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

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

HEARING ON JURISDICTION

Monday, May 2, 2011

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

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

MR. V.V. VEEDER, President

PROF. BRIGITTE STERN, Co-Arbitrator

PROF. GUIDO SANTIAGO TAWIL, Co-Arbitrator

Also Present:

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

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P R O C E E D I N G S

PRESIDENT VEEDER: Let's begin.

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

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

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

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

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

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

09:01:37 national of the United States in this arbitration. The initiation of the arbitration amounts to abuse of process because the manipulation of Claimant's nationality occurred after the alleged interference with Pacific Rim Mining's investment.

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

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

There is also no jurisdiction ratione

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

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

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

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

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

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

Let me now begin with the abuse of process objection.

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

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

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

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

The Tribunal drew a clear distinction between

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

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

In fact, as shown by the Phoenix Tribunal's

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

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

'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.'"

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

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

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

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

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

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

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

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

09:14:06 Islands to the United States.

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

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

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

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

Claimant's own Notice of Arbitration

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

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

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

09:18:29 1 establishes beyond any doubt that a dispute existed
2 before December 13th, 2007, and that Claimant's
3 Canadian parent, Pacific Rim Mining, was aware of and
4 was actively attempting to resolve that dispute when
5 its senior executives decided to manipulate Claimant's
6 corporate form to gain access to ICSID arbitration
7 under CAFTA that neither the Canadian parent nor
8 Claimant would have otherwise had. Therefore, the
9 second prong of the abuse of process test is also met.
10 Claimant, however, rather than recognize the
11 facts that stand out so clearly from the record has
12 instead decided to compound its bad faith abuse by
13 making new and contradictory factual assertions and
14 adopting novel legal positions that contradict the
15 premise of its case as set forth in the Notice of
16 Intent. Fortunately, despite the volumes of largely
17 irrelevant information put in the record by Claimant
18 and the more than 400 pages of its Counter-Memorial
19 and Rejoinder, the written pleadings have actually
20 served their intended purpose of narrowing the issues
21 for decision.
22 As Claimant recognized in its

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

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

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

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

Now, let me focus on the facts alleged by

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

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

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

09:24:30 1 measures from Claimant's point of view when it decided
2 to initiate these proceedings. The definition of the
3 dispute is uncontaminated by Claimant's knowledge of
4 El Salvador's abuse of process objection. The
5 relevant part of Claimant's description of the dispute
6 begins in the unnumbered paragraphs of the
7 introduction to its Notice of Intent.
8 This is a rather long quote, but I think it
9 is well worth reading at this time. "PRC's claims
10 arise out of unlawful and politically motivated
11 measures taken by the Government of El Salvador
12 through the Ministerio de Medio Ambiente y Recursos
13 Naturales, MARN; that is the environment ministry, and
14 the Ministerio de Economia, MINEC, the Ministry of
15 Economy, against the Enterprises' businesses and
16 operations in the area of Las Cabanas. These measures
17 have included, inter alia, the arbitrary imposition of
18 unreasonable delays and unprecedented regulatory
19 obstacles designed and implemented with the aim of
20 preventing PRES, and DOREX, which are the local Pac
21 Rim affiliates, from developing gold mining rights in
22 which PRC, through those Enterprises, has made

09:26:06 1 substantial and long-term investments. As a result of
2 the measures, the rights held by the Enterprises have
3 been rendered virtually valueless, and PRC's
4 investment in El Salvador has been effectively
5 destroyed."
6 This is Claimant's summary of the dispute
7 presented on December 9, 2008, used to introduce the
8 reasons why it initiated this arbitration. There are
9 three very important things to note about this concise
10 statement of Claimant's view of the dispute. First,
11 here, and in fact throughout the entire Notice of
12 Intent and Notice of Arbitration, Claimant refers to
13 multiple measures, in the plural, that took place
14 between 2004 and 2007 that allegedly interfered with
15 its investment.
16 Second, the measures are defined as
17 unreasonable delays and regulatory obstacles.
18 The measures are defined as delays and
19 regulatory obstacles, and these are the measures which
20 Claimant claims rendered the rights held by
21 enterprises virtually valueless and have effectively
22 destroyed the investment.

09:27:53 1 And finally, there is no mention of the press
2 article about former President Saca and no mention of
3 an alleged de facto ban on mining. The truth of the
4 matter is the phrase de facto ban on mining or, for
5 that matter, the word ban does not appear anywhere in
6 the Notice of Arbitration., including the Notice of
7 Intent, not in the 55 pages of the main body of the
8 Notice of Arbitration, not in the additional 16 pages
9 of the annex Notice of Intent, nor in any of the eight
10 other annexes to the Notice of Arbitration. Not once.
11 The facts alleged in the detailed section of
12 the Notice of Intent confirm with absolute clarity
13 that the alleged interference with the investment took
14 place and the dispute existed as early as 2004 and
15 certainly by December 2007. Beginning at Paragraph 17
16 of the Notice of Intent, Claimant describes how and
17 when it believes the dispute began, and importantly it
18 describes the measures it claims interfered with its
19 investment and caused it harm as well as how those
20 measures were communicated to Pacific Rim Mining of
21 Canada through its Salvadoran subsidiaries from 2004
22 to 2007. Claimant's description of how and when the

dispute arose begins at Paragraph 17 of the Notice of Intent. The Government began to reverse its previous policy and adopt measures specifically aimed at their activities; that is, the activities of the local subsidiaries.

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

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

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

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

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

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

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

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

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

arbitration.

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

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

They now state, "Pacific Rim Mining has

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

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

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

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

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

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

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

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

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

09:43:05 1 the El Dorado license are in 2004. On September 8th,
2 2004, Pacific Rim Mining El Salvador submitted an
3 Environmental Impact Assessment that had to be
4 approved before the environmental permit could be
5 issued. Under Salvadoran law, the Ministry of the
6 Environment was required to adjudicate the
7 Environmental Impact Assessment within 60 days. The
8 Ministry of the Environment did not issue a decision
9 in that time period, and Pacific Rim specifically
10 stated in a letter dated December 15, 2004, to the
11 Ministry of the Environment that this measure was in
12 violation of the law and was causing them harm.
13 In fact, the environmental permit was
14 presumptively denied after the 60-day period lapsed,
15 and Pacific Rim could have taken this to the
16 disputes--this dispute to the courts of El Salvador
17 but chose not to. Thus, the failure to grant the
18 environmental permit was one measure Claimant alleged
19 interfered with the investment and was causing it harm
20 in 2004, three years before the change of nationality.
21 The second measure that allegedly interfered
22 with the investment between 2004 and 2007, is the

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

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

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

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

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

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

change of nationality.

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

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

09:50:48 1 if omitted documents are not provided within 30 days,
2 by law the Bureau of Mines must reject and terminate
3 the Application.
4 Pacific Rim responded to the October warning
5 letter but did not correct the omissions. First,
6 Pacific Rim did not provide evidence of ownership or
7 authorization to use the entire Concession area.
8 Pacific Rim also failed to submit a
9 Feasibility Study, but rather resubmitted its
10 pre-feasibility Study dated January 21st, 2005.
11 Ultimately, Pacific Rim requested extra time
12 to submit the environmental permit, which had not yet
13 been granted. Pacific Rim had no right to more time,
14 the 30-day time limit for requesting--for responding
15 to the warning letter is by statute, and it's not
16 extendible. Nevertheless, the Bureau of Mines sent a
17 second warning letter in December 2006 granting
18 Pacific Rim El Salvador another 30 days to submit the
19 Application environmental permit. Pacific Rim El
20 Salvador did not respond.
21 Under Article 38 of the Mining Law, the
22 Bureau of Mines has no discretion as to whether or not

09:52:10 1 to terminate an Application once the notified
2 omissions are not corrected within 30 days. Thus,
3 once the Bureau of Mines notified Pacific Rim El
4 Salvador of the missing components and 30 days passed
5 without those omissions being corrected, the only
6 possible legal result under Salvadoran law was the
7 termination of the Application. Even without an
8 express resolution from the Bureau of Mines denying
9 the Application, Pacific Rim El Salvador's Application
10 could not have been lawfully reviewed, admitted, or
11 adjudicated after the 30-day period that ended in
12 January 2007.
13 Thus, in January 2007, the primary action
14 affecting the investment, the termination of the
15 Application for the El Dorado Exploitation Concession
16 was definitively concluded. Thus, the central measure
17 of Claimant's original complaint had culminated nearly
18 a year before the change in nationality. Nothing any
19 Salvadoran official could have done after January 2007
20 could have legally altered the situation of the
21 investment. No official, not even the President,
22 could reverse the termination of the Concession

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

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

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

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

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

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

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

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

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

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

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

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

10:00:08 1 approved without guarantees against environmental
2 damages. The interior headlines are, "Without
3 guarantees, there will be no permits." And the
4 sub-headline is, and it specifically mentions Pacific
5 Rim, "Pacific Rim will not obtain the exploitation
6 license for the El Dorado mine in San Ysidro Cabañas,
7 assures the Minister of the Environment."
8 Because its executives assumed the press
9 statements announced Government policy, if at any
10 moment Pacific Rim Mining thought that its problems
11 were due to bureaucratic incompetence and it did not
12 have a dispute with the Government of El Salvador,
13 this article from 2006 must have put them on clear
14 notice that they had a major dispute with the
15 Government. This is not a statement by a select group
16 of bureaucrats. These are reported statements of the
17 highest Government official in the country in charge
18 of granting some of the very permits they needed to
19 continue with their investment.
20 If the press report about President Saca in
21 2008 was significant to Claimants, this press report
22 must also have been equally significant, but it came

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

10:03:07 1 from the Minister of the Environment did not change in
2 2007 after Mr. Barrera left the Ministry and was
3 replaced by Carlos Guerrero. The reported statements
4 of Mr. Guerrero in June of 2007 are very similar in
5 content to the statements of Mr. Barrera in 2006 and
6 the reported statements of President Saca in March of
7 2008. On June 14, 2007, it was reported, "Carlos
8 Guerrero, Minister of the Environment, confirmed that
9 changes to the current legislation regulating approval
10 of mining exploitation permits have been ruled out.
11 In order to make these types of decisions, one first
12 has to determine if the mining industry is viable in
13 our country, he insisted, commenting that the study
14 undertaken by the Government is vital for this reason.
15 Only then would we be able to see which changes to
16 make to the law."
17 Recall that at this time Pacific Rim Mining
18 was seeking changes to the law so that its
19 exploitation permit could be awarded because it was
20 inconsistent with current law.
21 Then on June 24, 2007, the Minister of the
22 Environment of El Salvador, Carlos Guerrero, said,

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

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

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

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

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

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

10:07:51 1 is that they were based on the 2006 press article just
2 cited and asserted that the alleged ban actually began
3 in 2006, not 2008. El Salvador's position, of course,
4 is that there is no ban on mining. The Companies
5 cannot seem to agree as to when it started.
6 In sum, the above evidence, combined with
7 Claimant's own detailed description of the dispute in
8 the Notice of Arbitration demonstrates beyond any
9 doubt--beyond any doubt--that a dispute existed on the
10 date of Pacific Rim Cayman's change of nationality.
11 By the end of 2007, Pacific Rim Mining turned
12 to yet another strategy to resolve its dispute and
13 obtain the El Dorado Concession without meeting the
14 legal requirements under the Mining Law, pressuring
15 the Government by threatening international
16 arbitration. Pacific Rim Mining's decision to change
17 the nationality of Pac Rim Cayman to allow it to
18 assert jurisdiction under CAFTA was a part of that
19 strategy. Claimant has refused to reveal the full
20 details of its decision-making process leading up to
21 the change of its nationality, but we do have enough
22 information to piece together how things probably

10:09:49 unfolded.

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

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

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

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

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

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

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

later, on December 4, 2007, the board of Pacific Rim Mining approved a resolution that led to the change in Pac Rim Cayman's nationality.

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

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

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

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

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

10:15:57 1 through a Cayman Islands subsidiary called Pacific Rim
2 Caribe. To save costs, we decided to dissolve all
3 three Companies.
4 "These discussions led us to an examination
5 of the overall structure of the Companies. There were
6 also administrative costs involved in maintaining
7 Pacific Rim Cayman, the Claimant in this arbitration,
8 as a Cayman Islands entity. At the same time, we were
9 advised that there would be no adverse tax
10 consequences to domesticating Pac Rim Cayman to
11 Nevada, the jurisdiction from which I had managed it
12 since 1997. In other words, we believed that by
13 domesticating Pac Rim Cayman to Nevada, we could save
14 administrative costs without losing tax benefits."
15 Thus, Claimant asserts that the decision to
16 de-register Pac Rim Cayman from the Cayman Islands and
17 register it in the United States was to save the
18 administrative costs of maintaining registration in
19 the Cayman Islands and that this occurred to the
20 management of Pacific Rim Mining because they had
21 already saved money by dissolving another subsidiary
22 in the Cayman Islands, Pacific Rim Caribe.

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

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

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

savings had actually been their goal in the manipulate of the corporate organization of Pacific Rim, they certainly would not have neglected to take what they claimed was the primary cost saving step. Cost savings could not have been the motivation here.

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

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

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

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

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

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

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

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

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

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

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

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

10:25:13 1 headline in the article provided by Claimant at
2 Exhibit 7 on the Notice of Arbitration is, "President
3 of El Salvador requests caution on mining exploitation
4 projects." "Caution on mining." The headline in the
5 article entered into the record by El Salvador at
6 R-125 is, "The executive continues to study mining."
7 To study mining. These are hardly the headlines that
8 would have been used for something as profound as the
9 announcement of a complete countrywide ban on mining.
10 What the President is actually reported to
11 have said is not that he wanted a ban on mining, but
12 that environmental concerns must be addressed before a
13 new law could be passed to permit the issuance of
14 mining permits.
15 It is important to recall the context in
16 which this purported statement was made. By the date
17 of this report, Pacific Rim Mining's Application for
18 the El Dorado exploitation permit had been terminated
19 by operation of law about a year earlier because it
20 did not meet the requirements of the Mining Law.
21 Pacific Rim Mining of Canada was attempting to have
22 new legislation, a new law passed that would change

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

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

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

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

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

about the environment and that he might be able to convince him to support the project by alleging it would not damage the environment. He also clearly believed that a dispute existed because he threatened arbitration.

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

10:31:30 1 use of cyanide, I am willing to work with the National
2 Assembly on a law to establish things properly."
3 The truth of the matter is Pacific Rim
4 continued to characterize the dispute as a failure to
5 issue mining permits well after the March press
6 reports. This Press Release from July 2008 clearly
7 defines the dispute in terms of the failure to issue
8 the environmental permits and the Exploitation
9 Concession and does not even hint at the existence of
10 a generalized ban on mining; this is three, four
11 months after the March press reports.
12 Finally, I would like to make one final point
13 to demonstrate that the only alleged measures upon
14 which Claimant actually bases its claims are those set
15 forth in its Notice of Intent outlined above that it
16 claims took place between 2004 and 2007 and not the
17 2008 de facto mining ban. Claimant's newly created
18 version of events can easily be tested by comparing
19 two separate assumptions:
20 First, let's assume that the only fact
21 alleged to constitute a measure was the press article
22 making reference to statements by President Saca.

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

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

10:34:31 1 investment set forth in the Notice of Intent would
2 still allegedly exist. Would Claimant take the
3 position that it did not have a dispute with El
4 Salvador? Of course not. Claimant would be
5 vociferously asserting that it has a dispute with El
6 Salvador.
7 The only difference between today in 2011 and
8 2007, when they changed Pac Rim Cayman's nationality,
9 is the amount of time that has passed since the
10 dispute arose.
11 In fact, Claimant expressly recognized this
12 reality at Paragraph 163 of the Counter-Memorial. It
13 stated, "even if the de facto mining ban does not
14 exist, the individual instances of Respondent's
15 failure to grant Claimant's mining-related
16 Applications are continuing and composite acts or
17 omissions that breach CAFTA obligations and have
18 caused loss or damage to Claimant." this is in the
19 Counter-Memorial. As set forth in the Notice of
20 Arbitration, each and every one of these quote-unquote
21 individual instances that Claimant asserts breached
22 CAFTA obligations took place before December 13, 2007,

and Claimant was fully aware of them all and still--still--alleges that they caused Claimant and its parent company injury. A dispute undoubtedly existed when Pacific Rim Mining manipulated its corporate structure to change Pac Rim Cayman's nationality to become the Claimant in this arbitration.

And now I reach my conclusion.

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

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

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

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

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

PRESIDENT VEEDER: We will take a break when

10:37:03 1 you finish your conclusion.
2 MR. SMITH: Okay.
3 In conclusion, the facts alleged by Claimant
4 in its Notice of Intent and the facts proven by El
5 Salvador demonstrate beyond a doubt that Pacific Rim
6 Mining of Canada manipulated the corporate form of a
7 Cayman Islands shell company to make it a national of
8 the United States so that it would be able to initiate
9 this arbitration. These facts further demonstrate
10 that this manipulation took place after the alleged
11 interference with Pacific Rim Mining's investment in
12 El Salvador and after the dispute that is the subject
13 of this arbitration had clearly begun.
14 This abuse of process taints the entire
15 arbitration, including the claims based on CAFTA and
16 claims based on the Investment Law of El Salvador
17 which are inextricably linked in these proceedings.
18 Therefore, Mr. President and Members of the
19 Tribunal, you must dismiss this entire arbitration
20 because of a claimant's abuse of the international
21 arbitration process.
22 Thank you very much.

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

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

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

(Brief recess.)

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

Professor Stern.

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

PRESIDENT VEEDER: Mr. Tawil?

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

PRESIDENT VEEDER: The Respondents have the floor again.

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

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

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

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

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

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

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

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

11:07:19 Pacific Rim Mining Corporation.

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

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

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

11:08:47 1 includes access to dispute resolution--"to an
2 enterprise of another Party, if the enterprise has no
3 substantial business activities in the territory of
4 any Party, other than the denying Party, and persons
5 of a non-Party own or control the enterprise." That
6 is the legal framework for the denial-of-benefits
7 analysis.
8 Now, what is the framework applied to our
9 case? There's two simple questions:
10 One, does the Claimant, Pac Rim Cayman, have
11 "substantial business activities" in the United States
12 where it was incorporated in December of 2007, and is
13 the Claimant, Pac Rim Cayman, either owned by persons
14 of a non-Party or controlled by persons of a
15 non-Party? We will show that Claimant Pac Rim Cayman
16 has no substantial business activities in the United
17 States and never had any such activities at any
18 relevant time, and that Claimant Pac Rim Cayman is
19 both owned by persons of a non-Party, namely Canada,
20 and controlled by persons of a non-Party, again
21 Canada.
22 And finally, as I noted, we will show that El

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

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

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

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

11:11:25 1 that provision is made expressly applicable to, "the
2 advantages of this part," which is Part III. And Part
3 III of the Energy Charter Treaty does not include the
4 dispute-resolution provisions which are located in
5 Part V of that Treaty.
6 Now, there is one decision interpreting the
7 ECT, which I know the President is well familiar with,
8 since he was on that Tribunal, the Plama Decision.
9 And in that decision, the Tribunal noted that this
10 aspect of the ECT--in other words, the aspect of the
11 denial-of-benefits provision that limited that denial
12 to the substantive benefits and not the procedural
13 remedies--this aspect, said the Plama Tribunal was,
14 "unlike most modern investment treaties, which provide
15 for a denial of all benefits to a covered investor
16 under the Treaty." Well, it is that type of Treaty,
17 the Treaty that denies all benefits to covered
18 investors that CAFTA is. So, under CAFTA, the denial
19 of benefits is jurisdictional.
20 With that background, let's talk about the
21 first leg of the test, where we will show that
22 Claimant had and has no substantial business

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

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

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

Well, for purposes of my presentation today,

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

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

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

any influx of capital.

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

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

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

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

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

11:17:30 1 in El Salvador were made through the Claimant--through
2 the Claimant--and I have put up three examples of
3 that. They say: "Since at least 2005, virtually all
4 of the monies invested by the Pacific Rim Companies in
5 El Salvador have been made through Pac Rim Cayman."
6 that's the Counter-Memorial, Paragraph 17.
7 In the Rejoinder, they say: "Pac Rim Cayman
8 was the corporate entity through which predominantly
9 U.S. nationals made their investments in El Salvador."
10 Rejoinder, Paragraph 115.
11 And finally, my third example, although I
12 think they say this more than three times, "Respondent
13 has been well aware that investments of financial
14 capital have been made primarily through Pac Rim
15 Cayman." Rejoinder, Paragraph 330.
16 That's what they say. What do the undisputed
17 facts show? The undisputed facts show that the
18 investments in El Salvador were not from the Claimant,
19 and they were not from the United States. I have put
20 up citations to just four examples of the wire
21 transfer documentation when the investments were
22 registered in El Salvador. All of these wire

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

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

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

As for investments prior to November of 2004,

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

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

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

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

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

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

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

11:25:07 1 balance sheet, somewhat like this balance sheet,
2 showing assets and liabilities. I would be perfectly
3 entitled to list that house on my balance sheet as my
4 asset for half a million dollars, and I would.
5 Does that mean--is that evidence of the fact
6 that I invested the money in that house? Of course
7 not. Is that evidence that my mother invested money
8 in the house through me? Of course not. All it
9 proves is that I'm currently carrying that asset, that
10 I currently have that. The fact that somehow, through
11 some corporate manipulation, the alleged investment in
12 El Salvador has now been transferred to the Claimant's
13 books, is that evidence they made the investment? Of
14 course not.
15 The same thing for the liabilities. They
16 claim that these liabilities are evidence that the
17 parent made the investment, but it was on behalf of
18 the Claimant, and now the Claimant owes money to the
19 parent because of those investments.
20 My question is, if you could put up the
21 balance sheet slide: Where is the evidence of that?
22 Where is the evidence showing transfer of funds from

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

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

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

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

11:27:48 1 did not have any substantial business activities with
2 respect to the El Salvador project.
3 Mr. Shrake admits in his Witness Statement
4 that it was another entity, not the Claimant, that
5 served as the exploration arm of the Companies. That
6 entity is called Pacific Rim Exploration. And none of
7 the core team of geologists involved in the
8 exploration project, whom Mr. Shrake said did all the
9 work, none of them were employed by the Claimant.
10 The El Dorado studies and the technical
11 reports that we talked about so much during the
12 Preliminary Objections, if you look at them--and I've
13 pet out citations up on the slide--and you don't have
14 to go much further than the cover page--none of them
15 were commissioned or contracted by the Claimant. And
16 there is no evidence of any meetings or corporate
17 decisions by Claimant's managers, and they were
18 required to have two managers by Nevada law. They had
19 no way around that. And by the way, the managers
20 were, of course, from the parent Canadian company, but
21 there is no evidence of any meetings of those managers
22 having to do with the El Salvador project or the

11:29:07 1 investments.

2 So, there are no substantial business
3 activities irrespective of when the test is applied.
4 You can apply it at any point in time, when they're
5 making the alleged investments, when they're
6 incorporated in the U.S., or today. Certainly the
7 Claimant was not in the territory of any Party, as
8 Mr. Smith talked about, before it was incorporated in
9 the U.S. on December 13 of 2007. And before then, it
10 was a Cayman Islands entity. And prior to December of
11 2004, it did not even hold the other entities in El
12 Salvador that were responsible for mining exploration.
13 Nothing has changed since December of 2007. We have
14 not seen any evidence that Claimant has any employees,
15 any bank account, pays any taxes, or signs any
16 agreements having to do with mining work.
17 The Claimant wants this Tribunal to forget
18 all that and instead look at the activities of the
19 other Enterprises. Don't worry about the fact
20 Claimant does nothing in the U.S. Let's look at all
21 these other Companies. The plain language of the
22 Treaty does not permit that. If we look again at the

11:30:29 1 denial-of-benefits language, which I've put up on the
2 screen, it says a Party may deny the benefits of this
3 Chapter to an investor of another Party that is an
4 enterprise of such other Party, and to investments of
5 that investor if the enterprise has no substantial
6 business activities in the territory. The enterprise.
7 And the Claimant was finally forced to admit that the
8 Treaty says what it says. The Claimant said in its
9 Rejoinder, Paragraph 156, "The activities of the other
10 Companies cannot substitute for those of Pac Rim
11 Cayman in a denial-of-benefits analysis. They cannot
12 substitute for Pac Rim Cayman's utter lack of business
13 activities in the United States."
14 Now, let me turn to the owned and controlled
15 leg of the analysis. Again, if I could briefly put up
16 the legal framework. In addition to showing no
17 substantial business activities, the second part of
18 the test is that persons of a non-Party own or control
19 the enterprise.
20 We believe this is a simple inquiry. At all
21 relevant times Claimant has been 100 percent owned by
22 Pacific Rim Mining Corp., a Canadian corporation, who

11:32:04 1 is a person of a non-Party. Claimant has never
2 disputed this, and one of their admissions in this
3 regard is up on the screen.
4 So, because they don't dispute that, that
5 should end the inquiry on ownership. But Claimant
6 urges the Tribunal to look beyond the language of the
7 Treaty and to look at the ownership of a non-Claimant
8 entity, the Canadian parent. And what do they argue?
9 They argue that we cannot deny benefits here because
10 the majority of Shareholders of the Canadian parent
11 are U.S. Shareholders.
12 Now, first this would do violence to the
13 simple language of the Treaty which says persons of a
14 non-Party own or control the enterprise. That's
15 undisputed; the Canadian parent owns the enterprise.
16 They would insert additional language, which I've put
17 up there in red which says, "unless the parents of the
18 enterprise is owned by persons of a Party." They cite
19 no support for this rewriting of the Treaty.
20 But even if it were appropriate to so rewrite
21 the Treaty, Claimant still fails, and the reason they
22 fail is that they fail to even allege, much less show,

11:33:30 1 that these Shareholders are persons of a Party. And
2 let me take you through this analysis.
3 CAFTA defines persons of a Party as a
4 national or enterprise of a Party. Now, what does
5 "national" mean? In order to get the definition of
6 national, we have to go to Chapter 10 of CAFTA, who
7 says, national means a natural person who has the
8 nationality of a Party according to Annex 2.1. Okay,
9 so now we have to flip to Annex 2.1.
10 What does Annex 2.1 say? Here, the Claimant
11 admits as to what--the Claimant makes an admission as
12 to what Annex 2.1 says in their Counter-Memorial at
13 Paragraph 328, where Claimant writes, "Annex 2.1
14 states that for the United States, a natural person
15 who is the nationality of a Party means national of
16 the United States as defined in the existing
17 provisions in the Immigration and Nationality Act.
18 And then Claimant also says--and this is the
19 Counter-Memorial also in that paragraph--the manner in
20 which U.S. law, (in particular, the Immigration and
21 Nationality Act) defines and uses the concepts of
22 nationality and residents is determinative--is

11:34:57 1 determinative--for purposes of construing the meaning
2 of these terms."
3 Now, the Immigration and Nationality Act
4 defines a national as either a citizen of the United
5 States, or a person who though not a citizen, owes
6 permanent allegiance to the United States. Has the
7 Claimant shown that? Let's take a look.
8 In order to argue that the parent is
9 controlled by U.S. Shareholders, they rely on one
10 thing: Share-owning information generated by a firm
11 called Broadridge Financial Solutions. Yet the
12 Claimant makes a fatal admission undermining its
13 entire argument. Claimant says in its
14 Counter-Memorial that the information gathered by
15 Broadridge does not indicate the nationality of
16 Pacific Rim's Shareholders, but it indicates their
17 residence. On the prior slide we just saw Claimant
18 admit that nationality was the test, and the
19 definition of nationality given by the Immigration and
20 Naturalization Act was determinative, and now it tells
21 us it really doesn't know the nationality of the
22 Shareholders. It knows they're residents, and that's

11:36:24 1 the only thing that Mr. Shrake relies upon in his
2 Witness Statement. And the Claimant has to admit in
3 its Rejoinder that a U.S. resident is not necessarily
4 a U.S. citizen.
5 So, what does this mean? What this means in
6 terms of the ownership analysis is the following:
7 One, the Treaty language says owns, and it doesn't
8 talk about ownership of the parent company. It talks
9 about ownership of the enterprise. Who owns the
10 enterprise? The Canadian entity one hundred percent.
11 There is no justification for ignoring the Treaty
12 language and going up one level to ownership of the
13 parent. But let's suppose the Tribunal were inclined
14 to do that. Claimant asserts that the parent is
15 majority-owned by U.S. Shareholders who have to be
16 U.S. nationals under their argument, but they are not.
17 They haven't shown they are. At best they've shown
18 ownership by the parent by unidentified U.S.
19 residents.
20 Now, let's look briefly at control, and again
21 let's put up the legal framework. Again, the test is
22 disjunctive, if you can put up the next slide, because

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

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

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

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

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

11:40:59 1 demonstrated, that U.S. nationals as opposed to U.S.
2 residents, owned Majority Shares in the parent.
3 And finally, the best evidence of control is
4 what actually happened. The decision to change the
5 nationality of the Claimant which was made by the
6 Board of Directors of the Canadian parent.
7 Finally, I would like to spend a few moments
8 on notice because Claimant has made allegations that
9 somehow the notice that was made--that was given by
10 the Government of El Salvador in this case was
11 untimely or inappropriate. And I will demonstrate not
12 only was it timely and appropriate, but it was in
13 complete accordance with the intent of the
14 denial-of-benefits framework.
15 Let's look at the legal framework for the
16 providing of notice, put the language up on the
17 screen. The invocation of the denial-of-benefits
18 clause is subject to two provisions, Article 18.3,
19 which is Notification and Provision of Information,
20 and Article 20.4, Consultations. So, it's only
21 subject to two provisions.
22 Next slide, please.

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

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

11:43:54 1 denial-of-benefits provision expressly references the
2 type of notice that is necessary, which was not the
3 case with the ECT.
4 And also of note is the fact that the
5 language says the notice is to be of proposed or
6 actual measures. So, of course, the plain reading of
7 that suggests that no advance notice is required
8 because the measure could already have taken place
9 when the notice is given.
10 Now, was the notice given by El Salvador
11 untimely, as Claimant asserts? Well, let's look at
12 the facts and Claimant's admissions in that regard.
13 First, Claimant admits that no such notice would make
14 sense before Claimant was registered in the U.S. in
15 December of 2007. How could we give a notice under
16 CAFTA before there's even an alleged CAFTA entity?
17 What had happened by December of 2007? By
18 then, the Canadian company had already made over
19 93 percent of its alleged investment in El Salvador.
20 Indeed, the first evidence that the Government of El
21 Salvador had any inkling of this change of nationality
22 was in June of 2008, and by then over 97 percent of

11:45:25 1 the alleged investment in El Salvador had been made.
2 Now the Tribunal may be wondering why do I
3 mention this percentage of the investment? Why is it
4 relevant? I mention it because this is not a case
5 where Respondent could have denied benefits before the
6 investments were made, and where the investors'
7 legitimate expectations of being protected by CAFTA
8 were violated. There could have been no legislate
9 expectations of being protected by CAFTA certainly
10 before it was incorporated in the U.S. in December of
11 2007, if at all, because as I've demonstrated,
12 Claimant never made any investments in the U.S. It
13 was the Canadian company that made investments in the
14 U.S.
15 And let's look at a timeline to put this in
16 stark detail. The alleged investment by the Canadian
17 company began somewhere in 2001 or 2002 and continued
18 until September of 2008.
19 Claimant was registered in the U.S. in 2007,
20 and as I've pointed out in their Rejoinder, at
21 Paragraph 200, they admit that certainly no notice of
22 denial of benefits was appropriate before December of

11:46:52 1 2007.

2 What happened next? The Government was not
3 even given notice of this change--no, excuse me. What
4 happened next, according to the Claimant, is the news
5 article in March of 2008, which it alleges was the
6 first notice it had of any possible dispute. Now,
7 Mr. Smith has already talked about how the facts belie
8 that proposition, but assuming for the moment that you
9 believe that, certainly if the dispute first arose in
10 March of 2008, the authorities cited by the Claimant
11 say that how could you even think of giving a notice
12 of denial of benefits before there is a dispute.
13 So, under Claimant's theory of the case, no
14 notice of denial of benefits would make sense before
15 March of 2008.
16 And when was El Salvador notified of the
17 change of nationality? June of 2008. So, it could
18 not even have known that it was dealing with a
19 putative CAFTA Party until June of 2008. In fact, the
20 better view--and this is in, among other places, Meg
21 Kinnear's Treatise on NAFTA--is that there cannot be
22 any reason to require a notice of denial of benefits

11:48:25 1 before a claim is submitted to arbitration, which did
2 not happen until December of 2008.
3 So, to summarize these timelines and what
4 they show, in order to plausibly invoke the denial of
5 benefits, El Salvador would have had to have known at
6 least the following: One, the existence of a dispute,
7 which, if you believe Claimant, did not happen until
8 at least March of 2008, and certainly El Salvador
9 would certainly have to know that it was dealing with
10 a putative CAFTA Party, which it did not have notice
11 of until June of 2008. Again, this is not a case
12 where an investor goes into a country, puts in money
13 expecting to be protected by CAFTA, and then has those
14 expectations overturned. There were no such
15 legitimate expectations, and over 97 percent of the
16 investments had already been made before El Salvador
17 knew of the change of nationality, as demonstrated in
18 these next couple of slides.
19 Now, let me talk about the consultation
20 procedures, which is the only other condition to
21 invoking denial of benefits. Article 20.4.1 notes
22 that any Party may request in writing consultations

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

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

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

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

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

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

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

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

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

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

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

present.

MR. BADINI: Thank you.

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

MR. BADINI: I believe we are.

PRESIDENT VEEDER: Good.

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

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

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

11:56:17 1 no denial-of-benefits applicability under CAFTA.
2 With regard to the jurisdiction ratione
3 temporis under CAFTA, even if we assume for a minute
4 that Claimant's change of nationality was not abuse of
5 process, this change of nationality that took place in
6 December of 2007 does have some additional barriers to
7 ICSID jurisdiction under CAFTA.
8 First, Pac Rim Cayman is not an investor
9 under CAFTA;
10 Second, the undisputable maxim that there can
11 be no jurisdiction under CAFTA over any allegations of
12 claims that may have occurred before Claimant was a
13 national of a CAFTA Party;
14 And related to that, that CAFTA's three-year
15 statute of limitations precludes jurisdiction under
16 CAFTA.
17 So, let's start by examining why Claimant is
18 not an investor under CAFTA. Well, CAFTA
19 Article 10.28 defines investor of a Party as an
20 enterprise of a Party, that means in this case an
21 enterprise of the United States, that attempts to
22 make, is making, or has made an investment in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, let me refer quickly to Claimant's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:18:48 1 under the Investment Law.
2 Yes, Mr. President.
3 PRESIDENT VEEDER: Sorry for interrupting
4 you. We are concerned about the time. Some of these
5 matters are very fully dealt with in your excellent
6 paper so far, but the one area where we need your
7 assistance is your sixth independent reason. We
8 wonder whether given the time you would like to
9 proceed to that first.
10 MR. PARADA: Let me just double-check, sir to
11 make sure that there's--the other ones are
12 self-explanatory.
13 PRESIDENT VEEDER: They are.
14 MR. PARADA: You can follow them very
15 quickly.
16 I am concerned, though, about the full
17 understanding of El Salvador's position that if the
18 Tribunal determines that its decision on the
19 Preliminary Objections of treating these two
20 proceedings as indivisible is not followed, then that
21 the CAFTA waiver comes into place, and that the CAFTA
22 waiver will preclude jurisdiction because--give me

12:19:53 1 the--I just want to make reference to the text of
2 CAFTA Article 10.18.2. That would be Slide nine.
3 PRESIDENT VEEDER: Slide nine.
4 MR. PARADA: I think the text was the source
5 of some confusion before, and I just wanted to make
6 sure I had the opportunity to state this again.
7 What's being waived is the right to initiate
8 or continue--in this case, initiate--before any
9 administrative tribunal or court under the law of any
10 Party or other dispute-settlement procedures any
11 proceeding with respect to any measure alleged to
12 constitute a breach of CAFTA.
13 Now, there is no dispute that the Investment
14 Law proceeding is any proceeding. There is no dispute
15 that is in respect to the same measures that are being
16 alleged are a violation of CAFTA. The only source of
17 confusion is whether there is any or other dispute
18 settlement procedures means, and I would like to show
19 how if we substitute that phrase for other
20 dispute-settlement procedures, for example, mediation,
21 conciliation, domestic arbitration, or international
22 arbitration, it makes sense that what is being said

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

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

Now, let me go straight to Slide Number 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I just would like to finally address the

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

So, the Award in that case and the position

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

That is the conclusion, Mr. Chairman.

PRESIDENT VEEDER: Thank you very much, indeed.

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

We will adjourn now for lunch. Thank you.

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

AFTERNOON SESSION

PRESIDENT VEEDER: Let's resume.

We give the floor to the Claimant for their opening oral presentation.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. ALI: Thank you.

Mr. Chairman, Professor Stern, Professor Tawil, good afternoon. My name is Arif Ali, and I'm appearing on behalf of the Claimant.

Now, this may be something that only the Chairman understands, and I will apologize if others may not, but in cricket, which is one of the grandest sports ever to be invented and played, the afternoon post-lunch session is often the hardest for the player, the spectators, and, indeed, the Umpires, but it is also often the session in which much happens regarding the final outcome of the match.

We are confident that by the time we are done with our presentations the outcome of this match will be decisively tilted, if not finally decided in our favor. Allow me to thank you in advance for all of your hard work and attention to the multitude of

issues that we have been putting before you on a rapid fire basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

though neither of these failures, even if they could be considered to constitute measures at all, are the measures that Claimant have alleged to constitute the breaches of CAFTA giving rise to the claims that we have put before you.

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

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

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

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

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

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

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

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

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

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

02:15:09 1 that you cannot--you cannot--find an abuse of process
2 if you agree with us that there was no dispute as that
3 term is defined and applied in CAFTA that our client
4 knew about or should have known about prior to the
5 domestication of Pac Rim Cayman in December 2007. And
6 you cannot find an abuse of process unless you
7 determine that El Salvador has satisfied its
8 heightened burden of demonstrating clearly and
9 convincingly that the domestication of Pac Rim Cayman
10 was done in bad faith abusively and perniciously to
11 gain the system; that is, to gain access to ICSID
12 jurisdiction that it would otherwise not have had in
13 respect of a pre-existing dispute.
14 In our view, at the very earliest, the
15 parties' dispute arose when our client first became
16 aware of Respondent's practice of withholding the
17 permits necessary to carry out metallic meaning.
18 Prior to March 2008, there was no way that our client
19 knew or could have known about this practice; that is,
20 the de facto mining ban, particularly in light of the
21 numerous assurances that it was receiving from a
22 variety of quarters that the required permits were

02:16:25 1 going to be issued imminently.
2 Notably in all of the presentations we heard
3 this morning, not a single word was said about the
4 promises and assurances that were made to Mr. Shrake
5 and his colleagues by El Salvadoran Government
6 officials. Of course, they wouldn't mention this
7 because it's not very helpful to their case.
8 Indeed, for you to settle on an earlier date
9 than March 2008 would be patently unfair to Claimant
10 as it was El Salvador's own conduct that concealed the
11 ban's existence by leading Claimant to believe that
12 the applications of PRES and DOREX were being actively
13 reviewed, and that the government supported their
14 mining enterprises, venire contra factum proprium.
15 Now, allow me to turn to El Salvador's denial
16 of benefits objection, another extraordinary objection
17 for which Respondent must discharge a very high burden
18 of proof. CAFTA Article 10.12.2 permits a party to
19 deny CAFTA's protections to an enterprise that is an
20 investor of another Party if three conditions are met.
21 You heard about these conditions from Mr. Badini, but
22 let me repeat them to set up what I need to say.

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

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

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

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

02:18:57 1 has no substantial business activities in the
2 territory of any Party other than a denying Party. It
3 is not Claimant's burden to show that it has some
4 quantum of substantial business activities in the
5 United States.
6 Article 10.12.2 requires that Respondent bear
7 the burden of showing a complete absence of
8 substantial business activities of Claimant in the
9 U.S. This it clearly has not done. It has failed to
10 rebut our affirmative evidence demonstrating that our
11 client does, in fact, have substantial business
12 activities in the United States, whether considered
13 from the point of view of its integral role as part of
14 the Pac Rim corporate family or on its own.
15 As scores of tribunals have done before you,
16 we urge you to be realists and not formalists, to
17 focus on the economic reality of the investment that
18 underlies this dispute and not merely the corporate
19 formalities that are the vehicles for that investment.
20 El Salvador has also failed to rebut our
21 evidence that the ultimate owners and controllers of
22 Pac Rim Cayman are persons of the United States. They

02:20:08 1 want you to confine the Own-Or-control analysis to Pac
2 Rim Cayman's direct corporate parent in contravention
3 of the plain meaning of those terms.
4 They also want you to ignore the fact that
5 CAFTA was negotiated to allow a Party to deny benefits
6 only to Enterprises that lack a real and continuous
7 link with the territory of another Party. That is
8 plainly not the case with respect to Pac Rim Cayman, a
9 company which is not only ultimately owned and
10 controlled by the U.S. Shareholders of its publicly
11 traded parent, but which is also managed by
12 Mr. Shrake, a U.S. citizen, from his is office in
13 Reno, Nevada.
14 Again, we ask you to focus on the realities
15 of international business and investment and not
16 simply on the formalities. Given the object and
17 purpose of CAFTA, is it really possible to ignore the
18 interests of the U.S. investors whose share value has
19 been destroyed by El Salvador's actions? Does it
20 really make sense to ignore the realities of
21 Mr. Shrake's involvement in directing the activities
22 of this investment in El Salvador and to enhance

Shareholder value?

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

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

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

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

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

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

02:23:37 language of Article 15 of its Investment Law. Hopefully if I have time, we have time, I will return to this objection later on this afternoon, so I'm going to say very little about it other than the following:

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

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

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

Now, Members of the Tribunal, before I hand

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

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

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

02:27:37 Mr. Parada.

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

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

because of political agendas, expediency, administrative abuse, and arbitrary and capricious conduct--that much is clear--and we only ask that you allow us the opportunity to demonstrate this to you in the merits phase of this arbitration.

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

Thank you very much.

PRESIDENT VEEDER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Pause.)

PRESIDENT VEEDER: We are now working.

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

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

Let's look first at the Claimant.

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

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

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

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

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

was the hub of the company's mining operations. That's where all of the mining decisions and all of the mining plans were developed and made.

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

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

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

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

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

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

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

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

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

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

look only at the regulatory delays and alleged disagreements over municipal laws like the surface land ownership requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

extraction concessions have been granted.

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

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

The word of the President.

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

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

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

What's particularly remarkable is that even

as President Funes and his officials freely admit that the practice is in place through numerous public comments, Respondent in the context of this arbitration has consistently denied it.

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

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

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

have known about a practice that Respondent has repeatedly denied, even into this arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

property, and revenues in the United States than in Canada.

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

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

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

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

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

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

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

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

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

Mr. Shrake, who is identified as "Tom Shrake, CEO USA."

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

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

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

picture of David Ernst, "Chief Geologist (USA)."

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

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

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

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

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

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

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

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

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

had used the Cayman sandwich structure, there was more money to be invested in El Salvador than there would have been otherwise.

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

Okay.

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

Could I have my next chart.

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

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

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

into Pacific Rim Mining Corp. Pacific Rim Mining Corp., in turn, invested money into Pac Rim Cayman starting in 2004, which, in turn, invested the money into PRES and DOREX. You also had monies going from Pacific Rim Mining Corp. to Pac Rim Exploration, which, in turn, paid the salaries of the senior geologists working in El Salvador, and that included the salaries for Mr. Fred Earnest and Bill Gehlen, both U.S. citizens who served successively as the President of Pacific Rim El Salvador. Again, they were both employees of Pac Rim Exploration, and both had offices in Reno as well as in El Salvador.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

put it up on the screen, but it's only in your binder. Thank you for asking, Mr. President.

PRESIDENT VEEDER: Oh, that's fine.

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

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

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

Market Value is measured by the multiple of the project margin, and since the price of gold has soared and the cost of extraction haven't significantly increased, the Market Value is enormous.

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

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

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

reservoir and treatment facility in December 2006. That facility would have significantly increased the amount of clean water available to local residents.

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

the progress and the regulatory system were still in place.

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

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

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

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

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

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

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

blacklists by various countries.

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

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

If you already have lawyers and accountants in Nevada.

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

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

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

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

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

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

have brought a claim at ICSID under the Investment Law. The Cayman Islands are covered by the ICSID Convention. And Pacific Rim Mining Corp. could have brought a claim under the Investment Law at the ICSID additional facility.

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

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

surface ownership?

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

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

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

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

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

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

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

evidence that a dispute concerning that practice had arisen.

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

PRESIDENT VEEDER: Sure.

(Pause.)

MR. de GRAMONT: Thank you.

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

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

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

At Tab 19--the exhibit number--

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

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

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

Cayman to Pac Rim Cayman LLC. The LLC was added because it was a limited liability corporation in Nevada.

PRESIDENT VEEDER: I see.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

03:37:00 1 the application for the environmental permit had been
2 presumptively denied.
3 In October 2006, PRES and MARN completed the
4 exchange of observations and responses. In
5 December 2006, PRES submitted its proposal for the
6 water treatment facility at El Dorado. And as the
7 Tribunal will also recall from the first set of
8 objections and as Mr. Smith, I believe, mentioned this
9 morning, in October through December of 2006, there
10 was an exchange of correspondence between PRES and
11 Ms. Navas. Ms. Navas asked for various application
12 materials and PRES provided them, again except for the
13 environmental permit.
14 Ms. Navas had asked for those materials in
15 October 2006, and in a November 2006 letter PRES
16 submitted all of them again except for the
17 environmental permit.
18 PRES also explained why it wasn't able to
19 submit the environmental permit and asked MINEC to
20 excuse its absence on the basis that there was an
21 impediment with just cause.
22 And in December 2006, Ms. Navas submitted a

letter saying that PRES had partially complied with her previous request except for the missing environmental permit.

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

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

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

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

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

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

Government officials. Salvadoran officials continued to tell the Companies that the issue would be resolved. They were also optimistic about the pending amendments. In the meantime, progress was being made on the company's other applications for environmental exploitation permits. In August 2007, DOREX submitted EIA's for Guaco and Pueblos. In November 2007, MARN provided an observation on the Guaco EIA and asked DOREX to respond. In January 2008, MARN provided observations on the Pueblos EIA and asked for a response. January 2008.

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

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

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

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

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

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

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

President Funes later said, in El Salvador the word of the President is the law.

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

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

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

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

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

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

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

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

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

03:46:49 1 Claimant filed its Notice of Intent on
2 9 December 2008. On April 30, 2009, it filed this
3 arbitration.
4 Now, these are the record facts. They're all
5 unrebutted. Respondent has ignored them. Respondent
6 has tried to obscure them, but it has not even tried
7 to contest them.
8 Now, my colleagues will take these key facts
9 and put them in the context of the specific objections
10 raised by Respondent. But unless the Tribunal has any
11 questions, or unless the Tribunal would like to take a
12 break, I will turn the podium over to--oh, I'm sorry,
13 let me show you one more slide. This is Mr. Ali's
14 favorite, and this is Slide 17 of the PowerPoint, and
15 this shows the investment that the companies were
16 making into El Salvador, and you will see that from
17 2004 through the March 2008 statement, through the
18 alleged first presumptive denial, through the alleged
19 second presumptive denial and so forth, the Companies
20 increased their level of investment.
21 Now, why if the Companies believed there was
22 a dispute would they have continued to increase their

level of investment into El Salvador?

And with that, I will conclude. Thank you.

PRESIDENT VEEDER: Thank you very much.

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

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

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

(Brief recess.)

PRESIDENT VEEDER: Let's resume.

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

04:05:23 1 5:22.

2 Is there any difficulty with that

3 sophisticated calculation?

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

5 PRESIDENT VEEDER: Thank you.

6 Is it satisfactory to the Claimants?

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

8 PRESIDENT VEEDER: Then let's proceed. Thank

9 you.

10 MR. POSNER: Thank you, Mr. President and

11 Members of the Tribunal.

12 It's an honor to appear before you again. I

13 will try not to use all of that one hour and 22

14 minutes so that my colleagues will have at least a

15 little bit of time to address the issues I won't be

16 addressing.

17 So, I will be addressing you this afternoon

18 on two topics. I'm going to start with jurisdiction

19 ratione temporis, and then I will pivot as deftly as I

20 can into the topic of denial of benefits.

21 And on jurisdiction ratione temporis, there

22 are three issues here:

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

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

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

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

And CAFTA restates that Rule for greater

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

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

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

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

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

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

04:09:35 Salvadoran law.

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

been effectively destroyed."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, MARN's missed deadline in December 2004

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

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

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

04:19:46 1 senior levels, repeatedly reassured PRES that the
2 permits it had requested were forthcoming. In fact,
3 they encouraged PRES to expand its investment in El
4 Salvador, as Mr. de Gramont discussed earlier, a
5 dialogue between MARN and PRES about PRES's
6 Environmental Impact Assessment continued throughout
7 the course of 2005 and 2006. This dialogue cannot be
8 reconciled with Respondent's assertion that PRES's
9 application for a permit had been presumptively denied
10 as of December 2004 and that a dispute arose at that
11 point.
12 Even if the missed deadline meant presumptive
13 denial under Salvadoran law--and that is a point we
14 contest--MARN's continuing engagement with PRES caused
15 PRES to rely, to its detriment, on the expectation
16 that evaluation of the EIA was continuing.
17 Likewise, expressions of support for the El
18 Dorado project from the Vice President and Ministry of
19 the Economy throughout 2006 contradicts any suggestion
20 of a disagreement, let alone a dispute, as Mr. de
21 Gramont discussed earlier, there was actually a visit
22 to the Midas Mine in Nevada in November 2006. That

visit would have made absolutely no sense if, as Respondent now contends, a dispute existed at that point in time.

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

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

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

relying on a very strained and narrow definition of the term "ban." And as I said earlier, when we use the term "ban," we are using that as a shorthand, a label. The practice is what I described on the slide earlier. A ban is a convenient way of describing that practice.

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

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

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

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

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

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

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

should have been aware of the ban's existence and, on the other hand, denying its existence. I can't make sense of that; perhaps the Tribunal can.

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

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

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

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

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

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

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

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

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

The Tribunal, in fact, goes on to make a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Two points on that:

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

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

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

04:38:04 1 water and pivot to the denial of benefits.
2 Mr. President, Mr. Ali reminds me that before
3 I move on to denial of benefits, I should ask first
4 whether the Tribunal has any questions on the
5 jurisdiction ratione temporis.
6 PRESIDENT VEEDER: We do, but not for now.
7 MR. POSNER: Okay, thank you.
8 So, denial of benefits. Now, in discussing
9 denial of benefits, I'm going to take the issue in a
10 different order from our written submissions. I'm
11 going to start with the issue of Respondent's untimely
12 notice to the United States of its intent to deny
13 benefits to Pac Rim. Then I will turn to the subject
14 of substantial business activities. And, finally, I
15 will address the issue of ownership and control.
16 I submit to you at the outset that under
17 either of these grounds the Tribunal should reject
18 Respondent's belated attempt to deny benefits to Pac
19 Rim Cayman. I'm starting with the untimely notice
20 issue because, frankly, that's a pure legal issue.
21 The other two issues require some wading into fairly
22 fact-intensive questions, but there are no--there is

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

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

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

So, the question is whether Respondent's

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

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

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

Let's put that up.

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

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

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

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

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

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

So, Article 18.3, which Mr. Badini discussed

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

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

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

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

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

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

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

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

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

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

The problem is that CAFTA Article 20.4, one of the provisions in the "subject to" clause envisages an investor's home State, here the United States, engaging in formal dispute settlements consultations with the host State which could involved the giving of diplomatic protection. Now, that's not a problem if notice is given to the home State prior to the submission of claims in that arbitration. In that case, the home State can engage in consultations, including by advocating on behalf of its investor by showing that the investor has substantial business activities in its territory by advocating demonstrating to the host State that it is owned and controlled by nationals of that home state. But if notice of denial of benefits is not given until after claims are submitted to arbitration, the home State's ability to engage in consultations is severely constrained. It may not engage in advocacy for its

04:49:03 investor because doing so may be seen as giving diplomatic protection in breach of Article 27.

Now, Respondent tells you that the giving of diplomatic protection is confined to the espousal of claims by an investor's home State. However, we have shown that the concept of giving diplomatic protection is broader than that. Espousal, or otherwise known as the bringing of an international claim, is dealt with in Article 27 separately from giving of diplomatic protection. To treat those two terms as synonomous would be to render Article 27's separate reference to the bringing of an international claim a nullity. As we pointed out in our written submissions, the Tribunal in Aguas del Tunari recognized that taking a stand on whether the Tribunal had jurisdiction in that case could implicate the Article 27 obligation of The Netherlands, the investor's home State in that case. And in posing a question to The Netherlands, the Tribunal was very careful. It crafted its question to avoid putting that State in the position where it might consider itself to be in breach of its obligation not to give diplomatic protection to its

04:50:28 investor.

And in responding to the Tribunal's question, The Netherlands also was very careful, acknowledged its obligation not to give diplomatic protection, acknowledged that it wasn't opining on whether the Tribunal in that case had jurisdiction or not. It simply provided factual information--didn't engage in advocacy, just provided factual information--regarding the negotiation history of the instrument of consent in that case. And likewise in other cases which I've cited on this slide, it's been recognized that the giving of diplomatic protection is something broader than mere espousal.

And even if there is disagreement on this score, the possibility that the investor's home State may understand diplomatic protection to include advocacy will severely restrict its ability to engage in the consultations contemplated by CAFTA Article 20.4.

So, Respondent's understanding of when a Party is required to give notice of a proposed denial of benefits would put an investor's home State in an

04:51:38 untenable position. Either it can advocate for its investor, engage in the formal State-to-State consultations referred to in CAFTA Article 20.4 and risk violating its obligation under ICSID Convention Article 27, or it can refrain. It can avoid engaging in those consultations, assure itself that it's not running afoul of its obligations under Article 27 of the ICSID Convention, but also in the end deprive its investor of the kind of advocacy that Article 20.4 of CAFTA envisions.

In short, because of the restriction in ICSID Convention Article 27, Respondent's understanding with respect to timing would negate the opportunity for State-to-State consultations on denial of benefits.

Now, I said there was a second provision of the ICSID Convention that's also implicated by Respondent's interpretation with respect to timing, and that's Article 25(1). As the Tribunal knows, that provision prohibits a unilateral withdrawal of consent to ICSID jurisdiction. By purporting to trigger the denial of benefits after the submission of claims to arbitration, Respondent is doing just that. And

04:53:03 remarkably, in his remarks this morning, Mr. Badini essentially conceded that. I invite the Tribunal to go back and look at Slide 52 from that portion of Respondent's presentation where you will see a statement--and I believe I transcribed this correctly--to the following effect: Once those benefits are denied to Claimant--once those benefits are denied to Claimant--it has no right to submit any claims and does not have El Salvador's consent to arbitration. The key there is "once those benefits are denied." The purported denial of benefits in this case didn't occur until March of 2010, so perhaps going forward a Claimant would be submitted or this Claimant would be--would lack El Salvador's consent to arbitration and might not be able to submit a new claim to arbitration, but the claim that was already submitted to arbitration has been submitted. It's only once the benefits are denied, which, in this case, occurred after the submission of claims to arbitration. Therefore, I think even Respondent's own argument concedes the point that what they have tried to do here is inconsistent with Article 25(1) of the

ICSID Convention.

Now, Respondent argues in its written submissions that denial of benefits is no different than an Objection to Jurisdiction that may be raised notwithstanding a Party's originally having given its consent to the submission of claims to arbitration.

I submit to you, Mr. Chairman, that there is an important difference, and the difference this: When the Respondent makes objections, Jurisdictional Objections, in the course of an arbitration--say, an objection on the basis that the Claimant lacks the nationality of a Contracting State--it's doing that based on facts that existed before claims were submitted to arbitration. What Respondent has done in this case is it's created an essential fact. It's created a fact that is critical, absolutely essential, to the denial of benefits.

Denial of benefits isn't automatic. What Article 10.12.2 says is that under certain circumstances a host State may deny benefits. So, when the circumstances described in 10.12.2 exist, we don't know whether benefits have been denied or not

04:55:30 until Respondent exercises that right. In other words, that's a critical fact. That's a critical jurisdictional fact.

And unlike an ordinary Objection to Jurisdiction where all the relevant facts pre-date the submission of claims, here Respondent has created perhaps the most critical fact after, well after, claims have been submitted to arbitration. Now, I submit to you that that's what distinguishes what Respondent is doing here from an ordinary Objection to Jurisdiction.

Mr. President, I'm now going to move on to the second two prongs of the denial-of-benefits Article. As I said, I submit that if the Tribunal wishes, it could dispose on the denial-of-benefits argument on the basis of Respondent's untimely notice. In doing so, it could avoid wading into the much more fact-intensive issues of substantial business activities and ownership and control. However, even if the Tribunal chose to wade into those more fact-intensive areas, I submit to you that the results would be the same.

04:56:39 Now, in considering both substantial business activities and ownership and control, it is important to bear in mind why CAFTA contains a denial-of-benefits clause. As the Parties state prominently in CAFTA's Preamble, one of their objectives is to strengthen--is to promote regional economic integration. Another objective is to ensure a predictable commercial framework for business planning and investment. Those objectives are advanced when an investor is--when an investor with a real and continuous economic link to one Party makes an investment in the territory of another party. To encourage that kind of investment, the Parties commit to provide the investor the protections set forth in Chapter Ten.

On the other hand, where an investor of a Party lacks a real and continuous link to its home Party, its investment in the territory of another Party does little to advance regional economic integration. It does not bind more closely those two economies. Therefore, even though the investor is presumptively entitled to CAFTA's protections because,

04:57:54 after all, it is an investor of a Party, CAFTA gives the host Party the option of denying those protections to that investor.

Now, the substantial business activities inquiry and the ownership and control inquiry ultimately get at this question of a real and continuous link. And I'm drawing that language, by the way, from what's called the Statement of Administrative Action that was submitted by the President of the United States to the U.S. Congress in connection with NAFTA. The explanation of denial of benefits is a little bit less robust in the CAFTA Statement of Administrative Action, but I believe both parties would agree that essentially the CAFTA clause was modeled after the NAFTA clause; and I think it's appropriate, therefore, to refer to the understanding of the corresponding clause in NAFTA, which focuses on that concept of a real and continuous link.

And this underscores the point that the inquiries into substantial business activities and ownership and control are not meant to be mechanical inquiries. They're inquiries that need to be

04:59:06 undertaken with that objective in mind.

This is a point--let's go to the next slide--this is a point that the Respondent misses when it takes a quantitative approach to determining what kinds of business activities are substantial. It's a point that Respondent misses when it insists on examining Claimant's business activities outside the context of the corporate family of which Claimant is a part. And it is a point that Respondent misses when it chooses to disregard that a majority interest in the activities of Pac Rim Cayman ultimately are held by U.S. persons.

Now, in our submissions, we have shown that Pac Rim Cayman has always had a real and continuous link with the United States. Although it was originally created as a Cayman Islands company, it always has been managed from Nevada by Mr. Shrake as part of the Nevada-based Pacific Rim family of companies.

It is a holding company; we have never denied that. It engages in the kinds of activities that holding companies engage in. It holds and manages the

05:00:20 investments of the group of companies in El Salvador. It holds and manages Pacific Rim Exploration. It is engaged in just the kind of activities that the holding company Claimants in the Amto Case and in the Petrobart Case were engaged in.

Now, Respondent says that in argument that Claimant lacks substantial business activities in the United States, it is not--it is not making a criticism of all holding companies; it's just making a criticism of this holding company. But the distinction it's drawing appears to be based on this quantitative concept of "substantial." So, in Respondent's mind, there is some threshold, some amount of activities that must be engaged in in order for an investor's business activities in its home State to be substantial. We submit to you, Mr. President, that that is not in accord with the ordinary meaning of "substantial," which is consisting of or relating to substance; nor is it in accord with the object and purpose of CAFTA which I referred to earlier. After all, if an investor has to guess whether the quantum of business activities it's engaged in in its home

05:01:45 State are sufficiently large to ensure that it won't be denied protections by a host State, that certainly is not conducive to the sort of predictability that the CAFTA Parties sought to achieve.

I'm going to touch briefly on Respondent's disregard of the family of companies of which Pac Rim Cayman is a part. I will submit to you that the Tribunal will be able to find that Pac Rim Cayman does have substantial business activities in the United States, whether it's looked at on its own or as part of the corporate family of which it is an essential part. But just to avoid any doubt on this subject, let me say a little bit about that context because--because I believe it's very important.

As I said, Pac Rim Cayman is part of a broader U.S.-based corporate organization. It doesn't operate in isolation. It doesn't operate in a vacuum that distinguishes Pac Rim Cayman from what one might consider to be a shell company.

Now, that corporate family of which Claimant is an essential part includes Dayton Mining, which engages in mining activity in Nevada, generating the

05:03:08 capital that ultimately was used to make the investments in El Salvador; it includes Claimant's subsidiary Pacific Rim Exploration which makes strategic decisions regarding which mining opportunities the company should pursue, which also develops the intellectual capital about which Ms. McLeod-Seltzer has testified. And all of those activities are inextricably intertwined with Claimant's own activities.

So, the idea here is not to attribute to Pac Rim Cayman the activities of those other companies. It's simply to point out that the activities of this investor have to be viewed in context. You have to view this from an economically realistic point of view which is no different from the way the tribunals looked at the investor in the Petrobart Case, in the S.D. Myers Case, or in the Aguas del Tunari Case.

So, context, examination of context, examination of the Claimant from an economically realistic point of view, that's not attribution to the Claimant of some other enterprise's activities. That is simply looking at this from an economically

realistic perspective, and I submit to you that nothing in Article 10.12.2 tells you not to examine this company's activities from an economically realistic perspective.

I will talk briefly about the subject of ownership and control, and then turn the podium over to my colleague, Ms. Walter.

We've submitted to the Tribunal the Witness Statement of Mr. Pasfield from Broadridge Financial Services or Broadridge Investor Communication Solutions, demonstrating that in 2007, 2008, 2009, a majority of the Shares of Pac Rim Cayman's parent were held by persons with addresses in the United States. Respondent has chosen not to cross-examine Mr. Pasfield. Apparently it doesn't contest that fact. Instead, it makes two arguments:

Number one, it argues that indirect ownership and control of the Claimant doesn't count for purposes of Article 10.12.2. So, if the ownership of Claimant is indirect, if it is ownership by U.S. persons by virtue of their shareholding of the parent, that doesn't count, in Respondent's view.

05:05:38 And, secondly, they say, just because these people have addresses in the United States, we don't know that they're U.S. citizens. Well, on the first point, on indirect ownership and control, Mr. Badini said it is Claimant that's trying to rewrite Article 10.12.2. That's not what's going on at all. As you see from the text highlighted here, Article 10.12.2 doesn't refer to direct ownership or control. It refers to ownership or control or, in the verb form, own or control. So, it is, in fact, Respondent that is trying to rewrite this clause by insisting that the ownership or control that would defeat a denial of benefits has to be direct ownership and control. There's simply nothing in the text that says that.

Now, with respect to the citizenship of the persons who are the Majority Shareholders of Pac Rim Cayman's parent, one quick point. It is inherently difficult to know the citizenship of the Shareholders of a publicly held company. I think that proposition is axiomatic. And precisely because it is difficult to determine with any precision the citizenship of the

05:07:02 Shareholders of a publicly held company, we've proposed a rule of thumb, and we haven't just chosen that rule of thumb at random. It happens to be a rule of thumb that's applied by U.S. Government agencies when they are confronted with this very same problem. There are U.S. statutes that make certain companies eligible for certain trade-related benefits, and from time to time those benefits are conditioned on a company's being majority-held by U.S. citizens.

So, the U.S. Government agencies that are tasked with administering those statutes have posed this question to themselves from time to time: How do we determine whether the company, the publicly held company, is held in the majority by U.S. citizens? The rule of thumb that they have devised, as a matter of administrative practice, which is spelled out in regulation as well as administrative handbooks, is they say, "If a majority of the Shareholders have addresses in the United States, we will deem the company to be majority-held by U.S. citizens"--U.S. citizens--"unless there is evidence to the contrary."

And we would submit that because we are

05:08:20 talking about a determination whether a company is held in the majority by U.S. citizens, because, as Mr. Badini said earlier, we need to refer to U.S. law--U.S. law is relevant here for making this determination--I would submit that equally relevant is the practice of the very agencies that are tasked with administering that law, and the agencies that are tasked with administering that law apply the rule of thumb that I have just described. I would submit that the same rule of thumb ought to be applied here.

A last point with respect to control, Mr. Badini said earlier that because the parent company, the Canadian parent company, is the 100 percent owner, it controls Pac Rim Cayman, and that assumes that there can be only one controller of a company. As the Tribunal recognized in Aguas del Tunari, there is not necessarily one controller of a company. There may be multiple controllers of a company. And, in fact, the Shareholders of a company ultimately control it. It's to them that the directors, the Board of Directors, is accountable. The Board of Directors can be removed by the

Shareholders.

And, therefore, the assumption Respondent makes that because Pac Rim Cayman is 100 percent owned as a wholly owned subsidiary of Pacific Rim Mining Corp., therefore it is in no sense controlled by the Shareholders who ultimately can exercise that power, the power, the ultimate power, to remove a Board of Directors, therefore they're not in control, that's simply an incorrect assumption, and I urge the Tribunal to reject it.

In the interest of time, I'm now going to turn the microphone over to Ms. Walter. Should the Tribunal have any questions, of course, on denial of benefits, I'm happy to answer them now.

PRESIDENT VEEDER: We will put them to you later. Thank you.

MR. POSNER: Thank you.

MS. WALTER: Thank you, Mr. Chairman and Members of the Tribunal. We are all very interested in time now, so I'm going to, also in the interest of time, try to make this brief and just make a few points on abuse of process.

05:10:35 As I think we've understood by now, the question of whether there has been an abuse of process in this case really turns on one critical fact, and that is whether the dispute arose before or after Pac Rim's change of nationality in December 2007.

Now, we have shown you that, in fact, the dispute did not arise until, at the earliest, March of 2008, and we submit that if you find that that is, indeed, the case, there can be no finding of abuse of process here.

But to be clear, Pac Rim Cayman does not have the burden of proving that it brought this claim in good faith. Respondent bears the burden of proving its abuse-of-process defense. And if you show the first slide. That was recognized, for example, in the Chevron Case, where the Tribunal noted that a Claimant is not required to prove that its claim is asserted in a nonabusive manner. It is for the Respondent to raise and prove an abuse of process as a defense.

And this is important because some of the same fact that are at issue with respect to Respondent's objection ratione temporis and its

05:11:47 objection as to abuse of process are at issue, and particularly the timing issue. But when it comes to finding an abuse of process, you must look to Respondent to prove all of the facts that it has alleged.

And as we noted in our written pleadings, a finding of abuse of process is actually quite extraordinary. Even the Phoenix Case on which the Respondent relies shows that the Tribunal, as I'm sure Professor Stern knows better than anyone else here, did not dismiss the case for abuse of process per se. It dismissed the case because there was not a foreign investment, no bona fide investment by a foreign investor, and they found it would be an abuse of process to entertain the claim.

And we submit that the paucity of cases that actually find abuse of process, including the utter lack of any decision dismissing all claims on that ground alone reflects the fact that a heightened standard of proof applies to an accusation or an allegation of abuse of process which is, after all, an allegation of bad faith.

05:13:02 If you think back to this morning, think of how many times we heard Respondent talk about things like concealment and deceit. Those kinds of allegations must be proven by more than a preponderance of the evidence. They must be proven by at least clear and convincing evidence. Mere supposition and innuendo and notations of so-called "coincidences" do not suffice.

And I think it is clear from what you have heard today and what you will hear for the rest of this week, Respondent has come nowhere near establishing any of the facts that it has to prove by clear and convincing evidence in order to prevail on its theory of abuse of process.

The only witness that it has produced on Claimant's motivations for the change of nationality which is the core of its abuse-of-process claim--or defense, I should say--is one of its own attorneys, who testifies to what he speculates may have been in the minds of counsel for Claimant several years ago. But this is irrelevant to the issue of when the Act by the Government of El Salvador occurred or when we

gained knowledge of it such that a dispute arose, and that did not occur until early 2008, after the change of nationality.

And I would further note that Respondent's allegation of abuse of process goes beyond just the timing issue, although that is the key issue. There are actually several related facts that form part of Respondent's theory. And if you will go to the next slide--I think I have eight minutes or less, so I will make this quick--Respondent alleges first that there is an investor with no ties to the U.S.--that's Pac Rim Cayman--but as we'd discussed earlier today and particularly in Mr. de Gramont's presentation but also my colleague Mr. Posner's, Pac Rim Cayman has always been managed and controlled from the U.S., it has long-standing tie to the U.S. It is part and parcel of an enterprise making an investment in El Salvador directed mainly from the U.S.

Second, that this investor with no ties to the U.S. set up a shell company with no substance in the U.S. Now, Pac Rim Cayman is not a shell company because it does hold and manage significant assets, it

05:15:29 makes strategic decisions as to those assets through a U.S.-based Manager, and it has incurred liabilities. A shell company, by definition, does none of those things. It's not a shell company.

Now, we've also discussed to some extent the fact that its activities have substance. They are substantial activities. So, that's also not proven. And, in fact, quite the opposite, we would say, has been proven.

Third, that it did all of these things for the sole purpose of obtaining jurisdiction over a pre-existing dispute. And as I already mentioned, it was not a pre-existing dispute. Yes, there were delays. And as we already acknowledged, yes, that must have caused frustrations. There was continual dialogue between Pac Rim Cayman and representatives of the Salvadoran Government over how they could work their way through to a solution. But there was not a legal dispute, not until President Saca acknowledged or revealed, rather, the existence of what we called the de facto mining ban, again March 2008, after the change of nationality.

05:16:38 And, finally, Respondent's theory rests on the belief or the allegation that there was otherwise no access to international arbitration, no ICSID jurisdiction for the claims to be heard, and this is the motivation behind the alleged abuse. But as we'd mentioned earlier, the companies could have submitted claims to arbitration either under CAFTA through the U.S. investors who owned shares in Pacific Rim Mining Corp. or through the Investment Law.

So, that prong isn't met either. And again, quite the opposite. We believe we have proven that it can't be the case, although it is again not our burden to show those things.

Four minutes.

I will just quickly contrast this case with Phoenix again in a little bit more detail. There--now, it's interesting we heard this morning from counsel for Respondent that Phoenix Action wasn't really about a domestic dispute or that's not really important because it cited Banro and some other cases, but Banro didn't involve an obligation of abuse of process. Phoenix did. And it was key to the

Tribunal's decision, we submit, that it was actually a domestic dispute. There had been litigation, ongoing litigation, in the Czech Republic already happening when the owner or one of the owners of those companies fled to Israel, formed the Claimant, and then submitted a claim. And the Claimant was only created after the dispute and the damages had occurred. Not what we have here. Our Claimant has existed for a long time and changed nationality before the dispute arose.

Third, the investment was made--the "investment" was made by the Claimant only after the dispute in damages had occurred. That's when it bought its interest in the Czech companies that had the litigation. That is not the case here. There was significant foreign investment that occurred before the dispute arose, and again Pac Rim came in and was a U.S. national before the dispute arose as well.

Finally--and I think this was also very important to the Tribunal's outcome--the investment, and again I put it in quotes because the Tribunal found it wasn't a genuine bona fide international

05:18:47 investment, was accomplished through transactions that did no more than rearrange assets within a family. It wasn't really an investment at all. It was a way of trying to dress up a domestic dispute as an international dispute, and we have nothing like that here whatsoever. It is a bona fide investment.

And then I think we have one more slide just bring home that point. The Tribunal in Paragraph 97 of Phoenix explained its concerns and what we believe really underlay its decision as follows: "The BITs are not deemed to create a protection for rights involved in purely domestic claims, not involving any significant flow of capital, resources or activity into the host State's economy." This is why, number one, there was no real investment, and this is why it wasn't abuse. It was domestic dispute; there was no investment. That's not what we have here at all, we submit, and we can certainly answer your questions more likely on Wednesday, I would think, than now, but we stand ready to do so.

Thank you.

PRESIDENT VEEDER: Thank you very much.

05:19:52 MR. ALI: Mr. Chairman, given that we would not do justice to the Investment Law in a minute and 90 seconds, we will rest on our pleadings and address any submissions that are made by Respondent on Wednesday.

PRESIDENT VEEDER: You could take it we will read for ourselves what you have given us in the form of the slides in regard to the Investment Law. But we will come back to it, no doubt, later this week.

Unless there is anything else either Party wishes to raise, we'll adjourn this hearing until 9:00 tomorrow, when we resume with the two witnesses on agenda. Is there anything anybody wants to raise? I will turn to Respondent first.

MR. SMITH: Nothing from El Salvador.

PRESIDENT VEEDER: And for the Claimant?

MR. ALI: Nothing from Claimant, Mr. Chairman.

PRESIDENT VEEDER: Until 9:00 tomorrow. Thank you very much.

(Whereupon, at 5:20 p.m., the hearing was adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

_____

DAVID A. KASDAN