

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

- - - - -x
 In the Matter of Arbitration :
 Between: :
 :
 PAC RIM CAYMAN LLC, :
 : Case No.
 Claimant, : ARB/09/12
 :
 and :
 :
 REPUBLIC OF EL SALVADOR, :
 :
 Respondent. :
 - - - - -: Volume 1

HEARING ON JURISDICTION

Monday, May 2, 2011

The World Bank
MC Building
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:00 a.m., before:

- MR. V.V. VEEDER, President
- PROF. BRIGITTE STERN, Co-Arbitrator
- PROF. GUIDO SANTIAGO TAWIL, Co-Arbitrator

Also Present:

MR. MARCO T. MONTAÑÉS-RUMAYOR
Secretary of the Tribunal

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1 P R O C E E D I N G S

2 PRESIDENT VEEDER: Let's begin.

3 Good morning, ladies and gentlemen. This is
4 ICSID Case Number ARB/09/12, and we now start the
5 first day of this jurisdiction hearing. We need, I
6 hope, no introductions, and the Tribunal also
7 understands that there are no immediate procedural
8 issues to be addressed at this stage.

9 And so, accordingly, we give the floor to the
10 Respondent for its opening presentation this morning.

11 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

12 MR. SMITH: Thank you, Mr. President, Members
13 of the Tribunal. I'm Derek Smith of Dewey & LeBoeuf
14 here on behalf of the Republic of El Salvador.

15 Mr. President, Members of the Tribunal, we're
16 before you to present El Salvador's oral statement on
17 its Objection to Jurisdiction.

18 El Salvador's primary objection is that the
19 Canadian company, Pacific Rim Mining Corp., has abused
20 the international arbitration process by manipulation
21 of the corporate form to change the nationality of Pac
22 Rim Cayman to permit it to assert jurisdiction as a

09:01:37 1 national of the United States in this arbitration.

2 The initiation of the arbitration amounts to abuse of
3 process because the manipulation of Claimant's
4 nationality occurred after the alleged interference
5 with Pacific Rim Mining's investment.

6 This abusive process through Claimant's
7 change of nationality implicates both its CAFTA claims
8 and its claims under the Investment Law of El
9 Salvador. The change to U.S. nationality facilitated
10 Pac Rim Cayman's efforts to gain ICSID jurisdiction to
11 bring its claims under the Investment Law under the
12 ICSID Convention, and it taints the entire proceeding.

13 Because this entire arbitration must be
14 dismissed as a result of the abuse of process, El
15 Salvador considers that it will be unnecessary for the
16 Tribunal to address other objections. Nevertheless,
17 because there are other very substantial reasons why
18 there is no jurisdiction in this matter, El Salvador
19 has also demonstrated that there is no jurisdiction
20 because of the application of the denial-of-benefits
21 clause in CAFTA Article 10.12.

22 There is also no jurisdiction *ratione*

09:03:05 1 temporis under CAFTA; and, finally, there is no
2 independent jurisdiction under the Investment Law of
3 El Salvador.

4 Some of the above objections arise under
5 provisions of CAFTA. It is important to note,
6 however, that if the CAFTA proceeding is dismissed,
7 the entire arbitration must be dismissed. As this
8 Tribunal has held in its decision on the preliminary
9 objection, there is only one proceeding here because,
10 and I quote, "These arbitration proceedings are
11 indivisible, being the same single ICSID arbitration
12 between the same Parties before the same Tribunal in
13 receipt of the same Notice of Arbitration registered
14 once by the ICSID Acting Secretary-General under the
15 ICSID Convention." Thus, the CAFTA claims and the
16 Investment Law claims are indivisible; and, if the
17 CAFTA claims are dismissed, so must be the Investment
18 Law claims be dismissed.

19 If, on the other hand, the Tribunal were to
20 reverse this finding and determine that the
21 proceedings are not indivisible and that the
22 investment claims--then the Investment Law claims

09:04:25 1 would have to be dismissed because of Claimant's
2 waiver under CAFTA 10.18.2. Claimant waived any right
3 to initiate or continue before any administrative
4 tribunal or court under the law of any Party or other
5 dispute-settlement procedures any proceeding with
6 respect to any measure alleged to constitute a breach
7 referred to in Article 10.16.

8 If the proceedings are not indivisible as
9 held by the Tribunal and the proceeding under the
10 Investment Law continues, such proceeding would be, by
11 definition, subject to the waiver.

12 Today my colleagues Aldo Badini, Luis Parada,
13 and I will present El Salvador's oral submissions. I
14 will begin with our presentation on the abuse of
15 process objections. Mr. Badini will follow me with
16 our presentation on the denial of benefits, and
17 Mr. Parada will conclude our time with our
18 presentations on the *ratione temporis* objections and
19 the Objections to Jurisdiction under the Investment
20 Law of El Salvador.

21 Let me now begin with the abuse of process
22 objection.

09:05:53 1 During this presentation, I will explain why
2 the Tribunal must dismiss this entire arbitration
3 because of Claimant's abuse of the international
4 arbitration process. In summary, Pacific Rim Mining
5 Corp. of Canada manipulated the corporate form of a
6 Cayman Islands shell company to make it a national of
7 the United States so that it will be able to initiate
8 this arbitration. That manipulation culminated on
9 December 13, 2007, after the alleged interference with
10 Pacific Rim Mining's investment in El Salvador and
11 after the dispute that is the subject of this
12 arbitration had clearly begun. El Salvador's
13 pleadings set forth the basis for the Tribunal's power
14 to dismiss this arbitration for abuse of process, and
15 Claimant has not disputed that the Tribunal has such
16 authority.

17 The legal regime of abuse of process is also
18 clear from El Salvador's written pleadings and can be
19 summarized as follows: The notion of abuse of process
20 has long existed in international law. The Phoenix
21 Action Tribunal was the first to dismiss an
22 arbitration based squarely on this doctrine. The

09:07:24 1 Phoenix Tribunal began its analysis of abusive
2 manipulation of the corporate form with reference to
3 the cases of Banro and Mihaly. Each of these cases
4 concerned a foreign investor not entitled to the
5 protection of international arbitration that
6 transferred its claim to another and foreign investor
7 entitled to protection in order to assert
8 jurisdiction. The tribunals in Banro and Mihaly
9 refused to allow the Companies to benefit from such
10 manipulation and concluded that they did not have
11 jurisdiction.

12 From these cases the Phoenix Tribunal
13 concluded, and I quote, "According to ICSID case law,
14 a corporation cannot modify the structure of its
15 investment for the sole purpose of gaining access to
16 ICSID jurisdiction after damages have occurred. To
17 change the structure of a company complaining of
18 measures adopted by a State for the sole purpose of
19 acquiring an ICSID claim that did not exist before
20 such change cannot give birth to a protected
21 investment."

22 The Tribunal drew a clear distinction between

09:08:39 1 structuring investments upstream to choose the best
2 structure in advance of making an investment which is
3 permissible, and the manipulation of corporate
4 structure to gain jurisdiction after an investment is
5 made and the investor believes the host Government has
6 acted to interfere with the investment. This is
7 prohibited and amounts to abuse of process. In this
8 regard, the Phoenix Action Tribunal stated that, "An
9 international investor cannot modify downstream the
10 protection granted to its investment by the host
11 State, once the acts which the investor considers are
12 causing damage to its investment have already been
13 committed."

14 Thus, while the specific facts before the
15 Phoenix Tribunal involved manipulation of an
16 investment so that a national investor could access
17 international arbitration under the ICSID Convention,
18 the principle applies equally when a foreign investor
19 manipulates the corporate structure to gain access to
20 international arbitration that otherwise it would not
21 have had.

22 In fact, as shown by the Phoenix Tribunal's

09:09:58 1 reliance on Banro, the principle has its roots in
2 cases similar to the current case involving attempts
3 by Canadian foreign Investors to access the ICSID
4 system through manipulation that results in the use of
5 a claimant from the United States.

6 Therefore, Claimant's attempts to distinguish
7 itself from the Claimant in Phoenix Action based on
8 the fact that Claimant's parent company is a Canadian
9 foreign investor rather than a national investor has
10 no bearing on the abuse of process determination. The
11 Tribunal in Mobil versus Venezuela clearly shared this
12 view. That Tribunal cited the Phoenix Award in
13 relation to a situation similar to the case at hand
14 involving a change in nationality by a foreign
15 investor. Like Phoenix, the Mobil Tribunal concluded
16 that although the structuring can be legitimate if it
17 occurs before a dispute begins, and I quote, "With
18 respect to existing disputes, the situation is
19 different, and the Tribunal considers that to
20 restructure investments only in order to gain
21 jurisdiction under a BIT for such disputes would
22 constitute, to take the words of the Phoenix Tribunal,

09:11:20 1 'an abusive manipulation of the system of
2 international investment protection under the ICSID
3 Convention and the BITs.'"

4 The Mobil Tribunal, therefore, determined
5 that it only had jurisdiction for disputes born after
6 the restructuring and no jurisdiction, "with respect
7 to any dispute born before those dates."

8 Thus, according to settled ICSID case law,
9 while there are different ways in which a Party might
10 abuse the international arbitration process, in cases
11 such as the matter under consideration where the abuse
12 concerns the manipulation of the corporate form to
13 change nationality to gain jurisdiction over a
14 pre-existing dispute, there is, in essence, a
15 two-pronged test for abuse of process:

16 First, was the corporate form manipulated in
17 a way that allowed the Claimant to access jurisdiction
18 where it otherwise would not have been able to do so?

19 And, second, did the change of nationality
20 take place after the alleged interference with the
21 investment or after the dispute began or became
22 foreseeable?

09:12:49 1 As has been demonstrated in El Salvador's
2 pleadings and will again be shown today, both these
3 criteria are clearly met in the present case.
4 Moreover, while there is no requirement for the
5 Tribunal to make an affirmative finding of bad faith,
6 bad faith clearly exists by virtue of the manipulation
7 of the corporate structure to gain access to ICSID and
8 captive jurisdiction after the alleged interference
9 with the investment. Ex post-Treaty shopping done
10 after the events affecting the investment cannot be
11 considered good faith. Bad faith is inherent in this
12 type of manipulation. Here, in addition, there are
13 aggravating factors that have no doubt--that leave no
14 doubt as to the existence of bad faith. Claimant and
15 its Canadian parent company have acted in bad faith.

16 First, there is a lack of good faith in
17 carrying out and concealing the abuse.

18 Second, the nationality was changed well
19 after the date of the measures that allegedly harmed
20 Claimant.

21 Third, there was no legitimate business
22 purpose for moving the shell company from the Cayman

09:14:06 1 Islands to the United States.

2 And, fourth, before the change of
3 nationality, Pacific Rim Mining never made El Salvador
4 aware that the Canadian investor was preparing to
5 claim U.S. nationality. And before initiating this
6 arbitration, Claimant never claimed to be owned or
7 controlled from the United States. In fact, Pacific
8 Rim has always presented itself to the Government of
9 El Salvador as a Canadian investor. All of the
10 investments in El Salvador were made with funds
11 transferred directly to El Salvador from Canadian
12 entities. There was never any hint that El Salvador
13 was dealing with a national of the United States.
14 There is, thus, no doubt that the manipulation of
15 Claimant's nationality was in bad faith.

16 Now as regards the first prong of the test
17 for abuse of process, it is now undisputed that
18 Pacific Rim Mining of Canada manipulated the corporate
19 form of its Cayman Islands shell company so that it
20 could assert jurisdiction in this matter. Despite
21 early efforts to obscure the change of nationality,
22 Claimant has now admitted that access to CAFTA and

09:15:32 1 ICSID arbitration proceedings was a consideration when
2 the Decision was made to change its nationality so
3 that it could be used as a claimant in arbitration
4 against El Salvador. This is clear from Claimant's
5 Counter-Memorial at Paragraph 394 and from
6 Mr. Shrake's Witness Statement at Paragraph 113. I
7 won't read those out now, but it is very clear that
8 Claimant now recognizes that the change of nationality
9 had at least as one purpose access to jurisdiction;
10 thus, the first prong for the test of abuse of process
11 is met.

12 As regards the second prong of the test for
13 abuse of process, as I will discuss in a moment, El
14 Salvador has also shown that Claimant's own factual
15 allegations upon initiating this case as well as
16 undisputed evidence adduced by El Salvador during the
17 Preliminary Objections demonstrate unequivocally that
18 the alleged Government interference with the
19 investment took place well before Claimant's change of
20 nationality in December of 2007, and that the dispute
21 was clearly born before that date.

22 Claimant's own Notice of Arbitration

09:16:56 1 demonstrates beyond any doubt that a dispute existed
2 well before its change of nationality in December of
3 2007. When it filed the first document in this
4 arbitration, Claimant clearly and unequivocally stated
5 that its claims arise from multiple alleged measures
6 that all took place between December 2004 and January
7 of 2007. At Paragraph 7 of the Notice of Arbitration,
8 Claimant alleged, "As previously set out in the Notice
9 of Intent and further summarized herein, PRC's claims
10 arise out of unlawful and politically motivated
11 measures"--in the plural--"taken by the Government of
12 Elias Antonio Saca Gonzalez through the Ministerio de
13 Medio Ambiente y Recursos Naturales (MARN) and MINEC,
14 against Claimant's investments." Please note here the
15 use of the plural "measures" as it would be very
16 important to the decision in this case.

17 Also note the cross-reference to the Notice
18 of Intent.

19 In addition to the crystal clear statements
20 in Claimant's Notice of Arbitration and particularly
21 the Notice of Intent, El Salvador has presented
22 copious contemporaneous documentary evidence that

09:18:29 1 establishes beyond any doubt that a dispute existed
2 before December 13th, 2007, and that Claimant's
3 Canadian parent, Pacific Rim Mining, was aware of and
4 was actively attempting to resolve that dispute when
5 its senior executives decided to manipulate Claimant's
6 corporate form to gain access to ICSID arbitration
7 under CAFTA that neither the Canadian parent nor
8 Claimant would have otherwise had. Therefore, the
9 second prong of the abuse of process test is also met.

10 Claimant, however, rather than recognize the
11 facts that stand out so clearly from the record has
12 instead decided to compound its bad faith abuse by
13 making new and contradictory factual assertions and
14 adopting novel legal positions that contradict the
15 premise of its case as set forth in the Notice of
16 Intent. Fortunately, despite the volumes of largely
17 irrelevant information put in the record by Claimant
18 and the more than 400 pages of its Counter-Memorial
19 and Rejoinder, the written pleadings have actually
20 served their intended purpose of narrowing the issues
21 for decision.

22 As Claimant recognized in its

09:19:58 1 Counter-Memorial at Paragraph 400, the Tribunal's
2 Decision on abuse of process hinges on the answer to
3 one question: Did the alleged Government interference
4 with the investment take place prior to December 13,
5 2007? If the dispute was born on that date when the
6 change of nationality was made and the change allowed
7 an otherwise ineligible company to access the
8 international arbitration system by abusing El
9 Salvador's offer of consent, then there was an abuse
10 of process. Because the Tribunal's determination of
11 abuse of process hinges on this factual question and
12 because Claimant has done its utmost to confuse
13 matters, we would like to spend most of our time today
14 making sure that the Tribunal knows the facts as
15 originally alleged by Claimant and proven by El
16 Salvador.

17 Before setting forth the facts that
18 demonstrate beyond any possible doubt that a dispute
19 arose and the alleged interference with Claimant's
20 investment took place before December 13, 2007, I want
21 to remind the Tribunal that Claimant's defense against
22 El Salvador's abuse of process suggestion rests

09:21:25 1 entirely on its repeated assertion that, "The measure
2 at issue is Respondent's de facto ban on mining
3 operations, a practice which then-President Saca
4 announced in March 2008." This definition of the
5 dispute was created by Claimants well after it filed
6 its Notice of Arbitration and was put forth in a post
7 hoc effort to survive the abuse of process objection,
8 and is contradicted by the facts pleaded in the Notice
9 of Arbitration and by the uncontested evidence El
10 Salvador has placed in the record.

11 The Tribunal will no doubt find it curious
12 that Claimant is now denying its own pleaded factual
13 allegations and that El Salvador now insists that it
14 has put on uncontroverted evidence to prove certain
15 aspects of those allegations. But this is just the
16 result of the tangled confusion caused by Claimant's
17 deceptive attempts to avoid the consequences of an
18 early act of bad faith. One cannot help but think of
19 a famous quote that is often wrongly attributed to
20 Shakespeare: "Oh, what a tangled web we weave when
21 first we practice to deceive."

22 Now, let me focus on the facts alleged by

09:23:04 1 Claimant and the facts proven by El Salvador. The
2 most compelling indication that the alleged
3 interference with the investment took place and the
4 dispute had begun by December 13, 2007, is the
5 recitation of factual allegations and the definition
6 of dispute set forth in Claimant's own Notice of
7 Arbitration, and more specifically the Notice of
8 Intent, which, according to Claimant's counsel was,
9 "incorporated by reference in the Notice of
10 Arbitration."

11 So, all of the allegations in the Notice of
12 Intent are part of the Notice of Arbitration according
13 to Claimant's counsel.

14 I urge the members of the Tribunal to re-read
15 the Notice of Intent at this stage of the case to
16 recall in detail how Claimant described at the
17 beginning of this case the dispute and the measures
18 alleged to have interfered with the investment. The
19 statements that I will read from the Notice of Intent
20 constitute factual allegations that Claimant insists
21 the Tribunal must assume to be true. They also
22 represent the definition of the dispute and relevant

09:24:30 1 measures from Claimant's point of view when it decided
2 to initiate these proceedings. The definition of the
3 dispute is uncontaminated by Claimant's knowledge of
4 El Salvador's abuse of process objection. The
5 relevant part of Claimant's description of the dispute
6 begins in the unnumbered paragraphs of the
7 introduction to its Notice of Intent.

8 This is a rather long quote, but I think it
9 is well worth reading at this time. "PRC's claims
10 arise out of unlawful and politically motivated
11 measures taken by the Government of El Salvador
12 through the Ministerio de Medio Ambiente y Recursos
13 Naturales, MARN; that is the environment ministry, and
14 the Ministerio de Economia, MINEC, the Ministry of
15 Economy, against the Enterprises' businesses and
16 operations in the area of Las Cabanas. These measures
17 have included, inter alia, the arbitrary imposition of
18 unreasonable delays and unprecedented regulatory
19 obstacles designed and implemented with the aim of
20 preventing PRES, and DOREX, which are the local Pac
21 Rim affiliates, from developing gold mining rights in
22 which PRC, through those Enterprises, has made

09:26:06 1 substantial and long-term investments. As a result of
2 the measures, the rights held by the Enterprises have
3 been rendered virtually valueless, and PRC's
4 investment in El Salvador has been effectively
5 destroyed."

6 This is Claimant's summary of the dispute
7 presented on December 9, 2008, used to introduce the
8 reasons why it initiated this arbitration. There are
9 three very important things to note about this concise
10 statement of Claimant's view of the dispute. First,
11 here, and in fact throughout the entire Notice of
12 Intent and Notice of Arbitration, Claimant refers to
13 multiple measures, in the plural, that took place
14 between 2004 and 2007 that allegedly interfered with
15 its investment.

16 Second, the measures are defined as
17 unreasonable delays and regulatory obstacles.

18 The measures are defined as delays and
19 regulatory obstacles, and these are the measures which
20 Claimant claims rendered the rights held by
21 enterprises virtually valueless and have effectively
22 destroyed the investment.

09:27:53 1 And finally, there is no mention of the press
2 article about former President Saca and no mention of
3 an alleged de facto ban on mining. The truth of the
4 matter is the phrase de facto ban on mining or, for
5 that matter, the word ban does not appear anywhere in
6 the Notice of Arbitration., including the Notice of
7 Intent, not in the 55 pages of the main body of the
8 Notice of Arbitration, not in the additional 16 pages
9 of the annex Notice of Intent, nor in any of the eight
10 other annexes to the Notice of Arbitration. Not once.

11 The facts alleged in the detailed section of
12 the Notice of Intent confirm with absolute clarity
13 that the alleged interference with the investment took
14 place and the dispute existed as early as 2004 and
15 certainly by December 2007. Beginning at Paragraph 17
16 of the Notice of Intent, Claimant describes how and
17 when it believes the dispute began, and importantly it
18 describes the measures it claims interfered with its
19 investment and caused it harm as well as how those
20 measures were communicated to Pacific Rim Mining of
21 Canada through its Salvadoran subsidiaries from 2004
22 to 2007. Claimant's description of how and when the

09:29:27 1 dispute arose begins at Paragraph 17 of the Notice of
2 Intent. The Government began to reverse its previous
3 policy and adopt measures specifically aimed at their
4 activities; that is, the activities of the local
5 subsidiaries.

6 So, according to Claimant, there was a change
7 in Government policy that led to measures--again in
8 the plural--that affected the investment that were
9 specifically aimed at Pacific Rim's activities. This
10 is very different from a general ban on mining. The
11 following text from Paragraph 18 of the Notice of
12 Intent indicates when Claimants believe or believed
13 the change in policy and the imposition of measures
14 began. And I quote from Paragraph 18 of Claimant's
15 Notice of Intent: "The Government's nascent
16 opposition to the Enterprises' operations was first
17 manifested by MARN in late 2005, when it began
18 delaying"--again, delaying--"its responses to their
19 applications for environmental permits without
20 explanation. Soon thereafter, it began to arbitrarily
21 change or add new requirements to the established
22 legal process for obtaining such permits." It is

09:31:02 1 important to recall that Claimant defined the measures
2 affecting its investments as delays and regulatory
3 obstacles. Thus, according to Claimant's own factual
4 allegations, the alleged change in Government policy
5 was first manifested and implemented through measures
6 adopted by the Ministry of the Environment and the
7 Ministry of the Economy in 2005, a full two years
8 before Pacific Rim Mining of Canada decided to change
9 the nationality of its Cayman Islands tax shelter
10 holding company.

11 It is also clear that Claimant was aware of
12 the legal framework in El Salvador and had a clear
13 opinion regarding its rights within that framework.
14 Paragraph 23 of the Notice of Intent states, and I
15 quote, "With the submission of the water treatment
16 facility proposal in December 2006, PRES had
17 successfully addressed every observation and
18 eliminated every concern that had been expressed by
19 MARN (whether reasonable, substantiated, or otherwise)
20 throughout the improperly extended EIA review process.
21 Since that time, however, MARN has made no further
22 requests of PRES and, indeed

09:32:30 1 inexplicably"--inexplicably--"has ceased all official
2 communication with the company. Unbelievably, the
3 company has received no information from MARN
4 regarding the status of its EIA approval for over two
5 years, even though Salvadoran law clearly stipulates
6 that MARN must take definitive action on the EIA
7 submissions within 60 business days, even under
8 exceptional circumstances, within a maximum of 120
9 days."

10 Thus, Claimant originally alleged that the
11 Government had violated its own laws by failing to
12 adjudicate its Environmental Impact Assessment
13 submissions, and had cut off all official
14 communications. This began in 2004. Claimant's
15 original view that the dispute rose before
16 December 13, 2007 and is based on measures that took
17 place before that date is also obvious from its
18 description of events in 2007 but before December. At
19 Paragraph 9 of the Notice of Arbitration, Claimant
20 alleges, "Since the end of 2006, when indications
21 arose that MARN was intent on delaying the
22 Enterprises' activities, it has become increasingly

09:33:56 1 apparent that these delay tactics were designed and
2 implemented by the Government with the unlawful,
3 discriminatory, and politically motivated aim of
4 preventing their operations altogether. In this vein,
5 commencing in or about January
6 2007"--January 2007--"MARN informed the Enterprises
7 that it had taken the position clearly unfounded in
8 law that the exploration phase of the mining was
9 separate from the exploitation phase, and that, as
10 such, owners of an exploration license were not
11 entitled to engage in exploitation of their claims as
12 a matter of right."

13 The Tribunal will recall from the preliminary
14 objections that one of Claimant's central legal
15 positions at the outset of this proceeding was that,
16 and I quote from Paragraph 8 of the Notice of
17 Arbitration: "Under the plain and explicit provisions
18 of Salvadoran law, the Enterprises were entitled to
19 proceed to extract minerals upon the successful
20 completion of the exploration phase." In other words,
21 Claimant's position was that they had the right to
22 engage in exploitation as a matter of right. Thus,

09:35:28 1 Claimant alleged in its Notice of Intent that in
2 January 2007, about one year before the change of
3 nationality, that the Government informed the Pacific
4 Rim subsidiaries in El Salvador of the existence of a
5 dispute regarding the central legal claim in
6 Claimant's Notice of Arbitration. How can Claimant
7 now assert it was not aware that a dispute was even
8 possible until March of 2008?

9 But Claimant's allegation of the existence of
10 a dispute in 2007 did not stop here. At Paragraph 30
11 of the Notice of Intent, Claimant further alleged in
12 support of its claims in this arbitration that, and I
13 quote, "In addition to articulating the foregoing
14 position, MARN also informed Enterprises in 2007 that,
15 prior to the Ministry granting any environmental
16 permits, MARN would need to conduct a 'country-wide
17 strategy environmental study.'" There is, therefore,
18 no doubt that Claimant was fully aware of the
19 existence of a dispute from 2004 to 2007, and that
20 Claimant's view of this dispute is described in clear
21 and exact detail in the Notice of Intent that was the
22 very first document produced by Claimant in this

09:36:53 1 arbitration.

2 El Salvador asks the Tribunal to keep these
3 statements from Claimant's own Notice of Arbitration
4 in mind when it assesses Claimant's newly fabricated
5 position that the single measure at issue in this
6 arbitration is the alleged de facto ban on mining
7 allegedly announced by President Saca in March of
8 2008, and that Claimant did not know and could not
9 have known of the measure at issue prior to the
10 alleged announcement in March 2008.

11 I would just like to pause for a moment to
12 contrast Claimant's positions when they began this
13 arbitration with the Notice of Intent, and what they
14 stated in the Counter-Memorial after they learned of
15 El Salvador's objections. We have already read the
16 text on the left side of your screen which sets out
17 the measures, specifically the imposition of
18 unreasonable delays and unprecedented regulatory
19 obstacles that Claimant asserted began in 2005 and
20 continued through 2007, and on the right what they now
21 state as their position.

22 They now state, "Pacific Rim Mining has

09:38:32 1 maintained consistently that the measure," in the
2 singular, "at issue is El Salvador's de facto ban on
3 mining." Simply contrast the use here of the word
4 "measure" with the use of plural "measures" when they
5 first initiated this arbitration. The statement on
6 the right is clearly not true.

7 The second statement, "Claimant does not now
8 and never has contended that any disagreement dating
9 back to 2004 (even prior to March 2008) is the subject
10 of this dispute or that MARN's failure to act at those
11 times constitutes a measure in and of itself
12 constituting a breach of Respondent's CAFTA
13 obligations." This statement is clearly and directly
14 at odds with the facts alleged in the Notice of
15 Intent.

16 Next, now at the time of the
17 Counter-Memorial, Claimant alleges--having slight
18 technical difficulties--that, in fact, the measure
19 constituting the breach under Pac Rim Cayman's claim
20 is the de facto ban on mining of which Pac Rim Cayman
21 did not become aware--and, indeed, could not have
22 become aware--until March 2008. Contrast this with

09:40:13 1 the statement in the Notice of Intent that says
2 "Government's nascent opposition to the Enterprises'
3 operations was first manipulated by MARN in late
4 2005," nearly three years earlier.

5 Or with the statement that since the end of
6 2006, when indications arose that MARN was intent on
7 delaying the Enterprises' activities, or the
8 statement, "Commencing in or about January 2007, MARN
9 informed the Enterprises it had taken a position,
10 clearly unfounded in law." Claimant's new position is
11 clearly contradicted by its own Notice of Intent;
12 thus, Claimant in the same case has dramatically
13 changed its allegations of fact. It has gone from
14 alleging that it was injured by a series of measures
15 that took place from 2004 to 2007, to alleging that it
16 was injured by a single measure that took place in
17 2008.

18 El Salvador asks the Tribunal to consider
19 which definition of the dispute is the honest
20 representation of Claimant's actual beliefs regarding
21 the dispute, the one that's stated in detail on
22 December 9, 2008, when Claimant filed the Notice of

09:41:32 1 Intent or the one created after Claimant became aware
2 of El Salvador's objections. Both versions of the
3 facts cannot be true.

4 El Salvador could certainly rely solely on
5 Claimant's own factual allegations and admissions to
6 establish that the dispute existed in December of
7 2007, when the senior executives of the Canadian
8 company Pacific Rim Mining decided to change the
9 nationality of their Cayman Islands shell company to
10 the United States so it could act as Claimant in this
11 arbitration. El Salvador, however, has also provided
12 abundant uncontroverted evidence that the dispute
13 began in 2004 and continued through December 2007, and
14 that Pacific Rim Mining was aware of this dispute.

15 The Tribunal will recall from the Preliminary
16 Objections that Claimant's claims are based on the
17 actions of Ministries that adjudicate applications
18 required for obtaining a Mining Exploitation
19 Concession under the Mining Law of El Salvador.
20 First, Pacific Rim Mining, through its Salvadoran
21 subsidiary, applied to the Ministry of the Environment
22 for an environmental permit for the exploitation of

09:43:05 1 the El Dorado license are in 2004. On September 8th,
2 2004, Pacific Rim Mining El Salvador submitted an
3 Environmental Impact Assessment that had to be
4 approved before the environmental permit could be
5 issued. Under Salvadoran law, the Ministry of the
6 Environment was required to adjudicate the
7 Environmental Impact Assessment within 60 days. The
8 Ministry of the Environment did not issue a decision
9 in that time period, and Pacific Rim specifically
10 stated in a letter dated December 15, 2004, to the
11 Ministry of the Environment that this measure was in
12 violation of the law and was causing them harm.

13 In fact, the environmental permit was
14 presumptively denied after the 60-day period lapsed,
15 and Pacific Rim could have taken this to the
16 disputes--this dispute to the courts of El Salvador
17 but chose not to. Thus, the failure to grant the
18 environmental permit was one measure Claimant alleged
19 interfered with the investment and was causing it harm
20 in 2004, three years before the change of nationality.

21 The second measure that allegedly interfered
22 with the investment between 2004 and 2007, is the

09:44:39 1 termination by operation of law of the Application for
2 an Exploitation Concession for the El Dorado area and
3 submitted to the Ministry of the Economy on
4 December 22nd, 2004. As demonstrated with undisputed
5 evidence during the preliminary objections, this
6 Application was not accompanied by the documentation
7 required by law and necessary to permit the Ministry
8 of the Economy to even admit the Application for
9 adjudication. In addition to not submitting the
10 required environmental permit, the Application was
11 insufficient for additional independent reasons such
12 as the failure to include a Feasibility Study and the
13 failure to show ownership or authorization to use all
14 of the land covering the Concession area.

15 Here, I would just like to remind the
16 Tribunal of what was discussed during the Preliminary
17 Objections with regard to the aspects of the dispute
18 that centered on the land ownership and authorization
19 issue. After reviewing the exploitation Concession
20 Application in March of 2005, March of 2005,
21 Government officials informed Pacific Rim's El
22 Salvador subsidiary that the company failed show

09:46:09 1 ownership or authorization to use the entire area of
2 the requested Concession as required by the law. As
3 Claimant states in the Preliminary Objections
4 Rejoinder at Paragraph 30, the Bureau of Mines
5 informed PRES that several persons in MINEC were of
6 the view that the Mining Law required PRES to acquire
7 ownership or authorization to use the entire land
8 surface overlaying the Concession. Pacific Rim could
9 have tried to remedy the problem but chose not to,
10 instead of trying to acquire ownership or
11 authorization to use the land necessary for its
12 Application, on May 5th, 2005, Pacific Rim sent a
13 memorandum to the Bureau of Mines outlining its
14 arguments as to why it disagreed with the Government
15 on the land ownership and authorization issue. But
16 the Government did not adopt Pacific Rim's position.
17 This was in 2005. A legal dispute regarding the
18 interpretation of El Salvadoran law.

19 Having been unable to formally convince the
20 Government to change how it applied the Mining Law,
21 Pacific Rim asked the Government to adopt an authentic
22 interpretation of the Mining Law in accord with its

09:47:34 1 view or, failing that, to amend the law. According to
2 Mr. Shrake's Witness Statement, PRES's legal counsel
3 in El Salvador requested an authentic interpretation
4 of the law, and also suggested a legislative amendment
5 to clarify and resolve the issue. In an attempt to
6 work with Pacific Rim, the Ministry of Economy sent
7 the proposed authentic interpretation to the legal
8 adviser. The legal adviser rejected the proposed
9 interpretation because it would be a change and not an
10 interpretation of the law.

11 In yet another attempt to work with the
12 company, the Ministry of Economy considered amending
13 the law. As advocated by Pacific Rim, the main
14 purpose of the proposed amendment was to change the
15 surface land ownership and authorization requirement,
16 but neither the authentic interpretation nor the
17 proposed amendments to the Mining Law were adopted.
18 Thus, as of 2005, it was clear that Pacific Rim's
19 efforts to lobby the Ministry of the Economy to
20 reinterpret or change the law were not successful;
21 and, as a result, the company's Concession Application
22 was not being approved. This was two years before the

09:48:58 1 change of nationality.

2 Then, on October 2nd, 2006, the Bureau of
3 Mines sent Pacific Rim an official warning about the
4 elements lacking in its Application concession. In
5 order for the Application to be admitted for
6 adjudication, Pacific Rim was required to submit four
7 additional elements of proof, including documentation
8 of land ownership or authorization for the entire area
9 of the proposed project as well as a technical
10 economic Feasibility Study. The letter invoked
11 Article 48 of the Mining Law of El Salvador.

12 Under Article 48, Pacific Rim had 30 days to
13 fix the omission or else its Application had to be
14 terminated as a matter of law. Article 38 provides:
15 "After an Application is legally submitted, it shall
16 be reviewed by agents from the bureau and shall be
17 admitted if the results are favorable. If not
18 submitted with the legal requirements, the industry
19 Party shall be granted a term of no more than 30 days
20 to correct the omissions. If said period elapses and
21 the omissions are not corrected, the Application shall
22 be rejected and an order issued to archive it." Thus,

09:50:48 1 if omitted documents are not provided within 30 days,
2 by law the Bureau of Mines must reject and terminate
3 the Application.

4 Pacific Rim responded to the October warning
5 letter but did not correct the omissions. First,
6 Pacific Rim did not provide evidence of ownership or
7 authorization to use the entire Concession area.

8 Pacific Rim also failed to submit a
9 Feasibility Study, but rather resubmitted its
10 pre-feasibility Study dated January 21st, 2005.

11 Ultimately, Pacific Rim requested extra time
12 to submit the environmental permit, which had not yet
13 been granted. Pacific Rim had no right to more time,
14 the 30-day time limit for requesting--for responding
15 to the warning letter is by statute, and it's not
16 extendible. Nevertheless, the Bureau of Mines sent a
17 second warning letter in December 2006 granting
18 Pacific Rim El Salvador another 30 days to submit the
19 Application environmental permit. Pacific Rim El
20 Salvador did not respond.

21 Under Article 38 of the Mining Law, the
22 Bureau of Mines has no discretion as to whether or not

09:52:10 1 to terminate an Application once the notified
2 omissions are not corrected within 30 days. Thus,
3 once the Bureau of Mines notified Pacific Rim El
4 Salvador of the missing components and 30 days passed
5 without those omissions being corrected, the only
6 possible legal result under Salvadoran law was the
7 termination of the Application. Even without an
8 express resolution from the Bureau of Mines denying
9 the Application, Pacific Rim El Salvador's Application
10 could not have been lawfully reviewed, admitted, or
11 adjudicated after the 30-day period that ended in
12 January 2007.

13 Thus, in January 2007, the primary action
14 affecting the investment, the termination of the
15 Application for the El Dorado Exploitation Concession
16 was definitively concluded. Thus, the central measure
17 of Claimant's original complaint had culminated nearly
18 a year before the change in nationality. Nothing any
19 Salvadoran official could have done after January 2007
20 could have legally altered the situation of the
21 investment. No official, not even the President,
22 could reverse the termination of the Concession

09:53:43 1 Application, and they could not cause further harm
2 related to the El Dorado project. This is important
3 to keep in mind as the Tribunal considers Claimant's
4 new position that the dispute arose on March 11, 2008.

5 Thus, by January of 2007, Pacific Rim must
6 have known that its Exploitation Concession was not
7 going to be granted under the existing law and that
8 its entire investment was being affected. To the
9 extent it disagreed with the Government's
10 interpretation of the Mining Law and wanted to have
11 its Concession granted, it had a clear dispute with
12 the Government January 2007.

13 At this point, rather than seek resolution of
14 the dispute in Salvadoran courts or international
15 arbitration, the company decided to resolve its
16 dispute through attempts to have a new Mining Law
17 passed to change those aspects of the law that were
18 inconsistent with its position. In its 2007 Annual
19 Report for Canadian regulatory authorities, Pacific
20 Rim Mining admitted that it was, "unlikely that its
21 exploitation concession Application for the El Dorado
22 project, "would be granted prior to the expected

09:55:22 1 reformation of the El Salvadoran Mining Law." Thus,
2 Pacific Rim knew and publicly stated in 2007, before
3 the change of nationality, that its concession would
4 only be issued if it could get a new law passed.

5 In fact, in 2007, Pacific Rim was involved in
6 drafting a proposed new law, and Pacific Rim lobbied
7 the Salvadoran legislature to pass that law. And it
8 is clear that the proposed law was specifically
9 designed to resolve Pacific Rim's dispute with El
10 Salvador. Key changes to the proposed new law that
11 would have allowed Pacific Rim to get the concessions
12 according to its own terms included requiring
13 ownership or authorization for only the land on which
14 the applicant would locate surface mining
15 infrastructure and bestowing an automatic right to a
16 concession if the Government does not respond to an
17 Application; in other words, reversing the presumptive
18 denial under Salvadoran law to which Claimant or
19 Pacific Rim Mining more particularly knew it was
20 subject.

21 Thus, it is clear that Pacific Rim knew that
22 its Concession would not be granted as the Government

09:56:49 1 applied the requirements of existing law, and chose to
2 lobby for a new law to resolve its dispute with the
3 Government. As indicated in Claimant's
4 Counter-Memorial, "Mr. Shrake believed that a
5 legislative solution could be implemented. Such a
6 solution would be preferable to reducing the
7 Concession area or trying to buy or acquire
8 authorization to use more surface land. Accordingly,
9 the Companies pursued that approach." As of
10 December 2007, the new legislation had not been
11 adopted.

12 It is thus abundantly clear from the Notice
13 of Intent and uncontroverted evidence in the record
14 that the change of nationality of Pac Rim Cayman took
15 place after the alleged interference with the
16 investment and after, well after, the dispute was
17 born.

18 But there's more proof. Claimant's entire
19 defense to the abuse of process rests on its strained
20 interpretation of a single press report regarding
21 statements made by President Saca of El Salvador on
22 March 11th, 2008. From the emphasis Claimant has

09:58:25 1 placed on this report, it is safe to assume that
2 Pacific Rim Mining senior executives carefully
3 monitored the Salvadoran press for reports regarding
4 mining in El Salvador that might affect their
5 interests, and gave such reports great credence. They
6 seemed to believe that reports had the authority to
7 establish sweeping new Government policies and
8 announced the beginning of legal disputes. We can
9 therefore assume that they were aware of relevant
10 press reports from 2006 and 2007 that make it crystal
11 clear that the dispute they claim arose in 2008
12 existed in 2006 and 2007.

13 The first article is one they admit grabbed
14 their attention. It was published in the Sunday
15 edition of one of El Salvador's principal daily
16 newspapers on July 9, 2006. July 9, 2006. The large
17 headline on the front page reads, "Government Rejects
18 Mining Projects." On the inside is a full-page cover
19 with a further bold title that reads, "Farewell to
20 Mines."

21 In this article, the Ministry of the
22 Environment stated that no mining projects would be

10:00:08 1 approved without guarantees against environmental
2 damages. The interior headlines are, "Without
3 guarantees, there will be no permits." And the
4 sub-headline is, and it specifically mentions Pacific
5 Rim, "Pacific Rim will not obtain the exploitation
6 license for the El Dorado mine in San Ysidro Cabañas,
7 assures the Minister of the Environment."

8 Because its executives assumed the press
9 statements announced Government policy, if at any
10 moment Pacific Rim Mining thought that its problems
11 were due to bureaucratic incompetence and it did not
12 have a dispute with the Government of El Salvador,
13 this article from 2006 must have put them on clear
14 notice that they had a major dispute with the
15 Government. This is not a statement by a select group
16 of bureaucrats. These are reported statements of the
17 highest Government official in the country in charge
18 of granting some of the very permits they needed to
19 continue with their investment.

20 If the press report about President Saca in
21 2008 was significant to Claimants, this press report
22 must also have been equally significant, but it came

10:01:39 1 out two years earlier. But perhaps even more
2 importantly, there is a particular quote in this
3 article that completely undermines their post hoc
4 theory of a change of policy announced by President
5 Saca in March 2008. The Minister of the Environment,
6 Hugo Barrera, was asked in July of 2006, "Have you
7 discussed the issue of mining exploitation permits
8 with President Saca?" And his answer was: "I'm
9 Secretary to the President on environmental matters,
10 and I am in agreement with him that we are not going
11 to approve anything that could cause serious,
12 transitory, permanent, or irreversible environmental
13 damage." This is a clear indication in an article
14 that the senior management of Pacific Rim Mining read
15 at the time that President Saca's view of the need to
16 ensure the protection of the environment before
17 granting Exploitation Concession existed in July of
18 2006, almost two years before Claimant asserts that he
19 announced a new policy. And the concern here to note
20 is a concern for the environment. This is what is
21 expressed continuously in the news reports.

22 Now, the nature of the reported statements

10:03:07 1 from the Minister of the Environment did not change in
2 2007 after Mr. Barrera left the Ministry and was
3 replaced by Carlos Guerrero. The reported statements
4 of Mr. Guerrero in June of 2007 are very similar in
5 content to the statements of Mr. Barrera in 2006 and
6 the reported statements of President Saca in March of
7 2008. On June 14, 2007, it was reported, "Carlos
8 Guerrero, Minister of the Environment, confirmed that
9 changes to the current legislation regulating approval
10 of mining exploitation permits have been ruled out.
11 In order to make these types of decisions, one first
12 has to determine if the mining industry is viable in
13 our country, he insisted, commenting that the study
14 undertaken by the Government is vital for this reason.
15 Only then would we be able to see which changes to
16 make to the law."

17 Recall that at this time Pacific Rim Mining
18 was seeking changes to the law so that its
19 exploitation permit could be awarded because it was
20 inconsistent with current law.

21 Then on June 24, 2007, the Minister of the
22 Environment of El Salvador, Carlos Guerrero, said,

10:04:37 1 "The article says he maintains that exploitation
2 licenses will not be granted, some of which have
3 already been requested by companies, until the country
4 completes a study of the effects of mining, which
5 could take at least a year."

6 He was clearly--because these articles do not
7 fit with its new theory of the case, Claimant has gone
8 so far as to say El Salvador is estopped from relying
9 on them. In the Rejoinder, Claimant states with
10 regard to the statement of the Minister of the
11 Environment of June 24th, 2007, on the need to
12 complete an environmental study, "Claimant did not
13 know and could not have known of the measure at issue
14 prior to March 2008 announcement of President Saca
15 that he opposes granting mining permits."

16 Even giving the Claimant the benefit of the
17 doubt, it is hard to believe this statement was made
18 in good faith. As quoted above at Paragraph 30 of the
19 Notice of Intent, Claimant stated that the Ministry of
20 the Environment actually informed them directly of the
21 policy decision referred to in this press report at
22 the time the article was published, and I quote again

10:06:14 1 from Claimant's Notice of Intent which is part of the
2 Notice of Arbitration filed in this proceeding: "In
3 addition to articulating the foregoing position, MARN
4 has informed the--MARN also informed the enterprise in
5 2007 that, prior to the Ministry granting any
6 environmental permits, MARN would need to conduct a
7 "countrywide strategic environmental study."
8 Claimant was directly informed of what was in the
9 press article in 2007 by the Government and stated so
10 in its Notice of Intent.

11 Thus, not only could it have known of this
12 measure before the press report on President Saca in
13 March of 2008, but Claimant actually alleged it in its
14 Notice of Arbitration. Perhaps it is Claimant who
15 should be estopped from continually denying facts it
16 has alleged in its Notice of Arbitration.

17 It is of significance to note here that
18 another mining company, Commerce Group, operating in
19 El Salvador in 2006, also unsuccessfully tried to use
20 late coming allegations of a ban of mining to overcome
21 substantial objections made by El Salvador. The
22 interesting thing about Commerce Group's allegations

10:07:51 1 is that they were based on the 2006 press article just
2 cited and asserted that the alleged ban actually began
3 in 2006, not 2008. El Salvador's position, of course,
4 is that there is no ban on mining. The Companies
5 cannot seem to agree as to when it started.

6 In sum, the above evidence, combined with
7 Claimant's own detailed description of the dispute in
8 the Notice of Arbitration demonstrates beyond any
9 doubt--beyond any doubt--that a dispute existed on the
10 date of Pacific Rim Cayman's change of nationality.

11 By the end of 2007, Pacific Rim Mining turned
12 to yet another strategy to resolve its dispute and
13 obtain the El Dorado Concession without meeting the
14 legal requirements under the Mining Law, pressuring
15 the Government by threatening international
16 arbitration. Pacific Rim Mining's decision to change
17 the nationality of Pac Rim Cayman to allow it to
18 assert jurisdiction under CAFTA was a part of that
19 strategy. Claimant has refused to reveal the full
20 details of its decision-making process leading up to
21 the change of its nationality, but we do have enough
22 information to piece together how things probably

10:09:49 1 unfolded.

2 The situation Pacific Rim Mining senior
3 executives faced in late 2007, when they decided to
4 change Pac Rim Cayman's nationality to gain access to
5 CAFTA arbitration can be summarized as follows:

6 First, the environmental permit had been
7 effectively denied for three years.

8 The Concession Application had
9 been--Application had been terminated by operation of
10 law for about one year.

11 Pacific Rim had tried to resolve the dispute
12 regarding the Concession Application first by lobbying
13 to seek an interpretation, then by seeking an
14 amendment to the Mining Law and then by seeking an
15 entirely new Mining Law to eliminate the requirements
16 that were preventing its Application from being
17 approved. This effort to obtain a new law was ongoing
18 in late 2007.

19 And, finally, when the senior executives of
20 Pacific Rim Mining were making their decision to
21 change Pacific Rim Cayman's nationality, there had
22 been two successive Ministers of the Environment who

10:11:14 1 had made public statements indicating that no changes
2 in the law needed to grant the Concession Application
3 would be forthcoming until the Government's concerns
4 over the environment were addressed. Clearly, they
5 had a long-standing dispute with El Salvador. Faced
6 with this situation, on or around October 24, 2007,
7 the senior management of the Pacific Rim Mining of
8 Canada hired the law firm of Crowell & Moring and its
9 lobbying affiliate to assist them with regard to what
10 was then clearly a long-standing dispute with El
11 Salvador regarding their efforts to obtain an
12 Exploitation Concession for the El Dorado project.

13 On November 28, 2007, the Chief Executive
14 Officer of Pacific Rim Mining, Mr. Thomas Shrake, was
15 accompanied by the co-chair of Crowell & Moring's
16 international arbitration practice and another member
17 of the team representing Claimant here today when he
18 attended a luncheon meeting in Washington where the
19 keynote speaker was President Saca of El Salvador.
20 Claimant has asserted privilege with regard to the
21 advice given to Pacific Rim Mining at that time, but
22 it could hardly be a coincidence that just six days

10:12:42 1 later, on December 4, 2007, the board of Pacific Rim
2 Mining approved a resolution that led to the change in
3 Pac Rim Cayman's nationality.

4 On December 13, 2007, Pacific Rim Mining
5 completed the manipulation of the corporate form of
6 its Cayman Islands shell company subsidiary to
7 transform it into a national of the United States so
8 that it could become a claimant to file this
9 arbitration claiming hundreds of millions in damages.

10 It is important to recall that there is
11 absolutely no business reason for this change of
12 nationality and that Pac Rim Cayman was a shell
13 company with no business activities in the Cayman
14 Islands before the change in nationality and no
15 business activities after it registered in the United
16 States.

17 Clearly, the only motivation for changing Pac
18 Rim Cayman's nationality was to assert jurisdiction in
19 this arbitration. And, in fact, Pacific Rim Mining
20 began almost immediately to refer to newly acquired
21 rights under CAFTA in public documents issued just
22 after the change of nationality. The document on your

10:14:10 1 screen is a Press Release by Pacific Rim Mining on
2 January 17, 2008, and makes specific reference to
3 protection under international trade agreements,
4 including the Central American Free Trade Agreement
5 (CAFTA).

6 Claimant's alternate explanation for the
7 reason for the change of nationality is clearly a post
8 hoc attempt to avoid a finding of abuse of process.
9 Let's recall what Claimant has said. Mr. Shrake
10 described the decision-making process as follows at
11 Paragraph 110 of his Witness Statement. "At some
12 point in 2007, our then-Chief Financial Officer,
13 Ms. April Hashimoto, suggested to me that we could cut
14 costs by deactivating subsidiaries in jurisdictions
15 where the Companies had not conducted business for
16 some time, but where we still paid various fees and
17 costs and devoted administrative time in order to
18 maintain the business in good standing. In
19 particular, as of 2007, we still maintained
20 subsidiaries in Mexico and Peru, even though we had
21 not done any work there for many years. Pacific Rim
22 Mining owned the Mexican and Peruvian subsidiaries

10:15:57 1 through a Cayman Islands subsidiary called Pacific Rim
2 Caribe. To save costs, we decided to dissolve all
3 three Companies.

4 "These discussions led us to an examination
5 of the overall structure of the Companies. There were
6 also administrative costs involved in maintaining
7 Pacific Rim Cayman, the Claimant in this arbitration,
8 as a Cayman Islands entity. At the same time, we were
9 advised that there would be no adverse tax
10 consequences to domesticating Pac Rim Cayman to
11 Nevada, the jurisdiction from which I had managed it
12 since 1997. In other words, we believed that by
13 domesticating Pac Rim Cayman to Nevada, we could save
14 administrative costs without losing tax benefits."

15 Thus, Claimant asserts that the decision to
16 de-register Pac Rim Cayman from the Cayman Islands and
17 register it in the United States was to save the
18 administrative costs of maintaining registration in
19 the Cayman Islands and that this occurred to the
20 management of Pacific Rim Mining because they had
21 already saved money by dissolving another subsidiary
22 in the Cayman Islands, Pacific Rim Caribe.

10:17:26 1 In the first instance, this is implausible
2 because businesses, as a general rule, do not move tax
3 shelter subsidiaries from tax havens to tax-intensive
4 countries simply to save fees regardless of what their
5 tax advice might have been. Companies generally set
6 up these kinds of subsidiaries for tax reasons, and
7 nobody would move a company for no reason from a tax
8 haven to a tax-imposing country.

9 It's also implausible because the
10 registration fees in the Cayman Islands are in the
11 hundreds of dollars per years, which pales in
12 comparison to the hundreds of millions of dollars
13 Claimants claim are at stake in the dispute with El
14 Salvador.

15 But more importantly, this explanation is
16 inconsistent with reality. The fact of the matter is
17 that Pacific Rim Mining did not actually de-register
18 Pacific Rim Caribe until 2010, three years after it
19 changed the nationality of Pac Rim Cayman, so the cost
20 savings from the de-registration could not possibly
21 have led Pacific Rim Mining to seek cost savings by
22 moving Pac Rim Cayman to the United States. If cost

10:19:01 1 savings had actually been their goal in the manipulate
2 of the corporate organization of Pacific Rim, they
3 certainly would not have neglected to take what they
4 claimed was the primary cost saving step. Cost
5 savings could not have been the motivation here.

6 Moreover, while it may certainly be true that
7 once Pac Rim Pac Rim Cayman was de-registered in the
8 Cayman Islands, its Canadian parent no longer had to
9 pay fees to maintain the registration there.

10 But it's equally true that the parent now has
11 to pay such fees in the United States in Nevada;
12 therefore, it is likely that the cost savings were
13 negligible.

14 Despite these facts that are apparent from
15 Claimant's own pleadings, cost savings are the only
16 reason alleged by Claimant for the change of
17 nationality other than creating jurisdiction. In its
18 Counter-Memorial, Claimant tries to insinuate that
19 there was a business purpose to the manipulation of
20 the corporate form when it states that, "It made no
21 sense to manage a Cayman Islands company from Nevada."
22 But, in fact, as El Salvador has demonstrated in its

10:20:22 1 written pleadings and as Mr. Badini will discuss
2 momentarily, Pac Rim Cayman has always been a shell
3 company that exists only on paper with no business
4 activities before or after the change of nationality.
5 It made absolutely no difference from a management
6 perspective where that paper was filed. There could
7 be no practical business purpose for the change of
8 nationality, and Claimant, in fact, has alleged none,
9 other than alleged cost savings.

10 Therefore, there can be no doubt that the
11 sole reason Pacific Rim Mining of Canada changed the
12 nationality of Pac Rim Cayman was to gain access to
13 ICSID arbitration under CAFTA with regard to its
14 existing dispute with El Salvador. Everything
15 Claimant has said to the contrary is an attempt to
16 hide the truth in order to avoid having this
17 arbitration dismissed for abuse of process.

18 Finally, I would like to address the
19 March 2008 press report of statements by President
20 Saca of El Salvador that is the single piece of
21 evidence upon which Claimant rests its entire defense
22 to the abuse of process objection. It is abundantly

10:22:06 1 clear from the facts that I have just detailed that
2 all of the alleged interference with Claimant's
3 investment took place before Pacific Rim Mining of
4 Canada decided to change the nationality of its Cayman
5 Islands shell company in December 2007 to gain access
6 to international arbitration.

7 Despite this overwhelming evidence, the core
8 of Claimant's defense against the objection of abuse
9 of process is, and I quote, "It is only in 2008, after
10 then President Saca appeared to announce a de facto
11 ban on metallic mining that a dispute began to
12 crystallize," and that, "The measure giving rise to
13 Pac Rim Cayman's claims of breach of CAFTA obligation
14 and loss or damage resulting therefrom is the de facto
15 mining ban that President Saca first acknowledged in
16 March 2008."

17 Before analyzing the press report on
18 President Saca upon which Claimant relies so heavily,
19 it is important to note that even if it were true--and
20 we will see in a moment that it is not--that President
21 Saca had announced some kind of mining ban, such a
22 policy is not a measure giving rise to a breach of

10:23:30 1 CAFTA. On essentially the same facts as those before
2 this Tribunal, the Tribunal in the Commerce Group
3 case, less than two months ago, held in its Award, and
4 I quote, "Even if the de facto mining ban policy and
5 the revocation of the permits could be teased apart,
6 the Tribunal is of the view that the policy does not
7 constitute a 'measure' within the meaning of CAFTA."

8 Thus, Claimant's entire defense to abuse of
9 process rests on a claim that fails as a matter of
10 law. The measure they alleged as the single measure
11 giving rise to CAFTA claims is not even a measure
12 under CAFTA.

13 But to dispel any possible lingering doubt
14 regarding the lack of legal significance of the
15 March 2008 press report, I would ask the Tribunal to
16 read the article submitted by Claimant and the article
17 submitted by El Salvador very carefully to see what
18 they actually say as opposed to what Claimant now says
19 they say. What is most striking about these two
20 articles is that there is no reference whatsoever to a
21 ban on mining. The headlines and text of these
22 articles contradict Claimant's interpretation. The

10:25:13 1 headline in the article provided by Claimant at
2 Exhibit 7 on the Notice of Arbitration is, "President
3 of El Salvador requests caution on mining exploitation
4 projects." "Caution on mining." The headline in the
5 article entered into the record by El Salvador at
6 R-125 is, "The executive continues to study mining."
7 To study mining. These are hardly the headlines that
8 would have been used for something as profound as the
9 announcement of a complete countrywide ban on mining.

10 What the President is actually reported to
11 have said is not that he wanted a ban on mining, but
12 that environmental concerns must be addressed before a
13 new law could be passed to permit the issuance of
14 mining permits.

15 It is important to recall the context in
16 which this purported statement was made. By the date
17 of this report, Pacific Rim Mining's Application for
18 the El Dorado exploitation permit had been terminated
19 by operation of law about a year earlier because it
20 did not meet the requirements of the Mining Law.
21 Pacific Rim Mining of Canada was attempting to have
22 new legislation, a new law passed that would change

10:26:53 1 these requirements and allow the approval of its
2 Application. Thus, President Saca was not announcing
3 a ban on mining, but communicating that he would not
4 support the new Mining Law that Pacific Rim Mining
5 needed to get its Application approved unless he was
6 satisfied that the mining would not harm the
7 environment. This statement, of course, could not be
8 the basis of a claim by Claimant because a State has
9 no obligation to change its laws to accommodate the
10 wishes of a foreign investor. A failure to alter
11 legislation does not give rise to claims in
12 international arbitration.

13 Pacific Rim Mining's contemporaneous
14 statements on these press reports are consistent with
15 the view that President Saca was saying that
16 environmental concerns had to be addressed before a
17 new law would be passed and its mining concessions
18 could be granted. Pacific Rim Mining's CEO Thomas
19 Shrake sent a letter to President Saca in response to
20 the press report on April 14, 2008, and he stated as
21 follows. "Through the media, we have learned that you
22 have stated that you oppose our being granted

10:28:23 1 operating permits. In this public statement you have
2 said, 'In principle, I do not agree with granting
3 these permits. But if it is demonstrated to me
4 through studies done by the Ministry of the
5 Environment and the Ministry of the Economy that gold
6 can be produced, thus growing the economy without
7 damaging any resources like water from the use of
8 cyanide, I am willing to work with the assembly on a
9 law to establish things properly.'"

10 "Our project, Mr. President, does just what
11 you ask and responds to your concern. Modern mining
12 technology does not damage water tables and also
13 denatures the cyanide so that it does not produce any
14 harmful effects. Therefore, there is no damage to
15 people's health, nor to water, nor the environment.
16 Additionally, El Salvador has certain geological
17 characteristics that minimize the risk of
18 environmental impact."

19 Notably, there is absolutely no hint in this
20 letter that Mr. Shrake believed at this time President
21 Saca was announcing a mining ban, but he clearly
22 believed that President Saca was expressing concern

10:29:54 1 about the environment and that he might be able to
2 convince him to support the project by alleging it
3 would not damage the environment. He also clearly
4 believed that a dispute existed because he threatened
5 arbitration.

6 Let me just go back--before moving on, I just
7 want to point out what President Saca actually said in
8 the press article to which Mr. Shrake was responding.
9 He said, "The issue of mining is an issue which must
10 be studied in depth." He indicated that for the time
11 being, a committee led by the congressmen from the
12 General Assembly, together with the Ministries of
13 Environment and Economy, are working to create a new
14 law for this sector. The Head of State added that he
15 is awaiting technical reports that would show that
16 green mining exists and it is possible to proceed with
17 issuing exploitation permits. Saca clarified, "I do
18 not agree with granting those permits, but if it is
19 demonstrated to me through studies from the Ministry
20 of Environment, and if the Ministry of Economy shows
21 me that gold can be exploited to boost the economy
22 without damaging resources such as water through the

10:31:30 1 use of cyanide, I am willing to work with the National
2 Assembly on a law to establish things properly."

3 The truth of the matter is Pacific Rim
4 continued to characterize the dispute as a failure to
5 issue mining permits well after the March press
6 reports. This Press Release from July 2008 clearly
7 defines the dispute in terms of the failure to issue
8 the environmental permits and the Exploitation
9 Concession and does not even hint at the existence of
10 a generalized ban on mining; this is three, four
11 months after the March press reports.

12 Finally, I would like to make one final point
13 to demonstrate that the only alleged measures upon
14 which Claimant actually bases its claims are those set
15 forth in its Notice of Intent outlined above that it
16 claims took place between 2004 and 2007 and not the
17 2008 de facto mining ban. Claimant's newly created
18 version of events can easily be tested by comparing
19 two separate assumptions:

20 First, let's assume that the only fact
21 alleged to constitute a measure was the press article
22 making reference to statements by President Saca.

10:33:13 1 This is Claimant's new position, and that the other
2 alleged facts, the failure to approve the
3 environmental permit and Concession Application did
4 not take place. In other words, assume there was no
5 prior interference with the investment and Pacific
6 Rim's Concession Application had been granted. Would
7 Claimant have any basis for a claim for damages?
8 Would there be any dispute at all if Claimant's
9 permits and Concession had been issued and the press
10 article had still been published? Of course not
11 because the press article did not deprive them of
12 anything. All of their rights would be intact. The
13 statements contained in the press article are not a
14 measure, and they did not interfere in any way with
15 the investment.

16 On the other hand, if we look at the reverse,
17 it is clear that a dispute would exist. Let's suppose
18 that there were never any press articles attributing
19 statements to President Saca in 2008, and from 2004 to
20 the present, El Salvador had not granted the
21 environmental permit or the Exploitation Concession.
22 All of the claims of measures interfering with the

10:34:31 1 investment set forth in the Notice of Intent would
2 still allegedly exist. Would Claimant take the
3 position that it did not have a dispute with El
4 Salvador? Of course not. Claimant would be
5 vociferously asserting that it has a dispute with El
6 Salvador.

7 The only difference between today in 2011 and
8 2007, when they changed Pac Rim Cayman's nationality,
9 is the amount of time that has passed since the
10 dispute arose.

11 In fact, Claimant expressly recognized this
12 reality at Paragraph 163 of the Counter-Memorial. It
13 stated, "even if the de facto mining ban does not
14 exist, the individual instances of Respondent's
15 failure to grant Claimant's mining-related
16 Applications are continuing and composite acts or
17 omissions that breach CAFTA obligations and have
18 caused loss or damage to Claimant." this is in the
19 Counter-Memorial. As set forth in the Notice of
20 Arbitration, each and every one of these quote-unquote
21 individual instances that Claimant asserts breached
22 CAFTA obligations took place before December 13, 2007,

10:36:03 1 and Claimant was fully aware of them all and
2 still--still--alleges that they caused Claimant and
3 its parent company injury. A dispute undoubtedly
4 existed when Pacific Rim Mining manipulated its
5 corporate structure to change Pac Rim Cayman's
6 nationality to become the Claimant in this
7 arbitration.

8 And now I reach my conclusion.

9 PRESIDENT VEEDER: Thank you very much for
10 that. We may have questions, of course, for you
11 later.

12 Would you or your team like a break now, or
13 would you like to start with the second part?

14 MR. SMITH: I just have a brief conclusion to
15 my statements.

16 PRESIDENT VEEDER: In that case, let's have
17 that brief conclusion.

18 MR. SMITH: It will be very short. And then
19 I think it would be either I'm open to questions from
20 the Tribunal or we could take the break and then
21 continue.

22 PRESIDENT VEEDER: We will take a break when

10:37:03 1 you finish your conclusion.

2 MR. SMITH: Okay.

3 In conclusion, the facts alleged by Claimant
4 in its Notice of Intent and the facts proven by El
5 Salvador demonstrate beyond a doubt that Pacific Rim
6 Mining of Canada manipulated the corporate form of a
7 Cayman Islands shell company to make it a national of
8 the United States so that it would be able to initiate
9 this arbitration. These facts further demonstrate
10 that this manipulation took place after the alleged
11 interference with Pacific Rim Mining's investment in
12 El Salvador and after the dispute that is the subject
13 of this arbitration had clearly begun.

14 This abuse of process taints the entire
15 arbitration, including the claims based on CAFTA and
16 claims based on the Investment Law of El Salvador
17 which are inextricably linked in these proceedings.

18 Therefore, Mr. President and Members of the
19 Tribunal, you must dismiss this entire arbitration
20 because of a claimant's abuse of the international
21 arbitration process.

22 Thank you very much.

10:38:26 1 PRESIDENT VEEDER: Thank you. And I
2 apologize because I had read your conclusion at
3 Slide 81 and thought it was a very brief conclusion.
4 I'm sorry I cut you off.

5 MR. SMITH: No problem. Thank you very much.

6 PRESIDENT VEEDER: Let's have a break now.
7 Let's have a slightly longer break. Let's resume at
8 11:00, as planned. Thank you.

9 (Brief recess.)

10 PRESIDENT VEEDER: Before we resume, I'd just
11 like to ask my colleagues whether they have any
12 questions at this stage.

13 Professor Stern.

14 ARBITRATOR STERN: No, not at this stage.
15 Thank you.

16 PRESIDENT VEEDER: Mr. Tawil?

17 ARBITRATOR TAWIL: No, not at this stage,
18 Mr. Chairman.

19 PRESIDENT VEEDER: The Respondents have the
20 floor again.

21 MR. BADINI: Good morning, Mr. President,
22 Members of the Tribunal, counsel, Party and non-Party

11:04:25 1 representatives, and ICSID representatives and staff
2 and guests. As my partner, Mr. Smith, indicated, my
3 name is Aldo Badini. I will be addressing the
4 Government of El Salvador's Objections to Jurisdiction
5 on denial of benefits, and after me Mr. Parada will
6 discuss *ratione temporis* and the Investment Law
7 Jurisdictional Objections.

8 Mr. Smith has just taken the Tribunal through
9 the manipulation of corporate form and rewriting of
10 history that the Canadian parent of the Claimant has
11 engineered to try to take advantage of a treaty that
12 it is not otherwise entitled to invoke. This type of
13 frankly cynical gaming of the international
14 arbitration system should result not only in a finding
15 that there has been abuse of process, but also in a
16 finding that the Government of El Salvador has
17 appropriately invoked the denial-of-benefits
18 provisions of CAFTA.

19 In my presentation I will demonstrate to the
20 Tribunal that the CAFTA denial-of-benefits provision
21 of Article 10 applies here first because the Claimant
22 does not have and, in fact, never had, any substantial

11:05:53 1 business activities in the United States, where it was
2 incorporated as a shell company for the first time in
3 December of 2007.

4 While Claimant seeks here to create the
5 illusion that it was directing the operations in El
6 Salvador from the United States, the undisputed facts
7 really tell a different story. Claimant was not even
8 formed until well after the dispute here had arisen,
9 as demonstrated by Mr. Smith; and by that time, when
10 Claimant was formed in the United States, over
11 93 percent of the alleged investment in El Salvador
12 had already been made, an alleged investment not made
13 by Claimant, not made by its Cayman Islands
14 predecessor, but by Canadian Companies.

15 Claimant has not participated in any of the
16 operations in El Salvador, whether from the United
17 States or elsewhere, and it did not make any
18 investment in El Salvador, either directly or, as
19 Claimant asserts, indirectly.

20 Second, I will show that Claimant is owned
21 and controlled by a person of a non-Party; namely, its
22 100 percent parent company, a Canadian corporation,

11:07:19 1 Pacific Rim Mining Corporation.

2 And finally, I would like to touch for a
3 moment on a procedural issue. Claimant weakly
4 contends that somehow our notice of the denial of
5 benefits was untimely. Although that's the
6 allegation, Claimant cannot point to any Treaty
7 provisions that were breached by El Salvador's notice,
8 which was, in fact, perfectly appropriate. Indeed,
9 not only is the Treaty on the side of El Salvador, but
10 the equities here are as well, as the Canadian parent
11 of Claimant could not have had any reasonable
12 expectations of being protected by CAFTA when, for
13 years, it allegedly made investments in El Salvador
14 not from a CAFTA Party, but from Canada.

15 So, let's put up briefly the legal framework
16 with respect to the discussion that will follow. For
17 some reason we don't have input there, but I will
18 continue--now we do.

19 The appropriate Article is CAFTA
20 Article 10.12.2, which provides, and I will put the
21 language on the screen, that, "a CAFTA Party may deny
22 the benefits of this chapter"--notably this chapter

11:08:47 1 includes access to dispute resolution--"to an
2 enterprise of another Party, if the enterprise has no
3 substantial business activities in the territory of
4 any Party, other than the denying Party, and persons
5 of a non-Party own or control the enterprise." That
6 is the legal framework for the denial-of-benefits
7 analysis.

8 Now, what is the framework applied to our
9 case? There's two simple questions:

10 One, does the Claimant, Pac Rim Cayman, have
11 "substantial business activities" in the United States
12 where it was incorporated in December of 2007, and is
13 the Claimant, Pac Rim Cayman, either owned by persons
14 of a non-Party or controlled by persons of a
15 non-Party? We will show that Claimant Pac Rim Cayman
16 has no substantial business activities in the United
17 States and never had any such activities at any
18 relevant time, and that Claimant Pac Rim Cayman is
19 both owned by persons of a non-Party, namely Canada,
20 and controlled by persons of a non-Party, again
21 Canada.

22 And finally, as I noted, we will show that El

11:10:05 1 Salvador provided timely and appropriate notice of the
2 denial of benefits.

3 It is worth noting that the
4 denial-of-benefits provision in CAFTA is
5 jurisdictional, and again I've put up the language on
6 the screen--I won't read all of it, but it is clear
7 that it says a Party may deny the benefits of this
8 chapter. And if you look at next slide, Chapter Ten
9 is the chapter where that language appears, and
10 Chapter Ten includes the dispute-settlement
11 provisions. There can be no legitimate controversy
12 about this.

13 10.16 are the provisions relating to
14 submission of a claim to arbitration, and 10.17 relate
15 to consent of each Party to arbitration.

16 Now, because the denial of benefits under
17 CAFTA is jurisdictional, there is a crucial difference
18 between decisions under CAFTA and decisions under the
19 Energy Charter Treaty, because under the Energy
20 Charter Treaty, the provision there which is called
21 "denial of advantages," but it's essentially a
22 denial-of-benefits provision with a different name,

11:11:25 1 that provision is made expressly applicable to, "the
2 advantages of this part," which is Part III. And Part
3 III of the Energy Charter Treaty does not include the
4 dispute-resolution provisions which are located in
5 Part V of that Treaty.

6 Now, there is one decision interpreting the
7 ECT, which I know the President is well familiar with,
8 since he was on that Tribunal, the Plama Decision.
9 And in that decision, the Tribunal noted that this
10 aspect of the ECT--in other words, the aspect of the
11 denial-of-benefits provision that limited that denial
12 to the substantive benefits and not the procedural
13 remedies--this aspect, said the Plama Tribunal was,
14 "unlike most modern investment treaties, which provide
15 for a denial of all benefits to a covered investor
16 under the Treaty." Well, it is that type of Treaty,
17 the Treaty that denies all benefits to covered
18 investors that CAFTA is. So, under CAFTA, the denial
19 of benefits is jurisdictional.

20 With that background, let's talk about the
21 first leg of the test, where we will show that
22 Claimant had and has no substantial business

11:12:59 1 activities in the United States. I'd like to begin
2 this analysis with Claimant's own words because our
3 papers, which are quite thick, are filled with a
4 number of pages discussing what the appropriate test
5 is to determine what "substantial business activities"
6 should mean. I submit to the Tribunal that whatever
7 the test is that's applied, Claimant does not meet
8 that test.

9 And for purposes of my oral presentation, I'd
10 like to talk about the test that the Claimant has
11 proposed; and, using that test we will show, based
12 upon the detailed factual inquiry that the Claimant
13 urges that there are no substantial business
14 activities.

15 Here is the test that Claimant urges.
16 Claimant says that the form of a company should not be
17 dispositive. All companies are legal fictions. And
18 the Claimant says they are given substance by three
19 things, at least three things: The people who run
20 them, the capital that finances them, and the things
21 they own or make."

22 Well, for purposes of my presentation today,

11:14:24 1 I embrace that test, and I will show you that using
2 that test there are no substantial business activities
3 by Claimant in the United States, and there never have
4 been. Let's look at those three things that Claimant
5 says we should focus on.

6 One, the people who run the Claimant.
7 Claimant is and has always been, even before its
8 nationalization in the U.S., owned by a non-Party
9 Canadian corporation: Pacific Rim Mining Corp.
10 100 percent ownership. That's undisputed. Claimant
11 has no executives or employees in the United States or
12 otherwise; that is also undisputed. And Claimant has
13 no Board of Directors; that is undisputed.

14 The Claimant has no people who run it other
15 than the Canadian parent. The second part of the test
16 urged by Claimant is the capital that finances the
17 Claimant. Based on pre-hearing discovery that we were
18 able to obtain, thanks to the order of the Tribunal,
19 we've definitively established that the Claimant does
20 not have a bank account and never had a bank account.
21 The change of nationality of the Claimant from the
22 Cayman Islands to the United States did not involve

11:16:03 1 any influx of capital.

2 And there is no evidence that capital of the
3 Claimant, if any, came from anyone other than the
4 Canadian entity.

5 And third, let's look at the things that the
6 Claimant owns or makes. When registering in Nevada,
7 the Claimant had to fill out a form of registration.
8 In that form, they checked a box that said, and I
9 quote, "I do not purchase tangible personal property
10 for storage, use, or other consumption in Nevada."

11 Second, Claimant does not lease any office
12 space in the United States. The Claimant may try to
13 confuse this issue and say, well, there is an office
14 in the United States. It's not Claimant's office.
15 Claimant's not on the lease. Another Pac Rim entity
16 leases that office.

17 Claimant pays no taxes in the United States.
18 And simply there is no evidence Claimant owns or makes
19 anything in the United States.

20 Now, there is another statement that Claimant
21 makes throughout its papers that I urge the Tribunal
22 to look at. Claimant repeatedly says that investments

11:17:30 1 in El Salvador were made through the Claimant--through
2 the Claimant--and I have put up three examples of
3 that. They say: "Since at least 2005, virtually all
4 of the monies invested by the Pacific Rim Companies in
5 El Salvador have been made through Pac Rim Cayman."
6 that's the Counter-Memorial, Paragraph 17.

7 In the Rejoinder, they say: "Pac Rim Cayman
8 was the corporate entity through which predominantly
9 U.S. nationals made their investments in El Salvador."
10 Rejoinder, Paragraph 115.

11 And finally, my third example, although I
12 think they say this more than three times, "Respondent
13 has been well aware that investments of financial
14 capital have been made primarily through Pac Rim
15 Cayman." Rejoinder, Paragraph 330.

16 That's what they say. What do the undisputed
17 facts show? The undisputed facts show that the
18 investments in El Salvador were not from the Claimant,
19 and they were not from the United States. I have put
20 up citations to just four examples of the wire
21 transfer documentation when the investments were
22 registered in El Salvador. All of these wire

11:19:00 1 transfers indicate that the source of the funds was
2 Canada, and the source of the funds was an entity
3 other than the Claimant. If you look at them, Dayton
4 Acquisitions, which was one of the predecessor
5 Companies to the Canadian parent, and Dayton
6 Acquisitions was domiciled in Canada. Dayton
7 Acquisitions made some of the initial investments, and
8 then they were made by Pacific Rim Mining Corporation,
9 the Canadian parent, not the Claimant.

10 And even after Claimant became a U.S. company
11 in December of 2007, the payments continued to come
12 from Canada. They were sent from Olympia Trust
13 Company Canada.

14 So, faced with this evidence, how can
15 Claimants say that the investments were made by or
16 through the Claimant? Let me show the Tribunal what
17 they rely on and the problem with their argument.
18 They base their argument--they break their argument
19 into two pieces, one relating to investments prior to
20 November 2004, and another with investments from 2005
21 going forward.

22 As for investments prior to November of 2004,

11:20:26 1 this is their evidence that they were made by or
2 through the Claimant. They say merely that they were
3 assigned to Pac Rim Cayman. Counter-Memorial
4 Paragraph 84. And their Witness Statement by
5 Mr. Krause agrees. He says, the Companies' books and
6 records show that as of 2005, \$5.7 million in
7 investments made by the Companies--notice he uses the
8 plural and doesn't assert that the investment was made
9 by the Claimant--made by the Companies had been
10 reassigned to Pac Rim Cayman.

11 Now, let's look at what they say about
12 investments from 2005 forward. Claimant says,
13 "Virtually all of the Companies"--again, not a claim
14 that the Claimant made these investments--the
15 Companies--"direct investments of financial capital
16 into El Salvador were made through Pac Rim Cayman."
17 What's the evidence that they were made through Pac
18 Rim Cayman? Again, the only citation is to
19 Mr. Krause's Witness Statement. And he says: "From
20 30 November 2004, all of the Companies' direct
21 investments of financial capital in El Salvador were
22 made through Pac Rim Cayman."

11:22:01 1 Now, as a preliminary matter, I would like to
2 note that Mr. Krause was not even there at the time.
3 The last investment at issue was in September of 2008,
4 and Mr. Krause admits in his witness statements that
5 he began in October 2008. But the only evidence cited
6 by Claimant, the only evidence cited by Mr. Krause for
7 these propositions that the investments were made
8 through Pac Rim Cayman is one fragment purporting to
9 be a page of a Financial Statement. Mr. Krause
10 doesn't say this was audited. We don't know whether
11 it was audited. It's not dated. We don't know when
12 this document was created. We don't know who created
13 this document. And it's unconsolidated.

14 Now, what we've put up on the screen is a
15 redacted version; namely, the numbers have been whited
16 out because the Claimant has asserted confidentiality
17 over the actual numbers. The Tribunal Members will
18 have in their books the copy with the actual numbers.
19 But I will submit to you that for purposes of my
20 argument, you don't need to look at the numbers
21 because the principle is the same irrespective of what
22 the numbers are.

11:23:37 1 Mr. Krause directs us to two parts of this
2 financial statement. First, he directs us to the
3 assets section; and, under the assets section, there
4 is a line that says, "Investment in El Salvador," and
5 there are numbers for each of those years.

6 He also directs to us a liabilities section
7 of this statement, which says, "Liabilities and
8 Shareholders equity due to Pacific Rim Mining
9 Corporation," and there are numbers for each those
10 years.

11 Now, let's talk about the assets section
12 first. Because various numbers appear on the line
13 "Investment El Salvador" in this unidentified,
14 undated, unaudited statement, Claimant would have us
15 believe that that's proof that the Claimant made the
16 investments in El Salvador or that they went through
17 the Claimant. The absurdity of this is illustrated by
18 simple example. Suppose my mother purchases a house
19 two years ago for half a million dollars and then last
20 week she decides to gift the house to me. Naturally,
21 I'm grateful. And then suppose I need to get a bank
22 loan to pay various expenses and the bank wants a

11:25:07 1 balance sheet, somewhat like this balance sheet,
2 showing assets and liabilities. I would be perfectly
3 entitled to list that house on my balance sheet as my
4 asset for half a million dollars, and I would.

5 Does that mean--is that evidence of the fact
6 that I invested the money in that house? Of course
7 not. Is that evidence that my mother invested money
8 in the house through me? Of course not. All it
9 proves is that I'm currently carrying that asset, that
10 I currently have that. The fact that somehow, through
11 some corporate manipulation, the alleged investment in
12 El Salvador has now been transferred to the Claimant's
13 books, is that evidence they made the investment? Of
14 course not.

15 The same thing for the liabilities. They
16 claim that these liabilities are evidence that the
17 parent made the investment, but it was on behalf of
18 the Claimant, and now the Claimant owes money to the
19 parent because of those investments.

20 My question is, if you could put up the
21 balance sheet slide: Where is the evidence of that?
22 Where is the evidence showing transfer of funds from

11:26:31 1 Claimant into El Salvador? Where is the evidence
2 showing that Claimant had nothing anything to do with
3 the actual making of the investment? The argument
4 that they went through Claimant suggests that they
5 went in and then out of the Claimant. We would expect
6 to see two sets of documentation, the documentation
7 showing they went in, the funds went into the
8 Claimant, and then they went out into El Salvador. We
9 haven't seen any.

10 Where is the evidence showing that Claimant
11 even had a bank account to make the investments from?
12 Claimant says, well, we are thinking in the 18th
13 century. These days, things aren't made through bank
14 accounts. Payments are made other ways. Well, where
15 is the evidence it was made some other way?

16 And where is the evidence showing that there
17 was this alleged loan from the Canadian parent to the
18 Claimant for the purpose of investing in El Salvador?
19 There is none.

20 So much for the alleged investments of the
21 Claimant in El Salvador. Not only did they not put up
22 the money for the El Salvador projects, the Claimant

11:27:48 1 did not have any substantial business activities with
2 respect to the El Salvador project.

3 Mr. Shrake admits in his Witness Statement
4 that it was another entity, not the Claimant, that
5 served as the exploration arm of the Companies. That
6 entity is called Pacific Rim Exploration. And none of
7 the core team of geologists involved in the
8 exploration project, whom Mr. Shrake said did all the
9 work, none of them were employed by the Claimant.

10 The El Dorado studies and the technical
11 reports that we talked about so much during the
12 Preliminary Objections, if you look at them--and I've
13 put out citations up on the slide--and you don't have
14 to go much further than the cover page--none of them
15 were commissioned or contracted by the Claimant. And
16 there is no evidence of any meetings or corporate
17 decisions by Claimant's managers, and they were
18 required to have two managers by Nevada law. They had
19 no way around that. And by the way, the managers
20 were, of course, from the parent Canadian company, but
21 there is no evidence of any meetings of those managers
22 having to do with the El Salvador project or the

11:29:07 1 investments.

2 So, there are no substantial business
3 activities irrespective of when the test is applied.
4 You can apply it at any point in time, when they're
5 making the alleged investments, when they're
6 incorporated in the U.S., or today. Certainly the
7 Claimant was not in the territory of any Party, as
8 Mr. Smith talked about, before it was incorporated in
9 the U.S. on December 13 of 2007. And before then, it
10 was a Cayman Islands entity. And prior to December of
11 2004, it did not even hold the other entities in El
12 Salvador that were responsible for mining exploration.
13 Nothing has changed since December of 2007. We have
14 not seen any evidence that Claimant has any employees,
15 any bank account, pays any taxes, or signs any
16 agreements having to do with mining work.

17 The Claimant wants this Tribunal to forget
18 all that and instead look at the activities of the
19 other Enterprises. Don't worry about the fact
20 Claimant does nothing in the U.S. Let's look at all
21 these other Companies. The plain language of the
22 Treaty does not permit that. If we look again at the

11:30:29 1 denial-of-benefits language, which I've put up on the
2 screen, it says a Party may deny the benefits of this
3 Chapter to an investor of another Party that is an
4 enterprise of such other Party, and to investments of
5 that investor if the enterprise has no substantial
6 business activities in the territory. The enterprise.
7 And the Claimant was finally forced to admit that the
8 Treaty says what it says. The Claimant said in its
9 Rejoinder, Paragraph 156, "The activities of the other
10 Companies cannot substitute for those of Pac Rim
11 Cayman in a denial-of-benefits analysis. They cannot
12 substitute for Pac Rim Cayman's utter lack of business
13 activities in the United States."

14 Now, let me turn to the owned and controlled
15 leg of the analysis. Again, if I could briefly put up
16 the legal framework. In addition to showing no
17 substantial business activities, the second part of
18 the test is that persons of a non-Party own or control
19 the enterprise.

20 We believe this is a simple inquiry. At all
21 relevant times Claimant has been 100 percent owned by
22 Pacific Rim Mining Corp., a Canadian corporation, who

11:32:04 1 is a person of a non-Party. Claimant has never
2 disputed this, and one of their admissions in this
3 regard is up on the screen.

4 So, because they don't dispute that, that
5 should end the inquiry on ownership. But Claimant
6 urges the Tribunal to look beyond the language of the
7 Treaty and to look at the ownership of a non-Claimant
8 entity, the Canadian parent. And what do they argue?
9 They argue that we cannot deny benefits here because
10 the majority of Shareholders of the Canadian parent
11 are U.S. Shareholders.

12 Now, first this would do violence to the
13 simple language of the Treaty which says persons of a
14 non-Party own or control the enterprise. That's
15 undisputed; the Canadian parent owns the enterprise.
16 They would insert additional language, which I've put
17 up there in red which says, "unless the parents of the
18 enterprise is owned by persons of a Party." They cite
19 no support for this rewriting of the Treaty.

20 But even if it were appropriate to so rewrite
21 the Treaty, Claimant still fails, and the reason they
22 fail is that they fail to even allege, much less show,

11:33:30 1 that these Shareholders are persons of a Party. And
2 let me take you through this analysis.

3 CAFTA defines persons of a Party as a
4 national or enterprise of a Party. Now, what does
5 "national" mean? In order to get the definition of
6 national, we have to go to Chapter 10 of CAFTA, who
7 says, national means a natural person who has the
8 nationality of a Party according to Annex 2.1. Okay,
9 so now we have to flip to Annex 2.1.

10 What does Annex 2.1 say? Here, the Claimant
11 admits as to what--the Claimant makes an admission as
12 to what Annex 2.1 says in their Counter-Memorial at
13 Paragraph 328, where Claimant writes, "Annex 2.1
14 states that for the United States, a natural person
15 who is the nationality of a Party means national of
16 the United States as defined in the existing
17 provisions in the Immigration and Nationality Act.

18 And then Claimant also says--and this is the
19 Counter-Memorial also in that paragraph--the manner in
20 which U.S. law, (in particular, the Immigration and
21 Nationality Act) defines and uses the concepts of
22 nationality and residents is determinative--is

11:34:57 1 determinative--for purposes of construing the meaning
2 of these terms."

3 Now, the Immigration and Nationality Act
4 defines a national as either a citizen of the United
5 States, or a person who though not a citizen, owes
6 permanent allegiance to the United States. Has the
7 Claimant shown that? Let's take a look.

8 In order to argue that the parent is
9 controlled by U.S. Shareholders, they rely on one
10 thing: Share-owning information generated by a firm
11 called Broadridge Financial Solutions. Yet the
12 Claimant makes a fatal admission undermining its
13 entire argument. Claimant says in its
14 Counter-Memorial that the information gathered by
15 Broadridge does not indicate the nationality of
16 Pacific Rim's Shareholders, but it indicates their
17 residence. On the prior slide we just saw Claimant
18 admit that nationality was the test, and the
19 definition of nationality given by the Immigration and
20 Naturalization Act was determinative, and now it tells
21 us it really doesn't know the nationality of the
22 Shareholders. It knows they're residents, and that's

11:36:24 1 the only thing that Mr. Shrake relies upon in his
2 Witness Statement. And the Claimant has to admit in
3 its Rejoinder that a U.S. resident is not necessarily
4 a U.S. citizen.

5 So, what does this mean? What this means in
6 terms of the ownership analysis is the following:
7 One, the Treaty language says owns, and it doesn't
8 talk about ownership of the parent company. It talks
9 about ownership of the enterprise. Who owns the
10 enterprise? The Canadian entity one hundred percent.
11 There is no justification for ignoring the Treaty
12 language and going up one level to ownership of the
13 parent. But let's suppose the Tribunal were inclined
14 to do that. Claimant asserts that the parent is
15 majority-owned by U.S. Shareholders who have to be
16 U.S. nationals under their argument, but they are not.
17 They haven't shown they are. At best they've shown
18 ownership by the parent by unidentified U.S.
19 residents.

20 Now, let's look briefly at control, and again
21 let's put up the legal framework. Again, the test is
22 disjunctive, if you can put up the next slide, because

11:37:52 1 ownership by persons of a non-Party is shown, the
2 Tribunal need not reach the issue of whether there's
3 control by a non-Party. But in any event, control by
4 persons of a non-Party is evident from the undisputed
5 facts.

6 First, it is undisputed that the Canadian
7 company is the sole owner of the Claimant's Shares,
8 and the Claimant concedes in its Counter-Memorial that
9 with majority ownership comes control. Well, if with
10 majority ownership comes control, surely sole
11 ownership would also confer control.

12 But even if one were to look at the facts
13 beyond that, they indisputably demonstrate that
14 Claimant was controlled by its Canadian parent, and
15 I've highlighted some of them on this slide. The two
16 initial Managers the Claimant who were required under
17 Nevada law were Mr. Shrake and Ms. McLeod-Seltzer.
18 Mr. Shrake is the President and Chief Executive
19 Officer of whom? Pacific Rim Mining Corporation.
20 That's the Canadian parent. Ms. McLeod-Seltzer is
21 Chairman of the Board of whom? Pacific Rim Mining
22 Corporation, again the Canadian parent. In fact, all

11:39:25 1 four individuals who have served as managers of the
2 Claimant during the relevant period were officers or
3 employees of the Canadian parent.

4 And what is the ultimate test of control?
5 What could be more fundamental to a corporation than
6 changing its form than moving it from one jurisdiction
7 to another? Who made the decision to domesticate the
8 Claimant in the United States and give up its Cayman
9 Islands domestication? Pacific Rim Mining
10 Corporation, the Canadian parent. And in December of
11 2007, that decision was made, approved, and authorized
12 by the Board of Directors of the Canadian parent. If
13 that is not control, I don't know what is. So, to
14 conclude on the control issue, again this point is as
15 relevant to ownership as it is to control. It is
16 undisputed that the Canadian parent has always owned a
17 hundred percent of Claimant. Claimant concedes that
18 with majority ownership comes control. Surely sole
19 ownership confers control as well. Even if the Treaty
20 language were to be ignored, and we would go one step
21 up and look at control of the parent, Claimant has not
22 demonstrated, has not even alleged, much less

11:40:59 1 demonstrated, that U.S. nationals as opposed to U.S.
2 residents, owned Majority Shares in the parent.

3 And finally, the best evidence of control is
4 what actually happened. The decision to change the
5 nationality of the Claimant which was made by the
6 Board of Directors of the Canadian parent.

7 Finally, I would like to spend a few moments
8 on notice because Claimant has made allegations that
9 somehow the notice that was made--that was given by
10 the Government of El Salvador in this case was
11 untimely or inappropriate. And I will demonstrate not
12 only was it timely and appropriate, but it was in
13 complete accord with the intent of the
14 denial-of-benefits framework.

15 Let's look at the legal framework for the
16 providing of notice, put the language up on the
17 screen. The invocation of the denial-of-benefits
18 clause is subject to two provisions, Article 18.3,
19 which is Notification and Provision of Information,
20 and Article 20.4, Consultations. So, it's only
21 subject to two provisions.

22 Next slide, please.

11:42:25 1 There is no requirement anywhere here for
2 advanced notification to a Party prior to commencement
3 of the arbitration, and the Claimant is forced to
4 admit that the Treaty text does not require any notice
5 to investors. It talks about notice to a Party;
6 namely, the United States. And let's look at CAFTA
7 Article 18.3, which talks about the form of that
8 notice. The language is revealing. The language
9 says, "To the maximum extent possible, each Party
10 shall notify any other Party"--again, no reference to
11 notifying investors, simply a Party--"with an interest
12 in the matter of any proposed or actual measure that
13 the Party considers might materially affect the
14 operation of this agreement or otherwise materially
15 affect that other Party's interests under this
16 agreement." So what can we take away from this
17 language? The notice is only to the maximum extent
18 possible. Again, there is no mention of notifying
19 investors as I've noted. Notice is to go to the other
20 Party.

21 This is another difference between CAFTA and
22 the Energy Charter Treaty because here the CAFTA

11:43:54 1 denial-of-benefits provision expressly references the
2 type of notice that is necessary, which was not the
3 case with the ECT.

4 And also of note is the fact that the
5 language says the notice is to be of proposed or
6 actual measures. So, of course, the plain reading of
7 that suggests that no advance notice is required
8 because the measure could already have taken place
9 when the notice is given.

10 Now, was the notice given by El Salvador
11 untimely, as Claimant asserts? Well, let's look at
12 the facts and Claimant's admissions in that regard.
13 First, Claimant admits that no such notice would make
14 sense before Claimant was registered in the U.S. in
15 December of 2007. How could we give a notice under
16 CAFTA before there's even an alleged CAFTA entity?

17 What had happened by December of 2007? By
18 then, the Canadian company had already made over
19 93 percent of its alleged investment in El Salvador.
20 Indeed, the first evidence that the Government of El
21 Salvador had any inkling of this change of nationality
22 was in June of 2008, and by then over 97 percent of

11:45:25 1 the alleged investment in El Salvador had been made.

2 Now the Tribunal may be wondering why do I
3 mention this percentage of the investment? Why is it
4 relevant? I mention it because this is not a case
5 where Respondent could have denied benefits before the
6 investments were made, and where the investors'
7 legitimate expectations of being protected by CAFTA
8 were violated. There could have been no legislative
9 expectations of being protected by CAFTA certainly
10 before it was incorporated in the U.S. in December of
11 2007, if at all, because as I've demonstrated,
12 Claimant never made any investments in the U.S. It
13 was the Canadian company that made investments in the
14 U.S.

15 And let's look at a timeline to put this in
16 stark detail. The alleged investment by the Canadian
17 company began somewhere in 2001 or 2002 and continued
18 until September of 2008.

19 Claimant was registered in the U.S. in 2007,
20 and as I've pointed out in their Rejoinder, at
21 Paragraph 200, they admit that certainly no notice of
22 denial of benefits was appropriate before December of

11:46:52 1 2007.

2 What happened next? The Government was not
3 even given notice of this change--no, excuse me. What
4 happened next, according to the Claimant, is the news
5 article in March of 2008, which it alleges was the
6 first notice it had of any possible dispute. Now,
7 Mr. Smith has already talked about how the facts belie
8 that proposition, but assuming for the moment that you
9 believe that, certainly if the dispute first arose in
10 March of 2008, the authorities cited by the Claimant
11 say that how could you even think of giving a notice
12 of denial of benefits before there is a dispute.

13 So, under Claimant's theory of the case, no
14 notice of denial of benefits would make sense before
15 March of 2008.

16 And when was El Salvador notified of the
17 change of nationality? June of 2008. So, it could
18 not even have known that it was dealing with a
19 putative CAFTA Party until June of 2008. In fact, the
20 better view--and this is in, among other places, Meg
21 Kinnear's Treatise on NAFTA--is that there cannot be
22 any reason to require a notice of denial of benefits

11:48:25 1 before a claim is submitted to arbitration, which did
2 not happen until December of 2008.

3 So, to summarize these timelines and what
4 they show, in order to plausibly invoke the denial of
5 benefits, El Salvador would have had to have known at
6 least the following: One, the existence of a dispute,
7 which, if you believe Claimant, did not happen until
8 at least March of 2008, and certainly El Salvador
9 would certainly have to know that it was dealing with
10 a putative CAFTA Party, which it did not have notice
11 of until June of 2008. Again, this is not a case
12 where an investor goes into a country, puts in money
13 expecting to be protected by CAFTA, and then has those
14 expectations overturned. There were no such
15 legitimate expectations, and over 97 percent of the
16 investments had already been made before El Salvador
17 knew of the change of nationality, as demonstrated in
18 these next couple of slides.

19 Now, let me talk about the consultation
20 procedures, which is the only other condition to
21 invoking denial of benefits. Article 20.4.1 notes
22 that any Party may request in writing consultations

11:50:05 1 with respect--with any other Party with respect to any
2 actual or proposed measure. El Salvador completely
3 complied with this requirement and sent a
4 denial-of-benefits notification letter to the United
5 States Trade Representative on March 1, 2010. To
6 date, the United States Government has not requested
7 any additional information or consultations, which is
8 its right under CAFTA.

9 Let me conclude my presentation on denial of
10 benefits. First, I haven't said a lot about this yet,
11 but we say it in our papers. The burden here is not
12 on El Salvador. The burden is on Claimant. Claimant
13 embraces the test which is set forth by Judge Higgins
14 in the case concerning Oil Platforms applied in the
15 Plama arbitration, which holds that the Claimant must
16 show the alleged facts on which it relied were capable
17 of falling within the provisions of the Treaty. It
18 has not alleged any such facts that would take it
19 outside of the Treaty denial-of-benefits provisions.

20 First, the Claimant has no substantial
21 business activities in the United States and never had
22 any such activities at any time. It urges the

11:51:42 1 Tribunal to look to activities of other entities.
2 Those other entities are not here. They're not before
3 this Tribunal. They are not the Claimant. And
4 looking at those other entities would ignore the plain
5 treaty language.

6 With respect to ownership and control, again
7 the test is disjunctive. Only one of these needs to
8 be shown. With respect to ownership, there is no
9 dispute the Claimant has been 100 percent directly
10 owned by a person of a non-Party, Canada. Claimant
11 urges the Tribunal to look at the ownership not of the
12 Claimant, but the ownership of the parent. El
13 Salvador disputes that that's the appropriate test,
14 but El Salvador points out that even if it were,
15 Claimant has not shown that the parent is
16 majority-owned by U.S. nationals as opposed to U.S.
17 residents.

18 And as to control, the Claimant concedes that
19 with majority ownership comes control a fortiori; with
20 100 percent ownership comes control, and the facts
21 including the most fundamental event to a
22 corporation's life, the change in its state of

11:53:01 1 incorporation, that event was completely controlled by
2 the Canadian company when it moved the nationality of
3 the Claimant from the Cayman Islands to Nevada.

4 The application of the denial of benefits
5 requires dismissal of all the claims. As pointed out,
6 the benefits of Chapter Ten, which are implicated by
7 the denial of benefits includes dispute resolution.
8 Once those benefits are denied, Claimant has no right
9 to submit any claims, nor does it have El Salvador's
10 consent to arbitration. Therefore, the Tribunal has
11 no jurisdiction over any CAFTA claims.

12 The result of that, if the CAFTA claims are
13 dismissed, all other claims must be dismissed as well
14 given this Tribunal's prior finding that there is one
15 arbitration proceeding and that the claims are
16 inextricably linked.

17 At this time, I would like to thank you for
18 your time, and my colleague, Mr. Parada, will be
19 addressing *ratione temporis* and the Investment Law,
20 unless you have any questions for me now.

21 PRESIDENT VEEDER: Thank you very much. We
22 may well have questions for you later, but not at

11:54:22 1 present.

2 MR. BADINI: Thank you.

3 PRESIDENT VEEDER: We would just like some
4 reassurance from you or Mr. Parada that we are still
5 on time. We shall still finish by 12:30; is that
6 correct?

7 MR. BADINI: I believe we are.

8 PRESIDENT VEEDER: Good.

9 MR. PARADA: Good morning, Mr. President,
10 Members of the Tribunal.

11 I'm going to address the last two
12 Jurisdictional Objections of El Salvador, Objections
13 to Jurisdiction *ratione temporis* and Objections to
14 Jurisdiction under the Investment Law of El Salvador,
15 which, as presented to this Tribunal, is a second
16 proceeding that the Tribunal has found, though, is
17 indivisible from the CAFTA proceeding.

18 I would like to start by saying, though, that
19 these two objections I'm going to refer to are
20 subsidiary objections, and by that I mean that you,
21 the Tribunal, only need to address them if it does not
22 find that there is abuse of process or that there is

11:56:17 1 no denial-of-benefits applicability under CAFTA.

2 With regard to the jurisdiction *ratione*
3 *temporis* under CAFTA, even if we assume for a minute
4 that Claimant's change of nationality was not abuse of
5 process, this change of nationality that took place in
6 December of 2007 does have some additional barriers to
7 ICSID jurisdiction under CAFTA.

8 First, Pac Rim Cayman is not an investor
9 under CAFTA;

10 Second, the undisputable maxim that there can
11 be no jurisdiction under CAFTA over any allegations of
12 claims that may have occurred before Claimant was a
13 national of a CAFTA Party;

14 And related to that, that CAFTA's three-year
15 statute of limitations precludes jurisdiction under
16 CAFTA.

17 So, let's start by examining why Claimant is
18 not an investor under CAFTA. Well, CAFTA
19 Article 10.28 defines investor of a Party as an
20 enterprise of a Party, that means in this case an
21 enterprise of the United States, that attempts to
22 make, is making, or has made an investment in the

11:57:48 1 territory of another Party. It's undisputable that
2 Pac Rim Cayman only became an enterprise of a Party in
3 December 2007. And as it has been shown but I will
4 repeat now, since then, Pac Rim Cayman has not
5 attempted to make, is not making, or has made an
6 investment in El Salvador.

7 Now, Claimant says, well, there was an
8 investment before December 2007, and they seem to
9 argue that that investment that may happened before
10 December 2007 somehow becomes a covered investment
11 under CAFTA just by virtue of Claimant's change of
12 nationality. Well, let's look at what CAFTA Article
13 2.1 says about, "covered investments," and it defines
14 them as with respect to any Party an investment in its
15 territory of an investor of another Party--in this
16 case, it would have to be a United States
17 investor--that was in existence as of the date of the
18 entry into force of CAFTA, or that was established,
19 acquired, or expanded thereafter.

20 Now, when CAFTA entered into force for the
21 United States and El Salvador, which was March 1st of
22 2006, the alleged investment was held under the name

11:59:11 1 of Pac Rim Cayman when Pac Rim Cayman was a national
2 of the Cayman Islands, so it was not an investor of
3 the United States.

4 Now, Pac Rim Cayman's change of nationality
5 in December 2007 did not result in the establishment,
6 acquisition, or expansion of a lawful investment. It
7 was merely a company, the Cayman Islands company,
8 changing its nationality, but that did not change the
9 nature of the alleged previous investment to be a
10 covered investment.

11 As we have seen before, the investments
12 before the change of nationality were made by Canadian
13 Companies. And what's important here to note is the
14 last bullet, that even after the change of
15 nationality, Pac Rim Cayman has not made, acquired, or
16 attempted to make any investments.

17 As Mr. Badini showed, the wire transfers that
18 had been registered or submitted for registration
19 before El Salvador starting in December 2001 show that
20 they were made by several Canadian Companies, the last
21 ones by Pacific Rim Mining Corporation. But even
22 after Pac Rim Cayman became a U.S. enterprise, these

12:00:59 1 transfers continued to come from Canada. The wire
2 transfers sent from October 2007, which was slightly
3 before it changed its nationality to December 2008,
4 that was the last one that was attempted to be
5 registered, were sent from, it says, Olympia Trust
6 Company Canada. And I would like to say something
7 very interesting in this regard.

8 Now, this is the request of registration of
9 that investment that was requested by Pacific Rim El
10 Salvador, and it included the certificate of entry of
11 the foreign currency prepared by the local bank in El
12 Salvador, and it showed only that the sender was
13 Olympia Trust Company in Canada.

14 Let's go back to the one showing all the
15 transfers, two slides back.

16 The previous Applications for registration
17 clearly indicated who had ordered the payments. This
18 first one was Dayton Acquisitions; second one, Pacific
19 Rim Mining Corporation; third one, Pacific Rim Mining
20 Corporation. But the last one that covered little
21 over seven million dollars it only said the name of
22 the bank in Canada that had sent the transfer, but not

12:02:44 1 who had ordered the transfer. This prompted El
2 Salvador to request to Pacific Rim El Salvador saying
3 we cannot register this request because it does
4 not--first, there is an error in the name of the
5 company. It says Pacific Rim Cayman when the correct
6 name should be Pac Rim Cayman, but second that the
7 bank record does not specify the name of the company
8 ordering the transfer of the capital.

9 And to this date, as far as we are aware,
10 Pacific Rim El Salvador never replied with
11 the--supplied the information that was needed. So, we
12 can only assume that it was still Pacific Rim Mining
13 Company in Canadian, the sender of this one, and this
14 \$7 million has not been registered by El Salvador's
15 National Investment Office.

16 Now, going to the next point, it should be
17 uncontroversial that breaches of CAFTA can only be
18 alleged for measures, acts, or facts that occurred
19 after CAFTA entered into force, which was March of
20 2006, and after CAFTA became applicable to Pac Rim
21 Cayman, which was not until after Pac Rim Cayman had
22 its nationality change in December 2007. And here, as

12:04:29 1 my colleagues have explained before, the alleged
2 breaches related to the two measures involved in this
3 arbitration, which is the alleged failures by the
4 Ministry of the Environment and the Ministry of the
5 Economy to grant the Applications submitted by Pacific
6 Rim occurred before the change in nationality; and,
7 therefore, there can be no allegation of breach of
8 CAFTA in this case as these measures and the alleged
9 breaches took place before December 2007.

10 We know that CAFTA does not apply
11 retroactively. There are two measures, but they are
12 unrelated. Claimant alleges that MARN breached its
13 rights or violated Claimant's rights because it did
14 not issue the environmental permit, and that the
15 Ministry of the Economy did not issue the Exploitation
16 Concession. However, to issue the Exploitation
17 Concession, you needed the environmental permit. The
18 Ministry of Economy could not have issued lawfully the
19 Concession without the environmental permit.

20 So, it's important to note when Claimant
21 first noticed that the environmental permit, which was
22 necessary for the Concession, was not issued as it was

12:06:11 1 supposed to be as El Salvador through the Ministry of
2 the Environment had a duty to do. And this happened
3 in December of 2006. I'm sorry, 2004, when the
4 President of Pacific Rim El Salvador noted that the
5 statutory period for the granting or denial, so for
6 the decision on the environmental permit had already
7 passed, and that this delay was already causing damage
8 or harm to the company. That's one measure.

9 Now, what's the other measure? The not
10 issuance of the Concession from the Ministry of the
11 Economy? Now, Claimant was still a Cayman Islands
12 company when the Ministry of Economy sent it two
13 warning letters that, as Mr. Smith indicated before,
14 triggered the automatic termination of the Application
15 for the Concession if the defect was not cured within
16 30 days. There were two letters sent, one in October
17 of 2006, and that one invoked Article 38 of the Mining
18 Law, which expressly states that if the defect is not
19 cured within 30 days, the Application must be
20 terminated and sent to the file.

21 Now, because Pac Rim El Salvador adduced just
22 cause for not complying with the environmental permit

12:07:51 1 because it had not received it, the Bureau of Mines
2 granted an additional 30-day period. But still, when
3 that expired in January 2007, the company still had
4 not responded, had not provided the environmental
5 permit. Therefore, by operation of law, that
6 Application, the only one for the Concession for El
7 Dorado that Claimant alleged Pacific Rim El Salvador
8 has submitted, was effectively terminated in January
9 of 2007. That Application could not be continued or
10 revived then or today. If for some reason Claimant
11 wanted that Concession, they would have to refile a
12 new Application.

13 So, the dispute clearly was completely
14 crystallized by at the latest January of 2007. This
15 was before the change in nationality. And, therefore,
16 even if the Tribunal does not find that the change of
17 nationality was an abuse of process, it must at the
18 very least using principles already established on
19 jurisdiction, it must decline jurisdiction over the
20 claims related to the El Dorado Exploitation
21 Concession.

22 Now, let me refer quickly to Claimant's

12:09:19 1 attempt to assign a later date to this dispute by
2 saying that this article in the newspaper by President
3 Saca somehow recast the dispute. Let me just go
4 straight to--Mr. Smith has already referred to how the
5 article is really nothing new, that they were exactly
6 and even more detailed articles expressing the same
7 thing two years and one year before. Let me just go
8 straight to number 20, which is Claimant's allegation
9 that it was this newspaper article that caused their
10 stock prices to fall and their damages to ensue. And
11 with their Counter-Memorial, Claimant submitted the
12 chart at the top that shows a drop in the prices of
13 its stock in 2008, which they attribute solely to this
14 Salvadoran newspaper article in Spanish reporting some
15 statements that you have heard did not really announce
16 any ban on mining, only said that the President had
17 concerns about the environment, and we will have to
18 wait.

19 Now, El Salvador submitted in its Reply
20 another chart shown at the bottom of this slide. It
21 showed that the drop in stock for Pacific Rim Mining
22 Corporation mirrored the general drop in stock

12:11:03 1 everywhere, and in this chart is actually the stock,
2 an index of the stock of the main gold Companies.

3 Now, of course, there's a difference between
4 the two charts, and anybody can see that, that even
5 though the drop is similar, the stock price of the
6 other Companies went back up again, but the
7 price--that the stock for Pacific Rim Mining
8 Corporation remained flat.

9 In its Rejoinder, Claimant produced a more
10 detailed chart showing month by month this comparative
11 drop in value between the same index that El Salvador
12 had used for the main gold Companies in blue, and the
13 Pacific Rim Mining Corporation stock value at the
14 bottom, and they again insist on attributing it to
15 President Saca's statement in March of 2008.

16 But if you look at the steep drop in the
17 price, it doesn't take place in March. It took place
18 in July, and it almost never recovered.

19 Well, what happened in July of 2008? Well,
20 Claimant itself provides the answer. In Paragraph 155
21 of its Counter-Memorial, it says that it was in July
22 of 2008 that Pacific Rim Mining Corporation suspended

12:12:51 1 the drilling activities and began to make workforce
2 reductions.

3 Now, this was actually news. It was not just
4 in El Salvadoran newspaper. It was actually a news
5 release that was widely reported by Pacific Rim Mining
6 Corporation when it said that it would begin reduction
7 of personnel, reduction of drilling, and that it had
8 hired Crowell & Moring to prepare for potential
9 arbitration against El Salvador. So, it was this
10 announcement in July of 2008 that determined the
11 timing of this dramatic drop in value of Pacific Rim's
12 stock, and the fact that once it went down, it did not
13 recover again.

14 Now, finally, let me refer to a three-year
15 statute of limitations under CAFTA.

16 Even setting aside everything else, CAFTA
17 Article 10.18 establishes that no claim may be
18 submitted for arbitration under CAFTA if more than
19 three years elapse from the date on which the Claimant
20 first acquired or should have first acquired knowledge
21 of the breach alleged under Article 10.16.1 of CAFTA
22 and knowledge that the Claimant has incurred loss or

12:14:14 1 damage. On the facts of this case, it is clear that
2 Claimant became aware that the Ministry of Environment
3 was delaying issuing the environmental permits and
4 that it had incurred loss or damage since
5 December 2004, as we can see in that letter that has
6 been shown before from December 2004.

7 Now, you can say, well, this was a delay, the
8 first delay, according to Salvadoran law, and you
9 could not really say that that was a breach of CAFTA.
10 You can also say, well, CAFTA had not even entered
11 into force until March 2006, so it could not have been
12 a breach of CAFTA. Well, regarding the first
13 question, that's why CAFTA gives the Claimant three
14 years to notice that there's a breach and file an
15 arbitration. And even if we start counting those
16 three years from the date on which CAFTA entered into
17 force, which was March 1st, 2006, that takes us to
18 March 1st, 2009. The fact is that the Notice of
19 Arbitration was not filed until April 30 of 2009, two
20 months past the three-year statute of limitations.

21 And briefly, in the United States, the
22 alleged country of nationality of Claimant has

12:15:57 1 submitted before in NAFTA cases that there is only one
2 first time when the Claimant is supposed to take
3 notice or should take notice of the breach.
4 Therefore, in this case, independently of any other
5 reason, the three-year Statute of Limitations bars any
6 claims related to the El Dorado Exploitation
7 Concession.

8 Now, let me address the jurisdiction under
9 the investment law for El Salvador. This, as I said,
10 is a separate invocation of jurisdiction that could
11 have been filed before a different Tribunal, but it
12 wasn't. This Tribunal is seeing two proceedings, two
13 separate invocations of jurisdiction, two separate
14 sets of claims related to the very same measures. So,
15 this Tribunal is seeing two cases in one.

16 Now, I'm going to address six independent
17 reasons to reject jurisdiction under the Investment
18 Law of El Salvador. I have placed them in a
19 particular order, and I would request the Tribunal
20 examine these six potential reasons in that order
21 because it only takes for the Tribunal find that one
22 of them applies for the inquiry to stop.

12:17:28 1 The first reason is the Claimant's abuse of
2 process taints the entire arbitration. If the
3 Tribunal finds that the decision by Pacific Rim Mining
4 Corporation to change Pac Rim Cayman's nationality in
5 December 2007 was an abuse of process, this finding
6 would not only result in a denial of jurisdiction for
7 this proceeding under CAFTA, but also in the denial of
8 jurisdiction for the proceeding under the Investment
9 Law.

10 This is true for two reasons. The first is
11 that the abuse of process affects the entire
12 arbitration, not only the CAFTA claims. Claimant's
13 abuse of change of nationality was instrumental also
14 to initiate the proceeding under the Investment Law.
15 This is true for two reasons. One, the only Claimant
16 that could possibly invoke the protection of the
17 Investment Law of El Salvador was Pac Rim Cayman and
18 that is because Pacific Rim Mining Corporation chose
19 Pac Rim Cayman to be the holder of the Shares, and it
20 was registered as the owner of the Salvadoran
21 enterprises, and as the registered owner was the only
22 one that could claim--that could claim protections

12:18:48 1 under the Investment Law.

2 Yes, Mr. President.

3 PRESIDENT VEEDER: Sorry for interrupting
4 you. We are concerned about the time. Some of these
5 matters are very fully dealt with in your excellent
6 paper so far, but the one area where we need your
7 assistance is your sixth independent reason. We
8 wonder whether given the time you would like to
9 proceed to that first.

10 MR. PARADA: Let me just double-check, sir to
11 make sure that there's--the other ones are
12 self-explanatory.

13 PRESIDENT VEEDER: They are.

14 MR. PARADA: You can follow them very
15 quickly.

16 I am concerned, though, about the full
17 understanding of El Salvador's position that if the
18 Tribunal determines that its decision on the
19 Preliminary Objections of treating these two
20 proceedings as indivisible is not followed, then that
21 the CAFTA waiver comes into place, and that the CAFTA
22 waiver will preclude jurisdiction because--give me

12:19:53 1 the--I just want to make reference to the text of
2 CAFTA Article 10.18.2. That would be Slide nine.

3 PRESIDENT VEEDER: Slide nine.

4 MR. PARADA: I think the text was the source
5 of some confusion before, and I just wanted to make
6 sure I had the opportunity to state this again.

7 What's being waived is the right to initiate
8 or continue--in this case, initiate--before any
9 administrative tribunal or court under the law of any
10 Party or other dispute-settlement procedures any
11 proceeding with respect to any measure alleged to
12 constitute a breach of CAFTA.

13 Now, there is no dispute that the Investment
14 Law proceeding is any proceeding. There is no dispute
15 that is in respect to the same measures that are being
16 alleged are a violation of CAFTA. The only source of
17 confusion is whether there is any or other dispute
18 settlement procedures means, and I would like to show
19 how if we substitute that phrase for other
20 dispute-settlement procedures, for example, mediation,
21 conciliation, domestic arbitration, or international
22 arbitration, it makes sense that what is being said

12:21:30 1 there if we substitute international arbitration for
2 other dispute settlement procedures, we read it more
3 clearly and says that it is waiving the right to
4 initiate or continue before any administrative
5 tribunal or court under law of any Party, or by
6 international arbitration any proceeding with respect
7 to any measure alleged to constitute a breach referred
8 to in CAFTA.

9 So, El Salvador's point in interpreting this
10 Article is that it does not matter whether it's before
11 the same Tribunal or before a different international
12 arbitration tribunal. What is being waived is the
13 right to initiate any proceeding with respect to any
14 measure that is alleged to be a relation of CAFTA.

15 Now, let me go straight to Slide Number 21.

16 El Salvador alleges that Article 15 of the
17 Investment Law does not constitute consent, and this
18 would be the consent that is directly referred to by
19 Article 25 of the ICSID Convention. El Salvador's
20 point that this being an expression or an alleged
21 expression of consent in a unilateral declaration, and
22 in general also an expression of consent must be

12:23:03 1 clear. It cannot be presumed especially because this
2 would be a unilateral declaration. And we want to
3 show how, for example, this expression of consent is
4 clear in CAFTA, which is the source of the other
5 proceeding before this Tribunal. In CAFTA you have,
6 in addition--well, to the same similar language to
7 what the Investment Law says that the investor may
8 submit the dispute to ICSID. CAFTA has the
9 corresponding language in Article 10.16.

10 But in addition to that, CAFTA has something
11 that the Investment Law of El Salvador doesn't have,
12 and that is an express reference to consent, and that
13 is in Article 10.17; that in addition to saying that
14 an investor may initiate arbitration under ICSID,
15 states that each Party consents to the submission of a
16 claim to arbitration at this section, and specifically
17 says that this consent satisfies the requirements of
18 Chapter Two of the ICSID Convention.

19 Now, El Salvador has also made reference to a
20 comparison between the language on the Investment Law
21 and the, for example, the ICSID Model Clause that
22 makes a specific reference to consent, and it says

12:24:34 1 hereby consent or the ICC Model Clause, that even
2 though it does not use consent, it has a mandatory
3 "shall be finally settled" expression of international
4 arbitration.

5 This being a unilateral declaration by a
6 State, it has to be interpreted in a restricted manner
7 if it's not clear, and El Salvador submits because
8 that there's not a specific reference to consent, it's
9 not clear and, therefore, has to be interpreted
10 restrictively.

11 A second principle is--again that has to be
12 stated in clear or specific terms, and there's no
13 specific reference to consent. And the intention of
14 when the declaration was made was important as well as
15 the exercise of caution.

16 Now, the next slide is very important.
17 Intent to provide consent cannot be presumed. It must
18 be established. It must be clearly established, and
19 El Salvador submits that there is no clear expression
20 of consent in Article 15 of the Investment Law.
21 Article 15 is descriptive. It does not create
22 jurisdiction as you can see in the text. It refers,

12:26:05 1 first, that the dispute may be submitted to the courts
2 of El Salvador both for foreign investors and domestic
3 investors, and for foreign investors it is says that
4 it may be submitted to international arbitration.

5 Now, that language does not create
6 jurisdiction, for example, in the courts of El
7 Salvador. The courts in El Salvador have their own
8 jurisdictional requirements. Likewise, it does not
9 create jurisdiction for ICSID.

10 And regarding expression of intent at the
11 time the Investment Law was passed, it's important to
12 look at the signed bilateral investment treaties, for
13 example, for evidence of what the intent may have
14 been, or at least for evidence that there was not
15 clear that there was an intent to submit or give
16 consent to ICSID arbitration. In those BITs, for
17 example, where I showed the one from the United
18 Kingdom and El Salvador, it makes a specific reference
19 to consent, and says each Contracting Party hereby
20 consents to submit to the International Centre, and
21 this is in a separate article.

22 Now, there are other BITs that don't have the

12:27:32 1 reference to consent, but it has more forceful, as
2 opposed to--compared to the language of the Investment
3 Law, and refers to the language that the investor
4 "shall be entitled to submit the case at his choice."

5 So, the absence, El Salvador's submission is
6 the absence of a similar language in the Investment
7 Law is evidence that El Salvador did not intend to
8 consent to arbitration in the Investment Law, and it's
9 important to look at the wording of the Tribunal in
10 Mobil against Venezuela, that it also compared the
11 language of the Venezuelan Investment Law to the BITs
12 that Venezuela had already signed. In looking at the
13 language that Venezuela had used in those BITs, it
14 said that if you have any intention of Venezuela to
15 give consent to ICSID arbitration, it would have used
16 one of the phrases used in those BITs.

17 As a further indication that there is no
18 clear consent, it's Article 146 of the Salvadoran
19 Constitution, says that El Salvador may consent to
20 arbitration in treaties and contracts, but does not
21 mention law/legislation.

22 And I just would like to finally address the

12:29:07 1 Inceysa against El Salvador Award. I had the
2 opportunity to work on that case at the beginning of
3 the case. And from the beginning, El Salvador made a
4 decision for the strategy of the case that instead of
5 trying to fight on whether there was consent or there
6 was not consent under Article 15, it would just
7 continue the argument that was developed to show that
8 there was no consent for illegal investments under the
9 Bilateral Investment Treaty between El Salvador and
10 Spain, and take all that very heavily factually
11 intensive part into the Investment Law, and show the
12 Investment Law does not protect investments made
13 through fraud. So rather than starting from the
14 position that Article 15 of the Investment Law did not
15 constitute consent, El Salvador merely extended the
16 application of what it had already done at a great
17 expense with regard to the Bilateral Investment Treaty
18 between El Salvador and Spain to the Investment Law,
19 and the Tribunal found that like the Bilateral
20 Investment Treaty, the Investment Law did not provide
21 for protection for investments made through fraud.

22 So, the Award in that case and the position

12:30:43 1 taken by El Salvador in that case must be understood
2 with that in mind. In that Award, in the finding in
3 that Award, it's not binding on this Tribunal. The
4 Tribunal has the power and the duty to make its own
5 determination, but I would like to remind the Tribunal
6 that it doesn't need to get there if it finds that
7 there was no jurisdiction under the Investment Law
8 because there was abuse of process or because the
9 CAFTA denial-of-benefits provision applies, and these
10 two proceedings are indivisible; or, if it finds
11 otherwise, then the CAFTA waiver must away apply, that
12 the Claimant is not an investor under Investment Law,
13 is not a foreign investor under the Investment Law
14 because it did not make any investment in El Salvador,
15 or by piercing the corporate veil that Pac Rim Cayman
16 in getting to the Canadian company. That it is
17 not--is from a country that is not a Party to the
18 ICSID Convention, and therefore it should not be
19 allowed to take advantage of ICSID arbitration.

20 That is the conclusion, Mr. Chairman.

21 PRESIDENT VEEDER: Thank you very much,
22 indeed.

12:31:59 1 Well, thank you to the Respondent for this
2 morning's submissions. We will now break for lunch.
3 And under our timetable, we come back at 2:00 to give
4 the floor to the Claimant for their opening oral
5 presentation.

6 We will adjourn now for lunch. Thank you.

7 (Whereupon, at 12:32 p.m., the hearing was
8 adjourned until 2:00 p.m., the same day.)

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02:05:09 1 issues that we have been putting before you on a rapid
2 fire basis.

3 Let me also thank the Republic of El
4 Salvador's legal team for their presentation this
5 morning. However, I, for one, did not learn anything
6 that I already didn't know from my study of El
7 Salvador's written pleadings. We believe we've shown
8 you in writing why they're wrong, and we intend to do
9 so again in the course of this afternoon and over the
10 course of the next two days.

11 As you read in our respective submissions and
12 heard this morning, Respondent has put forward four
13 separate objections, an objection to your jurisdiction
14 *ratione temporis*, an objection on the basis of abuse
15 of process, a request that you defy the benefits of
16 CAFTA to Claimant, and an objection on the basis that
17 Article 15 of the El Salvadoran Investment Law does
18 not contain El Salvador's unilateral consent to ICSID
19 jurisdiction. Now, I'm going to give you just a quick
20 synopsis of why you should reject each of these
21 objections, and my colleagues will then in their
22 respective presentations make it abundantly clear why

02:06:25 1 what Respondent has said to you is just flat-out
2 wrong.

3 But before we get too mired in details here,
4 what's the bottom line? Is it this:

5 First, they're wrong because they're asking
6 you to disregard the plain terms of the two
7 instruments of consent that we have invoked; namely,
8 CAFTA and the El Salvadoran Investment Law.

9 Second, they cannot prevail because they have
10 not discharged their burden of proof which, in the
11 case of at least two of their objections, is a
12 heightened one.

13 In this regard, you might ask yourself the
14 following question: If El Salvador truly believed in
15 its litany of objections, why hasn't it tendered a
16 single fact witness in support of its objection; that
17 is, other than its own counsel, a person who claims to
18 be primarily responsible for bringing the Republic of
19 El Salvador as a client to his firm.

20 Where is Ms. Yolanda de Gavidia or Ms. Gina
21 Navas, the author of a very significant letter in
22 December 2008 for the purposes of this jurisdictional

02:07:31 1 debate. Or Mr. Guerrero, who is featured in the
2 newspaper clipping that Respondent discussed this
3 morning, or Mr. Barrera, who is featured in other
4 clippings or perhaps even someone who was involved in
5 the negotiation and drafting of the Investment Law?
6 They've offered you no one. Certainly, no one who can
7 speak to or deny the fact and contents of the many
8 assurances and promises that were being given to our
9 client from 2004 through 2008 regarding the imminent
10 release of the required permits. No one.

11 Let me turn to the first objection
12 jurisdiction *ratione temporis*. Let me start out by
13 clarifying a confusion that Respondent has worked very
14 hard to create.

15 There is a very clear distinction between the
16 requirements for jurisdiction *ratione temporis* and
17 requirements for establishing an abuse of process.
18 For jurisdiction *ratione temporis*, the relevant
19 inquiry is whether the claims asserted by the investor
20 Claimant are based on the measure alleged by the
21 investor and whether the measure and the resulting
22 claims are within the temporal scope of the Treaty.

02:08:49 1 The inquiry for abuse of process is whether a
2 corporate restructuring was undertaken by the Claimant
3 Party for the sole purpose of gaining access to ICSID
4 jurisdiction before there was a dispute between the
5 host State and the investor relating to a measure
6 giving rise to State responsibility on the
7 international plane.

8 We're going to be discussing this distinction
9 with you a lot this afternoon and again on Wednesday.

10 Respondent's argument that you lack
11 jurisdiction *ratione temporis* is based on two
12 propositions, each of which in our submission is
13 incorrect. First, it asserts that our client is not
14 an investor of a Party because it became an enterprise
15 of the United States only after it made its investment
16 in El Salvador.

17 Second, it asserts that the measure at issue
18 is either its environmental Ministries--that is
19 MARN's--failure to grant a permit to Pacific Rim El
20 Salvador within the statutorily required time period
21 in 2004 or, alternatively, that it is MINEC's failure
22 to grant the company a mining concession in 2007, even

02:09:57 1 though neither of these failures, even if they could
2 be considered to constitute measures at all, are the
3 measures that Claimant have alleged to constitute the
4 breaches of CAFTA giving rise to the claims that we
5 have put before you.

6 With respect to the first proposition, they
7 pointed to nothing in CAFTA that requires an investor
8 to first attain the status of a person of a Party and
9 then only afterwards make its investment in the
10 territory of another Party. That's because there is
11 no such requirement. They want to you read into CAFTA
12 a requirement that simply does not exist. As you will
13 hear shortly from Mr. Posner, a person that makes an
14 investment and then becomes a person of a Party
15 qualifies as an investor of a Party. Any other
16 conclusion would not only fly in the face of the
17 realities of international business and investment,
18 but also of well established investment arbitration
19 jurisprudence and, more importantly--and more
20 important, excuse me, the plain terms of CAFTA.

21 With respect to the second proposition
22 regarding the measure at issue, as we stated time and

02:11:11 1 time again, and as we will again demonstrate through
2 the presentations of my colleagues, the actual measure
3 at issue here is the practice of the Government of El
4 Salvador in direct contravention of the country's laws
5 to withhold permits and concessions in furtherance of
6 the exploitation of metallic mining investments; in
7 other words, El Salvador's de facto mining ban.

8 This ban, this "practice," this "practice"
9 was publicly confirmed for the first time by President
10 Saca in March 2008 and then reaffirmed several times
11 by President Saca, his successor President Funes, and
12 by other Government officials.

13 The Acts and omissions which Respondent keeps
14 bringing up, all of which occurred prior to 2008, are
15 not the measures on which our claims are based.
16 Individual instances in which Respondent's
17 environmental Ministry or mining bureau failed to
18 issue permits or concessions in a timely manner may
19 have caused delay. They may be part of the practice
20 that constitutes the measure at issue, but they aren't
21 necessarily the measure at issue, and certainly not
22 just because Respondent says so.

02:12:33 1 Unlike the public confirmation in March 2008
2 by President Saca of what in retrospect appears to be
3 a long-standing de facto mining ban, these
4 administrative delays did not wipe out the value of
5 Claimant's mining investments--that is, cause
6 damage--nor did they undermine the legitimate
7 expectations that it induced Claimant to make those
8 investments in the first place.

9 If you were to take Respondent's view to its
10 logical conclusion, then every time an investor faces
11 ordinary bureaucratic delay by some regulatory body or
12 another in a capital host State, you would have a
13 measure at issue for purposes of CAFTA. The investor
14 would be forced to immediately pursue international
15 arbitration or risk losing access to that procedure in
16 the event that a real international dispute with the
17 host State eventually arises. That can't be right.

18 Now, let me turn very briefly to Respondent's
19 abuse of process objection simply because when all is
20 said and done, this objection is nothing more than a
21 repackaging of its objection to your jurisdiction
22 *ratione temporis*. Like its jurisdictional argument,

02:13:52 1 its abuse argument is based on the fundamentally
2 flawed premise that the measure at issue in this
3 dispute is MARN's original failure in December 2004
4 to act on its PRES's application for an environmental
5 permit. El Salvador erroneously contends the
6 "dispute" was born at that moment, making Pac Rim
7 Cayman's subsequent acquisition of U.S. nationality an
8 improper attempt to gain access to CAFTA's
9 investor-State arbitration forum in order to litigate
10 an existing dispute. As evidence of the alleged
11 improper motive behind Pac Rim Cayman's acquisition of
12 U.S. nationality, they've attempted to highlight the
13 supposed absence of substantial business activities
14 that forms the basis for their denial-of-benefits
15 argument. Well, we are going to be hearing all about
16 the substantial business activities in a short while
17 as well as the reasons that underlay the company's
18 decision to domesticate itself to Nevada.

19 You are going to be hearing from Ms. Walter
20 as to why you should reject El Salvador's abuse of
21 process argument. To put it as succinctly as I can
22 without taking away her thunder, the bottom line is

02:15:09 1 that you cannot--you cannot--find an abuse of process
2 if you agree with us that there was no dispute as that
3 term is defined and applied in CAFTA that our client
4 knew about or should have known about prior to the
5 domestication of Pac Rim Cayman in December 2007. And
6 you cannot find an abuse of process unless you
7 determine that El Salvador has satisfied its
8 heightened burden of demonstrating clearly and
9 convincingly that the domestication of Pac Rim Cayman
10 was done in bad faith abusively and perniciously to
11 gain the system; that is, to gain access to ICSID
12 jurisdiction that it would otherwise not have had in
13 respect of a pre-existing dispute.

14 In our view, at the very earliest, the
15 parties' dispute arose when our client first became
16 aware of Respondent's practice of withholding the
17 permits necessary to carry out metallic meaning.
18 Prior to March 2008, there was no way that our client
19 knew or could have known about this practice; that is,
20 the de facto mining ban, particularly in light of the
21 numerous assurances that it was receiving from a
22 variety of quarters that the required permits were

02:16:25 1 going to be issued imminently.

2 Notably in all of the presentations we heard
3 this morning, not a single word was said about the
4 promises and assurances that were made to Mr. Shrake
5 and his colleagues by El Salvadoran Government
6 officials. Of course, they wouldn't mention this
7 because it's not very helpful to their case.

8 Indeed, for you to settle on an earlier date
9 than March 2008 would be patently unfair to Claimant
10 as it was El Salvador's own conduct that concealed the
11 ban's existence by leading Claimant to believe that
12 the applications of PRES and DOREX were being actively
13 reviewed, and that the government supported their
14 mining enterprises, *venire contra factum proprium*.

15 Now, allow me to turn to El Salvador's denial
16 of benefits objection, another extraordinary objection
17 for which Respondent must discharge a very high burden
18 of proof. CAFTA Article 10.12.2 permits a party to
19 deny CAFTA's protections to an enterprise that is an
20 investor of another Party if three conditions are met.
21 You heard about these conditions from Mr. Badini, but
22 let me repeat them to set up what I need to say.

02:17:48 1 First, the denying Party must prove that the
2 investor has no substantial business activities in the
3 territory of the Party where it is established or of
4 any other Party.

5 Second, the denying Party must prove that the
6 investor is owned or controlled by persons of a
7 non-Party or of the denying Party.

8 Third, the denying Party must prove--provide
9 advanced notification in accordance with Article 18.3
10 of its intent to withdraw CAFTA's protections from an
11 investor of a Party and must afford the investor's
12 home Party an opportunity to engage in State-to-State
13 consultations in accordance with Article 20.4 on the
14 proposed withdrawal of protections. None of these
15 conditions is met in this case. Mr. Posner will soon
16 explain to you why, but allow me again to provide you
17 with the punch lines.

18 As the Party seeking to deny CAFTA's
19 protections to an enterprise that is an investor of
20 another Party and, therefore, presumptively entitled
21 to those protections, let's not forget that it is
22 Respondent's burden to establish that Pac Rim Cayman

02:18:57 1 has no substantial business activities in the
2 territory of any Party other than a denying Party. It
3 is not Claimant's burden to show that it has some
4 quantum of substantial business activities in the
5 United States.

6 Article 10.12.2 requires that Respondent bear
7 the burden of showing a complete absence of
8 substantial business activities of Claimant in the
9 U.S. This it clearly has not done. It has failed to
10 rebut our affirmative evidence demonstrating that our
11 client does, in fact, have substantial business
12 activities in the United States, whether considered
13 from the point of view of its integral role as part of
14 the Pac Rim corporate family or on its own.

15 As scores of tribunals have done before you,
16 we urge you to be realists and not formalists, to
17 focus on the economic reality of the investment that
18 underlies this dispute and not merely the corporate
19 formalities that are the vehicles for that investment.

20 El Salvador has also failed to rebut our
21 evidence that the ultimate owners and controllers of
22 Pac Rim Cayman are persons of the United States. They

02:20:08 1 want you to confine the Own-Or-control analysis to Pac
2 Rim Cayman's direct corporate parent in contravention
3 of the plain meaning of those terms.

4 They also want you to ignore the fact that
5 CAFTA was negotiated to allow a Party to deny benefits
6 only to Enterprises that lack a real and continuous
7 link with the territory of another Party. That is
8 plainly not the case with respect to Pac Rim Cayman, a
9 company which is not only ultimately owned and
10 controlled by the U.S. Shareholders of its publicly
11 traded parent, but which is also managed by
12 Mr. Shrake, a U.S. citizen, from his is office in
13 Reno, Nevada.

14 Again, we ask you to focus on the realities
15 of international business and investment and not
16 simply on the formalities. Given the object and
17 purpose of CAFTA, is it really possible to ignore the
18 interests of the U.S. investors whose share value has
19 been destroyed by El Salvador's actions? Does it
20 really make sense to ignore the realities of
21 Mr. Shrake's involvement in directing the activities
22 of this investment in El Salvador and to enhance

02:21:19 1 Shareholder value?

2 We think not, and we are confident that if
3 you don't already agree with us, that you will
4 undoubtedly do so after you've heard Mr. Shrake's
5 testimony and have digested the presentations that you
6 will hear from our side.

7 Finally--and there is no factual dispute
8 about this--El Salvador failed to provide timely
9 notice of its intent to deny the benefits of CAFTA to
10 the Claimant here. Its provision of notice to the
11 United States on 1st March 2010, more than nine months
12 after commencement of the arbitration and more than 15
13 months after Claimant notified Respondent of its
14 intent to submit claims to arbitration, cannot be
15 accepted as sufficient to deprive the Tribunal of
16 jurisdiction or to deprive Claimant retroactively of
17 protections Respondent was obligated to afford
18 Claimant as an investor of a Party.

19 CAFTA Article 10.12.2, as you're soon going
20 to hear from Mr. Posner, is crystal clear.
21 Notification must be provided to the investor's home
22 Party before an arbitration is initiated. For you to

02:22:27 1 find in Respondent's favor on this point, you would
2 have to ignore the text, context, and object and
3 purpose of Article 10.12.2, and specifically determine
4 that there is no consequence whatsoever associated
5 with the fact that Respondent decided to invoke the
6 denial-of-benefits provision of CAFTA as an
7 afterthought some 15 months after Claimant notified
8 Respondent of its intent to submit claims to
9 arbitration.

10 In short, all we are asking you to do here is
11 to apply the specific terms of the Treaty. If you
12 apply the Treaty strictly, as we believe you must,
13 then timely notice was absolutely required, and there
14 is no dispute that this did not happen. If you decide
15 for some reason that the text of the Treaty does not
16 call for timely notice, then you must still find in
17 our favor as Respondent has not satisfied its
18 heightened burden of proof with respect to its
19 denial-of-benefits objection.

20 Finally just a very quick word on El
21 Salvador's objection to our claim that it has
22 consented to ICSID jurisdiction pursuant to the plain

02:23:37 1 language of Article 15 of its Investment Law.

2 Hopefully if I have time, we have time, I will return
3 to this objection later on this afternoon, so I'm
4 going to say very little about it other than the
5 following:

6 In light of how strenuously El Salvador has
7 clung to this objection, it's remarkable that they
8 haven't put forward any direct evidence in support of
9 their position that Article 15 was never intended to
10 set forth El Salvador's unilateral consent to ICSID
11 arbitration. The best that they have been able to do
12 is to rely on a strained reading of one provision of
13 El Salvador's Constitution and suggest to you that you
14 need to pass through some of El Salvador's BITs to
15 discern what the State's intent must have been when
16 the law was being drafted; and, on this basis, they
17 ask you to disregard the text of Article 15, which is
18 crystal clear in providing El Salvador's consent to
19 ICSID arbitration. The findings of Inceysa Tribunal
20 affirming that El Salvador's consent in Article 15 is
21 crystal clear, the characterizations of the Inceysa
22 Tribunal's findings on the Investment Law by the Mobil

02:24:53 1 and Cemex Tribunals, the analysis and views of noted
2 scholars such as our friend Professor Christoph
3 Schreuer and others, the views of Dr. Oliva de la
4 Cotera an El Salvadoran commentator on the scope and
5 effect of the law, El Salvador's submissions to
6 UNCTAD, an international body that serves as the focal
7 point for within the U.N. Secretariat for all matters
8 relating to foreign direct investment, the
9 presentations made on the scope and effect of the law
10 before the Salvadoran Asamblea Legislativa, and the
11 position that El Salvador took on the scope of
12 Article 15 in the context of the Inceysa arbitration
13 in which as you have now seen the Respondent affirmed
14 that Article 15, "certainly provided its consent to
15 ICSID arbitration of claims arising under the
16 Investment Law."

17 They have no real answer to any of this
18 direct evidence of the scope and effect of Article 15
19 of the Investment Law. It clearly contains El
20 Salvador's consent to ICSID jurisdiction, and we have
21 properly invoked that consent.

22 Now, Members of the Tribunal, before I hand

02:26:12 1 off to Mr. de Gramont, allow me to just make a couple
2 of final observations, please.

3 We have all read a lot about good faith in
4 this arbitration; and, indeed, good faith is a
5 critical principle underlying not only the performance
6 of the legal, political, operational, and economic
7 obligations associated with an investment, but also in
8 connection with dispute resolution proceedings that
9 may arise out of that or that are related to that
10 investment.

11 Now, we understand vigorous advocacy.
12 Indeed, we practice vigorous advocacy, but there is a
13 bright line between vigorous advocacy and unnecessary
14 advocacy or gratuitous advocacy. We believe that
15 Respondent has crossed that line. Do they truly
16 believe in good faith that the Chair and Vice Chair of
17 a leading international arbitration practice would
18 have been so inexperienced as to have discussed a
19 client's business and legal strategy with a potential
20 associate candidate in the course of a screening
21 interview? I imagine the answer to this question will
22 become clear tomorrow when we cross-examine

02:27:37 1 Mr. Parada.

2 In any event, let's not forget that once you
3 brush aside all of the letter writing, the advocacy
4 and jousting between lawyers, what is at issue here is
5 an investment in the tens of millions that was made in
6 El Salvador--in the tens of millions--as well as
7 state-of-the-art technology, intellectual property,
8 and livelihoods, all of which were invested in El
9 Salvador not just by Americans and Canadians, but also
10 by Salvadorans, Salvadoreños who needed the jobs
11 provided by our clients who and who today are
12 suffering because of politics.

13 Our client's investments were made on the
14 basis of assurances that Pac Rim received from
15 Salvadoran authorities, on the basis of collaboration
16 and the hope of mutual gain. But where we are today
17 and why we are fighting this fight in front of you and
18 in the eyes of the many who are watching on-line is
19 because of politics. If there's any doubt about that,
20 you need only look at the statements made by President
21 Saca, President Funes, El Salvador's Archbishop, just
22 to name a few. That we are here before you today is

02:28:58 1 because of political agendas, expediency,
2 administrative abuse, and arbitrary and capricious
3 conduct--that much is clear--and we only ask that you
4 allow us the opportunity to demonstrate this to you in
5 the merits phase of this arbitration.

6 And with that, Mr. Chairman, Members of the
7 Tribunal, I will close. I will now hand off to
8 Mr. de Gramont, who will then be followed by
9 Mr. Posner. Mr. de Gramont is going to take you
10 through some of the critical facts, and then
11 Mr. Posner will be addressing jurisdiction *ratione*
12 *temporis* and also Respondent's denial-of-benefits
13 objections. We would like to take a break after the
14 jurisdiction *ratione temporis* portion, and then
15 continue after the break, and then it will be
16 Ms. Marguerite Walter on abuse of process and myself
17 on the Investment Law.

18 Thank you very much.

19 PRESIDENT VEEDER: Thank you.

20 As to the break, please take it whenever it's
21 most convenient in the course of your submissions. We
22 will leave you to indicate the time.

02:30:10 1 MR. de GRAMONT: Thank you, Mr. President,
2 Professor Stern, Dr. Tawil.

3 I have spent the past 20 minutes or so trying
4 to come up with a good baseball analogy to offer to
5 the Tribunal on behalf of our U.S. clients, so I will
6 say that I thought Mr. Ali just hit a home run, and we
7 still have the heart of the batting order coming up.

8 I will be providing an overview of the facts
9 relevant to El Salvador's Objections to Jurisdiction,
10 and you should have a binder in front of you that
11 says--

12 PRESIDENT VEEDER: Mine had been
13 misappropriated by one of my colleagues.

14 MR. de GRAMONT: --a presentation to the
15 company oral submission of Claimant. Is that what you
16 have?

17 And in addition to slides, you should have
18 some documents. Okay.

19 So, I will be providing an overview of the
20 facts relevant to Respondent's objections, and three
21 of the four objections offered by Respondent involve
22 very fact-intensive inquiries. Abuse of process,

02:31:35 1 denial of benefits, *ratione temporis*--all of these
2 objections invite the Tribunal to determine its
3 jurisdiction based on a full examination of the
4 record. They are meant to avoid the determination of
5 jurisdiction based on a superficial or a partial
6 review of the facts. The purpose of denial of
7 benefits and abuse of process in particular is to
8 prevent an investor with no ties to a Contracting
9 State from setting up a mere paper company in the
10 Contracting State in order to get the protections to
11 which they would not be otherwise entitled.

12 And so, it is ironic that Respondent has
13 brought these very fact-intensive objections while at
14 the same time asking the Tribunal to decide the
15 objections based on very narrow slices of the record
16 that Respondent has chosen to focus on. They then
17 want to you ignore virtually everything else that's in
18 the record before you.

19 So, before I go into the facts in detail, I
20 would like to take a step back and briefly look at the
21 larger factual picture before us. And the focus of
22 our objections--is it on your screen but not on the

02:33:11 1 screen? As long as the Tribunal can see the screen
2 and as long as counsel can see the screen--

3 PRESIDENT VEEDER: Give us two minutes
4 because we have an obligation to make sure things are
5 available from outside this room.

6 But to cure it, it's a small hiccup.

7 (Pause.)

8 PRESIDENT VEEDER: We are now working.

9 MR. de GRAMONT: Thank you, Mr. Chairman.

10 So, taking a step back, the focus of the
11 objections is, of course, on number one, the Claimant,
12 its nationality, and the substance underlying its
13 nationality; and, number two, on the timing of dispute
14 over the measure or measures at issue. And the second
15 part really involves two issues: What is the measure
16 or measures at issue? And when did a dispute over
17 that measure or measures crystallize?

18 Let's look first at the Claimant.

19 Now, Respondent has tried to paint a picture
20 of the investor in this case as a purely Canadian
21 investor who transported a Cayman Islands shell
22 company to Nevada solely to bring CAFTA claims at

02:34:55 1 ICSID over a pre-existing dispute. Respondent is
2 basically asking you to pierce the corporate veil
3 between Pac Rim Cayman and its immediate parent
4 company, but they only want you to pierce a little bit
5 of that veil. They only want you to see a very small
6 portion of what's behind that veil because most of
7 what's behind that veil entirely refutes the basic
8 rationale underlying their principal objections.

9 So, they don't want to you look upwards to
10 see the majority of U.S. investors who actually own
11 the Claimant. They don't want to you look at the
12 company's Nevada subsidiaries and their mining
13 operation in Nevada, whose profits largely financed
14 the El Salvadoran operations, and they certainly don't
15 want you to look at the company's exploration center
16 in Nevada which is, itself, a Nevada corporation.
17 That's where all the U.S. geologists who planned,
18 developed, and managed the El Salvador project were
19 employed and where they were compensated. That's
20 where they worked. That's where they had their
21 offices. That's where they resided when they were not
22 out in the field.

02:36:15 1 So, yes, the immediate parents company of Pac
2 Rim came is a publicly traded Canadian corporation
3 called Pacific Rim Mining Corp. It has a small
4 Vancouver office which it currently shares with a
5 number of other companies. It currently has exactly
6 one full-time employee. I have seen it referred to in
7 the press as the Canadian mining behemoth Pacific Rim.
8 There's been an article in the Boston Phoenix. This
9 Canadian mining behemoth has never had more than seven
10 full-time employees in Canada even back in the days
11 when it could actually afford its own office there.

12 As the publicly traded entity, the Canadian
13 corporation's functions involved shareholder
14 relations, accounting, and complying with U.S. and
15 Canadian Securities Laws, but the company's actual
16 mining operations in El Salvador and elsewhere were
17 run by the company's geologists based in Nevada. Tom
18 Shrake, the President and CEO of Pacific Rim Mining
19 Corp. and the Manager of Pac Rim Cayman and the
20 company's most senior geologist, maintained his office
21 in Reno for all those positions going back to when he
22 joined the Companies in 1997, and that's because Reno

02:37:44 1 was the hub of the company's mining operations.

2 That's where all of the mining decisions and all of
3 the mining plans were developed and made.

4 And in 1997, Mr. Shrake, from his office in
5 Reno, Nevada, directed the establishment of Pac Rim
6 Cayman, the Claimant in this case. It was established
7 as a holding company to own and manage key mining
8 assets of the company outside the U.S. That was its
9 sole purpose. That is all it has ever done.

10 From 1997 on, Mr. Shrake and the other
11 geologists in Reno decided what assets Pac Rim Cayman
12 would hold, what assets they would sell, and how those
13 assets were managed. Those were its business
14 activities. It didn't make widgets. It didn't sell
15 stock. It held, disposed, and managed of assets. And
16 all of those decisions concerning those sales,
17 acquisitions, and management were made primarily in
18 Reno, Nevada, by U.S. citizens.

19 From 2004, Pac Rim Cayman became the direct
20 owner of the Salvadoran subsidiaries, and from that
21 point on virtually all of the company's investments
22 were accounted for through Pac Rim Cayman. Yes,

02:39:13 1 accounted for in the company's contemporaneous audited
2 books and records. And we submit that the bank
3 account from which a wire transfer originated does not
4 have any relevance to this inquiry, and I will come
5 back to that point later.

6 So, even before Pac Rim Cayman was
7 domesticated to Nevada in December of 2007, it had
8 always been managed from Nevada. Again, the decisions
9 about what it would hold, what it would sell, how
10 those holdings would be managed were made by the
11 Companies' U.S. executives, working out of the
12 Companies' U.S. offices, and employed and compensated
13 by the Companies' U.S. subsidiaries.

14 Most of the financial capital invested in El
15 Salvador through Pac Rim Cayman is of U.S. origin.
16 Again, it came substantially from the profits of the
17 Companies' mining operations in Nevada, and it came in
18 substantial part from the equity investments of U.S.
19 Shareholders with addresses of record in the United
20 States.

21 And virtually all of the intellectual
22 property invested in El Salvador originated from the

02:40:33 1 geologic team based in Nevada. The team not only
2 found enormous quantities of high quality gold and
3 silver, they also designed an underground mine that
4 would have set new standards for environmentally clean
5 mining in the Americas.

6 So, when Pac Rim Cayman was domesticated to
7 Nevada in December of 2007, the move reflected the
8 economic and managerial reality of the company that
9 had existed for years. And that's true, as Mr. Ali
10 said, whether you look at Pac Rim Cayman by itself or
11 Pac Rim Cayman as a larger group of integrated
12 Companies that for many years had a substantial
13 presence in the United States, as well as the presence
14 in Canada, and where the primary purpose of the
15 integrated company, the purpose for which all of these
16 Companies were working together was to invest in El
17 Salvador.

18 Now, let's turn to the measure at issue, and
19 here, too, Respondent wants to obscure almost all the
20 relevant part of the record. For now, I will use the
21 word singular measure, but I will address Mr. Smith's
22 point about measure versus measures. They want you to

02:41:48 1 look only at the regulatory delays and alleged
2 disagreements over municipal laws like the surface
3 land ownership requirements.

4 Query whether any of those delays or
5 disagreements in and of themselves constitute measures
6 under CAFTA that could give rise to a violation of
7 CAFTA. Yes, we alleged in our Notice of Arbitration
8 that those delays constituted measures, but only in
9 the light and context of what the Companies began to
10 learn in March 2008.

11 So, let's be very clear. The primary measure
12 at issue in this case is the practice of the
13 Government not to grant any metallic mining
14 application, regardless of whether it satisfied all of
15 the regulatory requirements. Even if it surpassed the
16 requirements, even if it provided for the best
17 possible mine, the best environmental safety
18 standards, the application would not be granted.

19 Prior to March 2008, the Companies recognized
20 that there were delay, bumps, even political
21 opposition in some quarters of the country, but they
22 had no reason--no reason--to believe that the basic

02:43:13 1 Regulatory Framework under which they had invested
2 over \$77 million of the country was going to be
3 effectively scrapped or even suspended for a period of
4 multiple years.

5 The evidence first began to emerge, the
6 dispute first began to crystallize in the public
7 statement of President Saca in March 2008. And this
8 morning El Salvador's lawyers repeatedly limited their
9 comments to the March 2008 press report. They said
10 that that's all we rely on. That's absolutely not the
11 case. Let's look at that statement and let's look at
12 the subsequent statements by President Saca as well as
13 by President Funes and members of his Government.

14 So, here are the statements of President
15 Saca, and you will see that the statements become
16 increasingly clear and definitive over time.

17 So, in March of 2008, the article that was
18 much discussed by the Respondent's lawyers this
19 morning, President Saca said, "What I am saying is
20 that, in principle, I do not agree with granting
21 pending mining permits."

22 This is July 2008: "For now, I will not

02:44:31 1 grant mining permits." This is still long before the
2 Notice of Intent was filed. The Notice of Intent was
3 filed in December 2008. Two months later, President
4 Sacca says, "As long as Elias Antonio Sacca holds the
5 Office of President, he will not grant a single permit
6 (for mining exploitation) not even environmental
7 permits, which are prior to the permits given by the
8 Ministry of the Economy."

9 Let's take a look at the statements by his
10 successor, President Funes, December 2009: "The
11 Government is not approving any mining exploration or
12 exploitation project."

13 January 2010: "No mining exploitation
14 projects will be authorized. I do not need to pass a
15 decree for such authorization to be given, since that
16 would be questioning the President's word. The
17 authorization of mining exploitation projects is not
18 included either in the governmental programs or in the
19 Five-Year Plan." The President's word, the Mining
20 Laws of El Salvador ceased to operate.

21 The next is a quote from an article
22 attributing and quoting the following statements to

02:45:58 1 Hector da Dada, Minister of the Economy: "What the
2 Government has done is to provide continuity to the
3 decision to not issue mining permits which was made
4 during the administration of Antonio Saca. I want to
5 clarify that we are engaged in an arbitration
6 proceeding due to a decision made by the previous
7 Government, although the people, the officials are
8 different, we share the responsibility."

9 So, there is no doubt--indeed, it is widely
10 held public knowledge in El Salvador--that El Salvador
11 has implemented this practice. It doesn't matter
12 whether the applications meet or don't meet the
13 requirements of Salvadoran law. It doesn't matter
14 whether an application far surpasses those
15 requirements. It doesn't matter whether the
16 application is revised. An application could be
17 revised a dozen times. It could be revised a hundred
18 times, and it will not be granted or even acted upon
19 pursuant to this practice.

20 And, indeed, since the March 2008 statement
21 by President Saca, no metallic mining permits for
22 extraction, whether environmental permits or

02:47:10 1 extraction concessions have been granted.

2 Now, President Sacca had said in one of his
3 earlier statements that no permits would be granted
4 pending a rewriting of the Mining Law and a nationwide
5 study of the pros and cons of mining. Here we are
6 more than three years later, and none of the laws have
7 changed. They've simply been ignored and unenforced.
8 A nationwide study has apparently begun long after we
9 filed this arbitration, long after President Sacca left
10 the Government, but that only started after El
11 Salvador lost its first round of objections in this
12 case. To the extent that the study has yielded any
13 findings, they haven't been made public. The de facto
14 mining ban remains in place even as Respondent's
15 counsel repeatedly denied its existence.

16 And whether you call it a de facto ban or a
17 temporary ban or a moratorium or whatever, it is a
18 practice that has been put in place by the Government
19 of El Salvador. It is a practice that is entirely
20 consistent--inconsistent with the existing laws of El
21 Salvador. It has been implemented outside any sort of
22 legal framework simply by the word of the President.

02:48:32 1 The word of the President.

2 It is the practice that violates CAFTA and
3 violates the Investment Law of El Salvador, and it is
4 a practice that has destroyed Claimant's investment in
5 El Salvador. It is entirely different from regulatory
6 delays. Those delays take on significance only in the
7 context of those subsequent statements.

8 Now, determining when the Government put that
9 practice into place is not an easy question to answer,
10 as we will explain, it's not an important question,
11 either, but the tricky part is that President Saca
12 appears to have put the practice in place for
13 political reasons, but at the same time President Saca
14 didn't want the practice to lead to an international
15 arbitration.

16 So, while President Saca started publicly
17 discussing the practice in March 2008, he and his
18 officials were also telling the Companies not to
19 worry. That's just all political rhetoric, and
20 apparently Respondent's counsel were still operating
21 under the same instructions.

22 What's particularly remarkable is that even

02:49:46 1 as President Funes and his officials freely admit that
2 the practice is in place through numerous public
3 comments, Respondent in the context of this
4 arbitration has consistently denied it.

5 Now, as my colleague, Mr. Posner, will
6 explain in greater detail later, the Tribunal doesn't
7 have to decide when the practice was put in place,
8 particularly in the context of this case where
9 Respondent has done everything it can to hide it. The
10 relevant inquiry is: Is the practice continuing? And
11 when did the practice--when did the dispute involving
12 that practice crystallize?

13 There is no evidence that Claimant knew or
14 should have known about the practice until President
15 Saca announced it in March 2008. Claimant didn't
16 actually complain about the practice until April 2008,
17 when Mr. Shrake wrote a letter to President Saca to
18 ask about the practice and to first invoke the
19 protections of CAFTA. Even after that, President Saca
20 tried to deny the existence of the practice.

21 And we submit that the Respondent should be
22 estopped from arguing that Claimant knew or should

02:51:01 1 have known about a practice that Respondent has
2 repeatedly denied, even into this arbitration.

3 But under any analysis, even the analysis
4 most charitable to Respondent, Claimant had no reason
5 to know about this practice until at the earliest
6 March of 2008.

7 So, that's the big picture. It's based on
8 record facts that are entirely unrebutted by
9 Respondent. Let's turn to the specific details.

10 And I know that these details are set forth
11 at length in our written submission, including the
12 four separate Witness Statements and the numerous
13 exhibits that we've provided to the Tribunal. My
14 colleagues will be discussing those further in the
15 context of the legal arguments offered by Respondent,
16 but we thought it would be helpful to walk the
17 Tribunal through the key facts and chronology.

18 With the particular focus on one, the actual
19 substance underlying the Claimant; two, the period of
20 regulatory delays, which are not the measure or
21 measures at issue; and, three, what the measure is and
22 when a dispute concerning the measure crystallized.

02:52:24 1 So, let's start at the beginning. The
2 current management of the company dates back to 1996,
3 when Catherine McLeod-Seltzer took over the Pacific
4 Rim Mining Corp. Ms. McLeod-Seltzer is one of the
5 most successful mining financiers in Canada, and, yes,
6 she is Canadian. Her grandfather was a gold miner in
7 Canada. Her father left high school during the Great
8 Depression to work as a gold miner in Canada. Unlike
9 her father and grandfather, Ms. McLeod-Seltzer did not
10 become a miner. She went on to college and into the
11 world of mining finance. And just about everywhere
12 Ms. McLeod-Seltzer has gone, she has re-created
13 remarkably successful mining companies, while also
14 building hospitals, medical clinics, and schools in
15 the local communities.

16 And the goal of the Companies in El Salvador
17 was perfectly clear: To create a mine, a gold mine
18 that would create new standards for environmental
19 mining that would make profits for the shareholders
20 and that would contribute significantly to El
21 Salvador. And I will note that even though the
22 Companies have not made a penny in El Salvador, even

02:53:41 1 though they have not been allowed to extract any
2 minerals, they have helped remove tons of refuse from
3 the local river system, they established environmental
4 education programs in the local schools, they funded
5 health services and adult literacy programs, they
6 established the first recycling program in the area.
7 They planted over 50,000 trees, and they created more
8 than 200 jobs in one of the poorest regions of the
9 country, jobs that have now been lost.

10 And we think it is noteworthy that Respondent
11 has chosen not to cross-examine Ms. McLeod-Seltzer on
12 the Witness Statement that she submitted in this
13 arbitration.

14 Now, as set forth in Ms. McLeod-Seltzer's
15 Witness Statement, her expertise is in finance, not
16 geology. Her model has been to lead the financing
17 efforts of her Companies. She then finds a highly
18 talented exploration geologist to actually lead the
19 day-to-day mining operations of the Companies. And in
20 1997 she hired Mr. Shrake to run Pacific Rim. Now,
21 Mr. Shrake had lived and worked for many years in
22 Reno.

02:54:56 1 And one of the conditions of his accepting
2 the job was that he be allowed to set up his office in
3 Reno. He hired a office manager. He started to hire
4 the geological team which consisted of all the U.S.
5 citizens living in the Reno area.

6 He also set up several new Companies. First,
7 he set up the Nevada company that is now known as
8 Pacific Rim Exploration. That's in the right-hand
9 corner of your slide. And since 1997, that Nevada
10 entity has served as the company's exploration arm.
11 It's the entity that employed and compensated all the
12 senior geologists, including Mr. Shrake. It's also
13 the entity that developed and paid for much of the
14 intellectual property that was sent to the El Salvador
15 project.

16 Mr. Shrake also directed the establishment of
17 Pac Rim Cayman to hold the Companies' non-U.S. assets
18 which at the time were all in Argentina.

19 Now, this structure that you see on the left
20 hand of your screen is not unusual for an
21 international company, even a small one. Sometimes
22 called the Cayman sandwich structure. It's typically

02:56:08 1 used by companies that have assets or plan to have
2 assets in multiple locations, and the idea is that if
3 you want to sell the assets in, say, Argentina to
4 Argentina to invest them in, say, El Salvador, you
5 sell off the bottom Cayman entity. The proceeds of
6 that sale go only to the top Cayman entity which then
7 reinvests the money elsewhere. The Canadian parent
8 doesn't pay taxes on the transaction since they're
9 invested elsewhere, and that's basically why this is
10 done.

11 Now, it does not make sense, as I will
12 discuss a little bit later. It does not make sense to
13 have a structure like this if you were a company that
14 is basically focused on one single foreign asset. But
15 from 1997, Pac Rim Cayman was part of the Companies.
16 Mr. Shrake from his office in Nevada decided to set up
17 Pac Rim Cayman to hold the company's non-U.S. assets.
18 And again, from 1997 on, from his office in Nevada,
19 Mr. Shrake decided what assets Pac Rim Cayman would
20 hold, what assets it would sell, and how those assets
21 would be managed. So, for example, in 2001, when the
22 Companies were preparing for their merger with the

02:57:19 1 Dayton Mining Company, Mr. Shrake wanted to raise cash
2 to immediately invest in El Salvador, so Mr. Shrake
3 directed that Pac Rim Cayman's indirect holdings in
4 Argentina be sold. The proceeds from that sale were
5 then invested in El Salvador.

6 Now, in 2001 and 2002, Mr. Shrake led the
7 merger with Dayton, and the main purpose behind the
8 merger was that Pacific Rim wanted to acquire Dayton's
9 assets in El Salvador. Mr. Shrake believed that the
10 El Dorado site which was then owned by Dayton, and
11 Dayton had the Exploration Permits for it, was exactly
12 what the company was looking for. It was a low
13 sulfidation deposit, meaning that it could be mined in
14 a very environmentally benign manner and also with low
15 costs.

16 Mr. Shrake believed that Dayton had
17 significantly underestimated the gold reserve at the
18 site. He believed that he and his geological team
19 could develop the site into an extremely successful
20 gold mine, and that it would be profitable for the
21 Shareholders of the company, even at the low price at
22 which gold was trading back in 2002. It would also

02:58:35 1 generate jobs and enormous economic benefits to one of
2 the poorest regions in El Salvador.

3 In addition, it would create enormous revenue
4 for the country as a whole. If the mine were
5 operating today, it would likely be one of the largest
6 taxpayers, if not the largest taxpayer in El Salvador.

7 Now, another benefit of the Dayton merger was
8 that Dayton owned 49 percent of the Denton Rawhide
9 gold mining operation near Fallon, Nevada. Mr. Shrake
10 wanted to use the profits earned from the Nevada
11 mining operation to help finance the El Salvador
12 project.

13 So, as a result of the merger with Dayton,
14 the Companies changed significantly. First of all, in
15 addition to the Reno office, in addition to Pac Rim
16 Exploration, they now had a significant operating
17 asset in the U.S. Indeed, the Denton Rawhide mine was
18 the only asset in the Companies to generate income.

19 Now, if you look at Slide 9--that's a chart
20 from the 2002 Annual Report--you will see at the
21 beginning of 2002 or as of 2002, as a result of the
22 merger, the company now had significantly more assets,

03:00:00 1 property, and revenues in the United States than in
2 Canada.

3 PRESIDENT VEEDER: Sorry to interrupt you,
4 but do you have an exhibit number for this? If not,
5 you can give it to us later.

6 MR. de GRAMONT: It is part of the 2002
7 Annual Report, which is--can someone find me an
8 exhibit number, and we will get back to you with that,
9 Mr. President.

10 Second, as a result of the merger, the
11 Companies now had a--the Companies now had a majority
12 of U.S. Shareholders and started to be traded on the
13 American Stock Exchange as well as on the Toronto
14 Stock Exchange.

15 Third, the primary focus of the Companies was
16 on El Salvador, and from 2002 on, virtually all of the
17 Company's money and resources were devoted to El
18 Salvador, and most of that money and resources
19 originated in the United States.

20 And this is all clear from the company's
21 public filings. Let's take a look at example--for
22 example, at the 2003 Annual Report. That's Tab 15 of

03:01:11 1 your binder, Mr. President, for the 2002 report, the
2 exhibit number is C-28.

3 Now, Respondent has always argued that it
4 thought it was dealing with a purely Canadian company.
5 Mr. Smith said this morning there was, "never a
6 hint"--never a hint--"that they were dealing with
7 anything other than a Canadian company."

8 Now, Mr. Shrake has given unrebutted
9 testimony that the officials of the Salvadoran
10 Government visited him in Nevada to tour a Nevada
11 mining site, but you wouldn't have to travel to Nevada
12 to understand that the investment in El Salvador was a
13 substantially U.S. investment. You would simply have
14 to look at the company's public filings.

15 So, let's look at the 2003 Annual Report.
16 And if you turn to the very first page under the
17 heading Corporate Profile, it says: "Pacific Rim uses
18 cash flow from its 49 percent interest in the Denton
19 Rawhide gold mine in Nevada to explore, define, and
20 advance its El Dorado and La Colera (ph.) gold
21 projects in El Salvador. Also down at the bottom of
22 this page you will see a very nice picture of

03:02:40 1 Mr. Shrake, who is identified as "Tom Shrake, CEO
2 USA."

3 On Page 2, it says, "Pacific Rim's
4 cornerstone asset is the El Dorado gold project." And
5 this Annual Report and all those that followed make it
6 very clear that pretty much all of the company's
7 resources are going into El Salvador.

8 Over on Page 3 you have a picture of Bill
9 Gehlen, Exploration Manager (USA). Mr. Gehlen was a
10 U.S. citizen who worked out of the Reno office. He
11 later became the Vice President of Exploration and now
12 serves as the President of Pacific Rim El Salvador.
13 He still maintains an office in Reno and is
14 compensated by Pacific Rim Exploration.

15 If you turn to Page 5, you will see a section
16 on the, "Denton Rawhide gold mine Nevada." And again
17 it says, "Pacific Rim's share of the cash flow from
18 the Denton Rawhide mine will be used to fund the
19 company's ongoing exploration efforts and corporate
20 expenditures." And again, nearly all of those efforts
21 and expenditures from 2002 on were devoted to El
22 Salvador. Down at the bottom of Page 5 you have a

03:04:03 1 picture of David Ernst, "Chief Geologist (USA)."

2 Mr. Ernst is also a U.S. citizen who
3 maintains his office in Reno and who was also
4 compensated by Pac Rim Exploration.

5 If you turn to page 25, which is the second
6 to last page, you will see that the companies list
7 their exploration office in Reno, Nevada. They have
8 Dorsey & Whitney as their U.S. counsel.

9 And you will find substantially the same
10 information in all of the subsequent annual reports.

11 So, there is no secret that this investor in
12 its investment in El Salvador had a substantial and
13 continual U.S. presence and connection. Sure, it had
14 a Canadian parent at the top of its corporate
15 organization chart. Yes, it had a small office in
16 Canada, which served several important non-mining
17 functions. But the notion that this was just a
18 Canadian investor that abused the corporate form by
19 setting up a shell company in Nevada when it had
20 absolutely no connection to the United States, that is
21 just plainly false. It's refuted by even a cursory
22 review of the publicly available evidence.

03:05:38 1 Now, also as a result of the Dayton merger,
2 the Companies had a very complex and unwieldy
3 corporate structure in 2002. Here it is in
4 Exhibit 54, which is now up on the chart.

5 And by the way, there is a typo in the
6 original Exhibit 54. It should say that Dayton Mining
7 holds 49 percent rather than 100 percent of the Denton
8 Rawhide joint venture.

9 Now, as detailed in the Witness Statements,
10 this structure is messy and nonsensical in many
11 respects. But since the Companies were primarily
12 focused on their exploration activities in El
13 Salvador, they only took steps gradually and over time
14 to clean the structure up.

15 In 2004 and 2005, the Companies made a number
16 of changes. First, Kinross El Salvador was renamed as
17 Pacific Rim El Salvador.

18 Second, the Companies sold their Chilean
19 assets in 2005. They did that by selling DMC Cayman,
20 which is the structure up in the middle, and all the
21 subs underneath it, and all of that money was
22 reinvested in El Salvador. And by the way, since they

03:07:01 1 had used the Cayman sandwich structure, there was more
2 money to be invested in El Salvador than there would
3 have been otherwise.

4 Third, PRES in 2004 was moved under Pac Rim
5 Cayman, and when DOREX was created in 2005, it also
6 became a wholly owned subsidiary of Pac Rim Cayman.

7 Okay.

8 Oh, finally, the Dayton Acquisition and its
9 subs were dissolved, leaving more or less a structure
10 that looks like that.

11 Could I have my next chart.

12 Okay. This is a complicated chart, and even
13 for me to explain it, it takes a little bit of time.

14 This chart shows specifically Cayman, Pac Rim
15 Cayman, and their U.S. and Salvadoran subsidiaries
16 prior to December 2007, and the chart is designed to
17 show the origin and flow of investment from the
18 Companies into El Salvador.

19 So, to the top left of the chart you had the
20 individual U.S. Shareholders who owned between 60 and
21 70 percent of the Companies depending on the time
22 frame, and you have there equity investments going

03:08:17 1 into Pacific Rim Mining Corp. Pacific Rim Mining
2 Corp., in turn, invested money into Pac Rim Cayman
3 starting in 2004, which, in turn, invested the money
4 into PRES and DOREX. You also had monies going from
5 Pacific Rim Mining Corp. to Pac Rim Exploration,
6 which, in turn, paid the salaries of the senior
7 geologists working in El Salvador, and that included
8 the salaries for Mr. Fred Earnest and Bill Gehlen,
9 both U.S. citizens who served successively as the
10 President of Pacific Rim El Salvador. Again, they
11 were both employees of Pac Rim Exploration, and both
12 had offices in Reno as well as in El Salvador.

13 Over to the left you have Dayton Mining
14 (U.S.). Dayton took the profits from the Denton
15 Rawhide mine and sent most of it to Pacific Rim Mining
16 Corp. in Canada. Pacific Rim Mining Corp. then
17 invested that money through Pac Rim Cayman into El
18 Salvador.

19 Now, again, by the way, Dayton Mining U.S. is
20 purely a holding company. It doesn't have any
21 employees. It doesn't have an office. It doesn't
22 have a Web site. It doesn't have a chair. And yet,

03:09:32 1 from Nevada mining operations it generated \$20 million
2 all of which was invested into El Salvador.

3 So, Dayton Mining transferred some of its
4 profits directly to Pac Rim Exploration as detailed in
5 our written submissions. Pac Rim Exploration
6 contracted with and supervised many of the paid
7 outside consulting and engineering firms who were
8 working on the El Salvador project, and in our
9 exhibits you will see numerous of those vendors'
10 contracts requiring the invoices to be sent and paid
11 out of Reno, Nevada.

12 So, Dayton Mining sent monies to Pac Rim
13 Exploration which in turn paid the outside firms that
14 it was working with to design and plan the El Salvador
15 project.

16 Now, Mr. Krause, the company's CFO, explained
17 all of this capital flow in his Witness Statement.
18 Respondent chose not to cross-examine him. As
19 Mr. Krause explained, all of this capital flow was
20 recorded in the company's contemporaneous books and
21 records. And if you look at Tab 16 of your binder,
22 that's the chart that Mr. Badini looked at with you

03:11:03 1 earlier this morning. These, I can represent that
2 these were part of the Companies' audited consolidated
3 Financial Statements. If Mr. Krause had been here
4 today, he would tell you that.

5 I'm not going to go through this in any sort
6 of detail, but the Tribunal can see that beginning in
7 2004 both Pacific Rim Mining Corp. and Pac Rim
8 Exploration invested substantial money in El Salvador
9 through Pac Rim Cayman, both in the form of loans and
10 equity investments.

11 Now, the reassignment that Mr. Badini spoke
12 of was in 2005, when the prior investments and loans
13 were reassigned to Pac Rim Cayman. As Mr. Krause
14 explained, all of the subsequent direct capital
15 investments after that was made through Pac Rim
16 Cayman, and that's how they were accounted for in the
17 company's books and records.

18 Now, books and records maintained by
19 certified accountants according to general accounting
20 standards are how modern companies keep track of money
21 flows. It's how they pay taxes. It's how they comply
22 with Securities Laws.

03:12:25 1 The bank account from which a wire transfer
2 originates doesn't mean anything. It could have been
3 wired from Timbuktu. If it was Pac Rim Cayman's
4 money, if it was accounted for through Pac Rim Cayman,
5 it was Pac Rim Cayman's investment. And by the way,
6 nearly all of these investments were registered in El
7 Salvador's Office of National Investment as having
8 been made by Pac Rim Cayman, and we will look at some
9 of those document.

10 PRESIDENT VEEDER: Could I interrupt. I take
11 it this document is not being transmitted. It's a
12 protected document?

13 MR. de GRAMONT: We originally designated it
14 as protected. I don't think we have any objection to
15 undesignating it, if that would make life easier for
16 the Tribunal.

17 PRESIDENT VEEDER: I don't think it makes
18 life difficult for the Tribunal, but we don't want to
19 transmit to the wider world the document that you
20 wanted redacted and protected. At the moment I don't
21 see it up on the screen.

22 MR. de GRAMONT: Oh, I'm sorry. We did not

03:13:23 1 put it up on the screen, but it's only in your binder.

2 Thank you for asking, Mr. President.

3 PRESIDENT VEEDER: Oh, that's fine.

4 MR. de GRAMONT: Now, in addition to the
5 financial capital as I mentioned, you have the
6 intellectual property contributed by Pacific Rim
7 Exploration. A mine property is valuable only if you
8 invest the intellectual property to find the minerals.

9 The El Dorado site is an incredibly valuable
10 site but that's only partially because of the enormous
11 high quantity gold and silver that has long existed
12 beneath the surface. What has actually made the site
13 so valuable is the intellectual property that went
14 into finding and delineating those deposits.

15 And at today's gold prices, with the amount
16 remember in 2002 gold was trading, what, under \$200,
17 \$400--270, it's now trading at 1500. And at today's
18 prices with the amount of resources that the Companies
19 have delineated, the market value of the El Dorado
20 site is worth hundreds and hundreds of millions of
21 dollars, probably in excess of half a billion. And
22 since mining projects are measured by the--since the

03:14:49 1 Market Value is measured by the multiple of the
2 project margin, and since the price of gold has soared
3 and the cost of extraction haven't significantly
4 increased, the Market Value is enormous.

5 And so, the contributions of all these
6 different investors in Nevada, the U.S. Shareholders,
7 Canadian Shareholders as well, these Companies and
8 investors together created a property, an investment
9 that is far in excess of the \$77 million originally
10 invested. We will get to this later, but that's why
11 the proper measure of damages is not the money
12 invested, not the financial capital invested, but the
13 Market Value. That's how you measure an integrated
14 investment like this one.

15 Okay. Let's turn to the December 2007
16 restructuring.

17 In 2007, the Companies were waiting for their
18 environmental permit, an extraction Concession for the
19 El Dorado site. They had considered their application
20 for the extraction Concession for the--they considered
21 their application for the environmental permit to be
22 complete when they submitted their plan for a water

03:16:09 1 reservoir and treatment facility in December 2006.

2 That facility would have significantly increased the
3 amount of clean water available to local residents.

4 Also in 2007, the Companies were continuing
5 in increasing their exploration activities at El
6 Dorado and delineating significant new gold deposits
7 at El Dorado. They were also making progress with
8 MARN on their applications for environmental permits
9 for exploitation at other sites, specifically Guaco
10 and Pueblos. You will recall from the first round of
11 objections that in 2004, when PRES was preparing to
12 submit an application for an Exploitation Concession
13 at El Dorado, MINEC expressed concern that the
14 property was too big, and so with MINEC's blessing,
15 PRES carved out the Guaco, Pueblos, and Huacuco sites
16 and DOREX was created to hold the licenses for those
17 sites. Now, the focus of the discussions we heard
18 from Respondent were entirely on El Dorado. The fact
19 was that throughout 2007 and into early 2008, progress
20 was being made with MARN on the environmental permits
21 for these other sites, again leading the Claimant to
22 believe that the progress was going slowly, but that

03:17:32 1 the progress and the regulatory system were still in
2 place.

3 And, indeed, the Companies had been
4 increasing the level of their investment in El
5 Salvador throughout 2006, 2007, and into 2008. At the
6 same time they were also looking for ways to save
7 money. Their expenditures were increasing, and the
8 cash flow from Denton Rawhide was beginning to dry up.
9 The Companies were also preparing for a private
10 placement financing in early 2008, as
11 Ms. McLeod-Seltzer described.

12 And so, for all of these reasons, the
13 companies were looking for ways to save money, and
14 they were looking at ways to continue the
15 simplification and the cleaning up of the corporate
16 structure inherited from the Dayton merger.

17 So, here is Exhibit 55. That is the
18 corporate structure of the companies immediately prior
19 to the December 2007 organization.

20 Now, first of all, the entities under Pac Rim
21 Caribe in Mexico and Peru had been completely inactive
22 for years, yet the Companies had been paying the

03:18:45 1 various annual fees for these entities, including Pac
2 Rim Cayman Caribe to continue as active Companies. In
3 addition to fees, you have to pay lawyers and
4 accountants in the Cayman Islands. It's not a lot of
5 money, but there was no reason to keep paying it with
6 no commensurate benefit or no benefit at all.

7 So, the companies decided to dissolve Pac Rim
8 Cayman Caribe and the Mexican and Peruvian
9 subsidiaries.

10 Second, the Companies decided to domesticate
11 Pac Rim Cayman to Nevada. Again, the Companies had
12 been paying fees to maintain Pac Rim Cayman as a
13 Cayman Islands entity. The whole reason behind
14 setting up Pac Rim Cayman as a Cayman Islands entity
15 was to realize tax savings in the event that any of
16 the underlying assets were ever sold. Now, in this
17 period questions arose as to whether Cayman Islands
18 status would, in fact, continue to provide tax savings
19 in the event that the underlying assets were ever
20 sold. As everyone knows, the Cayman Islands, fairly
21 or not, have come under increasing criticism for being
22 a tax haven. They have been placed on various

03:20:02 1 blacklists by various countries.

2 Moreover, the companies had no plans to sell
3 the Salvadoran subsidiaries any time soon. At this
4 time they were focused entirely on their projects in
5 El Salvador. They could save these by domesticating
6 Pac Rim Cayman to Nevada, and there would be no
7 adverse tax consequences.

8 Now, domestication is a term of art. It's a
9 legal term under Nevada law. And as you can see from
10 Tab 25 in your binder, those are the Articles of--so
11 no, I'm sorry, this should be the Articles of
12 Domestication, and we will get you the exhibit number
13 for that. They refer to the Nevada domestication
14 statute, and that statute's designed to encourage
15 bringing offshore Companies to Nevada. Under the
16 statute, the company continues to exist under the laws
17 of Nevada as though it has always been a Nevada
18 company from the date of its original incorporation in
19 the other jurisdiction. It's cheap and it's easy. In
20 fact, it is cheaper and easier than maintaining Pac
21 Rim Cayman as an entity of the Cayman Islands,
22 especially if you already have a presence in Nevada.

03:21:41 1 If you already have lawyers and accountants in Nevada.

2 Last, but by no means least, as Mr. Shrake
3 describes in his Witness Statement, he wanted the
4 Companies to be in the best position possible in the
5 event that a dispute with El Salvador ever arose.
6 Again, as of late 2007, the regulatory process seemed
7 to be moving forward, albeit slowly and with bumps.
8 The Companies were still being told that their El
9 Dorado permits would be forthcoming. Amendments had
10 been introduced in the Salvadoran legislature that
11 would have clarified the land surface ownership issue,
12 and Mr. Shrake had been advised those amendments were
13 likely to pass. The process seemed to be moving
14 forward with respect to the company's other sites.

15 At the same time, Mr. Shrake knew that there
16 was political opposition out there. He knew that
17 there were competing amendments that has also been
18 introduced in the legislature that would have banned
19 mining in its entirety. There were elections coming
20 up which included the possibility of a change in the
21 ruling Party. And as Mr. Shrake testified in his
22 statement, he did not think it likely that any

03:23:04 1 anti-mining legislation would pass. He did not think
2 that the arena Party, which had been in power since
3 1994, was going to lose its elections. He believed
4 the permits were going to be granted.

5 But in the event that something
6 were--something were to go south, if something bad
7 were to happen and if a dispute were to arise, he
8 wanted the Companies to be in the best position
9 possible.

10 Now, let's look at the structure that existed
11 prior to December 2007, which is set forth in
12 Exhibit 55. And if the Companies had believed they
13 had a dispute in December 2007, they would have had
14 recourse to CAFTA claims at ICSID. Both Pacific Rim
15 Exploration, Inc., and Dayton Mining (U.S.) had made
16 substantial indirect investments in El Salvador.
17 Again, all of Dayton's profits, approximately
18 20 million had been invested in El Salvador.

19 Pac Rim Exploration also made substantial
20 indirect investments in El Salvador. The Companies
21 could have also sought to mobilize a number of U.S.
22 Shareholders to bring a claim. Pac Rim Cayman could

03:24:13 1 have brought a claim at ICSID under the Investment
2 Law. The Cayman Islands are covered by the ICSID
3 Convention. And Pacific Rim Mining Corp. could have
4 brought a claim under the Investment Law at the ICSID
5 additional facility.

6 The companies could have filed multiple
7 arbitrations in multiple fora against El Salvador.
8 Those facts are certainly relevant to the abuse of
9 process objections. But the domestication of Pac Rim
10 Cayman meant that in the event that a dispute with El
11 Salvador arose, if one crystallized, the claims of
12 these various entities and individual investors could
13 be brought in a single proceeding at ICSID under
14 CAFTA. There is no doubt that if the different
15 entities and investors had brought multiple claims in
16 multiple fora, Respondent would have argued that that
17 was an abuse of process.

18 But we would also ask the Tribunal again to
19 consider what sort of CAFTA claims could have been
20 brought in December 2007? For delays? For what
21 Respondent called the presumptive denial of the El
22 Dorado applications for a disagreement about the land

03:25:24 1 surface ownership?

2 Now, what about for a practice of not
3 granting mining applications regardless of whether the
4 applications met the regulatory requirements? What
5 was the evidence of that in December of 2007? El
6 Salvador's officials said those permits would be
7 forthcoming. MARN appeared to be moving forward on
8 the other applications for the other sites. As stated
9 in the Witness Statement of Ms. McLeod-Seltzer, the
10 Companies were sufficiently confident that they were
11 going to get their El Salvador Concessions that in
12 early 2008 they conducted a private placement
13 financing in order to finance the anticipated
14 Exploitation Concession.

15 Now, I will also observe that in connection
16 with that financing, the Companies had a duty to
17 disclose anything that would materially affect the
18 company's financials. A dispute of this nature would
19 have been material.

20 And I would ask you to take a look at the
21 Board of Directors of Pacific Rim Mining Corp. They
22 include some of the most prominent and experienced

03:26:30 1 people in the mining business, including the former
2 CEO of Placer Dome as well as Ms. McLeod-Seltzer.

3 And I would ask the Tribunal to consider
4 whether it is reasonable to believe that any of these
5 people would have risked their reputations, their
6 careers, and their livelihoods by failing to disclose
7 a dispute of this nature if they had actually thought
8 one had existed.

9 And I would ask the Tribunal to consider
10 this: If the company's domesticated Pac Rim Cayman in
11 Nevada 2007 for a pre-existing dispute, why didn't
12 they start the arbitration right after that? Why did
13 they wait for a year before submitting their Notice of
14 Intent? Why did they wait for five months after that
15 until April 30, 2009, before actually commencing the
16 arbitration itself? That was nearly a year and a half
17 after the December 2007 domestication.

18 The reality is that in December 2007 there
19 was no real evidence of the de facto mining ban that's
20 at issue in this arbitration. There is no evidence
21 that the Companies believed that the de facto ban
22 existed as of December 2007, and there is certainly no

03:27:47 1 evidence that a dispute concerning that practice had
2 arisen.

3 Mr. Chairman, might I have a moment to confer
4 with Mr. Ali?

5 PRESIDENT VEEDER: Sure.

6 (Pause.)

7 MR. de GRAMONT: Thank you.

8 And, by the way, there is no evidence--no
9 evidence--that Claimant concealed the change of
10 nationality as Respondent has repeatedly alleged. If
11 you look at Tab 18 of your binder, you will see that
12 the Claimant duly informed the Salvadoran Government
13 of the change.

14 The last page reads, and this is in the
15 English translation, and this is from Bill Gehlen, the
16 President of Pac Rim El Salvador to the National
17 Investment Office, "I hereby request that this office
18 update the information in its Registries related to
19 the name and nationality of the company that until
20 December 13, 2007, existed under the name Pac Rim
21 Cayman and operated under the laws of the Cayman
22 Islands. Since that date, in accordance with

03:29:07 1 Section 92A.270 of the revised statutes of the State
2 of Nevada, United States of America, the company
3 originally from the Cayman Islands was reorganized in
4 the State of Nevada adopting the nationality of the
5 United States and also changing its name to Pac Rim
6 Cayman LLC. As proof of this, I attach a certified
7 copy of the translation of the Articles of
8 Domestication, a legal term used in the United States
9 of America, specifically in the State of Nevada, to
10 refer to the reorganization in that jurisdiction of
11 Companies from another jurisdiction and the Articles
12 of Organization pursuant to the laws of the State of
13 Nevada."

14 At Tab 19--the exhibit number--

15 PRESIDENT VEEDER: I think at some stage it
16 would help us if you went through this Bundle and just
17 gave us informally via an e-mail the corresponding
18 exhibit numbers. Let's not worry about it now.

19 I have another concern because I don't
20 understand why a company has changed its name from Pac
21 Rim Cayman LLC to Pac Rim Cayman LLC.

22 MR. de GRAMONT: No, I think it was Pac Rim

03:30:30 1 Cayman to Pac Rim Cayman LLC. The LLC was added
2 because it was a limited liability corporation in
3 Nevada.

4 PRESIDENT VEEDER: I see.

5 MR. de GRAMONT: And at Tab 19, and this is
6 Exhibit 3 to our Notice of Arbitration, you will see
7 the Resolution by the Ministry of Economy, by MINEC,
8 updating the name of a nationality of Pac Rim Cayman
9 domiciled in the Cayman Islands to Pac Rim Cayman LLC
10 domiciled in the State of Nevada, United States of
11 America. Again, this is an exhibit to our Notice of
12 Arbitration.

13 Notwithstanding that evidence, counsel has
14 repeatedly, repeatedly, represented that we concealed
15 this change of nationality from El Salvador and from
16 the Tribunal. The opening of their Reply says we
17 uncovered--we uncovered this concealment. There has
18 been no concealment. All of this is in the public
19 record.

20 I would ask the Tribunal to consider who is
21 being cynical and who is being candid with the
22 Tribunal.

03:31:50 1 Okay. Let's walk through the regulatory
2 history through the chronology of the regulatory
3 process and put the reorganization of December 2007 in
4 the context of what was happening in El Salvador at
5 that time. Let's even put the process in the context
6 of the alleged presumptive denial of the application
7 that Respondent relies upon so heavily.

8 And the theory Respondent offers is that
9 after Claimant submitted its application, and the
10 Government failed to respond within 60-days or 30
11 days, apparently, with respect to the Concession
12 application, the application was presumptively denied.

13 Now, as we explained in our written
14 submissions, the doctrine of administrative silence
15 under Salvadoran law is designed to protect the
16 Applicant. It enables the Applicant to seek recourse
17 at the Applicant's election if the Government fails to
18 take the administrative action. It's not meant to be
19 a weapon used by the Government or as a sort of
20 statute of limitations; if you don't appeal in 60-days
21 you're done. Under the Constitution of El
22 Salvador--could we put that slide up--every person has

03:33:17 1 the right to petition the legally established
2 authorities, to have those petitions resolved, and to
3 be notified of the decision.

4 So, the doctrine of administrative silence
5 does not act as a sort of 60- or 30-day limitations
6 period. It is not meant to de prior the Applicant of
7 rights. It's meant to protect the Applicant.

8 But even if the Tribunal were to conclude in
9 this jurisdictional proceeding that Salvadoran law
10 provides otherwise and that this is a sort of 60- or
11 30-day limitations period, the record facts still
12 don't remotely support Respondent's theory.

13 Let's take a look at the sequence of events,
14 and let's go back to September of 2004. And as
15 described in our Witness Statement, during the first
16 several years of this process, Claimant and the
17 Government were working closely and cooperatively.
18 They were in constant consultation. And so, in
19 December 2004, PRES first submitted its Environmental
20 Impact Assessment or EIA for the El Dorado site.

21 Now, according to El Salvador, when MARN
22 failed to rule on it within 60 days, it was

03:34:34 1 presumptively denied, and there we see the presumptive
2 denial in November of 2004. Now, if that's the case,
3 how did El Salvador explain all of the activity that
4 follows? Neither the Claimant nor anyone in the
5 Government of El Salvador appears to have recognized
6 this so-called "presumptive denial." In
7 December 2004, Mr. Ernst wrote to MARN, and he said,
8 and Respondent showed you the letter, 60 days have
9 passed. What's happening? Can we have a meeting? In
10 December, also in December of 2004, PRES submits the
11 El Dorado Concession letter but without the
12 environmental permit, and that was also done in
13 consultation with MINEC.

14 And in March 2005, MARN begins an extensive
15 notice and comment period, and an extensive exchange
16 of observations and responses that can be used for
17 well over a year until October 2006. MARN asked
18 for--MARN poses questions about the EIA. PRES answers
19 them. MARN asked them more questions. It's published
20 in the newspaper. Public comments are received. Why
21 engage in that elaborate process if there has been a
22 presumptive denial?

03:35:47 1 Now, also during this period, around March
2 2005, as the Tribunal will remember probably all too
3 well from the first round of objections, Ms. Navas,
4 the Director of the Bureau of Mines, first informed
5 the companies that some officials at MENIC believed
6 that the Mining Law required ownership or control of
7 the entire land surface overlaying the Concession
8 area.

9 And as we explained in the first round of
10 objections, PRES had several options. PRES could have
11 immediately revised the application to cover a smaller
12 Concession area. Again PRES had done that previously
13 with Guaco and Huacuco and Pueblos, or PRES could have
14 said clarification of the issue through a definitive
15 interpretation or a legislative amendment clarifying
16 the issue. PRES chose the latter course. It was
17 engaged in the notice and comment period with MARN at
18 the time, and there was no reason to revise the
19 application at that time.

20 But again, with respect to the issue of
21 presumptive denial, why would MINEC have engaged in
22 this whole exchange about the land surface issue if

03:37:00 1 the application for the environmental permit had been
2 presumptively denied.

3 In October 2006, PRES and MARN completed the
4 exchange of observations and responses. In
5 December 2006, PRES submitted its proposal for the
6 water treatment facility at El Dorado. And as the
7 Tribunal will also recall from the first set of
8 objections and as Mr. Smith, I believe, mentioned this
9 morning, in October through December of 2006, there
10 was an exchange of correspondence between PRES and
11 Ms. Navas. Ms. Navas asked for various application
12 materials and PRES provided them, again except for the
13 environmental permit.

14 Ms. Navas had asked for those materials in
15 October 2006, and in a November 2006 letter PRES
16 submitted all of them again except for the
17 environmental permit.

18 PRES also explained why it wasn't able to
19 submit the environmental permit and asked MINEC to
20 excuse its absence on the basis that there was an
21 impediment with just cause.

22 And in December 2006, Ms. Navas submitted a

03:38:12 1 letter saying that PRES had partially complied with
2 her previous request except for the missing
3 environmental permit.

4 Now, as the Tribunal may recall, the
5 Respondent claimed in the first round of objections
6 that Ms. Navas's December 2006 letter had been
7 withdrawn. Mr. Smith showed this letter this morning,
8 and he had a bullet point that said PRES did not
9 respond. The allegation that El Salvador offered was
10 that the letter had been withdrawn. Now, that's a
11 fact that remains unresolved and which the Tribunal
12 certainly doesn't have to consider at this juncture,
13 but again why would Ms. Navas been asking for all
14 these application materials if there had been a
15 presumptive denial of the environmental permit? Why
16 would she have written that letter? Would she have
17 engaged in any of this correspondence?

18 Which leads us to the alternative presumptive
19 denial that Respondent alleges in 2007. So, according
20 to Respondent, if the application for an environmental
21 permit wasn't denied in 2004, then alternatively it
22 must have been presumptively denied in January 2007.

03:39:23 1 Here the theory is that, I think, is that PRES's
2 submission of various materials requested by Ms. Navas
3 in its request to excuse the absence of the
4 environmental permit seems to have triggered either a
5 30-day--I guess a 30-day time within which to respond.
6 And after 30 days of silence, according to Respondent,
7 the application was again presumptively denied.

8 So, was there a dispute under CAFTA at that
9 time? Should Dayton Mining (U.S.) or Pacific Rim
10 Exploration or the U.S. Shareholders have filed a
11 CAFTA arbitration action? Again, let's look at the
12 facts.

13 From Claimant's perspective, all it needed
14 with respect to the El Dorado Concession was the
15 environmental permit. To the extent that there was an
16 open question with the land surface ownership issue,
17 the Companies were willing to wait and see what
18 happened with the pending amendments to the Mining
19 Law. And again if the amendments didn't pass, they
20 would revise the application.

21 So, as stated in the Notice of Arbitration,
22 the companies continued to meet with MARN and other

03:40:27 1 Government officials. Salvadoran officials continued
2 to tell the Companies that the issue would be
3 resolved. They were also optimistic about the pending
4 amendments. In the meantime, progress was being made
5 on the company's other applications for environmental
6 exploitation permits. In August 2007, DOREX submitted
7 EIA's for Guaco and Pueblos. In November 2007, MARN
8 provided an observation on the Guaco EIA and asked
9 DOREX to respond. In January 2008, MARN provided
10 observations on the Pueblos EIA and asked for a
11 response. January 2008.

12 Also in January 2008, the Majority Leader of
13 the Salvadoran legislature, a high-ranking official in
14 President Saca's arena, told Mr. Shrake that he
15 believed the proposed amendments introduced in the
16 legislature would pass. He also believed the permits
17 would be issued.

18 Now, were the Companies doing everything they
19 could to get the permits issued? Yes.

20 Did they hire lobbyists in San Salvador and
21 in Washington, D.C., including at Crowell & Moring?
22 Yes.

03:41:37 1 Were they watching the legislative process in
2 El Salvador closely? Yes.

3 Did they think that the Saca administration
4 had implemented or would implement a practice whereby
5 the Government wouldn't grant their applications no
6 matter what? No. All of the company's actions were
7 entirely inconsistent with any such belief. Why would
8 Mr. Shrake be in San Salvador in January 2008
9 inquiring about the proposed amendments, how the
10 proposed amendments were going to turn out if he
11 thought that the Saca administration had implemented
12 such a practice or if the permit had been
13 presumptively denied?

14 And so, it was, indeed, a shock when in
15 March 2008 President Saca announced that he was
16 opposed to granting any metallic permits. The Saca
17 administration had always been, for the most part,
18 very supportive of the Companies. There was no reason
19 to believe that the Saca administration was going to
20 abandon the existing legal framework.

21 Moreover, this March 2000 statement was a
22 statement of the Chief of State of El Salvador. As

03:42:48 1 President Funes later said, in El Salvador the word of
2 the President is the law.

3 The comments were widely reported in the
4 Salvadoran press, and they put the delays concerning
5 the El Salvador applications in an entirely different
6 light.

7 In April 2008, Mr. Shrake wrote a letter to
8 President Sacca asking him about his comments and for
9 the first time invoking the protections of CAFTA. On
10 25 June 2008, Mr. Shrake was able to get a
11 face-to-face meeting with President Sacca through the
12 U.S. Ambassador to El Salvador Mr. Charles Glazer.

13 That meeting was attended by President Sacca,
14 the Minister of the Economy, and the Minister of the
15 Environment. It was also attended by Ambassador
16 Glazer and the Economic Council at the Embassy Mr. Don
17 Alan Titus. In our unrebutted testimony, Mr. Shrake
18 summarized the June 2008 meeting. Mr. Shrake
19 explained that President Sacca told him that his
20 statements were just political rhetoric and that he
21 should meet with the Ministers to work out the issue
22 later that day. As explained in Mr. Shrake's Witness

03:44:02 1 Statement, Minister de Gavidia, the Minister of
2 Economy, didn't show up and resigned her position the
3 very next day. Mr. Shrake and Minister Guerrero met,
4 but they were not able to work out any agreement.

5 Within a few weeks later, despite President
6 Sacca's supposed assurances to Mr. Shrake, he stated in
7 much stronger terms than in the March 2000 statement,
8 that he would not grant any further mining permits.
9 The headline stated, Sacca affirms that he will not
10 grant mining permits.

11 So, in July 2008, some four months after the
12 March 2000 statement by President Sacca, and having had
13 a number of meetings with the Sacca administration, the
14 Companies decided to shut down their drills and
15 started to lay off employees. They laid off nearly
16 200 employees in El Salvador. They also laid off
17 employees in Canada and the United States.

18 And then in December 2008, PRES received a
19 very puzzling letter from MARN. It's at Tab 27 in
20 your binder. This is not a letter that Respondent has
21 shown to you. Mr. MARN wrote to Mr. Ernst, who had
22 been the President of PRES and asked a series of

03:45:37 1 questions about the proposed El Dorado water treatment
2 facility. The subject of the letter was requirements
3 for the water treatment plan for the El Dorado mining
4 project. The concluding paragraph read, "Once these
5 requirements are satisfied, it will be possible to
6 resolve your application for the environmental permit
7 for your mineral exploitation project El Dorado
8 previously mentioned within the 30 days following the
9 date where you finalized all the procedures of the
10 assessment of the environmental impact.

11 Now, we don't understand how the Government
12 can come before this Tribunal and say that the El
13 Dorado application was presumptively denied in 2004
14 or, for that matter, in 2007, when the Government was
15 sending letters like this in December of 2008. But I
16 can tell you that when Claimant received this letter
17 in 2008, in light of the statements that President
18 Saca had made, in light of all the prior
19 representations that had been made, that Claimant
20 concluded quite fairly, I think, that this letter was
21 simply part of a ruse, of a double game that the
22 Government had been playing for quite some time.

03:46:49 1 Claimant filed its Notice of Intent on
2 9 December 2008. On April 30, 2009, it filed this
3 arbitration.

4 Now, these are the record facts. They're all
5 unrebutted. Respondent has ignored them. Respondent
6 has tried to obscure them, but it has not even tried
7 to contest them.

8 Now, my colleagues will take these key facts
9 and put them in the context of the specific objections
10 raised by Respondent. But unless the Tribunal has any
11 questions, or unless the Tribunal would like to take a
12 break, I will turn the podium over to--oh, I'm sorry,
13 let me show you one more slide. This is Mr. Ali's
14 favorite, and this is Slide 17 of the PowerPoint, and
15 this shows the investment that the companies were
16 making into El Salvador, and you will see that from
17 2004 through the March 2008 statement, through the
18 alleged first presumptive denial, through the alleged
19 second presumptive denial and so forth, the Companies
20 increased their level of investment.

21 Now, why if the Companies believed there was
22 a dispute would they have continued to increase their

03:48:22 1 level of investment into El Salvador?

2 And with that, I will conclude. Thank you.

3 PRESIDENT VEEDER: Thank you very much.

4 I think for the interpreters and the
5 shorthand writer, we do need a break, so we will take
6 a break now, and we'll resume at 4:00 for the last
7 hour of the Claimant's oral presentation.

8 MR. ALI: Mr. Chairman, I believe that we
9 have used up 105 minutes, and we have 75 minutes left.

10 PRESIDENT VEEDER: We'll have an arbitration
11 about that at 4:00.

12 (Brief recess.)

13 PRESIDENT VEEDER: Let's resume.

14 On the timing, we can now correct our
15 arithmetic. Officially, we understand that since we
16 started early, the Respondent used three hours-10
17 minutes this morning, and that means that the
18 Claimants have used, on our calculations, one hour and
19 48 minutes this afternoon so far. They have another
20 one hour and 22 minutes to bring themselves into
21 equivalence with the Respondent. So, if we start now,
22 which is just after 4:00, we should finish just after

04:05:23 1 5:22.

2 Is there any difficulty with that
3 sophisticated calculation?

4 MR. SMITH: Now, it sounds perfect to me.

5 PRESIDENT VEEDER: Thank you.

6 Is it satisfactory to the Claimants?

7 MR. ALI: Yes, Mr. Chairman. Thank you.

8 PRESIDENT VEEDER: Then let's proceed. Thank
9 you.

10 MR. POSNER: Thank you, Mr. President and
11 Members of the Tribunal.

12 It's an honor to appear before you again. I
13 will try not to use all of that one hour and 22
14 minutes so that my colleagues will have at least a
15 little bit of time to address the issues I won't be
16 addressing.

17 So, I will be addressing you this afternoon
18 on two topics. I'm going to start with jurisdiction
19 *ratione temporis*, and then I will pivot as deftly as I
20 can into the topic of denial of benefits.

21 And on jurisdiction *ratione temporis*, there
22 are three issues here:

04:06:07 1 First the question of whether the measure at
2 issue--that is, the de facto mining ban--is covered by
3 CAFTA's scope. That's issue number one.

4 Secondly, the what is in effect the mirror
5 image of that issue, which is the question of whether
6 the Claimant's claim was brought within the
7 limitations period provided for in Article 10.18.1 of
8 the CAFTA.

9 And, thirdly, I will touch briefly on the
10 question of whether the Claimant is, indeed, an
11 investor of a Party as that term is defined CAFTA.

12 With respect to the first issue, the question
13 of whether this measure comes within CAFTA's temporal
14 scope, the key question is what is the measure at
15 issue? And it's important to remind ourselves why
16 that is the key question. CAFTA's temporal scope
17 provision which you have up here the screen states,
18 "For greater certainty, this Chapter does not bind any
19 Party in relation to any act or fact that took place
20 or any situation that ceased to exist before the date
21 of entry into force of this agreement."

22 And CAFTA restates that Rule for greater

04:07:15 1 certainty because, as the Tribunal is well aware, that
2 is, indeed, the customary international law rule on
3 nonretroactivity, the Rule articulated in Article 28
4 of the Vienna Convention. And that Rule can be
5 restated or expressed in the affirmative, so acts or
6 facts that take place before entry into force or
7 rather acts and facts that take place after entry into
8 force or situations that began before entry into force
9 and continued after entry into force are, indeed,
10 covered. In other words, entry into force or, in this
11 case, entry into force as to this particular investor
12 draws a line. And if you're on the line--if you're on
13 the side of the line, if the measure at issue is on
14 the side of the line before entry into force, then
15 it's not covered by CAFTA's temporal scope. If it's
16 on the side of the line after entry into force, then
17 it is covered by CAFTA's temporal scope.

18 So that, then, leads to the question which
19 side of the line are we on? What is the measure at
20 issue/

21 And the answer is straightforward,
22 Mr. President: The measure at issue--and Mr. de

04:08:28 1 Gramont stated this earlier--the measure at issue is
2 Respondent's practice of withholding permits and
3 licenses necessary for metallic mining, regardless of
4 the Applicant's compliance with relevant laws and
5 regulations.

6 Now, we've come up with an appropriately
7 descriptive shorthand for that measure because that
8 is, after all, a lot of verbiage, and we described
9 that as the de facto ban on metallic mining.

10 Now, let me be clear about something: That
11 phrase, "de facto ban on metallic mining," that's a
12 label. That's a shorthand. We say it's an
13 appropriately descriptive shorthand, and we may not
14 have used that particular label or that particular
15 shorthand in our Notice of Intent or our Notice of
16 Arbitration to describe the measure at issue, but in
17 substance we've said the same thing. We've just used
18 different words to describe it. The measure at issue
19 is still what you see summarized on the slide before
20 you which is the practice of systematically
21 withholding permits and licenses necessary for
22 metallic mining, regardless of the requirements of

04:09:35 1 Salvadoran law.

2 Now, it is--the de facto ban, it is not a
3 measure that is the basis for this dispute. That is
4 what underlies Claimant's claims in this case. That
5 is the measure identified in Claimant's Notice of
6 Arbitration. Now, Respondent challenges us on this
7 point, but the Notice of Arbitration speaks for
8 itself. And as an illustration--and this is just one
9 place of many throughout the Notice of Arbitration
10 where we've identified the measure at issue. I give
11 you as an example Paragraph 9, where we say, and I
12 quote, "only after President Sacca's announcement in
13 March 2008 did they," meaning PRES and DOREX,
14 "understand that they had become the target of
15 something other than bureaucratic delay or
16 incompetence. Rather, President Sacca, without any
17 legal or other valid reason, had simply decided to
18 shut the Enterprises down and deprive them of their
19 substantial and long-term investments. As a result of
20 the Government's actions and inactions, the rights
21 held by the Enterprises have been rendered virtually
22 valueless and PRC's investments in El Salvador have

04:10:44 1 been effectively destroyed."

2 Mr. President, I submit that that is a clear
3 identification of the measure at issue as what we call
4 as, again for shorthand, the "de facto mining ban."

5 Now, when that measure, when that de facto
6 mining ban came into existence is difficult to say
7 precisely because it is an unwritten practice. It's
8 not like a statute. It's not like a regulation where
9 we can pinpoint the date of promulgation or the date
10 of enactment. It is an unwritten practice that
11 manifests itself through various acts and failures to
12 act. It's difficult to identify when it actually came
13 into existence. But the good news for the Tribunal is
14 that you don't need to decide precisely the date on
15 which it came into existence. That question isn't
16 relevant to the decision of whether you have
17 jurisdiction *ratione temporis*. What is important for
18 this purpose is that in March 2008, for the first
19 time, El Salvador's Head of State publicly
20 acknowledged the ban's existence.

21 In light of that fact, either the ban is an
22 act or fact that came into existence at that moment or

04:11:55 1 to the extent that it was in existence before that
2 moment and was just unknown to Claimant or, indeed,
3 any other investor, it is a situation that continued
4 after CAFTA became applicable to Claimant. In either
5 case, the ban is a measure covered by CAFTA, and the
6 Tribunal has jurisdiction to consider it.

7 Now, respondent for this very reason says the
8 measure at issue is, in fact, not the de facto mining
9 ban. The Respondent tells you that the measure at
10 issue is something else. Either it's a missed
11 deadline in December 2004--that is the moment when
12 MARN should have acted on the application PRES for an
13 environmental permit--or it tells you, alternatively,
14 it was another missed deadline in January 2007.

15 Now, yes, there had been missed deadlines,
16 and yes, those missed deadlines were, indeed,
17 frustrating to Pac Rim Cayman and to the Salvadoran
18 vehicles Pac Rim Cayman, PRES and DOREX.

19 And yes, our Notice of Arbitration and our
20 Notice of Intent discussed those missed deadlines, but
21 it discusses them or discussed them, obviously,
22 because they provide context for the claims at issue

04:13:15 1 in this dispute. Just because we discussed those
2 measures--and they are measures; we don't dispute that
3 point, but because we discussed those measures in the
4 Notice of Intent and the Notice of Arbitration doesn't
5 make them the measures at issue. The measure at
6 issue, the thing on which our claims are founded is
7 still the de facto mining ban. Those pre-existing,
8 those prior acts and omissions may, indeed, have been
9 manifestations of that practice, but that only became
10 apparent when the de facto mining ban came to light as
11 such which didn't happen until March of 2008 at the
12 earliest.

13 And I would submit, Mr. President, that the
14 alternative measures that Respondent has identified,
15 in fact, cannot be the measures at issue, and that's
16 so for three reasons, which I listed here on this
17 slide:

18 Firstly, and most importantly, to be a
19 measure at issue, a measure must be capable of serving
20 as the foundation for a dispute. That's what it means
21 to be "at issue." It can't be "at issue" if the
22 measure isn't the basis for a dispute under CAFTA.

04:14:31 1 Now, CAFTA doesn't define the term "dispute,"
2 but CAFTA uses that term frequently, and we will put
3 up on the screen one instance where CAFTA uses the
4 term "dispute," and that's in Article 10.15, which is
5 the very first Article in the portion of CAFTA Chapter
6 Ten that deals with dispute settlement, and it says:
7 "In the event of an investment dispute, the Claimant
8 and the Respondent should initially seek to resolve
9 the dispute through consultation and negotiation."

10 So, what this particular clause makes clear
11 is that for there to be a dispute, as that term is
12 used in CAFTA, you have to have a Claimant and a
13 Respondent. It is presumed that the two Parties have
14 the respective statuses of Claimant and Respondent.
15 And you can't have a Claimant unless you have a claim,
16 unless you have some view of your legal entitlement to
17 particular rights under CAFTA.

18 So, a measure can't be a measure at issue.
19 It can't be a foundation for a dispute unless it's
20 capable of giving rise to a claim of breach of the
21 CAFTA obligation, not just a claim of breach of some
22 obligation under municipal law, not just a claim that

04:15:56 1 a host State hasn't acted consistently with its
2 municipal law, but a claim of breach under CAFTA;
3 otherwise, it can't give rise to a dispute as that
4 term is used in CAFTA.

5 And I would submit to you, Mr. President,
6 that the measures that Respondent has identified--the
7 missed deadline in 2004, the missed deadline in
8 2007--could not give rise to a dispute as that term is
9 used in CAFTA. They couldn't support claims under
10 CAFTA. The missed deadline in 2004 didn't deprive the
11 investments of their value. They did not constitute
12 an expropriation. They may have been inconsistent
13 with Salvadoran law, but they weren't a denial of fair
14 and equitable treatment or an expropriation or breach
15 of any other obligation on the international law plane
16 as opposed to the municipal law plane.

17 And so, for that reason, I would submit that
18 those measures cannot be measures at issue, as that
19 term is used in CAFTA.

20 Now, the second reason that the alternative
21 measures Respondent identifies can't be measures as
22 issue--and let's go to the next slide--is that even if

04:17:18 1 you gave the most charitable definition to the term
2 "dispute," the broadest definition, even if you define
3 "dispute" as Respondent would define it, to include
4 not only disputes on the international law plane but
5 also disputes on the domestic law plane, on the
6 municipal law plane, it still is not the case that the
7 missed deadlines Respondent identifies gives rise to a
8 dispute. They may have given rise to a difference of
9 view between the parties as to what Respondent's
10 agencies should or should not have done, but a mere
11 difference of views is not a dispute. For there to be
12 a dispute, again assuming that we are talking about a
13 dispute whether under municipal law or under
14 international law, for there to be a dispute, there
15 must be something more than just a difference of
16 views, and this proposition was articulated by the
17 Tribunal in the Maffezini versus Spain Case.

18 As the Tribunal in that case put it, "There
19 must be a formulation of legal claims, their
20 discussion and eventual rejection or lack of response
21 by the other Party."

22 Now, MARN's missed deadline in December 2004

04:18:30 1 did not result in a formulation of legal claims by Pac
2 Rim, let alone a discussion and eventual rejection of
3 legal claims by El Salvador, nor did MINEC's missed
4 deadline in 2007 lead to these results. This is not a
5 case like Mobil versus Venezuela, for example, where
6 the existence of a dispute is evidenced by letters
7 from the aggrieved Party to the State claiming breach
8 of an obligation and demanding satisfaction, demanding
9 a process to remedy that breach. Pac Rim's
10 formulation of legal claims under CAFTA leading to a
11 discussion with Respondent did not come until the
12 middle of 2008, after the existence of the mining ban
13 came to light.

14 Now, as I said, there is a third reason why
15 Respondent's articulation of the measures at issue
16 cannot be--cannot, in fact, be the measures at issue,
17 and that is as a result of Respondent's own conduct,
18 and we've summarized that conduct on this slide and
19 the slide that follows.

20 But the main point here is that throughout
21 the period from 2004 to 2008, officials at all levels
22 of the Salvadoran Government, including the most

04:19:46 1 senior levels, repeatedly reassured PRES that the
2 permits it had requested were forthcoming. In fact,
3 they encouraged PRES to expand its investment in El
4 Salvador, as Mr. de Gramont discussed earlier, a
5 dialogue between MARN and PRES about PRES's
6 Environmental Impact Assessment continued throughout
7 the course of 2005 and 2006. This dialogue cannot be
8 reconciled with Respondent's assertion that PRES's
9 application for a permit had been presumptively denied
10 as of December 2004 and that a dispute arose at that
11 point.

12 Even if the missed deadline meant presumptive
13 denial under Salvadoran law--and that is a point we
14 contest--MARN's continuing engagement with PRES caused
15 PRES to rely, to its detriment, on the expectation
16 that evaluation of the EIA was continuing.

17 Likewise, expressions of support for the El
18 Dorado project from the Vice President and Ministry of
19 the Economy throughout 2006 contradicts any suggestion
20 of a disagreement, let alone a dispute, as Mr. de
21 Gramont discussed earlier, there was actually a visit
22 to the Midas Mine in Nevada in November 2006. That

04:21:04 1 visit would have made absolutely no sense if, as
2 Respondent now contends, a dispute existed at that
3 point in time.

4 Now, even Respondent appears to recognize the
5 implausibility of its argument that the measure at
6 issue is a missed deadline in either December 2004 or
7 January 2007 and that a dispute arose when those
8 deadlines were missed. Therefore, Respondent tries to
9 attack our contention that the mining ban is the
10 measure at issue in other ways.

11 And I'm going to just briefly describe some
12 of those other ways and then get to the recent
13 discussion of the Commerce Group Case and how it might
14 be relevant or not relevant here.

15 One of the ways in which Respondent has tried
16 to attack our identification of the measure at issue
17 is to insist that there was no de facto mining ban in
18 El Salvador; you heard Mr. Smith say that earlier
19 today. That assertion, frankly, seemed incredible to
20 us in light of clear statements by President Saca and
21 his successor President Funes; but, on closer
22 inspection, it became evident that Respondent was

04:22:19 1 relying on a very strained and narrow definition of
2 the term "ban." And as I said earlier, when we use
3 the term "ban," we are using that as a shorthand, a
4 label. The practice is what I described on the slide
5 earlier. A ban is a convenient way of describing that
6 practice.

7 But under the definition of "ban" that
8 Respondent adopts, a ban would exist only if the
9 subject conduct were prohibited permanently. If the
10 prohibition were merely indefinite, even if that
11 indefinite prohibition could go on for years or
12 decades, the fact that it isn't described as permanent
13 at the inception, in Respondent's view, seemingly
14 would mean it's not a ban.

15 And I would submit to you that that
16 understanding of a ban simply doesn't accord with the
17 ordinary meaning of the term. Under the ordinary
18 meaning of the term, a prohibition of any sort is a
19 ban, whether it's permanent or merely for some
20 indefinite period.

21 And, in fact, in its Reply--we could go on to
22 the next slide--in the Reply Memorial, Respondent

04:23:29 1 actually admitted that a ban, as actually ordinarily
2 understood, does exist on metallic mining. That is,
3 despite what the laws and regulations may require, the
4 Government of El Salvador will not issue permits for
5 metallic mining for some indefinite period of time.

6 Now, while Respondent has tried to play down
7 the existence of this measure, it hardly can deny it,
8 given the widespread reporting of its existence in the
9 three years since President Saca's statement. And on
10 this slide we've summarized some of the more explicit
11 statements and headlines admitting the existence of
12 the ban.

13 Now, Respondent has also tried to argue that
14 Claimant did not allege the de facto mining ban to be
15 the measure at issue in its Notice of Arbitration, but
16 as I stated earlier, the Notice speaks for itself and
17 plainly refutes that assertion.

18 Now, in its Reply, Respondent made a
19 half-hearted attempt to show that Pac Rim should have
20 been aware of the mining ban's existence before 2008.
21 And, by the way, you will note the contradiction
22 between, on the one hand, trying to show that Claimant

04:24:41 1 should have been aware of the ban's existence and, on
2 the other hand, denying its existence. I can't make
3 sense of that; perhaps the Tribunal can.

4 In any event, it made that point using press
5 reports from 2006 and 2007 of statements by Salvadoran
6 environmental ministers, but those statements were
7 ambiguous at best. One, for example, was by a
8 Minister who later clarified that the views expressed
9 were his personal views, not the official views of the
10 Salvadoran Government. Another was made in the
11 context of an article about nongovernmental
12 organizations protesting against the Government
13 precisely because they, like Pac Rim, understood that
14 the Government supported metallic mining. Thus, far
15 from helping Respondent's point, the articles
16 Respondent cited in its Reply reinforce the point,
17 that Claimant could not have been aware of the measure
18 at issue until President Saca's announcement in March
19 of 2008.

20 Now, I want to spend a little bit of time
21 talking about Commerce Group because, as the
22 Tribunal's aware, there has been substantial

04:25:49 1 correspondence about the Award in that case in the
2 period since the briefing in this case closed.
3 Respondent tells you that Commerce Group is absolutely
4 on point that it should govern this Tribunal's
5 consideration of what the measure at issue is; and
6 whether the de facto mining ban is, indeed, a measure
7 at all, let alone the measure at issue.

8 I submit to you that that award does not
9 support Respondent's position at all. The Commerce
10 Group Case was about El Salvador's--and we could go to
11 the next slide--was about El Salvador's revocation of
12 environmental permits previously granted to the
13 investors in that case. As the Tribunal in that case
14 said, and you see it quoted here, "it is
15 undisputed"--undisputed--"that the relevant measures
16 in this case in the El Salvador proceedings are the
17 revocation of the environmental permits." The
18 investors in that case challenged the revocations in
19 local courts and failed to terminate local court
20 actions even after they had submitted claims to
21 arbitration under CAFTA. And their failure to
22 terminate the local court actions was blatantly

04:27:05 1 inconsistent with the waiver obligation in
2 Article 10.18 of CAFTA. And, on that basis, the
3 Tribunal dismissed Commerce Group's claims.

4 Now, that was the main thrust of Commerce
5 Group. The failure to terminate the local court
6 litigation was the key fact that hung over that case.
7 It is true that the Claimant in Commerce Group made a
8 separate argument based on what it referred to as the
9 "policy" that led to the revocations, and it is true
10 that the Claimant characterized claims about the
11 policy as separate from claims about the revocations
12 of the individual licenses. However--and we could go
13 to the next slide--however, the Tribunal held, and I
14 quote, "The claim regarding the de facto mining ban
15 policy," it held that that claim is part and parcel of
16 the claim regarding the revocation of the
17 environmental permits. It then said that the de facto
18 mining ban policy claim is not separate and distinct
19 from the permit revocation claims.

20 The Tribunal then went on to make a
21 statement--and this is the paragraph that Respondent
22 focuses on--it went on to make a statement about what

04:28:18 1 it would have found if the de facto mining ban policy
2 and the revocation of the permits could be teased
3 apart. But since it already had held that those two
4 things could not be teased apart, this statement is
5 obiter dicta. It is the definition of dicta. The
6 Tribunal is, in effect, saying we can't tease these
7 two things apart. But if, hypothetically, we could do
8 that which we have already told you we cannot do, here
9 is what we would have found. That is dicta. And,
10 indeed, it is dicta set forth in a mere three
11 sentences in this Paragraph 112 of the Commerce Group
12 Award.

13 In fact, not only is it dicta, it is
14 conclusory dicta. The Tribunal gives no reasons for
15 the distinction it's drawing between what it refers to
16 as a policy and a measure, which is a defined term in
17 CAFTA. There is no examination of CAFTA's definition
18 of measure. You won't find in that paragraph any
19 discussion of the definition in Article 2.1 of CAFTA.
20 There is no attempt to apply that definition to the
21 facts of that case.

22 The Tribunal, in fact, goes on to make a

04:29:28 1 point of qualifying its own dicta by stating that it
2 is limited to, and I quote, "the Tribunal's evaluation
3 of this particular case." That's in the second
4 sentence. Thus, the Tribunal recognized that the
5 conclusion it was drawing was based on a particular
6 set of facts and arguments and should not be
7 generalized.

8 And in that regard, Mr. President, we should
9 recall that the Commerce Group Tribunal's evaluation
10 was pursuant to an objection under Article 10.20.4 of
11 CAFTA and, therefore, was confined to allegations in
12 the Notice of Arbitration and undisputed facts.
13 Unlike this Tribunal, that Tribunal did not have
14 before it extensive evidentiary submissions. And, as
15 if to emphasize this point, the Tribunal went on to
16 say in its last sentence, "By contrast," by contrast,
17 "the revocation of the environmental permits squarely
18 constitutes a measure taken pursuant to that policy
19 and, as noted, it was that revocation that put an end
20 to Claimant's mining and processing activities." That
21 sentence plainly indicates that the Tribunal's
22 evaluation of the mining ban as characterized in that

04:30:42 1 case was colored by its consideration of the ban by
2 contrast to the revocation of the environmental
3 permits. In the present case, there is no revocation
4 of similar or a similar measure to serve as contrast
5 in evaluating the mining ban practice that is the
6 measure at issue here.

7 One last point about Commerce Group before I
8 move on, and that is that we actually agree with what
9 the Commerce Group Tribunal says in that last
10 sentence; that is, that the act or omission that put
11 an end to a Claimant's mining and processing
12 activities should be treated as the measure at issue.
13 In Commerce Group itself, the act or omission that put
14 an end to that Claimant's mining and processing
15 activities was the revocation of environmental
16 permits. In this case, the act or omission that put
17 an end to Claimant's mining and processing activities
18 was the de facto mining ban. It was not a missed
19 deadline in December 2004. That didn't put an end to
20 Claimant's mining and processing activities. It
21 wasn't a missed deadline in December--in January 2007.
22 That didn't put an end to Claimant's mining and

04:31:54 1 processing activities, as evidenced by the expansion
2 of its investment after that date. It is the de facto
3 mining ban as confirmed by President Saca in
4 March 2008 that put an end to Claimant's mining and
5 processing activities.

6 In sum, nothing in the Commerce Group Award
7 supports Respondent's belated argument that the de
8 facto mining ban cannot be treated as the measure at
9 issue.

10 Now, given limited time, Mr. President, I'm
11 going to conclude with just a couple of brief remarks
12 on statute limitations and then on Claimant's status
13 as an investor of a Party.

14 Statute of Limitations is easy because, as I
15 said, it's essentially a mirror image of Respondent's
16 contention that the de facto mining ban is not the
17 measure at issue. In other words, Respondent is
18 telling you either, or they're telling you that both
19 the measure is outside CAFTA's temporal scope and,
20 therefore, as a consequence, a claim brought in
21 April 2009 on the basis of that measure--not the one
22 we allege, but the measure they allege we allege--is

04:33:14 1 out of time; it's beyond the three-year limitation
2 period. But precisely for the same reason that their
3 argument with respect to temporal scope is wrong,
4 their argument with respect to statute of limitations
5 is wrong. In both cases, the argument is premised on
6 a misidentification of the measure at issue.

7 And, in fact--in fact--their focus on the
8 limitations provision in Article 10.18.1 of CAFTA
9 actually highlights their error in identifying the
10 measure at issue as anything other than the de facto
11 mining ban. What Article 10.18.1, which we've
12 reproduced on this slide here, tells you is that for
13 CAFTA's temporal limitations to be triggered, there
14 must be a breach, and there must be damages, and it
15 can't just be any breach. It's got to be a breach
16 under Article 10.16.1. In other words, it's got to be
17 a breach of a CAFTA obligation or a breach of an
18 investment agreement or an investment authorization.

19 If it's not one of those things, if it's
20 merely a breach of some obligation on the municipal
21 law plane, then it doesn't trigger the temporal
22 limitations delineated in NAFTA. And I submit to you

04:34:30 1 that that is crystal clear with respect to the
2 limitations provision defined in Article 10.18.1, and
3 that same rule logically applies when we're talking
4 about whether the measure is or isn't within CAFTA's
5 temporal scope.

6 It goes back to the point I made earlier,
7 that for a measure to be at issue or for it to be a
8 measure at issue, it has to be capable of forming the
9 basis for a dispute as that concept is understood in
10 CAFTA, meaning it has to be capable of giving rise to
11 a claim of breach of a CAFTA obligation. MARN's
12 missed deadline in December 2004 did not do that.
13 Whatever else it may have done, whatever frustration
14 it may have engendered, it did not constitute an
15 expropriation. It did not constitute a denial of fair
16 and equitable treatment. And, indeed, as Mr. Ali said
17 earlier, if you follow the theory that it did to its
18 logical conclusion, it leads to absurd consequences
19 where an investor essentially is required to protect
20 itself on the international law plane every time there
21 is a breach of an obligation on the municipal law
22 plane.

04:35:50 1 I know I'm moving through this material
2 rapidly, and I know it's rather dense, but as I said,
3 I'm doing in the interest of time and to make sure
4 that there is sufficient time at the conclusion of my
5 remarks for my colleague to address abuse of process.
6 So, let me just speak briefly on the question of
7 Claimant's status as an investor of a Party.

8 Respondent makes the argument which it
9 reduces to a mere three sentences in its Reply that
10 the Tribunal lacks jurisdiction because Claimant does
11 not meet CAFTA's definition of investor of a Party,
12 and that argument is based on the unsupported
13 assumption that CAFTA mandates the sequence in which a
14 person acquires the nationality of a Party, number
15 one; and makes an investment in the territory of
16 another Party, number two. In other words, it says
17 you have to do it in that order. First, you have to
18 acquire the status--first, you have to become a
19 national--and only then can you make the investment
20 into the territory of the other Party. And if you do
21 that in reverse, you're not an investor of a Party.

22 Two points on that:

04:36:52 1 Number one, there is no such prescription in
2 CAFTA. It's not in the definition that Respondent
3 showed you during the course of its presentation.
4 It's just not there. There is nothing that says you
5 have to do the operations in that order.

6 Secondly, the argument that Respondent is
7 making is actually an argument that's been made by
8 Respondents in numerous cases. The two most prominent
9 perhaps Fedax versus Venezuela, and African Holding
10 versus DRC, where an investor acquires its investment
11 on the secondary market from the person who actually
12 put the capital or put the other assets into the
13 territory of the host Party, and Respondent says, "Oh,
14 you acquired your investment on the secondary market,
15 just as Mr. Badini acquired his house from his mother
16 through a gift." The fact of making acquisition on
17 the secondary market doesn't defeat the investor's
18 status as an investor of a Party. That's what the
19 Tribunal said in Fedax. That's what it said in
20 African Holding. I submit to you that the same
21 proposition applies here.

22 With that, I'm going to take a brief gulp of

04:38:04 1 water and pivot to the denial of benefits.

2 Mr. President, Mr. Ali reminds me that before
3 I move on to denial of benefits, I should ask first
4 whether the Tribunal has any questions on the
5 jurisdiction *ratione temporis*.

6 PRESIDENT VEEDER: We do, but not for now.

7 MR. POSNER: Okay, thank you.

8 So, denial of benefits. Now, in discussing
9 denial of benefits, I'm going to take the issue in a
10 different order from our written submissions. I'm
11 going to start with the issue of Respondent's untimely
12 notice to the United States of its intent to deny
13 benefits to Pac Rim. Then I will turn to the subject
14 of substantial business activities. And, finally, I
15 will address the issue of ownership and control.

16 I submit to you at the outset that under
17 either of these grounds the Tribunal should reject
18 Respondent's belated attempt to deny benefits to Pac
19 Rim Cayman. I'm starting with the untimely notice
20 issue because, frankly, that's a pure legal issue.
21 The other two issues require some wading into fairly
22 fact-intensive questions, but there are no--there is

04:39:39 1 no dispute with respect to the facts underlying the
2 Notice, and why don't we put up the timeline here.

3 This timeline shows no dispute that
4 Respondent first notified the United States of its
5 intent to deny benefits to Pac Rim on March 1, 2010,
6 in a letter addressed to the Office of the U.S. Trade
7 Representative. Of course, it did not advise the
8 Tribunal or Pac Rim of its intent until five months
9 later, on August 3rd, 2010, but let's put that issue
10 to one side.

11 Now, Respondent's notification to the United
12 States comes almost one year after Claimant filed its
13 Notice of Arbitration. It came 15 months after
14 Claimant filed its December 2008 Notice of Intent. It
15 came more than 20 months after President Saca met with
16 Mr. Shrake and the Ambassador of the United States to
17 El Salvador--not the Ambassador of Canada, the
18 Ambassador of the United States to El
19 Salvador--Mr. Charles Glazer, to discuss Pac Rim's
20 concerns, and after press reports indicated Pac Rim
21 was considering arbitration.

22 So, the question is whether Respondent's

04:40:50 1 delay in providing notice of its intent to deny
2 benefits precludes it from stripping this Tribunal of
3 jurisdiction to consider the merits of Pac Rim's
4 claim. And I submit to you, Mr. President, Members of
5 the Tribunal, that Respondent is, indeed, precluded
6 from doing that, from stripping you of jurisdiction by
7 virtue of its untimely notice.

8 Now, there is a related question of
9 Respondent's lack of notice or failure to give notice
10 to Pac Rim, but I'm going to focus my remarks on the
11 untimeliness of the notice to the United States.

12 And to understand why Respondent's untimely
13 notice defeats its attempt to invoke CAFTA's
14 denial-of-benefits provision, it's important to
15 understand the significance of the notice and
16 consultation clause in that provision.

17 Let's put that up.

18 So, the denial-of-benefits provision, which
19 is Article 10.12.2 is made, and I quote, "subject to
20 Articles 18.3 on Notification and Provision of
21 Information, and 20.4 on Consultations." And as we
22 pointed out in our written submissions, that "subject

04:42:00 1 to" clause is extremely rare among United States
2 agreements postdating the North American Free Trade
3 Agreement. That point is illustrated by this slide.
4 Following NAFTA, the template the United States used
5 in negotiating investment treaties and investment
6 chapters of trade agreements did not include that
7 "subject to" clause. The agreements based on that
8 template generally do not condition the denial of
9 benefits on compliance with obligations pertaining to
10 transparency and State-to-State consultations; CAFTA
11 does. Including that provision represented a
12 departure from the prevailing model; in other words,
13 the CAFTA negotiators went out of their way--they
14 deliberately conditioned the denial of benefits on
15 compliance with this Notice State-to-State
16 consultations requirement.

17 And I stress this point to highlight the
18 significance of that "subject to" clause. The CAFTA
19 negotiators chose to impose a procedural obligation on
20 the denying Party to avoid surprise invocations of
21 denial of benefits which is precisely what we have
22 here.

04:43:11 1 Yet, Respondent fails to acknowledge that
2 distinction between CAFTA and other free trade
3 agreements. On Respondent's theory, the provision of
4 notice of the intent to deny benefits to an investor's
5 home Party is simply a box that has to be checked at
6 some point. It doesn't matter if it's done before the
7 denial of benefits or contemporaneously with the
8 denial of benefits. It doesn't matter if it's done
9 before the submission of claims to arbitration or
10 almost a year after the submission of claims to
11 arbitration.

12 But if that's the case, then there really is
13 no difference between denial of benefits under CAFTA
14 and denial of benefits under an agreement that lacks
15 that "subject to" clause. And I submit to you that
16 that's not the case that the CAFTA negotiators
17 intended these provisions to be mere formalities.
18 They are material conditions. They are key
19 conditions.

20 Now, let's go to the next slide. Let's go to
21 the one after this.

22 So, Article 18.3, which Mr. Badini discussed

04:44:12 1 earlier today, requires a CAFTA Party to notify
2 another Party of actual or proposed measures that
3 might materially affect an operation of CAFTA or
4 otherwise substantially affect the other Party's
5 interests. And we will have more to say about this on
6 Wednesday, but for present purposes, I submit to you
7 that contrary to Mr. Badini's suggestion, that is not
8 a choice. You don't get to choose whether you provide
9 notice with respect to actual measures or proposed
10 measures. You have to provide that notice whether the
11 measure is actual or whether it is proposed. And I
12 will have more to say on that in our closing remarks
13 on Wednesday. Now, it also requires the notifying
14 Party to promptly provide information and to respond
15 to questions.

16 The second "subject to" Article is
17 Article 20.4--and let's put that up. So, 20.4 sets
18 forth detailed rules--detail rules--for State-to-State
19 consultations over actual or proposed measures or
20 other matters that might affect the operation of
21 CAFTA. In the denial-of-benefits context, it gives
22 the investor's home State the opportunity to persuade

04:45:24 1 the host State that the denial of benefits criteria
2 are not met. In Respondent's words, the home State
3 can use that mechanism to show the denying State that
4 the investor does actually have substantial business
5 activity in its territory.

6 Now, Mr. Badini said earlier, "Well, we gave
7 United States notice and the United States didn't
8 avail itself of the opportunity to go to
9 State-to-State consultations." Well, why would it?
10 We are a year into arbitration. Do they really think
11 El Salvador is going to change its position as a
12 result of State-to-State consultations with the United
13 States? Of course not.

14 So, it stands to reason that the United
15 States to this point has not availed itself of that
16 opportunity because it would have been futile at this
17 point.

18 Now, by making the denial of benefits subject
19 to these provisions, Article 10.12.2--let's go back to
20 10.12.2--Article 10.12.2 makes clear that the
21 requirements of these provisions must be met in order
22 for the denial of benefits to occur. If a Party could

04:46:28 1 deny benefits to an investor regardless of whether it
2 has complied with the transparency and consultation
3 obligations, then denial of benefits really is not
4 subject to those provisions.

5 Likewise, in a Party can deny benefits
6 retroactively, then the denial really isn't subject to
7 those provisions. The phrase "subject to" makes
8 compliance--makes compliance with the referenced
9 provisions a condition precedent to denying benefits.
10 Since Respondent failed to satisfy that condition
11 precedent, it cannot now retroactively deny Pac Rim
12 the benefits of CAFTA, including the benefit of being
13 able to pursue its claims through the present
14 arbitration.

15 Now, as we told you in our written
16 submissions, not only is Respondent's attempt to deny
17 benefits inconsistent with the precedent or with the
18 condition precedent in CAFTA Article 10.12.2, it is
19 also problematic in light of provisions of the ICSID
20 Convention, and we identify two. We focus first on
21 Article 27 of the ICSID Convention, and what
22 Article 27 says is it prohibits a Contracting State

04:47:45 1 from giving diplomatic protection in respect of a
2 dispute which one of its nationals and another
3 Contracting State shall have consented to submit or
4 shall have submitted to arbitration.

5 The problem is that CAFTA Article 20.4, one
6 of the provisions in the "subject to" clause envisages
7 an investor's home State, here the United States,
8 engaging in formal dispute settlements consultations
9 with the host State which could involved the giving of
10 diplomatic protection. Now, that's not a problem if
11 notice is given to the home State prior to the
12 submission of claims in that arbitration. In that
13 case, the home State can engage in consultations,
14 including by advocating on behalf of its investor by
15 showing that the investor has substantial business
16 activities in its territory by advocating
17 demonstrating to the host State that it is owned and
18 controlled by nationals of that home state. But if
19 notice of denial of benefits is not given until after
20 claims are submitted to arbitration, the home State's
21 ability to engage in consultations is severely
22 constrained. It may not engage in advocacy for its

04:49:03 1 investor because doing so may be seen as giving
2 diplomatic protection in breach of Article 27.

3 Now, Respondent tells you that the giving of
4 diplomatic protection is confined to the espousal of
5 claims by an investor's home State. However, we have
6 shown that the concept of giving diplomatic protection
7 is broader than that. Espousal, or otherwise known as
8 the bringing of an international claim, is dealt with
9 in Article 27 separately from giving of diplomatic
10 protection. To treat those two terms as synonymous
11 would be to render Article 27's separate reference to
12 the bringing of an international claim a nullity. As
13 we pointed out in our written submissions, the
14 Tribunal in *Aguas del Tunari* recognized that taking a
15 stand on whether the Tribunal had jurisdiction in that
16 case could implicate the Article 27 obligation of The
17 Netherlands, the investor's home State in that case.
18 And in posing a question to The Netherlands, the
19 Tribunal was very careful. It crafted its question to
20 avoid putting that State in the position where it
21 might consider itself to be in breach of its
22 obligation not to give diplomatic protection to its

04:50:28 1 investor.

2 And in responding to the Tribunal's question,
3 The Netherlands also was very careful, acknowledged
4 its obligation not to give diplomatic protection,
5 acknowledged that it wasn't opining on whether the
6 Tribunal in that case had jurisdiction or not. It
7 simply provided factual information--didn't engage in
8 advocacy, just provided factual information--regarding
9 the negotiation history of the instrument of consent
10 in that case. And likewise in other cases which I've
11 cited on this slide, it's been recognized that the
12 giving of diplomatic protection is something broader
13 than mere espousal.

14 And even if there is disagreement on this
15 score, the possibility that the investor's home State
16 may understand diplomatic protection to include
17 advocacy will severely restrict its ability to engage
18 in the consultations contemplated by CAFTA Article
19 20.4.

20 So, Respondent's understanding of when a
21 Party is required to give notice of a proposed denial
22 of benefits would put an investor's home State in an

04:51:38 1 untenable position. Either it can advocate for its
2 investor, engage in the formal State-to-State
3 consultations referred to in CAFTA Article 20.4 and
4 risk violating its obligation under ICSID Convention
5 Article 27, or it can refrain. It can avoid engaging
6 in those consultations, assure itself that it's not
7 running afoul of its obligations under Article 27 of
8 the ICSID Convention, but also in the end deprive its
9 investor of the kind of advocacy that Article 20.4 of
10 CAFTA envisions.

11 In short, because of the restriction in ICSID
12 Convention Article 27, Respondent's understanding with
13 respect to timing would negate the opportunity for
14 State-to-State consultations on denial of benefits.

15 Now, I said there was a second provision of
16 the ICSID Convention that's also implicated by
17 Respondent's interpretation with respect to timing,
18 and that's Article 25(1). As the Tribunal knows, that
19 provision prohibits a unilateral withdrawal of consent
20 to ICSID jurisdiction. By purporting to trigger the
21 denial of benefits after the submission of claims to
22 arbitration, Respondent is doing just that. And

04:53:03 1 remarkably, in his remarks this morning, Mr. Badini
2 essentially conceded that. I invite the Tribunal to
3 go back and look at Slide 52 from that portion of
4 Respondent's presentation where you will see a
5 statement--and I believe I transcribed this
6 correctly--to the following effect: Once those
7 benefits are denied to Claimant--once those benefits
8 are denied to Claimant--it has no right to submit any
9 claims and does not have El Salvador's consent to
10 arbitration. The key there is "once those benefits
11 are denied." The purported denial of benefits in this
12 case didn't occur until March of 2010, so perhaps
13 going forward a Claimant would be submitted or this
14 Claimant would be--would lack El Salvador's consent to
15 arbitration and might not be able to submit a new
16 claim to arbitration, but the claim that was already
17 submitted to arbitration has been submitted. It's
18 only once the benefits are denied, which, in this
19 case, occurred after the submission of claims to
20 arbitration. Therefore, I think even Respondent's own
21 argument concedes the point that what they have tried
22 to do here is inconsistent with Article 25(1) of the

04:54:18 1 ICSID Convention.

2 Now, Respondent argues in its written
3 submissions that denial of benefits is no different
4 than an Objection to Jurisdiction that may be raised
5 notwithstanding a Party's originally having given its
6 consent to the submission of claims to arbitration.

7 I submit to you, Mr. Chairman, that there is
8 an important difference, and the difference this:

9 When the Respondent makes objections, Jurisdictional
10 Objections, in the course of an arbitration--say, an
11 objection on the basis that the Claimant lacks the
12 nationality of a Contracting State--it's doing that
13 based on facts that existed before claims were
14 submitted to arbitration. What Respondent has done in
15 this case is it's created an essential fact. It's
16 created a fact that is critical, absolutely essential,
17 to the denial of benefits.

18 Denial of benefits isn't automatic. What
19 Article 10.12.2 says is that under certain
20 circumstances a host State may deny benefits. So,
21 when the circumstances described in 10.12.2 exist, we
22 don't know whether benefits have been denied or not

04:55:30 1 until Respondent exercises that right. In other
2 words, that's a critical fact. That's a critical
3 jurisdictional fact.

4 And unlike an ordinary Objection to
5 Jurisdiction where all the relevant facts pre-date the
6 submission of claims, here Respondent has created
7 perhaps the most critical fact after, well after,
8 claims have been submitted to arbitration. Now, I
9 submit to you that that's what distinguishes what
10 Respondent is doing here from an ordinary Objection to
11 Jurisdiction.

12 Mr. President, I'm now going to move on to
13 the second two prongs of the denial-of-benefits
14 Article. As I said, I submit that if the Tribunal
15 wishes, it could dispose on the denial-of-benefits
16 argument on the basis of Respondent's untimely notice.
17 In doing so, it could avoid wading into the much more
18 fact-intensive issues of substantial business
19 activities and ownership and control. However, even
20 if the Tribunal chose to wade into those more
21 fact-intensive areas, I submit to you that the results
22 would be the same.

04:56:39 1 Now, in considering both substantial business
2 activities and ownership and control, it is important
3 to bear in mind why CAFTA contains a
4 denial-of-benefits clause. As the Parties state
5 prominently in CAFTA's Preamble, one of their
6 objectives is to strengthen--is to promote regional
7 economic integration. Another objective is to ensure
8 a predictable commercial framework for business
9 planning and investment. Those objectives are
10 advanced when an investor is--when an investor with a
11 real and continuous economic link to one Party makes
12 an investment in the territory of another party. To
13 encourage that kind of investment, the Parties commit
14 to provide the investor the protections set forth in
15 Chapter Ten.

16 On the other hand, where an investor of a
17 Party lacks a real and continuous link to its home
18 Party, its investment in the territory of another
19 Party does little to advance regional economic
20 integration. It does not bind more closely those two
21 economies. Therefore, even though the investor is
22 presumptively entitled to CAFTA's protections because,

04:57:54 1 after all, it is an investor of a Party, CAFTA gives
2 the host Party the option of denying those protections
3 to that investor.

4 Now, the substantial business activities
5 inquiry and the ownership and control inquiry
6 ultimately get at this question of a real and
7 continuous link. And I'm drawing that language, by
8 the way, from what's called the Statement of
9 Administrative Action that was submitted by the
10 President of the United States to the U.S. Congress in
11 connection with NAFTA. The explanation of denial of
12 benefits is a little bit less robust in the CAFTA
13 Statement of Administrative Action, but I believe both
14 parties would agree that essentially the CAFTA clause
15 was modeled after the NAFTA clause; and I think it's
16 appropriate, therefore, to refer to the understanding
17 of the corresponding clause in NAFTA, which focuses on
18 that concept of a real and continuous link.

19 And this underscores the point that the
20 inquiries into substantial business activities and
21 ownership and control are not meant to be mechanical
22 inquiries. They're inquiries that need to be

04:59:06 1 undertaken with that objective in mind.

2 This is a point--let's go to the next
3 slide--this is a point that the Respondent misses when
4 it takes a quantitative approach to determining what
5 kinds of business activities are substantial. It's a
6 point that Respondent misses when it insists on
7 examining Claimant's business activities outside the
8 context of the corporate family of which Claimant is a
9 part. And it is a point that Respondent misses when
10 it chooses to disregard that a majority interest in
11 the activities of Pac Rim Cayman ultimately are held
12 by U.S. persons.

13 Now, in our submissions, we have shown that
14 Pac Rim Cayman has always had a real and continuous
15 link with the United States. Although it was
16 originally created as a Cayman Islands company, it
17 always has been managed from Nevada by Mr. Shrake as
18 part of the Nevada-based Pacific Rim family of
19 companies.

20 It is a holding company; we have never denied
21 that. It engages in the kinds of activities that
22 holding companies engage in. It holds and manages the

05:00:20 1 investments of the group of companies in El Salvador.
2 It holds and manages Pacific Rim Exploration. It is
3 engaged in just the kind of activities that the
4 holding company Claimants in the Amto Case and in the
5 Petrobart Case were engaged in.

6 Now, Respondent says that in argument that
7 Claimant lacks substantial business activities in the
8 United States, it is not--it is not making a criticism
9 of all holding companies; it's just making a criticism
10 of this holding company. But the distinction it's
11 drawing appears to be based on this quantitative
12 concept of "substantial." So, in Respondent's mind,
13 there is some threshold, some amount of activities
14 that must be engaged in in order for an investor's
15 business activities in its home State to be
16 substantial. We submit to you, Mr. President, that
17 that is not in accord with the ordinary meaning of
18 "substantial," which is consisting of or relating to
19 substance; nor is it in accord with the object and
20 purpose of CAFTA which I referred to earlier. After
21 all, if an investor has to guess whether the quantum
22 of business activities it's engaged in in its home

05:01:45 1 State are sufficiently large to ensure that it won't
2 be denied protections by a host State, that certainly
3 is not conducive to the sort of predictability that
4 the CAFTA Parties sought to achieve.

5 I'm going to touch briefly on Respondent's
6 disregard of the family of companies of which Pac Rim
7 Cayman is a part. I will submit to you that the
8 Tribunal will be able to find that Pac Rim Cayman does
9 have substantial business activities in the United
10 States, whether it's looked at on its own or as part
11 of the corporate family of which it is an essential
12 part. But just to avoid any doubt on this subject,
13 let me say a little bit about that context
14 because--because I believe it's very important.

15 As I said, Pac Rim Cayman is part of a
16 broader U.S.-based corporate organization. It doesn't
17 operate in isolation. It doesn't operate in a vacuum
18 that distinguishes Pac Rim Cayman from what one might
19 consider to be a shell company.

20 Now, that corporate family of which Claimant
21 is an essential part includes Dayton Mining, which
22 engages in mining activity in Nevada, generating the

05:03:08 1 capital that ultimately was used to make the
2 investments in El Salvador; it includes Claimant's
3 subsidiary Pacific Rim Exploration which makes
4 strategic decisions regarding which mining
5 opportunities the company should pursue, which also
6 develops the intellectual capital about which
7 Ms. McLeod-Seltzer has testified. And all of those
8 activities are inextricably intertwined with
9 Claimant's own activities.

10 So, the idea here is not to attribute to Pac
11 Rim Cayman the activities of those other companies.
12 It's simply to point out that the activities of this
13 investor have to be viewed in context. You have to
14 view this from an economically realistic point of view
15 which is no different from the way the tribunals
16 looked at the investor in the Petrobart Case, in the
17 S.D. Myers Case, or in the Aguas del Tunari Case.

18 So, context, examination of context,
19 examination of the Claimant from an economically
20 realistic point of view, that's not attribution to the
21 Claimant of some other enterprise's activities. That
22 is simply looking at this from an economically

05:04:19 1 realistic perspective, and I submit to you that
2 nothing in Article 10.12.2 tells you not to examine
3 this company's activities from an economically
4 realistic perspective.

5 I will talk briefly about the subject of
6 ownership and control, and then turn the podium over
7 to my colleague, Ms. Walter.

8 We've submitted to the Tribunal the Witness
9 Statement of Mr. Pasfield from Broadridge Financial
10 Services or Broadridge Investor Communication
11 Solutions, demonstrating that in 2007, 2008, 2009, a
12 majority of the Shares of Pac Rim Cayman's parent were
13 held by persons with addresses in the United States.
14 Respondent has chosen not to cross-examine
15 Mr. Pasfield. Apparently it doesn't contest that
16 fact. Instead, it makes two arguments:

17 Number one, it argues that indirect ownership
18 and control of the Claimant doesn't count for purposes
19 of Article 10.12.2. So, if the ownership of Claimant
20 is indirect, if it is ownership by U.S. persons by
21 virtue of their shareholding of the parent, that
22 doesn't count, in Respondent's view.

05:05:38 1 And, secondly, they say, just because these
2 people have addresses in the United States, we don't
3 know that they're U.S. citizens. Well, on the first
4 point, on indirect ownership and control, Mr. Badini
5 said it is Claimant that's trying to rewrite
6 Article 10.12.2. That's not what's going on at all.
7 As you see from the text highlighted here,
8 Article 10.12.2 doesn't refer to direct ownership or
9 control. It refers to ownership or control or, in the
10 verb form, own or control. So, it is, in fact,
11 Respondent that is trying to rewrite this clause by
12 insisting that the ownership or control that would
13 defeat a denial of benefits has to be direct ownership
14 and control. There's simply nothing in the text that
15 says that.

16 Now, with respect to the citizenship of the
17 persons who are the Majority Shareholders of Pac Rim
18 Cayman's parent, one quick point. It is inherently
19 difficult to know the citizenship of the Shareholders
20 of a publicly held company. I think that proposition
21 is axiomatic. And precisely because it is difficult
22 to determine with any precision the citizenship of the

05:07:02 1 Shareholders of a publicly held company, we've
2 proposed a rule of thumb, and we haven't just chosen
3 that rule of thumb at random. It happens to be a rule
4 of thumb that's applied by U.S. Government agencies
5 when they are confronted with this very same problem.
6 There are U.S. statutes that make certain companies
7 eligible for certain trade-related benefits, and from
8 time to time those benefits are conditioned on a
9 company's being majority-held by U.S. citizens.

10 So, the U.S. Government agencies that are
11 tasked with administering those statutes have posed
12 this question to themselves from time to time: How do
13 we determine whether the company, the publicly held
14 company, is held in the majority by U.S. citizens?
15 The rule of thumb that they have devised, as a matter
16 of administrative practice, which is spelled out in
17 regulation as well as administrative handbooks, is
18 they say, "If a majority of the Shareholders have
19 addresses in the United States, we will deem the
20 company to be majority-held by U.S. citizens"--U.S.
21 citizens--"unless there is evidence to the contrary."

22 And we would submit that because we are

05:08:20 1 talking about a determination whether a company is
2 held in the majority by U.S. citizens, because, as
3 Mr. Badini said earlier, we need to refer to U.S.
4 law--U.S. law is relevant here for making this
5 determination--I would submit that equally relevant is
6 the practice of the very agencies that are tasked with
7 administering that law, and the agencies that are
8 tasked with administering that law apply the rule of
9 thumb that I have just described. I would submit that
10 the same rule of thumb ought to be applied here.

11 A last point with respect to control,
12 Mr. Badini said earlier that because the parent
13 company, the Canadian parent company, is the
14 100 percent owner, it controls Pac Rim Cayman, and
15 that assumes that there can be only one controller of
16 a company. As the Tribunal recognized in Aguas del
17 Tunari, there is not necessarily one controller of a
18 company. There may be multiple controllers of a
19 company. And, in fact, the Shareholders of a company
20 ultimately control it. It's to them that the
21 directors, the Board of Directors, is accountable.
22 The Board of Directors can be removed by the

05:09:28 1 Shareholders.

2 And, therefore, the assumption Respondent
3 makes that because Pac Rim Cayman is 100 percent owned
4 as a wholly owned subsidiary of Pacific Rim Mining
5 Corp., therefore it is in no sense controlled by the
6 Shareholders who ultimately can exercise that power,
7 the power, the ultimate power, to remove a Board of
8 Directors, therefore they're not in control, that's
9 simply an incorrect assumption, and I urge the
10 Tribunal to reject it.

11 In the interest of time, I'm now going to
12 turn the microphone over to Ms. Walter. Should the
13 Tribunal have any questions, of course, on denial of
14 benefits, I'm happy to answer them now.

15 PRESIDENT VEEDER: We will put them to you
16 later. Thank you.

17 MR. POSNER: Thank you.

18 MS. WALTER: Thank you, Mr. Chairman and
19 Members of the Tribunal. We are all very interested
20 in time now, so I'm going to, also in the interest of
21 time, try to make this brief and just make a few
22 points on abuse of process.

05:10:35 1 As I think we've understood by now, the
2 question of whether there has been an abuse of process
3 in this case really turns on one critical fact, and
4 that is whether the dispute arose before or after Pac
5 Rim's change of nationality in December 2007.

6 Now, we have shown you that, in fact, the
7 dispute did not arise until, at the earliest, March of
8 2008, and we submit that if you find that that is,
9 indeed, the case, there can be no finding of abuse of
10 process here.

11 But to be clear, Pac Rim Cayman does not have
12 the burden of proving that it brought this claim in
13 good faith. Respondent bears the burden of proving
14 its abuse-of-process defense. And if you show the
15 first slide. That was recognized, for example, in the
16 Chevron Case, where the Tribunal noted that a Claimant
17 is not required to prove that its claim is asserted in
18 a nonabusive manner. It is for the Respondent to
19 raise and prove an abuse of process as a defense.

20 And this is important because some of the
21 same fact that are at issue with respect to
22 Respondent's objection *ratione temporis* and its

05:11:47 1 objection as to abuse of process are at issue, and
2 particularly the timing issue. But when it comes to
3 finding an abuse of process, you must look to
4 Respondent to prove all of the facts that it has
5 alleged.

6 And as we noted in our written pleadings, a
7 finding of abuse of process is actually quite
8 extraordinary. Even the Phoenix Case on which the
9 Respondent relies shows that the Tribunal, as I'm sure
10 Professor Stern knows better than anyone else here,
11 did not dismiss the case for abuse of process per se.
12 It dismissed the case because there was not a foreign
13 investment, no bona fide investment by a foreign
14 investor, and they found it would be an abuse of
15 process to entertain the claim.

16 And we submit that the paucity of cases that
17 actually find abuse of process, including the utter
18 lack of any decision dismissing all claims on that
19 ground alone reflects the fact that a heightened
20 standard of proof applies to an accusation or an
21 allegation of abuse of process which is, after all, an
22 allegation of bad faith.

05:13:02 1 If you think back to this morning, think of
2 how many times we heard Respondent talk about things
3 like concealment and deceit. Those kinds of
4 allegations must be proven by more than a
5 preponderance of the evidence. They must be proven by
6 at least clear and convincing evidence. Mere
7 supposition and innuendo and notations of so-called
8 "coincidences" do not suffice.

9 And I think it is clear from what you have
10 heard today and what you will hear for the rest of
11 this week, Respondent has come nowhere near
12 establishing any of the facts that it has to prove by
13 clear and convincing evidence in order to prevail on
14 its theory of abuse of process.

15 The only witness that it has produced on
16 Claimant's motivations for the change of nationality
17 which is the core of its abuse-of-process claim--or
18 defense, I should say--is one of its own attorneys,
19 who testifies to what he speculates may have been in
20 the minds of counsel for Claimant several years ago.
21 But this is irrelevant to the issue of when the Act by
22 the Government of El Salvador occurred or when we

05:14:17 1 gained knowledge of it such that a dispute arose, and
2 that did not occur until early 2008, after the change
3 of nationality.

4 And I would further note that Respondent's
5 allegation of abuse of process goes beyond just the
6 timing issue, although that is the key issue. There
7 are actually several related facts that form part of
8 Respondent's theory. And if you will go to the next
9 slide--I think I have eight minutes or less, so I will
10 make this quick--Respondent alleges first that there
11 is an investor with no ties to the U.S.--that's Pac
12 Rim Cayman--but as we'd discussed earlier today and
13 particularly in Mr. de Gramont's presentation but also
14 my colleague Mr. Posner's, Pac Rim Cayman has always
15 been managed and controlled from the U.S., it has
16 long-standing tie to the U.S. It is part and parcel
17 of an enterprise making an investment in El Salvador
18 directed mainly from the U.S.

19 Second, that this investor with no ties to
20 the U.S. set up a shell company with no substance in
21 the U.S. Now, Pac Rim Cayman is not a shell company
22 because it does hold and manage significant assets, it

05:15:29 1 makes strategic decisions as to those assets through a
2 U.S.-based Manager, and it has incurred liabilities.
3 A shell company, by definition, does none of those
4 things. It's not a shell company.

5 Now, we've also discussed to some extent the
6 fact that its activities have substance. They are
7 substantial activities. So, that's also not proven.
8 And, in fact, quite the opposite, we would say, has
9 been proven.

10 Third, that it did all of these things for
11 the sole purpose of obtaining jurisdiction over a
12 pre-existing dispute. And as I already mentioned, it
13 was not a pre-existing dispute. Yes, there were
14 delays. And as we already acknowledged, yes, that
15 must have caused frustrations. There was continual
16 dialogue between Pac Rim Cayman and representatives of
17 the Salvadoran Government over how they could work
18 their way through to a solution. But there was not a
19 legal dispute, not until President Saca acknowledged
20 or revealed, rather, the existence of what we called
21 the de facto mining ban, again March 2008, after the
22 change of nationality.

05:16:38 1 And, finally, Respondent's theory rests on
2 the belief or the allegation that there was otherwise
3 no access to international arbitration, no ICSID
4 jurisdiction for the claims to be heard, and this is
5 the motivation behind the alleged abuse. But as we'd
6 mentioned earlier, the companies could have submitted
7 claims to arbitration either under CAFTA through the
8 U.S. investors who owned shares in Pacific Rim Mining
9 Corp. or through the Investment Law.

10 So, that prong isn't met either. And again,
11 quite the opposite. We believe we have proven that it
12 can't be the case, although it is again not our burden
13 to show those things.

14 Four minutes.

15 I will just quickly contrast this case with
16 Phoenix again in a little bit more detail.
17 There--now, it's interesting we heard this morning
18 from counsel for Respondent that Phoenix Action wasn't
19 really about a domestic dispute or that's not really
20 important because it cited Banro and some other cases,
21 but Banro didn't involve an obligation of abuse of
22 process. Phoenix did. And it was key to the

05:17:45 1 Tribunal's decision, we submit, that it was actually a
2 domestic dispute. There had been litigation, ongoing
3 litigation, in the Czech Republic already happening
4 when the owner or one of the owners of those companies
5 fled to Israel, formed the Claimant, and then
6 submitted a claim. And the Claimant was only created
7 after the dispute and the damages had occurred. Not
8 what we have here. Our Claimant has existed for a
9 long time and changed nationality before the dispute
10 arose.

11 Third, the investment was made--the
12 "investment" was made by the Claimant only after the
13 dispute in damages had occurred. That's when it
14 bought its interest in the Czech companies that had
15 the litigation. That is not the case here. There was
16 significant foreign investment that occurred before
17 the dispute arose, and again Pac Rim came in and was a
18 U.S. national before the dispute arose as well.

19 Finally--and I think this was also very
20 important to the Tribunal's outcome--the investment,
21 and again I put it in quotes because the Tribunal
22 found it wasn't a genuine bona fide international

05:18:47 1 investment, was accomplished through transactions that
2 did no more than rearrange assets within a family. It
3 wasn't really an investment at all. It was a way of
4 trying to dress up a domestic dispute as an
5 international dispute, and we have nothing like that
6 here whatsoever. It is a bona fide investment.

7 And then I think we have one more slide just
8 bring home that point. The Tribunal in Paragraph 97
9 of Phoenix explained its concerns and what we believe
10 really underlay its decision as follows: "The BITs
11 are not deemed to create a protection for rights
12 involved in purely domestic claims, not involving any
13 significant flow of capital, resources or activity
14 into the host State's economy." This is why, number
15 one, there was no real investment, and this is why it
16 wasn't abuse. It was domestic dispute; there was no
17 investment. That's not what we have here at all, we
18 submit, and we can certainly answer your questions
19 more likely on Wednesday, I would think, than now, but
20 we stand ready to do so.

21 Thank you.

22 PRESIDENT VEEDER: Thank you very much.

05:19:52 1 MR. ALI: Mr. Chairman, given that we would
2 not do justice to the Investment Law in a minute and
3 90 seconds, we will rest on our pleadings and address
4 any submissions that are made by Respondent on
5 Wednesday.

6 PRESIDENT VEEDER: You could take it we will
7 read for ourselves what you have given us in the form
8 of the slides in regard to the Investment Law. But we
9 will come back to it, no doubt, later this week.

10 Unless there is anything else either Party
11 wishes to raise, we'll adjourn this hearing until 9:00
12 tomorrow, when we resume with the two witnesses on
13 agenda. Is there anything anybody wants to raise? I
14 will turn to Respondent first.

15 MR. SMITH: Nothing from El Salvador.

16 PRESIDENT VEEDER: And for the Claimant?

17 MR. ALI: Nothing from Claimant, Mr.
18 Chairman.

19 PRESIDENT VEEDER: Until 9:00 tomorrow.
20 Thank you very much.

21 (Whereupon, at 5:20 p.m., the hearing was
22 adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN

