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 3

HEARING ON JURISDICTION

Wednesday, May 4, 2011

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

The hearing in the above-entitled matter came on, pursuant to notice, at 12:35 p.m., before:

MR. V.V. VEEDER, President

PROF. BRIGITTE STERN, Co-Arbitrator

PROF. GUIDO SANTIAGO TAWIL, Co-Arbitrator

Also Present:

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

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MS. JUDITH LETENDRE

MR. DANIEL GIGLIO

MS. SILVIA COLLA

APPEARANCES:

Attending on behalf of the Claimants:

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MR. ALEXANDRE de GRAMONT
MR. R. TIMOTHY McCRUM
MR. THEODORE POSNER
MS. ASHLEY R. RIVEIRA
MS. MARGUERITE C. WALTER
MS. KASSI TALLENT
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Representatives of Pac Rim Cayman LLC:

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MS. CATHERINE McLEOD-SELTZER

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

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Secretary-General, Office of the Attorney General
MR. DANIEL RÍOS
Legal Adviser, Ministry of the Economy of El Salvador
MR. RENÉ SALAZAR
Director General of Commercial Treaty Administration, Ministry of the Economy of El Salvador
MS. CLAUDIA BELTRAN
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Embassy of El Salvador in Washington, D.C.

MR. DEREK SMITH
MR. ALDO BADINI
MR. LUIS PARADA
MR. TOMÁS SOLÍS
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On behalf of Consortium:

MR. OSCAR SAMOUR

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MR. DOUG BRIGGS

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C O N T E N T S

P R O C E E D I N G S

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

We will start Day 3 of this jurisdictional hearing.

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

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

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

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

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

12:36:20 1 correct?
2 MR. ALI: That's correct.
3 PRESIDENT VEEDER: Let's work on that basis.
4 Is there anything that Claimants want to
5 raise at this stage?
6 MR. ALI: Yes, Mr. Chairman.
7 First of all, I'd like to introduce
8 Mrs. Catherine Seltzer, the Chairman of Pacific Rim
9 Mining Corp., who has been able to join us today.
10 And, secondly, I would like to raise the
11 issue of the new document that we gave to Respondent's
12 counsel yesterday afternoon. I just remind the
13 Tribunal that is an excerpt from the Foreign Affairs
14 manual of the United States Government entitled
15 "Assistance to Citizens Involved in Commercial
16 Investment and Other Business-Related Disputes
17 Abroad."
18 We believe that this document must be
19 admitted for several reasons:
20 First of all, it is a document of public
21 record.
22 Secondly, it isn't a very long document.

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

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

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

12:38:28 1 the document not being admitted.
2 Thank you.
3 PRESIDENT VEEDER: Do the Respondents want to
4 respond to that at this stage?
5 MR. SMITH: Yes, we would.
6 PRESIDENT VEEDER: Please do.
7 MR. SMITH: To begin with, I don't think
8 Claimant can claim any prejudice if the document is
9 not admitted. As Claimant's counsel has indicated,
10 this is a public document that was fully available to
11 them at the time they prepared their written
12 submissions. They've indicated no reason whatsoever
13 why they failed to file it in a timely manner. While
14 it is only an eight-page excerpt of the document, the
15 full document of the Foreign Affairs Manual is, in
16 fact, many, many hundreds of pages long, and therefore
17 to understand the context of this submission, one
18 obviously has to have access to the full Foreign
19 Affairs Manual.
20 And there is, in fact, no heightened
21 relevance of the United States that's come to light
22 since El Salvador's last written pleading. The

12:39:38 1 denial-of-benefits objection was filed before they
2 filed any of their written pleadings. Every issue
3 that this document addresses was fully in the record
4 in the written pleadings, and there's just no reason
5 to allow them to file this document out of time.
6 Not to mention the procedural issue that,
7 well, we had overnight to prepare for today, the
8 filing of a document like this, we had to deal with it
9 last night. And it is--unless there is a good reason
10 to do it, I don't think it should be permitted as a
11 matter of course.
12 MR. ALI: Mr. Chairman, if I have a brief
13 response?
14 PRESIDENT VEEDER: Brief reply.
15 MR. ALI: First of all, I would simply remind
16 the Tribunal and my friend, Mr. Smith, that we
17 received a number of documents yesterday in the midst
18 of cross-examination which should have been produced
19 to us before.
20 And, secondly, we will have another round of
21 written submissions, and certainly within the context
22 of that round of written submissions where we aren't

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

PRESIDENT VEEDER: Let's stop the debate there.

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

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

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

MR. SMITH: Okay.

PRESIDENT VEEDER: We don't have to retread every issue.

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

12:41:36 1 We need to distribute between the three of us. And
2 rather than hold things up now, we would rather give
3 the floor to the Respondent. But for the moment don't
4 refer to this document, even though you may have
5 prepared for it.
6 MR. SMITH: Slides, yes, no time for copies,
7 however. I apologize for that.
8 PRESIDENT VEEDER: Could we have them later?
9 Because they tend to be quite useful.
10 MR. SMITH: Yes, of course. They're being
11 prepared.
12 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT
13 MR. SMITH: Thank you, Mr. President, Members
14 of the Tribunal.
15 Again, I'm Derek Smith of Dewey & LeBoeuf
16 appearing on behalf of El Salvador. I'm going to give
17 our final observations based on the arguments and
18 testimony that was adduced over the last two days.
19 I will address our objections of abuse of
20 process ratione temporis and the lack of jurisdiction
21 under the Investment Law. After I finish, Mr. Badini
22 will address our objections based on denial of

benefits.

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

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

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

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

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

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

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

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

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

12:45:35 1 access to jurisdiction was the primary reason for the
2 manipulation of Pacific Rim Cayman's corporate
3 structure to change its nationality.
4 This is from Mr. Shrake's testimony
5 yesterday, Day 2 at 454, 12 to 22.
6 "QUESTION: Is it your position, your
7 truthful position, that the primary reason
8 for changing the nationality of Pacific Rim
9 Cayman was to save these few thousand dollars
10 in fees?
11 "ANSWER: No. There were numerous
12 reasons. You said primary reason.
13 "QUESTION: Right.
14 "ANSWER: There were numerous reasons to
15 move it to Nevada.
16 "QUESTION: So, saving money was not the
17 primary reason?
18 "ANSWER: It was one of the reasons."
19 PRESIDENT VEEDER: Just reading that, is it
20 fair to say that he conceded that it was a primary
21 reason? I don't read his answer "right" as meaning
22 you were right. We heard your question.

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

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

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

"No."

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

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

12:47:27 1 that it was a primary reason, we need to find a
2 relationship.
3 MR. SMITH: I understand.
4 PRESIDENT VEEDER: If you have it, show it to
5 us.
6 MR. SMITH: I accept the President's logic,
7 but it stands out that--to me that it is--that the
8 preponderance of the evidence indicates that it was
9 the primary reason for changing nationality was to
10 access jurisdiction because clearly saving money could
11 not have been a significant consideration.
12 Thank you.
13 In any event, it is clear that access to
14 jurisdiction was a reason and, therefore, the second
15 prong as regards to whether the interference with the
16 investment took place prior to Pac Rim Cayman's change
17 of nationality is the only object of dispute here.
18 This is from the statement of Ms. Walter
19 yesterday, indicating Claimant's agreement that there
20 is a single factual issue at issue. I quote from
21 Day 1, 265, 1 to 5, "As I think we've understood by
22 now, the question of whether there has been an abuse

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 2007."

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

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

The elaborate steps articulated by the

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

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

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

(Pause.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:58:10 1 denied by operation of law. Therefore, by
2 December 13, 2007, there was a clear and dramatic
3 dynamic between the Parties that would qualify for any
4 definition of a dispute. There was the formulation of
5 legal claims. There was discussion and eventual
6 rejection or lack of response by the other Party. The
7 facts clearly demonstrate that all of that happened
8 before December 7--December 13, 2007, with regard to
9 the Exploitation Concession Application, and there
10 it's clearly in the facts.
11 (Pause.)
12 MR. SMITH: At this point it is also
13 clear--one more forward, I'm sorry. It is also
14 abundantly clear from the record from the testimony of
15 Mr. Parada, which is uncontroverted, that Claimants
16 were preparing for arbitration prior to December 13,
17 2007, and had every plan to submit an arbitration
18 claim. If arbitration could have been submitted, then
19 there was clearly a dispute for all purposes.
20 Mr. Parada has submitted an unrebutted
21 Witness Statement and testimony that Claimant's
22 counsel informed him of the existence of the dispute

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

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

Next.

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

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

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

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

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

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

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

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

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

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

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

Can we go on?

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

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

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

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

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

12 to 18:

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

"ANSWER: In March 2008?

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

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

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

"ANSWER: No."

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

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

"ANSWER: No.

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

"ANSWER: That's correct.

"QUESTION: Okay.

"ANSWER: I did not know that every mining Concession in El Salvador was eventually going to be expropriated."

That sounds to me like I did not know there was a ban.

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

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

PRESIDENT VEEDER: Do you mind if we interrupt you?

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

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

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

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

MR. SMITH: Right.

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

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

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

were true and known and existing in December. If there was no ban, then the dispute must have started before this date.

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

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

MR. SMITH: I will go to that immediately.

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

Continue.

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

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

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

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

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

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

Okay. We can go on.

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

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

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

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

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

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

Okay, can we go to the next one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARBITRATOR TAWIL: That's okay. Please finish.

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

There's more if you want to ask--

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

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

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

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

ARBITRATOR TAWIL: Okay.

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

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

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

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

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

01:33:30 1 want to make sure that those two legal concepts are
2 distinct.
3 Now, I would like to turn to your next
4 question on ratione temporis. And you ask, another
5 aspect of the Mining Law is simply this. As we stand
6 today going back in time to March 2008, has any
7 foreign company been given an exploitation permit for
8 underground mining for, first of all, as regards any
9 foreign company and, separately, as regards any
10 local--this is national--company. If none has been
11 granted, either none to a foreign company or none to a
12 local company or both, what is the reason for that?
13 The truth of the matter is that no foreign or
14 national company received a mining exploitation
15 Concession in El Salvador since Commerce Group was
16 issued its last Concession in August of 2003. The
17 truth of the matter is that since then there have only
18 been two Exploitation Concession Applications. One
19 was by Pacific Rim Mining Corp. of Canada. One was
20 another company whose name I do not know. That other
21 one was filed in 2005 and was rejected by the Ministry
22 of the Economy in 2006.

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

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

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

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

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

carefully consider each of these six grounds for denial of jurisdiction.

Now turning to your question.

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

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

01:38:08 1 understanding that's not been raised by the Parties.
2 We want to make absolutely clear that it is not an
3 issue that we're being asked to consider, at least not
4 by Respondent.
5 As El Salvador confirms that it is not
6 advancing an argument based on res judicata, issue
7 estoppel, collateral estoppel, or any other doctrine
8 related to those. However, we do maintain that
9 judicial consistency would dictate that the Tribunal
10 should not make contradictory findings on the same
11 issue in the same case. Therefore, if the Tribunal
12 dismisses the CAFTA proceeding, it must also dismiss
13 the Investment Law proceeding, and I know that you
14 indicated in your question that you understood our
15 point, but I will make it just one more time.
16 In the alternative, if the Investment Law
17 proceedings were to survive alone, then it is our
18 position, and I believe it is the correct
19 interpretation of CAFTA that it would be the
20 continuation of a proceeding with respect to a measure
21 alleged to constitute a breach of Article 10.16 before
22 another dispute-settlement procedure; namely,

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

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

PRESIDENT VEEDER: Maybe later.

MR. SMITH: Okay. Miscellaneous question: Now, we would like, if any point is being made about witnesses who should have been made available before this Tribunal and have not been made, if we are being asked to draw adverse inference, we would like to know exactly what the submission would be and what the effect of that submission would be on this jurisdiction stage of the proceedings.

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

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

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

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

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

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

MR. SMITH: Thank you, Mr. President.

PRESIDENT VEEDER: So, we'll just pause.

(Brief recess.)

PRESIDENT VEEDER: Let's resume.

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

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

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

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

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

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

joy in Mudville: Mighty Casey has struck out."

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

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

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

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

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

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

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

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

"QUESTION: Did it lease any office space?

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

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

And he continued:

"QUESTION: Did it have a bank account?

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

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

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

And then Mr. Smith asked him,

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

"ANSWER: None."

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

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

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

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

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

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

That's not the Claimant.

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

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

02:00:32 intellectual property of the company.

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

"ANSWER: It contributed everything to El Salvador."

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

Next slide, please.

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

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

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

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

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

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

"ANSWER: Yes."

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

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

"ANSWER: Yes.

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

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

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

but hold shares.

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

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

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

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

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

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

02:07:06 1 substantial business activities in the jurisdiction of
2 all of these other Enterprises.
3 The absurdity of that is demonstrated if we
4 simply change the name here. They're creating
5 confusion by the fact that these other companies are
6 in the United States. But they just as easily could
7 be, say, in India; right? What if these mines were in
8 India? And what if the exploration company were in
9 India? If you accept Claimant's theory, the fact this
10 mine in India sent money to the Canadian parent and
11 the fact that the exploration company was also in
12 India, all of those facts should be leading you to the
13 conclusion that the Pac Rim Company, which is a mere
14 holding company, holding El Salvador companies, this
15 now has substantial business activities in India.
16 It's absurd, and the cases don't say that.
17 The first authority that I would direct the
18 Tribunal to is again one that Mr. Chairman is familiar
19 with. It's the Plama versus Bulgaria ECT arbitration,
20 where a very similar argument was made. A very
21 similar argument was made. The argument was don't
22 just look at the Claimant. Look at the other

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

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

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

Next slide, please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"ANSWER: Yes.

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

"ANSWER: Yes.

"QUESTION: And whose decision was that?

"ANSWER: Mine.

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

"ANSWER: I did.

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

"ANSWER: I did.

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

"ANSWER: Yes.

"QUESTION: Who made that decision?

"ANSWER: I did."

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

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

"ANSWER: I did."

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

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

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

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

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

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

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

here's Pacific Rim Exploration. Again, is Pacific Rim Exploration and Mr. Shrake wearing his hat as President of Pacific Rim Exploration, is he controlling the Claimant? No, they're at the same level. They're being controlled by the parent company.

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

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

wearing. Let's look at his testimony.

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

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

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

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

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

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

"ANSWER: Yes."

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

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

After then he made that circle, I asked him.

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

"ANSWER: Yes."

And you can see for yourselves, the companies

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

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

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

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

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

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

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

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

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

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

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

MR. BADINI: That's correct.

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

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

been made.

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

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

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

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

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

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

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

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

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

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

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

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

And with that, I will close and thank the

Tribunal for its time.

PRESIDENT VEEDER: Thank you very much.

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

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

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

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

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

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

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

PRESIDENT VEEDER: Yes.

MR. ALI: Thank you.

(Recess.)

PRESIDENT VEEDER: Let's resume.

The Tribunal first addresses the application

made by the Claimants in respect of the new documentation. What the Tribunal is going to do is not to make any formal decision whether to admit or reject this document, and by "document," we understand it relates to the eight pages to be proffered by the Claimant.

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

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

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

MR. ALI: Thank you, Mr. Chairman.

Should we hand out copies of the document

03:03:08 now?

PRESIDENT VEEDER: Yes, please.

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

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

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

PRESIDENT VEEDER: Please proceed.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

03:09:18 to his Government contacts.

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

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

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

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

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

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

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

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

for the Government of El Salvador.

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

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

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

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

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

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

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

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

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

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

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

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

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

Let me repeat that because that really bears emphasis.

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

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

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

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

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

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

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

offered on this point yesterday.

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

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

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

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

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

Okay. Here are the basic undisputed facts

about Pac Rim Cayman:

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

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

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

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

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

cross-examine the CFO. It chose not to do so.

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

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

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

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

CAFTA. They are legal entities whose investment decisions can be made by a single person, without furniture, without employees, without UCC filings.

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

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

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

entities, would be redirected from those entities and invested through Pac Rim Cayman in El Salvador.

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

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

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

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

The next slide.

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

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

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

Pacific Rim Exploration, another Nevada corporation, served as the exploration arm of the companies. A majority of the shareholders of the Pacific Rim Mining Corp. have addresses of record in the United States. These are substantial U.S. connections.

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

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

July 2008. President Saca, "will not grant a single permit."

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

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

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

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

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

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

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

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

2007 through 2008. Indeed, MARN requested DOREX to provide comments on MARN's observations to the Pueblos EIA in January of 2008. Again, that's undisputed.

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

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

Where is Mr. Guillermo Antonio Gallegos, the

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

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

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

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

03:36:42 1 both Parties. But let's take a look at the respective
2 role of these witnesses. There is, I believe, a
3 single reference to Ms. Hashimoto in Mr. Shrake's
4 witness other than her being laid off. It says, "At
5 some point in 2007, our then-Chief Financial Officer,
6 Ms. April Hashimoto, suggested to me that we could cut
7 costs by deactivating subsidiaries in jurisdictions
8 where the companies had not conducted business for
9 some time, but where we still paid various fees and
10 costs and devoted administrative time in order to
11 maintain the business in good standing."
12 Again, as Mr. Shrake testified, this was one
13 of at least two reasons for the reorganization. And
14 the fact is--
15 PRESIDENT VEEDER: If I could interrupt, what
16 seems to be significant about that piece of evidence
17 is that it relates to the initiative, the timing of
18 this change. And if you look at that paragraph, it
19 looks as though the idea came from Ms. Hashimoto. Is
20 there any other evidence that it came or originated
21 from any other person?
22 MR. de GRAMONT: Well, Mr. Krause testified

that he reviewed the books and records and he spoke to KPMG.

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

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

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

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

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

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

MR. de GRAMONT: No, I understand.

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

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

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

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

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

thought that there was a pre-existing dispute.

Next slide, please.

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

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

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

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

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

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

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

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

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

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

say sorry, we are still working on it, we are working really hard, we are really backed up, come back in a week. I come back in a week, oh,we are still working on it, we'll get it done. Don't worry.

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

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

were raised through the issuance of 6.7 million units consisting of one share and one share purchase warrant.

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

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

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

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

strict Securities Laws and rules that any material fact has to be disclosed to potential investors. There is no record that a dispute was disclosed to investors prior to this private placement financing.

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

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

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

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

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

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

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

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

responsibilities associated with our mining permit Application has caused the company to take stock of its future options."

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

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

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

PRESIDENT VEEDER: Why don't you do that.

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

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

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

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

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

03:52:18 1 companies had been de-registered in the Cayman Islands
2 and transferred by way of continuance to Peru."
3 Mr. Shrake made a comment about trying to
4 administer things in the Cayman Islands, and I suggest
5 this may be evidence of that, so let's keep going
6 through the documents. Tab 3. This is Respondent's
7 Exhibit 69. This was the document that I tried to
8 find during my opening and wasn't able to, but let's
9 look at it now.
10 Again, articles of domestication. The name
11 of the entity is Pac Rim Cayman LLC, a Nevada limited
12 liability company. The entity named before filing
13 articles of domestication, Pac Rim Cayman, date and
14 jurisdiction of creation, date of creation September
15 10, 1997, and the jurisdiction that constituted the
16 principal place of business, central administration or
17 equivalent of the undomesticated entity before the
18 articles of domestication was Cayman Islands.
19 So, this indicates that for a filing fee of
20 $350, the company could be domesticated to Nevada and
21 would continue its corporate identity there.
22 Let's take a look at Tab 4. Now, this

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

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

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

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

liabilities of approximately $42 million.

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

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

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

Shareholder of the company--to the sole shareholder of company that the company be continued under the laws of Nevada, et cetera.

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

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

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

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

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

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

(Brief recess.)

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

SECRETARY MONTAÑÉS-RUMAYOR: With apologies,

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

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

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

We also need to ask what the Parties would

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

04:19:55 1 did not know--and, indeed, Claimant did not have
2 reason to know--that the acts and omissions through
3 which permits were denied to PRES and DOREX
4 constituted the practice that is the measure at issue.
5 From all outward appearances, those acts--yes,
6 Mr. Tawil.
7 ARBITRATOR TAWIL: Please, finish your
8 sentence.
9 MR. POSNER: I was going to say, from all
10 outward appearances, those acts and omissions were
11 just instances of ordinary delay.
12 ARBITRATOR TAWIL: Mr. Posner, can you
13 develop a little bit more how 10.1.3 would work with a
14 change of nationality?
15 MR. POSNER: Well, let's start with the basic
16 proposition in 10.1.3.
17 So, the focus in 10.1.3--and, as I said
18 earlier, it's a repetition of Article 28 of the Vienna
19 Convention on the Law of Treaties is the basic
20 nonretroactivity principle, and its focus on entry
21 into force of the treaty. We are sort of taking one
22 step away from that and saying we are not focusing on

when the Treaty entered into force for the whole word for these two capital "P" Parties, United States and El Salvador, but when it became applicable to a given investor. So, before a person--before an investor becomes a person of a Party, the Treaty is not applicable to it. From the moment it becomes a person of a Party, the Treaty is applicable to it.

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

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

Does that answer your question?

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

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

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

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

MR. POSNER: Right.

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

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

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

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

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

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

ARBITRATOR TAWIL: Who was--

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

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

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

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

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

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

ARBITRATOR TAWIL: Okay, thank you.

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

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

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

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

Now, as I said--

PRESIDENT VEEDER: Can you put a date on

04:28:02 this?

MR. POSNER: Date on...

PRESIDENT VEEDER: "The measure at issue." For the purpose of your claim.

MR. POSNER: Yes.

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

MR. POSNER: Right.

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

PRESIDENT VEEDER: That wasn't my question.

MR. POSNER: Okay.

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

MR. POSNER: Yes.

PRESIDENT VEEDER: What is the date?

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

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

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

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

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

04:29:55 1 context before February 2008.
2 MR. POSNER: Absolutely.
3 And, indeed, we did that. And I will come to
4 that in a moment because I think some of the confusion
5 here or some of the confusion that Respondent has
6 created around the Notice of Intent and the Notice of
7 Arbitration stems from the reference to various acts
8 and omissions which we accurately described as
9 measures giving rise to the ultimate claim.
10 It is true that they gave rise to the claim
11 and that they created the foundation. They were
12 there. We don't deny that those delays, as Mr. de
13 Gramont said earlier, those frustrating delays, missed
14 deadlines, those various acts and omissions existed,
15 yes, they existed, but they only became cognizable as
16 the measure at issue when the measure at issue became
17 apparent, which wasn't until March 2008 at the
18 earliest.
19 I think the distinction that I'm making here,
20 Mr. President, between measures and the measure at
21 issue is a very important one, and I think to avoid
22 any confusion, I think an illustration might help to

clarify the point.

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

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

resulted in the rejection of applications for the marketing of biotech products.

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

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

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

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

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

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

(Document handed to counsel.)

MR. POSNER: Thank you.

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

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

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

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

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

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

04:37:09 1 situation that took place, occurred for the first
2 time, at the moment when President Saca formally said
3 in March of 2008, "This is the practice. This is
4 going to be the way our agencies conduct themselves
5 going forward."
6 ARBITRATOR STERN: You answered part of my
7 question saying that you don't know exactly when the
8 practice started. Okay, let's take this as you said.
9 But one aspect of my question was whether in a
10 continuing practice you can take into account for a
11 claim acts that existed before you are protected.
12 MR. POSNER: Yes.
13 ARBITRATOR STERN: I mean, it's quite a
14 simple question. It's not simple to answer.
15 MR. POSNER: The answer is yes. You can take
16 them into account; and, indeed, we have done that. In
17 our Notice of Intent and in our Notice of Arbitration,
18 we've described those earlier acts and omissions
19 because they're quite relevant as context and as
20 background for understanding the practice that only
21 came to light subsequently. So, yes, indeed, we can
22 take them into account.

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

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

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

MR. POSNER: Yes.

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

MR. POSNER: We will absolutely do that.

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

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

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

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

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

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

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

04:41:54 do identify the measure at issue in the manner I've just described. What it says at Paragraph 9 is this: 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 had been rendered virtually valueless, and PRC's investments in El Salvador have been effectively destroyed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Of course, that is the same approach we

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

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

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

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

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

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

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

04:52:56 1 Let me first refer to the invitation by El
2 Salvador that Mr. Badini communicated earlier that it
3 would not challenge U.S. advocacy, advocacy by the
4 United States Government in State-to-State
5 consultations as a breach of Article 27. Well, while
6 that invitation which now comes more than 24 months
7 after this arbitration has commenced is interesting.
8 El Salvador does not have the power unilaterally to
9 waive the obligations of the United States under the
10 ICSID Convention. The ICSID Convention is not a
11 bilateral treaty. It is a multilateral treaty. And
12 El Salvador, one Party, cannot waive the obligations
13 of another Party under a multilateral treaty. That's
14 a basic principle of international law, and I'm sure I
15 don't need to dwell on that further.
16 Moreover, whatever possible comfort this late
17 breaking information may give to the United States,
18 and I doubt it gives it any at all, it still doesn't
19 change the untenable policy choice that El Salvador's
20 late notice imposes on the United States. El Salvador
21 has put the United States in a predicament which I
22 described yesterday. Either the United States could

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

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

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

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

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

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

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

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

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

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

a nullity.

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

And I give you that illustration to highlight

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

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

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

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

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

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

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

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

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

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

Well, so as you know, it's entitled

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

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

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

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

document before you, Mr. President.

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

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

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

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

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

SECRETARY MONTAÑÉS-RUMAYOR: 15 minutes.

MR. ALI: Thank you very much.

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

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

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

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

about this issue.

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

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

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

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

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

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

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

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

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

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

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

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

gives rise to State responsibility on the international plane, not just the domestic plane. Why? Because what is at issue is an objection regarding the abuse of an instrument of international jurisdiction.

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

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

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

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

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

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

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

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

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

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

Then, just a couple of additional points.

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

PRESIDENT VEEDER: Let me stop you.

MR. ALI: Yes, sir.

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

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

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

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

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

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

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

withdrawn, but that is an issue to be dealt with on the merits.

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

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

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

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

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

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

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

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

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MR. BADINI: Members of the Tribunal, I will

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

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

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

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

substantial business activities in the United States or controls someone from the United States cannot turn on the physical location of the Chief Executive Officer of a company. It cannot turn on that issue, or even the citizenship of the Chief Executive Officer of a company.

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

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

05:22:51 1 that subsidiary to the United States, can they take
2 the position, which is the position that they have
3 taken here, that Claimant has taken in this
4 arbitration, that because the Chief Executive Officer
5 of the parent is in the United States and has been
6 there a long time and because Novartis as a company,
7 as a family of companies, does substantial business in
8 the U.S., then surely that sub qualifies as having
9 substantial business in the U.S. That cannot be the
10 test, and there is no support for that being the test.
11 Now, the argument was also made that when he
12 was in the U.S., he made all of these decisions and,
13 therefore, he exercised control, and so we have not
14 shown, Claimant says, that control was exercised from
15 Canada. But again the words of Mr. Shrake belie that
16 argument. I asked him directly yesterday whether the
17 companies that he circled on our exhibit were
18 controlled by the Canadian parent. The question was:
19 And does Pacific Rim Mining Corp.--that's the Canadian
20 parent--also control all of these companies you just
21 circled?
22 Yes.

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

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

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

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

On that note, unless the Tribunal has any

questions, I will cede the podium to Mr. Smith.

Thank you.

PRESIDENT VEEDER: We'll hear Mr. Smith.

MR. BADINI: Thank you for your indulgence.

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

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

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

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

05:27:00 1 place, he had a very elaborate theory as to why he
2 could not identify that date, but the reality is, is
3 that their definition of the measure has been a moving
4 target throughout this arbitration in order to fit the
5 legal theory that allows their case to continue.
6 Mr. Posner referred to not being very clear
7 in the drafting of the Notice of Intent. There is
8 nothing unclear about the drafting of the Notice of
9 Intent. There is nothing unclear about the drafting
10 of the Notice of Arbitration. It is very clear. And
11 when lawyers--when lawyers draft a document that
12 initiates and refers to an arbitration under CAFTA
13 where the word "measure" is a defined term and a term
14 of art, and then they say that their claims arise
15 because of a measure and that those measures destroyed
16 their investment, I find it hard to believe that they
17 did not understand that they were alleging that those
18 measures are their claims under CAFTA and that somehow
19 later on they realized that they only have one
20 measure. It just doesn't--it does not fit.
21 In fact, the measures that they refer to in
22 their Notice of Intent are quite clear, and they--the

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

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

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

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

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

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

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

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

05:34:16 1 that sort of a definition.
2 And just let me conclude for El Salvador that
3 El Salvador has put forward four very substantial
4 Objections to Jurisdiction. Each and every one is
5 sufficient to dismiss some or all of this arbitration.
6 The primary objection is abuse of process, and I urge
7 the Tribunal in that regard to very carefully read the
8 Claimant's Notice of Intent, the Claimant's Notice of
9 Arbitration, and the Press Reports from March 2008,
10 and Mr. Shrake's letter with regard to those Press
11 Reports, as well as the other facts that have put into
12 the record by El Salvador regarding the dispute
13 regarding the Application for the exploitation
14 Concession, how that dispute developed from 2004 to
15 2007. Very carefully look at the facts, not the
16 twisting of facts by Claimant's counsel, not their
17 redefinition of the measures upon which they base
18 their case. Carefully look at the facts and come to a
19 factual determination as to on what date the
20 interference with the investment took place, on what
21 date the dispute was born, and I think the inevitable
22 conclusion is that it was before December 13, 2007.

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

Thank you very much.

PRESIDENT VEEDER: Thank you very much.

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

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

Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

imposing a page limit, and we asked the Parties whether they discussed that between themselves. We have a figure in mind if they haven't.

We ask the Respondents first.

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

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

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

MR. SMITH: Not to Respondent.

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

(Laughter.)

PRESIDENT VEEDER: But we trust you.

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

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

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

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

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

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

MR. SMITH: Two weeks.

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

PRESIDENT VEEDER: So we'll do two weeks.

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

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

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

PRESIDENT VEEDER: Can I say--

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

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

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

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

MR. SMITH: No difficulty.

PRESIDENT VEEDER: And on the Claimant's?

MR. ALI: No difficulty.

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

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

MR. SMITH: Yes.

MR. ALI: Yes.

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

MR. SMITH: Nothing further from Respondent.

PRESIDENT VEEDER: Anything from Claimant?

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

but I can't remember what it is. Yeah, so perhaps it is forgotten but...

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

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

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

MR. SMITH: Mr. President, I think perhaps

05:43:36 1 the issue that Mr. Ali was referring to was the
2 provision of transcripts to the...
3 PRESIDENT VEEDER: Of course. Let's come
4 back to that.
5 First of all, there is no difficulty in our
6 supplying copies of transcripts to the nondisputing
7 CAFTA Parties, I take it. From either side we can do
8 that?
9 MR. SMITH: No problem from Respondent.
10 PRESIDENT VEEDER: And from the Claimants?
11 MR. ALI: None from Claimant. I've just
12 confirmed that with Mr. Shrake.
13 PRESIDENT VEEDER: Now, we understood that
14 fairly swiftly after we indicated there was a problem,
15 the live feed resumed, so we assumed that it may be
16 only about 15-20 minutes was missing at the most.
17 So, I suspect people who have access to what
18 has been happening here, including the amicae, but it
19 may be that they would wish to have a transcript of
20 the three days. Is there any difficulty about
21 providing that transcript either by the Parties, the
22 disputing Parties, or by the ICSID Secretariat? We

ask the Respondents first.

MR. SMITH: No difficulty for Respondent.

PRESIDENT VEEDER: And the Claimants?

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

PRESIDENT VEEDER: Well then we will do that. Okay.

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

MR. SMITH: Nothing from Respondent.

PRESIDENT VEEDER: And from the Claimants?

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

PRESIDENT VEEDER: Thank you very much.

I think it allows me to say on behalf of the

Tribunal, and I'm sure the Parties, too, a big thank you to our shorthand writers, without whom this would be a memory feat of distinction, and to thank also the interpreters whom we haven't seen but have been laboring in the back, and also the technicians behind us, who have been providing the live feed, and we don't know to how many people; they may have reduced significantly over the last three days, but they may still be quite numerous.

And I think from the Tribunal's side, we would like to express our great things to all the counsel and the support staff. It's been a very interesting and a very efficient hearing in what is not an easy case, perhaps for any of us. So thank you, all, very much, and I formally close this hearing.

MR. ALI: Thank you.

MR. SMITH: Thank you, Mr. President.

(Whereupon, at 5:46 p.m., the hearing was adjourned.)

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.

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DAVID A. KASDAN