

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

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In the Matter of Arbitration      :
Between:                          :
                                   :
PAC RIM CAYMAN LLC,              :
                                   : Case No.
      Claimant,                   : ARB/09/12
                                   :
      and                          :
                                   :
REPUBLIC OF EL SALVADOR,         :
                                   :
      Respondent.                 :
- - - - -: Volume 3

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HEARING ON JURISDICTION

Wednesday, May 4, 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 12:35 p.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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MR. R. TIMOTHY McCRUM
MR. THEODORE POSNER
MS. ASHLEY R. RIVEIRA
MS. MARGUERITE C. WALTER
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Representatives of Pac Rim Cayman LLC:

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MS. CATHERINE McLEOD-SELTZER

APPEARANCES: (Continued)

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Legal Adviser, Ministry of the Economy of
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MR. RENÉ SALAZAR
Director General of Commercial Treaty
Administration, Ministry of the Economy of
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MS. CLAUDIA BELTRAN
MR. ENILSON SOLANO
Embassy of El Salvador in Washington, D.C.

MR. DEREK SMITH
MR. ALDO BADINI
MR. LUIS PARADA
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1 P R O C E E D I N G S

2 PRESIDENT VEEDER: All right. Good
3 afternoon, ladies and gentlemen.

4 We will start Day 3 of this jurisdictional
5 hearing.

6 Before we give the floor to the Respondent
7 for its Closing oral submissions, are there any
8 housekeeping matters we need to address at this stage?
9 On the Respondent's side?

10 MR. SMITH: Simply the Tribunal indicated in
11 its agenda that the Parties would have the option to
12 save some of their time for a response after the other
13 Party's presentation, and we would like to reserve
14 whatever time is left after our presentations for a
15 response.

16 PRESIDENT VEEDER: This will be strictly a
17 response. It wouldn't be introducing new points?

18 MR. SMITH: No, no, it would be strictly a
19 response to what they say, if it's necessary.

20 PRESIDENT VEEDER: I'm sure that's something
21 that both sides had in mind when they made their
22 points respectively yesterday evening; is that

12:36:20 1 correct?

2 MR. ALI: That's correct.

3 PRESIDENT VEEDER: Let's work on that basis.

4 Is there anything that Claimants want to

5 raise at this stage?

6 MR. ALI: Yes, Mr. Chairman.

7 First of all, I'd like to introduce

8 Mrs. Catherine Seltzer, the Chairman of Pacific Rim

9 Mining Corp., who has been able to join us today.

10 And, secondly, I would like to raise the

11 issue of the new document that we gave to Respondent's

12 counsel yesterday afternoon. I just remind the

13 Tribunal that is an excerpt from the Foreign Affairs

14 manual of the United States Government entitled

15 "Assistance to Citizens Involved in Commercial

16 Investment and Other Business-Related Disputes

17 Abroad."

18 We believe that this document must be

19 admitted for several reasons:

20 First of all, it is a document of public

21 record.

22 Secondly, it isn't a very long document.

12:37:11 1 It's only eight pages long.

2 And, it is, I think, a document that has
3 become very relevant in light of the--in light of
4 how--I wouldn't say important, but how relevant the
5 U.S. Government's involvement in these proceedings has
6 become. It wasn't as evident previously. I think it
7 has become more evident as the last three days have
8 progressed.

9 And I think if you balance the respective
10 interest here--that is, whatever prejudice the
11 Respondent might suffer, if any, by virtue of the
12 admission of this public document against the
13 jurisprudential--I would say jurisprudential and
14 public policy interests of your deciding an issue of
15 first instance, i.e., the dispute over how to
16 interpret the scope and effect of the CAFTA
17 denial-of-benefits provision without taking into
18 consideration this document, prudence for counsel in
19 favor of admitting it, and then for the Tribunal to
20 determine whether it is or not relevant to its
21 determinations as it deliberates. And that's leaving
22 aside the prejudice that we would suffer by virtue of

12:38:28 1 the document not being admitted.

2 Thank you.

3 PRESIDENT VEEDER: Do the Respondents want to
4 respond to that at this stage?

5 MR. SMITH: Yes, we would.

6 PRESIDENT VEEDER: Please do.

7 MR. SMITH: To begin with, I don't think
8 Claimant can claim any prejudice if the document is
9 not admitted. As Claimant's counsel has indicated,
10 this is a public document that was fully available to
11 them at the time they prepared their written
12 submissions. They've indicated no reason whatsoever
13 why they failed to file it in a timely manner. While
14 it is only an eight-page excerpt of the document, the
15 full document of the Foreign Affairs Manual is, in
16 fact, many, many hundreds of pages long, and therefore
17 to understand the context of this submission, one
18 obviously has to have access to the full Foreign
19 Affairs Manual.

20 And there is, in fact, no heightened
21 relevance of the United States that's come to light
22 since El Salvador's last written pleading. The

12:39:38 1 denial-of-benefits objection was filed before they
2 filed any of their written pleadings. Every issue
3 that this document addresses was fully in the record
4 in the written pleadings, and there's just no reason
5 to allow them to file this document out of time.

6 Not to mention the procedural issue that,
7 well, we had overnight to prepare for today, the
8 filing of a document like this, we had to deal with it
9 last night. And it is--unless there is a good reason
10 to do it, I don't think it should be permitted as a
11 matter of course.

12 MR. ALI: Mr. Chairman, if I have a brief
13 response?

14 PRESIDENT VEEDER: Brief reply.

15 MR. ALI: First of all, I would simply remind
16 the Tribunal and my friend, Mr. Smith, that we
17 received a number of documents yesterday in the midst
18 of cross-examination which should have been produced
19 to us before.

20 And, secondly, we will have another round of
21 written submissions, and certainly within the context
22 of that round of written submissions where we aren't

12:40:49 1 submitting our written submissions until I think it's
2 June 10th, there is more than adequate opportunity for
3 Respondent to review this document and the entire
4 Foreign Affairs Manual if it so chooses for purposes
5 of that submission, so I don't think they will suffer
6 any prejudice.

7 PRESIDENT VEEDER: Let's stop the debate
8 there.

9 Do you need a decision before we give the
10 floor to the Respondents? Because we need to
11 deliberate about this Application and we'd rather get
12 with the Respondent's closing oral submissions and
13 then take our deliberations during the break.

14 MR. SMITH: We do not need a decision, but I
15 do want to point out that the documents that they were
16 providing--

17 PRESIDENT VEEDER: You made that point.
18 Don't worry.

19 MR. SMITH: Okay.

20 PRESIDENT VEEDER: We don't have to reread
21 every issue.

22 So, we'll come back to this during the break.

12:41:36 1 We need to distribute between the three of us. And
2 rather than hold things up now, we would rather give
3 the floor to the Respondent. But for the moment don't
4 refer to this document, even though you may have
5 prepared for it.

6 MR. SMITH: Slides, yes, no time for copies,
7 however. I apologize for that.

8 PRESIDENT VEEDER: Could we have them later?
9 Because they tend to be quite useful.

10 MR. SMITH: Yes, of course. They're being
11 prepared.

12 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

13 MR. SMITH: Thank you, Mr. President, Members
14 of the Tribunal.

15 Again, I'm Derek Smith of Dewey & LeBoeuf
16 appearing on behalf of El Salvador. I'm going to give
17 our final observations based on the arguments and
18 testimony that was adduced over the last two days.

19 I will address our objections of abuse of
20 process *ratione temporis* and the lack of jurisdiction
21 under the Investment Law. After I finish, Mr. Badini
22 will address our objections based on denial of

12:42:48 1 benefits.

2 I'd like to thank you for the questions that
3 you presented yesterday as they have allowed us to
4 focus our comments on issues that you consider
5 important, and I will organize my presentation based
6 on your questions, although not exactly in the order
7 in which you have asked them, and we will reserve
8 answers for some questions for the written submissions
9 rather than address them now orally.

10 And, finally, we reserve the right to
11 supplement any of our answers in the written
12 submissions. And I will, of course, make some
13 additional comments that are not directly in response
14 to your questions.

15 Your first set of questions relates to our
16 abuse-of-process objection. I would like to make some
17 general comments before addressing your specific
18 questions. You will recall that there is a two-prong
19 test for abuse of process, and El Salvador has
20 demonstrated that both prongs have been met in this
21 case, and I'd like to comment briefly why this simple
22 test established in Phoenix Action and Mobil should be

12:44:02 1 maintained and that Claimant's assertion that a new
2 heightened burden to prove subjective bad faith should
3 be rejected.

4 First, bad faith is inherent in this type of
5 abuse, as we discussed during our presentations.

6 Second, Claimant's new standard would invite
7 a complex and impossible inquiry into the subjective
8 motivations of individuals, but also of legal persons.
9 Abuse of process could never be established if it was
10 required to show subjective bad faith.

11 And, finally, the current test is clear and
12 simple to apply. All investors, States, and future
13 tribunals know exactly what is prohibited. Investors
14 know what conduct to avoid. States know what their
15 rights are, and judicial consistency will be a
16 relatively simple matter. All of this would be lost
17 if you adopt Claimant's approach.

18 Now, let's go back to the facts of this case.

19 As we indicated, the first prong of the test
20 has been met. Claimant has conceded that the change
21 of nationality was necessary for Claimant to access
22 jurisdiction. In fact, Claimant has conceded that

12:45:35 1 access to jurisdiction was the primary reason for the
2 manipulation of Pacific Rim Cayman's corporate
3 structure to change its nationality.

4 This is from Mr. Shrake's testimony
5 yesterday, Day 2 at 454, 12 to 22.

6 "QUESTION: Is it your position, your
7 truthful position, that the primary reason
8 for changing the nationality of Pacific Rim
9 Cayman was to save these few thousand dollars
10 in fees?

11 "ANSWER: No. There were numerous
12 reasons. You said primary reason.

13 "QUESTION: Right.

14 "ANSWER: There were numerous reasons to
15 move it to Nevada.

16 "QUESTION: So, saving money was not the
17 primary reason?

18 "ANSWER: It was one of the reasons."

19 PRESIDENT VEEDER: Just reading that, is it
20 fair to say that he conceded that it was a primary
21 reason? I don't read his answer "right" as meaning
22 you were right. We heard your question.

12:46:29 1 MR. SMITH: I read it. I understood his
2 answer as indicating. He said, "No." I said: "Is it
3 your primary reason?" He said, "No."

4 This is--the question here is whether saving
5 money was the primary reason. He indicated that
6 saving money was not the primary reason.

7 The question, "Is your position, your
8 truthful position, that the primary reason for
9 changing the nationality of Pac Rim Cayman was to save
10 these few thousand dollars in fees?"

11 "No."

12 Now, the reason that this is an admission
13 that accessing jurisdiction was the primary reason is
14 because throughout all of their pleadings and all of
15 their statements, in fact, Claimants have only alleged
16 two reasons for changing nationality. One was to save
17 money, and one was to access jurisdiction. If saving
18 money was not the primary reason, then the logical
19 inference is that--

20 PRESIDENT VEEDER: Well, I query the logic.
21 You can have two reasons without either one of them
22 being primary. And if you're looking for a concession

12:47:27 1 that it was a primary reason, we need to find a
2 relationship.

3 MR. SMITH: I understand.

4 PRESIDENT VEEDER: If you have it, show it to
5 us.

6 MR. SMITH: I accept the President's logic,
7 but it stands out that--to me that it is--that the
8 preponderance of the evidence indicates that it was
9 the primary reason for changing nationality was to
10 access jurisdiction because clearly saving money could
11 not have been a significant consideration.

12 Thank you.

13 In any event, it is clear that access to
14 jurisdiction was a reason and, therefore, the second
15 prong as regards to whether the interference with the
16 investment took place prior to Pac Rim Cayman's change
17 of nationality is the only object of dispute here.

18 This is from the statement of Ms. Walter
19 yesterday, indicating Claimant's agreement that there
20 is a single factual issue at issue. I quote from
21 Day 1, 265, 1 to 5, "As I think we've understood by
22 now, the question of whether there has been an abuse

12:48:55 1 of process in this case really turns on one critical
2 fact, and that is whether the dispute arose before or
3 after Pac Rim's change of nationality in 2007."

4 Now, the next slide is the way that we
5 formulated that question during our presentation:
6 "Did the alleged Government interference with the
7 investment take place prior to December 13, 2007?
8 These are slightly different formulations of the same
9 factual questions--they agree that this is a factual
10 question--we agree it's a factual question, and we
11 also agree that this is the question that must be
12 answered with regard to abuse of process.

13 Now I would like to address your question
14 number three that relates to abuse of process. The
15 question is up on the screen, and it relates to the
16 dictum in Maffezini cited at Claimant's Legal
17 Authority 80--what is Claimant's Legal Authority 81,
18 Paragraph 91 and onwards and produced at Claimant's
19 Slide 10, and we have been asked to comment on this,
20 which we will do now and again in writing when we have
21 the opportunity.

22 The elaborate steps articulated by the

12:50:26 1 Tribunal in Maffezini describe how a dispute may
2 evolve in time, but it is largely irrelevant for an
3 objection on abuse of process. What is relevant is
4 when the alleged state interference occurred or
5 otherwise commenced. Maffezini address the question
6 of the existence of a legal dispute for purposes of
7 jurisdiction *ratione temporis*. It does not address
8 the standard for abuse of process. They're not the
9 same inquiry. They're two different legal concepts,
10 and the factual inquiry of each one is distinct.

11 That is why the Tribunal in Mobil used the
12 term "born," that abuse-of-process inquiry relates to
13 when the dispute is born, which is a different stage
14 in the development of a dispute, and I will explain
15 myself, whereas the Maffezini analysis I think leads
16 to what has been called when a dispute is
17 crystallized, and they're two different moments in the
18 life of a dispute.

19 And if you'll put forward the next
20 slide--keep going--keep going--one more--one more--I
21 hope it got in there.

22 (Pause.)

12:52:16 1 MR. SMITH: The vagaries of overnight
2 preparation. Forgive us.

3 The Tribunals in Mobil and Maffezini
4 identified different stages of a dispute as they are
5 relevant to different types of objections. For
6 abuse-of-process objection, the Tribunal in Mobil
7 gives a determination of legal relevance to the
8 genesis of a dispute as when it was born.

9 For the existence of a legal dispute for
10 purposes of *ratione temporis* objection, the Tribunal
11 in Maffezini describes and given legal relevance to
12 the final stage of a dispute between two Parties. The
13 stage is essentially set out in Maffezini slightly
14 modified for purposes of this are set out here.

15 It is El Salvador's contention that the
16 abuse-of-process factual inquiry looks to determine
17 the moment at which the dispute actually began, not
18 when it became a fully crystallized legal dispute
19 ready for arbitration. It focuses on the moment in
20 which the State took action which affected the
21 investment, which is at the very beginning of a
22 dispute. If you look here, the first thing that

12:53:34 1 happens in a dispute is a State does something that
2 affects the investment, and then the investor reacts
3 to that, either accepting it or disagreeing.

4 And then it would perhaps, in some cases
5 obviously the States in Maffezini don't happen in real
6 life every time. Sometimes there is no communication,
7 but generally the investor would communicate its
8 position to the State, and the State would either
9 respond or not. And then the investor would
10 communicate perhaps its legal rights to the State, and
11 the State would respond or not. And then there would
12 be a legal dispute because there has been an exchange
13 of legal views, and the dispute has become a legal
14 dispute.

15 Our contention is that the abuse-of-process
16 inquiry starts at very beginning of this. And why is
17 this? Because the distinction between a--the real
18 distinction here is between structuring an investment
19 prior to going in so that everybody has notice of who
20 the parties are and what their nationality is, which
21 is--which is clearly proper. There is another thing
22 that might be done, which is restructuring after the

12:54:52 1 investment has been made, but before there is any
2 dispute or contention between the Parties, and then
3 there is a third moment where the nationality or the
4 corporate structure is manipulated after the dispute
5 arose or after the dispute is born, and why is it that
6 the abuse-of-process inquiry focuses on born? Because
7 that is the moment when the investor knows--that's the
8 moment when the investor knows--that there is an issue
9 that may someday be litigated. That is when the
10 investor knows--that is when the investor can begin to
11 manipulate its form after it has learned of the
12 conduct of the Government, and so that's the moment at
13 which it becomes abusive.

14 Although--now let's go back--go forward a
15 bit.

16 Now, let's--one more. Okay. You can leave
17 it there for a moment.

18 Although the measures Claimant identified in
19 the Notice of Arbitration as giving rise to its
20 claims, those relating to the Application for an
21 environmental permit and the Application Concession
22 all occurred before the change of nationality,

12:56:31 1 Mr. de Gramont said on Monday that the dispute first
2 began to crystallize in the public statement of
3 President Saca on March 2008. However, between
4 December 2007 and March 2008, nothing new happened,
5 and we will--I will indicate why this is true.

6 Even with the heightened standard articulated
7 by the Tribunal in Maffezini for the determination of
8 a dispute, it is quite clear that by December 13,
9 2007, okay, what I'm indicating here, if we look at
10 the Maffezini formulation, which El Salvador does not
11 accept for abuse of process purposes, but we're just
12 indicating that if the Tribunal were to apply this
13 formulation, it would have been met by December 13,
14 2007, with regard to the Concession Application.

15 By December 13, 2007, two Applications have
16 been filed. I'd like to focus here on the Application
17 for Concession for the mining Concession, which
18 was--and contrary opinions had been exchanged on
19 whether the requirements for obtaining an exploitation
20 Concession had been met, including legal memoranda.
21 By operation of law due to Article 38 of the Mining
22 Law, Claimant's Applications were terminated and

12:58:10 1 denied by operation of law. Therefore, by
2 December 13, 2007, there was a clear and dramatic
3 dynamic between the Parties that would qualify for any
4 definition of a dispute. There was the formulation of
5 legal claims. There was discussion and eventual
6 rejection or lack of response by the other Party. The
7 facts clearly demonstrate that all of that happened
8 before December 7--December 13, 2007, with regard to
9 the Exploitation Concession Application, and there
10 it's clearly in the facts.

11 (Pause.)

12 MR. SMITH: At this point it is also
13 clear--one more forward, I'm sorry. It is also
14 abundantly clear from the record from the testimony of
15 Mr. Parada, which is uncontroverted, that Claimants
16 were preparing for arbitration prior to December 13,
17 2007, and had every plan to submit an arbitration
18 claim. If arbitration could have been submitted, then
19 there was clearly a dispute for all purposes.

20 Mr. Parada has submitted an unrebutted
21 Witness Statement and testimony that Claimant's
22 counsel informed him of the existence of the dispute

01:00:01 1 before Claimant's change of nationality on
2 December 13, 2007, and well before Claimant alleges
3 there was even a possibility of a dispute in
4 March 2008. Mr. Parada's recollection is supported by
5 contemporaneous documentary evidence which reveals
6 information whose source could only have been
7 Claimant's counsel.

8 This is an e-mail from April 8, 2008, from
9 Luis Parada to the former Attorney General of El
10 Salvador, and it indicates an ICSID arbitration
11 against the Republic of El Salvador might be initiated
12 under the CAFTA framework.

13 Next.

14 This is an e-mail from Mr. Parada to Eric
15 Schwartz, also of Dewey & LeBoeuf: "We have been on
16 top of that dispute since last December, when I first
17 learned that opposing counsel was preparing for
18 arbitration."

19 And finally, in Claimant's counsel's letter
20 April 22nd, 2007, in fact, Claimant's counsel
21 indicated that on 24 October 2007, an attorney-client
22 relationship between Crowell & Moring and Pacific

01:01:29 1 Mining Corp. and its subsidiaries had commenced.

2 Claimant's counsel, who were party to the
3 discussions with Mr. Parada in November and
4 December 2007, were not only available to offer
5 Witness Statements and testimony, but also had been
6 participating in this hearing for three days. Their
7 failure to offer any evidence, only insinuations,
8 contrary to Mr. Parada's testimony, should only lead
9 to an adverse inference.

10 This is the letter from Mr. Shrake to the
11 President of El Salvador, Mr. Saca, of April 14th,
12 2008, and it indicates that on that date Pacific Rim
13 Mining of Canada had in mind initiating the
14 controversy resolution process established in the Free
15 Trade Treaty between Central America, the United
16 States, and the Dominican Republic.

17 Now, I'd like to go back to the point I was
18 making. I'd like to go back to the point I was making
19 regarding the difference between the factual situation
20 on December 13, 2007 and March 11, 2008, when
21 Claimants claim there was a legal dispute, a fully
22 developed legal dispute on March 11, 2008, and this is

01:03:13 1 from the hearing transcript, Day 1, 269, 18 to 22,
2 again from Mrs. Walter: "But There was not a legal
3 dispute, not until President Saca acknowledged or
4 revealed, rather, the existence of what we call the de
5 facto mining ban, again March 2008, after the change
6 of nationality. So, there was a legal dispute in
7 March of 2008, okay? And Claimant's position is that
8 a legal dispute begins for purposes of abuse of
9 process when there is the formulation of legal claims,
10 their discussion, and eventual rejection or lack of
11 response by the other Party." Okay? So, for
12 Respondent, these criteria--I'm sorry, for Claimants,
13 these criteria had been met by March 11th, 2008.
14 That's their position because not only have they
15 alleged in their legal arguments that there was a
16 dispute on this date, but shortly after this date they
17 threatened arbitration under CAFTA.

18 So, what is in the record that could possibly
19 have met their definition of a dispute by March 2008?
20 The press reports of President Saca are nothing about
21 the formulation of legal claims, their discussion,
22 eventual rejection, or lack of response. There were

01:04:39 1 no legal claims formulated there. There was no
2 discussion because President Saca was alone and not
3 with anybody from the Claimant when he made those
4 statements, and there was no rejection or lack of
5 response.

6 When did that happen? All of those criterias
7 must have happened before March 11, 2008. When did
8 they happen? They happened just as I described them,
9 in 2005 and 2006 and 2007, with regard to the
10 Exploitation Concession Application.

11 I think, Mr. President, on this issue, my
12 logic is sound.

13 Can we go on?

14 Now, let's look at the summary of events
15 regarding the Concession.

16 Now, the red area is the time between
17 December 7th and April--should say April 14, I think,
18 but in any case, it's the time between when they
19 change nationality and when they threatened CAFTA
20 arbitration, okay? And the only event in that time
21 period are the press reports about President Saca,
22 which we've discussed at length as to whether or not

01:06:14 1 they actually do what Claimant says they do. All of
2 the other actions of the Government that could be
3 considered, the knowledge of the dispute, the
4 discussion of the dispute, the presentation of legal
5 opinions and the rejection of that, all of that
6 happened between December 2004 and December 2008. In
7 fact, it all happened up to January 2007 with regard
8 to the Exploitation Concession.

9 And, in fact, they discussed a lot of
10 communication with the Government or some
11 communication with the Government regarding the
12 environmental permits and MARN after January 2007.
13 There is nothing in the record, there was no
14 communication, nothing after January 2007 because by
15 that date, the dispute regarding the Concession
16 Application, which is, in fact, the real source of
17 rights, was over and crystallized at that date.
18 Nothing happened between December 7th and March that
19 could fit the definition of a dispute under Maffezini.

20 Now, I want to--just to bring home the point
21 about what the Saca Press Reports meant or didn't
22 mean, this is from the testimony of Mr. Shrake at 475,

01:07:44 1 12 to 18:

2 "QUESTION: Okay, do you have any other
3 evidence from March 2008 that there was a ban
4 on mining? Again, from March 2008, I'm
5 asking about a specific--

6 "ANSWER: In March 2008?

7 "QUESTION: When at the time--when at
8 the moment this letter came out," intended to
9 refer to process report.

10 "ANSWER: No. No additional evidence of
11 a ban in March 2008.

12 "QUESTION: So, it's your position that
13 on March 12, 2008, you knew there was a ban?

14 "ANSWER: No."

15 Claimant's entire case up to now has rested
16 on the statement that Mr. Saca's press, the Press
17 Reports about Mr. Saca created a ban. Mr. Shrake, the
18 CEO of Pacific Rim Mining, the Manager of Pac Rim
19 Cayman, the one person who has had primary
20 responsibility for all of this, when asked if he knew
21 there was a ban when the Saca article came out said,
22 no.

01:08:57 1 "QUESTION: So, the March 12, 2008, you
2 did not know there was a ban?

3 "ANSWER: No.

4 "QUESTION: Okay. But on that date, but
5 immediately thereafter you threatened
6 arbitration in a letter of April 14, 2008; is
7 that correct?

8 "ANSWER: That's correct.

9 "QUESTION: Okay.

10 "ANSWER: I did not know that every
11 mining Concession in El Salvador was
12 eventually going to be expropriated."
13 That sounds to me like I did not know there
14 was a ban.

15 "ANSWER: I didn't know that at that
16 point in time, but what I did know is that
17 our efforts to get the Government to follow
18 the law with our particular asset had not
19 been followed, and the indications were with
20 numerous consultations was that they were
21 going to continue to dangle and withdraw the
22 carrot."

01:09:45 1 Now, these numerous consultations must all
2 have taken place before March 12, 2008, because he's
3 referring to that time period. Therefore, it's the
4 numerous consultations that made him realize that
5 perhaps that his Concession was in trouble, not
6 anything that was said in the press article of--about
7 President Saca.

8 PRESIDENT VEEDER: Do you mind if we
9 interrupt you?

10 MR. SMITH: No, I'm very happy for you to
11 interrupt.

12 PRESIDENT VEEDER: Because culturally some
13 advocates, and I'm not one of them when I was an
14 advocate, like Tribunals that are completely silent.

15 MR. SMITH: No, no, I have no trouble if you
16 would like to interrupt and if I could be helpful.

17 PRESIDENT VEEDER: Take your point you just
18 raised. It may be a very good merits point. Is it
19 really you've got nothing to complain about in March
20 or April because there wasn't a ban. It wasn't a
21 measure.

22 MR. SMITH: Right.

01:10:35 1 PRESIDENT VEEDER: And that may be a very
2 good merits point, but is it a jurisdictional point?

3 MR. SMITH: It is a jurisdictional point for
4 purposes of abuse of process because their contention
5 is that there was no dispute until this date, and
6 their contention is that there was a dispute on this
7 date because on this date, a ban was established.

8 If no ban was established, there was nothing
9 different on March 12, 2008 than December 13, 2007.
10 If there was no ban, nothing changed. Every fact that
11 had occurred in the record occurred prior to
12 December 13, 2007. There is nothing in the record
13 about the Exploitation Concession that happened
14 between December 13 and March 12. If no ban was
15 announced, nothing changed. And if the dispute
16 existed, as they admit it did on that date and they
17 threatened arbitration shortly thereafter, which means
18 they felt the dispute existed, then if it existed on
19 that date, it also existed back in December because
20 there was no change. The only change they allege is
21 the ban. If the ban didn't exist, then all of the
22 facts that made the dispute happen in March of 2008

01:11:54 1 were true and known and existing in December. If
2 there was no ban, then the dispute must have started
3 before this date.

4 And if they allege--if they allege--if they
5 threaten arbitration, they're threatening it based on
6 facts that happened before December 7th.

7 ARBITRATOR TAWIL: Mr. Smith, I'm wondering.
8 I didn't hear the Respondent's view concerning the
9 alleged conversations and promises with officers of El
10 Salvador brought by Claimant. I would like to know--

11 MR. SMITH: I will go to that immediately.

12 Just one point. After March 2008, when they
13 allege that something profound happened, they
14 continued to invest millions of dollars in El
15 Salvador, which seems to me inconsistent with their
16 position that some momentous moment happened in March
17 of 2008. There was a ban. Why would you keep
18 investing money in a country where you thought there
19 was an all-out mining ban.

20 Continue.

21 In fact, I had anticipated this issue. The
22 alleged assurances. Here are the alleged assurances.

01:13:23 1 This is from Mr. Shrake's Witness Statement. "From my
2 meetings with El Salvadoran officials prior to the
3 2002 merger with Dayton and well into 2008, officials
4 at the highest levels in the Salvadoran Government
5 repeatedly expressed support for our project, and
6 particularly," and listen to these dates, "and
7 particularly in 2007--2007 and 2008, assured us that
8 the permits necessary to conduct extraction activities
9 at El Dorado would be forthcoming. I recall numerous
10 such meetings on my many trips to El Salvador." And
11 the next sections of his Witness Statement is the
12 recitation of all of those meetings.

13 And then with the letter of April 22nd of
14 this year from Claimant's counsel to El Salvador's
15 counsel, we heard of two more meetings.

16 Now, this next slide, and this is just from
17 counsel's same position, assurances from 2004 to
18 2008--next slide--these are the meetings. You will
19 notice the gap. There were no meetings--no
20 meetings--alleged from January 2007 to December 13,
21 2007. Not one meeting alleged for the entire year of
22 2007 when they have based a large part--a large

01:14:59 1 part--of their argument of their argument that there
2 was no dispute, that they were constantly getting
3 assurances, but from the date of the termination by
4 law of their Concession Application to the date of
5 their change of nationality, they had no meetings, and
6 I asked Mr. Shrake yesterday if he could recall any
7 further meetings, and he said no.

8 Now, there were other events in 2007. There
9 were the statements of the Minister of the Environment
10 that were clearly indications of a disagreement and a
11 dispute on a number of legal issues, but there were no
12 meetings. If there were no meetings, it's hard to see
13 how there could be assurances, unless there were
14 assurances in writing; and, if there are assurances in
15 writing, we would have had them in the record by now.

16 Okay. We can go on.

17 Now, that was my answer, a long answer to the
18 Question Number 3 on abuse of process. The next
19 question I will address was your first question: Now,
20 we are correct in understanding the Claimant's case,
21 then, to be based upon a measure in and after
22 March 2008 and not anything which took place prior to

01:16:25 1 2008, although they might be described as measures,
2 they're not measures on the Claimant's claim as based.

3 It's El Salvador's position that Claimant's
4 constant reformulation of its claim in these
5 proceedings cannot alter the abuse-of-process
6 analysis. Claimant cannot at this late stage through
7 statements of counsel amend its Notice of Arbitration.
8 And, in fact, Claimant hasn't offered any amendment to
9 its Notice of Arbitration and continues to affirm the
10 truth of the facts alleged therein, including the
11 notice of intent. Its reformulation of the measure,
12 even if permissible, cannot negate the facts that they
13 have alleged and have told the Tribunal must be
14 assumed as true.

15 Everything I went through in their Notice of
16 Intent yesterday and put up here regarding measures
17 and the consequences of those measures were
18 allegations of fact which they have not denied, and I
19 would assert at this stage they cannot deny. Nor does
20 El Salvador accept those facts, but for purposes of
21 this determination, the Tribunal has been told to
22 accept them by Claimant. The question of whether or

01:17:45 1 not the interference with dispute has taken place is a
2 question of fact. It's not a question of what
3 measures, what claims they make. It is a question of
4 fact regarding the birth, the genesis of the dispute,
5 if you accept our view, or the crystallization of the
6 dispute if you accept their view. But as they said
7 yesterday, and we have agreed, this is a question of
8 fact, not a question of how they formulate their
9 claims.

10 And let's look at their factual claims in the
11 Notice of Intent. Their factual claim is that PRC's
12 claims arise out of El Salvador's arbitrary and
13 discriminatory conduct, lack of transparency, and
14 unfair and inequitable treatment in failing to act
15 upon the Enterprises' Applications for a Mining
16 Exploitation Concession.

17 Okay, can we go to the next one.

18 Now, I went through--I yesterday went through
19 all of their allegations of fact to point out that the
20 dates on which they indicated their investment was
21 interfered with. I'm not going to go through all of
22 that.

01:19:14 1 Now, they have said yesterday that all of
2 these measures that they alleged in their Notice of
3 Intent to be breaches of CAFTA are somehow no longer
4 breaches of CAFTA but are still measures. I'm not
5 sure that it's appropriate to allow them to change
6 that, but in any case when they filed their Notice of
7 Intent, they believed they were breaches of CAFTA.
8 Now, apparently, they do not. But let's look at what
9 they say as a matter of fact were the consequences of
10 these measures whether they are breaches of CAFTA or
11 not.

12 As a result of the measures, the rights held
13 by the Enterprises had been rendered virtually
14 valueless, and PRC's investments in El Salvador have
15 effectively been destroyed.

16 Now, whether these measures are violations of
17 CAFTA or not, whether they've changed their position
18 on that, whether they've invented some new measure
19 that is consistent with their temporal concept of the
20 case, these measures that took place between 2004 and
21 2007, they have said, and have not denied and cannot
22 deny because it is now their allegations of facts,

01:20:21 1 these measures rendered virtually valueless--rendered
2 the investment virtually valueless and have
3 effectively destroyed the investment. All of this
4 took place before December 13, 2007. If a State has
5 taken actions that render rights virtually valueless
6 and destroy an investment, I would say a dispute has
7 been born. I would say a dispute has been
8 crystallized. I would say under any definition a
9 dispute exists, and they changed nationality after
10 that dispute existed. After their investment had
11 been--not affected--destroyed.

12 These I put up yesterday. I won't go through
13 them again, but they clearly show the measures took
14 place between 2005 and 2007.

15 And then we also saw this yesterday. This is
16 a Press Release from Pacific Rim Mining Corp. of
17 Canada. In July of 2008, referring to their dispute
18 with the Government and, as I indicated--as we
19 indicated yesterday, the dispute is described as, if I
20 can read it, stalling the process without with regard
21 to the company's rights. This was four months after
22 they alleged the mining ban started. This is their

01:21:53 1 public statement of what their dispute was when they
2 were telling the world, "this is our dispute," they
3 said it was stalling the process. They didn't mention
4 a mining ban. They didn't mention anything other than
5 delay, which they repeatedly called "measures" in
6 their Notice of Intent.

7 I think the slides don't indicate our answer
8 to your Question Number 4 with regard to. Well, let
9 me look. Okay.

10 Question Number 2, which unfortunately I
11 don't have a slide with regard to abuse of process we
12 will address in writing. I think there are some
13 complicated issues of corporate law there that we
14 didn't want to speak about extemporaneously.

15 With regard to Question Number 4, it makes
16 reference to the private placement financing and
17 whether--it's actually a question to Claimant about
18 whether there was more evidence in the record, but we
19 went ahead and looked, and we're not aware of any
20 further evidence in the record about the February 2008
21 private financing mentioned by Claimants and referred
22 by Mr. Ali's and Ms. McLeod-Seltzer's Witness

01:23:33 1 Statement. But, of course, Mr. Ali said much more in
2 his presentation than Ms. McLeod-Seltzer actually
3 said, and his statement should not be accepted as
4 facts in the record.

5 There is no information--as far as their
6 reliance on this as some kind of proof that there was
7 no dispute, there is insufficient information in the
8 record for this to be used. There is no information
9 in the record about the nature of the placement, about
10 the details of what it was, of what was disclosed or
11 not disclosed. Mr. Ali said they didn't disclose, but
12 we don't know if they disclosed or they didn't
13 disclose as a part of the offering.

14 We don't know who it was offered to. A
15 private placement could have been offered to current
16 Shareholders who are all Managers and officers of the
17 company, in which case there would be no reason to
18 disclose. They draw--they extract too much from a few
19 statements in a Witness Statements.

20 And it should also be noted, although this is
21 not in the record--they are free to deny it if they
22 would like--Pacific Rim Mining Corp. has continued to

01:24:36 1 conduct private placements after this arbitration was
2 initiated belying the assertion that private
3 placements can't be done if a dispute is known.
4 Obviously the world knows about this dispute, they
5 know it's in arbitration, but they've continued to do
6 private placement, so I would assert that the
7 conclusion they would like you to draw from those few
8 lines in Ms. McLeod-Seltzer's statement do not follow
9 from that statement.

10 Now I would like to move forward to your
11 questions on our objections *ratione temporis*.

12 The question is Section 38 of the Mining Law,
13 we would like the Respondents to address the issue as
14 to why Respondent did not simply reject the
15 applications by Claimant, and that's linked to the
16 submission paid by Claimants. Basically they were
17 being used with a carrot and--I guess a carrot dangled
18 before them is I think what they said.

19 Article 38 of the Mining Law mandates the
20 rejection of the application for the Concession if the
21 Applicant did not cure any defect mentioned in the
22 warning letter within a period of time specified in

01:25:57 1 the warning letter. But this period cannot be
2 extended. We've indicated that.

3 In the current case, you will recall that the
4 Ministry of the Economy was going out of its way to
5 assist the Applicant. Back in 2005, they had been
6 trying to portray El Salvador as somehow being against
7 them. Clearly, back in 2005, the Ministry of the
8 Economy was trying to assist Pacific Rim Mining Corp.
9 in getting its Application right. They were getting
10 the application wrong, and the Government was bending
11 over backwards and including doing things that, in
12 fact, were not permitted strictly by law that the
13 bureaucrats did on their own in order to give them
14 continuing opportunities to correct, okay? And what
15 is it that they needed an opportunity to correct? It
16 was two things. It was their ownership of land, which
17 they've admitted they would rather have new
18 legislation than correct, and it was their
19 pre-Feasibility Study, which they say was a
20 Feasibility Study, but the Government said it wasn't.
21 But by October 2006 the Bureau of Mines decided that
22 it had waited long enough and decided to issue the

01:27:17 1 warning letter invoking the provisions of Article 38
2 of the Mining Law, regardless of whether the document
3 submitted by PRES in November 2006 complied with the
4 requirements. It is undisputed that PRES did not
5 submit the environmental permit because MARN had not
6 issued it.

7 And because of the argument on just cause,
8 the Bureau of Mines, again bending the law in
9 Applicant's favor, granted an additional 30 days to
10 submit the environmental permit because that was what
11 was being requested and pressured by the company. The
12 company, as you heard from Mr. Shrake, very, very
13 vociferously lobbies all of the U.S. Government, but
14 also the El Salvador Government constantly to try to
15 get the Government to act in their favor.

16 So, it's very--so, they issued a second
17 warning letter. Now, it's doubtful that the second
18 warning letter changed the legal consequences that the
19 application for the Concession was effectively
20 terminated when the original 30-day period expired.
21 But taking the most favorable interpretation to the
22 Claimant, even if the second period of 30 days was

01:28:30 1 legally granted, that second period ended without
2 Claimant having provided the necessary documents.
3 Therefore, the application of the Concession was
4 effectively terminated by operation of law in
5 January 2007.

6 As El Salvador admitted and as reflected in
7 the Tribunal's question, though, the Bureau of Mines
8 did not take the formal step of issuing a Resolution
9 declaring the application terminated in sending the
10 application to the file, to archives.

11 However, the nonperformance of that formality
12 does not change the legal effect that under Article 38
13 of the Mining Law the application for the El Dorado
14 Concession was terminated by operation of law.

15 Claimant complains that the fact that the
16 formality of the termination was not completed was
17 prejudicial, but it would not--but it did not
18 challenge it in court.

19 This is incorrect, although this would have
20 been an issue for the merits of the case, if the case
21 had gone to the merits and not relevant for
22 jurisdiction, the information El Salvador has obtained

01:29:38 1 so far from potential witnesses, again who were not
2 necessary for this jurisdictional phase, points that
3 the nonperformance of the--

4 ARBITRATOR TAWIL: That's okay. Please
5 finish.

6 MR. SMITH: The nonperformance of the
7 formality of declaring the application terminated was
8 done with the intention, albeit ineffective, to help
9 Claimant.

10 There's more if you want to ask--

11 ARBITRATOR TAWIL: Mr. Smith, just a
12 question. What do you mean by bending the law? Is
13 that possible?

14 MR. SMITH: Well, bending the law means doing
15 some--what I mean is that they did something that was
16 inconsistent with the law.

17 ARBITRATOR TAWIL: So, what you're saying is
18 that the Ministry of Environment was acting--violating
19 the law when it gave the extension?

20 MR. SMITH: The Ministry of Economy was
21 acting inconsistently with the law, yes.

22 ARBITRATOR TAWIL: Okay.

01:30:38 1 MR. SMITH: But again, the extension was to
2 give--was to benefit Claimant.

3 As the Tribunal will recall, El Salvador
4 stated in its written pleading during the preliminary
5 objection phase that the second warning letter was
6 withdrawn. The second warning letter was withdrawn
7 precisely so that nothing would change officially--or
8 that was the intent at least--because there was
9 legislation that was going to be introduced to create
10 a three-year moratorium on mining, and pending
11 Applications, the way that if I understand it
12 correctly, pending Applications--Applications that
13 were pending when the moratorium started would then be
14 open to consideration when the moratorium ended. If
15 that letter had not been drawn or the intention was
16 that it not--if it--let me try to say this clearly.

17 If they--if the 30-day period--if that letter
18 had not been withdrawn, then they would have been
19 subject--they would not have had the benefit of having
20 a live Application when the moratorium started. That
21 was ineffective in any event, and their Application
22 was terminated by operation of law.

01:31:56 1 In any event, the physical withdrawal of the
2 letter did not have any legal effect because the
3 second warning letter was not revoked. The second
4 warning letter was notified to Claimant, who does not
5 dispute having received it and kept at least one copy,
6 so the lack of revocation means that the letter still
7 stood, as well as its legal consequences.

8 Claimant has also mischaracterized the
9 expiration of the 30-day period as an act of presumed
10 denial by administrative silence, and I just want to
11 draw a distinction briefly between what happens under
12 Article--what happens under Article 38 of the Mining
13 Law and the general provision of Salvadoran
14 administrative law. When an Application is not
15 responded to within 60 days under Salvadoran law, it
16 is presumed denied, and the Applicant has the right to
17 seek redress in the courts. That's the presumed
18 denial that Claimants say we have given too much
19 emphasis to. This is different from Section 38 of the
20 Mining Law, which is a specific statutory provision
21 that requires by its terms the rejection of an
22 Application and the closing of the file, and I just

01:33:30 1 want to make sure that those two legal concepts are
2 distinct.

3 Now, I would like to turn to your next
4 question on *ratione temporis*. And you ask, another
5 aspect of the Mining Law is simply this. As we stand
6 today going back in time to March 2008, has any
7 foreign company been given an exploitation permit for
8 underground mining for, first of all, as regards any
9 foreign company and, separately, as regards any
10 local--this is national--company. If none has been
11 granted, either none to a foreign company or none to a
12 local company or both, what is the reason for that?

13 The truth of the matter is that no foreign or
14 national company received a mining exploitation
15 Concession in El Salvador since Commerce Group was
16 issued its last Concession in August of 2003. The
17 truth of the matter is that since then there have only
18 been two Exploitation Concession Applications. One
19 was by Pacific Rim Mining Corp. of Canada. One was
20 another company whose name I do not know. That other
21 one was filed in 2005 and was rejected by the Ministry
22 of the Economy in 2006.

01:35:16 1 Since 2005, with the exception of the Pacific
2 Rim Mining Corp., there simply have been no Mining
3 Exploitation Concession Applications.

4 PRESIDENT VEEDER: Can you remind me, the
5 Commerce Group permit was revoked. When was it
6 revoked?

7 MR. SMITH: The environmental permit was
8 revoked in 2006, and the revocation of the
9 environmental permit resulted in them being unable to
10 exploit under their Exploitation Concession.

11 Now I'd like to--I'd like to address your
12 questions under the Investment Law. I'd just like to
13 make one general observation about our Objections to
14 Jurisdiction under the Investment Law before we
15 proceed, before addressing the question.

16 El Salvador has set forth six independent
17 reasons why jurisdiction should be denied. If any one
18 of these reasons is accepted by the Tribunal,
19 jurisdiction must be denied. Only the last of these
20 objections relates to the fact that El Salvador has
21 not given its consent to jurisdiction under Article 15
22 of the Investment Law, and we ask the Tribunal to

01:36:48 1 carefully consider each of these six grounds for
2 denial of jurisdiction.

3 Now turning to your question.

4 The first question on the Investment Law is,
5 again, as we understand the Claimant's case, and we
6 would like confirmation, the measure on which all
7 their claims are based, including claims under the
8 Investment Law, are described by Mr. Ali at Day 1,
9 Page 137, from March 2008 and not before
10 December 2007. We reserve our response to this in
11 writing. It's not actually clearly directed at us,
12 but we reserve the right to address it in writing.

13 And the next question which is more directed
14 at us, the Respondent has made several submissions
15 about the indivisibility of these proceedings being
16 upon certain--based upon certain paragraphs in our
17 decision, principally at Page 86, and we understand
18 the point they're making, but we want to make sure
19 that it's not being advanced as an argument based upon
20 res judicata, issue estoppel, or collateral estoppel,
21 or anything else which prevents the Tribunal from
22 looking at the merits of the point. It is our

01:38:08 1 understanding that's not been raised by the Parties.
2 We want to make absolutely clear that it is not an
3 issue that we're being asked to consider, at least not
4 by Respondent.

5 As El Salvador confirms that it is not
6 advancing an argument based on res judicata, issue
7 estoppel, collateral estoppel, or any other doctrine
8 related to those. However, we do maintain that
9 judicial consistency would dictate that the Tribunal
10 should not make contradictory findings on the same
11 issue in the same case. Therefore, if the Tribunal
12 dismisses the CAFTA proceeding, it must also dismiss
13 the Investment Law proceeding, and I know that you
14 indicated in your question that you understood our
15 point, but I will make it just one more time.

16 In the alternative, if the Investment Law
17 proceedings were to survive alone, then it is our
18 position, and I believe it is the correct
19 interpretation of CAFTA that it would be the
20 continuation of a proceeding with respect to a measure
21 alleged to constitute a breach of Article 10.16 before
22 another dispute-settlement procedure; namely,

01:39:17 1 international arbitration. It would be the
2 continuation of a proceeding, and it would no longer
3 be the continuation of a CAFTA proceeding.

4 Now I come to--do you have a question?

5 PRESIDENT VEEDER: Maybe later.

6 MR. SMITH: Okay. Miscellaneous question:

7 Now, we would like, if any point is being made about
8 witnesses who should have been made available before
9 this Tribunal and have not been made, if we are being
10 asked to draw adverse inference, we would like to know
11 exactly what the submission would be and what the
12 effect of that submission would be on this
13 jurisdiction stage of the proceedings.

14 Of course, El Salvador does not agree with
15 Mr. Ali's insinuation that El Salvador failed to
16 present any necessary witnesses. El Salvador has been
17 able to fully prove its case without any additional
18 witnesses. The factual question of when the dispute
19 arose is abundantly proven by Claimant's own notice of
20 intent and other abundant evidence in the record.
21 There was no need to put on fact witnesses to meet the
22 burden of proof which has been more than met.

01:40:53 1 And the Tribunal will no doubt recall that by
2 letter of April 27, 2011, El Salvador noted that the
3 Claimant had until very recently, at by El Salvador's
4 insistence, had admitted that it had met with certain
5 Government officials--and had not until recently
6 admitted--and El Salvador noted if Claimant had
7 disclosed the information about these meetings
8 earlier, El Salvador would have been able to interview
9 the officials mentioned, that Mr. Ali now takes this
10 position on unavailable witnesses is surprising.

11 With regard to inferences about the
12 unavailability of witnesses, we would note the
13 statement that I have already made with regard to
14 Mr. Parada's Witness Statement and inferences to be
15 drawn from the lack of denial of those statements.

16 That is the conclusion of my part of our
17 final observations affirmatively. I will give the
18 podium to Mr. Badini to address our objections with
19 regard to denial of benefits, and I think we will have
20 ample time for our response later on this afternoon.

21 PRESIDENT VEEDER: Well, thank you very much
22 for making good progress.

01:42:32 1 We would just like five minutes' break now
2 which we'll take before the next speaker.

3 MR. SMITH: Thank you, Mr. President.

4 PRESIDENT VEEDER: So, we'll just pause.

5 (Brief recess.)

6 PRESIDENT VEEDER: Let's resume.

7 MR. BADINI: Good afternoon, Mr. President,
8 Members of the Tribunal. Again, my name is Aldo
9 Badini, and as Mr. Smith indicated, I will try to
10 summarize these proceedings with respect to denial of
11 benefits. At least as seen from the Respondent's
12 perspective.

13 I tried in the small hours of the morning to
14 heed the Tribunal's suggestion to focus on two things:
15 The testimony that we have seen the last couple of
16 days and the arguments that we have seen in the last
17 couple of days, rather than trying to merely rehash
18 our previous argument, and I will try to do that.

19 The Tribunal also asked a series of questions
20 relating to denial of benefits. I will try to at
21 least to give our preliminary thoughts on those. I
22 have not structured my argument as elegantly as

01:54:46 1 Mr. Smith has done around the questions, but I will
2 try to work them in and alert you when I am addressing
3 one of the questions.

4 I would like to start, however, with a
5 preliminary comment. I recalled last night Mr. Ali's
6 beginning these proceedings with a cricket analogy,
7 which I readily admit is a sport that I either watch
8 nor understand, and perhaps the two are related. If I
9 watched it, perhaps I would understand it. But given
10 Claimant's relatively recent putative connections to
11 the United States of America, I thought it would be
12 more fitting to recall the immortal--to recall another
13 sport and the immortal words of an individual whose
14 name does not really roll off the tongue, he may be
15 unknown to most, at least by name, his name is Ernest
16 Lawrence Thayer, and I wanted to read as a preface the
17 last few lines of a poem he wrote about that most
18 American of all American sports:

19 "Oh, somewhere in this favored land the sun
20 is shining bright, the band is playing somewhere, and
21 somewhere hearts are light, and somewhere men are
22 laughing, and little children shout, but there is no

01:56:07 1 joy in Mudville: Mighty Casey has struck out."

2 We began these two days with respect to the
3 denial of benefits on three issues: One, whether
4 Claimant has substantial business activities in the
5 United States; two, whether Claimant is owned or
6 controlled by persons of a non-Party; and, three,
7 whether our notice of denial of benefits was
8 appropriate.

9 The Government of El Salvador submits to this
10 Tribunal that our mighty Casey has indeed struck out
11 at least with respect to the first two issues, and I
12 say that because Mr. Shrake yesterday, under oath,
13 effectively conceded points one and two in
14 Respondent's favor, and I will briefly summarize the
15 evidence where he has done that.

16 As to Point 3, we submit that that's
17 basically a legal issue. I don't believe the facts
18 are disputed as to the timing of the notice, and we
19 will give you some outline today as to why we think
20 the notice was appropriate, and we will further
21 expound on that issue in our written submissions.

22 So, without further ado, let's turn to the

01:57:27 1 first issue, whether Claimant has substantial business
2 activities in the United States, and let's go directly
3 to what Mr. Shrake said yesterday.

4 He admitted, first of all, that Claimant
5 performs no business activities in the United States
6 or otherwise. It only holds shares.

7 "QUESTION: How many employees did Pac
8 Rim Cayman have while it was registered in
9 the Cayman Islands?

10 "ANSWER: It's a holding company. It
11 doesn't have employees.

12 "QUESTION: Did it lease any office
13 space?

14 He asked incredulously for no employees.
15 No, it didn't lease any office space.

16 "QUESTION: Did it own anything other
17 than the Shares for being held at the holding
18 company, its purpose is to hold. It did
19 nothing. It held those shares. That's what
20 a holding company does.

21 And he continued:

22 "QUESTION: Did it have a bank account?

01:58:23 1 "ANSWER: No, it did not have a bank.

2 "QUESTION: So, pretty much it existed
3 just on paper?

4 "ANSWER: Well, no, it's a holding
5 company. The purpose of the company is to
6 hold assets."

7 And then Mr. Smith asked him,

8 "QUESTION: But what physical existence,
9 what existence did it have other than on the
10 documents that exist perhaps in your office
11 and registered with the corporate registry in
12 the Cayman Islands?

13 "ANSWER: None."

14 He also admitted something that the Claimants
15 have tried to obfuscate from the beginning, but I
16 think we finally got complete clarity yesterday that
17 Claimant performs absolutely no exploration
18 activities. He said Pac Rim is a holding company. It
19 apparently has no board of directors, but again, this
20 is a company designed solely to hold assets. There is
21 no exploration activities directly through that
22 holding company. This is, as the name suggests,

01:59:23 1 strictly a company to hold assets.

2 And we looked at some of this evidence
3 yesterday. There were third-party vendors who
4 actually do the work, who look at the soil, who look
5 at mine, who plan the project. None of those
6 companies--none of them--contracted or directed by the
7 Claimant, and all of the finance, marketing, and
8 administrative functions was performed in Canada.

9 We've also seen numerous references in
10 Claimant's submissions to intellectual property and
11 how valuable the intellectual property was that they
12 sent to El Salvador. That was not the Claimant's
13 intellectual property.

14 Mr. Shrake was asked, and in fact I think
15 this question was from Mr. de Gramont:

16 "QUESTION: What was the role of Pacific
17 Rim Exploration?"

18 That's not the Claimant.

19 "QUESTION: What was the role of the
20 Pacific Rim Exploration?"

21 "ANSWER: We are the mine binders, we
22 are the wealth creators. We are the

02:00:32 1 intellectual property of the company.

2 "QUESTION: And how did that contribute
3 to El Salvador?

4 "ANSWER: It contributed everything to
5 El Salvador."

6 Now, with respect to investments, I won't go
7 through this in detail. I just put up the slide as a
8 reference. We have demonstrated that the investments
9 in El Salvador were not from the Claimant, and they
10 were not from the United States. Where is the
11 evidence to the contrary?

12 Next slide, please.

13 The only evidence that is put up on this
14 issue is a fragmentary document which we put up
15 before--we don't need to show it again--it's that
16 fragmentary page from a balance sheet. It's undated.
17 There is no indication it was ever audited, and it's
18 unconsolidated. Now, I heard Mr. de Gramont the other
19 day say, "These were part of the company's audited
20 consolidated Financial Statements." With all due
21 respect to counsel, first of all, it contradicts the
22 face of the document, which says "unconsolidated."

02:01:42 1 Second, Mr. Krause--Mr. Krause--as well as
2 the CEO, Mr. Shrake, had every opportunity to say that
3 these were audited, that these were consolidated.
4 They had every opportunity to say who created them,
5 when they were created, and to put in the entire
6 document. They did none of that.

7 And even if the document is what it purports
8 to be, as I spoke about the other day, a balance
9 sheet, of course, as any accountant will tell you, it
10 does not demonstrate the source of the investments,
11 and the fact that they are carrying that on the
12 Claimant's books today doesn't prove anything about
13 where those investments came from.

14 But we know where they came from. And we
15 know where they came from because Mr. Shrake told us
16 where they came from. Yesterday, we looked at Annex H
17 to Mr. Parada's Witness Statement, which was the
18 July 3, 2008, Press Release of the Canadian parent,
19 and I asked Mr. Shrake about that Press Release which
20 purported to quote him, and I asked:

21 "QUESTION: So, when you said, 'the
22 company cannot continue to invest millions of

02:03:02 1 dollars annually in advancing its El Salvador
2 gold projects,' the company you were talking
3 about was the Canadian company; correct?"

4 "ANSWER: Yes."

5 And again, if you look to the next--yes, this
6 is the slide--I asked him further about that Press
7 Release.

8 And the language that's attributed to you is,
9 "Pacific Rim and its predecessors have invested
10 approximately 77 million on gold exploration and
11 development in El Salvador with exceptional results,
12 says Tom Shrake, President and CEO. Have I read that
13 correctly?

14 "ANSWER: Yes.

15 "QUESTION: And again, Pac Rim in that
16 sentence is the parent company, the Canadian
17 parent; correct?

18 "ANSWER: Yes. This is a news release
19 for the parent company."

20 So, the evidence is undisputed that the
21 investments came from Canada and they came from the
22 parent company and that Claimant doesn't do anything

02:04:05 1 but hold shares.

2 Now, how does the Claimant attempt to deal
3 with all of this overwhelming evidence? There is only
4 one way they can try to deal with it, and that's with
5 a shell game. They say don't look at the Claimant and
6 the fact that Claimant does nothing and does not make
7 the investments. You should look at all of these
8 other companies. You should look at the Pac Rim
9 family of companies.

10 And if there is any one piece of paper in
11 this case that demonstrates just how much of a shell
12 game this is, it was a piece of paper that was used by
13 Mr. de Gramont on his opening the first day, and I
14 would like to put that up on the screen.

15 This vertigo-inducing document with arrows
16 pointing in all directions was Mr. de Gramont's
17 attempt, Claimant's attempt to distract the Tribunal
18 from what is happening in this case. And if I may
19 approach the board, their allegation is--and I've
20 heard this in various forms in the form of
21 Mr. Shrake's testimony, in the form of the statements
22 in their Memorial--their allegation is, look, we do

02:05:27 1 all this mining in Nevada with these companies, Dayton
2 Mining, Nevada. Those companies make lots of money,
3 and all of that money goes up here to the parent, and
4 then the parent, through various avenues, and these
5 arrows go all sorts of ways--I'm not going to draw the
6 arrow because I'm not sure how they draw it--but
7 through various avenues, they say, it gets from the
8 parent down here to El Salvador.

9 And they also say there is intellectual
10 property over here. They're geologists over here--I
11 can't draw--when I say IP for intellectual property,
12 and geologists at Pac Rim Exploration.

13 Let's assume that all of that is true. Let's
14 assume they make all of this money in Nevada from the
15 Dayton Companies. All of the money goes up to the
16 Canadian parent, and that money then that the Canadian
17 parent makes from its Nevada mining operation system
18 reinvested in El Salvador. They would have this
19 Tribunal hold that because of that, Pac Rim Cayman,
20 whether Cayman Islands or Nevada, doesn't matter to
21 this analysis, either pre- or post-12/07, they would
22 have this Tribunal believe that Pac Rim Cayman has

02:07:06 1 substantial business activities in the jurisdiction of
2 all of these other Enterprises.

3 The absurdity of that is demonstrated if we
4 simply change the name here. They're creating
5 confusion by the fact that these other companies are
6 in the United States. But they just as easily could
7 be, say, in India; right? What if these mines were in
8 India? And what if the exploration company were in
9 India? If you accept Claimant's theory, the fact this
10 mine in India sent money to the Canadian parent and
11 the fact that the exploration company was also in
12 India, all of those facts should be leading you to the
13 conclusion that the Pac Rim Company, which is a mere
14 holding company, holding El Salvador companies, this
15 now has substantial business activities in India.
16 It's absurd, and the cases don't say that.

17 The first authority that I would direct the
18 Tribunal to is again one that Mr. Chairman is familiar
19 with. It's the Plama versus Bulgaria ECT arbitration,
20 where a very similar argument was made. A very
21 similar argument was made. The argument was don't
22 just look at the Claimant. Look at the other

02:08:31 1 companies in the family to determine whether the
2 Claimant has substantial business activities. The
3 Tribunal noted that the Claimant had no substantial
4 business activities in Cyprus, and it said, and this
5 is the key language, "Contrary to the Claimant's
6 pleading, this shortfall cannot be made good with
7 business activities undertaken by an associated but
8 different legal entity"--there it was Plama Holding
9 Limited--"even where PHL owns or controls the
10 Claimant."

11 And what I have put up here, if we could go
12 to the next slide, is a graphic illustration of the
13 holdings in the Plama case. The Claimant was a
14 company that was owned or controlled by the parent,
15 and the Tribunal assumed without finding, is my
16 understanding, that the parent had substantial
17 business activities in Cyprus. Plama held, "That's
18 not good enough. The test is does the Claimant have
19 substantial business activities."

20 Now, let's compare this to the facts of our
21 case.

22 Next slide, please.

02:09:53 1 These are the facts of our case. And there
2 are really two time periods at issue. One is the
3 organizational structure before nationalization in the
4 U.S. Here is Pacific Rim Exploration. This is the
5 company that Mr. Shrake says has given everything to
6 El Salvador. It's got the IP. It has everything.
7 Pacific Rim Mining Canada has given the rest, which is
8 the dollars, the Canadian dollars, I assume. And here
9 is the Claimant. What has it given? Where are its
10 substantial business activities?

11 Post 12/07, now the Claimant holds the
12 exploration company, but the results should be the
13 same as in Plama. The Claimant here cannot take
14 credit for the business activities of another
15 corporate entity.

16 Indeed, in Plama, it said even if the
17 Claimant--even if the corporate entity was holding the
18 Claimant and that corporate entity had those business
19 activities, that would not satisfy the test. So,
20 Claimant under the existing jurisprudential decisions
21 cannot take credit for the business activities of
22 other companies, nor can it take such credit under a

02:11:19 1 plain reading of the treaty language.

2 Now, let me turn to the issue of whether
3 Claimant is owned or controlled by persons of a
4 non-Party. I don't believe there is much dispute
5 about the direct ownership by the Canadian corporation
6 at all times. I've put up their admission to that in
7 the Counter-Memorial. As I said the other day, that
8 should end the inquiry. Unfortunately, Claimant has
9 set forth a theory that is not supported by the
10 language of the Treaty, and this relates to one of the
11 questions the Tribunal asked; namely, whether the
12 practice of one or more agencies in defining
13 "national" should have any bearing on this case.

14 And it's the Government of El Salvador's
15 position that to define "national" other than
16 expressly set forth in the Treaty would be
17 inappropriate. I have put up on the screen the CAFTA
18 definition of "persons of a Party" as a "national or
19 enterprise of a Party." Chapter Ten of CAFTA defines
20 "national" by reference to Annex 2.1.

21 And the Claimant--that's a quote from the
22 Claimant and not a quote from us--says the Claimant

02:12:46 1 states that for the--sorry, Annex 2.1 states that for
2 the United States, a natural person who has the
3 "nationality of a Party" means "national of the United
4 States" as defined in the existing provisions of the
5 Immigration and Nationality Act.

6 What does the Immigration and Nationality Act
7 says? It says: "a national of the United States" is
8 a citizen of the United States or a person who, though
9 not a citizen, owes permanent allegiance to the United
10 States.

11 Claimant makes an admission that the manner
12 in which U.S. law, particularly the Immigration and
13 Nationality Act defines "nationality" is
14 determinative. So, it would be inappropriate to use
15 rules of thumb.

16 But if I may step back, why are we even
17 talking about this issue? The reason we are even
18 talking about this issue is because Claimant says the
19 ownership or control of the Claimant by the Canadian
20 parent should be disregarded. We don't believe that's
21 appropriate. We don't believe the Tribunal should
22 even get to this issue. But we submit that if the

02:14:03 1 Tribunal does go to the issue of the ownership or
2 control of the parent, you must apply the Treaty
3 definition of "national," and not consider U.S.
4 stockholders who are merely residents in the United
5 States.

6 Now, let me briefly talk about control, and
7 let me show you what Mr. Shrake said about control.
8 Mr. Shrake admitted that he makes all of the decisions
9 relating to mergers and acquisitions, investments, and
10 corporate ownership. Now, again, these were a series
11 of questions I wish I had asked because the answers
12 are very revealing, but, in fact, Mr. de Gramont asked
13 these questions.

14 "QUESTION: Now, you testified that Pac
15 Rim Cayman made a number of acquisitions and
16 dispositions over the years. Do you recall
17 that?

18 "ANSWER: Yes.

19 "QUESTION: So, for example, in 2001,
20 Pac Rim Cayman decided to sell its Argentine
21 assets. Do you recall that?

22 "ANSWER: Yes.

02:15:21 1 "QUESTION: And whose decision was that?

2 "ANSWER: Mine.

3 "QUESTION: And then it took the
4 proceeds from the Argentine sales and
5 reinvested them in El Salvador. Who decided
6 that?

7 "ANSWER: I did.

8 "QUESTION: And then in 2004, Pac Rim
9 Cayman became the 100 percent owner of
10 Pacific Rim El Salvador. Who decided that?

11 "ANSWER: I did.

12 "QUESTION: And then in 2005, Pac Rim
13 Cayman became the 100 percent owner of the
14 other Salvadoran subsidiary DOREX. Do you
15 recall that?

16 "ANSWER: Yes.

17 "QUESTION: Who made that decision?

18 "ANSWER: I did."

19 And then the most fundamental corporate
20 decision, as I said the other day, a corporation can
21 make, to change its state of incorporation. This
22 question was asked:

02:16:07 1 "QUESTION: And then in 2007, Pac Rim
2 was domesticated from the Cayman Islands to
3 Nevada. Who made that decision?

4 "ANSWER: I did."

5 Now, I asked myself last night why would
6 Mr. de Gramont ask these questions to elicit these
7 answers? And I came up with two hypotheses. One
8 hypothesis is that Claimant seeks to argue that
9 because Mr. Shrake in addition to being President of
10 the Canadian company, which he is, he is also
11 President, Treasurer, and Secretary of Pacific Rim
12 Exploration, the exploration company, which he said
13 has given everything to El Salvador.

14 And perhaps the argument is that because he's
15 President of that company as well, the exploration
16 company, and that's a United States company, the
17 activities of that company is something that the
18 Claimant can take credit for, and they can argue that
19 that company was controlling the Claimant.

20 The problem with that argument, first of
21 all--there are a couple of problems with it--is it is
22 completely inconsistent with the Plama Decision and

02:17:30 1 the decision of other tribunals with respect to not
2 being able to take credit for the activities of other
3 entities.

4 But there's a second possibility I thought
5 of. Aside from the taking credit for the business
6 activities, perhaps he's saying that in his role as
7 President of this U.S. company, that U.S. company is
8 controlling the Claimant and, therefore, there must be
9 control by a Party. Well, the problem is the Claimant
10 has it precisely backwards. Let me show you the
11 organizational charts again.

12 This is the organizational chart in 1997.
13 Here's the Claimant. Here's the exploration
14 company--I'm sorry it's a little grayed out, but this
15 is from their exhibit, I think it's C-21.

16 If the claim is that Pacific Rim Exploration
17 controls Pac Rim Cayman, this chart demonstrates the
18 fallacy of that argument. They're both controlled by
19 the Canadian company. Well, maybe things changed
20 after 1997. Let's look after 1997. Let's look to
21 C-55 immediately prior to the December 2007
22 restructuring. Here's the Claimant, Pac Rim Cayman;

02:19:05 1 here's Pacific Rim Exploration. Again, is Pacific Rim
2 Exploration and Mr. Shrake wearing his hat as
3 President of Pacific Rim Exploration, is he
4 controlling the Claimant? No, they're at the same
5 level. They're being controlled by the parent
6 company.

7 And, finally, let's look at the ultimate
8 structure that resulted from all of these corporate
9 manipulations. We've got up there R-126 which we
10 marked yesterday, and what's interesting here is that
11 here is the Claimant, and below it--below it--is the
12 exploration company, so the Claimant cannot possibly
13 be that the subsidiary here is controlling the
14 Claimant.

15 So, that leads me to the question that I
16 asked myself. Mr. Shrake obviously was telling the
17 truth when he was saying that he made all these
18 decisions himself. Was he making those decisions
19 wearing his hat as President of Pacific Rim
20 Exploration, or was he making those decisions as
21 President of the parent Canadian company? We don't
22 have to speculate. He told us what hat he was

02:20:38 1 wearing. Let's look at his testimony.

2 As I said, he's the President and Chief
3 Executive Officer not just at the exploration company,
4 but of the Canadian parent. It was in that role,
5 wearing that hat, that he directed all of those
6 subsidiary companies. I asked him this question:

7 "QUESTION: Are you able to point to any
8 documentation you're aware of that suggests
9 that Pac Rim Cayman ever had a Board of
10 Directors?

11 "ANSWER: Pac Rim Cayman, again, is a
12 holding company. The Board of Directors of
13 Pacific Rim Mining Corp. is--and myself as
14 the chief executive--direct Pac Rim Cayman as
15 a holding company."

16 He expressly admitted all of those things
17 that Mr. de Gramont asked him about, all of those
18 corporate decisions. He was doing those as the Chief
19 Executive of the Canadian parent. And I--just to
20 clarify it, I said:

21 "QUESTION: You say the Board of
22 Directors of Pacific Rim Mining Corp. direct

02:21:52 1 Pac Rim Cayman. You're talking about the
2 Board of Directors of the Canadian companies;
3 correct?

4 "ANSWER: Yes."

5 And as if there were any remaining doubt, you
6 will remember that Mr. Shrake wanted to go up to the
7 chart to make his own circle around the family of
8 companies, and I, of course, invited that. When a
9 witness asks me if they can draw on my chart, I always
10 say yes.

11 And he said in response to that drawing,
12 Pacific Rim Mining Corp. owns all of the companies,
13 all of the holding company, all of the operating
14 companies, all of the local subsidiary companies, and
15 Pacific Rim Mining Corp. is owned a majority by U.S.
16 Shareholders.

17 After then he made that circle, I asked him.

18 "QUESTION: And does the Pacific Rim
19 Mining Corp. also control all of these
20 companies you just circled?

21 "ANSWER: Yes."

22 And you can see for yourselves, the companies

02:22:55 1 he circled includes the Claimant. That should be the
2 end of the control issue.

3 Finally, let me turn to the issue of notice
4 and whether El Salvador provided timely and
5 appropriate notice relating to denial of benefits.
6 I've put up on the screen Meg Kinnear's treatise, an
7 excerpt from the treatise, rather, which I will not
8 read, but the point of it is that it really makes no
9 sense to require that notice before a claim is
10 submitted to arbitration for all sorts of prudential
11 reasons. We have seen how quickly these shell games
12 can happen. We have seen how corporation ownership or
13 control can be changed. It is unworkable to expect a
14 Party to keep up with that and to know when they have
15 to provide notice of denial of benefits prior to the
16 time that Jurisdictional Objections in an arbitration
17 are due.

18 Now, El Salvador had no reason to invoke
19 denial of benefits certainly before it knew of
20 Claimant's U.S. nationalization. In fact, Claimant
21 concedes this in its papers, and that notice was not
22 until June 2008. Even at that time, that notice was

02:24:29 1 not a formal notice that was sent in a letter to
2 high-ranking El Salvadoran officials. It wasn't even
3 volunteered by the Claimant. It was in response to a
4 question from the entity responsible for registering
5 investments in El Salvador.

6 And after a number of months, they responded
7 and said, yes, there has been a change of nationality.

8 But even if the knowledge that this agency
9 knew about the change of nationality, even if that's
10 imputed to all of the El Salvadoran Government, that
11 would not put us on notice that this is the entity
12 that is going to commence an arbitration or that this
13 is the entity that's going to claim, contrary to fact,
14 as you've seen, that they made all of these
15 investments in El Salvador and, therefore, are a
16 covered investor subject to the protections of CAFTA?
17 We would have no way of knowing that.

18 And this is a response, I believe, to one of
19 the questions, which was: Was El Salvador in a
20 position to invoke the denial of benefits when the
21 Notice of Intent was filed? The answer, we submit, is
22 no. The Notice of Intent raised more questions than

02:25:50 1 it answers. Claimant, for one, alleged that it was an
2 American investor and that it had made the investment
3 in El Salvador. That would require an investigation
4 into whether Claimant had--I'm sorry, in order to
5 invoke the denial of benefits at that time, that would
6 require an investigation into whether Claimant had
7 substantial business activities and whether they were
8 owned or controlled by a person of a non-Party. That
9 investigation was completed, in part, by the time we
10 gave notice to the U.S. Trade Representative on
11 March--on or about March 1, 2010, but the
12 investigation continued.

13 As this Tribunal knows, we were obliged to
14 invoke the Tribunal's assistance to obtain additional
15 discovery to have further demonstration of our basis
16 for denial of benefits.

17 PRESIDENT VEEDER: At some stage, and I think
18 this is more for your Post-Hearing Submissions rather
19 than now, it will be very helpful to go through your
20 letter to the United States of America and indicate
21 what further information you needed that is not in
22 that letter which makes up for your present case as

02:27:19 1 regards denial of benefits because that's quite a
2 long, detailed letter, and that, I think, was prepared
3 without the benefit of this Tribunal.

4 MR. BADINI: That's correct.

5 And that actually--we will do that,
6 Mr. President, and that actually leads me into an
7 answer to one of your other questions, if you could
8 put up the next slide. One of your questions was why
9 the delay between that letter and when the denial of
10 benefits was invoked in this arbitration; and, with
11 respect, we would submit that the question is really
12 put the other way: Why did we provide notice five or
13 so months earlier than we think we were required to?

14 It is our position, as we put up on the
15 screen, that the denial-of-benefits invocation really
16 has to take place by the time Jurisdictional
17 Objections are made in an arbitration, which is
18 normally at the time of the Counter-Memorial on the
19 merits. If it is not made by that time, we think it
20 is waived. And as you asked in yet another question,
21 can you wait until after an award has been made? No,
22 we don't think you can wait until after an award has

02:28:43 1 been made.

2 So, why did we--if that is our position, and
3 I think it's a very reasonable position given what is
4 involved in the process, why did we provide notice to
5 the United States Trade Representative five months
6 earlier? And the answer is because this really is the
7 first denial of benefits that we're aware of under
8 CAFTA or NAFTA. And because we take seriously the
9 opportunity of the United States Government or any
10 other affected Party to engage in State-to-State
11 consultation. We wanted to give them the opportunity
12 to say to us, "El Salvador, you are wrong. El
13 Salvador, you misunderstood something here. El
14 Salvador, you don't have your facts straight."

15 And despite that opportunity, we have not
16 heard anything. El Salvador has not. Of course, they
17 may, but that is why we gave notice at a time earlier
18 than the time we thought was required.

19 Now, the reason we think it is appropriate to
20 wait--or I should not say wait. The reason it is
21 inappropriate to require notice and invocation before
22 the arbitration is that a lot of things have to

02:30:07 1 happen. You have to make this factual investigation.
2 You have to hire counsel. Many of the Parties
3 involved in these types of disputes do not hire
4 counsel until after the Notice of Intent has already
5 been filed, and we were hired shortly before the
6 Notice of Arbitration in March of 2009.

7 Now--and if you could go to the next slide,
8 this interpretation that we're urging is not an
9 unusual interpretation. The EMELEC Decision, like
10 involved the U.S.-Ecuador BIT and like CAFTA here, the
11 issue there did not--the BIT there at issue did not
12 require that investors receive advance notice, and the
13 Tribunal held that the Objections to Jurisdiction
14 phase was the proper phase of the proceedings.

15 Now, it's significant, Members of the
16 Tribunal, that in all of the reams of paper that we
17 have seen relating to the timeliness of denial of
18 benefits, there has been no coherent argument advanced
19 as to how Claimant has been prejudiced, how had--if
20 benefits had been denied earlier, they would not have
21 been injured in some way. The only thing close to an
22 argument of prejudice is this argument that's not

02:31:59 1 supported by the text of the Treaty, which goes
2 something as follows if I understand it correctly:
3 Well, by waiting so long, you've interfered with the
4 State-to-State consultation process because the United
5 States may be afraid to engage in that process
6 because, if it does, El Salvador will accuse it of
7 having improperly provided diplomatic protection under
8 the ICSID Convention.

9 Well, first, there is no authority that we
10 are aware of that says that engaging in those
11 State-to-State consultations would constitute
12 diplomatic protection.

13 But lest there be any debt--lest there be any
14 doubt--we have consulted with the Government of El
15 Salvador, and I'm authorized here today to say the
16 following: El Salvador does not interpret the
17 initiation of consultations under the
18 denial-of-benefits provision in CAFTA as in any way
19 constituting diplomatic protection for purposes of
20 Article 27 of the ICSID Convention. Therefore, if the
21 United States of America wishes to initiate such
22 consultations with El Salvador with respect to the

02:33:25 1 invocation of the denial of benefits, El Salvador
2 would not have any objection to those consultations on
3 the basis that they would amount to diplomatic
4 protection for purposes of Article 27 of the ICSID
5 Convention, and El Salvador expressly waives any right
6 it might have to object to those consultations on that
7 ground.

8 Now, finally, the Tribunal is asked whether
9 it would be useful if the United States were to
10 comment on this issue. We believe it would be useful.
11 The Tribunal can, of course, decide, and will decide
12 in its discretion, how to formulate that request, but
13 we do again remind the Tribunal that this is the first
14 time that the denial-of-benefits provision is invoked
15 under NAFTA or CAFTA.

16 And finally, I would just put up on the
17 slide--put up on the screen, rather, the Meg Kinnear
18 treatise again, and a quote she has in there about the
19 fact that Parties have an opportunity to come in and
20 complain if they believe that the denial of benefits
21 is inappropriate.

22 And with that, I will close and thank the

02:34:53 1 Tribunal for its time.

2 PRESIDENT VEEDER: Thank you very much.

3 MR. BADINI: I believe we may have 10 minutes
4 or so to reserve. Thank you.

5 PRESIDENT VEEDER: Our Secretary tells us
6 that you have 20 minutes left.

7 MR. BADINI: (Off microphone) Excellent. I
8 was being conservative.

9 PRESIDENT VEEDER: We were now going to have
10 our midafternoon break. We had a slightly longer
11 break than we should have had earlier in the
12 afternoon. How long do you need now? If you want 30
13 minutes, of course you can have it.

14 MR. ALI: If we could perhaps start at 3:00?

15 PRESIDENT VEEDER: Let's adjourn until 3:00.

16 MR. ALI: Thank you. And, Mr. Chairman, will
17 the Tribunal address the--

18 PRESIDENT VEEDER: Yes.

19 MR. ALI: Thank you.

20 (Recess.)

21 PRESIDENT VEEDER: Let's resume.

22 The Tribunal first addresses the application

03:02:01 1 made by the Claimants in respect of the new
2 documentation. What the Tribunal is going to do is
3 not to make any formal decision whether to admit or
4 reject this document, and by "document," we understand
5 it relates to the eight pages to be proffered by the
6 Claimant.

7 What we are going to do is to invite the
8 Claimant to give us the relevant document, and we
9 receive it de bene esse.

10 We don't at the moment understand its
11 relevance either to the Claimant's case or to the
12 Respondent's case, and so in the oral submissions to
13 come this afternoon, we are going to invite the
14 Claimant to explain its relevance to the submissions
15 with the document before us, and only then shall we
16 make a decision whether to admit or reject the
17 document after hearing further the Respondents.

18 So, that's the basis of the Decision, it's de
19 bene esse only, and the Respondent's objection is
20 fully preserved.

21 MR. ALI: Thank you, Mr. Chairman.

22 Should we hand out copies of the document

03:03:08 1 now?

2 PRESIDENT VEEDER: Yes, please.

3 MR. ALI: Ms. Ferrante is going to go get the
4 copies, Mr. Chairman. Just bring them down. They
5 were left upstairs accidentally.

6 PRESIDENT VEEDER: Do you want to wait for
7 that document or can you proceed with your other
8 submissions now?

9 MR. ALI: She will be back shortly, so we can
10 proceed.

11 PRESIDENT VEEDER: Please proceed.

12 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

13 MR. ALI: Mr. Chairman, good afternoon,
14 Members of the Tribunal, thank you for this
15 opportunity.

16 As so often happens with closing remarks on
17 the heels of a tight hearing, our presentation will be
18 more like a--less like a Mozart-like symphony and more
19 akin to a Freddie Mercury/Queen-type Bohemian
20 Rhapsody.

21 We, too, have tried to strictly adhere to the
22 Chairman's exhortation that we not regurgitate what

03:04:13 1 we've already stated in our written pleadings and in
2 our opening remarks on Monday. And by organizing
3 ourselves on the basis of the less is more principle,
4 we sincerely hope that we're not going to leave the
5 Tribunal wanting in terms of the issues that need to
6 be clarified. In any event, we certainly intend to
7 elaborate on all of the issues that we'll be
8 discussing with you in this closing on the questions
9 that you have raised, as well as any other issues that
10 we identify that are important after we've had an
11 opportunity to examine the record with less tired and
12 quieter minds.

13 We also make the same reservations that
14 Respondent did with respect to supplementing our
15 responses when we present our written submissions.

16 I can seldom recall an arbitration in which I
17 have featured so prominently or by name mentioned as
18 frequently. It almost reminds me of Ali/Foreman one
19 in Kinshasa, and we all recall what Ali did to Foreman
20 in Round 8 of this fight, and I think we are now in
21 Round 8. But given that I'm only a middleweight and
22 not a heavyweight, I'm going to be assisted by my two

03:05:37 1 law partners, who will be assisting with this closing
2 presentation.

3 We are going to start off with Mr. Posner who
4 will address what we learned from Mr. Parada's
5 testimony on cross-examination yesterday.
6 Mr. de Gramont will then address a few factual issues
7 that perhaps warrant clarification, and the process
8 will address the factual issues that you raised
9 yesterday in your questions. And then we intend to
10 address your various questions very much in the order
11 in which you presented them to us yesterday afternoon.

12 So, with that, Mr. President, I will turn the
13 floor over to Mr. Posner.

14 MR. POSNER: Good afternoon, Mr. President
15 and Members of the Tribunal. It's an honor to appear
16 before you once again.

17 As Mr. Ali has said I'm going to make some
18 observations about the testimony of Mr. Parada and
19 their relevance to the case.

20 Now, at the heart of that testimony, of
21 Mr. Parada's testimony, is a very serious accusation
22 directed at two of my law partners, Mr. Ali and

03:07:00 1 Mr. de Gramont, two seasoned attorneys, the Chair and
2 Vice Chair, respectively, of Crowell & Moring's
3 international arbitration practice and highly regarded
4 members of the Arbitration Bar. The accusation is
5 that in the course of a screening interview for a
6 lateral associate position, Mr. Ali and Mr. de Gramont
7 revealed to Mr. Parada confidential information
8 regarding a client's intention to initiate arbitration
9 against the Government of El Salvador. Now, that
10 accusation is patently preposterous. That was clear
11 from the face of Mr. Parada's Witness Statement, and
12 it became clearer still over the course of
13 Mr. Parada's testimony yesterday.

14 Why would two senior attorneys each
15 independently reveal to a lateral associate candidate,
16 whom they were meeting for the first time, their
17 strategy for addressing a client's problem? Why in
18 the course of a screening interview would they tell
19 someone with deep ties to the Government of El
20 Salvador that they were planning to initiate
21 arbitration against the Government? It simply makes
22 no sense.

03:08:10 1 Now, Mr. Parada told us his theory as to why
2 these client confidences would have been revealed, and
3 he says, and I quote from Page 314 of yesterday's
4 transcript, "And I concluded that perhaps knowing my
5 relationship with El Salvador, they were wanting me to
6 relay that information to El Salvador so El Salvador
7 would know that there was International Arbitration
8 Law firm already preparing an ICSID case against them,
9 and therefore they would try to avoid going to
10 arbitration and give in to whatever the company
11 wanted. That was my conclusion."

12 Now, Mr. Parada said he came to this
13 conclusion even though he admitted that he did not
14 know Mr. Ali previously, that this was a screening
15 interview for a lateral position arranged by a
16 headhunter, and that Mr. Ali never revealed the name
17 of the client, the amount of damages the client
18 sought, or any sense of when the client intended to
19 file for arbitration if its demands were not met.

20 Apparently, Mr. Parada was supposed to intuit
21 this critical information omitted by Mr. Ali and
22 deliver the message supplemented by his own intuition

03:09:18 1 to his Government contacts.

2 Moreover, Mr. Parada believes that Mr. Ali
3 told him that he--that is, Mr. Ali--had personally
4 told the President of El Salvador of his plan to bring
5 ICSID arbitration against the Government, a statement
6 which, if true, would seem to obviate any need to use
7 Mr. Parada to communicate that message, and I refer
8 here, Mr. President, to page 327 of yesterday's
9 transcript.

10 And with regard to this meeting with
11 President Saca that Mr. Ali supposedly told Mr. Parada
12 about, I would remind the Tribunal that, despite his
13 original claim to have, and I quote, "very precise
14 information that, if true, would completely undermine
15 everything," Mr. Parada admitted that he has been
16 unable to locate any documents confirming that such a
17 meeting took place.

18 Mr. President, I submit to you this is the
19 stuff of conspiracy theories. It is not evidence, and
20 certainly not evidence that could even arguably be
21 probative of any issue in this proceeding. But that
22 is just the tip of the iceberg when it comes to the

03:10:24 1 implausibility of Mr. Parada's testimony. I will
2 point to just a few other indicators of its utter lack
3 of credibility.

4 First, in his Witness Statement--that is, the
5 original Witness Statement that Mr. Parada
6 submitted--Mr. Parada testified that the client
7 confidence divulged to him by Messrs. de Gramont and
8 Ali were revealed, and I quote, during our first
9 meeting. That comes from Paragraph 6 of the Witness
10 Statement. Yet, in his testimony yesterday at
11 Page 295, he was less sure, and this time he says,
12 "They gave that information to me at the very latest
13 on the second meeting we had on December 7th of 2007."

14 But he then went on to qualify that testimony
15 further. He qualified his accusation by stating with
16 respect to Mr. de Gramont, and I quote again from
17 Page 304 of the transcript, "It may have been that I
18 mentioned to him what I had been told"--that is what
19 he had been told by Mr. Ali--"and he confirmed it,"
20 all of this despite stating under oath that he had
21 been precise in preparing his Witness Statement, and
22 that occurs at Page 371 of yesterday's transcript.

03:11:36 1 Now, second, despite supposedly having
2 learned from Messrs. de Gramont and Ali confidential
3 information about impending arbitration against the
4 Government of El Salvador, a Government, I remind you,
5 in which he had worked for 15 years, including in
6 senior positions, a Government that had been a client
7 of his, a Government with which he continued to have
8 very strong ties, in none of Mr. Parada's
9 communications with the Government or with his own
10 colleagues at Dewey & LeBoeuf did he mention how he
11 came by this information. Although he apparently was
12 trying to win the Government as a client, in none of
13 his communications did he mention that he had learned
14 about impending arbitration against the Government
15 directly from counsel for the would-be claimant.

16 Indeed, none of Mr. Parada's contemporaneous
17 communications say anything about having learned of
18 the impending arbitration from counsel for the
19 would-be claimant. The first time he says that he
20 learned about the impending arbitration from Mr. Ali
21 and Mr. de Gramont is in the Witness Statement
22 submitted in this case long after becoming an advocate

03:12:48 1 for the Government of El Salvador.

2 And by the way, the lack of any reference to
3 Mr. Ali, to Mr. de Gramont, to the law firm of Crowell
4 & Moring in any of Mr. Parada's contemporaneous
5 communications is all the more remarkable, given his
6 admission that he felt, and I quote, "no duty of
7 confidentiality after terminating discussions about
8 potential employment with Crowell & Moring in March of
9 2008," and this appears at Page 293 of yesterday's
10 transcript and at various other places in the record
11 as well, in addition to appearing in Paragraph 9 of
12 Mr. Parada's Witness Statement.

13 Now, if, indeed, Mr. Parada felt no duty of
14 confidentiality, why would he have failed to mention
15 the source of the information he had learned about
16 impending arbitration against El Salvador in
17 communications with close contacts with the Government
18 or with his own colleagues?

19 Moreover, Mr. Parada's e-mails to the
20 Government starting in March 2008 don't even mention
21 Pacific Rim. It is not until July of 2008, when the
22 possibility of arbitration between Pac Rim and El

03:13:56 1 Salvador was being widely reported, that Pac Rim is
2 named in Mr. Parada's correspondence.

3 His earlier e-mails are so general and
4 lacking in information that, as Mr. Parada admitted,
5 one could not tell whether they were alluding to a
6 possible dispute with Pac Rim or some other dispute.
7 And as we know another dispute under CAFTA also
8 involving a United States mining company was in the
9 making during precisely this time period. That, of
10 course, was the Commerce Group dispute.

11 Now, third, Mr. Parada testified that even
12 though Messrs. Ali and de Gramont did not tell him the
13 identity of the client whose litigation strategy they
14 were divulging to him, he was able to infer the
15 identity. In particular, he testifies at Page 318 of
16 yesterday's transcript, and I quote, "I was aware that
17 there was a mining dispute in the brewing. I was
18 aware that the company was Canadian. I assumed that
19 was the case they were talking about."

20 Mr. Parada then added, "I believe with
21 perhaps 90 percent certainty that I told them that I
22 believe this arbitration may be started by the

03:15:05 1 individual U.S. investors because that was what I
2 immediately believed when I first heard." And that's
3 at Page 319 of the transcript.

4 Now, on his account, not only did he
5 instantly understand exactly who and what Mr. Ali was
6 talking about, but he was already fully informed as to
7 the client's nationality and as to its shareholding
8 structure.

9 Not only that, but he was able instantly to
10 identify a solution to a jurisdictional problem that
11 he identified, analyzed, and resolved during the
12 course of a brief screening interview. Nonetheless,
13 when writing to a contact in the Salvadoran Ministry
14 of Foreign Affairs eight months later, in July of
15 2008, following Press Reports of the impending
16 arbitration, Mr. Parada stated that he had, and I
17 quote, "just completed preliminary research and found
18 that the company in question, Pacific Rim Mining, is
19 Canadian, not a U.S. national." In other words, he
20 had just completed his preliminary research in
21 July 2008; that is, after the press reports came out.
22 And this is reflected in Annex K to his Witness

03:16:17 1 Statement as well as at Page 365 of yesterday's
2 transcript.

3 In short, Mr. President, the core story
4 behind--the core story that Mr. Parada tells makes no
5 sense. It is fraught with internal inconsistencies,
6 and it is exceedingly farfetched if not downright
7 ridiculous.

8 But setting all of that to one side, putting
9 all of that to one side, if we take Mr. Parada at his
10 word, his own contemporaneous understanding of what
11 Mr. Ali and Mr. de Gramont said to him undermines
12 rather than helps Respondent's argument. And thus, in
13 his first e-mail to the assistant for the Attorney
14 General--this is the e-mail from March 7, 2008 that we
15 discussed at some length yesterday--this is Annex D to
16 Mr. Parada's Witness Statement, in that e-mail,
17 Mr. Parada refers to the matter not as a dispute, but
18 as a possible international dispute in the making at
19 this time that may result in an international ICSID
20 arbitration against El Salvador.

21 Let me repeat that because that really bears
22 emphasis.

03:17:29 1 It's not a dispute--he didn't understand it
2 to be a dispute. He understood it to be a possible
3 dispute in the making that may result in ICSID
4 arbitration. Thrice qualified. I can't think of any
5 more ways you could possibly qualify that
6 characterization of the dispute as Mr. Parada
7 understood it at the time as reflected in a
8 contemporaneous e-mail as opposed to a document
9 created once he became an advocate for El Salvador in
10 this case. It really is hard to imagine any more ways
11 one could qualify that characterization.

12 In Mr. Parada's own words what he understood
13 to be the situation in March of 2008 was not that a
14 dispute had arisen between Pac Rim and El Salvador.
15 He understood, based on what he says he learned from
16 my partners, Mr. Ali and Mr. de Gramont, that there
17 was a possible dispute in the making. In other words,
18 the circumstances, as he understood them at the time,
19 in his own words, were such that they might--they
20 might ripen into a dispute. On the other hand, they
21 might not ripen into a dispute, and might or might not
22 result in international arbitration.

03:18:40 1 Now, later e-mails we reviewed in addition to
2 that March of 2008 e-mail, we reviewed several other
3 e-mails yesterday, and those later e-mails do nothing
4 to salvage Respondent's case. Yesterday, we looked at
5 Mr. Parada's July 9th, 2008, e-mail, Annex K to his
6 Witness Statement, and that says that it definitely
7 seems like they," meaning Pacific Rim Mining Corp.,
8 "are laying the groundwork to initiate arbitration in
9 the medium term if their plans are not approved."
10 Thus even as late as July of 2008, Mr. Parada is still
11 expressing uncertainty. Even at that date the
12 situation has not advanced much beyond the possible
13 dispute in the making that may result in arbitration.
14 In other words, Mr. President, the contemporaneous
15 documents Mr. Parada has produced only confirm
16 Claimant's position that no dispute arose until
17 sometime in 2008.

18 Now, as we have explained, it was only in
19 March of 2008 that the dispute began to crystallize
20 after President Saca's revelation of the de facto ban
21 on mining permits. Before that, while Pac Rim Cayman
22 may have been unhappy at the delays in getting a

03:19:54 1 response to its Applications for permit, it did not
2 have a dispute with El Salvador. Mr. Parada has said
3 nothing that in any way suggests otherwise.

4 Mr. President, before I turn the podium over
5 to Mr. de Gramont, I'd like to make one last point.
6 We would like the Tribunal to take note of
7 Mr. Parada's highly charged statements that he was
8 seeking further information on Mr. Ali's most private
9 meeting with President Saca, information that he said,
10 and I quote, "would completely undermine everything,"
11 and which he said he feared would prejudice the
12 Tribunal if he were to reveal it here in the context
13 of this hearing," and that's at Pages 320 and 324 of
14 yesterday's transcript.

15 Claimant respectfully requests that the
16 Tribunal order Respondent to produce the results of
17 Mr. Parada's investigation as soon as possible, but
18 certainly no later than May 20th. If Respondent is
19 unable to uncover this purported information, Claimant
20 requests the Tribunal to order Respondent to write a
21 letter of explanation, an apology to the Tribunal and
22 Claimant for the insinuations and innuendos Mr. Parada

03:21:05 1 offered on this point yesterday.

2 I thank you, and I will now turn the podium
3 over to Mr. de Gramont.

4 MR. de GRAMONT: Thank you, Mr. President,
5 good afternoon Professor Stern, Professor Tawil.

6 As Mr. Ali stated, I am going to briefly
7 review what we've learned about the relevant facts in
8 the past couple of days.

9 From the perspective of the relevant facts,
10 we really didn't learn much that was new that has any
11 bearing on the issues before the Tribunal during the
12 course of the past two days. We've learned a couple
13 of things, and I will mention those in passing.

14 But what is noteworthy is that all of the
15 facts that Claimant offered and that Respondent didn't
16 even try to rebut, that Respondent often failed even
17 to mention, that Respondent often tried to steer the
18 Tribunal's attention away from, so let's take a quick
19 overview of the key unrebutted facts that remain
20 unrebutted and that we believe are dispositive of
21 Respondent's objections.

22 Okay. Here are the basic undisputed facts

03:23:01 1 about Pac Rim Cayman:

2 Pac Rim Cayman was established in 1997 at the
3 direction of Mr. Shrake from his office in Reno,
4 Nevada. Undisputed.

5 Pac Rim Cayman was always substantially
6 managed by Mr. Shrake from his office in Reno, Nevada.
7 That's undisputed, and I will come back and I'll
8 discuss that a little bit further.

9 Mr. Shrake, in Reno, was primarily
10 responsible for deciding what assets Pac Rim acquired,
11 what assets Pac Rim disposed of, and how those assets
12 were managed. Undisputed.

13 Pac Rim Cayman was domesticated to Nevada at
14 the direction of Mr. Shrake. Undisputed.

15 All of the direct investments of financial
16 capital made by the companies into El Salvador were
17 accounted for through Pac Rim Cayman beginning in
18 2004. Mr. Badini said what's the evidence of that?
19 Read the testimony of the current CFO at Paragraph 27.
20 "From 30 November 2004, all of the company's direct
21 financial capital in El Salvador were made through Pac
22 Rim Cayman." Respondent had the opportunity to

03:24:18 1 cross-examine the CFO. It chose not to do so.

2 A substantial portion of the financial
3 capital invested into El Salvador through Pac Rim
4 Cayman was of U.S. origin. It came from U.S. mining
5 operations. It came from shareholders with addresses
6 of record in the United States. Undisputed.

7 Pac Rim Cayman was registered as the investor
8 owning PRES and DOREX with El Salvador's national
9 office of investment. Undisputed.

10 Pac Rim Cayman has been the 100 percent owner
11 of Pacific Rim Exploration, a Nevada corporation,
12 since the December 2000 reorganization. Undisputed.

13 Now, Respondent's response to all of this is,
14 well, there was nothing to manage. It's just a pure
15 paper company. This is a company that owned,
16 acquired, and disposed of millions of dollars of
17 assets. Now, all legal entities are legal fictions.
18 They're often given substance only through the people
19 who control them, who decide what and where the
20 company is going to invest. A trust or a sole
21 proprietorship may not have offices or employees, but
22 they are specifically defined as Enterprises under

03:25:42 1 CAFTA. They are legal entities whose investment
2 decisions can be made by a single person, without
3 furniture, without employees, without UCC filings.

4 Again, the undisputed evidence is that over
5 the years Pac Rim Cayman acquired key assets of the
6 companies. It disposed of some of the assets of the
7 companies. Funds from those assets were then
8 reinvested in other assets owned or acquired by Pac
9 Rim Cayman.

10 Now, did those investment decisions often
11 involving millions of dollars just happen by magic?
12 Did Pac Rim Cayman, this paper company, somehow make
13 those decisions by itself? Sort of like the computer
14 Hal in the movie 2001? Good news, Mr. Shrake, this is
15 Pac Rim Cayman reporting, and I'm happy to tell you
16 that I just put all your money in El Salvador.

17 Of course not. A human being had to make
18 those decisions. A human being had to give the
19 company substance by making its investment decisions.
20 That human being was Mr. Shrake, a U.S. citizen, who,
21 from his offices in Nevada, decided that millions of
22 dollars from the company's entities, many of them U.S.

03:26:58 1 entities, would be redirected from those entities and
2 invested through Pac Rim Cayman in El Salvador.

3 This was a company that was given substance
4 by people, here really the person who made its
5 decisions. It was given substance by the capital that
6 flowed through it, which was principally of U.S.
7 origin. It was given by the substance--it was given
8 substance by the assets it owned both in El Salvador
9 and, since December 2007, in the United States.

10 Again, that's more than a year and a half
11 before this arbitration commenced.

12 Now, Mr. Badini said Pac Rim Cayman has no
13 mining operations. Neither does Pacific Rim Mining
14 Corp. Pacific Rim Mining Corp. is a company of
15 accountants and investment experts.

16 Dayton Mining (U.S.) has no mining
17 operations. It's a holding company. It holds the
18 assets of another mining company. It generated
19 millions of dollars that was invested through Pac Rim
20 Cayman into El Salvador. How did the money get there?
21 Mr. Shrake directed it there from Nevada.

22 The next slide.

03:28:21 1 All of the evidence concerning the broader
2 Pac Rim family of companies of which Pac Rim Cayman is
3 an integrated part is also undisputed. Mr. Badini
4 referred to the putative connections with the United
5 States. They're not putative. They're undisputed,
6 and they are substantial.

7 And the gravamen of the Respondent's
8 objections is that a paper company was set up by an
9 investor with no ties to the relevant jurisdiction.
10 In fact, in substance, this was a U.S. investor and a
11 U.S. investment. That's relevant not only to the
12 denial of benefits, but also to the abuse of process,
13 the whole underlying principle of which is to avoid
14 investors with no connection to a jurisdiction setting
15 up a paper company and trying to take advantage of
16 that. Pure formality.

17 So, what's the evidence concerning the
18 Pacific Rim Companies? Mr. Shrake, the President and
19 CEO of Pacific Rim Mining Corp., always maintained his
20 office in Nevada. Dayton Mining (U.S.) of Nevada
21 owned mining operations in Nevada that generated over
22 \$20 million that was invested into Pac Rim Cayman.

03:29:40 1 Pacific Rim Exploration, another Nevada corporation,
2 served as the exploration arm of the companies. A
3 majority of the shareholders of the Pacific Rim Mining
4 Corp. have addresses of record in the United States.
5 These are substantial U.S. connections.

6 Now I suppose if Pac Rim Cayman had been
7 transported from Nevada to Cayman Islands because
8 Cayman Islands had some sort of Treaty and there were
9 no ties to the Cayman Islands, maybe this would be a
10 different case. This is a case where the
11 domestication reflected the actual economic and
12 managerial substance that had existed for years. To
13 apply the denial-of-benefits or the abuse-of-process
14 objections here would be to turn the principles
15 underlying those objections on their head.

16 Now, what about the numerous statements by El
17 Salvador's successive Presidents, President Saca and
18 President Funes regarding the de facto ban? We didn't
19 hear anything about that. Respondent talked about the
20 initial March 2008 report, but what about all of the
21 other statements? We didn't hear a word--not a word.
22 "I will not grant mining permits." President Saca,

03:31:01 1 July 2008. President Saca, "will not grant a single
2 permit."

3 President Funes, "the Government is not
4 approving any mining exploration or exploitation
5 project."

6 President Funes, "No mining exploitation
7 projects will be authorized."

8 Minister Dada, the Government has, "provided
9 continuity to the decision to not issue mining permits
10 which was made during the administration of President
11 Saca."

12 We didn't hear anything about those from the
13 Respondent. They didn't try to explain them. They
14 didn't even mention them. They tried to distract your
15 attention away from them because they understand that
16 there is a practice not to grant mining permits no
17 matter how meritorious they are. This is
18 fundamentally different from delays, and counsel knows
19 that.

20 What about El Salvador's continued
21 reassurances to the companies? We didn't hear
22 anything about those. Mr. Shrake testified that there

03:32:12 1 were numerous representations by the Government that
2 the process was moving forward, that Respondent
3 intended to comply with the existing laws. Mr. Smith
4 said nothing in December 2007. There's testimony
5 about a meeting that Pacific Rim had in January 2008.
6 I'm sorry, in January of 2007. There was testimony
7 given yesterday by Mr. Shrake about a trip he took to
8 Chile in November of 2007 with key members of the
9 legislature so that they could look at a mine that was
10 similar in design to El Dorado.

11 Reassurances can come not only in the form of
12 words, but actions as well. After the first alleged
13 presumptive denial in 2004, there was an extended
14 notice and comment period and an extended exchange of
15 observations and responses on El Dorado's EIA that
16 went on from 2004 to 2006. Respondent never addresses
17 that or explains how that could possibly be consistent
18 with the presumptive denial in 2004, because it's not
19 conceivably consistent. There is no explanation as to
20 how you can reconcile those two things.

21 The environmental regulatory process was
22 moving forward on other sites, Pueblos and Guaco in

03:33:41 1 2007 through 2008. Indeed, MARN requested DOREX to
2 provide comments on MARN's observations to the Pueblos
3 EIA in January of 2008. Again, that's undisputed.

4 There's the letter from MARN in December 2008
5 asking for more information--this is
6 December 2008--asking for more information so that it
7 could move forward on the El Dorado EIA. That's
8 nearly two years after the alternative presumptive
9 denial in 2007. Not a word--not a word--from
10 Respondent's counsel to explain that letter.

11 What about El Salvador's missing witnesses?
12 All of these witnesses were referred to multiple times
13 in the testimony of our witnesses and our documents.
14 Where is Ms. Gina Navas, the Director of the Bureau of
15 Mines? Where is Mr. Ernesto Javier Figueroa Ruiz, the
16 author of the 4 December 2008 letter asking for more
17 information so that they could continue the El Dorado
18 permitting process? Where is Vice President
19 de Escobar and Minister de Gavidia who gave assurances
20 to the companies that the laws of El Salvador would be
21 followed.

22 Where is Mr. Guillermo Antonio Gallegos, the

03:35:15 1 Majority Leader of El Salvador's Congress, who led a
2 delegation to visit Mr. Shrake in Nevada, and who in
3 January 2008 told Mr. Shrake that legislative
4 amendments were likely to be passed and that the
5 permits were likely to be granted?

6 Where is the MARN Minister, Mr. Guerrero
7 Contreras, who was at the meeting with Mr. Shrake and
8 President Saca in June 2008? Why were none of these
9 witnesses called to rebut Mr. Shrake's testimony?

10 Mr. Smith said that we submitted a letter two
11 weeks ago mentioning a dinner that Mr. Shrake had
12 appeared--had attended in January 2008, and only if
13 they had known about it, they would have talked to
14 these witnesses. Those--the guests at that dinner
15 included Ms. De Gavidia, Ms. De Escobar. They had
16 numerous opportunities to talk to these witnesses.
17 They either chose not to do so or they chose not to
18 present them to this Tribunal.

19 Yesterday, the Tribunal asked us whether it
20 should draw an adverse inference from the fact that we
21 did not present the testimony of Ms. Hashimoto, and
22 that's a fair question. The rules apply equally to

03:36:42 1 both Parties. But let's take a look at the respective
2 role of these witnesses. There is, I believe, a
3 single reference to Ms. Hashimoto in Mr. Shrake's
4 witness other than her being laid off. It says, "At
5 some point in 2007, our then-Chief Financial Officer,
6 Ms. April Hashimoto, suggested to me that we could cut
7 costs by deactivating subsidiaries in jurisdictions
8 where the companies had not conducted business for
9 some time, but where we still paid various fees and
10 costs and devoted administrative time in order to
11 maintain the business in good standing."

12 Again, as Mr. Shrake testified, this was one
13 of at least two reasons for the reorganization. And
14 the fact is--

15 PRESIDENT VEEDER: If I could interrupt, what
16 seems to be significant about that piece of evidence
17 is that it relates to the initiative, the timing of
18 this change. And if you look at that paragraph, it
19 looks as though the idea came from Ms. Hashimoto. Is
20 there any other evidence that it came or originated
21 from any other person?

22 MR. de GRAMONT: Well, Mr. Krause testified

03:37:56 1 that he reviewed the books and records and he spoke to
2 KPMG.

3 PRESIDENT VEEDER: He wasn't there at the
4 time.

5 MR. de GRAMONT: And Ms. McLeod-Seltzer
6 didn't testify about the origin, but she testified
7 about that reason.

8 PRESIDENT VEEDER: She's a very senior
9 officer. Is it your case that it originated with her?

10 MR. de GRAMONT: That's--that's what
11 Mr. Shrake testified to.

12 For all we know, Ms. Hashimoto got it from
13 another employee.

14 PRESIDENT VEEDER: This is not necessarily a
15 point against you.

16 MR. de GRAMONT: No, I understand.

17 The position of the company is--well, we
18 never considered that who came up with the idea, who
19 within the companies came up with that idea was an
20 interesting question. I mean, certainly the
21 Respondent didn't ask Mr. Shrake about who originated
22 that particular idea. The fact that that was one of

03:38:44 1 the reasons is corroborated by our other company
2 witnesses. I mean, we offered three witnesses, all of
3 whom are still affiliated with the company.
4 Ms. Hashimoto is not affiliated with the company. I
5 mean, I suppose we could have tracked down all of the
6 employees who had been laid off and interviewed them,
7 and we could have tried to put them on, and we could
8 have tried to put on members of the board, and we
9 could have tried to put on people from KPMG. That
10 would have become an expensive endeavor, and I'm not
11 sure how much it would have added.

12 I'm going to skip over the--the next two
13 slides are portions of the Witness Statement from
14 Ms. McLeod-Seltzer and Mr. Krause, corroborating that
15 one of the ideas, one of the reasons for the
16 reorganization was to cut costs.

17 And I'm going to the slide, the "Investment
18 Into El Salvador" slide.

19 Now, you have seen this slide before, and I
20 will not linger on it. The fact is that there is no
21 explanation from the Respondent as to why Claimant
22 would have continued to invest into El Salvador if it

03:40:04 1 thought that there was a pre-existing dispute.

2 Next slide, please.

3 One more key fact on when a dispute arose or
4 crystallized, and my colleagues will address the legal
5 meaning of that shortly, involves when the company
6 first perceived that it was being damaged. A dispute
7 doesn't begin to arise until the loss complained of
8 arises. Regulatory delays were frustrating. The
9 imposition of the ban was devastating.

10 This chart shows the share price of the
11 company versus that of an index selected by
12 Respondent, and what you can see is that the company's
13 share price closely tracked that of the rest of the
14 industry through March 2008. It began to depart from
15 the rest of the industry following the March 2008
16 announcement.

17 In July, which was following Mr. Saca's
18 meeting with or rather Mr. Shrake's meeting with
19 President Saca and Mr. Shrake's decision to shut down
20 the drills, they fell dramatically and never
21 recovered.

22 Now, we didn't--no one testified that

03:41:39 1 suddenly in March 2008 we knew that there was a ban in
2 place. What we have testified, what we have argued is
3 that through 2008, the process seemed to be moving
4 forward, albeit with delays and bumps. Through 2008,
5 Respondent's representatives were representing that
6 the process would go forward and that the permits
7 would be granted.

8 In March 2008, suddenly the Head of State,
9 after all this has happened, after \$77 million has
10 been invested in the company, after years of working
11 on this project with the regulatory framework in
12 place, the President of the country says, I oppose
13 mining permits. Mr. Shrake wrote to President Saca
14 and said I read that you oppose granting permits? Can
15 that be right? We have rights under CAFTA. And the
16 discussion continued. Mr. Shrake met with officials,
17 including President Saca himself in July 2008. And if
18 you read Mr. Shrake's testimony, it was at that moment
19 that he decided to, after the July meeting, that he
20 decided to shut down the drills and begin layoffs. It
21 wasn't until six months after that that we filed the
22 Notice of Intent.

03:43:13 1 Could we go to the next slide.

2 We didn't hear very much from Respondent on
3 the argument that they had made concerning the
4 resubmission of the application. They made that
5 argument repeatedly in their briefs. For example, in
6 the Memorial, they said, "Indeed, Claimant could have
7 resubmitted its Application for an environmental
8 permit after CAFTA entered into force."

9 In the Reply they said, "As El Salvador noted
10 in its Memorial, Claimant could have submitted another
11 Application for an environmental permit, but it has
12 not."

13 How can you reconcile those statements? With
14 the repeated statements by Presidents Saca and Funes
15 that no permits would be granted? You can't reconcile
16 them. And therein lies the difference between
17 regulatory delays and potential differences over
18 regulatory requirements, and a practice not to grant
19 mining permits regardless of the regulatory
20 requirements. If I go and apply for a permit and the
21 agency says, oh, we grant those in seven days, come
22 back in a week, you will be fine, I come back, they

03:44:23 1 say sorry, we are still working on it, we are working
2 really hard, we are really backed up, come back in a
3 week. I come back in a week, oh, we are still working
4 on it, we'll get it done. Don't worry.

5 This goes on for several weeks. I come back
6 and they say oh, guess what, we are not giving those
7 permits anymore. We decided not to issue them
8 anymore. Suddenly that puts the prior delays in a
9 very different light.

10 There were two factual questions posed by the
11 Tribunal. The first one, if I understand it
12 correctly, was: Is there other evidence that a
13 private placement was undertaken in early 2008, and so
14 I would direct the Tribunal's attention to the first
15 document that's in our binder, which is Claimant's
16 Exhibit 33. These are excerpts from the 2008 Pacific
17 Rim Mining Corp. Annual Report. The entire report is,
18 of course, available to you in the exhibits. And I
19 direct you to Page 3, and there is a bullet point down
20 under overview. It says on February 29, 2008, the
21 company closed a private placement finance offering in
22 which gross proceeds of roughly 7 million Canadian

03:46:10 1 were raised through the issuance of 6.7 million units
2 consisting of one share and one share purchase
3 warrant.

4 So, that's additional evidence that there was
5 the private placement financing, and two points arise
6 from that:

7 First, why would the company undertake a
8 private placement financing if they thought they were
9 already embroiled in a dispute?

10 Second, if the companies thought that there
11 was a dispute, they would have had to disclose that.
12 I mean, take a look at Page 21. Under controls and
13 procedures, disclosure controls and procedures.
14 Management has designed disclosures controls and
15 procedures or has caused them to be designed under its
16 supervision to provide reasonable assurance that
17 material information related to the company is
18 gathered and reported to senior management, including
19 the Chief Executive Officer and Chief Financial
20 Officer, as appropriate, to permit timely decisions
21 regarding public disclosure.

22 In the U.S. and in Canada, there are very

03:47:24 1 strict Securities Laws and rules that any material
2 fact has to be disclosed to potential investors.
3 There is no record that a dispute was disclosed to
4 investors prior to this private placement financing.

5 PRESIDENT VEEDER: Come back to Page 3.
6 There is a reference to a Section 7.3. Do we have
7 that?

8 MR. de GRAMONT: I'm sorry, Mr. President,
9 where is this?

10 PRESIDENT VEEDER: Page 3, if you look at the
11 bullet that's highlighted beginning on February 29.
12 Do you see that on Page 3? The last line refers to
13 Section 7.3.

14 MR. de GRAMONT: We do have it in the actual
15 exhibit.

16 PRESIDENT VEEDER: If we have it, I will find
17 it. Don't worry.

18 MR. de GRAMONT: Again, we took the
19 Tribunal's admonition not to kill any more trees
20 seriously, so these are just excerpts that I wanted to
21 point out to the Tribunal. The whole document is in
22 the complete exhibits.

03:48:23 1 And we, you know this was--this is one of
2 many, many points we made regarding the absence of
3 evidence that a dispute concerning this measure
4 existed at this time, but we simply would like to
5 suggest to the Tribunal that it was extraordinarily
6 unlikely these experienced directors would have failed
7 to disclose a dispute prior to the private placement
8 financing if they had believed a dispute existed.
9 That would have been an extraordinary risk for them
10 to do.

11 And what you will see in this report, which
12 is dated July 2008, and I suspect this was written
13 slightly before--well, if you look at Page 2, it says
14 in the highlighted language, "Unfortunately,
15 permitting risks remains an unresolved issue. While
16 at the beginning of fiscal 2008 we appeared to be
17 experiencing the normal hiccups associated with the
18 stewarding and mining permit through its often
19 complicated process, the apparent lack of willingness
20 on the part of the El Salvadoran Government throughout
21 the past year to finalize approval of our El Dorado
22 Environmental Impact Study and otherwise meet its

03:49:43 1 responsibilities associated with our mining permit
2 Application has caused the company to take stock of
3 its future options."

4 And then several paragraphs down it says that
5 the company may pursue our legal options under El
6 Salvadoran law and international treaties, including
7 CAFTA. There is no disclosure like that prior to
8 March 2008.

9 PRESIDENT VEEDER: Just pausing, we have now
10 found Paragraph 7.3, and it's self-explanatory, but it
11 does refer to something, speaking for myself, I don't
12 understand. The private placement was conducted on a
13 best efforts/commercially reasonable basis. That's
14 obviously a term of art, but I don't know what it
15 means.

16 MR. de GRAMONT: I don't either,
17 Mr. President. I would be happy to address that in
18 our closing submission.

19 PRESIDENT VEEDER: Why don't you do that.

20 MR. de GRAMONT: The second factual question
21 that the Tribunal asked was whether Pac Rim Cayman
22 maintained its corporate personality through the

03:50:51 1 domestication to Nevada, and the answer is yes, and I
2 will explain that.

3 Under the doctrine of corporate migration, a
4 company can migrate from one jurisdiction to another
5 without losing its corporate personality if both
6 jurisdictions recognize the doctrine. That's what
7 happened in Aguas del Tunari. The investor migrated a
8 holding company from the Cayman Islands to Luxembourg.
9 Both the Cayman Islands and Luxembourg permitted this
10 migration and recognized the continuation and
11 corporate personality, and so it was permissible both
12 for the purposes of local law as well as for the
13 purposes of establishing jurisdiction.

14 Here both the Cayman Islands and Nevada
15 recognized the doctrine of corporate migration and the
16 continuation of corporate personality. Let's look at
17 the documents. And the first is at Tab 2 in your
18 binder. It's Respondent's Exhibit 68.

19 And I will confess that it's only somewhat
20 helpful because on the second page, under "Pac Rim
21 Cayman," it says, "Notice is hereby given pursuant to
22 Section 229 companies law whereby the following

03:52:18 1 companies had been de-registered in the Cayman Islands
2 and transferred by way of continuance to Peru."

3 Mr. Shrake made a comment about trying to
4 administer things in the Cayman Islands, and I suggest
5 this may be evidence of that, so let's keep going
6 through the documents. Tab 3. This is Respondent's
7 Exhibit 69. This was the document that I tried to
8 find during my opening and wasn't able to, but let's
9 look at it now.

10 Again, articles of domestication. The name
11 of the entity is Pac Rim Cayman LLC, a Nevada limited
12 liability company. The entity named before filing
13 articles of domestication, Pac Rim Cayman, date and
14 jurisdiction of creation, date of creation September
15 10, 1997, and the jurisdiction that constituted the
16 principal place of business, central administration or
17 equivalent of the undomesticated entity before the
18 articles of domestication was Cayman Islands.

19 So, this indicates that for a filing fee of
20 \$350, the company could be domesticated to Nevada and
21 would continue its corporate identity there.

22 Let's take a look at Tab 4. Now, this

03:53:42 1 doesn't have an exhibit number. It's Tab 13 from a
2 bind that was submitted with the Respondent's
3 Memorial. The Respondent submitted it as a binder
4 that accompanied its Memorial, Claimant's entire
5 production document of 6 October 2010. That's
6 referenced in their Memorial. We are happy to give it
7 an exhibit number, whether it's Respondent's or
8 Claimant's, but it is in the record before the
9 Tribunal. And the first document is a written
10 resolution of the Sole Shareholder of the company, and
11 Paragraph 1 says pursuant to Article 107-A of the
12 company's articles of association, an Application be
13 made to register the companies for the
14 de-registration--to the Registrar of the companies--an
15 Application be made to the Registrar of companies for
16 the de-registration of the company in the Cayman
17 Islands and its transfer by way of continuation to the
18 State of Nevada.

19 Okay, the next page is the Articles of
20 Organization, and in the Cayman Islands the company
21 actually did have a Board of Directors, as we will see
22 in a moment. When it was domesticated to Nevada, it

03:55:06 1 instead had two managers who at the time were
2 Mr. Shrake, and you can see his address here in Reno,
3 Nevada, and Mrs. McLeod-Seltzer.

4 We have the articles of domestication again.
5 Then we have the affidavit of Wendy Hoo-sue on behalf
6 of Woodridge Corporation in its capacity as a
7 corporate director in the matter of Pac Rim Cayman.
8 And among the statements in the affidavit, the company
9 is able to pay its debts as they fall due--this is Pac
10 Rim Cayman. The application for de-registration is
11 bona fide and not intended to defraud creditors of the
12 company. The transfer is permitted by and has been
13 approved in accordance with the company's memorandum
14 and articles of association. The laws of the State of
15 Nevada, United States of America with respect to the
16 transfer had been or will be complied with. And the
17 company will, upon registration under the laws of the
18 State of Nevada, United States of America, continue as
19 a body corporate limited by shares.

20 After that you have the interim
21 unconsolidated balance sheet, which shows that Pac Rim
22 Cayman had assets of approximately \$52 million and

03:56:25 1 liabilities of approximately \$42 million.

2 A few pages after that you have the corporate
3 director's undertaking, and this is again Ms. Hoo-sue,
4 who undertakes on behalf of the said corporate
5 director to give notice to the secured creditors of
6 the company of the transfer of the company to the
7 State of Nevada.

8 And then after that you have written
9 resolutions of the directors of the company passed in
10 accordance with articles of association of the
11 company, and it says, number one, continuation of the
12 company in the State of Nevada, USA. It is noted that
13 a proposal has been put to the directors of the
14 company to continue the company in the State of
15 Nevada; and, accordingly, to change the name of the
16 company to include the suffix LLC and to amend the
17 company's memorandum and articles of association to
18 comply with the laws of the State of Nevada USA.

19 And the proposal has been--the proposal has
20 been carefully reviewed by the directors, and is
21 considered to be in the best interests of the company,
22 and the directors wish to recommend that the Sole

03:57:42 1 Shareholder of the company--to the sole shareholder of
2 company that the company be continued under the laws
3 of Nevada, et cetera.

4 Now, so the company had a Board of Directors.
5 It's a corporate formality. Again, the real person
6 who was making this decision was Mr. Shrake. And
7 again, the whole point of the exercise that we
8 undertake in abuse of process and denial of benefits
9 is to look beyond the corporate formalities, to look
10 to where the real control resided. In Vacuum Salt,
11 the Tribunal looked to the Chief Executive, the person
12 who "steered the companies' forces."

13 And we will submit that if you look beyond
14 the rigidities of corporate structure, if you look to
15 the real substance of this investor and this
16 investment, you will see that the investor and the
17 investment is substantially a U.S. investor and a U.S.
18 investment.

19 Finally, I included as Tab 6 and 7
20 Mr. Gehlen's Application to register the foreign
21 investment which had been in the name of Pac Rim
22 Cayman of the Cayman Islands to Pac Rim Cayman of

03:59:17 1 Nevada. And again, there is the resolution resolving
2 to effectuate that domestication. I include those
3 primarily for the reason that I find it so galling
4 that we have been repeatedly accused of hiding this
5 from El Salvador and from the Tribunal when these
6 documents have long been in the record, when one of
7 them was attached as Exhibit 3 to our Notice of
8 Arbitration. I would submit that that kind of
9 accusation, in the face of obvious evidence to the
10 contrary, is, unfortunately, indicative of the way
11 that Respondent has chosen to conduct its defense of
12 that case.

13 With that, I will turn this over to my
14 colleagues.

15 PRESIDENT VEEDER: Don't disappear just yet.
16 We have a question.

17 (Brief recess.)

18 PRESIDENT VEEDER: We are going to resume the
19 hearing, but we have a sudden difficulty with the
20 feed, and I'm going to ask the Secretary to the
21 Tribunal to explain what's happened.

22 SECRETARY MONTAÑÉS-RUMAYOR: With apologies,

04:12:36 1 we have been advised that the World Bank server is
2 down. They're trying to upload it. There was an
3 alleged threat to the system. So, our suggestion,
4 subject to the Tribunal and the Parties, is to record
5 the remaining part of the hearing while they try to
6 fix it--that is one option--and the other option is to
7 wait until the server is up and running again, but at
8 this point we don't know for sure when will that
9 happen.

10 PRESIDENT VEEDER: I suggest we continue
11 because we understand the technicians will continue to
12 record the hearing, and then when the feed is
13 reestablished, the transmission can resume, so it will
14 still be public.

15 But it leads us to another question that the
16 Tribunal considered last night, and that is the status
17 of the transcript. We obviously wish to make
18 available the transcript of this hearing, including
19 today's closing oral submissions, to the non-disputing
20 CAFTA Parties. And unless there is some objection
21 from the Parties, we will do this.

22 We also need to ask what the Parties would

04:13:41 1 wish us to do as regards the amicae. They will
2 certainly hear the hearing, but would it be
3 appropriate for one or both of the Parties for ICSID
4 to make available the transcript to the amicae? Can I
5 throw that out. We don't need an answer yet, but
6 before we depart this evening, we need to come back to
7 the status of the transcript.

8 So, unless there is some objection, let's
9 continue, and if the feed resumes, it will resume if
10 and when it does.

11 MR. POSNER: Very good. Thank you, Mr.
12 President, Members of the Tribunal.

13 I'm back at the podium--I'm back at the
14 podium to address the topic of the measure at issue as
15 it relates to the abuse-of-process objection and the
16 objection to jurisdiction *ratione personae*. In the
17 course of my comments, I hope to respond at least in a
18 preliminary fashion to the first issue that the
19 Tribunal raised yesterday under the heading of "abuse
20 of process."

21 We will then depart a little bit from the
22 order that Mr. Ali described at the beginning of our

04:14:53 1 remarks. Rather than have Mr. Ali come up after I
2 speak and address various topics, I will stay at the
3 podium and continue on with the subject of denial of
4 benefits and address several of the issues that have
5 been raised under that heading.

6 So, first on the subject of measure at issue,
7 now there has been, I think, some confusion over the
8 course of these proceedings as to what the relevant
9 facts are for the purposes of abuse of process and
10 what the relevant facts are for purposes of
11 jurisdiction *ratione temporis*, so let me be very clear
12 at the outset:

13 The question of when the dispute arose--the
14 question of when the dispute arose--is not relevant to
15 the determination whether the Tribunal has
16 jurisdiction *ratione temporis*. It may be relevant to
17 an abuse-of-process analysis, but it is not relevant
18 to a jurisdiction *ratione temporis* analysis. As we
19 discussed in our opening submission--and I'm not going
20 to regurgitate that submission, but as we discussed
21 there, CAFTA's temporal scope is defined by reference
22 to when acts, facts, and situations occur. CAFTA

04:16:13 1 incorporates the customary international law rule of
2 nonretroactivity which is set forth "for greater
3 certainty" in Article 10.1.3 of CAFTA. And under that
4 rule, as I put it earlier in this hearing, the
5 Treaty's entry into force effectively draws a dividing
6 line. And if an act or fact took place after entry
7 into force, if it takes place on that side of the
8 dividing line, it's covered by CAFTA. If the
9 situation began before entry into force but continued
10 after entry into force, again if it's on that side of
11 the dividing line, it is covered by CAFTA.

12 Now, there are investment treaties that
13 define their scope and coverage by reference to when a
14 dispute arose, and we've discussed a couple of those
15 treaties in our Counter-Memorial at Paragraphs 220 to
16 223; that is, those treaties expressly exclude
17 disputes arising prior to the Treaty's entry into
18 force. We discussed a couple of those treaties, as I
19 mentioned, but CAFTA is not one of them.

20 So, in principle, even if a dispute arose
21 prior to CAFTA's entry into force or, in this case,
22 prior to CAFTA's becoming applicable to the Claimant,

04:17:22 1 the dispute could be submitted to CAFTA arbitration as
2 long as it involved a situation that continued after
3 entry into force.

4 Now, as we've stated repeatedly over the
5 course of the past three days, the measure at issue in
6 this case is a practice that may well have begun
7 before CAFTA entered into force as to the Claimant,
8 but that came to light as a practice only when
9 President Saca publicly confirmed its existence in
10 March of 2008, and that practice continued after entry
11 into force--that is, after CAFTA became applicable to
12 Claimant--and, in fact, that practice continues to
13 this very day.

14 And that practice, just to emphasize the
15 point so there's no confusion on this issue, that
16 "practice is the withholding of permits and licenses
17 necessary for metallic mining, regardless of the
18 applicant's compliance with relevant laws and
19 regulations." And as a shorthand label, we refer to
20 this practice as the "de facto mining ban."

21 Now, let me be very, very clear about this:
22 President Saca's statement of March 2011 is not the

04:18:35 1 measure at issue. That is not the measure at issue.
2 We have never alleged that it is the measure at issue.
3 His statement is confirmation of the existence of the
4 practice--that is the measure at issue; it shed light
5 on the practice--but that does not mean that it is the
6 practice.

7 Now, CAFTA defines measure, the term
8 "measure," in Article 2.1, and it defines it to
9 include any law, regulation, procedure, requirement,
10 or practice. CAFTA does not define the term
11 "practice," but as explained in our Counter-Memorial,
12 the ordinary meaning of "practice" is--and I quote
13 from the dictionary as quoted in our Counter-Memorial
14 at Paragraph 408, Footnote 492--a "practice" is a
15 repeated or customary action or the usual way of doing
16 something. The repeated or customary action that
17 constitutes the practice at issue in this case
18 consists of various acts and omissions which result in
19 the nonissuance of metallic mining-related permits,
20 despite the requirements of Salvadoran law.

21 Now, prior to President Saca's announcement,
22 prior to that March 2008 public statement, Claimant

04:19:55 1 did not know--and, indeed, Claimant did not have
2 reason to know--that the acts and omissions through
3 which permits were denied to PRES and DOREX
4 constituted the practice that is the measure at issue.
5 From all outward appearances, those acts--yes,
6 Mr. Tawil.

7 ARBITRATOR TAWIL: Please, finish your
8 sentence.

9 MR. POSNER: I was going to say, from all
10 outward appearances, those acts and omissions were
11 just instances of ordinary delay.

12 ARBITRATOR TAWIL: Mr. Posner, can you
13 develop a little bit more how 10.1.3 would work with a
14 change of nationality?

15 MR. POSNER: Well, let's start with the basic
16 proposition in 10.1.3.

17 So, the focus in 10.1.3--and, as I said
18 earlier, it's a repetition of Article 28 of the Vienna
19 Convention on the Law of Treaties is the basic
20 nonretroactivity principle, and its focus on entry
21 into force of the treaty. We are sort of taking one
22 step away from that and saying we are not focusing on

04:21:00 1 when the Treaty entered into force for the whole word
2 for these two capital "P" Parties, United States and
3 El Salvador, but when it became applicable to a given
4 investor. So, before a person--before an investor
5 becomes a person of a Party, the Treaty is not
6 applicable to it. From the moment it becomes a person
7 of a Party, the Treaty is applicable to it.

8 So, if we think about this in terms of that
9 dividing line that I described earlier, the dividing
10 line in this case is the moment at which the person
11 acquires the nationality of a Party, so at the moment
12 you acquired the nationality of a Party, assuming that
13 at some earlier stage you were a national of a
14 non-Party--the Cayman Islands or any other country
15 that's not a Party to CAFTA--if you acquire the
16 nationality of a Party, if you become a U.S. person,
17 whether by domesticating in the United States if
18 you're a corporate entity or if you're a natural
19 person, if you acquire citizenship, from that point
20 that's where the line is. And if the act, fact, or
21 situation occurred before that line comes into
22 existence before you acquired the nationality, then

04:22:14 1 the Treaty doesn't apply to you, unless it's a
2 situation that began before you acquired the
3 nationality and continued or did not cease to exist
4 after you acquired the nationality.

5 Does that answer your question?

6 ARBITRATOR TAWIL: Would there be any change
7 if instead of changing nationality the same company--a
8 new company from the U.S. had acquired the asset? I
9 mean, you had continuing measures or conducts or
10 whatever, and instead of having the same company
11 change its nationality you had a new company from the
12 U.S. buying the assets? Would that be the same
13 situation?

14 MR. POSNER: So, let me just make sure I
15 understand the hypothetical correctly.

16 So, in the situation you're describing, at
17 the first point in time, the asset is owned by a
18 person of a non-Party and then, subsequently, the
19 assets acquired by a person of a Party.

20 ARBITRATOR TAWIL: While the conduct has been
21 steady in time, the continuing conduct?

22 MR. POSNER: Right.

04:23:26 1 I suppose one question that might arise in
2 that hypothetical, I think, really goes to the merits
3 rather than jurisdiction. I mean if, for example, we
4 are talking about a claim of denial of fair and
5 equitable treatment and the merit of that claim hinges
6 on the investor's legitimate expectations, if the
7 investor who acquired that investment, the person of a
8 Party who acquired the asset is aware of the situation
9 that might hypothetically be the basis for a claim of
10 denial of fair and equitable treatment, then I would
11 suppose that would go to the merits and might alter
12 your view--

13 ARBITRATOR TAWIL: So, you're saying that for
14 purposes of jurisdiction there would be no difference?

15 MR. POSNER: I believe for purposes of
16 jurisdiction--again, the focus has to be on the
17 measure, and it's the measure as it relates to some
18 point in time.

19 With respect to persons who are persons of a
20 Party and who were persons of a Party on the date of
21 entry into force, the two temporal points are
22 identical. It's only when we are talking about a

04:24:37 1 person who acquires U.S. nationality or who acquires
2 the nationality of a Party at some date after the
3 Treaty entered into force that those two points in
4 time are different, and we need to focus on the point
5 at which the person acquired U.S. nationality.

6 But I would say with respect to somebody who
7 was a U.S. nationality, who was a U.S. national--

8 ARBITRATOR TAWIL: Who was--

9 MR. POSNER: Sorry, in your hypothetical--let
10 me take a step back.

11 Let's remember, too, that the scope is
12 defined by reference to acts, facts, and situations,
13 but it's also defined by reference to investors and
14 covered investments. So, in the hypothetical that
15 you've described, at the moment prior to the
16 acquisition of that asset by the U.S. national, there
17 is no covered investment. It only becomes a covered
18 investment--that investment only takes on the status
19 of a covered investment when it's acquired by a U.S.
20 national.

21 So, the Treaty wouldn't even apply to that
22 investment until the investment is acquired by an

04:25:47 1 investor who is a person of a Party.

2 ARBITRATOR TAWIL: So, it would be the same
3 situation as a change of nationality?

4 MR. POSNER: I believe--as I'm standing here,
5 I believe that's right. I believe the answer would
6 be--you would have the same situation. I would like
7 to reflect on that a bit more and perhaps elaborate on
8 that in our Post-Hearing Brief.

9 ARBITRATOR TAWIL: Okay, thank you.

10 MR. POSNER: Just to come back to the
11 distinction I'm drawing here between what appeared to
12 be the case before Claimant became aware of the
13 measure at issue and what the reality that took hold
14 once the Claimant became aware of the measure at
15 issue, it was only when viewed from the perspective of
16 President Saca's announcement that it became evident
17 that the acts and omissions that led up to the
18 Claimants becoming aware of the practice were, indeed,
19 part of a more general practice.

20 And it is true--and Respondent has really hit
21 on this point over and over again over the course of
22 these proceedings--it is true that we've sometimes

04:26:56 1 referred to the individual acts and omissions that
2 resulted in the denial of permits to PRES and DOREX as
3 measures. We sometime used term "measures" to
4 describe those acts and omissions. And they are,
5 indeed, measures. That is an accurate way to describe
6 those acts and omissions, but they're not the measure
7 at issue, and I think that's a very important
8 distinction to make.

9 The measure at issue--and I really want to
10 emphasize that phrase--"the measure at issue"--that
11 is, the measure that is the basis for Claimant's
12 articulation of breaches by Respondent of obligations
13 on the international law plane is the practice of
14 withholding mining-related permits. It is that
15 measure that forms the basis of our claims for
16 expropriation, denial of fair and equitable treatment,
17 and denial of national treatment. It is that measure
18 that gives rise to the damages for which we seek
19 compensation. In short, it is that measure that forms
20 the basis for a dispute as that term is used in CAFTA.

21 Now, as I said--

22 PRESIDENT VEEDER: Can you put a date on

04:28:02 1 this?

2 MR. POSNER: Date on...

3 PRESIDENT VEEDER: "The measure at issue."

4 For the purpose of your claim.

5 MR. POSNER: Yes.

6 PRESIDENT VEEDER: Liability, causation,
7 quantum. The date.

8 MR. POSNER: Right.

9 The moment at which Pac Rim Cayman became
10 aware of the measure at issue, the moment it became
11 aware--

12 PRESIDENT VEEDER: That wasn't my question.

13 MR. POSNER: Okay.

14 PRESIDENT VEEDER: You're making a claim
15 under CAFTA. You say the relevant measure is the
16 measure at issue.

17 MR. POSNER: Yes.

18 PRESIDENT VEEDER: What is the date?

19 MR. POSNER: Yes--it is difficult to tell you
20 precisely the date on which that measure came into
21 existence. I can tell you the date on which Claimant
22 became aware of its existence, and that is March 2008.

04:28:43 1 So, approximately March 2008, Claimant became aware
2 that this practice existed as a practice. But because
3 the nature of this practice is an unwritten
4 practice--it's an unwritten measure--that consists of
5 a series of acts and omissions that only through the
6 light of President Saca's statement become--only
7 through the light of that statement does it become
8 apparent that they sort of have a cohesive existence
9 as a practice--as components of a practice, only at
10 that moment does Claimant become aware that there is a
11 measure that forms the foundation for its claim of
12 breach.

13 PRESIDENT VEEDER: If CAFTA had come into
14 effect in only February 2008, would you have a claim?

15 MR. POSNER: I believe we would because here
16 we are talking about a practice that is a situation
17 that began--in your hypothetical, Mr. President, would
18 have begun before entry into force but continued after
19 entry into force. It did not cease to exist.

20 PRESIDENT VEEDER: In those circumstances
21 where you were pleading an unlawful measure in March
22 2008, could you go back in time to put it in the

04:29:55 1 context before February 2008.

2 MR. POSNER: Absolutely.

3 And, indeed, we did that. And I will come to
4 that in a moment because I think some of the confusion
5 here or some of the confusion that Respondent has
6 created around the Notice of Intent and the Notice of
7 Arbitration stems from the reference to various acts
8 and omissions which we accurately described as
9 measures giving rise to the ultimate claim.

10 It is true that they gave rise to the claim
11 and that they created the foundation. They were
12 there. We don't deny that those delays, as Mr. de
13 Gramont said earlier, those frustrating delays, missed
14 deadlines, those various acts and omissions existed,
15 yes, they existed, but they only became cognizable as
16 the measure at issue when the measure at issue became
17 apparent, which wasn't until March 2008 at the
18 earliest.

19 I think the distinction that I'm making here,
20 Mr. President, between measures and the measure at
21 issue is a very important one, and I think to avoid
22 any confusion, I think an illustration might help to

04:31:01 1 clarify the point.

2 And we actually gave a small illustration in
3 our Counter-Memorial. I realize that the length of
4 these written briefs has been quite long, and it may
5 be--it may be that this illustration didn't get the
6 full attention it deserved, but in our
7 Counter-Memorial we referred to a case in the World
8 Trade Organization concerning a practice that was
9 alleged to be a measure. And I'm smiling a little bit
10 because I'm sure my former USTR colleagues at the back
11 of the room are smiling about my reference to a World
12 Trade Organization case in the context of an
13 investor-State arbitration, but I think the relevance
14 will become evident momentarily.

15 Now, the case I'm talking about concerned a
16 complaint by the United States about an alleged de
17 facto moratorium in the European Union on the
18 marketing of biotechnology products. It was a very
19 famous case at the time, and you may well be familiar
20 with it. There was no regulation imposing this
21 moratorium, but certain EU Member State
22 Representatives consistently voted in a way that

04:32:11 1 resulted in the rejection of applications for the
2 marketing of biotech products.

3 Now, the United States challenged the de
4 facto moratorium as opposed to the individual
5 rejections of marketing applications that made up the
6 moratorium. It was the moratorium that was the
7 measure at issue. And, indeed, the WTO Panel agreed
8 with that characterization of the moratorium. That
9 is, the panel agreed that it was the moratorium that
10 was the measure at issue, and it found that, and I
11 quote, even though it's hard to read on the screen, I
12 assure you that the quotation is up there: "The
13 general de facto moratorium on approvals constitutes a
14 challengeable EC measure."

15 Now, in making that finding, the panel
16 observed that, and again it's quoted up there,
17 although I know it's going to be hard to read, "The
18 moratorium is a measure which is the result of other
19 measures," meaning decisions. In other words, the
20 individual decisions, it was acknowledged, are
21 measures. They meet the definition of "measures."
22 But the moratorium as such was not cognizable until

04:33:19 1 you've had sort of an accumulation of these measures,
2 these individual components or constituent measures
3 over time. Only over time and as a result of various
4 public statements by the Member States involved in
5 those decisions did it become evident that there was
6 this practice, this moratorium of which these
7 individual decisions--these individual acts and
8 omissions were a part.

9 ARBITRATOR STERN: Maybe to follow up on the
10 same line because I think it's quite a crucial issue,
11 you state in a way, if I understand you correctly,
12 that the practice is a series of measures.

13 So, do you consider that the Claimant can
14 base its claim on acts that occurred before the time
15 that Claimant could invoke the protection of CAFTA?
16 And, if so, because you are speaking about continuing
17 measures, I remember that in your Counter-Memorial, in
18 Paragraph 163, you were speaking about continuing or
19 composite acts or omissions. Do you still base your
20 reasoning on that? And if so, is it rather a
21 continuing or a composite act, which, as you know, are
22 not exactly the same?

04:34:37 1 MR. POSNER: I believe, Professor Stern,
2 that--

3 (Document handed to counsel.)

4 MR. POSNER: Thank you.

5 --part of the difficulty in characterizing
6 the measure whether as an act or fact that occurred at
7 a moment in time or as you rightly point out we
8 propose in our Counter-Memorial, a continuing or
9 composite act, part of the difficulty in
10 characterizing it is that it's not a written measure.
11 It's not a statute. It's not a regulation. So, one
12 has to examine the conduct of the instrumentalities of
13 the Salvadoran Government over time to make that
14 determination.

15 I believe, as we stated in our
16 Counter-Memorial, that it is accurate to describe this
17 practice as either a composite act or--I'm sorry, a
18 composite or continuing act. I believe that that is a
19 fair--that would be a fair characterization for the
20 reasons we've described in our Counter-Memorial.

21 I think it's also possible, and again we just
22 don't know because the information we have is the

04:35:44 1 information we derived from our own experience
2 interacting with the Government over time, but I
3 believe you could also describe it as an act or a fact
4 that came into existence, if you will, in March of
5 2008. That's possible. I don't know the answer with
6 any precision because we don't know precisely at what
7 moment this measure was put in place.

8 So, I can't tell you with any certainty that
9 those prior acts and omissions, that even at that
10 early date, even back in 2004, or Mr. Smith said
11 earlier that there hasn't been a permit granted in El
12 Salvador in 2003. I can't say with any certainty
13 whether it was at that moment in time that the measure
14 was put in place, and so--

15 I believe that, based on the information we
16 have, any one of those characterizations may, indeed,
17 be an accurate characterization of the practice, but I
18 would submit that, for purposes of the Tribunal's
19 *ratione temporis* determination, you don't need to
20 decide which of those it is. The fact is--the clear
21 fact is it is one of those. It either is a continuing
22 or composite measure; or it is an act, fact, or

04:37:09 1 situation that took place, occurred for the first
2 time, at the moment when President Saca formally said
3 in March of 2008, "This is the practice. This is
4 going to be the way our agencies conduct themselves
5 going forward."

6 ARBITRATOR STERN: You answered part of my
7 question saying that you don't know exactly when the
8 practice started. Okay, let's take this as you said.
9 But one aspect of my question was whether in a
10 continuing practice you can take into account for a
11 claim acts that existed before you are protected.

12 MR. POSNER: Yes.

13 ARBITRATOR STERN: I mean, it's quite a
14 simple question. It's not simple to answer.

15 MR. POSNER: The answer is yes. You can take
16 them into account; and, indeed, we have done that. In
17 our Notice of Intent and in our Notice of Arbitration,
18 we've described those earlier acts and omissions
19 because they're quite relevant as context and as
20 background for understanding the practice that only
21 came to light subsequently. So, yes, indeed, we can
22 take them into account.

04:38:22 1 But let me be very clear: With respect to
2 our claim for damages, we are only asking for damages
3 as a result of the breach that we became aware of and
4 that we only could have become aware of in--as of
5 March 2008 at the earliest.

6 So, when I say we're relying on those earlier
7 acts and omissions, we're relying on them because they
8 appear to be part of the practice that is the measure
9 at issue.

10 ARBITRATOR STERN: And the last question I
11 don't ask you to answer now because I might need some
12 more time, but maybe in your Post-Hearing Brief, as
13 you said continuing or composite, but you didn't
14 choose. It's either one or the other. It cannot be
15 the two. That has a very precise meaning in
16 international law.

17 MR. POSNER: Yes.

18 ARBITRATOR STERN: So, if you could elaborate
19 on that in your Post-Hearing Brief--

20 MR. POSNER: We will absolutely do that.

21 Let me just--to close out on this point, and
22 then I'm going to walk through a bit our Notice of

04:39:24 1 Intent and our Notice of Arbitration and discuss a bit
2 how we've identified the measure at issue there, but
3 before I turn to that, just to close out on this point
4 and why I brought this on the EU biotech case to your
5 attention as sort of an analogy, the reason is that
6 the situation described there where you have a measure
7 at issue that consists of component measures--in that
8 case, a moratorium that consist was a series of
9 decisions--is really very much akin to the situation
10 we have here.

11 In this case, the de facto mining ban is a
12 measure which is the result of other measures. In the
13 biotech case, again, it was not immediately evident
14 that the individual rejections of marketing approvals
15 were part of a broader moratorium. It was only in
16 view of repeated conduct over time and other evidence
17 that it became apparent. The same is true here.

18 Now, as I said, Respondent alleges that in
19 our Notice of Intent and in our Notice of Arbitration
20 we have been less than clear on this point. In their
21 view, those documents characterized individual acts
22 and omissions that took place prior to December 2007

04:40:40 1 as the measure at issue, and I will admit, I will
2 admit, Mr. President, Members of the Tribunal, that we
3 could have been clearer in our drafting of the
4 notices. So, we do not claim perfection or
5 infallibility when it comes to the drafting of the
6 notices. However, even if we did not articulate our
7 claims as clearly in those documents as we did in more
8 recent submissions, we have been consistent throughout
9 this case.

10 In particular, we consistently have rested
11 our claims of breach of CAFTA obligations as well as
12 our claims of breach of the Investment Law obligations
13 on Respondent's practice of withholding metallic
14 mining-related permits, despite the requirements of
15 Salvadoran law.

16 In our Opening Statement on Monday, I called
17 your attention to Paragraph 9 of our notice of
18 arbitration; and given Respondent's contention that we
19 have changed the measure at issue in response to its
20 objections, it's worth recalling what is stated in
21 that paragraph, and I realize time is short, but let
22 me just read it briefly to remind you that, indeed, we

04:41:54 1 do identify the measure at issue in the manner I've
2 just described. What it says at Paragraph 9 is this:
3 Only after President Saca's announcement in March 2008
4 did they, meaning PRES and DOREX, understand that they
5 had become the target of something other than
6 bureaucratic delay or incompetence. Rather, President
7 Saca, without any legal or other valid reason, had
8 simply decided to shut the Enterprises down and
9 deprive them of their substantial and long-term
10 investments. As a result of the Government's actions
11 and inactions, the rights held by the Enterprises had
12 been rendered virtually valueless, and PRC's
13 investments in El Salvador have been effectively
14 destroyed.

15 Now, in the interest of time, I won't read
16 out the other places in our notices where we've made
17 similar statements, but I will describe them to you,
18 or I will give you the citations, and at its leisure,
19 I would invite the Tribunal to go back and read those.
20 I refer in particular to Paragraphs 73 through 81 of
21 the Notice of Arbitration, as well as Paragraph 32 of
22 the Notice of Intent.

04:43:05 1 And again in the interest of time, I'm not
2 going to read through all of those statements, but I
3 submit to you that they identify the measure at issue
4 precisely as I have just described it to you and as
5 Claimant has described it to you consistently
6 throughout this arbitration.

7 Now, that is why Claimant, contrary to what
8 Respondent alleged in its opening presentation on
9 Monday, concluded the factual recitation of its Notice
10 of Intent by referring to President Saca's March 2008
11 statement, and noting that Claimant commenced
12 negotiations with the Government in relation to its
13 permits in light of President Saca's comments.

14 So, while, as I said, we could have been
15 clearer, I won't contest that, we have, indeed, been
16 consistent.

17 But even to the extent that we were not as
18 precise as we could have been, we recall the
19 Tribunal's observations in its decision on the
20 Preliminary Objections that a Notice of Arbitration,
21 and I quote from Paragraph 99, "cannot be equated to
22 the fine-tuned instrument which emerges at the later

04:44:16 1 stages of ICSID arbitration proceedings." I submit to
2 you that our written submissions, I hope the Tribunal
3 views our written submissions as that fine-tuned
4 instrument.

5 And in any event, we urge, and again in the
6 Tribunal's words, we urge that the notice should not
7 be judged by a formalistic standard more appropriate
8 to a later pleading.

9 Finally, before I move on to denial of
10 benefits, let me just emphasize in response to the
11 Tribunal's question as to whether the measure at issue
12 is the same for the CAFTA claims and the Investment
13 Law claims, it is. In both cases the measure at issue
14 is the de facto mining ban. Also, as I said earlier,
15 in both cases, Claimant is alleging damages only from
16 the period from March 2008 forward and not from any
17 earlier period.

18 I'm going to take a brief drink of water here
19 and then turn to denial of benefits.

20 And on denial of benefits, Mr. President, I'm
21 only going to address two brief points in response to
22 topics four and five under that heading that the

04:45:36 1 Tribunal raised yesterday. With respect to
2 substantial business activities, I believe our
3 submission to you over the past three days is
4 complete, certainly further amplified by Mr. de
5 Gramont's remarks earlier this afternoon, and so I'm
6 going to focus on the question concerning ownership
7 that the Tribunal raised yesterday.

8 I'm also going to address the question of the
9 Foreign Affairs manual document that we've asked be
10 submitted into the record, and I'm going to respond to
11 a few points that Mr. Badini made with respect to the
12 untimely Notice of Intent to deny benefits. First,
13 with respect to the topic of ownership and control,
14 now, we submit that for purposes of the
15 denial-of-benefits analysis under Article 10.12.2, Pac
16 Rim Cayman is both owned and controlled by U.S.
17 nationals by virtue of the fact that a majority of the
18 Shareholders of its parent, Pacific Rim Mining Corp.,
19 are persons with addresses in the United States. And
20 for reasons discussed in our written and oral
21 submissions, we maintain that ownership and control of
22 an enterprise by persons of a Party defeats any

04:46:58 1 attempt to deny CAFTA benefits to the enterprise
2 whether that ownership or control is direct or
3 indirect. And the reasons for that have been
4 described earlier in this proceeding.

5 Now, assuming the Tribunal agrees with that
6 proposition, the next question, and the one that the
7 Tribunal posed yesterday afternoon is how one
8 determines the nationality of the Shareholders of a
9 publicly traded company such as Pacific Rim Mining
10 Corp., and we've suggested to you that an appropriate
11 Rule of thumb is the one applied by certain U.S.
12 Government agencies confronted with a similar problem.
13 And under that rule of thumb, if a majority of a
14 publicly held company's Shareholders have addresses in
15 the United States, the company is deemed to be owned
16 in the majority by citizens of the United States
17 absent any evidence to the contrary.

18 Now, the Tribunal has asked us for
19 information on the legal bases for applying this rule
20 of thumb. I would first refer the Tribunal to our
21 Counter-Memorial at Paragraph 329 and Footnote 397, as
22 well as our Rejoinder at Paragraphs 183 through 185.

04:48:10 1 And let me summarize briefly what's stated there.

2 There, we refer to two U.S. Government
3 agencies: The Overseas Private Investment
4 Corporation, or OPIC, and the U.S. Agency for
5 International Development, or USAID.

6 Now, let me talk first about OPIC, and you
7 will see on the screen, even though I know it's hard
8 to read, a page from the OPIC handbook, which has been
9 designated as Claimant's Legal Authority 127.

10 Now, the law establishing OPIC, which is 22
11 U.S.C. 2198, and we've provided that to you as
12 Claimant's Legal Authority 126, provides that
13 political-risk insurance is available only to
14 corporate entities that are, and I quote,
15 "substantially beneficially owned by United States
16 citizens." A corporation has to be substantially
17 beneficially owned by United States citizens. Not
18 residents, not persons with addresses, the statute
19 says citizens, in order to receive political-risk
20 insurance.

21 Now, realizing the practical impossibility of
22 determining the citizenship of Shareholders of

04:49:22 1 publicly traded companies, OPIC applies the law in the
2 following manner. It says, and I quote again from the
3 handbook, and this is what's highlighted on your
4 screen, "Where shares of stock of a corporation with
5 widely dispersed public ownership are held in the
6 names of Trustees or nominees, (including stock
7 brokerage firms) with addresses in the United States,
8 such shares may be deemed to be owned by U.S. citizens
9 unless the investor has knowledge to the contrary."
10 and this is stated in the handbook at Page 17 at the
11 asterisks footnote which you see highlighted there.

12 And by the way, you see it's also worth
13 noting that for purposes of the law it administers,
14 OPIC takes into account shareholding by persons with
15 addresses in the United States whether those
16 shareholdings are direct or indirect. Thus, the last
17 sentence in that same footnote reads, "OPIC generally
18 permits the beneficial ownership of U.S. corporations
19 to be determined by tracing back through any foreign
20 ownership of their shares to the ultimate beneficial
21 owners."

22 Of course, that is the same approach we

04:50:29 1 contend that the Tribunal should take here.

2 Now, Mr. Badini says, well you have to be
3 guided by the reference in Annex 2.1 of CAFTA, which
4 refers you to the Immigration and Nationality Act, and
5 the Immigration and Nationality Act says that a person
6 is a person of the United States or a national of the
7 United States only if it's a citizen or a person who
8 owes allegiance to the United States. I will put that
9 to one side. That category is not relevant here.

10 So, he says, you can only be a citizen--you
11 can only be a person of the United States if you're a
12 citizen. And while we don't disagree with that
13 proposition, it begs the question of how do you
14 determine the citizenship of the Shareholders of a
15 publicly traded company, and we submit that if U.S.
16 law is relevant to determining the nationality of the
17 Shareholders of a corporation, then one must look not
18 only to the black letter of the statute, but also to
19 the manner in which it is applied by the agencies that
20 are tasked with applying it.

21 In the interest of time, I will just identify
22 the other agency and the Legal Authority. I'm not

04:51:37 1 going to review how that agency administers its law in
2 the same depth, but it's the Agency for International
3 Development. The same principle applies. There are
4 benefits that are eligible to a company only if it's,
5 and I quote, "more than 50 percent beneficially owned
6 by individuals who are citizens of the United States
7 or certain other authorized countries," and USAID
8 applies that same rule of thumb.

9 Now, just to close out on this point before I
10 turn to the untimely notice, the unrebutted Broadridge
11 geographic profiles which we provided to you in
12 connection with Mr. Pasfield's Witness Statement show
13 that a majority of the Shareholders of Pacific Rim
14 Mining Corp., i.e., the indirect owners of Pac Rim
15 Cayman, have addresses in the United States; and,
16 following the rule of thumb that I have just described
17 to you, Pac Rim Cayman should be considered to be
18 indirectly owned in the majority by U.S. citizens.

19 Now, as I said, let me turn briefly to the
20 issue of notice and the related point regarding the
21 FAM, the Foreign Affairs Manual chapter that we've
22 asked to you admit into the record.

04:52:56 1 Let me first refer to the invitation by El
2 Salvador that Mr. Badini communicated earlier that it
3 would not challenge U.S. advocacy, advocacy by the
4 United States Government in State-to-State
5 consultations as a breach of Article 27. Well, while
6 that invitation which now comes more than 24 months
7 after this arbitration has commenced is interesting.
8 El Salvador does not have the power unilaterally to
9 waive the obligations of the United States under the
10 ICSID Convention. The ICSID Convention is not a
11 bilateral treaty. It is a multilateral treaty. And
12 El Salvador, one Party, cannot waive the obligations
13 of another Party under a multilateral treaty. That's
14 a basic principle of international law, and I'm sure I
15 don't need to dwell on that further.

16 Moreover, whatever possible comfort this late
17 breaking information may give to the United States,
18 and I doubt it gives it any at all, it still doesn't
19 change the untenable policy choice that El Salvador's
20 late notice imposes on the United States. El Salvador
21 has put the United States in a predicament which I
22 described yesterday. Either the United States could

04:54:09 1 invest whatever resources it chooses to invest in the
2 State-to-State dispute settlement process and possibly
3 breach its obligations under Article 27, or it could
4 refrain from doing that and prejudice the interests of
5 a United States investor.

6 But as I pointed out, what possible benefit
7 is to be gained from engaging El Salvador today, 24
8 months into this arbitration, in State-to-State
9 consultations? El Salvador clearly has committed it
10 to its position. Yes.

11 ARBITRATOR STERN: You just mentioned the
12 State-to-State consultation, but isn't that radically
13 different from diplomatic protection, which is a
14 protection of a national by the State?

15 MR. POSNER: Well, it is, that's right, but
16 as I pointed out in our opening submission, diplomatic
17 protection as that term is used in Article 27
18 certainly means something more than espousal.
19 Respondent's contention is it's confined to espousal.
20 But as I demonstrated in my statement on Monday, if
21 you interpret diplomatic protection as being confined
22 to espousal, then you render the second phrase, the

04:55:25 1 one that comes after the word "or" in Article 27(1) a
2 nullity because that second phrase refers to bringing
3 an international claim.

4 And so, if you interpret giving diplomatic
5 protection as espousal, then you're rendering that
6 second phrase a nullity.

7 ARBITRATOR STERN: But diplomatic protection
8 in the second paragraph of Article 27 is a reference
9 to diplomatic protection in the first, so it's not
10 alternative.

11 MR. POSNER: No, sorry. I was referring in
12 27(1), let me read it just so we are clear that we are
13 talking about the same verbiage.

14 So, 27(1) says, "No contracting state shall
15 give diplomatic protection," and then there is a
16 comma, "or bring an international claim, in respect of
17 a dispute with one of its nationals and another
18 Contracting State shall have consented to submit or
19 shall have submitted to arbitration."

20 Our point is that if you read diplomatic
21 protection to be confined to espousal, then you are
22 rendering the phrase "or bring an international claim"

04:56:37 1 a nullity.

2 But even more fundamentally, even more
3 fundamentally, Professor Stern, the concept of
4 diplomatic protection has been understood in other
5 cases to cover concepts broader than espousal, and we
6 gave you a couple of examples of that in a slide from
7 our opening presentation. For example, just to take
8 one example that I know Dr. Tawil is familiar with, in
9 the Duke versus Peru case, you had an investor that
10 had brought a petition--again, I hate to be picking on
11 my friends in the U.S. Trade Representative's office,
12 but Duke had brought a petition to USTR seeking
13 removal of Peru's trade preference, and Peru
14 complained, it complained to the Tribunal and it said
15 that's a violation of Article 27. Simply for USTR to
16 maintain that petition on its docket, even if it
17 doesn't act on the petition, even if it just lets it
18 sit there on the docket, the mere fact of having it on
19 the docket amounts to the giving of diplomatic
20 protection. It's impermissible, and Peru insisted
21 that it be taken off the docket.

22 And I give you that illustration to highlight

04:57:46 1 the fact that giving diplomatic protection is widely
2 understood as encompassing conduct much broader than
3 mere espousal as Respondent would have you believe.

4 But even more fundamentally, what would be
5 the point of the United States accepting the grudging
6 invitation that Mr. Badini made earlier today? What
7 would be the point? We're 24 months into this
8 proceeding. There has been a full briefing on denial
9 of benefits. There has been two rounds of extensive
10 briefing. We are almost completing an oral hearing
11 here. What would be the United States--what would be
12 the point of the United States sitting across from the
13 table with El Salvador and trying to persuade El
14 Salvador that Pac Rim Cayman has substantial business
15 activities in the United States? It would be a
16 completely futile exercise, and that really goes to
17 the basic--the nub of the issue here, which is that
18 CAFTA was written, and this "subject to" clause in
19 CAFTA which we are focused on here, which I remind you
20 was a departure from the template. It was unique for
21 the time. After NAFTA it had been decided by the
22 United States as a matter of policy not to include

04:59:03 1 that "subject to" clause, but it was included here on
2 an exceptional basis, and it was included here on an
3 exceptional basis obviously because the Parties,
4 whether it was the United States or whether it was the
5 Central American Parties felt it important that before
6 a country denies benefits it goes through these
7 procedural steps, that it gives the other Party--that
8 is, the other capital "P" Party--the home State of the
9 investor, a meaningful opportunity to engage in
10 State-to-State consultations, not just a check the
11 box, not just an empty opportunity to do it, but a
12 meaningful opportunity.

13 And by the way, Professor Stern, since you
14 referred to Paragraph 2 of Article 27, let me just
15 point something out there because this is a point that
16 Respondent has made in its briefs. They say, well,
17 Paragraph 2 of Article 27 says, diplomatic protection
18 for the purposes of Paragraph 1 shall not include
19 informal diplomatic exchanges for the sole purpose of
20 facilitating a settlement of the dispute.

21 So, the drafters of the ICSID Convention
22 recognize that informal diplomatic exchanges are okay,

05:00:12 1 but Article 20.4 of CAFTA, which is the relevant
2 provision here, isn't about informal diplomatic
3 exchanges. Quite the contrary. Article 20.4 appears
4 in the dispute settlement chapter of CAFTA. It is a
5 formal process. It's commenced through a written
6 request for consultation. Third parties are invited
7 to participate in the consultations. It's much more
8 involved than the informal diplomatic exchange that's
9 contemplated by Paragraph 2 of Article 27 of the ICSID
10 Convention.

11 Let me because I know we are running out of
12 time and there are important questions that I know
13 Mr. Ali wants to address, let me speak briefly to the
14 question of the FAM, which we've asked be admitted in
15 the record of this proceeding and how it relates to
16 this argument with respect to notice.

17 Now, the FAM, which I think I has been
18 distributed to everybody at this point--

19 PRESIDENT VEEDER: We have it, and we have
20 read it.

21 MR. POSNER: Yeah. Oh, terrific. Great.

22 Well, so as you know, it's entitled

05:01:24 1 "Assistance to citizens involved in commercial,
2 investment and other business-related disputes
3 abroad." It describes--it's a document that's
4 circulated to officials of the--

5 PRESIDENT VEEDER: To save you time, just
6 tell us why you wanted it.

7 MR. POSNER: Why it's relevant, okay. So,
8 the general policy described here is that when a
9 dispute has been submitted to arbitration, the United
10 States takes a hands-off policy. It stays out of it.
11 That is U.S. Government policy. That's well-known
12 throughout the U.S. Government, and it's articulated
13 very clearly here in the FAM.

14 The point is why would the United States have
15 negotiated a Free Trade Agreement where it provides
16 for State-to-State consultations at a moment taking
17 place at a moment when the United States as a matter
18 of long-standing policy has said it won't engage in
19 State-to-State consultations? What would have been
20 the point of providing for State-to-State
21 consultations at that time in light of U.S. Government
22 policy? That's the reason we wanted to put this

05:02:21 1 document before you, Mr. President.

2 ARBITRATOR TAWIL: Mr. Posner, are we then
3 referring then to paragraph S?

4 MR. POSNER: Paragraph S is a key paragraph.
5 I think the document needs to be read as a whole. I
6 think Paragraph G is also relevant. But certainly
7 paragraph S is an important paragraph.

8 I think the FAM is reflective of, as I said,
9 what is a well-known policy throughout the U.S.
10 Government.

11 If there are no further questions, I will
12 turn the podium over to Mr. Ali.

13 MR. ALI: If I may ask the Secretary how much
14 time we have left.

15 SECRETARY MONTAÑÉS-RUMAYOR: 15 minutes.

16 MR. ALI: Thank you very much.

17 Thank you, Mr. Chairman and Members of the
18 Tribunal. I will be brief because we do want to
19 reserve some of our time for rebuttal. There isn't
20 much of it, so hopefully at least we will have at
21 least five minutes. I'm going to hit just a couple of
22 points.

05:03:31 1 First of all, I'm going to deal with this
2 question of when is a dispute born versus when does a
3 dispute crystallize, and then I will address a couple
4 of the questions that you have put to us on the
5 Investment Law and then a few subsidiary points in
6 advance rebuttal of the presentation that was made by
7 Respondents earlier.

8 Now, I wasn't very good at either biology or
9 chemistry when I was in school, so I'm going to stay
10 away in discussing this issue from anything being born
11 or conceived in biological terms or crystallized in
12 chemical or geological terms. I think that those are
13 natural analogies that people might be looking to when
14 they think about this. And I see some smiles around
15 the room, and, Professor Stern, you I think
16 appropriately are smiling, but I do think it's
17 important to think about conceptually when one's
18 thinking of being born. I mean, there are debates
19 about these issues.

20 So, what I have done is look at all of the
21 cases addressing not only abuse of process arguments,
22 but also jurisdiction *ratione temporis* in thinking

05:04:52 1 about this issue.

2 What are those cases and commentaries? I
3 looked at Professor Schreuer in his recent commentary
4 in which he says, and here I quote, "The time of the
5 dispute is not identical with the time of the events
6 leading to the dispute. By definition, the
7 incriminating acts must have occurred sometime before
8 the dispute. A dispute requires not only the
9 development of the events to a degree where a
10 difference of legal positions can become apparent, but
11 also the existence of a communication between the
12 Parties that demonstrates the difference, but also the
13 existence of a communication between the Parties that
14 demonstrates the difference."

15 I also looked at Maffezini versus Spain,
16 Lucchetti versus Peru. I looked at Duke Energy versus
17 Peru, which dealt with the issue of the consummation
18 point of a dispute. I looked at Helnan. I looked at
19 a number of cases.

20 Now, of course, what I did note from
21 reviewing all of these cases is a number of things:
22 First of all, that these are issues that both

05:06:04 1 Professor Stern and Professor Tawil have had occasion
2 to consider before on tribunals on which they have
3 both sat. And we're glad that the Chairman will now
4 have an opportunity to address these issues as well
5 and to join this august club because it is a very,
6 very difficult issue.

7 Now, different tribunals have used different
8 terminology and different phraseology to address this
9 issue. We will identify the different standards
10 adopted by various Tribunals in our written briefing.
11 I don't think I have the time to do it now, but just
12 let me make a couple of very quick points.

13 Mr. Smith said that for abuse of process you
14 shouldn't be looking at when a dispute crystallizes,
15 but when it is born; and, in that connection, he
16 referred to Mobil. Now, the facts in Mobil are very
17 clear. We had three letters in February, May, and
18 June of 2005 in that case specifically referring to
19 ICSID arbitration as a means of resolving Mobil's
20 claims or complaints regarding its royalty
21 assessments. So, there were communications
22 specifically invoking the instrument of consent.

05:07:33 1 Now, Mr. Smith also acknowledged that there
2 is a separate inquiry for purposes of jurisdiction
3 *ratione temporis* and abuse of process. We completely
4 agree, and we are actually quite pleased that our
5 opponents have finally understood this clarification
6 because certainly in their written pleadings this is
7 an issue that they have confused and, we believe,
8 purposefully elided the two inquiries, but now have
9 been forced to concede that they are, indeed, separate
10 inquiries.

11 And then Mr. Smith went on to characterize
12 the Maffezini test for jurisdiction *ratione temporis*
13 as, I quote, "a heightened test." And I'm using his
14 words. So, what he's telling you is that there should
15 be a lower standard or perhaps a less rigorous inquiry
16 for the purposes of abuse of process. That can't be
17 right. We would submit to you that it is, in fact,
18 quite the opposite.

19 Now, once you have reviewed our written
20 pleadings on this issue, and the standards that we
21 will be putting before you, we think that the
22 following propositions come across very clearly from

05:08:58 1 the cases and commentary, and they are these: Given
2 the severity of the allegation and the severity of the
3 sanction--and here we are dealing with abuse of
4 process--the temporal determination for abuse of
5 process purposes must be made on the basis of
6 evaluating what concrete acts were taken by the Party
7 asserting jurisdiction to invoke the instrument on
8 which it intends to base its consent and under which
9 it intends to assert its claims.

10 Now, this need not be a formal assertion of
11 claims in the form of a Notice of Intent or a BIT
12 notice or a Request for Arbitration. It can be as was
13 the case in Mobil a letter communication invoking the
14 protection of the instrument of consent.

15 The relevant conflict of legal or factual
16 claims bearing on the parties' respective rights, and
17 that phrase "legal or factual claims bearing on the
18 parties' respective rights" are put in quotes. It
19 comes from *Mavrommatis*, and it's a standard that you
20 will see articulated in a variety of cases. So, the
21 relevant conflict of legal or factual claims bearing
22 on the parties' respective rights must be one that

05:10:19 1 gives rise to State responsibility on the
2 international plane, not just the domestic plane.
3 Why? Because what is at issue is an objection
4 regarding the abuse of an instrument of international
5 jurisdiction.

6 And the other proposition that becomes very
7 clear from the different cases and commentary is that
8 the Party that is asserting an abuse of process is the
9 Party that bears the burden of demonstrating clearly
10 and convincingly that the acts relied on by the Party
11 asserting jurisdiction are not the relevant acts, and
12 we will elaborate on all of these different
13 propositions in our written briefing.

14 Now, let me turn very quickly to consent
15 under the Investment Law.

16 Now, Respondent's attempt to turn your
17 decision in connection with El Salvador's Preliminary
18 Objections into Hobson's choice sounds catchy at first
19 blush, but they're completely wrong. Based on your
20 earlier conclusion that the arbitration proceedings
21 commenced on the CAFTA and the Investment Law, and I
22 quote, "indivisible being the same single ICSID

05:11:44 1 arbitration," what they're asking you to find is that
2 because there has been abuse of process of one
3 instrument of consent, you must also necessarily
4 dismiss the claims asserted under the other instrument
5 of consent, even though there has been no abuse of
6 process alleged, let alone proven with respect to that
7 instrument of consent. And here we are talking about
8 the Investment Law. This makes no sense whatsoever.

9 They then say if you decide that there isn't
10 this omnibus dismissal based on abuse of process, you
11 must dismiss the Investment Law claims based on
12 Claimant's CAFTA waiver. This also makes no sense.
13 Why?

14 First of all, let's not forget that Pac Rim
15 Cayman could have invoked Article 15 of the Investment
16 Law when it was a Cayman Islands company, in the same
17 way that it has done as a Nevada company. And that's
18 an issue that we address in our written pleadings, so
19 I won't dwell on it much further.

20 Secondly, what we have here is one ICSID
21 arbitration based on two separate consents in which
22 different claims are being asserted under two

05:13:04 1 different instruments of international investment
2 protection, and which must be decided under what the
3 Tribunal may ultimately determine to be different
4 legal standards, even if those claims arise out of the
5 same common nucleus of facts.

6 So, even if you agree, if you agree with them
7 for some reason that our CAFTA claims should be
8 dismissed, there is no reason whatsoever for also
9 dismissing our investment law claims for lack of
10 jurisdiction unless you have an independent basis for
11 doing so, and we don't believe you do, and we
12 certainly don't believe that there is any basis to
13 dismiss our CAFTA claims for an abuse of process.

14 And finally, your findings on the waiver
15 issue res judicata. Now, this is a complicated issue.
16 When everyone starts about issue preclusion or
17 preclusive affect or res judicata, the inquiry is
18 necessarily, I believe, best put or addressed in
19 writing, and so we understood the question that you
20 raised yesterday; and, if you would indulge to us deal
21 with it in writing, we would be grateful.

22 Then, just a couple of additional points.

05:14:24 1 Mr. Smith, in his presentation, dealt with the--

2 PRESIDENT VEEDER: Let me stop you.

3 MR. ALI: Yes, sir.

4 PRESIDENT VEEDER: I'm not sure you have
5 understood our point. It's not whether our decision
6 on the waiver is or is not res judicata, but whether
7 the reason which we gave in our decision, namely the
8 indivisibility of these proceedings, is something that
9 we can't--or doesn't allow us to review the issue
10 today on its merits, which is the issue of
11 indivisibility invoked by the Respondent. We're not
12 seeking to revisit the waiver itself.

13 Now, maybe that's expressed rather unclearly
14 as it was last night, but I'm surprised to hear you
15 say that you're going to allege res judicata in regard
16 to our decision.

17 MR. ALI: Then I may not have understood--we
18 may not have understood the question that was put
19 yesterday. We will re-examine the question as was
20 stated yesterday in light of the comments you have
21 just made, Mr. President.

22 And may I also say that, as I did at the

05:15:35 1 outset, that to the extent that we have made any
2 statements with tired minds in the context of these
3 closing arguments, we have reserved the right to
4 clarify and revisit without prejudice in our written
5 submissions. But thank you for the clarification, and
6 I do think that it's beginning to dawn on me what it
7 is that--what the import is of your question.

8 Just briefly turning to a couple of very
9 quick points, Mr. Smith addressed the withdrawal of
10 this warning letter that we've heard some about, and
11 the withdrawal of a fairly key letter from the El
12 Salvadoran Government to our client. But there is
13 absolutely no evidence in the record that this letter
14 was withdrawn. And presumably, as it's their letter,
15 you would assume that they would have been able to
16 provide evidence of its withdrawal because these are
17 official communications within the context of a
18 bureaucratic procedure in the truest sense of
19 bureaucracy.

20 So, we would imagine they would be able to
21 adduce some evidence that they have withdrawn this
22 letter, and we would submit to you that it was not

05:17:05 1 withdrawn, but that is an issue to be dealt with on
2 the merits.

3 Mr. Smith focused on language in our Notice
4 of Intent where we stated that our client's investment
5 was rendered valueless, virtually destroyed. Well, as
6 Mr. de Gramont pointed out, that happened after the
7 meetings in June of 2008. You saw the chart that
8 Mr. de Gramont put up, demonstrating the precipitous
9 decline in our client's investment in El Salvador
10 following in the June-July 2008 period and thereafter.
11 And this followed the meeting between Mr. Shrake and
12 the United States Ambassador and President Saca and
13 various Government officials in El Salvador. The
14 assurances given by President Saca that there
15 was--that the permits were going to be imminently
16 issued, the subsequent newspaper statements by
17 President Saca that no permits were going to be
18 issued, and Mr. Shrake's consequent shutdown of
19 operations, so that's when the company's share value
20 took a precipitous decline.

21 Now, that's not to say that the company
22 didn't suffer damage as a result of the delays that it

05:18:39 1 had been experiencing over the previous years, but
2 that is an issue for the merits; and, as Mr. Posner
3 said, we will be invoking or relying upon facts, acts,
4 omissions that occurred prior to the domestication of
5 Pac Rim Cayman, but our claims don't arise exclusively
6 out of those acts, facts, or omissions. And again,
7 this is a matter that we have addressed in our written
8 pleadings, and we will certainly make this quite clear
9 again, we hope, in our post-hearing submissions.

10 And with that, I will close because I hope we
11 have been able to reserve some time for a brief
12 rebuttal, but I don't know if that's true.

13 PRESIDENT VEEDER: I think you're overdrawn
14 with the Secretary's bank.

15 MR. ALI: Okay. Well, we will certainly
16 provide some credit, then, to our opponents.

17 PRESIDENT VEEDER: Do the Respondents wish to
18 make use of any Reply?

19 MR. SMITH: Yes, please, so it's on the
20 record.

21 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

22 MR. BADINI: Members of the Tribunal, I will

05:20:02 1 be very brief. I have assured Mr. Smith I will give
2 him the bulk of the time.

3 I would just like to make a couple of points
4 on denial of benefits. Mr. Ali used the phrase,
5 albeit in a different context, "State responsibility
6 on the international plane." And I think that that
7 phrase is quite applicable to the denial-of-benefits
8 issue before this Tribunal. I apologize for this but
9 unfortunately by invoking this concept, we have put a
10 heavy burden upon this Tribunal because it is the
11 first Tribunal, to my knowledge, to decide this
12 denial-of-benefits issue in the context either of
13 CAFTA or NAFTA.

14 But the reason I raise the issue, or the
15 phrase that Mr. Ali put on the screen a few moments
16 ago, is because of something I heard in closing on
17 denial of benefits today about how Mr. Shrake lives in
18 Nevada and how he does everything in Nevada and how he
19 is a U.S. citizen.

20 I submit to this Tribunal that something as
21 profound as the issue of denial of benefits and
22 whether or not the Claimant--the Claimant--has

05:21:30 1 substantial business activities in the United States
2 or controls someone from the United States cannot turn
3 on the physical location of the Chief Executive
4 Officer of a company. It cannot turn on that issue,
5 or even the citizenship of the Chief Executive Officer
6 of a company.

7 There are many large international
8 corporations today all over the world that are in many
9 jurisdictions. And, in fact, some of them were born,
10 to use another phrase that's been thrown around here,
11 were born in places other than the U.S. but now have a
12 Chief Executive Officer in the U.S. In fact, I think
13 Novartis is one of them; I may be mistaken, but if so,
14 I know there are others.

15 Now, let's look at what the Rule urged by
16 Claimant would do to international relations and to
17 the Rule of denial of benefits. If a company like
18 Novartis has a Chief Executive Officer in the U.S.,
19 does substantial business in the U.S., and sets up a
20 Cayman Islands subsidiary, that, let's say, invests in
21 El Salvador, and then years after the events leading
22 up to the dispute have taken place, decides to move

05:22:51 1 that subsidiary to the United States, can they take
2 the position, which is the position that they have
3 taken here, that Claimant has taken in this
4 arbitration, that because the Chief Executive Officer
5 of the parent is in the United States and has been
6 there a long time and because Novartis as a company,
7 as a family of companies, does substantial business in
8 the U.S., then surely that sub qualifies as having
9 substantial business in the U.S. That cannot be the
10 test, and there is no support for that being the test.

11 Now, the argument was also made that when he
12 was in the U.S., he made all of these decisions and,
13 therefore, he exercised control, and so we have not
14 shown, Claimant says, that control was exercised from
15 Canada. But again the words of Mr. Shrake belie that
16 argument. I asked him directly yesterday whether the
17 companies that he circled on our exhibit were
18 controlled by the Canadian parent. The question was:
19 And does Pacific Rim Mining Corp.--that's the Canadian
20 parent--also control all of these companies you just
21 circled?

22 Yes.

05:24:17 1 The second point, and my final point is
2 simply on this issue of notice, again. I would just
3 like to say a few things.

4 First of all, the treaty language does not
5 have any time limit on when denial of benefits have to
6 be invoked.

7 Second, as Professor Stern correctly
8 recognized, diplomatic protection is different, an
9 entirely different concept, from State-to-State
10 consultations. And the argument that engaging in
11 State-to-State consultations would somehow amount to
12 giving diplomatic protection is not supported by any
13 authority.

14 And, finally, I would just like to remind the
15 Tribunal of El Salvador's waiver of any rights to make
16 that argument. There was some suggestion that we
17 could not affect the rights of other ICSID Parties,
18 but I would just leave the Tribunal with the question:
19 What other ICSID Parties would even have standing to
20 complain about any State-to-State consultations that
21 the United States engaged in with El Salvador?

22 On that note, unless the Tribunal has any

05:25:30 1 questions, I will cede the podium to Mr. Smith.

2 Thank you.

3 PRESIDENT VEEDER: We'll hear Mr. Smith.

4 MR. BADINI: Thank you for your indulgence.

5 MR. SMITH: Thank you, Mr. President, Members
6 of the Tribunal.

7 Mr. Posner indicated that he was going to
8 clear up the confusion about the measure or measures
9 that are the basis of their claim. Just in their
10 presentations this afternoon, they've defined the
11 measure in three different ways.

12 With reference to the--or maybe even
13 more--with reference to the Press Reports about
14 President Saca, Mr. de Gramont said that is when the
15 dispute began to crystallize. Mr. Ali, talking about
16 the measures that destroyed their investment, said
17 that happened after the meeting in June 2008.

18 And then Mr. Posner said the de facto mining
19 ban is confirmation of a practice; that is the measure
20 at issue. It is very, very hard, and when Mr. Posner
21 was asked directly to define the date on which the
22 measure that interfered with their investment took

05:27:00 1 place, he had a very elaborate theory as to why he
2 could not identify that date, but the reality is, is
3 that their definition of the measure has been a moving
4 target throughout this arbitration in order to fit the
5 legal theory that allows their case to continue.

6 Mr. Posner referred to not being very clear
7 in the drafting of the Notice of Intent. There is
8 nothing unclear about the drafting of the Notice of
9 Intent. There is nothing unclear about the drafting
10 of the Notice of Arbitration. It is very clear. And
11 when lawyers--when lawyers draft a document that
12 initiates and refers to an arbitration under CAFTA
13 where the word "measure" is a defined term and a term
14 of art, and then they say that their claims arise
15 because of a measure and that those measures destroyed
16 their investment, I find it hard to believe that they
17 did not understand that they were alleging that those
18 measures are their claims under CAFTA and that somehow
19 later on they realized that they only have one
20 measure. It just doesn't--it does not fit.

21 In fact, the measures that they refer to in
22 their Notice of Intent are quite clear, and they--the

05:28:43 1 other issue is that we don't know--or I don't
2 know--perhaps the Tribunal knows--what exactly they
3 allege about the 2008 Press Report about President
4 Saca. Was it a measure? Did it start a ban on
5 mining? Did it crystallize the dispute? Did it
6 inform them about a measure that already existed?
7 Every time that they mention the article about
8 President Saca, they have not put it on the screen
9 once in these entire three days, and the reason for
10 that is, is because the language in it doesn't support
11 the interpretation that they would like to give it.
12 They didn't show it once. They've referred to it, and
13 they've said what it says multiple times, and every
14 time they've said what it says, it isn't the language
15 used in it. It is a paraphrase that twists the
16 language in it.

17 Now, Mr. de Gramont indicated that El
18 Salvador has not made mention to the documents that
19 they have cited to after March 11th, 2008. They cite
20 a number of additional Press Releases. We cited Press
21 Releases from 2006 and 2007, which they seem to give
22 no importance to, but there is a legal reason why we

05:30:30 1 believe those press articles--and it's not a reason of
2 convenience. The issue for abuse of process is, as
3 they have stated, did the dispute arise prior to
4 December 13, 2007? And they have specifically stated
5 that that's the issue.

6 Now, they cannot escape that Claimant's
7 position was that the dispute was fully crystallized
8 in March of 2008 because they threatened arbitration
9 to Mr. Saca, to the President of the country directly,
10 under CAFTA based on that, or at least by April 14th.

11 Therefore, for the question of abuse of
12 process, the issue is everything that happened after
13 that is irrelevant because both Parties agree that
14 there was a dispute on that date, and the question is:
15 Did it arise before that date? So, everything they've
16 cited, the Funes articles, the additional Saca
17 articles, are irrelevant to the inquiry of abuse of
18 process. The question is: What was the state of
19 facts on December 13, 2007?

20 Now, I wanted to just briefly say something
21 about the testimony of Ms. Hashimoto--or about
22 Ms. Hashimoto in Mr. Shrake's Witness Statement. I

05:32:14 1 believe if you read Paragraph 110 carefully, she did
2 not come up with the idea of changing the nationality
3 of Pac Rim Cayman. She came up with the idea of
4 saving money by abolishing the operations where--the
5 subsidiaries where they had no operations in Peru and
6 Mexico and, thereby, abolishing Pac Rim Caribe. And
7 then Mr. Shrake goes on to say that as a result of
8 this we--and so the decision, as Mr. Shrake has
9 admitted multiple times in this proceeding, the
10 decision to change the nationality was Mr. Shrake's,
11 not Ms. Hashimoto's.

12 Now, I wanted to also address something
13 Mr. Ali said. He said that a dispute doesn't arise
14 for the purpose of abuse of process until there is a
15 concrete invocation of instrument of jurisdiction.
16 That would be a fantastic definition for Claimants
17 because Pac Rim Cayman could not invoke the instrument
18 of jurisdiction until after the change of nationality
19 because they needed to change the nationality in order
20 to invoke jurisdiction. This can't be the standard
21 for abuse of process or abuse of process would never
22 exist. And no Tribunal has ever even come close to

05:34:16 1 that sort of a definition.

2 And just let me conclude for El Salvador that
3 El Salvador has put forward four very substantial
4 Objections to Jurisdiction. Each and every one is
5 sufficient to dismiss some or all of this arbitration.
6 The primary objection is abuse of process, and I urge
7 the Tribunal in that regard to very carefully read the
8 Claimant's Notice of Intent, the Claimant's Notice of
9 Arbitration, and the Press Reports from March 2008,
10 and Mr. Shrake's letter with regard to those Press
11 Reports, as well as the other facts that have put into
12 the record by El Salvador regarding the dispute
13 regarding the Application for the exploitation
14 Concession, how that dispute developed from 2004 to
15 2007. Very carefully look at the facts, not the
16 twisting of facts by Claimant's counsel, not their
17 redefinition of the measures upon which they base
18 their case. Carefully look at the facts and come to a
19 factual determination as to on what date the
20 interference with the investment took place, on what
21 date the dispute was born, and I think the inevitable
22 conclusion is that it was before December 13, 2007.

05:36:17 1 And because they manipulated the nationality of
2 Claimant to gain access to CAFTA, that means they have
3 abused process, and this entire arbitration must be
4 dismissed.

5 Thank you very much.

6 PRESIDENT VEEDER: Thank you very much.

7 Mr. Ali, you have 12 seconds, if you want to
8 save five of them, you can address us sitting down.

9 MR. ALI: I believe the fact that we're 12
10 seconds over, so we will rest on our submissions, our
11 pleadings, and make further comments in our
12 Post-Hearing Submissions.

13 Thank you, Mr. Chairman.

14 PRESIDENT VEEDER: Thank you. Thank you all
15 for your closing oral submissions.

16 We now need to just tidy up the procedure,
17 which will start obviously when we adjourn in a few
18 moments.

19 First of all, we would like to announce our
20 decision regarding the so-called "FAM" document.
21 Subject to any further submissions from the
22 Respondent, we are now minded to admit the FAM

05:37:15 1 document into evidence and to request the Respondent,
2 if it wishes to do so, to address the Claimant's
3 argument we've just heard in its Post-Hearing Brief.
4 We don't need to hear that now.

5 Does the Respondent wish to make any further
6 submissions opposing this introduction of the FAM
7 document?

8 MR. SMITH: No. Respondent won't make any
9 further submissions.

10 PRESIDENT VEEDER: As regards the Procedural
11 Timetable, it's now agreed, and this order is
12 immediately effective, or they will confirm it in
13 writing, that the deadline for any written submissions
14 by CAFTA non-disputing parties is the 20th of May
15 2011. The deadline for any written submissions by the
16 designated amicae that is designated by the Tribunal's
17 previous order is also the 20th of May 2011.

18 The 10th of June, 2011, is the agreed date
19 for the Parties to exchange and to submit to the
20 Tribunal through the ICSID Secretariat their
21 Post-Hearing Briefs. We are talking of one round. We
22 discussed here today the desirability of agreeing or

05:38:23 1 imposing a page limit, and we asked the Parties
2 whether they discussed that between themselves. We
3 have a figure in mind if they haven't.

4 We ask the Respondents first.

5 MR. SMITH: We haven't actually discussed a
6 figure.

7 MR. ALI: No--we will be guided by the
8 Tribunal.

9 PRESIDENT VEEDER: 50 pages. Will that cause
10 any difficulties to either side?

11 MR. SMITH: Not to Respondent.

12 PRESIDENT VEEDER: Yes, it has to be in
13 legible print of a sizable font (laughter), and it
14 includes all footnotes and endnotes, and we would like
15 spaces between the words.

16 (Laughter.)

17 PRESIDENT VEEDER: But we trust you.

18 We would like with that, obviously on one
19 view of what happens with our decision, we may have to
20 address costs, and that's the claims which is made by
21 the Respondent. So I think we need a brief summary as
22 regards both allocation and quantification of costs

05:39:25 1 that are being sought by both sides. We would like
2 that with your Post-Hearing Submissions on the 10th of
3 June. It need not be very long. We are not asking
4 for an audit, but enough to give the other side some
5 idea of why and what is being claimed.

6 And then we'd suggest that within a very
7 short time limit, there ought to be a very brief
8 response if you are minded to respond to those costs
9 submissions.

10 Now, do you have any date in mind? Can I ask
11 the Respondent first for doing any response on the
12 costs submissions from the other Party?

13 MR. SMITH: I have not looked at a specific
14 date, but given other matters that do, I would ask
15 that it be after the 17th of June.

16 PRESIDENT VEEDER: Well, if we said two
17 weeks, would that be convenient?

18 MR. SMITH: Two weeks.

19 MR. ALI: That's fine for us, Mr. Chairman.

20 PRESIDENT VEEDER: So we'll do two weeks.

21 Now, apart from anything relating to costs,
22 we close the file at this stage as regards our

05:40:28 1 decision. There is to be no new evidence of any kind
2 submitted to us. It's understood, I hope, by the
3 Respondents and the Claimants.

4 MR. ALI: Confirmed by Claimants,
5 Mr. Chairman.

6 PRESIDENT VEEDER: Can I say--

7 MR. ALI: Sorry, Mr. Chairman, with one
8 proviso, which is the application that was made by
9 Mr. Posner in his presentation for the information
10 that Mr. Parada claims is being investigated. That
11 will be provided.

12 PRESIDENT VEEDER: As I understood that
13 Application, it was made to the Tribunal, and
14 obviously the Tribunal can order a Party to introduce
15 new material, but we haven't made an order in respect
16 to that Application. We are not wanting the Parties
17 to volunteer in their Post-Hearing Brief further
18 evidence or, indeed, at any other stage after today,
19 except for costs, and I think we ought to add maybe
20 except if there is any response to the FAM document.

21 If that causes any difficulties to any side,
22 we need to hear that now and resolve it.

05:41:31 1 Is there any difficulty on the Respondent's
2 side with that approach?

3 MR. SMITH: No difficulty.

4 PRESIDENT VEEDER: And on the Claimant's?

5 MR. ALI: No difficulty.

6 PRESIDENT VEEDER: The transcript, as always,
7 is perfect, and I'm not going to insinuate otherwise,
8 but if there are any correction to the transcripts,
9 particularly to the testimony, we are not talking
10 about obvious mistakes, we would like that to be
11 notified within the next seven days.

12 Is that agreeable to both sides? We ask the
13 Respondent first.

14 MR. SMITH: Yes.

15 MR. ALI: Yes.

16 PRESIDENT VEEDER: Is there anything else we
17 need to address at this stage? We ask the Respondent
18 first.

19 MR. SMITH: Nothing further from Respondent.

20 PRESIDENT VEEDER: Anything from Claimant?

21 MR. ALI: Mr. Chairman, you had mentioned an
22 issue that you didn't want to forget that we address,

05:42:37 1 but I can't remember what it is. Yeah, so perhaps it
2 is forgotten but...

3 The other thing is that you had yesterday
4 said--the other--yesterday, you had also indicated
5 that there may be more questions forthcoming from the
6 Tribunal. If we could set a date by which we might
7 get those.

8 PRESIDENT VEEDER: Can I suggest that, in
9 fact, we will raise those after we've read your
10 Post-Hearing Briefs? You're pretty good at answering
11 a lot of questions that we have in mind and even
12 questions that we haven't thought of.

13 So, we'll anticipate first reading your
14 Post-Hearing Briefs, but then we may have further
15 questions, fairly specific questions, but I suspect if
16 we ask them now, these are probably something you
17 already have well in mind or indeed have previously
18 answered already in some of your extensive written
19 material. So we will leave that for the moment. But
20 please be assured if we have any further questions, we
21 won't hesitate to ask you both to address them.

22 MR. SMITH: Mr. President, I think perhaps

05:43:36 1 the issue that Mr. Ali was referring to was the
2 provision of transcripts to the...

3 PRESIDENT VEEDER: Of course. Let's come
4 back to that.

5 First of all, there is no difficulty in our
6 supplying copies of transcripts to the nondisputing
7 CAFTA Parties, I take it. From either side we can do
8 that?

9 MR. SMITH: No problem from Respondent.

10 PRESIDENT VEEDER: And from the Claimants?

11 MR. ALI: None from Claimant. I've just
12 confirmed that with Mr. Shrake.

13 PRESIDENT VEEDER: Now, we understood that
14 fairly swiftly after we indicated there was a problem,
15 the live feed resumed, so we assumed that it may be
16 only about 15-20 minutes was missing at the most.

17 So, I suspect people who have access to what
18 has been happening here, including the amicae, but it
19 may be that they would wish to have a transcript of
20 the three days. Is there any difficulty about
21 providing that transcript either by the Parties, the
22 disputing Parties, or by the ICSID Secretariat? We

05:44:31 1 ask the Respondents first.

2 MR. SMITH: No difficulty for Respondent.

3 PRESIDENT VEEDER: And the Claimants?

4 MR. ALI: None from us, Mr. Chairman,
5 although we would prefer it be provided by the ICSID
6 Secretariat.

7 PRESIDENT VEEDER: Well then we will do that.

8 Okay.

9 Now the usual question at this stage, as you
10 appreciate, sometimes members of arbitration
11 tribunals, especially ICSID tribunals, are only human
12 beings, and they can make mistakes. Is there anything
13 either of you wish to raise here by way of a
14 procedural mishap that we need to correct, if we can
15 do so at this stage? It's a fairly formal question,
16 but we ask the Respondents formally first.

17 MR. SMITH: Nothing from Respondent.

18 PRESIDENT VEEDER: And from the Claimants?

19 MR. ALI: Nothing with respect to this
20 particular phase, Mr. Chairman.

21 PRESIDENT VEEDER: Thank you very much.

22 I think it allows me to say on behalf of the

05:45:20 1 Tribunal, and I'm sure the Parties, too, a big thank
2 you to our shorthand writers, without whom this would
3 be a memory feat of distinction, and to thank also the
4 interpreters whom we haven't seen but have been
5 laboring in the back, and also the technicians behind
6 us, who have been providing the live feed, and we
7 don't know to how many people; they may have reduced
8 significantly over the last three days, but they may
9 still be quite numerous.

10 And I think from the Tribunal's side, we
11 would like to express our great things to all the
12 counsel and the support staff. It's been a very
13 interesting and a very efficient hearing in what is
14 not an easy case, perhaps for any of us. So thank
15 you, all, very much, and I formally close this
16 hearing.

17 MR. ALI: Thank you.

18 MR. SMITH: Thank you, Mr. President.

19 (Whereupon, at 5:46 p.m., the hearing was
20 adjourned.)

21

22

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

