69. For the reasons stated above in this Part VIII (A)-(C), the Tribunal decides the two sub-issues of legal interpretation and estoppel (or *actos propios*) adversely to the case advanced by the Claimant. The Tribunal addresses the consequences of these several decisions in Part X below.

## **PART IX: LIABILITY – OTHER MINING AREAS**

### ***A. Introduction***

9.1. The Tribunal here addresses the Claimant's ancillary claims in respect of projects by DOREX and PRES (with the Claimant) for: (i) Zamora/Cerro Colorado; (ii) Guaco; (iii) Pueblos; (iv) Huacuco; and (v) Santa Rita. It will be recalled that the Claimant has expressly stated in this arbitration that none of its claims relate to any measure by the Respondent before 10 March 2008 (see Part 1 above). Hence, for these ancillary claims also, the Claimant does not invoke any wrongful conduct by the Respondent sounding in damages under the Investment Law or customary international law before 10 March 2008.

### ***B. The Ancillary Claims***

9.2. (i) *Zamora/Cerro*: As regards the two projects at Zamora and Cerro Colorado, there were no exploration licences granted to DOREX by the Bureau; but DOREX appears to have had a contractual relationship with a third party holding one or more exploration licenses under the Mining Law. The Claimant contended that these projects provided it "with long term, organic growth potential."<sup>363</sup> The Zamora project, begun by DOREX in February 2006, was located about 50 km north of San Salvador. The Cerro Colorado project, begun by DOREX in September 2006, was located about 10 km west of the Zamora project. (Neither was geographically contiguous with the El Dorado Project).

9.3. At the hearing, the Claimant applied for permission to introduce new documentation relating to these projects. The application was opposed by the Respondent. The Tribunal was informed by the Claimant that this documentation comprised two documents: an option agreement and an amendment to that agreement. It was said that these could not have been submitted earlier by the Claimant in this arbitration, owing to unresolved issues of confidentiality with a third party.<sup>364</sup> At the end of the hearing, the Tribunal reserved its decision on the admissibility of these two new documents.<sup>365</sup> Having considered this disputed application more fully, with the further benefit of the Parties' post-hearing

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<sup>363</sup> Memorial, paras. 361 & 364, exhibits C-258 and C-425.

<sup>364</sup> Tr. D2.551; D3.591-592; D6.1481-1483.

<sup>365</sup> Tr. D7.2080.



submissions, the Tribunal has decided not to admit this documentation, on two cumulative grounds. First, the Claimant's application was made too late; and, second, these documents could not materially affect the result of the Tribunal's decisions in this Award.

- 9.4. (ii)-(iv) *Guaco, Pueblos and Huacuco*: As regards Guaco, Pueblos and Huacuco, DOREX applied to the Bureau for exploration licences on 25 August 2005.<sup>366</sup> Such licences were granted by the Bureau under the Mining Law on 28 September, 29 September and 29 September 2005 respectively.<sup>367</sup> The periods of these licences were stated to be "four years", expiring by 30 September 2009. These exploration areas overlapped with the area of the former El Dorado exploration licences;<sup>368</sup> and they were geographically contiguous with parts of the area of the El Dorado exploitation concession requested by PRES (as re-confirmed in August 2005).<sup>369</sup>
- 9.5. On 17 February 2006, DOREX submitted to MARN its EIA for a drilling environmental permit regarding Huacuco.<sup>370</sup> On 7 and 17 August 2007, DOREX submitted EIAs to MARN for like permits regarding Guaco and Pueblos.<sup>371</sup> On 27 November 2007, MARN requested DOREX to respond to technical observations on the Guaco EIA.<sup>372</sup> On 9 January 2008, MARN requested that DOREX respond to technical observations on the Pueblos EIA.<sup>373</sup> DOREX responded to MARN regarding Guaco on 11 February 2008 and Pueblos in March 2008.<sup>374</sup> DOREX received no environmental permits from MARN permitting drilling under these exploration licences.
- 9.6. (v) *Santa Rita*: The Santa Rita project, begun by PRES in or about June 2005, was located about 8 km north of the El Dorado project.<sup>375</sup> PRES applied for an exploration licence also in June 2005.<sup>376</sup> It was granted by the Bureau on 8 July 2005 under the Mining Law for a

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<sup>366</sup> Gehlen WS paras. 110-112.

<sup>367</sup> C-43 (Huacaco); C-44 (Guaco); & C-45 (Pueblos).

<sup>368</sup> C-658 (Guaco); C-659 (Pueblos); & C-670 (Huacaco).

<sup>369</sup> C-288; Memorial, para. 210.

<sup>370</sup> C-185.

<sup>371</sup> C-216.

<sup>372</sup> C-199.

<sup>373</sup> C-201.

<sup>374</sup> C-202; Shrake 1 WS, para. 99; Colindres 1 WS, para. 173.

<sup>375</sup> C-657.

<sup>376</sup> C-404.

four-year term, which expired on 14 July 2009.<sup>377</sup> This exploration area was not contiguous with the El Dorado Project. On 16 January 2006, PRES submitted its EIS to MARN for a drilling environmental permit regarding Santa Rita.<sup>378</sup> The environmental permit for exploration was received by PRES on 9 June 2006.<sup>379</sup> PRES began drilling in November 2006. On 13 December 2006, PRES announced the temporary suspension of drilling at Santa Rita following strong opposition from anti-miners.<sup>380</sup> This suspension continued until late 2007, when PRES resumed limited exploration activities.<sup>381</sup> Those resumed activities ceased in July 2008.<sup>382</sup> As Mr Shrake testified: “In July 2008, at my direction, PRES and DOREX suspended drilling activities in El Salvador. In one of the most painful and difficult decisions I have ever made, I directed PRES and DOREX to begin laying off its employees in El Salvador. By the end of July 2008, we had laid off over 200 employees in the country.”<sup>383</sup>

- 9.7. On 14 July 2009, under its four-year term, the Santa Rita exploration license expired. This expiry is common ground between the Parties, although the reasons for its expiry are disputed.<sup>384</sup> On 17 July 2009, PRES requested from the Bureau a two-year extension to the Santa Rita exploration license under the Mining Law.<sup>385</sup> On 20 July 2009, the Bureau informed PRES that the Santa Rita license had expired on 14 July 2009; and that it could not now be extended under the Mining Law.<sup>386</sup> On 21 July 2009, DOREX applied to the Bureau for the renewal of the expired Santa Rita exploration license under the Mining Law.<sup>387</sup> There was to be no renewal of that licence.

### *C. The Claimant's Cases*

- 9.8. (i) *Zamora/Cerro Colorado*: In summary, the Claimant contends that its interest in these projects formed part of its desire and support for a thriving mining industry in El Salvador

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<sup>377</sup> C-416; R-23.

<sup>378</sup> C-418.

<sup>379</sup> C-420.

<sup>380</sup> C-263, Shrake 2 WS, para. 92.

<sup>381</sup> C-423.

<sup>382</sup> C-53.

<sup>383</sup> Shrake 1 WS, para. 125.

<sup>384</sup> Memorial, para. 334; Counter-Memorial, para. 189

<sup>385</sup> R-23.

<sup>386</sup> R-23.

<sup>387</sup> C-424

and that, as such, these projects formed part of its “portfolio of high-quality gold projects.”<sup>388</sup> The Claimant adduced expert evidence from FTI, who valued these projects at US\$ 1.29 million as at March 2008.<sup>389</sup> It is not, however, entirely clear to the Tribunal how the Claimant advances its case as to the Respondent’s liability in damages regarding these two projects.

9.9. (ii)-(iii) *Guaco & Pueblos*: In summary, having recited at greater length the factual record, the Claimant contends that on 1 July 2009, long after DOREX had submitted responses to MARN’s observations relating to its application for the drilling environmental permit for Guaco and almost as long after DOREX had presented MARN with a second EIS regarding its application for a drilling environmental permit for Pueblos, MARN sent a letter to DOREX requesting certification of both the exploration licenses and the legal documentation regarding the ownership or possession of the real estate on which the exploration operations would be carried out.<sup>390</sup> The Claimant contends that, as with the Claimant’s other environmental permit applications to MARN, the regulatory process was being impeded by the Respondent’s political machinations and not for any technical concerns regarding the applications, in violation of Salvadoran law (including Article 33 of the Environmental Regulations). The Claimant adduced expert evidence from FTI, who valued the Coyotera deposit in Pueblos at between US\$ 37.12 and 30.26 million, as at March 2008.<sup>391</sup> There seems to be no specific claim quantified for Guaco pleaded by the Claimant.

9.10. (iv) *Huacuco*: In summary, having recited at greater length the factual record, the Claimant contends that the Respondent wrongfully failed to grant to DOREX a drilling environmental permit for Huacuco. It alleges that the permit “became mired in the same political quagmire”; and that, as a result, DOREX was never able to carry out the exploration operations that it had planned for Huacuco.<sup>392</sup> The Claimant adduced expert evidence from FTI, who valued the Nance Dulce deposit in Huacuco at between US\$ 9.17

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<sup>388</sup> Memorial, para. 364.

<sup>389</sup> Reply, para. 480.

<sup>390</sup> C-204.

<sup>391</sup> Reply, para. 480.

<sup>392</sup> Memorial, para. 347.

and 7.47 million, as at March 2008.<sup>393</sup>

- 9.11. (v) *Santa Rita*: In summary, having recited at greater length the factual record, the Claimant contends that this project was thwarted by the *de facto* mining ban announced by President Sacca in March 2008. According to the Claimant, President Sacca's decision openly to announce his opposition to mining made it clear to the Claimant that it could not advance its projects in El Salvador through any of the legitimate channels that it had actively pursued up until that point. What had in the past appeared to be inaction by the Respondent's executive branch, pending presidential approval, turned into an unlawful decision by the executive not to act: "in short, a ban on metallic mining activities."<sup>394</sup> The Claimant adduced expert evidence from FTI, who valued this project at US\$ 502,424 as at March 2008.<sup>395</sup> .

#### ***D. The Respondent's Cases***

- 9.12. (i) *Zamora/Cerro Colorado*: The Respondent contends that the Claimant (including PRES) has not presented any evidence that it has any exploration rights to these Other Mining Areas. Therefore, the Respondent contends, the Claimant cannot claim any compensation for a right it has not established under the Mining Law or the Investment Law.<sup>396</sup>
- 9.13. (ii)-(iv) *Guaco, Pueblos & Huacuco*: The Respondent contends that the Claimant, PRES and DOREX had no legal right under the Mining Law to obtain these new exploration licenses, because their areas overlapped with the areas of the expired exploration licenses at El Dorado. According to the Respondent, the Mining Law prohibited the Claimant and any affiliated company (such as PRES and DOREX) from obtaining new exploration licenses that included any areas of expired exploration licenses that had been held by any other company affiliated with the Claimant (namely PRES). Article 17 of the Mining Regulations prohibits a licensee from obtaining through another person another exploration licence over all or part of what was covered by an expired licence. It provides, in material part: "Once the term of the Exploration License or its extension has expired, the Holder

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<sup>393</sup> Reply, para. 480.

<sup>394</sup> Reply, para. 433.

<sup>395</sup> Reply, para. 480.

<sup>396</sup> Rsp CM, paras. 179ff; Tr. D1.224fff; Tr. D7.1977ff;

may not obtain directly, or through another person, another exploration licence over all or part of what the expired Licence covered.”<sup>397</sup> By operation of Salvadoran law, so the Respondent submits, there is therefore no legal basis for the Claimant to make claims regarding these licences in this arbitration under the Mining Law and the Investment Law.

- 9.14. The Respondent further contends that the Claimant’s case is not advanced by its deliberate use of DOREX as a legal person ostensibly distinct from PRES. The Respondent refers to Mr Earnest’s email message to Mr Shrake dated 18 March 2005: “... We are going to have to form a subsidiary company to obtain new exploration licenses. It would be better if the new company didn’t have Pacific Rim in its name. Any ideas? ...”<sup>398</sup> This new company was therefore named DOREX.
- 9.15. The Respondent does not contend in this arbitration that these three exploration licences have been revoked or annulled by the Respondent.<sup>399</sup> It submits that DOREX had no right to apply for or to receive these licences; that it never undertook exploration work in their areas; that it did not receive any environmental permit required for such exploration; and, further, that these exploration licences expired in 2009.<sup>400</sup> It contends that DOREX acquired no right to any exploitation concession, nor any legal or property rights to any deposits in Guaco, Huacuco and Pueblos.
- 9.16. *Santa Rita*: The Respondent contends that this exploration license expired in 2009 with no allegation that the Respondent has impeded PRES’ exploration of the area. Neither the Claimant nor its subsidiaries had any right to explore or to apply for a new exploration license after the Claimant allowed the initial exploration period to expire without having applied for a renewal. Thus, so the Respondent concludes, any such claims regarding renewal must be dismissed.

#### ***E. The Tribunal’s Analyses***

- 9.17. The Tribunal addresses these projects separately, in turn. However, much of the factual and legal materials overlap between several of these projects.

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<sup>397</sup> RL-8.

<sup>398</sup> C-713.

<sup>399</sup> Tr. D1.228; Tr. D7.1982.

<sup>400</sup> Tr. D7.1982.

- 9.18. (i) *Zamora/Cerro Colorado*: The Claimant, by its two subsidiary companies, PRES and DOREX, was never a licensee for these projects. The Claimant (by itself or by one of its subsidiaries) had contractual rights with a third party in the form of an amended option agreement; but nothing more. In these circumstances, where the Claimant bears the burden of proving its case as regards liability, causation and injury, the Tribunal concludes that it has not discharged that burden.
- 9.19. (ii) *Guaco*: Under the Mining Law and Mining Regulations, DOREX had no legal right to apply for this exploration licence from the Bureau because its area overlapped with the area of the former El Dorado exploration licences. Article 17 of the Mining Regulations so provided, as cited immediately above and more fully in Part II. It is not entirely clear why the Bureau and the Ministry of Economy was so accommodating to DOREX. However, at the time (August-September 2005), the Bureau and the Ministry of Industry were still actively concerned to assist the Claimant in regard to the El Dorado Project; and this exploration area was contiguous with the area of the requested El Dorado exploitation concession. By March 2008, however, that benevolent relationship lay in the past. It is also clear that DOREX would not have received from the Bureau any exploitation concession for any part of the area of its exploration licence at Guaco. Like PRES, DOREX would have had to confront Article 37(2)(b) of the Mining Law and, as with PRES under the same direction from the Claimant, DOREX would not have satisfied its requirements. Further, it is not clear what legal injury was suffered by DOREX resulting from the Respondent's conduct in regard to this particular project on 10 March 2008 or thereafter. As regards causation and injury, the Tribunal concludes that the Claimant has not discharged its legal burden of proof.
- 9.20. (iii) *Pueblos*: The same analysis as Guaco, as regards causation and injury, applies to Pueblos.
- 9.21. (iv) *Huacuco*: The same analysis as Guaco, as regards causation and injury, applies to Huacuco.
- 9.22. (v) *Santa Rita*: The available evidence as a whole is sparse. However, it shows that PRES faced intermittent difficulties from local communities at Santa Rita in 2006 and 2007, before President Saca's announcement on 10 March 2008. Moreover, whilst that

announcement badly affected pending or future applications for exploitation concessions, it did not directly affect extant exploration licences. The reasons for PRES' departure from Santa Rita seems to have had much more to do with the demise of the Claimant's other projects in El Salvador, particularly its principal project at El Dorado. The consequential abandonment of the Santa Rita project by the Claimant is readily understandable; but the Tribunal does not consider that it resulted from any wrongful conduct by the Respondent towards this particular project under the Mining Law or Investment Law on or after 10 March 2008.

- 9.23. As regards the issues of extension and renewal, the Claimant allowed this exploration licence to expire without any request for an extension from the Bureau. Thus, under Article 27 of the Mining Law and Article 11(2) of the Mining Regulations, the Respondent was not legally required to grant any extension or renewal, as explained to the Claimant by the Bureau's letter dated 16 July 2009.<sup>401</sup>
- 9.24. Hence, as regards liability and causation, the Tribunal concludes that the Claimant has not discharged its legal burden of proof.
- 9.25. *Conclusion:* In these circumstances, in respect of these Other Mining Areas, the Claimant can have no claim for damages against the Respondent (at 10 March 2008 or later) under Articles 4, 5, 6, 8 and 13 of the Investment Law, the Constitution and (if and to the extent applicable) customary international law. The Claimant has not established its allegations as regards liability, causation and injury. Accordingly, the Tribunal dismisses on their merits these five ancillary claims as pleaded by the Claimant against the Respondent in this arbitration.

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<sup>401</sup> R-22.

## **PART X: THE TRIBUNAL'S DECISIONS**

### ***A. Introduction***

- 10.1. The Tribunal here addresses the Tribunal's list of principal issues in Part IV above and the Parties' respective prayers for relief in Part III above as to jurisdiction and the merits. (The Tribunal addresses the issues of costs in Part XI below).
- 10.2. It will be recalled that the Claimant, as recorded in Part I above, makes no claim for damages under the Investment Law or customary international law in regard to any measure by the Respondent before 10 March 2008 (being the date of President Saca's alleged "*de facto* mining ban", publicly reported on 11 March 2008). In its own words, the "Claimant is alleging damages only from the period from 10 March 2008 forward and not from any earlier period." It follows that, although the earlier period from 2001 up to 10 March 2008 provides an important factual background to all the Claimant's claims (whether by itself or with PRES or DOREX), that background does not provide the Claimant with any cause of action sounding in damages under the Investment Law or (if and to the extent applicable) customary international law.

### ***B. Jurisdiction***

- 10.3. As to the first principal issue ("Additional Jurisdictional Objections"), as decided in Part V above, the Tribunal dismisses the Respondent's additional jurisdictional objections; and it re-affirms its jurisdiction under Article 15(a) of the Investment Law and Article 25(1) of the ICSID Convention to decide on their respective legal and factual merits the Claimant's claims and the Respondent's defences pleaded in this third phase of the arbitration.

### ***C. Liability-El Dorado***

- 10.4. As to the second principal issue ("Liability – El Dorado"), for the factual and legal reasons stated in Parts VI to VIII above, the Tribunal decides that PRES had no legal entitlement under the Mining Law to obtain from the Respondent and the Respondent no legal obligation to grant to PRES any exploitation concession for its El Dorado Project, owing to the continued inadmissibility of PRES' application of 22 December 2004 under Article 37(2)(b) of the Mining Law. In addition, PRES' exploration licences for its El Dorado



Project expired on 1 January 2005 in accordance with the Mining Law. Accordingly, as at 10 March 2008, the Claimant (with PRES) had no legal right to any concession at El Dorado and no rights of property in any part of its sub-soil or any of its deposits under Salvadoran law.

- 10.5. In these circumstances, the Claimant can have no claim for damages as pleaded against the Respondent (at 10 March 2008 or later) under Articles 4, 5, 6, 8 and 13 of the Investment Law (including the Respondent's Constitution) as regards the El Dorado Project. Further, for similar reasons, the Claimant's claim for damages, as pleaded against the Respondent under customary international law (if and to the extent applicable) fails for want of any relevant legal right or right of property as at 10 March 2008 protected under Salvadoran law and international law.
- 10.6. Given the Tribunal's decisions regarding the application of Article 37(2)(b) of the Mining Law and its dismissal of the Claimant's pleaded claim for damages as regards the El Dorado Project, it is unnecessary here for the Tribunal to address further and decide separately the other issues arising under Article 37(2)(c) and Article 37(2)(d) of the Mining Law. It would unduly lengthen this already long Award and, whatever the answer, it could not affect the end-result of this Award. Hence, the Tribunal declines to do so. However, nothing should be assumed (one way or the other) as to how the Tribunal would have decided these issues, if it had been required to do so.

#### ***D. Other Mining Areas***

- 10.7. As to the third principal issue ("Liability – Other Areas), as addressed and decided in Part IX above, the Tribunal dismisses the Claimant's claim for damages as regards (i) Zamora/Cerro Colorado; (ii) Guaco; (iii) Pueblos; (iv) Huacuco; and (v) Santa Rita, for the reasons there stated.

#### ***E. Damages***

- 10.8. As to the fourth principal issue regarding quantum, it does not arise given the Tribunal's earlier decisions in this Award.

***F. Interest***

10.9. As to the fifth principal issue regarding interest, it does not arise given the Tribunal's earlier decisions in this Award.

***G. Legal and Arbitration Costs***

10.10. As to the sixth principal issue regarding costs, as already indicated, it is addressed in Part XI below.

***H. The Parties' Respective Prayers for Relief***

10.11. As to the Claimant's prayer for relief recited in Part III(E) above, the Tribunal dismisses paragraphs (1), (2), (4) and (5). (It addresses paragraph (3) on costs in Part XI below).

10.12. As to the Respondent's prayer for relief also recited in Part III(E) above, the Tribunal dismisses paragraphs (1) and (4); and it grants paragraph (2) for the reasons stated above. (It addresses paragraph (3) on costs in Part XI below).

## **PART XI: LEGAL AND ARBITRATION COSTS**

### ***A. Introduction***

- 11.1. In its Decision on Preliminary Objections (at paragraph 266(3)) and its Decision on Jurisdiction (at paragraph 7.1 C), the Tribunal made no order as regards costs, save to reserve in full its jurisdiction and powers to make any order as regards costs in an Award subsequent to these Decisions.
- 11.2. During the last day of the hearing (on the merits), the Tribunal invited the Parties to file written submissions and reply submissions on costs by 21 November 2014 and 5 December 2014, respectively. Both Parties subsequently filed their submissions and reply submissions on the designated dates.
- 11.3. Both Parties request an order of costs in respect of both their own legal fees and expenses (“Legal Costs”) and the costs, fees and expenses of the Tribunal and ICSID in connection with this arbitration for which the Parties are jointly and severally liable (“Arbitration Costs”).
- 11.4. As to its own Legal Costs, the Claimant’s legal fees and expenses amount to US\$ 9,971,503.47 (including a success fee payable in the sum of US\$ 2.5 million). As to Arbitration Costs, the Claimant has advanced US\$ 1,049,867.00 to ICSID as well as a lodging fee to ICSID of US\$ 20,000 towards ICSID’s administrative fees and expenses, and the fees and expenses of the Members of the Tribunal.
- 11.5. As to its own Legal Costs, the Respondent’s legal fees and expenses amount to US\$ 11,910,696.00. As to Arbitration Costs, it has advanced US\$ 1,050,126.30 to ICSID towards ICSID’s administrative fees and expenses, and the fees and expenses of the Members of the Tribunal.
- 11.6. Each Party divided its costs into the following three categories: (i) costs relating to the preliminary objections first phase of the arbitration, (ii) costs relating to the jurisdictional second phase of this arbitration and (iii) costs relating to this merits third phase of the arbitration. The Tribunal refers to Annex 1 to the Claimant’s costs submissions and the annexure to the Respondent’s costs submissions for the relevant figures. It is unnecessary

here to recite the relevant figures broken into these three phases: it suffices for present purposes to state that the relative proportions for the first phase “Preliminary Objections”, the second phase “Jurisdiction” and the third phase “Merits” are approximately: 21%; 19.5% and 59.5% respectively.

11.7. It is necessary to explain these three distinct procedural phases, required under CAFTA Article 10.20.4 and the ICSID Convention. As was stated by the tribunal in *RDC v Guatemala* (2010) in regard to its own successive hearings, these distinct procedural phases are “inconvenient, to say the least.”<sup>402</sup> The costs of this arbitration were substantially increased by these three separate phases.

11.8. *Arbitration Costs*: The total fees and expenses of the Tribunal and ICSID’s administrative fees and expenses are the following:

Professor Tawil

Expenses: US\$ 50,904.25

Fees: US\$ 476,250.00

Professor Stern

Expenses: US\$ 38,324.71

Fees: US\$ 336,000.00

V.V.Veeder

Expenses: US\$ 67,729.96

Fees: US\$ 403,500.00

ICSID

Administrative fees and expenses: US\$ 505,639.09

*Total: US\$ 1,878,348.01*

11.9. The Tribunal’s fees and expenses, as well as ICSID’s administrative fees and expenses, are paid out of the advances made by the Parties. As a result, each Party’s share of the costs of arbitration amounts to US\$ 939,174.005 (being 50% of US\$ 1,878,348.01).

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<sup>402</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No ARB/07/23, Second Decision on Objections to Jurisdiction, Award (18 May 2010); footnote 2.

***B. The Tribunal's Analysis***

- 11.10. Article 61(2) of the ICSID Convention provides that: “[t]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”
- 11.11. ICSID Arbitration Rule 47(1) provides that the Tribunal’s Award “shall contain [...] (j) any decision [...] regarding the cost of the proceeding.”
- 11.12. Article 61 of the ICSID Convention grants the Tribunal discretion to allocate all costs of the arbitration, including attorney’s fees and other costs, between the Parties as it deems appropriate.
- 11.13. For the purpose of deciding costs in this Award, in addition to the Parties’ submissions of November and December 2014, the Tribunal has also taken into account the Parties’ earlier submissions as regards the allocation and assessment of costs made in regard to both the first phase (Preliminary Objections) and the second phase (Jurisdiction) of this arbitration. In the circumstances, it is unnecessary here to address these submissions in full. It is, however, necessary to recall the Tribunal’s approach on costs contained in its previous Decision on Preliminary Objections and Decision on Jurisdiction.
- 11.14. In its Decision on Preliminary Objections, the Tribunal noted that the Respondent’s request was the first application made under CAFTA Article 10.20.4 and also the first time that the expedited procedure under CAFTA Article 10.20.5 was invoked for a preliminary objection under CAFTA Article 10.20.4. As such, there was thus much to be learnt for all involved in this arbitration. The Tribunal concluded that the Respondent’s Preliminary Objections could not be regarded as “frivolous” within the meaning of CAFTA Article 10.20.6.
- 11.15. As regards the Decision on Jurisdiction, the Tribunal considered that neither the Claimant nor the Respondent could be regarded as having either wholly succeeded or wholly lost their respective cases. The Tribunal decided that whilst the Claimant’s CAFTA Claims could no longer proceed in this arbitration as a result of its jurisdictional decision, the

Claimant's Non-CAFTA Claims under the Respondent's Investment Law could proceed to the merits of the Parties' dispute (as has occurred). The Tribunal concluded in that Decision that: "the eventual result of the Non-CAFTA Claims on the merits may provide a highly relevant factor to any decision as to the final allocation of legal and arbitration costs between the Parties": see paragraph 6.80.

- 11.16. The Tribunal considers that it has a broad discretion as to the award of costs under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j). In the Tribunal's view, the following factors in this case are relevant to the exercise of such discretion.
- 11.17. First, as noted above, the Tribunal has decided that the Respondent is to be considered as the prevailing party in the merits phase of this arbitration. Second, as already indicated, the Tribunal decided in its Decision on Jurisdiction that neither Party could be considered as having prevailed overall. Third, as also indicated, whilst the Claimant's case prevailed over the Respondent's case under the Tribunal's Decision on Preliminary Objections, it was perhaps, as the Duke of Wellington might have put it (as he did of the Battle of Waterloo), a "near-run thing" with consequences for this third phase on the merits. Lastly, the Claimant's case prevailed over the Respondent's case on the latter's Additional Jurisdictional Objections.
- 11.18. In the exercise of its discretion as to Legal Costs, the Tribunal has decided to reject in full the Claimant's claim for its Legal Costs against the Respondent and to order the Claimant to pay to the Respondent a proportion of its Legal Costs in the total amount of US\$ 8 million.
- 11.19. In the exercise of its separate discretion as to Arbitration Costs, the Tribunal has decided to reject both Parties' claims for Arbitration Costs *inter se*, ordering each Party to bear its own share of Arbitration Costs.

### ***C. The Tribunal's Decision***

- 11.20. Accordingly, for the reasons stated above, the Tribunal orders the Claimant to pay to the Respondent the total amount of US\$ 8 million towards the latter's Legal Costs; and, save as aforesaid, the Tribunal rejects all other claims for Legal and Arbitration Costs made by the Parties.

## **PART XII: THE OPERATIVE PART**

**12.1. For the reasons set out and incorporated above, the Tribunal decides and awards as follows:**

- (1) It has jurisdiction to decide the Claimant's claims and the Respondent's defences pleaded in this third phase of the arbitration on their respective merits;**
- (2) It dismisses the Respondent's Additional Jurisdictional Objections;**
- (3) It dismisses on their merits all the Claimant's pleaded claims for damages and interest in this third phase of the arbitration;**
- (4) As to Legal Costs incurred in the arbitration, it orders the Claimant to pay to the Respondent the total sum of United States Dollars 8 million; and it dismisses the Claimant's claim for Legal Costs against the Respondent;**
- (5) As to Arbitration Costs incurred in the arbitration, it orders both the Claimant and the Respondent to bear in full their own share of the Arbitration Costs without any recourse to the other; and**
- (6) Save as aforesaid, all extant claims by the Claimant and the Respondent pleaded in this third phase of the arbitration are dismissed.**

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Brigitte Stern.

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Prof. Brigitte Stern

Arbitrator

Date: 7 October 2014



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Prof. Dr. Guido Tawil

Arbitrator

Date: 3 October 2016



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V.V. Veeder

President

Date: 11 October 2016