

1 INTERNATIONAL CENTRE FOR
2 SETTLEMENT OF INVESTMENT DISPUTES
3 ICSID Case No. ARB/09/17
4

5 COMMERCE GROUP CORP.
6 and SAN SEBASTIAN GOLD MINES,
7 Claimant,

8 v.

9 REPUBLIC OF EL SALVADOR,
10 Respondent.

11 -----
12 Hearing on Preliminary Objections
13 Monday, November 15, 2010
14

15 TRANSCRIPT of the stenographic notes
16 of the proceedings in the above-entitled matter,
17 as taken by and before TAB PREWETT, a Registered
18 Professional Reporter, a Certified Shorthand
19 Reporter, a Certified LiveNote Reporter, and
20 Notary Public, held at the World Bank, 1818 H
21 Street NW, Washington DC, 20005, on Monday,
22 November 15, 2010, commencing at 9:40 a.m.

1 A P P E A R A N C E S:

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3 MEMBERS OF THE TRIBUNAL

4

5 Prof. Albert Jan van den Berg,
6 President of the Arbitral Panel

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8 Dr. Horacio A. Grigera Naún,
9 Co-Arbitrator

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11 Mr. J. Christopher Thomas QC,
12 Co-Arbitrator

13

14

15 ICSID Secretariat

16 Mr. Marco T. Montañés-Rumayor,
17 Secretary of the Tribunal

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9 Counsel for Claimant

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12 University of Victoria Law

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9 ERIC STANCULESCU, ESQ.

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1 OFFICE OF THE ATTORNEY GENERAL OF EL SALVADOR

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3 Counsel for Respondent

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5 EMBASSY OF EL SALVADOR IN WASHINGTON, D.C.

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7 Counsel for Respondent

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9 DOAR CONSULTING

10 BY: STEPHANIE McDONNELL

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1 CAFTA-DR NON-DISPUTING PARTIES

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3 ON BEHALF OF THE REPUBLIC OF COSTA RICA

4 MS. MÓNICA C. FERNÁNDEZ-FONSECA

5 Ministerio de Comercio Exterior (COMEX)

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7 ON BEHALF OF THE REPUBLIC OF

8 THE DOMINICAN REPUBLIC

9 MS. YAHAIRA SOSA MACHADO

10 Ministerio de Industria y Comercio

11

12 ON BEHALF OF THE UNITED STATES OF AMERICA

13 Jeff Kovar, State Department, L/CID

14 Lisa Grosh, State Department, L/CID

15 Mark Feldman, State Department, L/CID

16 Patrick Pearsall, State Department, L/CID

17 Karen Kizer, State Department, L/EB

18 Kimberley Claman, USTR

19 Daniel Bahar, USTR

20 Gary Sampliner, Department of Treasury

21

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1 ALSO PRESENT:

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3 Court Reporters:

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5 Mr. Dante Rinaldi,

6 Spanish Language Reporter

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8 Mr. William I. Prewett,

9 English Language Reporter

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11 Interpreters:

12

13 Silvia Colla, Spanish-English

14 Charles Roberts, Spanish-English

15 Daniel Giglio, Spanish-English

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

2 MR. Van den BERG: Good morning,
3 Ladies and Gentlemen. I open here the hearing
4 on preliminary objections in the case of
5 Commerce Group Corporation and San Sebastian
6 Gold Mines, claimants, versus the Republic of
7 El Salvador, respondents, in ICSID case number
8 ARB/09/17.

9 I may first introduce the tribunal.
10 On my right-hand side is Dr. Horacio A. Grigera
11 Naon. And on my left is Christopher Thomas; and
12 the secretary of tribunal, Mr. Montanes-Rumayor.

13 As good custom, the parties also
14 introduce their team. And I would like to
15 invite the claimants group just to introduce
16 their team.

17 MR. MACHULAK: Thank you very much,
18 sir. My name is John Machulak. I am

19 representing Commerce Group and San Sebastian
20 Gold Mines, Inc.

21 To my immediate right is Professor
22 Andrew Newcombe, of the Victoria University.

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1 Next to him on the right is Eugene Bykhovskiy of
2 our law firm, Machulak Robertson & Sodos. And
3 to the far right is my son, James Machulak, who
4 is our unofficial translator.

5 MR. Van den BERG: Thank you.

6 MR. MACHULAK: Thank you.

7 MR. Van den BERG: On the
8 respondents side, Mr. Smith, please proceed.

9 MR. SMITH: Yes, I am Derek Smith
10 from the law firm of Dewey & LeBoeuf
11 representing the Republic of El Salvador. From
12 the Government of El Salvador, we have
13 Dr. Benjamin Pleites, secretary general of the
14 Office of the Attorney General of El Salvador.
15 From our law firm, Dewey & LeBoeuf, we have Luis
16 Parada, immediately to my left, and Tomas Solis
17 and Erin Argueta.

18 MR. Van den BERG: Thank you.

19 According to the notes of the first session and
20 under section 2.2 and under B of the count, the
21 point of -- the main point of contact for the
22 respondents is Mr. Luis Parada. I understand,

10

1 Mr. Smith, that you are the hearing
2 spokesperson.

3 MR. SMITH: I am the spokesperson
4 at the hearing.

5 MR. Van den BERG: The main
6 spokesperson would be more correct.

7 Mr. Machulak, you are also the main
8 spokesperson for the claimants.

9 MR. MACHULAK: I will be giving
10 some opening remarks, and then Professor
11 Newcombe will be carrying the bulk of the legal
12 argument.

13 MR. Van den BERG: Before we get
14 there, we have some more preliminary matters.
15 One is that we have an agenda, and the tribunal
16 is grateful to the parties for having agreed, to
17 a large extent, to the agenda for this evening

18 and today, but we had a small disagreement about
19 the lengths of time. And the tribunal has
20 decided in favor of the longer periods, so that
21 the parties have a full opportunity to present
22 their case; and we did not want to cut off

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1 unduly parties presenting their case today.

2 The agenda, therefore, is as you
3 have it being distributed here. We have -- let
4 me tell you, the first from 9:45 to 11:15,
5 respondent's argument, or so-called initial
6 presentation. Then we have a break from 11:15
7 to 11:30. We have then the -- after claimants'
8 argument or initial presentation, from 11:30 to
9 1 o'clock. And at 1 o'clock to 2:30 we have a
10 lunch break.

11 Then there was time reserved from
12 2:30 to 3 o'clock for the non-disputing parties
13 for presentations. However, we have been
14 informed that those parties, non-disputing
15 parties that have made submissions pursuant to
16 Article 10.22, will not be present here to make
17 the oral submissions. They have made

18 submissions -- I'm talking about Costa Rica and
19 Nicaragua.

20 So the time reserved for the
21 non-disputing parties will not be used because
22 the understanding is that we have also received

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1 a letter from the United States that they do not
2 wish to make comments at this stage; and,
3 perhaps, the United States can confirm that they
4 have observer status only.

5 Mr. Kovar, I see you are nodding.
6 Nodding is not enough for the transcript. Can I
7 say "yes" on your behalf?

8 MR. KOVAR: Yes.

9 MR. Van den BERG: Thank you. The
10 United States being observers only, that means
11 that we can speed up the agenda in the sense
12 that, at 2:30, we can start with the
13 respondents' response, rebuttal; and that will
14 be then to 3:30. Then we have a coffee break or
15 tea break for 15 minutes. And then we have
16 claimants' rebuttal at 3:45 until 4:45. Yes.

17 That's correct.

18 And then after 4:45 until 5:15, we
19 have the final matters and the conclusion of the
20 hearing.

21 Now, that being the agenda, as
22 usual in an arbitration, just prior to the

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1 hearing, you get an increase of correspondence
2 from the parties, and this case was no
3 exception.

4 The tribunal, first of all, is of
5 course, liable itself for the increase of
6 correspondence because we asked you to do it.
7 We asked you a question last week about the
8 procedure and the discontinuance of Supreme
9 Court proceedings in El Salvador. And that was
10 by E-Mail of 9 November 2010.

11 We received, as requested, on
12 Friday, last Friday, a response from the
13 respondent; and added to that were a day later
14 the two documents referred to in footnote two of
15 the submission, the response. And there was a
16 small question whether they're admitted into the

17 record. So those documents are admitted into
18 the record and -- because they are referred to
19 in the footnote and should actually be a full
20 part of that submission.

21 We have also received a letter from
22 the claimants which I may quote on 12 November

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1 which says:

2 "On November 9, 2010,
3 Mr. Montanès-Rumayor related to us that the
4 tribunal invited the parties to answer questions
5 regarding El Salvador Supreme Court procedure.
6 At this time I am writing to advise that,
7 although we have been addressing these
8 questions, we are at this time unable to furnish
9 the tribunal with our answer. I am sending this
10 letter so that the tribunal is aware of our
11 efforts and the status of this matter."

12 Mr. Machulak, would you like to
13 expound on this?

14 MR. MACHULAK: Yes. I apologize,
15 the lead contact, though I am not Spanish

16 speaking myself, but the -- our counsel in
17 El Salvador -- I was in a jury trial until
18 Thursday which preoccupied my time. I know the
19 people helping me were working on this Tuesday,
20 Wednesday, Thursday, until I completed my other
21 trial.

22 We have been in touch with counsel

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1 for El Salvador to try to ferret out an answer
2 to these questions. I don't think that we
3 disagree that the rule quoted by the respondent
4 is the appropriate rule for dismissal of where a
5 proceeding can be dismissed.

6 Where we were having difficulty is
7 getting the nuance to the application of the
8 rule. When -- our experience in the courts in
9 El Salvador is nothing happens sometimes as
10 exactly -- the experience may be different than
11 the rules -- where our counsel had been telling
12 us that, "Yes, you can make an application to
13 the Court; you don't know whether that's going
14 to happen in a month, in a year or what
15 happens."

16 I can tell you today we still do
17 not have -- as recently as yesterday I was in
18 communication with our liaison -- I don't have a
19 definitive answer for you today.

20 I think that the rule that they
21 cite is the appropriate rule. I don't have
22 enough experience myself, having difficulty in

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1 communicating how that translates as the
2 practical experience in El Salvador.

3 MR. Van den BERG: Let's put it
4 this way. Do the claimants disagree with what
5 the respondents have submitted in writing on the
6 12 of November?

7 MR. MACHULAK: No.

8 MR. Van den BERG: So that's --

9 MR. MACHULAK: The rule is the --
10 they have identified the rule. And I -- I don't
11 question that the Attorney General of
12 El Salvador would mis-cite an opinion or
13 something. I just don't think that would
14 happen.

15 MR. Van den BERG: So there may be
16 a difference of opinion about the application of
17 the rule; but perhaps we will hear some more
18 about this today.

19 Mr. Smith, you would like to
20 comment on this?

21 MR. SMITH: Simply that the
22 research that El Salvador has done and obviously

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1 the accompanying opinion of the Attorney General
2 of El Salvador is very clear that a claimant may
3 request termination of the proceedings during
4 the deliberation phase in the cases we cited in
5 our submission, and that the time period for a
6 decision between the request of termination and
7 the actual termination has been about three
8 months.

9 MR. Van den BERG: Thank you. Then
10 we have no further questions or observations
11 regarding the procedure. The only thing we
12 would like to mention to you is, since you
13 have -- both sides have extensively written on
14 the issue before us, the tribunal would like to

15 ask you questions during the presentation if you
16 -- unless you have an objection to that.

17 MR. MACHULAK: No.

18 MR. Van den BERG: Because -- of
19 course, we would let you finish the first
20 sentence.

21 MR. SMITH: No objection from
22 El Salvador. I would like to make a request.

18

1 MR. Van den BERG: Sure.

2 MR. SMITH: Which is that, if the
3 time limits are slightly exceeded in the
4 morning, that the parties be permitted to -- to
5 exceed slightly the time limits and subtract
6 that time from their time limits in the
7 afternoon.

8 MR. Van den BERG: We will apply a
9 reasonable flexibility. The same applies to
10 your side, Mr. Machulak.

11 Then are there any questions of a
12 procedural or an administrative nature we would
13 like to address now or raise now?

14 Mr. Machulak, your side.

15 MR. MACHULAK: No.

16 MR. SMITH: Just one point of
17 clarification. Also, since the submission of
18 the recent written documents, claimants filed
19 Claimants' Exhibits 14 and 15, and just to
20 confirm that those have been entered officially
21 into the record.

22 MR. Van den BERG: Yes. They have

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1 been entered.

2 Before you start, Mr. Machulak, I
3 don't see the secretary of the tribunal again.

4 (There was a discussion off the
5 record.)

6 MR. Van den BERG: Off the record.
7 There is -- not on the record now.

8 (There was a discussion off the
9 record.)

10 (A break is taken.)

11 MR. Van den BERG: What the
12 tribunal suggests is the following: That we
13 proceed because, otherwise, we have to wait

14 probably for eternity before we get proper
15 connection, but that we have the recorders on
16 the video coverage, VCR or whatever or video,
17 and, if it's available online later on the ICSID
18 web site -- if that's an acceptable solution.

19 MR. SMITH: El Salvador accepts
20 that solution.

21 MR. MACHULAK: That would be fine
22 for the claimants.

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1 MR. Van den BERG: Then hopefully
2 we have also satisfied the transparency
3 requirements. That's the only thing the
4 tribunal is worrying about.

5 MR. SMITH: El Salvador certainly
6 would believe that that satisfies the
7 transparency requirements in this circumstance.

8 MR. Van den BERG: What we will do
9 then is we will post this simply on the web site
10 of ICSID as a record of this hearing.

11 MR. SMITH: Perhaps it would be
12 helpful if ICSID would post a message on their

13 web site now indicating that there are technical
14 difficulties and that's why it's not streaming.

15 MR. Van den BERG: My understanding
16 is that the streaming will be in the next 10
17 point minutes, but that's not the same -- the
18 experience as the late aircraft at the
19 airport -- "only ten minutes more, sir," and two
20 hours later, you still there. So that is the
21 point.

22 As soon as the secretary is back,

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1 we will ask that it be posted on the web site.

2 All right, Mr. Machulak, I
3 apologize for this technical delay. Please
4 proceed with your opening.

5 MR. MACHULAK: I think the
6 respondents -- sorry -- you will give me a heart
7 attack.

8 MR. Van den BERG: Okay.
9 Mr. Smith, please start. Please proceed.

10 RESPONDENT'S ARGUMENT BY MR. SMITH:

11 MR. SMITH: Thank you.

12 Mr. President, we have one further

13 technical delay. We need to get the visual
14 working. I'm not sure what the problem is.

15 Okay. Thank you.

16 Thank you, Mr. President and
17 members of the tribunal. Before beginning I
18 would just like to introduce one more member of
19 the delegation of El Salvador who has arrived
20 since the introduction. He is Enilson Solano,
21 who is minister/counselor of the Embassy of
22 El Salvador in Washington, D.C.

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1 Okay. Mr. President, members of
2 the tribunal, members of the team of the
3 claimants, members of the team of El Salvador,
4 as you know, we are here today in the matter of
5 Commerce Group Corp. and San Sebastian Gold
6 Mines, Inc., versus the Republic of El Salvador.

7 Before beginning, I would just like
8 to welcome the presidents of -- the
9 representatives of the Government of the
10 United States of America. The presence of
11 representatives of the United States at this

12 hearing is particularly relevant for two
13 reasons. One is that the United States is the
14 state party to CAFTA of which the claimants are
15 nationals.

16 The second reason is that the
17 United States is the state party to CAFTA that
18 is most knowledgeable about the meaning of the
19 waiver requirement in CAFTA Article 10.18.2.

20 The waiver requirement in CAFTA
21 10.18 has the exact same text as Article 26 of
22 the 2004 United States model bilateral

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1 investment treaty, and it tracks very closely
2 the text of the corresponding provision in the
3 North American Free Trade Agreement, to which
4 the United States is also a party.

5 So when the other CAFTA parties,
6 namely, the Dominican Republic, Guatemala,
7 Honduras, Nicaragua, Costa Rica, and El Salvador
8 signed CAFTA with regard to Chapter 10, they
9 are, in essence, agreeing to a proposal by the
10 United States.

11 Again, before setting forth the

12 details of our argument today, I would like to
13 outline clearly the principal issues to be
14 decided by the tribunal in this preliminary
15 objection.

16 In broad terms, the tribunal is
17 being asked to interpret Article 10.18 of the
18 Dominican Republic, Central America,
19 United States Free Trade Agreement.

20 The relevant portions of Article
21 10.18 are as follows: No claim may be
22 submitted -- submitted to arbitration unless the

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1 notice of arbitration is accompanied by the
2 claimant's written waiver of any right to
3 initiate or continue before any administrative
4 tribunal or court under the law of any party or
5 other dispute settlement procedure, any
6 proceeding with respect to any measure alleged
7 to constitute a breach referred to in Article
8 10.16.

9 It is a very clear, very broad
10 waiver of any right to initiate any proceedings

11 or continue any proceedings other than CAFTA
12 proceedings.

13 Because the written pleadings have
14 served to narrow considerably the differences in
15 the legal positions of the parties, the primary
16 issues to be decided are well defined. The
17 parties are in agreement on the relevant facts
18 and most of the key points of interpretation.

19 The parties agree that claimants
20 were required to comply with the waiver
21 requirement of CAFTA Article 10.18.2. The
22 parties agree that CAFTA Article 10.18.2

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1 required the claimants to waive their right to
2 initiate or continue any proceeding before any
3 court, tribunal, or other administrative body
4 related to the same measures that claimant
5 alleges are breaches of CAFTA.

6 The parties agree that the waiver
7 requirement is a condition to consent and is,
8 therefore, a jurisdictional requirement. And by
9 implication, they must agree that failure to
10 comply with the waiver requirement results in a

11 lack of jurisdiction.

12 The parties also agree that the
13 waiver requirement applies to the legal
14 proceedings initiated by claimants before the
15 Supreme Court of El Salvador with respect to the
16 revocation of the environmental permits of
17 Commerce Group Corp. and San Sebastian Gold
18 Mines, Inc., because the revocations of the
19 environmental permits are the same measures
20 complained of in claimants' notice of
21 arbitration.

22 The parties also agree that the

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1 proceedings before the Supreme Court of
2 El Salvador were continued at the time claimants
3 submitted its waiver and filed the notice of
4 arbitration and for the full time required for
5 those proceedings to be completed.

6 The parties agree that El Salvador
7 sent letters at the outset of this arbitration
8 to ICSID, which were transmitted to claimants,
9 pointing out the jurisdictional issues raised by

10 claimants' simultaneous filing of the waiver and
11 material noncompliance with its terms.

12 And, finally, the parties agree
13 that claimants took no steps to discontinue
14 local proceedings.

15 Thus, the questions for the
16 tribunal are clear. There are only two
17 differences between the parties at this point.

18 The questions are:

19 Was it a violation of the waiver
20 requirement in CAFTA 10.18.2 for claimants to
21 initiate CAFTA arbitration without terminating
22 the domestic judicial proceedings in El

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1 Salvador? And the second issue is, what are the
2 consequences of such violation?

3 El Salvador will show that CAFTA
4 Article 10.18.2 required the claimants
5 materially comply with their waivers by
6 terminating the local court proceedings and that
7 the failure of claimants in this case to comply
8 with the waiver results in a lack of
9 jurisdiction because the waiver is specifically

10 made a condition of consent to arbitration.
11 Without valid waivers, there is no consent, and
12 without consent there is no jurisdiction.
13 Therefore, this arbitration must be dismissed in
14 its entirety for lack of jurisdiction.

15 El Salvador's position is
16 affirmatively supported by six of the seven
17 states that drafted and signed CAFTA. The
18 seventh state, Honduras, simply has not yet made
19 a public statement on this issue.

20 The unanimous decision of the one
21 arbitration tribunal under CAFTA that has
22 addressed the question reached -- that has

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1 addressed this question, reached the same
2 conclusion as El Salvador and the other CAFTA
3 parties regarding the requirement to materially
4 comply with the waiver, regarding the
5 requirement to terminate local proceedings prior
6 to filing a CAFTA arbitration.

7 El Salvador's position is also
8 supported by the three states who are parties to

9 NAFTA which has a waiver requirement that is
10 almost identical to the requirement in CAFTA, as
11 well as by the jurisprudence of NAFTA tribunals
12 addressing the issues.

13 Of course, here I'm double-counting
14 the United States because the United States is a
15 party to both treaties.

16 While the United States did not
17 make a submission in this proceeding, its
18 position is very clear from its pleadings in
19 NAFTA cases. And there is no indication to
20 suggest that its position has changed or is
21 different with respect to CAFTA.

22 El Salvador presumes that the

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1 United States has chosen to remain silent in
2 part because they trust that this tribunal will
3 not depart from the expressed views of the state
4 parties of CAFTA and NAFTA and the established
5 jurisprudence.

6 Of course, El Salvador cannot speak
7 for the United States, but its representatives
8 are present and can inform the tribunal if the

9 United States has changed its interpretation of
10 the waiver requirement of NAFTA, or if that
11 interpretation is different with regard to
12 CAFTA.

13 In contrast to El Salvador's
14 position, claimants' position is supported only
15 by the dissenting opinion of a single
16 party-appointed arbitrator in a NAFTA
17 arbitration in which the majority affirmed the
18 requirement of effective compliance with the
19 waiver, the requirement to terminate local
20 proceedings.

21 Today, El Salvador will demonstrate
22 that the reason the state parties to CAFTA and

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1 to NAFTA and the arbitral authority support its
2 position is because this is the correct
3 interpretation of CAFTA.

4 Before we begin to discuss the main
5 issues in El Salvador's preliminary objection,
6 we would like to take just a moment to consider
7 how the state of El Salvador and two companies

8 from the United States of America have come to
9 be before this tribunal today. As the members
10 of the tribunal are aware, under international
11 law there is no mandatory international dispute
12 resolution jurisdiction available to private
13 parties against states.

14 In fact, when claimants started
15 working in El Salvador, they had no possible
16 recourse to international arbitration. It was
17 the entry into force of CAFTA in March of 2006
18 that provided claimants with an avenue to access
19 international arbitration. Claimants have been
20 able to initiate this arbitration because
21 El Salvador and other states have concluded
22 that -- the ICSID convention and CAFTA as

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1 exceptions to the general rule that private
2 parties cannot bring international legal
3 proceedings against a state.

4 When the states drafted and signed
5 CAFTA, they expressly placed some conditions on
6 the consent, and these concessions must be met
7 before a foreign investor can access

8 international arbitration.

9 Among those conditions is the one
10 established in Article 10.18.2, that condition
11 states that no claim may be submitted to
12 arbitration under CAFTA unless the claimant
13 waives the right to initiate or continue any
14 proceeding before any court, tribunal, or
15 administrative body related to the same measures
16 that the claimant alleges are a breach of CAFTA.

17 We are at this hearing on
18 El Salvador's preliminary objection because
19 claimants failed to meet this condition.

20 Claimants filed their notice of
21 arbitration in July of 2009, without complying
22 with the CAFTA waiver requirement. Claimants

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1 did file two pieces of paper saying that they
2 waived their right to initiate or continue any
3 proceeding relating to the same measures as they
4 allege as breaches of CAFTA. But claimants
5 violated those waivers at the very moment they
6 initiated the CAFTA arbitration by not

7 terminating, that is to say, by choosing to
8 continue two domestic judicial proceedings
9 before the Supreme Court of El Salvador related
10 to the same measures claimants allege also
11 violate CAFTA.

12 So claimants violated the waivers
13 at the time they filed their waivers and at the
14 time they filed their notice of arbitration.
15 Their waivers were ineffective and therefore did
16 not meet the requirements of CAFTA Article
17 10.18.2.

18 This violation of the waivers was
19 manifest on the face of the notice of
20 arbitration. Paragraph 22 of the notice of
21 arbitration now on the screen, stated
22 specifically that there were pending judicial

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1 proceedings in El Salvador related to the very
2 same measures that claimants were alleging were
3 a violation of CAFTA. So there is absolutely no
4 doubt that the proceedings were continued on the
5 date of filing of the notice of arbitration, and
6 this is recognized in the notice itself.

7 Now, let us turn to the specific
8 arguments that El Salvador has made in its
9 written pleadings on this preliminary objection.

10 As I've indicated, the tribunal is
11 asked to decide two narrow and well-defined
12 questions. Was it a violation of the waiver
13 requirement in CAFTA 10.18.2 for claimants to
14 initiate CAFTA arbitration without terminating
15 the domestic judicial proceedings?

16 And second: There is a collateral
17 disagreement between the parties regarding the
18 consequences of violating the waiver on this --
19 in this arbitration proceeding.

20 Does the lack of jurisdiction
21 created by the failure to meet the conditions
22 for consent result in the dismissal of the

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1 entire arbitration? Or does it merely result in
2 the dismissal of claims based on the measures
3 challenged in the local court proceedings?

4 As stated, El Salvador maintains
5 that CAFTA makes the waiver requirement a

6 condition to consent, and that the waiver
7 requirement includes the requirement for a CAFTA
8 claimant to take action to terminate any
9 proceeding with respect to the same measures
10 alleged to be a breach of CAFTA.

11 As a result, claimants' violation
12 of those waivers is at the same time the waivers
13 were filed. There is no consent to this
14 arbitration. And because there is no consent,
15 there is no jurisdiction. Because there is no
16 jurisdiction, this arbitration must be
17 terminated in its entirety, not just a dismissal
18 of selected claims.

19 Initially, there was a disagreement
20 between the parties as to whether or not the
21 Article 10.18.2 was, in fact, a condition of
22 consent and was, in fact, a jurisdictional

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1 matter. Claimants initially rested their entire
2 case essentially on their argument that, in
3 spite of the fact that CAFTA Article 10.18 is
4 titled, "Conditions and Limitations on Consent
5 of Each Party," the waiver requirement was not a

6 condition to consent. And thus, it was not a
7 jurisdictional issue.

8 The other arguments in their
9 response to El Salvador's preliminary objection
10 were based on this unsustainable premise.

11 Claimants, however, have changed
12 their position. Claimants have admitted in the
13 rejoinder that they agree with the respondents;
14 they now agree with the respondents that the
15 requirements set out in CAFTA Article 10.18
16 should be treated as jurisdictional. Although
17 the claimants argued in their response that the
18 text of CAFTA Article 10.18 establishes
19 procedural requirements for the submission of
20 claims, the claimants now accept that the
21 submission of a waiver under CAFTA Article 10.18
22 is a condition and limitation on consent and

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1 thus, a jurisdictional requirement. That is a
2 quote from the claimants' rejoinder.

3 They therefore have reversed their
4 position on the issue that was the foundation of

5 their arguments. And they agree that compliance
6 with CAFTA Article 10.18.2 is a matter of
7 jurisdiction. However, they have not been
8 willing to accept the consequences of this
9 change of position as regards the outcome of
10 this proceeding.

11 But El Salvador believes the
12 consequences are self-evident. If the waiver
13 requirement is a jurisdictional requirement,
14 claimants' failure to comply with the waiver
15 must result in a lack of jurisdiction and in the
16 dismissal of this arbitration because, if there
17 is no jurisdiction, there can be no arbitration.

18 The contradiction in claimants'
19 current position is apparent. They admit that
20 the waivers apply to the domestic proceedings.
21 They admit that the waivers are a jurisdictional
22 requirement, and they admit, as they must, that

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1 the domestic proceedings continued at the time
2 of and after the initiation of the CAFTA
3 arbitration.

4 Nonetheless, in their rejoinder,

5 claimants continue to pursue the other arguments
6 that were based on their flawed initial position
7 that the waiver requirement was not
8 jurisdictional.

9 Although claimants accept that the
10 waiver requirement is a condition to consent,
11 and thus a failure to comply affects the
12 tribunal's jurisdiction, they insist on arguing
13 that non-compliance with the waiver only affects
14 admissibility. This position is
15 self-contradictory.

16 The power to decide on the
17 admissibility of claims is limited to tribunals
18 which otherwise have jurisdiction. But it is
19 not possible in this case where a condition to
20 consent is missing and thus there is no consent
21 to arbitration. Because the waiver requirement,
22 as claimants admit, is jurisdictional,

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1 non-compliance with the waiver requirements
2 simply means that there is no jurisdiction to
3 hear the case and the case must be dismissed.

4 There is no room for consideration of issues of
5 admissibility because there is no room for this
6 arbitration to continue.

7 MR. Van den BERG: Mr. Smith.

8 MR. SMITH: Yes.

9 MR. Van den BERG: That raises the
10 question, in the submission of El Salvador, when
11 the waiver should have been made effective. If
12 I understand your position correctly, the waiver
13 should have been made effective, at the latest,
14 on the moment you filed the notice of
15 arbitration.

16 MR. SMITH: The waiver should have
17 been made effective at the latest at the moment
18 that the claimants filed the notice of
19 arbitration which is the moment when they made
20 the waivers. Because if it is not made
21 effective at that moment, they are immediately
22 in violation of the waivers and the waivers

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1 become ineffective.

2 MR. Van den BERG: To be more
3 precise, if you have a pending proceeding, it

4 would mean, in your submission, that you have
5 discontinued the proceedings.

6 MR. SMITH: That's correct.

7 MR. Van den BERG: To discontinue
8 proceedings.

9 MR. SMITH: Yes, it is a logical
10 consequence and a necessary practical
11 consequence of the requirement to comply with
12 the waiver when it is filed, that a proceeding
13 would have to be discontinued before you file.
14 You can't simultaneously discontinue.

15 It is the fact that the proceeding
16 exists on the date of filing that violates the
17 waiver. But to avoid that violation, you must
18 discontinue the proceeding prior to filing the
19 proceeding, if you understand.

20 MR. Van den BERG: Yes. Because
21 another way of looking at it might be -- and I
22 am not suggesting the case is this -- you file

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1 the waiver exactly as it says of 10.18.2 under
2 B, and then say, "I waive the right to initiate

3 or to continue." And then the next thing is
4 what is then -- now, I have to implement that I
5 filed that waiver. This is the text. So I do
6 X. If after X, then the next step is you waive.

7 As I understand the claimants'
8 position to be in this position is, look, the
9 filing of the waiver itself, that's a
10 jurisdictional requirement for consent. But
11 then the next step to be taken to implement the
12 waiver, that is something to be policed by the
13 tribunal, if I paraphrase properly their
14 position. If I am wrong, I will be corrected
15 later on.

16 And that is what they call then an
17 admissibility matter. I don't know whether it's
18 correct as a matter of law, but that's the way I
19 understand the arguments to be.

20 MR. SMITH: I understand that that
21 is their argument. The position of El Salvador
22 is that the waiver must be made effective in the

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1 moment that it is filed because that is the
2 moment in which jurisdiction is determined. And

3 an ineffective waiver is not a validly filed
4 waiver. It is not a valid waiver at the moment
5 that it is filed, and it is not a question of
6 taking post-filing acts to then comply with the
7 waiver.

8 It is our position that the
9 claimant must be in compliance with its waiver
10 in good faith and have the intention of
11 complying with its waiver at the time it is
12 filed in order for the waiver to be valid upon
13 filing.

14 MR. Van den BERG: We may come back
15 on that one later. Let me ask you one further
16 question, if I may.

17 MR. SMITH: Yes.

18 MR. Van den BERG: We just have
19 seen that, according to your submission, the
20 submission of El Salvador, to discontinue
21 Supreme Court proceedings it takes three months
22 between filing the request for discontinuance

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1 and telling them -- the statement of the Supreme

2 Court telling them that indeed your case has
3 been discontinued.

4 Would then your submission be the
5 case that, if they had to file for arbitration
6 in this case, they have to wait for three months
7 and get the statement of the Supreme Court that
8 the case indeed had been discontinued, or would
9 it have been sufficient that they had filed the
10 application with the Supreme Court?

11 MR. SMITH: Our position is that it
12 would have been sufficient to file the
13 application with the Supreme Court because,
14 under Salvadoran law, discontinuance is
15 automatic when the claimant in an administrative
16 case, such as this, requests discontinuance.

17 So they would have done everything
18 they needed to do to discontinue the case at
19 that time. And they would have acted as much as
20 they could to be in compliance with the waiver.

21 MR. Van den BERG: Because the act
22 of filing discontinuance itself means that

1 legally the case is discontinued, or is it that

2 the statement by the Supreme Court that the case
3 had been discontinued applies retroactively to
4 the date of filing?

5 MR. SMITH: No, it means that
6 the -- that the discontinuance will definitely
7 occur. It's not retroactive.

8 Again, my understanding, I would
9 have to -- I don't know off the top of my head
10 exactly what the date of discontinuance is. I
11 don't think it's retroactive.

12 MR. Van den BERG: My question is
13 here is -- legally, the effect.

14 MR. SMITH: The effect of the
15 discontinuance would be at the date of the order
16 of the Supreme Court of El Salvador to
17 discontinue the case.

18 MR. Van den BERG: That might cause
19 an additional window of three months to file the
20 arbitration although you just said the filing
21 itself is sufficient. But you have not yet
22 legally discontinued your case because the

1 Supreme Court has not issued its decision on
2 this discontinuance, but you just said there is
3 no retroactivity.

4 MR. SMITH: Right. But the
5 claimant would have taken all steps within the
6 claimant's power to have the case discontinued
7 and, therefore, would be acting consistently
8 with their waivers.

9 MR. THOMAS: Just to follow up
10 on --

11 MR. SMITH: Additionally, just to
12 further respond, the respondents, of course -- I
13 mean, the claimants must file a notice of intent
14 also at least 90 days before they file their
15 notice of arbitration. And that creates an
16 additional window in which -- for local
17 procedures to operate for the discontinuance of
18 the case as a matter of law.

19 MR. THOMAS: So I just want to make
20 sure I understood your position. Let me give
21 you the hypothetical.

22 On the date of the filing of the

1 notice of arbitration, the claimant says
2 enclosed is a copy of a request for the
3 dismissal or discontinuance of a local
4 proceeding, and proffers that with the waiver
5 and with the request for arbitration. Is that
6 -- did I take -- was I correct to understand
7 that your position was that at that point the
8 claimant had complied with the requirements many
9 of the waiver, notwithstanding the fact that the
10 local court would have to subsequently accede to
11 the request for the discontinuance?

12 MR. SMITH: That's correct.

13 MR. NA'N: I have a question that
14 is not exactly on all fours with the issues that
15 have been raised by my colleagues, but it has
16 some connection with this part of your
17 presentation. And it is, which are the legal
18 effects under Salvadorean law of the withdrawal
19 of the claims before the Supreme Court? Is it
20 just a withdrawal of the proceedings, or does it
21 also kill, quote-unquote, the cause of action
22 and the underlying the claim on the merits?

1 Let me tell you, quite frankly, why
2 I am asking this question. If you go to the
3 statute that has been referred to as
4 the [speaking Spanish] -- you can read the text
5 maybe. I am going to refer --

6 MR. SMITH: Actually -- okay.

7 MR. NA"N: Article 53.

8 MR. SMITH: Perhaps I don't have
9 the full text here.

10 MR. NA"N: I may read it to you. I
11 will make an attempt at an unofficial
12 translation into English if you want.

13 MR. SMITH: I understand the
14 Spanish quite well.

15 MR. NA"N: Article 53, indicates
16 that there is a cross reference to the Code of
17 Civil Procedure of El Salvador.

18 Now, I was reading Article 467 of
19 the code. I don't know if you have it there. I
20 can provide an unofficial translation if I am
21 allowed, which indicates that the party
22 withdrawing the complaint cannot reintroduce it

1 against the same person or against those who
2 legally represented that person.

3 When I read this on its face, the
4 idea that I get is that it is not just the
5 practical consequence of when you withdraw a
6 claim. It's not waiving the proceedings. You
7 are really waiving the cause of action. You are
8 really waiving the underlying claim on the
9 merits. But, of course, this is my reading.
10 And I would like to know what the position of
11 El Salvador is in this matter.

12 MR. SMITH: I would not at this
13 point want to respond to that as a matter of
14 interpretation of El Salvadoran law, which I
15 have not had a chance to review or consult with
16 local counsel. We would be happy to provide an
17 answer to that after the hearing.

18 MR. NA" N: Thank you very much.

19 MR. Van den BERG: The question is,
20 when you discontinue, did you discontinue with
21 prejudice or without prejudice, if I may use
22 your lingo.

1 MR. SMITH: Yes, thank you.

2 MR. Van den BERG: Please proceed.

3 MR. SMITH: As I said, claimants
4 have argued that they have no obligation to --
5 they had no obligation to terminate the local
6 proceedings.

7 Claimants have presented no legal
8 authority for the position that the issue of the
9 effect of the waiver is one of admissibility,
10 rather than one of jurisdiction.

11 To the contrary, there is -- the
12 existing legal authority supports El Salvador's
13 position and -- rather than the claimants,
14 particularly, the Waste Management decision
15 which states the following:

16 "Any waiver implies a formal and
17 material act on the part of a person tendering
18 the same. To this end, this tribunal will
19 therefore have to ascertain whether Waste
20 Management did indeed submit the waiver in
21 accordance with the formalities envisioned under
22 CAFTA and whether it has respected the terms of

1 the same through the material act of either
2 dropping or desisting from initiating parallel
3 proceedings before other tribunals."

4 And I further quote:

5 "The act of the waiver involves a
6 declaration of intent by the issuing party which
7 logically entails a certain conduct in line with
8 the statement issued. Indeed, such a
9 declaration of intent must assume concrete form
10 in the intention or resolve whereby something is
11 said or done. Hence, in order for said intent
12 to assume legal significance, it does not
13 suffice for it to exist internally."

14 It is clear that the Waste
15 Management tribunal has come to the conclusion
16 that pending proceedings must be terminated in
17 order for the waiver to be complied with.

18 In RDC versus Guatemala, the
19 tribunal was also clear. It said that:

20 "It is the fact that the two
21 domestic arbitration proceedings exist and
22 overlap with this arbitration as determined by

1 the tribunal that triggers the defect in the
2 waiver."

3 Again, as we have been indicating,
4 the failure to terminate the proceedings
5 triggers the defect in the waiver. The
6 jurisprudence could not be clearer.

7 The positions of the state parties
8 to CAFTA are equally clear. In addition to
9 El Salvador, two CAFTA parties, Costa Rica and
10 Nicaragua, have submitted non-disputing
11 positions expressing their interpretation of the
12 waiver requirement as a condition to
13 jurisdiction requiring not only a formal
14 submission of the waiver on paper, but actual
15 compliance in the form of termination of any
16 existing proceedings before initiating CAFTA
17 arbitration.

18 Costa Rica said that the submission
19 must be accompanied by the effective waiver,
20 withdrawal, or discontinuance as appropriate, of
21 any and all proceedings, either court or
22 administrative proceedings, pending when the

1 arbitration is commenced and whose procedural
2 drive lies with the claimant.

3 Again, Costa Rica takes the same
4 position as El Salvador.

5 Similarly, Nicaragua, in its
6 statement, indicated that, if an investor
7 submits the waiver referred to in Article
8 10.18.2b1 and 2, and then does not comply with
9 such waiver in the field of law, this would
10 constitute deception and, according to the
11 provisions of CAFTA, would constitute a breach
12 of the requirements.

13 The Dominican Republic has taken
14 the same position in its pleadings in CAFTA
15 arbitration cases. Claimant's post-waiver
16 conduct -- now, the Dominican Republic was faced
17 with a slightly different situation. They were
18 faced with both pending local proceedings and
19 local proceedings that were filed after the
20 initiation of the arbitration.

21 The Dominican Republic stated
22 claimant's post-waiver conduct runs afoul of the

1 material requirements of Article 10.18.2 of
2 CAFTA-DR. In particular, claimants and their
3 affiliates have failed to take the formal and
4 material act of either dropping or desisting
5 from initiating parallel proceedings before
6 other courts or tribunals.

7 MR. Van den BERG: Mr. Smith, would
8 you please go back to slide 25.

9 MR. SMITH: Sure.

10 MR. Van den BERG: There you quote
11 part of the submission by Costa Rica.

12 MR. SMITH: Yes.

13 MR. Van den BERG: Do you see that?

14 MR. SMITH: Yes.

15 MR. Van den BERG: What you did not
16 highlight is the last sentence of the first
17 paragraph -- "high bright," I should say. And
18 this says:

19 "Otherwise, this provision would be
20 denied the effectiveness or effet utile."

21 I assume you are aware the effet

22 utile that has been the subject of the recent

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1 decision in the BIT context, Mobile versus
2 Venezuela.

3 MR. SMITH: Right.

4 MR. Van den BERG: I did not see,
5 in your submissions, any submission -- help me
6 if I am wrong -- which relies on this
7 international law principle. Perhaps you could
8 expound on it in your rebuttal this afternoon,
9 unless you disagree with what Costa Rica is
10 writing here.

11 MR. SMITH: I can address this in
12 the rebuttal this afternoon.

13 Similarly, Guatemala, another CAFTA
14 state party, has stated that, for a claimant to
15 waive effectively its claims, it is not enough
16 for the claimant to simply state in writing that
17 it is waiving its claims before the tribunal.
18 It must actually act in accordance with that
19 waiver.

20 And, finally, the United States has
21 expressed its position very clearly in its

22 pleadings in the NAFTA arbitration. The

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1 United States has said:

2 "Compliance with the NAFTA waiver
3 requirement requires that the claimant not only
4 provide a written waiver, but that it act
5 consistently with that waiver by abstaining from
6 initiating or continuing proceedings with
7 respect to the same measures in another forum."

8 All three NAFTA parties have
9 confirmed in submissions to the NAFTA tribunal
10 that a claimant's failure to terminate parallel
11 claims invalidates any purported waiver under
12 Article 11.21.

13 MR. Van den BERG: It may also be a
14 matter of international law or international
15 customary law, depending where we are. The --
16 is it your submission that, because the states
17 to CAFTA have made these submissions in the
18 various cases, that this is subsequent state
19 practice which is the meaning of Article 31 of
20 the Vienna Convention of Law Treaties.

21 impracticable, and it's shown to be
22 impracticable in this case.

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1 They maintain that the only purpose
2 of the waiver is for it to be used by states to
3 seek dismissal of judicial proceedings initiated
4 or continued in violation of the waiver and that
5 the claimants themselves have no obligation to
6 comply with the waiver by seeking dismissal of
7 those proceedings or dismissing those
8 proceedings themselves.

9 Claimants allege that El Salvador
10 could have taken claimants' waiver to the
11 Supreme Court of El Salvador and the Supreme
12 Court would have terminated the pending
13 proceedings.

14 Claimants have made this statement
15 without adequate knowledge of the procedures
16 before the Supreme Court of El Salvador. The
17 Salvadorean legal provision relevant to the
18 termination of a case has now been presented to
19 this tribunal with the letter submitted by

20 El Salvador in response to your question which
21 is Article 40 of the law of administrative
22 litigation jurisdiction.

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1 This provision lists the only ways
2 to terminate a pending case. None of those
3 provisions include a submission by the
4 respondent of a waiver submitted by the claimant
5 to a different tribunal.

6 Under Article 40 of the Salvadorean
7 Administrative Litigation Procedures law, only
8 claimants are authorized to request termination
9 of a case of this type pending before the
10 Supreme Court of El Salvador. The respondent,
11 which in this case is always the government --
12 these are proceedings that are by individuals or
13 companies against the government -- the
14 respondent is always the government, and it is
15 not authorized to seek termination.

16 So assuming for a moment that
17 El Salvador had attempted to test the claimants'
18 reinterpretation of the CAFTA waiver, the
19 Supreme Court of El Salvador would not have

20 terminated the proceedings on the government's
21 request. Rather, it would have indicated that
22 the request was not being submitted by a duly

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1 authorized representative of the claimant which
2 is a requirement of a request for termination,
3 and that the original waiver by the claimants
4 had been submitted to a different tribunal, not
5 to the Supreme Court, and thus it could not be
6 recognized.

7 Only the claimants could have ended
8 the proceedings in El Salvador. The
9 respondents -- the Government of El Salvador
10 does not have the legal authority to do so under
11 Salvadorean law.

12 MR. NA" N: If I understand you
13 correctly, it is not only that, under
14 Salvadorean administrative law, only a claimant
15 may waive, but the respondent, being the state,
16 it's prevented from agreeing on the waiver?

17 MR. SMITH: No, if the claimant --
18 if the claimant seeks termination of the

19 proceedings in El Salvador, there is no
20 requirement that the government agree; that will
21 automatically result in termination. It is
22 simply that the government, in these

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1 proceedings, has no role in the termination of
2 proceedings. The proceedings are either
3 terminated by a final decision or by withdrawal
4 on the part of the claimant.

5 MR. NA"N: Thank you.

6 MR. Van den BERG: But,
7 theoretically, can the government refuse to
8 oppose the discontinuance?

9 MR. SMITH: No. It is my
10 understanding it is not, but I would make --
11 confirm that that is the case with local
12 counsel. But my understanding is that the
13 government cannot prevent the discontinuance.

14 That the request for termination of
15 a pending case must be submitted in writing to a
16 duly authorized representative of the claimant
17 directly to the Supreme Court is exemplified in
18 one of the Supreme Court decisions quoted by

19 El Salvador in its response to the tribunal's
20 question last week, a copy of which has now been
21 provided to the tribunal.

22 In that case, the Supreme Court

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1 rejected the attempt of the respondent -- again,
2 they're the Government of El Salvador -- to
3 invoke the provisions of Article 40(b) of the
4 law of administrative litigation jurisdiction.
5 The Supreme Court declared that only the
6 claimant can invoke the provision on termination
7 of the law and that the request must be made by
8 the claimant in writing to the Supreme Court,
9 just as the case had been initiated by the
10 claimant in writing to the Supreme Court.

11 So even setting aside for one
12 minute the other arguments of why it was the
13 claimants and not El Salvador that had the
14 obligation to take action to make their waiver
15 effective by terminating the existing judicial
16 proceedings, the alternative reinterpretation of
17 CAFTA offered by claimants would not result in

18 the effective application of the waivers in
19 El Salvador.

20 Only the claimants could have
21 requested termination directly to the Supreme
22 Court and claimants chose not to do so.

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1 Despite all of the above-cited
2 facts and precedents, claimants refused to
3 concede that they have violated the terms of
4 their waiver. Claimants first argue that there
5 were never parallel proceedings in this case as
6 the CAFTA proceedings did not actually begin
7 until the tribunal was constituted on July 1,
8 2010. This argument is inconsistent with the
9 rest of their pleadings and fails even under the
10 authority that they cite. It is also
11 inconsistent with the ICSID convention and with
12 CAFTA.

13 As noted, claimants have
14 consistently argued that July 2, 2009, is the
15 only relevant date for the termination of the
16 tribunal's -- for the determination of the
17 tribunal's jurisdiction. Claimants argue in

18 paragraph 40 of their response, that, in
19 accordance with CAFTA Article 10.16.4(a): "A
20 claim is deemed submitted to arbitration upon
21 receipt by the secretary general."

22 Thus, the date for determining the

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1 jurisdiction of the tribunal is 2 July 2009. It
2 is well established that events occurring after
3 that date are irrelevant to the tribunal's
4 jurisdiction.

5 They then quote the following from
6 the Vivendi versus Argentina:

7 "It is an accepted principle of
8 international adjudication that jurisdiction
9 will be determined in light of the situation as
10 it existed at the date the proceedings were
11 instituted. Events that take place before that
12 date may affect jurisdiction. Events that take
13 place after do not."

14 The proceedings are instituted on
15 the date of the filing of the notice of
16 arbitration, not on the date of the constitution

17 of the tribunal.

18 Furthermore, the cases cited by the
19 claimants clearly establish that the relevant
20 date for purposes of determining the tribunal's
21 jurisdiction is the date of institution of the
22 proceedings, which is the date of the filing of

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1 the request of arbitration.

2 This is established in both ICSID
3 and CAFTA. It is an ICSID Convention Article
4 361, and CAFTA Article 10.16.4.

5 Thus, the relevant time to measure
6 compliance or lack of compliance with the
7 jurisdictional requirement of the waiver is the
8 date on which the notice of arbitration was
9 received by the secretary general of ICSID.
10 This was in July of 2009, and at that time
11 claimants were in violation of their waivers.

12 It is thus clear that, on the date
13 of the filing of the notice of arbitration, an
14 effective waiver is required as a condition to
15 the state's consent to CAFTA. Therefore, an
16 ineffective waiver, that is, a waiver the

17 waiving party does not comply with, results in
18 their not being consent. Without consent, there
19 is no jurisdiction, as we have said, and without
20 jurisdiction, there can be no arbitration.

21 There is one waiver per claimant
22 for the entire arbitration. The waivers are not

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1 directed to individual measures. A violation of
2 the waivers therefore affects consent for the
3 entire arbitration. Without the waivers, there
4 is no right to submit any claims to CAFTA
5 arbitration because there is no jurisdiction.

6 I would like to address briefly the
7 decision in RDC versus Guatemala. As stated in
8 El Salvador's preliminary objections,
9 El Salvador respectfully believes that the RDC
10 versus Guatemala tribunal came to the incorrect
11 conclusion about the consequences of a defective
12 waiver.

13 As the tribunal in Waste Management
14 One concluded, the overlap of one measure as
15 between the domestic proceedings and the

16 international arbitration results in lack of
17 jurisdiction and a dismissal of the entire
18 arbitration.

19 In Waste Management, there were
20 measures that overlapped and other measures that
21 did not overlap, but the entire case was
22 dismissed because of the defective waiver.

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1 The RDC versus Guatemala tribunal
2 overlooked this basic point and focused on the
3 meaning of the word "claim" in paragraphs 1 and
4 4 of Article 10.18. And they concluded that in
5 those paragraphs the word "claim" refers to
6 individual claims and not the arbitration as a
7 whole, and that that same interpretation must be
8 given to the word "claim" in paragraph 2 of
9 Article 10.18.

10 The RDC versus Guatemala tribunal
11 may have been correct that the word "claim" has
12 the same meaning in all three paragraphs, but
13 the analysis of the tribunal was not complete.
14 The tribunal did not analyze the meaning of
15 paragraph 2 in light of its conclusion of the

16 meaning on "claim." If this further
17 interpretive step is taken, it becomes clear
18 that the tribunal in Waste Management reached
19 the correct conclusion and that that conclusion
20 is equally applicable to CAFTA.

21 Unlike paragraphs 1 and 4 of
22 Article 10.18 which relate to requirements

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1 applicable to individual breaches, paragraph 2
2 sets out two requirements for jurisdiction over
3 the entire arbitration that must be met or there
4 is no jurisdiction at all. This is absolutely
5 indisputable, for paragraph 2(a) which requires
6 claimants to consent in writing to arbitration.

7 Claimants do not consent to
8 arbitration for each individual claim. They
9 consent to arbitration for the entire CAFTA case
10 presented in the notice of arbitration. If they
11 do not provide consent in writing, there is no
12 jurisdiction over any claim presented in the
13 notice of arbitration.

14 So when paragraph 2(a) says, "No

15 claim may be submitted to arbitration unless the
16 claimant consents to writing..." -- no claim may
17 be submitted to arbitration means there is no
18 jurisdiction if the condition is not met.

19 10.18.2, paragraph 2(b) creates the
20 same type of requirement. It requires a valid
21 waiver of any right to initiate or continue any
22 proceeding if there is no -- not a valid waiver,

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1 there is no consent to arbitration, and there is
2 no jurisdiction to the same extent that, if
3 there is not a written submission of consent to
4 arbitration, there is no jurisdiction to the
5 entire case. That is -- no claim may be
6 submitted to arbitration if there is not a valid
7 waiver.

8 MR. Van den BERG: Sorry.

9 MR. SMITH: Yes, sir.

10 MR. Van den BERG: Again, may I ask
11 you a question. It's not entirely related to
12 the RD -- the Guatemala case. RDC, sorry. But
13 it concerns the text of paragraph 2 of Article
14 10.18.

15 MR. SMITH: Right.

16 MR. Van den BERG: What you are
17 saying earlier is that, on the moment of filing
18 the request for arbitration, the claimant should
19 have discontinued any pending proceedings
20 concerning the measures that are now being
21 submitted to arbitration; is that correct?

22 MR. SMITH: That's correct.

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1 MR. Van den BERG: Let's look at
2 what the text asks a party to do, a claimant to
3 do. It asks, at the moment of filing, your
4 notice of arbitration, you have to submit
5 together with it accompanied a written waiver of
6 -- and written in the text -- of any right to
7 initiate or continue, right.

8 Now, if I follow your argument,
9 your argument you say, "Look, you should have
10 already discontinued," why would this text not
11 have the words "or continue"?

12 MR. SMITH: Because the waiver sets
13 up the requirements on the claimants and the

14 waiver must be made effective. The waiver has
15 both a formal aspect and a material aspect. It
16 is -- it is the form in which the parties
17 determine to express the requirement on the
18 parties. They could have expressed the
19 requirement, as claimants indicate, by saying
20 you must discontinue.

21 But they decided to express it in
22 terms of a waiver, but the waiver implies -- the

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1 existence of a waiver means that the waiver must
2 be effective. It also implies a material aspect
3 to the waiver which is compliance with the
4 waiver, and it is the waiver that is invalidated
5 by the continuance of the proceedings.

6 It is just -- it is a drafting
7 technique that reaches the result which is
8 different from the drafting technique that
9 claimants say that the drafters could have used,
10 but this is equally effective for reaching the
11 result.

12 MR. Van den BERG: Under Article 31
13 of the Vienna Convention, I have to read this

14 according to ordinary meaning in the context in
15 good faith. But if I follow your argument,
16 would it not be more logical to state
17 that, "Well, they provide a written statement
18 certifying that any pending litigation or
19 proceedings have been discontinued"?

20 MR. SMITH: They could have drafted
21 it that way, but that does not mean that the
22 current draft does not reach the same effect by

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1 creating a waiver requirement and expecting that
2 that waiver to be effectively applied.

3 Remember the Waste Management
4 decision was settled jurisprudence with regard
5 to NAFTA when the CAFTA parties adopted this
6 text. And that decision had interpreted the
7 waiver requirement as having a material
8 requirement. So in the context in which this
9 was drafted, it was a logical way to draft it to
10 reach the result of creating a requirement for
11 the claimants to terminate proceedings prior to
12 filing the waiver.

13 MR. Van den BERG: My question is
14 only exploratory in the sense that I don't want
15 to prejudge anything. But could it also not be
16 that -- that it says, "Well, look, you have to
17 file a waiver, and then subsequently you have to
18 act in accordance with the waiver"? And
19 basically what it is, this is a question about
20 timing.

21 Your point is you have, on the
22 moment of the filing of the notice of

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1 arbitration, you have discontinued all
2 proceedings before the local courts in relation
3 to the measures.

4 MR. SMITH: That's correct.

5 MR. Van den BERG: Maybe another
6 reading may be if you follow this say, "Look, I
7 have waived my rights to continue those
8 proceedings; I filed my request for arbitration;
9 the next step I have to take is I need to
10 discontinue, if that is a requirement as an
11 active step in the local proceedings."

12 MR. SMITH: But the waiver is a

13 jurisdictional requirement and the requirement,
14 as understood by El Salvador, is to file an
15 effective waiver. And filing an ineffective
16 waiver and a waiver that the party has no
17 intention of complying with, is the same as
18 having filed no waiver at all.

19 MR. Van den BERG: How do I know
20 that the party has no intention it comply with?

21 MR. SMITH: Because they had within
22 their full power the ability to comply and have

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1 not.

2 MR. Van den BERG: Yes, but there
3 is a time requirement interpretation. Maybe I
4 will come to the same result, if you don't do
5 anything that you -- then you indeed you do not
6 comply. Your position is very strict, if I may
7 say so. You say:

8 "Well, look at the moment of
9 filing; you should have discontinued your
10 proceedings."

11 MR. SMITH: Because the claimant is

12 in a position to discontinue, is in a position
13 to comply with its waiver when it files the
14 waiver, it should do so. It is a matter of good
15 faith to comply with the waiver and not to say,
16 "I filed my waiver and some day I will
17 discontinue." It's a matter of good faith
18 compliance with the waiver.

19 MR. Van den BERG: My question goes
20 to timing, not to compliance.

21 MR. SMITH: Certainly, I would not
22 take the position that, post filing; lack of

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1 compliance would not be evidence of an initial
2 intent not to comply and, therefore, also
3 invalidates the waiver. The waiver has to be
4 valid when filed, but maybe actions that a
5 claimant takes after filing, that would also
6 result in a conclusion that the waiver itself
7 was invalid when filed because that action
8 clearly signifies that they had no intent to
9 comply on the date of filing.

10 MR. Van den BERG: Thank you.
11 Sorry, I interrupted, actually, your RDC versus

12 Guatemala critique. Please continue.

13 MR. SMITH: Yes, there are -- I am
14 sort of running a little bit short of time, and
15 I don't want to abuse the tribunal's willingness
16 to allow extra time; so I am going to summarize
17 the rest of what I had to say about RDC v.
18 Guatemala so that I may move on.

19 There are two -- there are two
20 aspects of that case that are not really legal
21 aspects, but they are important, I think, to
22 understand as to why maybe that tribunal reached

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1 what El Salvador thinks is the wrong legal
2 result, by reaching the conclusion that only
3 those claims before local -- the local
4 arbitration had to be dismissed from the CAFTA
5 arbitration.

6 Our position is, if there is
7 overlap, the waiver is ineffective, and the
8 entire case must be dismissed.

9 In the RDC versus Guatemala case,
10 in the first instance, Guatemala essentially

11 consented to the continuation of the rest of the
12 case. Towards the end of the case -- I mean,
13 that was the conclusion the tribunal. And
14 towards the end of the case, they withdrew that
15 consent, but, essentially, they had already
16 signaled to the tribunal -- it seems to me --
17 that they would be willing to accept the
18 continuance of the case with regard to the
19 measures that did not overlap and that possibly
20 has affected the view of the tribunal.

21 The other issue is that, in the RDC
22 versus Guatemala case, the claims that were a

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1 part of the local arbitrations were very, very
2 minor claims as compared to the main claims in
3 the CAFTA arbitration. And I think that it
4 would be the natural instinct of a tribunal not
5 to want to dismiss an entire case based on some
6 minor claims.

7 The situation here is very
8 different. The claims that were brought before
9 the Supreme Court of El Salvador, which is the
10 revocation of the environmental permits, are the

11 core measures of the CAFTA claim. And if we
12 look at the two cases, for instance, the
13 requests for damages before the Supreme Court of
14 El Salvador was \$110 million, the request for
15 damages in this CAFTA arbitration is
16 \$100 million or more. They reserve their
17 rights. So we can see that there is a great
18 deal of identity.

19 So dismissing -- so it is the main
20 claims that are the overlap. Dismissing the
21 entire arbitration makes sense from an
22 efficiency point of view, in that regard.

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1 Perhaps it would be helpful to just
2 get an idea from the tribunal just how much
3 extra time I might be able to use so I --

4 MR. Van den BERG: You may --
5 obviously, of course, the time intervals are
6 active. Also, all of those questions go to the
7 claimants, who will also have the possible time
8 to respond to them.

9 What I may suggest to you is you

10 can skip, unless you really would like to
11 present it, 44 to 48. We have the state
12 parties. We can read -- we know what they have
13 said and actually have noted that we have
14 specifically read it.

15 MR. SMITH: Okay.

16 MR. Van den BERG: So that's not a
17 problem. And I would suggest that you go onto
18 at paragraph -- slide 49.

19 You have, basically -- because we
20 started at -- look at the secretary -- at 10 --
21 we started late, so we still have --

22 MR. SMITH: I think we started at

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1 10:15.

2 MR. Van den BERG: So you still
3 have almost 30 minutes, 25 minutes. So if you
4 are done in 20 minutes, it's okay. But don't
5 rush.

6 MR. SMITH: I will be as efficient
7 as possible. Thank you. I accept the
8 president's suggestion not to put up the slides
9 regarding the state parties position.

10 I would like -- of course, like to
11 emphasize that, again, the seven CAFTA state
12 parties who have provided an opinion on the
13 issue agree with El Salvador that the
14 consequences of a violation of the waiver are
15 the dismissal of the entire arbitration.

16 It's clear from the foregoing that
17 there is no jurisdiction for the CAFTA claims.
18 And, in fact, there are no surviving claims in
19 this arbitration because the claimants did not
20 submit any claims under the investment law of
21 El Salvador in their notice of arbitration.
22 There are no investment law claims before this

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1 tribunal.

2 In their notice of arbitration
3 specifying their CAFTA claims, claimants mention
4 the investment law of El Salvador briefly in
5 only two paragraphs. Claimants did not allege
6 any breaches damages or claims under the
7 investment law. Claimants state in their
8 rejoinder that they confirm -- they confirm that

9 they have submitted a claim for breach of the
10 foreign investment law. But, in reality,
11 claimants are not confirming anything. They are
12 attempting to amend the notice of arbitration
13 and calling that amendment a confirmation.

14 The rejoinder cites paragraphs 1
15 and 37 of the notice of arbitration as clearly
16 -- as clear references to submission of claims
17 under investment under the investment law.

18 Claimants do not mention the
19 investment law of El Salvador -- excuse me.

20 Claimants do mention the investment
21 law of El Salvador in those two paragraphs, but
22 claimants do not submit or assert any claim

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1 under the investment law in those paragraphs or
2 anywhere else in the notice of arbitration as
3 these are the only two paragraphs that mention
4 the investment law.

5 In fact, it's very clear that the
6 notice of arbitration addresses only CAFTA
7 claims. Claimants allege only breaches of
8 CAFTA. Claimants consent only to CAFTA

9 arbitration. And claimants request damages only
10 for alleged breaches of CAFTA.

11 The notice of arbitration contains
12 no reference to obligations or breaches of such
13 obligations under the investment law. It does
14 not contain the claimants' consent to
15 arbitration under the investment law, and it
16 does not request relief under the investment
17 law.

18 As a part of their attempt to gloss
19 over the fact that they are trying to add
20 investment law claims now, claimants assert that
21 they complied with ICSID Rule 21(e). Claimants
22 misinterpret this rule.

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1 Institution rule 21(e) provides
2 that:

3 "The request shall contain
4 information concerning the issues in dispute
5 indicating that there is between the parties a
6 legal dispute arising directly out of an
7 investment."

8 That the dispute must be a legal
9 dispute is a jurisdictional requirement pursuant
10 to Article 25 of the ICSID convention. The
11 reference to a legal dispute in the institution
12 rules requires the investing party to provide
13 not only the factual base for the alleged
14 dispute, but also an indication of the legal
15 provisions alleged to have been breached, so
16 that a dispute of a legal nature can plausibly
17 be established.

18 The report of the executive
19 directors of the convention explains that the
20 reference to a legal dispute in Article 25 of
21 the convention must concern the existence or
22 scope of legal right or obligation or the nature

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1 or extent of the reparation to be made for
2 breach of a legal obligation.

3 The tribunals in *Continental versus*
4 *Argentina* and *Suez versus Argentina* have made
5 reference to the requirement in the ICSID
6 Convention that a dispute be of a legal nature
7 as one that has to be based on legal rights.

8 Professor Schreuer notes in
9 reference to Continental and Suez that:
10 "It follows from the practice of
11 the tribunals that the legal nature of a dispute
12 is determined by the way the claimant presents
13 its claim."

14 In the present case, the claimants
15 have utterly failed to present any claims based
16 on any alleged rights granted to them in the
17 investment law.

18 By not invoking any provisions of
19 the investment law, they have -- which they have
20 allegedly breached, claimants have failed to
21 indicate, let alone establish that there is
22 between the parties a dispute of a legal nature

1 for purposes of the investment law.

2 It is, in any case, abundantly
3 clear that claimants did not submit investment
4 law claims in the notice of arbitration. It is
5 now too late for them to make those claims.

6 Claimants also invoke ICSID Rule --

7 ICSID arbitration Rule 40 in their late effort
8 to add investment law claims. Rule 40 allows an
9 incidental or additional claim arising directly
10 out of the subject matter of a dispute, provided
11 that such ancillary claim is within the scope of
12 the consent of the parties and is otherwise
13 within the jurisdiction of the center.

14 Claimants here attempt to bring new
15 claims under ICSID Rule 40, but that rule covers
16 only ancillary claims; that is, claims ancillary
17 to claims already made and not new claims. It
18 is axiomatic wherever the ancillary claims can
19 only be brought if there are valid principal
20 claims which they be associated.

21 In the present case, because there
22 is no jurisdiction with respect to CAFTA claims

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1 and because there were no investment claims
2 made, there are no principal claims before this
3 tribunal and no claims to which ancillary claims
4 might be attached.

5 Moreover, even if there were CAFTA
6 jurisdiction and the investment law claims could

7 be considered ancillary, claimants could not add
8 investment law claims to this arbitration
9 through arbitration Rule 40 because they are not
10 within the scope of the consent of the parties.

11 I want to be clear here about the
12 issue we are presenting. While the lack of
13 consent to jurisdiction under the investment law
14 is an independent ground for objecting to
15 jurisdiction, El Salvador is not objecting to
16 jurisdiction right now based on a lack of
17 consent under the investment law. We are simply
18 pointing out that arbitration Rule 40 is
19 inapplicable, and I will explain.

20 Claimants have made consent
21 relevant to the question at hand in the limited
22 context of arbitration Rule 40. It is in this

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1 context that the investment law claims are
2 outside of the scope of consent of the parties.

3 In their notice of arbitration,
4 claimants only consented to arbitration under
5 CAFTA. They did not separately consent to

6 arbitration under the investment law; and, thus,
7 investment law claims are outside the scope of
8 the consent of the parties for purposes of
9 arbitration Rule 40.

10 Note F of the institution Rule 2,
11 provides:

12 "Consent must exist when the center
13 receives the dispute, and information concerning
14 the consent by both parties must be given in the
15 request. The mere fact that a request is made
16 is not adequate information concerning consent."

17 There must be a specific statement
18 of consent.

19 Claimants did not record their
20 consent to arbitration under the investment law
21 in their request for arbitration. Their only
22 statement of consent was in paragraph 34 of the

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1 notice of arbitration. The claimants consent to
2 submit the present dispute to arbitration under
3 the auspices of ICSID in accordance with the
4 procedures set out in CAFTA. This notice of
5 arbitration signifies the claimants' consent

6 pursuant to Article 10.18.2(a) of CAFTA.

7 There simply was no statement of
8 consent to arbitration under the investment law.
9 And, therefore, in accordance with arbitration
10 Rule 40, any investment law claims that would be
11 brought in as ancillary claims fall outside the
12 scope of the consent of the parties. And so
13 these claims cannot be brought in under Article
14 40 -- or rule, Arbitration Rule 40.

15 Now, claimants having admitted that
16 the waiver requirement in CAFTA Article 10.18.2
17 is jurisdictional, and faced with the fact that
18 they failed to terminate the proceedings before
19 the Supreme Court of El Salvador, as required by
20 the waiver, claimants have developed a new
21 argument that one of them was not a party to the
22 proceedings before the Supreme Court. But this

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1 argument cannot be sustained.

2 As El Salvador stated in its reply,
3 the petitions to the Supreme Court of
4 El Salvador challenging the revocation of the

5 environmental permits was filed on behalf of
6 Commerce Group Corporation and San Sebastian
7 Gold Mines. Claimants tried to deny this fact
8 by stating at paragraph 78 of their rejoinder
9 that:

10 "Although Commerce Group's attorney
11 indicated in the petition that he represented
12 Sanseb, that statement was made for the purpose
13 of fully disclosing to the Court the
14 relationship between Commerce Group and Sanseb
15 in the context of the mining operation."

16 This, however, clearly is a post
17 hoc justification to fit claimants' new argument
18 regarding the waivers. There is no indication
19 in the petitions that the reference to San
20 Sebastian Gold Mines was for informational
21 purposes only. It is clear from the text of the
22 petition that the attorney for Commerce Group

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1 and San Sebastian Gold Mines was filing the
2 petition on behalf of both parties.

3 There is, however, clearly an
4 anomaly in the fact that, after the filing of

5 the petition, the Supreme Court of El Salvador
6 refers only to Commerce Group. But this does
7 not mean that San Sebastian Gold Mines was not a
8 party to the proceedings. There is a logical
9 explanation for the court's actions.

10 Respondent's Exhibit 22 contains
11 the documents that authorize Commerce Group and
12 San Sebastian Gold Mines to do business in
13 El Salvador. Such authorization requires a
14 two-step process. First, the Ministry of
15 Economy must issue a resolution authorizing a
16 company to do business in El Salvador.
17 Resolution 206 of the Ministry of Economy
18 provides this authorization for Commerce Group
19 and San Sebastian Gold Mines.

20 And it states that:

21 "It was decided to authorize
22 Commerce Group and San Sebastian Gold Mines

1 Incorporated to conduct commercial activities in
2 the Republic through a branch that can be called
3 Commerce Sanseb Joint Venture. This ministry

4 resolves to authorize the corporation Commerce
5 Group and San Sebastian Gold Mines to conduct
6 commercial activities in the country through a
7 branch that would be focused primarily on
8 exploitation within the mining industry, and
9 resolves to register in the commercial registry
10 the authorization granted by this resolution."

11 Commerce Group and San Sebastian
12 Gold Mines were thus authorized to do business
13 in El Salvador only as a joint venture, not as
14 separate entities. They registered as such,
15 because they had already established a joint
16 venture for this purpose in 1987, in an
17 agreement that authorized Commerce Group to act
18 on their behalf of the joint venture.

19 When Commerce Group and San
20 Sebastian Gold Mines took the next step in the
21 process of conducting business in El Salvador,
22 which is to register the branch with the

1 commercial registry, based on Resolution 206 of
2 the Ministry of the Economy, they registered
3 under the name Commerce Group rather than the

4 actual name of the branch Commerce Sanseb Joint
5 Venture.

6 On the screen is the resolution
7 which makes reference -- I mean, the registry
8 which makes reference to the prior Resolution
9 206, but shows that they were actually
10 registered under the name Commerce Group rather
11 than under the name Commerce Sanseb Joint
12 Venture as the resolution had indicated.

13 So you can see that there is some
14 confusion within the system over naming. But it
15 seems clear that here what is being done is the
16 registration of the joint venture, even though
17 it is with the wrong name, the name of Commerce
18 Group.

19 From this point forward, all of the
20 acts of the Government of El Salvador affecting
21 the two companies in El Salvador were taken
22 under the name Commerce Group Corp. The

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1 environmental permits were issued to Commerce in
2 the name Commerce Group Corp.; the exploitation

3 concession was issued in the name Commerce Group
4 Corp.; the exploration licenses referred to in
5 the notice of arbitration were issued in the
6 name of Commerce Group Corp.; and the revocation
7 of the environmental permits were issued in the
8 name of Commerce Group Corp.

9 This is why the documents in the
10 case before the Supreme Court were issued in the
11 name of Commerce Group Corp.

12 In the present context, it is
13 logical to conclude that this reference was, in
14 fact, to Commerce Sanseb Joint Ventures and
15 implies -- and implicated both companies.

16 Up to the time that they faced El
17 Salvador's preliminary objections based on the
18 defects in their waivers, claimants clearly
19 shared this conclusion. First, in paragraph 7
20 of their notice of arbitration, claimants
21 clearly identified the Commerce Sanseb Joint
22 Venture as the corporate form used to make their

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1 investment in El Salvador. And they also
2 indicate that the joint venture agreement

3 authorized Commerce to execute agreements on
4 behalf of Commerce Sanseb Joint Ventures, and it
5 is essentially authorizes Commerce Group to act
6 on behalf of the joint venture.

7 Additionally, in the notice of
8 arbitration, claimants refer to every one of the
9 administrative acts of the Salvadorean
10 government as acts directed towards Commerce
11 Sanseb, the joint venture to which both parties
12 are a part.

13 And finally and most importantly,
14 statements -- claimants stated in their notice
15 of arbitration that the petitions before the
16 Supreme Court of El Salvador were filed by
17 Commerce Sanseb's legal counsel.

18 However, when they were faced with
19 the consequences of their decision to continue
20 the proceedings before the Supreme Court,
21 claimants have suddenly adopted an entirely new
22 position regarding the relationship between

2 and the Commerce Sanseb Joint Venture. They now
3 take the position that the reference to Commerce
4 Group Corp. are not references to Commerce
5 Sanseb and have nothing whatsoever to do with
6 San Sebastian Gold Mines, Inc. Claimants want
7 to completely change the way they represent
8 themselves for the sole purpose of keeping their
9 arbitration alive for one of the claimants.

10 Now, let's take a look at the
11 specific examples of their change of position.

12 In their notice of arbitration,
13 they said Commerce Sanseb applied for and
14 received the environmental permits. Now, they
15 say Commerce was the holder of the environmental
16 permits. In the notice of arbitration, they
17 indicate that the Ministry of the Environment
18 delivered Commerce Sanseb Salvador -- excuse me,
19 to Commerce Sanseb's Salvadorean legal counsel
20 its revocation of the environmental permits.

21 Now, they are saying on 13
22 September 2006, the Ministry of the Environment

1 issued notices suspending Commerce's permits for

2 the San Sebastian Gold Mines and San Cristobal
3 Mill.

4 And, finally, in the notice of
5 arbitration, they stated that on December 6,
6 2006, Commerce Sanseb's legal counsel filed with
7 the Salvadorean court of administrative
8 litigation of the Supreme Court of Justice two
9 complaints relating to this matter.

10 Now, they are saying that the
11 petitions were filed on behalf of Commerce, the
12 party with standing to contest the termination
13 of the permits.

14 Claimants' attempt to change its
15 position must be rejected as improper and
16 inconsistent with the facts regarding the legal
17 personality of the companies in El Salvador and
18 the proceedings in El Salvador.

19 It should be noted, nevertheless,
20 that, were the tribunal to accept claimants' new
21 position on the legal personality acting in
22 El Salvador, the entire factual basis of

1 claimants' case would become inapplicable to San
2 Sebastian, leaving it with no claims.

3 Indeed, San Sebastian is not
4 authorized to conduct commercial activities in
5 El Salvador as an independent legal entity.
6 Thus, if the licenses, environmental permits,
7 and the very concession that are the core of the
8 present dispute were granted only to Commerce
9 Group, then San Sebastian has no claims.

10 But claimants cannot have it both
11 ways. On the one hand, claimants want to file
12 arbitration claims on behalf of both claimants
13 implying that both claimants had rights and made
14 investments in El Salvador. But on the other
15 hand, when convenient, they allege that, when
16 they say Commerce Sanseb, they really mean
17 Commerce Group.

18 And when their attorney identifies
19 himself as acting on behalf of the two
20 corporations, he really means just Commerce
21 Group.

22 But, in truth, San Sebastian is

1 either a part of Commerce Group's activities in
2 El Salvador, and, therefore, a party to the
3 legal proceedings before the Supreme Court or it
4 is not. If the facts are as presented in the
5 claimants' notice of arbitration, then San
6 Sebastian was a party to the Supreme Court
7 proceedings, and it, like Commerce Group, failed
8 to meet the waiver requirement under CAFTA
9 10.18.2.

10 If the facts are as presented by
11 claimants under their new theory of the case,
12 then San Sebastian is not an investor in
13 El Salvador, held none of the alleged rights set
14 out in the notice of arbitration and suffered
15 none of the alleged harms. In sum, it has no
16 claims.

17 Now, I come to our conclusion in
18 this matter, and I see that I actually am within
19 the time limits.

20 Claimants failed to submit valid
21 and effective waivers as required by CAFTA
22 Article 10.18.2. As a result, claimants did not

1 fulfill a condition to El Salvador's consent to
2 arbitration. There can be no jurisdiction
3 without El Salvador's consent. And without
4 jurisdiction, the entire arbitration must be
5 dismissed. The defects in the waivers affect
6 San Sebastian as well as Commerce Group because
7 the domestic proceedings were initiated on
8 behalf of both claimants; and neither claimant
9 took any action to make its waiver of its rights
10 to continue the domestic proceedings effective
11 by terminating the domestic judicial proceedings
12 before initiating the CAFTA arbitration.

13 There were no investment law claims
14 submitted in the notice of arbitration, and none
15 can be added now. Therefore, the dismissal of
16 the CAFTA arbitration due to the lack of
17 El Salvador's consent is the dismissal of the
18 entire arbitration initiated by claimants'
19 notice of arbitration.

20 In short, because of claimants'
21 failure to comply with the waiver requirement of
22 CAFTA 10.18.2, this entire arbitration must be

1 dismissed.

2 Before finishing, I wanted to
3 briefly address the issue of respondent's
4 request for costs in this matter. From
5 El Salvador's point of view, we should never
6 have gotten to this point. El Salvador should
7 never have had to undergo the expense of filing
8 this preliminary objection and the expense of
9 this proceeding. Claimants ignored early on the
10 opportunity to end this arbitration in July and
11 August of 2009 and avoid the costs of this
12 proceeding. Their disregard of the conditions
13 in the treaty when filing their notice of
14 arbitration was compounded by their decision to
15 ignore the letter El Salvador sent to the ICSID
16 secretary general opposing registration of the
17 case.

18 El Salvador pointed out to ICSID in
19 a letter sent to claimants the problems with
20 claimants' waiver, the existence of the domestic
21 judicial proceedings that dealt with the same
22 measures that are the central claims in the

1 CAFTA arbitration. The claimants also ignore a
2 second letter that El Salvador sent immediately
3 after registration telling the claimants exactly
4 what they had done wrong and pointing out the
5 precedent in NAFTA and CAFTA indicating that the
6 waiver requirement includes conduct in
7 conformity with the waiver.

8 In that letter, El Salvador invited
9 the claimants to terminate the ICSID arbitration
10 and provided its unilateral consent to the
11 termination of this case if claimants requested
12 it before the constitution of the tribunal.

13 It is important to recall that at
14 the time claimants filed their notice of
15 arbitration, the Waste Management decision
16 regarding the requirement to materially comply
17 with the waiver by terminating domestic court
18 proceedings had been settled precedent with
19 respect to the NAFTA waiver for nine years. And
20 the RDC versus Guatemala decision, reaching the
21 same conclusion under CAFTA, had been issued and
22 had been available to the public.

1 Claimants had the opportunity to
2 terminate this arbitration, request the
3 termination of proceedings before the Supreme
4 Court, and file a new notice of arbitration.

5 Claimants, however, despite being
6 put on express notice, decided to ignore the
7 provisions of the treaty upon which they base
8 jurisdiction and thus have forced El Salvador to
9 suffer the expense of bringing this preliminary
10 objection before the tribunal.

11 Claimants chose to wait for a
12 favorable resolution of the two cases pending
13 before the Supreme Court of El Salvador. And
14 when those two cases were decided, the claimants
15 then proceeded to request constitution of this
16 tribunal, ignoring the warnings of El Salvador.

17 El Salvador respectfully requests
18 that this tribunal send a strong message, not
19 only to these claimants, but to other claimants
20 that are only too ready to disregard the will of
21 states expressed in the very same international
22 treaties that the claimants purport to benefit

1 from.

2 The only way to send this clear
3 message is with an award not only dismissing
4 this case, but awarding El Salvador its legal
5 costs for having had to defend such a frivolous
6 action filed and continued by these claimants.

7 Thank you very much.

8 MR. Van den BERG: Thank you,
9 Mr. Smith, for presenting the initial arguments
10 for the respondent.

11 I suggest a break of 15 minutes.
12 Is that okay?

13 MR. MACHULAK: Yes, that would be
14 fine.

15 MR. Van den BERG: Okay. Recess
16 for 15 minutes until 12 o'clock.

17 (A break is taken.)

18 MR. Van den BERG: All right.
19 Mr. Machulak, please proceed on behalf of the
20 claimants.

21 CLAIMANTS' ARGUMENT BY MR. MACHULAK:

22 MR. MACHULAK: Thank you very much,

1 sir.

2 Mr. President, members of the
3 tribunal, again, my name is John Machulak, and I
4 will be speaking right at the beginning to give
5 you some background to what has happened and
6 leave the legal -- and I will --
7 Professor Newcombe will be addressing you with
8 the more legal portion of the argument.

9 First, let me say this: We do
10 represent two claimants, Commerce Group Corp.
11 and San Sebastian Gold Mines Inc. They are
12 separate companies, and our duties lie to two
13 clients. They are very close, in terms of the
14 number of shareholders, but there are different
15 sets of shareholders to the two of them.

16 Let me say, first, that Commerce
17 Group Corporation is a Delaware corporation
18 incorporated in 1962. It's now been converted
19 into a Wisconsin corporation along the way. San
20 Sebastian Gold Mines Inc. was founded as a
21 Nevada company in 1968. Combined, there's about
22 3,300 shareholders to the two corporations.

1 Now, you have been presented some
2 facts to joint venture agreement. Let me give
3 you a little bit of background on that.

4 This project in El Salvador where
5 the two have been mining and processing gold
6 started in 1968 with an investment on the part
7 of San Sebastian Gold Mines Inc.

8 Commerce became a shareholder of
9 San Sebastian between 1968 and 1978. It had
10 that status. San Sebastian was kind of a lead.

11 The civil war broke out in 1978,
12 and -- or at least was at a stage where he
13 couldn't mine anymore in El Salvador, and worked
14 under dis -- discontinued in 1985 when the two
15 companies came back to El Salvador. The whole
16 operation, the mill and plant that had been
17 there at the time at the San Sebastian Gold
18 Mines were destroyed. They were just missing
19 members starting from ground zero at that point.

20 So at that point in time, San --
21 Commerce began to give a more heavy investment

22 in San Sebastian Gold Mines Inc., and eventually

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1 they were supporting a rekindling of the
2 operation in El Salvador.

3 In 1987, if you recall from the
4 materials, is, when President Duarte awarded us
5 a new concession for -- for exploitation at the
6 San Sebastian gold mine, and Commerce was more
7 involved in -- in getting the financing to get
8 that going.

9 At that point in time, the parties
10 entered into a joint venture agreement. And the
11 big contribution that San Sebastian had at that
12 time is they had the lease rights to the mining
13 site down in El Salvador; and, basically, I'm
14 reciting to you the very same background that
15 you'll see in the joint venture agreement
16 itself.

17 Now, after the -- after the new --
18 after the 1987 concession was granted, the
19 company acquired a new mill about 15 miles away
20 from the original San Sebastian site, rather
21 than attempting to rebuild on site, because

22 there had been a Canadian Javalon [phonetic]

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1 mill that was available. That became the
2 San Cristobal mill, and from -- that took a
3 considerable amount of refurbishing.

4 But from 1995 through 2000, the
5 companies were producing gold at the 22,700-odd
6 ounces of bullion at the -- at the
7 San Cristobal. The ore was taken from San
8 Sebastian and carted over there. And eventually
9 the -- after about five years of production,
10 successful production, the company was going to
11 expand the -- the mill site.

12 In between 2000 and all the way
13 through 2004, the -- and in -- earlier, the
14 company had a remarkably good relationship, we
15 thought, with the country of El Salvador. There
16 is mention in the materials about us getting a
17 new concession, which happened in 2002.

18 The company adopted a new mining
19 law. We adapted. We took our concession. We
20 got -- we worked with the government to get a

21 long -- not only a long-term concession for the
22 San Sebastian gold mines, but we got two other

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1 exploration sites at that time that consisted of
2 another 86 kilometers in the vicinity of the
3 mine site.

4 And last but not least, if -- all
5 the way through this long history with
6 El Salvador, the company has had a mining
7 presence. It's invested in local
8 infrastructure, built a church there, roads,
9 bridges, created hundreds of jobs there, and it
10 contributed. This was not an operation that --
11 that just took without giving back.

12 Now, what happens -- what led,
13 then, to the CAFTA filing?

14 Well, at the point in time, the --
15 all -- everything started to come to a head in
16 2006, or the start of the problem. At that
17 point in time, the company had a concession
18 through 2034 for the mining site. It had
19 86 square kilometers in its exploration
20 concession. It had a substantial investment

21 that went all the way back to its first
22 involvement in the gold mine.

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1 What happened in -- in 2006? Not
2 only was the revocation of the environmental
3 permits that we talked about, but the
4 exploration was denied. The exploration was not
5 renewed. And the important thing is that, in
6 2006, there was a de facto moratorium on mining.

7 I mean, it -- it -- and it's clear.
8 We've given you information in the materials
9 about just a glimpse of some of the newspaper
10 articles.

11 In mid 2006, in July 2006, there
12 was a de facto -- there was an announced de
13 facto ban on mining. In fact, the article that
14 we put to you shows that it wasn't that --
15 something we -- the minister said. It's not
16 something that we did. It's something that
17 generally the company -- the country is going to
18 go through, is not going to issue mining permits
19 for anyone. And this was 2006.

20 stay right here until you're -- until you're
21 ready for that.

22 But in -- yes, you know, there --

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1 we'll -- we'll come to that. But we did start
2 in a proceeding, a challenge in administrative
3 courts of El Salvador in 2006. In 2007, we
4 asked for an injunctive relief to continue
5 mining during the case that was denied to us by
6 the El Salvadorean court.

7 There is a lot of discussion in the
8 materials about how everybody is waiting on the
9 ruling of the court, quite frankly. There --
10 there really -- at the point in time we got to
11 the CAFTA proceedings, there wasn't really a lot
12 of hope in the outcome for the court there,
13 although we thought we had a strong case.

14 In -- in 2000 -- all the way along
15 the way, 2008, 2009 and 2010, the -- the
16 Government of El Salvador continually told
17 everyone there -- there would no longer be
18 permits issued for mining.

19 In 2000 -- and what led to the
20 CAFTA proceeding specifically? First, in 2008,
21 Pacific Rim, another mining company that perhaps
22 you are familiar with, has a similar dispute

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1 with El Salvador, announced its intent to file
2 for arbitration.

3 We, as a team -- this is a
4 different team -- went down to El Salvador in
5 February of 2009, and said, "Can we work with
6 you? Is there some way we could work this out?"

7 And we were very interested in
8 doing so because we had an investor from the
9 previous year who was having trouble with
10 working with the El Salvadorean government to be
11 able to kind of take over the operation and --
12 and -- and get it going.

13 There is a missing fact here. In
14 -- in 2007, my dad, who was like the spearhead
15 of the whole thing all the way along the way,
16 passed away; and we were looking at outside
17 investors to come in and assist us with the
18 mining. We then in a very dramatic way found

19 out that the government was not going to give us
20 any mining permits, because it didn't matter how
21 much money we would invest, what you would do at
22 the site. There would be no mining in

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1 El Salvador. I found that out myself.

2 (There was a discussion off the
3 record.)

4 MR. MACHULAK: I found that out
5 myself at meetings with the Ministry of
6 Environment, the Council for the Ministry of
7 Environment, where he announced that is what is
8 going to be coming. But in March of -- then,
9 finally, in March of 2009, we gave our notice of
10 intent to file for a proceeding under CAFTA.

11 One of the things that was
12 paramount in our mind was a lot of this action
13 took place in 2006. So it was kind of time to
14 fish or cut bait in early 2009, when we finally
15 put out our notice of intent.

16 Now, the -- the thought -- the
17 thought being projected by the respondents is

18 that in 2006 we commenced this litigation, and
19 2009 the Supreme Court began its deliberations.
20 We did not know that at the time.

21 If you look at the documents being
22 submitted to you, we understood that this was a

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1 proceeding that was out there somewhere in the
2 distance, but it was out there. Obviously, we
3 referenced it in our arbitration proceedings.

4 When we started our arbitration
5 proceedings, which was pretty close to 90 days
6 after our notice of intent, I -- I have a
7 timetable here in -- it -- it would be helpful,
8 the thing. But here -- here -- let me just
9 walk, you if I may, through the documents.

10 On March 16, 2009, we gave our
11 notice of intent. On July 2, 2009, we submitted
12 our notice of arbitration. With our notice of
13 arbitration, we submitted two waivers. One was
14 a waiver by Commerce Group Corp., which you have
15 as an exhibit, and one is a waiver by San
16 Sebastian Gold Mines Inc. These are both dated
17 the same day, signed by my brother, who is now

18 president of both companies.

19 Next -- well, I -- well, I will say
20 this, but there is -- there is a talk about us
21 purposely delaying the CAFTA proceedings. When
22 we found these two waivers, we thought -- we --

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1 we figured -- we thought we had done every -- we
2 read the treaty, and we thought we had done
3 everything that complied with the -- with the
4 treaty, because we -- I mean, we filed it
5 religiously in -- in framing the waivers. And
6 we did not understand and did not agree, or just
7 didn't understand at this point in time that you
8 had to do anything else but give the waiver.
9 And to us a waiver means you're in -- the other
10 side can do with it whatever they want to, but
11 you have no right to claim \$100 million,
12 \$111 million. You're done with whatever you
13 want to claim later.

14 And what started to delay things,
15 you can see right in -- in our petition and
16 count this as our inexperience at two pages of

17 the -- of the -- the last two pages of our arbit
18 -- notice of arbitration.

19 We, my brother and I, when we
20 started things, we went through the list
21 provided by ICSID, and we didn't -- we thought
22 -- we had picked Professor Greenwood out of the

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1 list as an arbitrator, and we had not talked to
2 him, we had not spoken with him.

3 We -- we just understood the
4 proceeding; you go through the list and pick
5 one, which is what we did. We did not know that
6 he was unavailable, or -- or you go through this
7 process of finding out whether people are
8 available before doing it. But this is what we
9 did on July 2nd. We picked Professor Greenwood.

10 Then after we filed, we got a
11 letter back from ICSID asking us the questions
12 about our filing. This was -- and we responded
13 to that on August 19th, which is in the exhibits
14 furnished by the respondent. But here what the
15 respondent says is this, is that on August 14,
16 2009, the Attorney General for El Salvador by

17 rights in -- and we didn't so much as respond to
18 it.

19 Well, truthfully, we weren't sent
20 the letter. This letter was filed ex parte with
21 ICSID, and the way we found out about it was a
22 little bit later. I think that by E-Mails with

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1 the -- with the ICSID will confirm that. But I
2 -- what -- what happened was -- is that when
3 Mr. Smith wrote to us on August 24th, he
4 referenced a letter to the Attorney General, but
5 it was not -- it -- it was not -- it was not a
6 letter that was addressed or -- or we -- we
7 weren't copied.

8 Now, the -- if I -- when -- when we
9 studied -- the exhibits I have for you has some
10 yellow highlighting, which is not exactly coming
11 up on the -- on the overhead screen.

12 But here is how we interpreted the
13 letter from the Attorney General when we got it.
14 We asked for it, and we got it.

15 In the second paragraph, here,

16 where -- where I've got the highlighting in your
17 thing, the Attorney General said:

18 "Even if claimants were to withdraw
19 the legal proceedings still pending in
20 El Salvador, Claimants' failure to honor their
21 waivers before submitting their requests for
22 arbitration to ICSID cannot be remedied once the

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1 request for arbitration has been filed."

2 So we're looking at this from our
3 practical standpoint. Here we are in August of
4 2009. We certainly don't want to get into a
5 statute of limitations question. This is three
6 years after. And what they are saying is, you
7 have to dismiss your CAFTA proceedings, and then
8 go through the some process in El Salvador
9 before you could even -- an unknown time frame
10 before you can start it.

11 I mean, this -- this was telling --
12 this is something that -- the position that they
13 took at the time. It wasn't:

14 "Let's continue this -- let's
15 continue this now."

16 It says:

17 "You have to dismiss the CAFTA
18 proceeding before you do anything else."

19 If you go to the very last line of
20 this page, it picks up on the next page, it goes
21 on to say there:

22 "The defects on the request for

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1 arbitration are not of the nature that can be
2 cured once the request for arbitration has been
3 filed."

4 So it isn't asking us to -- to do
5 anything now. It's saying, you're basically --
6 there's nothing you can do right now. There was
7 never any request to do something vis-à-vis the
8 -- the domestic proceedings. It's basically
9 saying:

10 "Dismiss the CAFTA. Otherwise, you
11 will forever have this jurisdictional defect."

12 So what was happening at the same
13 time for us? In -- in the next exhibit, you see
14 we got -- we -- we had a letter, and -- and this

15 was referenced from -- from doing Dewey &
16 LeBoeuf from Mr. Derek Smith.

17 But this letter basically
18 reiterates the same thing. If you go to the --
19 you know, it told us the same thing. And it --
20 and it said that -- yeah, the -- yeah, the
21 second paragraph, that we -- claimants have been
22 made fully aware during the registration process

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1 through the letter of the Attorney General to
2 the Secretary General -- through the letter of
3 the Attorney General to the Secretary General,
4 together with Claimants' knowledge about the
5 nature of the proceedings, that they did not
6 comply with the jurisdictional requirements.

7 We read this, and it -- it really
8 doesn't say who we got -- again, it doesn't say
9 we got this letter. But we read this. Did we
10 comply with the jurisdictional requirements? We
11 go back to look at the treaty, and -- and -- and
12 in our -- in our estimation, we -- we have.

13 And the -- and you look in the very
14 next paragraph, it's still:

15 "We have" -- you know, the -- the
16 second middle line there:

17 "We still have the choice to dis"
18 -- "request discontinuance of the arbitration.
19 That was the drive at that point in time, that
20 we were jurisdictionally defective from the
21 beginning, that there is nothing we could do to
22 fix it."

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1 Now -- and in the second page, they
2 reiterate the same point. So it's not to
3 short-change Mr. -- Professor Newcombe. Let me
4 just say this. It took some time, and you have
5 the exhibits there to sort through for us the --
6 to get a replacement arbitrator appointed after
7 Professor Greenwood.

8 We wrote him, and he said he's not
9 available to do it. So, you know, that delayed
10 some proceedings on our part. Never on our part
11 did we -- did we -- this whole fiction of
12 waiting for El Salvador is so outside of what
13 was going on that it's incredible to me.

14 But if you look through the
15 proceedings, here you will see that there was a
16 lot of things happening vis-à-vis for us versus
17 ICSID, and we were trying to do what we could to
18 advance the proceeding for it.

19 A couple of other exhibits I want
20 to mention: One is that El Salvador submits a
21 -- a -- kind of a status report from their
22 Attorney General. And -- and what the status

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1 report says, working with the translation, is
2 that at some point -- and this was right around
3 when the Attorney General wrote ICSID, he asked
4 for a status report of the local proceedings.

5 And the clerk -- this -- this is
6 just a request for a status report. And the
7 turnaround is not a day or two. I mean, it's --
8 just to get a status report from the court takes
9 a considerable turnaround in time, and this is
10 nothing of -- a procedural nature happening in
11 the El Salvador case.

12 The other thing I wish to point out
13 from their exhibits is that they -- they submit

14 a letter and translation from Pedro Valle, one
15 of our attorneys in El Salvador, who is not the
16 one who is involved in the local proceedings.

17 But he -- he -- you know, contrary
18 to being hopeful about something happening in
19 El Salvador at the time, his letter shows that
20 in -- to after we filed our CAFTA proceedings,
21 we started to disassemble the mill and plant.

22 And we were certainly not -- the

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1 letter does not -- speaks of a wonderful
2 expectation of something that is going to happen
3 in a month or two.

4 I mean, we were -- we were closing
5 up shop down there, and it -- more to the point,
6 he says we are complying with whatever they want
7 in the resolution, in the -- in the government
8 action that we were challenging in 2006. I
9 highlighted -- highlighted the section there.

10 And I know you do not have a full
11 translation of what things will discontinue in
12 an administrative proceeding before you; but I

13 understand that, in addition to 40B, which says
14 that claimant can submit a withdrawal, there is
15 a subsection C there that says, if you start to
16 act in conformity with the -- with the -- with
17 the government action you are challenging, that
18 is another ground for dismissal.

19 How things all play out
20 procedurally, I couldn't tell. I do not have
21 the type of expertise, I am sure, that the
22 Attorney General of El Salvador has. But I -- I

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1 know that -- that none of this is directed to
2 somehow perpetrating, you know, or prolonging
3 the CAFTA proceeding.

4 So without further adieu, I'll --
5 I'll give you Professor Newcombe.

6 MR. Van den BERG: Thank you.
7 Professor Newcombe, please proceed.

8 CLAIMANTS' ARGUMENT

9 BY PROFESSOR NEWCOMBE:

10 MR. NEWCOMBE: Mr. President,
11 members of the tribunal, representatives of
12 El Salvador, representatives of the CAFTA

13 parties, Mr. Machulak has outlined the context
14 of the dispute and the proceedings to date. My
15 presentation will focus on the overview of the
16 claimants' submissions with respect to the
17 preliminary objection.

18 I will be making six principal
19 submissions in response to the respondent's
20 preliminary objection.

21 First, the claimants have fully
22 satisfied the jurisdictional requirement under

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1 CAFTA Article 10.18.2 with respect to the
2 submission of waivers. In light of the parties'
3 agreement that the parties -- that the
4 claimants' waiver satisfies all formal
5 requirements, the -- the narrow issue for
6 determination is -- is this -- this question of
7 whether a CAFTA claimant is required to request
8 termination of a domestic proceeding as a
9 jurisdictional precondition prior to a claim
10 being submitted to arbitration under CAFTA.

11 The claimants' answer is a clear

12 no. CAFTA Article 10.18.2 imposes no such
13 requirement. And to interpret Article 10.18.2
14 in such a way would be to -- would be to read in
15 a restrictive jurisdictional precondition that
16 is not present in the plain text of the treaty.

17 My second submission is that the
18 claimants submit that the continuation of the --
19 of the domestic proceedings after the -- after
20 the submission of the notice of arbitration is a
21 question of admissibility of claims, not
22 jurisdiction.

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1 Although the -- the claimants
2 affirm that this tribunal has the power to find
3 that claims are inadmissible where there are
4 concurrent proceedings, we submit that there is
5 no impediment to the admissibility of claims in
6 this case because there never were concurrent
7 proceedings. Further, there are no ongoing
8 current proceedings that could serve as an
9 impediment to the claimants' claims.

10 My third submission is that, since
11 July 2, 2009, the -- the date of the submission

12 of the notice of arbitration, the claimants have
13 acted consistently with the waivers and in good
14 faith.

15 Fourth, if this tribunal were to
16 find that the continuation of the domestic
17 proceedings with respect to the revocation of
18 the environmental permits affects in some way
19 the tribunal's jurisdiction, the claimants'
20 submission is that any impediment exists only to
21 the extent of the overlap of the measures
22 between this proceeding and the domestic

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1 proceeding, in particular the measures -- the
2 measure in question in the domestic proceeding,
3 the revocation of the environmental permits.

4 Claimants' other claims in this
5 proceeding with respect to other measures,
6 including that respondents treatment of the
7 expiration licenses, and the respondent's de
8 facto moratorium on mining, which continues to
9 this day, are unaffected as these measures --
10 measures were not the subject of the domestic

11 proceedings.

12 Fifth, any jurisdictional
13 impediment that may exist applies only to the
14 Commerce Group and not to San Sebastian.

15 Sixth and, finally, the preliminary
16 objection does not apply to the claimants'
17 independent claims for breach of the foreign
18 investment law. Even if it's accepted in its
19 entirety, the preliminary objection does not
20 apply. Actually, it does not even raise the
21 issue of El Salvador's consent under the foreign
22 investment law.

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1 Now, I understand this -- this
2 morning the respondent has -- has raised the
3 issue of the respondents' consent under the
4 foreign investment law, and also the claimants'
5 consent. I would suggest that this -- this --
6 this issue has not been briefed. The -- the
7 preliminary objection is that -- was a
8 preliminary objection to -- whether there was
9 consent under CAFTA.

10 So there's a question of whether,

11 if the tribunal's decision that arises out of
12 this preliminary objection, whether the foreign
13 investment law -- to what extent the foreign
14 investment law issue really is before the -- the
15 tribunal in this preliminary objection.

16 To the extent I can, I will try to
17 be responsive to the claimants. I will try to
18 be responsive to the respondent's arguments this
19 morning, although many of the points I will have
20 to elaborate on this afternoon.

21 MR. Van den BERG: Sure. But
22 perhaps you may also consider the -- the

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1 following question in -- in -- related to the
2 invocation of the investment law, which is the
3 -- the text of the waiver itself. The text of
4 the waiver refers to any right to initiate or
5 continue before any administrative tribunal or
6 court under the law of any party or dispute
7 settlement procedures, any proceeding with
8 respect to measures.

9 This investment law, does the

10 arbitration contemplated by the investment law
11 fall under this waiver provision?

12 MR. NEWCOMBE: No, it doesn't,
13 Mr. President. As in the Pac Rim case, which
14 decided this particular -- this particular
15 issue, the waiver -- this proceeding, this --
16 this arbitration is not another -- another -- I
17 don't have the provision in front of me now, the
18 10.18.2, the -- the point which I'll --

19 MR. Van den BERG: Would you like
20 to take it --

21 MR. NEWCOMBE: -- I'll return to it
22 this afternoon, is that it -- it's not

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1 applicable.

2 MR. Van den BERG: No, would you
3 like to take the text in front of you?

4 MR. NEWCOMBE: Thank you,
5 Mr. President.

6 The waiver provision requires a
7 waiver with respect to -- or other dispute
8 settlement procedures and any proceeding. Our
9 submission is that this -- that there are --

10 that there is one arbitration and one
11 proceeding. There is -- there are claims that
12 are submitted under CAFTA, under the consent of
13 CAFTA and under the consent of the foreign
14 investment law, and that this tribunal is not an
15 -- or other dispute settlement procedure.

16 MR. Van den BERG: You have the two
17 -- one or two in one? What do we have here?

18 MR. NEWCOMBE: We have -- we have
19 claims arising from two different instruments.

20 MR. Van den BERG: Yes.

21 MR. NEWCOMBE: One -- one treaty,
22 one foreign investment law, with two separate

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1 consents to arbitration in one proceeding, in
2 one arbitration. And as -- as determined, we
3 would submit that the -- that the preliminary
4 decision in the Pac Rim case, which decided this
5 particular point, as we -- we submitted in
6 our -- in our -- in our pleadings decided that
7 the waiver did not exclude the tribunal's --
8 does -- does not apply where claims are brought

9 into one proceeding.

10 MR. Van den BERG: Thank you.

11 MR. NEWCOMBE: Turning to my first
12 submission, Commerce and San Sebastian submitted
13 written waivers as required by CAFTA Article
14 10.18.2 of their notice of arbitration.

15 Mr. Smith has indicated this
16 morning a number of areas of agreement between
17 the -- the parties. I won't go into those in
18 detail, other than to note that the respondent
19 has not raised any objections based on the form
20 of waivers submitted by the claimants.

21 In its pleadings, the respondent
22 has not disputed that the waivers were effective

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1 to waive the claimants' right in -- in the
2 domestic proceedings. In the respondents'
3 preliminary objection at paragraph 21, the
4 claimants -- the -- the respondents say:

5 "Claimants therefore knowingly and
6 willingly waived any right to initiate or
7 continue any proceeding."

8 The respondent's reply -- the

9 respondent's reply at paragraph three states
10 that:

11 "The parties agree on several
12 points pursuant to the waiver."

13 Then I quote:

14 "They, the claimants, waive the
15 right to continue the domestic judicial
16 proceedings. Although the respondent argues
17 that the claimants were required to take
18 additional steps when it was submitting the
19 claims, in particular, to request discontinuance
20 of the domestic proceedings as a precondition,
21 respondent has not contested that the waivers
22 were, in fact, effective to waive the claimants'

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1 rights to continue the domestic proceedings."

2 Claimants say that the waiver was
3 defective for purposes of CAFTA jurisdiction
4 because of a failure to request the
5 discontinuance because they read in this -- this
6 jurisdictional precondition.

7 They have not contested that

8 claimants' submission of the waivers had a legal
9 effect. The waivers waived real legal rights.
10 And the respondent was the beneficiary of those
11 waivers. The respondent simply ignores this
12 fact and argues that the treaty required more, a
13 submission, as I will -- I will -- that is
14 without legal merit.

15 Fourth, the parties agree -- my
16 next point is, the parties agree that the
17 jurisdiction of this tribunal is determined as
18 of the day of the notice of arbitration, the
19 date that it's received by the secretary
20 general, and that events after that date do not
21 affect jurisdiction.

22 As a result in the claimants'

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1 submission, conduct after the submission of the
2 waivers, which I will refer to for ease of
3 reference as "post-waiver conduct," is not
4 relevant to whether this tribunal has
5 jurisdiction. Jurisdiction can neither be lost
6 nor found by events occurring after the
7 submission of the notice of arbitration.

8 Now, there is a difference between
9 the parties on the date for determining
10 jurisdiction. The parties agree that Article
11 10.16.4 which governs the notice of arbitration
12 is deemed to be submitted when it's received by
13 the Secretary General of ICSID.

14 Claimants submit that the date of
15 receipt of notice of arbitration was July 2,
16 2009, the date that the claimants -- the date of
17 the claimants' consent to arbitration and the
18 date that the notice of arbitration was E-Mailed
19 to the Secretary General.

20 The respondent submits that the
21 date of receipt is July 6th, the date of the
22 secretary general's formal acknowledgement of

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1 receipt.

2 I would like to explain why the
3 claimants take this position.

4 The MARN revolution, the Ministry
5 of Environment Resolutions invoking the
6 environmental permits are dated July 5th and

7 6th, 2006. But it's clear from the record that
8 the resolutions were notified to the parties on
9 September 13, 2006; and this is the position
10 that is taken by both parties and supported by
11 all of the evidence, all of the -- all of the
12 exhibits.

13 The three-year time limitation for
14 bringing a claim under Article 10.18.1, with
15 respect to the revocation of environmental
16 permits, runs from the date of knowledge of the
17 event and thus runs from September 13, 2006.

18 So we submit that, since the notice
19 of arbitration was received on July the 2nd,
20 2009, there can be no question of the three-year
21 time limit running. But out of an abundance of
22 caution, we submit that the earlier date, the

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1 July 2nd date, applies in order to -- to ensure
2 that the respondent does not later
3 opportunistically change its position and make a
4 further jurisdictional objection, that the
5 three-year time limit applies on the earlier
6 date of the date of the actual -- the date of

7 resolutions revoking the -- the permits, which
8 were 5th and 6th of July.

9 Thus, if the date of receipt is
10 July 6th, there may be a -- a-- a potential for
11 further preliminary objection. So that's the --
12 the -- the sort of the reason, the rationale,
13 why we submit that July 2nd is the date for
14 determining jurisdiction.

15 I now turn to my primary
16 submission, the primary dispute between the
17 parties.

18 Were the claimants required under
19 Article 10.18.2 to request discontinuance of the
20 domestic proceedings prior to submitting a
21 notice of claim?

22 This is fundamentally a question of

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1 treaty interpretation. The interpretation
2 proposed by the respondent reads in a
3 jurisdictional precondition in Article 10.18.2
4 that does not exist in the text of the treaty:

5 "It's well accepted in

6 international law that there is no presumption
7 of restrictive or" expansion -- "expansive
8 interpretation of jurisdictional provisions in
9 treaties. A positive obligation to request
10 termination of domestic proceedings prior to
11 submitting a notice of arbitration imposes an
12 additional and restrictive jurisdictional
13 condition that's not present in the
14 jurisdictional provision."

15 CAFTA Article 1.2.2 requires --
16 provides that:

17 "The parties shall interpret and
18 apply the provisions of disagreement in light of
19 its objectives set out in paragraph one and in
20 accordance with applicable rules of
21 international law."

22 The objectives set out in paragraph

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1 one of CAFTA include creating effective
2 procedures for the resolution of disputes,
3 substantially increasing investment
4 opportunities in the territories of the parties;
5 so these are objectives F and D.

6 Further, the preamble of the CAFTA
7 states that the parties resolve to ensure a
8 predictive commercial framework for business
9 planning and investment.

10 As the tribunal is well aware,
11 Article 31.1 of the Vienna Convention of the Law
12 of Treaties codifies the well-established
13 guiding principle of treaty interpretation.
14 It's revealing that the respondent in its
15 written pleadings does not refer once to
16 principles of treaty interpretation in the
17 Vienna Convention on the Law of Treaties.

18 This is particularly surprising
19 since the entire preliminary objection rests on
20 the interpretation of Article 10.18.2. Rather,
21 the respondent asserts that there must a
22 positive obligation to discontinue under Article

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1 10.18.2 since otherwise a waiver is defective or
2 invalid or repudiated or a number of other
3 adjectives.

4 But this is simply not the case.

5 The whole point of the submission of a binding
6 and written waiver is that it's effective,
7 notwithstanding the subsequent conduct of the
8 claimant. The state obtains the benefit of the
9 waiver and can use it to have the domestic
10 proceedings dismissed if the claimant fails to
11 discontinue proceedings or initiates new
12 proceedings.

13 As the claimants submit in
14 paragraph 17 of their rejoinder, the ordinary
15 meaning of Article 10.18.2 -- we have the text
16 in front of us -- is that a written waiver must
17 -- the notice of arbitration is accompanied by a
18 written waiver.

19 The ordinary meaning of -- of these
20 words cannot be reasonably interpreted as
21 requiring discontinuance of existing proceedings
22 prior to submitting a claim, while

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1 simultaneously requiring a written waiver of the
2 right to continue those same proceedings.

3 If this were the case, there would
4 be no reason -- there would be no need for the

5 -- or the -- for the waiver of the right to
6 continue because there would already have been
7 discontinuance.

8 The respondent's interpretation of
9 CAFTA -- of the CAFTA text rewrites the
10 requirement to our requirement to discontinue
11 existing proceedings prior to the submission of
12 a claim and then to waive any right to initiate
13 new proceedings. And our submission is that the
14 ordinary meaning of the text does not -- does
15 not support this interpretation.

16 We say that, if the CAFTA -- the
17 CAFTA drafters have intended to make this
18 discontinuance of existing proceedings a
19 jurisdictional precondition to submitting a
20 claim, they would have done so expressly through
21 clear language to that effect, while maintaining
22 a requirement for the waiver of rights with

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1 respect to the initiation of new claims.

2 Turning to the surrounding context,
3 the fact that Article 10.18.3 states that

4 certain types of action may be continued does
5 not warrant reading in an obligation to
6 discontinue proceedings. Rather, Article
7 10.18.3 provides an exception to the scope of
8 the required waiver. Paragraph 53 of the
9 decision on jurisdiction, and RDC in Guatemala
10 expressly refers to Article 10.18.3 as an
11 exception.

12 And we submit that this is -- that
13 this interpretation is correct, that what the
14 CAFTA drafters intended by 10.18.3 was to create
15 an exception, a limited -- a limited exception,
16 for the waivers, which, of course, is really not
17 at issue in this -- in this case.

18 If the intent of the CAFTA drafters
19 had to have been -- had been to provide an
20 absolute prohibition on continuation of domestic
21 proceedings as a condition on jurisdiction,
22 Article 10.18.3 would have been read as a

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1 prohibition, and it's not.

2 When the CAFTA drafters wanted to
3 prohibit certain types of concurrent

4 proceedings, they did so expressly. This was
5 done, for example, in Article 10.18.4 that says
6 that no claims may be made for breaches of an
7 investment authorization, of an investment
8 agreement, if the claimant has previously
9 submitted the same breach in domestic
10 proceedings.

11 Further, Annex 10E provides that a
12 US investor may not submit a claim to
13 arbitration under CAFTA if the investor had
14 alleged a breach of CAFTA in the domestic courts
15 of a Central American party. So in the other
16 instances, we have an express prohibition.

17 Throughout its written submission,
18 the respondent states that the claimants'
19 waivers are invalid or defective because the
20 claimants did not request discontinuance of the
21 proceedings prior to submitting a notice of
22 arbitration.

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1 The respondent argues that the
2 waivers were an -- invalid the moment they were

3 submitted. At the same time, the respondent
4 appears to agree that, as a result of the
5 waivers -- the claimants waived right to the --
6 to the domestic proceedings.

7 Thus, on one hand, the respondent
8 acknowledges that the waivers were effective for
9 the purposes of waiving rights. There -- there
10 -- there were waivers -- there was a waiver of
11 legal rights to initiate the proceedings; but,
12 on the other hand, the respondent argues that
13 the waivers were not effective for the purposes
14 of complying with CAFTA's jurisdictional
15 requirements.

16 In addition to being -- in addition
17 to being inconsistent, the respondent's argument
18 rested on this assumption that, in order to be
19 effective, the claimant must do something more,
20 that the claimants must request termination.
21 Claimants reject this interpretation of CAFTA.

22 As noted by the tribunal in Waste

1 Management Two, in reference to waivers under
2 Article 11.21 of NAFTA, a waiver is definitive

3 in its effect. A waiver is a unilateral and
4 final abandonment, extinguishment, and
5 abdication of legal rights.

6 It's the very fact that a waiver
7 has this definitive effect that makes it such an
8 effective tool to protect the interests of host
9 states.

10 The respondent argues in its reply
11 at paragraph 32, that, if the -- despite the
12 written waiver, concurrent proceedings, in fact,
13 exist, the waiver is not effective because it is
14 not achieving its purpose.

15 The very effectiveness of the
16 waiver is that it provide the final and
17 definitive abandonment of the investor's rights
18 to continue any domestic proceedings with
19 respect to measures that are also subject to
20 CAFTA claims. The submission of assigned and
21 binding waiver to a respondent state ensures
22 that a state is not required to defend itself in

1 concurrent proceedings.

2 If the respondent's submission is
3 correct, then the corollary must be that CAFTA
4 does not -- does not permit, indeed, prohibits
5 concurrent proceedings. Since the respondent's
6 argument is that concurrent proceedings make a
7 waiver defective and thus deprives the CAFTA
8 tribunal of jurisdiction, therefore, there could
9 never be concurrent proceedings because the
10 CAFTA tribunal would never have jurisdiction.

11 In the claimants' submission, CAFTA
12 does not require exclusivity of proceedings as a
13 condition of consent to arbitration as a
14 jurisdictional condition. The structure of the
15 waiver requirement in Article 10.18 means that
16 the state is the beneficiary of the waiver,
17 ultimately has some discretion whether to allow
18 domestic proceedings to continue.

19 We do not say that this is a likely
20 or frequent occurrence. Rather, the point is
21 simply that the existence of concurrent domestic
22 and CAFTA proceedings, with respect to the same

1 measure, is not impossible.

2 The delivery of the waiver puts the
3 respondent state in the position of having a
4 choice. Although in the vast majority of cases,
5 respondent states will undoubtedly want to have
6 the benefit of the waiver, at the same time a
7 respondent state may have an interest in certain
8 cases in allowing the domestic proceedings to
9 continue to completion.

10 The non-disputing party of --
11 submission of the Republic of Costa Rica
12 suggests that the principle of effectiveness in
13 treaty interpretation requires that the treaty
14 be interpreted to -- to impose a positive
15 obligation on a claimant to discontinue any
16 ongoing domestic proceedings.

17 Claimants agreed that the principle
18 of effectiveness applies to treaty
19 interpretation. In accordance with Article 31
20 of the Vienna Convention, treaty interpretation
21 should be interpreted to give effect to the
22 objects and the purposes of the treaty, and

1 effect should be given to the treaty text.
2 Treaty provisions and terms should not be
3 interpreted in such a way as to be infective or
4 to render them meaningless, redundant or
5 inutile.

6 Costa Rica's submission, however, I
7 respectfully submit, assumes that a written
8 waiver is not effective. In the claimants'
9 submission, it is. It ensures that a state is
10 not forced to defend itself in -- in concurrent
11 proceedings. Further, it appears that Costa
12 Rica's submission addresses post-waiver conduct,
13 conduct after the submission. The claimant and
14 the respondent agree, however, that post-waiver
15 conduct is not a jurisdictional issue.

16 Article 10.18 sets out the
17 limitations and conditions on the consent to
18 arbitration. The principle of effectiveness is
19 not served by adding additional jurisdictional
20 requirements that are not present in a treaty
21 text. Imposing an additional jurisdictional
22 requirement not evident on the face of the

1 treaty does not create effective procedures for
2 the resolution of disputes; nor does it give
3 effect to the ordinary meaning of the treaty
4 text as agreed between the parties.

5 The -- to complete my submissions
6 on the question of whether the failure to
7 discontinue the domestic proceedings is a
8 jurisdictional impediment, I'll -- I would like
9 to briefly address the award in Waste Management
10 One, the decision in jurisdiction in RDC
11 Guatemala, and in addition I will briefly
12 address the decision on jurisdiction in Vanessa
13 Ventures and Venezuela.

14 First, the claimants submit that
15 the -- the decisions -- with the award in the
16 decision in Waste Management and RDC
17 respectively are distinguishable on their facts.

18 In both Waste Management One and
19 RDC, the tribunals were faced with situations in
20 which there were ongoing domestic proceedings at
21 the time of -- of the issue arose before the
22 tribunal. In the case at hand, the domestic

1 proceedings ended three months before this
2 tribunal was constituted, this tribunal being
3 constituted on July 1st.

4 First, it's clear that there are no
5 currently ongoing proceedings in El Salvador,
6 with -- with respect to Commerce or Sanseb. The
7 jurisdictional defect in Waste Management One
8 was that the investor submitted a waiver with a
9 restrictive scope, a waiver that purported not
10 to apply to non-NAFTA claims, including claims
11 based upon domestic law.

12 As a result, the waiver was
13 defective from the day that it was submitted
14 because it did not satisfy the required "show
15 me" merit scope of the waiver. The Waste
16 Management One tribunal determined that the
17 waiver -- that a waiver containing the
18 additional language did not comply with the
19 treaty, pointing to the interpretation that the
20 investor itself gave to the additional language
21 as evidenced by its conduct, the fact that the
22 investor in that case filed three new legal

1 proceedings after tendering its claim.

2 In its award, the tribunal
3 repeatedly refers to the investor's post-waiver
4 conduct in assessing the investor's intention in
5 granting a qualified waiver.

6 The Waste Management tribunal
7 concluded that, in Section 30:

8 "Based on the foregoing, it's clear
9 that the claimant issued a statement of intent
10 different from that required in a waiver
11 pursuant to NAFTA Article 11.21. The waiver was
12 defective from the beginning, and also defective
13 for all claims."

14 So the -- the -- the point about
15 the Waste Management One sort of applying to the
16 situation here is -- doesn't -- is not
17 applicable because in the Waste Management case,
18 you had a defective waiver, a qualified waiver
19 that applied to all claims.

20 The issue here is to the extent
21 that there is a defect, the -- the -- the
22 noncompliance was -- is allegedly that there --

1 the -- the domestic proceedings with respect to
2 one measure were not -- were not withdrawn.

3 The waiver was defective in Waste
4 Management because -- from the beginning because
5 of the qualified language. And in the
6 claimants' submission, the tribunal rightly
7 found that there was no jurisdiction because the
8 waiver was defective when it was submitted.

9 The Waste Management One tribunal
10 does not stand for the proposition, in our view,
11 that a valid waiver, generally, is invalidated
12 by subsequent conduct. That's not the issue.
13 That's not the real issue that was in dispute in
14 Waste Management One.

15 With respect to the decision on
16 jurisdiction in RDC and Guatemala, to the extent
17 that the -- that RDC and Guatemala stands for
18 the principle that the mere existence of
19 concurrent proceedings on the date of submission
20 of a CAFTA claim makes a waiver defective, we
21 respectfully submit that the -- the decision in
22 RDC should not be followed.

1 Although the RDC tribunal found
2 that the defect in the investor's waiver was
3 triggered because the -- the two domestic
4 arbitration proceedings existed -- sorry --
5 existed and overlapped with the CAFTA
6 arbitration, with the greatest respect to the --
7 the tribunal in RDC, the tribunal does not
8 explain -- there is no reasoning on why an
9 overlap necessarily renders an otherwise valid
10 waiver defective, and why that conclusion is
11 mandated by the CAFTA text as interpreted by
12 rules of a treaty interpretation.

13 The approach of the tribunal in RDC
14 may be explained by the fact that RDC's argument
15 really focused on the question of whether there
16 was an overlap. Their -- their primary
17 submission was that there wasn't an overlap;
18 therefore, there was no issue. Of course, the
19 RDC tribunal then found that there was an
20 overlap, and then made the determination that,
21 because of the overlap, there was no
22 jurisdiction.

1 In the claimants' submission, it's
2 incorrect to analyze concurrent proceedings and
3 -- and overlap sort of as a question of defect
4 in the waiver. Where there's a written waiver,
5 it has definitive effect. The jurisdictional
6 requirement with respect to the CAFTA
7 arbitration is met. The question is then the
8 effect of the waiver in the other proceeding and
9 whether with respect to the arbitration -- and
10 then -- and then -- and then, I guess, the
11 subsequent question, which I'll be turning to in
12 a moment, is whether sort of bad faith
13 non-compliance with the waiver might render
14 claims inadmissible.

15 The RDC tribunal's focus on the
16 overlap of different proceedings as a
17 jurisdictional test under Article 10.18.2 is
18 unpersuasive. In a case where claimants begin
19 domestic proceedings after the initiation of a
20 CAFTA claim, there would be concurrent
21 proceedings; but in that case a CAFTA tribunal
22 would still presumably have jurisdiction.

1 Indeed, the CAFTA tribunal may have made an
2 affirmative -- may have made a decision on
3 jurisdiction.

4 In that case, we -- it's clear that
5 the -- the tribunal has jurisdiction based upon
6 the fundamental principle, the events after the
7 submission of arbitration are not relevant to
8 the determination of jurisdiction. Simply put,
9 the initiation of proceedings after the
10 submission to arbitration would not be a
11 jurisdictional issue.

12 And the claimant asked, if the
13 initiation of new proceedings is not a
14 jurisdictional issue, why is it that the
15 continuation of existing proceedings is a
16 jurisdictional issue?

17 Different jurisdictional treatment
18 is not justified, and is not justified clearly
19 on the basis -- there is no distinction in the
20 clear language of the treaty between the effect
21 of a waiver with respect to continuation versus
22 the effect of a waiver with respect to

1 initiation of new proceedings.

2 This goes back to the claimants'
3 fundamental point that the mere existence of the
4 fact that there were concurrent proceedings does
5 not deny a CAFTA tribunal of jurisdiction, and
6 that there is no positive obligation to -- to
7 discontinue prior to submitting a claim.

8 Finally, just in terms of my
9 submissions on this issue, I would like to refer
10 to the Vanessa Ventures in Venezuela case, a
11 case under the Canada Venezuela Investment
12 Treaty. That treaty, like CAFTA and NAFTA,
13 requires that the investors submit a waiver of
14 the right to initiate or continue other
15 proceedings.

16 Now, in Vanessa, the tribunal
17 dismissed Venezuela's objections to jurisdiction
18 based on non-compliance with the waiver,
19 notwithstanding the fact that at the time the
20 notice of arbitration was submitted, there were
21 at least ten ongoing domestic proceedings.

1 it is true that -- that Vanessa thereafter
2 discontinued those. But at the time of -- at
3 the time of the submission there were the
4 concurrent proceedings. Further, after the
5 submission of the notice of arbitration, there
6 was a final judgment in one of the cases, just
7 as in -- in -- in this case.

8 Further, Vanessa began a new
9 proceeding seeking extraordinary review of a
10 decision of the constitutional chamber. The
11 constitutional chamber then subsequently
12 dismissed Venezuela's petition for seeking
13 extraordinary review based upon the waiver, the
14 application of the waiver.

15 In Vanessa, therefore, the tribunal
16 rejected the objection to jurisdiction, even
17 though, one, Vanessa did not continue all
18 proceedings before submitting a claim; and, two,
19 that there was a final court judgment in --
20 rendered in one of the proceedings after the
21 submission of the notice of arbitration, similar

22 to this case.

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1 Further, the constitutional court
2 in that case, in Vanessa, dismissed the -- the
3 extraordinary review proceeding, based upon
4 Vanessa -- Vanessa's waiver. So, again, we have
5 a -- we have a domestic court that a state that
6 is a beneficiary of waiver that uses the waiver
7 to have a proceeding dismissed.

8 The respondent in its reply
9 correctly notes that the Vanessa -- in Vanessa
10 there claimants discontinued proceedings after
11 the submission of the notice of arbitration, and
12 that one of the disputes in that case was
13 whether the discontinuance had to be with or
14 without prejudice.

15 That aside, Vanessa Ventures is a
16 clear case where an investment treaty tribunal
17 found that the existence of concurrent
18 proceedings was not fatal to jurisdiction.
19 Further, Vanessa's waiver was not found to be
20 defective, even though it had initiated a new

21 proceeding. Rather, Venezuela was able to rely
22 on Vanessa's written waiver to have the

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1 constitutional chamber review proceeding
2 initiated by Vanessa dismissed.

3 I'll now turn to the -- the --
4 unless there are any questions regarding the
5 claimants' submissions on the issue of sort of
6 the discontinuance prior to submission of notice
7 of claim, I'll turn to the issue of -- of such a
8 post-waiver conduct.

9 Claimants' second submission is the
10 fact that -- the fact that the domestic
11 proceedings are continued after the submission
12 of the notice of arbitration is a question of
13 admissibility of claims, not jurisdiction.

14 Although the respondent accepts that
15 jurisdiction is determined as of the date of
16 filing, indeed the -- the -- the respondent
17 notes that -- I will highlight paragraph 86 of
18 its reply -- that, as of July 6, 2009, of
19 course, we -- we -- we disagree. We -- we say
20 that the date is July 2nd -- the parties' legal

21 rights and obligations relevant for the
22 tribunal's determination of its jurisdiction

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1 were frozen as a result of the filing.

2 So even though the respondent
3 accepts that jurisdiction is determined as of,
4 you know, in our view, the 2nd of July, 2009,
5 the respondent at times also seems to suggest in
6 particular parts of its -- of its reply that the
7 validity of -- of -- of the waiver also depends
8 upon post-waiver conduct.

9 Our submission is clear that the
10 claimant -- that, in accordance with the
11 established jurisdictional principles, the
12 claimants' post-waiver conduct is simply -- and
13 cannot be relevant to the question of
14 jurisdiction. Events that take -- take place
15 after the submission of a claim to arbitration
16 do not affect jurisdiction.

17 This, however, does not mean that a
18 claimant's post-waiver conduct is irrelevant,
19 and that a respondent's state and the tribunal

20 are powerless in the face of the existence of
21 concurrent proceedings.

22 First and foremost, the

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1 respondent's state is the beneficiary of the
2 investor's waiver, which has definitive effect
3 and which it can use to have domestic
4 proceedings dismissed.

5 And this afternoon I will return to
6 the point about the -- the -- the procedural
7 question under El Salvadorean law that was
8 discussed this morning about whether it was
9 actually possible for the -- for El Salvador to
10 have the -- the pleadings, the -- the domestic
11 proceedings dismissed.

12 In summary, the -- the -- the
13 opinion of the attorney general clearly states
14 that claimants can request to have proceedings
15 discontinued. And the claimants agree with
16 that. We -- we -- we do not object -- we do not
17 -- we agree that the -- that if -- the
18 claimants -- it was possible for the claimants
19 to have discontinued the proceedings, even

20 though the -- the issue was before the
21 deliberation of -- of the court.

22 However, the attorney general's

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1 opinion does not say anything about the other
2 question about whether the respondent state
3 under Article 40 could have also requested to
4 have the proceedings discontinued. That --
5 there is nothing in -- in -- in the attorney
6 general's opinion on that point -- point.

7 Our submission would be that it is
8 possible under El Salvadorean law for the
9 respondent state to have submitted the -- the --
10 the waivers.

11 And I guess, also, in the
12 alternative, if it was impossible, in this case
13 it would be clearly -- this is not a situation
14 where the -- El Salvador tried to submit the
15 waivers to the court. The court said:

16 "Well, actually we can't do that
17 procedurally."

18 And then the respondent said -- -

19 asked the claimant:

20 "Well, can you please discontinue?"

21 And then there was a refusal by the
22 claimant. That's not the situation.

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1 Turning to the main point, the
2 claimants submit that the tribunal has the power
3 to find that a CAFTA claim is inadmissible where
4 there are ongoing current proceedings. Once the
5 tribunal has jurisdiction, then we have the
6 existence of certain jurisdictional power.

7 The question of admissibility is
8 with respect to sort of the -- is the question
9 of, once the tribunal has jurisdiction, the
10 exercise of that power -- and it's highlighted
11 in the decision in SG Philippines:

12 "International Tribunals have a
13 certain flexibility in dealing with questions of
14 competing forums. ICSID tribunals have the
15 power to" -- "to stay a proceeding, or to find
16 that a particular claim is inadmissible until an
17 impediment to the claim has been remedied. A
18 tribunal's supervisory power to find claims

19 inadmissible provides a powerful disincentive
20 from claimants from pursuing concurrent
21 proceedings."

22 It's a control mechanism because

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1 claimants are going to be -- will be aware that,
2 if they engage in abusive conduct, in bad faith
3 conduct, by -- in -- in -- in -- in their --
4 their respondent's submission, you know, by --
5 by starting, you know, multiple proceedings in
6 multiple fora, that our submission is clearly
7 that that type of abusive conduct can be
8 controlled by a tribunal on the basis of the --
9 a -- a flagrant, sort of via bad faith
10 continuation of proceedings, can be sanctioned
11 by the tribunal by finding that those claims are
12 inadmissible.

13 MR. Van den BERG: May I ask a
14 question? On the language of Article 10.18,
15 paragraph 2, it is the period between the filing
16 of the notice of arbitration, accompanied by the
17 waiver and the date that the Supreme Court

18 renders its decision -- is that caught by the
19 words to continue before any administrative
20 tribunal as set forth in Article 10.18.2 under
21 B?

22 MR. NEWCOMBE: Mr. President, I am

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1 unable to answer that question at the -- I would
2 like to take time to consider it.

3 MR. Van den BERG: Do you
4 understand the question? I'm saying, the --
5 does the time between the filing of the -- the
6 request for arbitration, accompanied by the
7 waiver, which sets forth the language as
8 contained in Article 10.18.2, and the decision
9 by the Supreme Court, that period of time --

10 MR. NEWCOMBE: Our -- our
11 submission would be that the waiver covers that
12 period of time.

13 MR. Van den BERG: That -- that
14 period, that would be covered by those words to
15 continue before the administrative tribunal, or
16 any administrative matter to be correct.

17 MR. NEWCOMBE: In our submission,

18 yes, although I would like to reserve the
19 opportunity to provide a -- a fuller submission
20 on that point this afternoon.

21 MR. Van den BERG: Now, could you
22 then also apply then your mind to the following?

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1 That -- is it fair to assume that the claimants
2 knew that a decision would be forthcoming of the
3 Supreme Court?

4 MR. NEWCOMBE: The claimants --
5 from the claimants' position, the proceedings in
6 the -- El Salvador after the -- the last
7 claimant -- the claimants' last submission in
8 the domestic proceedings appears to have been
9 sometime in 2008. From the claimants'
10 submission -- position, the -- the proceedings
11 were then essentially a black -- a black hole,
12 in the sense that we -- there -- there was not
13 -- there was nothing happening in those -- in
14 those proceedings. The claimants --

15 MR. Van den BERG: Yeah, okay.
16 Right. Let's -- let's be more specific, please.

17 MR. NEWCOMBE: Yes.
18 MR. Van den BERG: On the 2nd of
19 July of 2009 --
20 MR. NEWCOMBE: Yes.
21 MR. Van den BERG: -- your clients
22 filed a notice of arbitration together with a

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1 written waiver.

2 MR. NEWCOMBE: Yes.

3 MR. Van den BERG: We just
4 established that -- unless you -- but subject to
5 what you would like to reflect further on and to
6 come back, that it appeared between the 2nd of
7 July 2009, and the decision of the Supreme Court
8 on the 29th of April, 2010, that period of time
9 is caught by the words:

10 "Continue before any administrative
11 tribunal."

12 MR. NEWCOMBE: Yes, Mr. --
13 Mr. President.

14 MR. Van den BERG: All right.

15 MR. NEWCOMBE: Yes.

16 MR. Van den BERG: On the -- is

17 then my -- my follow-up question is, is it fair
18 to assume factually that on the 2nd of July of
19 2009, the date of the filing of the notice of
20 arbitration, your clients knew that at some
21 point in time after the 2nd of July of 2009, the
22 Supreme Court would render the decision?

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1 MR. NEWCOMBE: The claimants were
2 aware that the -- as stated in the notice of
3 arbitration, that those proceedings were
4 continuing, and, yes, at some point that there
5 would -- that the matter was -- at -- at that
6 point, upon submission, the claimants were not
7 aware that it was currently in deliberation be
8 -- before the Supreme Court.

9 MR. Van den BERG: Sorry.

10 MR. NEWCOMBE: Yes.

11 MR. Van den BERG: Your clients
12 were not aware, on the 2nd of July, 2009, is
13 that your submission, that it would be that the
14 Supreme Court was in the phase of deliberating
15 its decision?

16 MR. NEWCOMBE: That's -- that's --
17 that's correct.

18 MR. Van den BERG: Was there not a
19 subsequent notice that they were in the phase of
20 deliberations?

21 MR. NEWCOMBE: Not that we are
22 aware of. There is no evidence to that -- to

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1 that effect.

2 There was --

3 MR. Van den BERG: Well, were your
4 clients totally ignorant of those proceedings
5 before the Supreme Court?

6 MR. NEWCOMBE: There were -- there
7 were issues of miscommunication with -- with
8 local counsel. There was not a free flow of
9 information -- of -- of -- of information. The
10 -- in early 2009, the claimants were not, you
11 know, at the time of submitting the notice of
12 arbitration, knew that the proceedings were
13 continuing, but did not know exactly at what
14 state of -- those -- those proceedings were at.

15 MR. Van den BERG: And when did

16 they become aware of what the status was of
17 those proceedings to the extent that you -- you
18 -- you know this?

19 MR. NEWCOMBE: The claimants became
20 aware -- well, became aware of the fact that a
21 judgment had been rendered in -- in July 2010.

22 MR. Van den BERG: Very well. The

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1 date of the Supreme Court judgment is which
2 date?

3 MR. NEWCOMBE: Is -- the 29th of
4 April is the date of the notification of 2010.
5 That -- and that information was not
6 communicated to -- to -- to claimants in the
7 United States. There was not --

8 MR. Van den BERG: We are talking
9 about two judgments?

10 MR. NEWCOMBE: The -- yes, the two
11 judgments.

12 MR. Van den BERG: Okay. Thank
13 you.

14 MR. THOMAS: I just want to make

15 sure I understand.

16 You used the term "black hole"
17 before. As I understood the record, the
18 respective disputing parties in court
19 proceedings may file their pleadings and
20 whatever evidence in accordance with the civil
21 procedure of the respondent, and at a certain
22 point that pleading phase was completed.

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1 And, I mean, when you say -- when
2 you use the term "black hole," which is
3 rhetorical --

4 MR. NEWCOMBE: Yes, yes.

5 MR. THOMAS: -- not descriptive, I
6 am trying to understand whether you mean
7 something different than what one would
8 ordinarily expect following legal argument to a
9 court --

10 MR. NEWCOMBE: Yes.

11 MR. THOMAS: -- which is that the
12 court would be deliberating, and that period of
13 time during the -- it takes to deliberate can be
14 very short, or in some cases can be very long.

15 It's not a comment about any particular legal
16 system. It's a generally known fact.

17 Do you mean something different
18 than that, that anything other than the court
19 was deliberating?

20 MR. NEWCOMBE: No, I -- I -- I
21 retract the comment that it was a -- a black
22 hole. I mean, the point was that the -- the --

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1 the -- nothing more than the fact that the --
2 from the claimants' perspective, they did not
3 know when those proceedings would be resolved,
4 and that -- and that the -- yes, I say the
5 pleading part of the proceedings was -- was --
6 was finished.

7 MR. Van den BERG: But simply to
8 confirm, you just stated also that they were
9 aware that the proceedings were continuing
10 before the Supreme Court.

11 MR. NEWCOMBE: Well, they were --
12 they were -- the question is, as -- as of
13 July 2, 2009, when the notice of arbitration was

14 submitted, the claimants were aware that the
15 proceedings were continuing. They were not
16 aware that the attorney general had just, in
17 June, done their final submissions. That --
18 that sort of -- that is the -- the position that
19 is put forward by the respondent -- that the
20 final sort of step in the litigation sort of
21 completed in June of 2009, that was unknown to
22 the -- to the claimants.

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1 There is no -- there is no
2 correlation between the June 2009 date of the
3 completion of the proceedings in El Salvador and
4 the filing date on July 2, 2009. The filing
5 date on July 2, 2009 was because of the
6 three-year time limitation issues.

7 And -- and so although the dates
8 when you put them up against each other might
9 suggest that there was a reaction based upon --
10 the claimants were acting because of the -- the
11 completion of the proceedings, that's -- that's
12 actually not -- not the case, and the claimants
13 did not know -- knew that the claims were -- the

14 proceedings were continuing, but did not know
15 that -- with respect -- with respect to the
16 attorney general's final submission in June of
17 2009.

18 MR. Van den BERG: Much earlier
19 than the Q and A --

20 MR. NEWCOMBE: Yes.

21 MR. Van den BERG: -- may I ask you
22 a question which is just a previous point, it

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1 has -- not -- not about what you are at this
2 point in time, which is about the
3 post-submission waiver conduct, if I may follow
4 up --

5 MR. NEWCOMBE: Yes.

6 MR. Van den BERG: -- you were
7 discussing Waste Management One --

8 MR. NEWCOMBE: Yes.

9 MR. Van den BERG: -- and if I
10 understand your -- the submission on your side
11 correctly, you say in -- let's see, it is your
12 response of paragraph 43. Perhaps you -- you

13 would like to take it in front of you -- you
14 rely on the dissenting opinion of Mr. Hyatt.

15 MR. THOMAS: Hyatt.

16 MR. Van den BERG: Hyatt. Sorry.
17 Do you see that?

18 MR. NEWCOMBE: Yes.

19 MR. Van den BERG: May I invite to
20 take Waste Management Two? And there's also a
21 question I have for the respondent.

22 So look at this. So you say you

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1 rely on this dissenting opinion. Then you go to
2 Waste Management Two, and please go first to
3 paragraph 19 of Waste Management Two. Do you
4 have it there in front of you?

5 MR. NEWCOMBE: Yes.

6 MR. Van den BERG: Very well. And
7 there they discuss what happens in the first
8 arbitration.

9 And then you see the last sentence
10 of this paragraph, it says:

11 "The respondent" -- that is in this
12 -- in this case Mexico -- "however stresses Mr.

13 Hyatt's" --

14 MR. NEWCOMBE: Hyatt's.

15 MR. Van den BERG: -- Hyatt's

16 statement that I quote:

17 "Entire" -- "the entire NAFTA claim
18 has been undone." Unquote.

19 "In its view this indicated" more
20 -- "much more than a procedural error
21 immediately for approval by new proceedings."

22 Do you see that statement?

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1 MR. NEWCOMBE: Yes.

2 MR. Van den BERG: So that's you
3 rely on the statement of -- of -- of Mr. Hyatt.

4 They go on in paragraph 20, 21,
5 discussing this, 22, and then they comment at
6 paragraph 23, and that's where my question is
7 directed at.

8 It says, and I quote now from Waste
9 Management Two:

10 "In the present tribunal's view,
11 the dissenting arbitrator's characterization of

12 the effect of the decision cannot be decided,
13 even if that characterization was clear and
14 unambiguous, (which it is not)" closed brackets.

15 "Only the majority of the tribunal
16 could determine the effects of its decision,
17 and, as noted, there is no indication on the
18 face of the award that the majority expressed
19 any view on the matter." End of the quote.

20 My question to you is, and then
21 probably also for the -- for the respondent, is,
22 what value, if any, has this tribunal to attach

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1 to the dissenting opinions, especially the
2 dissenting opinion of Mr. Hyatt, on which you
3 rely in paragraph 43 of your response, in light
4 of paragraph 23, or in Waste Management Two?
5 Perhaps you would like to reflect on this.

6 MR. NEWCOMBE: Yes, thank you.

7 (Brief pause.)

8 MR. Van den BERG: You are online
9 now. I got a note.

10 MR. NEWCOMBE: Although the
11 claimants affirm that this tribunal has the

12 power to find that claims are inadmissible
13 because of the continued existence of concurrent
14 proceedings, we submit there is no impediment to
15 the admissibility of this -- in this case,
16 because domestic proceedings ended before this
17 tribunal was constituted.

18 In this case, there were no
19 concurrent proceedings. Under arbitration rule
20 six, the tribunal was constituted; and the
21 proceedings in this arbitration are deemed to
22 have begun on July 1, 2010, well over three

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1 months after the date of the second Supreme
2 Court judgment on 18th March, 2010.

3 MR. THOMAS: May I just understand
4 -- may I just understand what that means?

5 Is it your argument that, because
6 the domestic proceedings were completed, that
7 the tribunal has jurisdiction over all claims,
8 including the claims relating to the revocation
9 of the environmental permits?

10 MR. NEWCOMBE: Yes. We -- we -- we

11 -- we -- we submit that there is jurisdiction
12 with respect to all claims because of the way --
13 yes.

14 MR. THOMAS: And you would say that
15 to the extent that the tribunal -- you would say
16 that the question then becomes one of
17 admissibility because of the fact that the
18 domestic proceedings were not discontinued.

19 MR. NEWCOMBE: Discontinued.

20 MR. THOMAS: And do you -- do you
21 say that those claims are admissible?

22 MR. NEWCOMBE: Yes, in our

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1 submission the -- the -- the claims are
2 admissible, because there is currently -- there
3 is currently no impediment to the tribunal
4 considering those -- those claims.

5 And may I -- I will turn to my --
6 my -- my submissions.

7 The third submission is that the
8 claimants have acted consistently with the
9 waivers since July 2, 2009. Respondents charge
10 that the claimants have engaged in manifest

11 violation of an explicit precondition up to
12 initiating CAFTA arbitration and have acted in
13 bad faith and that their conduct is an affront
14 to the international arbitration process. These
15 allegations are frivolous and not worthy of
16 serious attention.

17 What is the evidence of claimants'
18 bad faith? In its reply at paragraphs 128 to
19 132, the respondent points to a delay in
20 constituting this tribunal, some factual errors
21 in the notice of arbitration, and, of course,
22 the failure to get -- discontinue the domestic

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1 proceedings.

2 The revocation of the environmental
3 permits in the respondent's other measures have
4 destroyed the claimants' business in El Salvador
5 and prevent the claimants from benefiting from
6 their investments.

7 The claimants worked hard to
8 address the legal and logistical and financial
9 challenges resulting from the measures. The

10 claimants prepared their waivers with careful
11 attention to CAFTA requirements, and did exactly
12 what CAFTA Article 10.18.2 says that they should
13 do.

14 Claimants did not commence any new
15 litigation and took no action in the domestic
16 proceedings. Shortly after the submission of
17 their notice of arbitration, the Attorney
18 General of El Salvador sent a letter to the
19 Secretary General of ICSID, and in the attorney
20 general's letter of 14th August, 2008, the
21 attorney general asked the -- the secretary
22 general to find that there was -- the claims

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1 were manifestly outside the jurisdiction,
2 because the claimants' waivers were defective.

3 The attorney general's letter then
4 states that, even if the claimants were to
5 withdraw the legal proceedings still pending in
6 El Salvador, claimants' failure to honor their
7 waivers before submitting their request for
8 arbitration to ICSID cannot be remedied once the
9 request has been filed.

10 The letter made it clear that the
11 attorney general's position was that the waivers
12 were defective, the defects could not be
13 remedied, and that formally discontinuing the
14 domestic proceedings would have no effect on
15 ICSID jurisdiction.

16 The fact that the claimants took no
17 action to formally discontinue the domestic
18 proceedings is entirely consistent with the
19 attorney general's position that any such action
20 would be pointless. Further, it must be noted
21 that the Republic of El Salvador never at any
22 point requested that the claimant take the

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1 formal step to discontinue the domestic
2 proceedings. Rather, El Salvador's position was
3 that the CAFTA arbitration should be
4 discontinued.

5 The respondent refers in its reply
6 to the attorney general's communication of
7 August 1, 2009, to the Court regarding the
8 status of the proceedings.

9 Despite having complained of the
10 concurrent proceedings four days earlier in the
11 letter to ICSID, it does not appear that the
12 attorney general brought the waivers to the
13 attention of the court in August of 2009 or
14 thereafter, including when the attorney general
15 received the court notification on October 1,
16 2009.

17 El Salvador suggests that the
18 claimants should have responded to this
19 notification from the court, but the
20 notification is clearly addressed to the
21 attorney general. And it's in any event sort of
22 unclear why local counsel, given that it was a

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1 noticed to the attorney general, why local --
2 there was no reason for local counsel to respond
3 to that notice from the court.

4 Respondent also refers to a letter
5 from El Salvador's lawyer, Attorney Pedro Valle,
6 in December of 2009 to MARN, to suggest the
7 claimants were awaiting the domestic
8 proceedings. The letter in -- the letter, in

9 fact, suggests quite the opposite.

10 Attorney General Pedro Valle
11 explains that, due to the domestic proceedings
12 challenging the revocation of the environmental
13 permits, that Commerce had not complied with
14 various requirements established in the
15 resolution for the closure of the San Cristobal
16 plant.

17 He then says that the company was
18 closing the facility. In paragraph four he says
19 that:

20 "Compliance with the measures
21 established by the Ministry in its reference --
22 in reference to its resolution dated July 5,

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1 2006, will begin."

2 Commerce thus was complying with
3 the very same resolutions that were the subject
4 of the domestic proceedings. Contrary to the
5 respondent's view of the claimants waiting for a
6 favorable result overturning the resolutions, in
7 December of 2009, the claimants were actually in

8 -- complying with the requirements for the
9 closure of the facilities required with MARN
10 resolutions.

11 This demonstrates that the
12 claimants were, in fact, complying with the
13 challenged act, conduct completely at odds with
14 the respondent's allegations that the claimants
15 were awaiting a favorable result in the domestic
16 litigation.

17 This -- this allegation is
18 completely fanciful. Having delivered the
19 waivers in good faith, there was no need to take
20 the formal step of discontinuing the
21 proceedings, a step that the attorney general
22 had in any event informed them was pointless.

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1 Finally, let us note that
2 respondent has suffered no prejudice by the
3 conclusion of the domestic proceedings in its
4 favor. Indeed, the respondent relies upon the
5 court decisions to suggest that the revocation
6 of the environmental permits were justified and
7 legal under El Salvadorean law.

7 expectation or right to the benefit from the
8 domestic proceedings.

9 Mr. President, I am aware of the
10 time. Perhaps the -- could I -- according to my
11 watch, I have three, four more minutes.

12 You know, I am -- I was asking for
13 clarification on the amount of time.

14 MR. Van den BERG: You are right on
15 your watch, and there is also another right; but
16 there is a human right to food.

17 MR. NEWCOMBE: Yes.

18 MR. Van den BERG: And -- and let's
19 see how you can deal with this. Do you still
20 have -- you're at your slide 52? And you're --
21 still to slide 59.

22 MR. NEWCOMBE: Mr. President, what

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1 -- what I would propose doing would be to -- to
2 make the submission on -- on point four, with
3 respect to the preliminary objection cannot
4 result in the dismissal of the CAFTA's --
5 claimants' CAFTA claims, the -- sort of the RDC
6 overlap issue, which should take about five

7 minutes, and then my -- my -- my submissions
8 with respect to San Sebastian and their foreign
9 investment law can really be wrapped into the
10 claimants' response this afternoon, and -- and
11 we can be responsive to the -- to the
12 respondent's arguments this morning on -- on
13 those further submissions.

14 MR. Van den BERG: Fine from the
15 respondents?

16 MR. SMITH: Yes.

17 MR. Van den BERG: Please proceed.
18 But really stop at a quarter to 2. You may do
19 that.

20 MR. NEWCOMBE: Thank you very much,
21 Mr. President.

22 My fourth submission addresses the

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1 point that the respondent's preliminary
2 objection cannot result in the dismissal of all
3 of the CAFTA -- claimants' CAFTA claims. The
4 question for the tribunal to decide -- decide is
5 this:

6 If the tribunal were to find that
7 the failure to discontinue the domestic
8 proceedings creates a jurisdictional impediment,
9 does this affect El Salvador's consent to the
10 entire CAFTA arbitration?

11 Or is its consent -- or is its
12 consent to arbitrate claims relating to sort of
13 -- does it affect El Salvador's consent to the
14 entire CAFTA arbitration, or -- or only its
15 consent to arbitrate claims relating to the
16 revocation of the environmental permits?

17 Claimants submit that any
18 jurisdictional defect that the tribunal finds
19 applies only to the claims with respect to the
20 respondent's revocation of the environmental
21 permits. The claimants submit that the general
22 approach in the tribunal in RDC and Guatemala

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1 should be followed on this issue, and any defect
2 and consent only applies to the extent of the
3 overlap at -- at -- of the measures at issue in
4 the CAFTA, and the other proceedings.

5 As stated by the RDC tribunal, the

6 word "claim" in Article 10.18 means the specific
7 claim and not the whole arbitration in which the
8 claim is maintained. The interpretive issue is
9 whether the word "claim" in Article 10.18.2, "no
10 claim may be submitted to arbitration," means
11 the entire arbitration proceeding or whether a
12 claim submitted to arbitration may contain
13 multiple claims, such that each claim is to be
14 considered separately as a claim subject to the
15 provisions of Article 10.18.2.

16 In RDC the tribunal noted that
17 Article 10.18.1 time-bars claims older than
18 three years from the date on which the claimant
19 first acquired knowledge of the alleged breach.
20 Here the word "claim" must mean each individual
21 claim submitted to arbitration, because the time
22 limit runs from the date of each individual

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1 measure that is alleged to breach CAFTA. The
2 RDC tribunal rightly notes that there is no good
3 reason why the same word in 10.18.2 would have a
4 different meaning.

5 As the RDC tribunal also notes, the
6 reference to claim in 10.18.4 is to a specific
7 type of claim. And, further, Article 10.16.2
8 clearly indicates that a claim to arbitration
9 can include a number of different claims for
10 breaches of various provisions of CAFTA.

11 Article 16.2B and C require
12 information for each claim. Respondent's
13 interpretation of "No claim may be submitted to
14 arbitration," and Article 10.18.2 is excessively
15 restrictive.

16 Consent to arbitration is not a
17 binary choice between consent to all claims, and
18 consent to no claims. Each claim must be
19 assessed on its merits with respect to the --
20 with -- with respect to various jurisdictional
21 requirements imposed by the treaty, whether they
22 be temporal requirements, subject matter

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1 requirements, or with respect to the submission
2 of a waiver.

3 Claimants make claims of breach of
4 CAFTA and the foreign investment law based on a

5 number of measures other than -- other than the
6 revocation of the environmental permits,
7 including respondent's conduct with respect to
8 the extension of the exploration -- exploration
9 licenses, the de facto moratorium, and other
10 measures.

11 The respondent self-acknowledges
12 that the resolutions revoking environmental
13 measures do not constitute all the claims in
14 this arbitration. Dismissing an entire
15 arbitration and all claims based on a partial
16 overlap is not inconsistent -- is not consistent
17 with the objective of CAFTA to introduce
18 effective procedures of dispute settlement, and,
19 as rightly noted by the tribunal in RDC, this is
20 a rather ineffective and procedurally
21 inefficient result.

22 The de facto moratorium is a

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1 continuing measure. El Salvador is not issuing
2 any regulatory approvals for metallic mining.
3 So notwithstanding the fact of the -- the

4 question of the revocation of the environmental
5 permits, there is an ongoing de facto moratorium
6 on mining.

7 Dismissal of the entire
8 arbitration, specifically all the claims based
9 upon the waiver issue, would simply result in
10 the claimants resubmitting the CAFTA claims
11 based upon the de facto moratorium and other
12 measure, a procedurally inefficient result, and
13 not one dictated by the clear text of NAFTA as
14 affirmed by the tribunal in RDC and Guatemala,
15 which correctly decided this issue.

16 With that I will complete my
17 submissions and -- and continue in the
18 afternoon.

19 MR. Van den BERG: But you are
20 doing that during the time of the rebuttal?

21 MR. NEWCOMBE: Yes. I -- our --
22 the -- within the one hour.

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1 MR. Van den BERG: Yeah, fine.

2 MR. NEWCOMBE: I understand that we
3 will have the -- the one hour.

4 MR. Van den BERG: I would like to
5 make -- make one thing clear. If there is
6 something which has not yet been raised and to
7 which the respondents would like to reply, then
8 I would just leave it to reply on -- on the side
9 of the respondents. Otherwise, you get an
10 uneven -- unbalanced proceeding, yes.

11 MR. SMITH: Yes.

12 MR. Van den BERG: Okay. Then we
13 will now adjourn for lunch until quarter past 3.

14 I understand that the recording has
15 been made of this morning's session, and the
16 taped DVD, okay.

17 MR. MONTANES-RUMAYOR: It will be
18 working shortly. We're working with that.

19 MR. Van den BERG: Okay. For those
20 who are now viewing us, the morning session can
21 be viewed during the intermission. On the web
22 site, it will be posted shortly. What do you

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1 mean by word "shortly"?

2 MR. MONTANES-RUMAYOR: Today, in

3 the next two or three hours.

4 MR. Van den BERG: Next -- as soon
5 as possible. Let's put it that way. Okay.

6 Recess until 3:15.

7 (There was a lunch break.)

8 MR. Van den BERG: All right. Then
9 we resume the hearing. And it's now time for
10 rebuttal for the respondents.

11 Mr. Smith, please proceed.

12 REBUTTAL ARGUMENT BY THE RESPONDENTS

13 BY MR. SMITH:

14 MR. SMITH: Thank you very much,
15 Mr. President, members of the tribunal.

16 I would like to begin this
17 afternoon by -- I would like to begin this
18 afternoon by responding to the specific
19 questions that the tribunal has posed this
20 morning.

21 The first question I would like to
22 respond to is with regard to Costa Rica's

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1 reference to the principle of "effet utile" in
2 their non-party -- their non-disputing party

3 submission as regards the waiver requirement and
4 CAFTA Article 10.18.2.

5 In their affirmative submission
6 this morning, claimants indicated that they
7 agree that the principle of "effet utile" is
8 applicable to CAFTA and to the waiver of
9 requirement, and El Salvador also agrees that
10 this is a fundamental principle of treaty
11 interpretation, and it would apply to the
12 interpretation of CAFTA.

13 As regards the decision in *Mobile*
14 *v. Venezuela*, my understanding of that decision
15 is that the tribunal came to the conclusion
16 that, while this principle applies to treaty
17 interpretation, it does not apply to the
18 interpretation of the unilateral acts of states.
19 For instance, it would apply to the
20 interpretation of CAFTA. It would apply to the
21 interpretation of the ICSID Convention, but it
22 would not, for example, apply to the

1 interpretation of the investment law of

2 El Salvador, which under international law is
3 considered a unilateral act.

4 In fact, the decision regarding
5 "effet utile" at paragraph 23 of the *Mobile v.*
6 *Venezuela* decision was a discussion of
7 Venezuela's investment law as a unilateral act,
8 and the decision of the tribunal was that
9 because that investment law is a unilateral act,
10 it is not to be interpreted under the principle
11 of "effet utile."

12 If we apply the principle to the
13 waiver requirement and -- well, let's just say
14 this:

15 As -- if applying the principle to
16 the waiver requirement is proper as Costa Rica
17 did, it also leads to the conclusion that, in
18 this case, the waiver must be understood to
19 include the obligation to comply with the terms
20 of the waiver. Otherwise, there would have been
21 no way to terminate the proceeding in
22 El Salvador.

1 The waiver requirement would be

2 deprived of all effectiveness if the claimants
3 had no obligation to withdraw their proceedings
4 to discontinue, their proceedings in
5 El Salvador, because there would have been no
6 way for the waiver requirement to be complied
7 with.

8 The state would not be able to make
9 it -- would not be able to cause compliance, and
10 the claimants, if they did not cause compliance,
11 obviously -- if the claimants had no obligation
12 to comply, then the waiver itself would be
13 completely without any effect.

14 The next question posed by the
15 tribunal was with regard to the discontinuance
16 of proceedings before the Supreme Court of
17 El Salvador under Article 40 of the
18 administrative -- administrative jurisdiction
19 law.

20 In the short time that we have had
21 over the lunch break to look at this issue, it
22 has not been possible for me to come to a

1 conclusion as to whether that withdrawal would
2 be with or without prejudice, both looking at
3 Article 40 itself and also the Salvadorean civil
4 code. And I would not like to put forward an
5 opinion on the complicated matter of Salvadorean
6 procedural law without being certain of the
7 conclusion.

8 And I would ask the tribunal to
9 give us the opportunity to consult with local
10 counsel and do some research and provide perhaps
11 in writing in a time period established by the
12 tribunal an answer to the question of whether
13 that termination of the proceeding would be with
14 or without prejudice.

15 MR. Van den BERG: You would like
16 an answer from the tribunal now?

17 MR. SMITH: No, no. I'm just
18 saying that that is our position. The tribunal
19 does not have to give us an answer now.

20 MR. Van den BERG: While we are at
21 it, how many days do you need for that?

22 MR. SMITH: I would -- I would

1 think a minimum of seven days. I would like to
2 have 14, if possible.

3 MR. Van den BERG: You are mindful
4 that we are on expedited proceeding.

5 MR. SMITH: Okay. Seven is fine.

6 MR. Van den BERG: Seven real days,
7 okay.

8 MR. SMITH: Okay. Seven real days,
9 yes.

10 MR. Van den BERG: Okay. Thank
11 you.

12 MR. SMITH: The next question posed
13 by the tribunal was the question of whether the
14 statements of the CAFTA state parties would be
15 considered subsequent practice in accordance
16 with the Vienna Convention on the law of
17 treaties, Article 31:3(b). That article
18 indicates that there shall be taken into account
19 in interpreting a treaty together with the
20 context any subsequent practice in the
21 application of the treaty which establishes the
22 agreement of the parties regarding its

1 interpretation.

2 Without a doubt, the statements of
3 the CAFTA parties, both in the context of
4 arbitration hearings where they are acting as
5 respondent and putting forward legal briefs
6 which state their legal positions, as well as in
7 submitting non-disputing party submissions in
8 CAFTA proceedings, are subsequent practice to
9 the treaty.

10 We do not have subsequent practice
11 of all seven CAFTA members; so it is not
12 possible to reach the conclusion that there is
13 an agreement among all of the CAFTA members. I
14 think it is, however, possible to say that the
15 acts of these states are subsequent practice and
16 signify the agreement of those states who have
17 engaged in that practice.

18 MR. Van den BERG: Would you, then,
19 say that these positions taken by the states
20 is -- the number of them is not all seven as you
21 indicated -- Honduras, for example, has not
22 taken a position -- why not be in a position to

1 take a position. To be more accurate in that
2 respect -- is equivalent to, for example, the
3 interpretive note of 2001 of the NAFTA parties?
4 In other words, I don't know if you are familiar
5 with that note.

6 MR. SMITH: I --

7 MR. Van den BERG: Don't worry if
8 you're not. Then you have to ask somebody else
9 what the note means, whether they took the NAFTA
10 parties -- said -- together, then said, "Look,
11 we want, for example, the minimum requirements
12 to be interpreted in this way."

13 MR. SMITH: It is not equivalent to
14 the interpretive note because the interpretive
15 note is a statement by all of the parties which
16 would, in fact, I think be a subsequent
17 agreement between the parties regarding the
18 interpretation of the treaty under the Vienna
19 Convention Article 31:3(a).

20 MR. Van den BERG: Thank you.

21 MR. SMITH: It is, in this regard,
22 notable in this context that the claimant here,

1 who is only a third-party beneficiary of the
2 treaty signed by its state of nationality, is
3 actually asserting an interpretation of the
4 treaty that contradicts the interpretation of
5 its state of nationality.

6 I think that that is an important
7 thing for -- an important point for the tribunal
8 to keep in mind as a investor under a treaty
9 such as CAFTA, is not a party to the treaty --
10 is a third-party beneficiary to that treaty and
11 is acting in a way in putting forward an
12 interpretation that actually contradicts the
13 interpretation of the state of which it is a
14 national.

15 The next question posed by the
16 tribunal is whether the Government of
17 El Salvador may oppose discontinuance of a case
18 before the Supreme Court and a case under the
19 administrative procedure law of El Salvador.
20 And it is clear to us that the government cannot
21 prevent discontinuance. Article 40 of that law
22 makes clear that the claimant may terminate the

1 proceedings without the consent of the
2 government, and the government cannot prevent
3 termination.

4 The next question as regards --
5 although it was posed to the claimants, it also
6 was directed to us -- regards the value or the
7 extent to which dissenting opinions can or
8 should be followed by arbitration tribunals.

9 The first point is that it's very
10 clear that only the award in an arbitration has
11 legal effect. A dissenting opinion has no legal
12 effect. El Salvador agrees with the statement
13 of the Waste Management Two tribunal that only
14 the majority of the tribunal speaking as the
15 tribunal could determine the effect of its
16 decision.

17 El Salvador also believes that
18 dissenting opinions are clearly less persuasive
19 than the awards of arbitration tribunals, in
20 part because they are almost always issued by
21 party-appointed arbitrators as in the case of
22 the dissenting opinion of Keith Hyatt in Waste

1 Management One.

2 Obviously, dissenting opinions are
3 very often written by very learned legal
4 scholars and to the extent that they are in and
5 of themselves persuasive as legal scholarship,
6 they certainly do not need to be ignored. But
7 as legal authority, they do not have any binding
8 legal effect.

9 Finally, the tribunal raised a
10 question with regard to whether the waiver in
11 CAFTA Article 10.18.2, applies to the -- to any
12 proceeding on the investment law of El Salvador
13 and particularly whether that waiver would apply
14 to proceedings on the investment law before this
15 tribunal.

16 El Salvador maintains that, in
17 fact, the waiver applies to all proceedings,
18 other than CAFTA proceedings before this
19 tribunal, including investment law proceedings
20 whether they be brought before this tribunal or
21 before any other tribunal.

22 If we could bring 10.18.2 up on the

1 screen. Can we --

2 (There was a discussion off the
3 record.)

4 MR. SMITH: Okay.

5 (There was a discussion off the
6 record.)

7 MR. SMITH: The waiver is of any
8 right to initiate or continue before any
9 administrative tribunal or court under the law
10 of any party or other dispute settlement
11 procedures any proceeding with respect to any
12 measure.

13 It is the view of El Salvador that
14 the adjudication of claims under the investment
15 law is a proceeding within the meaning of any
16 proceeding, and it would be -- it is a
17 proceeding even when those claims are
18 adjudicated before the same tribunal as the
19 CAFTA claims.

20 The fact that there is a single
21 tribunal doesn't make the CAFTA proceeding and
22 the investment law proceeding the same

1 proceeding. The reference to other dispute
2 settlement procedures is not a reference to
3 dispute settlement procedures other than this
4 tribunal. El Salvador is not arguing that this
5 tribunal is somehow a dispute -- a dispute
6 proceeding other than itself. Other dispute
7 procedures as to distinguish it from local
8 proceedings, that could essentially be read
9 international arbitration.

10 So it is clearly El Salvador's
11 position that the waiver would apply to
12 investment law proceedings even before this
13 tribunal.

14 Of course, this issue, in the
15 understanding of El Salvador, is not currently
16 before the tribunal for decision. El Salvador
17 certainly reserves its right to raise it in a
18 jurisdictional objection at a later time, but
19 doesn't consider that that issue has been placed
20 before the tribunal at this time for decision.

21 I also want to mention the decision

22 in the Pac Rim v. El Salvador case mentioned by

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1 claimant this morning. No doubt that decision
2 was issued, but it was a decision under the
3 expedited proceedings under CAFTA 10.20.5, which
4 was without prejudice for El Salvador to raise
5 the issue again in jurisdictional objections at
6 a later time.

7 In fact, El Salvador has raised the
8 issue again. So in El Salvador's view, that
9 decision is not a final decision. It's a
10 decision still subject to further review by the
11 tribunal that issued it, and it will not become
12 final until that further review has been
13 completed.

14 I believe with that, I have
15 answered all of the tribunal's questions. If I
16 have left anything unanswered, please let me
17 know.

18 MR. Van den BERG: We have one
19 further question for you, for the respondents.
20 Obviously, also the claimants may wish to
21 comment on this. And it is this:

1 respondent to state that claimant should have
2 acted beyond the text of Article 10.18.2? And
3 this means -- what the text says is that, put
4 colloquially, a piece of paper has to be added
5 to the notes of arbitration. And it says, "We
6 waive any right to initiate or continue," et
7 cetera.

8 MR. SMITH: Okay. Yes.

9 MR. Van den BERG: You take it one
10 step further and the respondent says, "And you
11 should have, therefore, actively discontinued
12 proceedings in El Salvador before the Supreme
13 Court."

14 So what is the legal basis? What I
15 heard this morning from you was two bases -- and
16 we heard this morning you say "implied
17 obligation," and then we read your submissions
18 that was in reference to good faith.

19 Could you enlighten us more about
20 the legal basis for you taking that position?

21 MR. SMITH: Yes.

22 (There was a discussion off the

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1 record.)

2 MR. SMITH: The text -- again, I --
3 going back to the interpretation of treaties --
4 because here we are interpreting a treaty and
5 Article 31 of the Vienna Convention on the Law
6 of Treaties -- does state that a treaty must be
7 interpreted in good faith in accordance with the
8 ordinary meaning, to be given the terms of the
9 treaty in their context and in the light of
10 their object and purpose.

11 The text says, "No claim may be
12 submitted to arbitration under this section
13 unless claimants submit a written waiver."

14 Now -- so there's the term
15 "waiver," and there is a meaning under law and
16 an understood meaning of the term "waiver," and
17 El Salvador would submit that the term "waiver"
18 includes two aspects. One is a formal
19 submission of the waiver, and the second is the
20 material compliance, the material aspect of the

21 waiver which is to act in conformity with the
22 waiver.

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1 And the good faith requirement
2 comes in that, when a party makes an
3 irrevocable, final decision, that is, they put
4 forward a waiver that binds them in law that
5 they have the obligation to comply with that
6 waiver, and that obligation is part of the
7 meaning of the word "waiver."

8 "Implicit" may be the right word,
9 but when states use the term "waiver," states
10 mean -- mean formally waive and materially
11 waive, which means acting in compliance with the
12 waiver. This is precisely the interpretation
13 that the Waste Management One tribunal gave to
14 NAFTA, and it is the interpretation that all but
15 one of the states' parties have also given to
16 this text.

17 MR. Van den BERG: The text itself
18 says the written waiver, and that's -- at least,
19 textually, would refer to a document. And if I

20 listen to the claimants, they say:

21 "Well, that is what we have done.

22 We have submitted that document. It's a written

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1 waiver, and we have actually repeated the text
2 here."

3 And what Waste Management One,
4 apparently, does is go beyond that. And now you
5 are going to distinguish between a formal
6 requirement, which is the written document, and
7 then take it one step further; and there is also
8 a material requirement. And do you, in means of
9 interpretation -- and which view of
10 interpretation do you use?

11 MR. SMITH: It is El Salvador's
12 position that the use of the term "waiver"
13 includes the material aspect of a waiver, that
14 is, it is included in the meaning of the term.
15 It is in the plain meaning of the text within
16 the use of the word "waiver."

17 MR. Van den BERG: But if you use
18 the expression "written waiver," then you
19 disconnect the word "written" from "waiver."

20 MR. SMITH: No, well, written --

21 MR. Van Den BERG: That would be
22 parsing the language here too much.

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1 MR. SMITH: Let me address that.

2 "Written waiver" as opposed to "oral waiver."

3 That is, if the waiver, in order to be valid,

4 must be in writing, it's a requirement to put it

5 in writing. It is not a distinction to say that

6 it is a written waiver and, therefore, only a

7 formal waiver. It has to be in writing.

8 If it were presented orally, it

9 would be invalid. Written is just to indicate

10 that the form of the waiver must be in writing,

11 but it does not change the meaning of the word

12 "waiver."

13 MR. NA" N: So if I understand you

14 correctly, the waiver -- the written waiver that

15 would be required under this provision should

16 say, "And we have submitted -- submitted a

17 waiver in writing before the Salvadorean Supreme

18 Court."

19 Those words should have been
20 included in the waiver to be a waiver qualified
21 under the treaty?

22 MR. SMITH: No. The waiver -- the

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1 waiver would not need to include those words.
2 The waiver includes the requirement to act in
3 conformity with the waiver. That is, the fact
4 that it is a waiver means that there is a
5 material requirement to comply with the waiver.

6 So it is the act of issuing the
7 waiver that creates the requirement to act in
8 conformity. The waiver does not need to have
9 any additional language in order for it to
10 include a material requirement. The waiver, as
11 stands, would include the requirement to act in
12 good faith in accordance with the waiver.

13 MR. NA" N: Thank you.

14 MR. SMITH: One -- now, I will
15 turn -- sir? Yes.

16 MR. THOMAS: Let me just ask a
17 question.

18 Are the parties in agreement that

19 the only relevant date for evaluating the waiver
20 is the date of the submission of the claim?

21 MR. SMITH: I don't think I can
22 give a yes-or-no answer to that question.

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1 El Salvador agrees that the waiver must be valid
2 on the date that it is submitted. El Salvador
3 agrees that, as a general rule and international
4 arbitration law, jurisdiction is determined on
5 the date of filing of -- or the date of
6 initiation of arbitration proceedings.

7 That doesn't necessarily mean that
8 acts that take place after that date are
9 irrelevant to the validity of the waiver. That
10 is the key date. But the validity of the waiver
11 depends, as the Waste Management tribunal
12 indicated, on the good faith intent of the party
13 to comply with the waiver. Subsequent acts may
14 be evidence that the waiver was invalid on the
15 date that it was filed.

16 Similarly, the fact that the waiver
17 is filed on the date of the notice of

18 arbitration, and that is the date for
19 determining jurisdiction, that clearly and as
20 admitted by claimants does not mean that
21 pre-waiver -- that conduct before that date is
22 not relevant.

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1 And the question for the tribunal
2 is: Was the waiver valid when filed? El
3 Salvador's position is that, because the
4 claimants did not take steps to terminate the
5 proceedings, and at the date of filing had taken
6 no such steps and the proceedings continued,
7 they continued the proceedings that the waiver
8 was invalid.

9 That implies that they must have
10 taken some steps prior to filing; but the date,
11 as you've indicated, the crucial date, is the
12 date of filing. But there are relevant actions
13 before and after -- actions relevant to
14 evaluating the validity of the waiver on that
15 date. I hope that answers your question.

16 MR. THOMAS: Yes. Do I take that
17 to mean -- and I'm thinking -- I'm mindful of

18 what was said in the RDC case where there is a
19 discussion of the overlap of claims.

20 Are you saying to us that, if there
21 were domestic proceedings extant as of the date
22 of the filing of the waiver, that a proper

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1 waiver cannot be given? Is that your argument?
2 It's not possible for the claimant to give a
3 proper waiver if there are extant domestic
4 proceedings in relation to the same measure?

5 MR. SMITH: If -- again, the
6 claimant -- the requirement is that the claimant
7 act in conformity with the waiver, that is, it
8 comply with the material requirement that is
9 inherent in the issuance of a waiver, inherent
10 in the term of a waiver.

11 So it is -- it is whether or not
12 they have complied with their obligations under
13 the waiver that is determinative. It may be
14 that the proceedings are still continuing
15 because they have taken steps to comply by
16 requesting discontinuance, and that

17 discontinuance has not happened yet. Okay? Am
18 I being clear?

19 That is, the focus is on the waiver
20 itself and the validity of the waiver. And it
21 is on the actions of the claimants in complying
22 with the material aspect of the waiver, not

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1 necessarily with what is happening in the
2 proceedings themselves.

3 I would like to move now to some
4 rebuttal points as to what was said by the
5 claimants this morning. Claimants spent a
6 considerable amount of time discussing the
7 letters sent by El Salvador at the initiation of
8 this arbitration and indicating what those
9 letters told them or did not tell them they
10 should do. They have indicated that they did
11 not comply with the waivers because El Salvador
12 said in its letters -- told them that
13 withdrawing the local proceedings would not cure
14 jurisdiction.

15 But the obligation to comply with
16 the waiver does not come from El Salvador's

17 letters. Claimants had the obligation under
18 CAFTA. And they did have a way to comply and
19 preserve their CAFTA claims, but they chose not
20 to use it. El Salvador had nothing to do with
21 this. El Salvador did not have an obligation to
22 send the claimants a later saying, "If you take

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1 the following steps, the problems we have
2 pointed out to you might be cured."

3 Claimants are in a position to hire
4 counsel, to study issues, and to understand
5 international arbitration proceedings. The
6 burden is not on El Salvador to tell them how
7 they need to act in order to preserve their
8 claims.

9 El Salvador was simply putting them
10 on notice that there was a defect in their
11 waivers, that El Salvador gave them -- offered
12 them the opportunity to withdraw the -- the
13 arbitration in order to avoid what we have gone
14 through over the past months and this hearing
15 which has cost El Salvador a considerable amount

16 of money, which should have been avoided because
17 claimants should have understood their waiver,
18 should have understood international law, and
19 should have complied with their waivers.

20 What El Salvador said or did not
21 say in its letters is not determinative in any
22 way of the obligations of the claimants.

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1 A further point, claimants
2 continued this morning to rely on a view of the
3 purpose of the waiver that is impractical. Let
4 me just go back because I think I didn't restate
5 the way in which they could have preserved their
6 claims.

7 They had the opportunity to
8 withdraw this arbitration, withdraw their --
9 seek discontinuance of the proceedings before
10 the Supreme Court of El Salvador, and then
11 reinitiate arbitration. They chose not to do
12 that. Because of the time bar in CAFTA, they
13 have lost the opportunity to do that, but that
14 was a choice that they made.

15 The claim -- the claimants claim --

16 moving on to the next point -- claimants claim
17 that the sole purpose of the waiver is to let
18 states seek dismissal of cases brought against
19 them. They continue to say that, regardless of
20 the solemn commitment in the waiver, the waiver
21 gives them no obligation to do anything. They
22 may allow as many proceedings as they want to

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1 continue, and it would appear they may initiate
2 as many proceedings as they want. And the
3 waiver only serves for the state to go around
4 and try to defeat those proceedings.

5 That is what they said that
6 El Salvador should have done in El Salvador.
7 But we have pointed out this morning that the
8 waiver would be an effective protection for
9 El Salvador in this circumstance. Without a
10 doubt, part of the purpose of the waiver was to
11 arm states with a way to try to defeat
12 proceedings as Venezuela did with regard to the
13 Vanessa Ventures case.

14 But the waiver also generates

15 obligations on claimants to end proceedings, to
16 not initiate proceedings, to not pursue
17 proceedings. It is -- there are two pieces to
18 that protection, and claimants want to rely on
19 only one -- and one that in this case, and in
20 many cases, would be ineffective for states.

21 With regard to the letters sent by
22 the attorney general of El Salvador and counsel

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1 for El Salvador, the claimants stated that they
2 were not the recipients of those letters and had
3 to request those letters to get copies. But
4 that's -- it's true that they weren't the
5 recipients. But the ICSID secretariat, as it
6 always does -- and is very efficient in doing --
7 sent the letters to counsel for claimants within
8 two days of their filing.

9 And the fact that the letters were
10 not addressed to claimants doesn't mean that the
11 claimants should not pay attention to them and
12 could not have taken heed of them and acted in
13 consequence, if that is what the claimants
14 wanted to do. The fact that they were not

15 addressed to them doesn't mean that they were
16 not made aware of them and given copies of them.

17 And, finally, in a related point to
18 this, as regards to the date of filing of the
19 claim, the ICSID secretary general's letter
20 acknowledging receipt of the claims states that
21 the date of receipt was July 6, 2009, not
22 July 2, 2009.

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1 Finally, I want to address
2 claimants' misrepresentation of the Waste
3 Management One decision. That tribunal clearly
4 stated that the waiver was defective for two
5 reasons:

6 Because there was a formal defect
7 in the addition of reservation language, and
8 because there was a material defect created by
9 non-compliance.

10 Claimants, again, read only half of
11 the quote leaving out the last clause of the
12 sentence. They did this in their pleading, and
13 they did it again today. The full quote is:

14 "Based on the foregoing, it is
15 clear that claimant issued a statement of intent
16 different from that required in a waiver
17 pursuant to NAFTA Article 11.21, since it
18 continued with the proceedings initiated against
19 BONABRAS after the date of submission of the
20 waiver, September 28 -- 29 September 1998, until
21 all avenues of recourse had been exhausted."

22 The continuation of the proceedings

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1 was a key part to the tribunal's conclusion that
2 claimant -- that claimant had filed waivers that
3 were defective. And it's the same situation as
4 existed in this case. It is the claimants'
5 actions that created the defective waivers
6 because they did not act in conformity with
7 those waivers.

8 In conclusion, Mr. President and
9 members of the tribunal, El Salvador believes
10 that it has demonstrated and affirmed that the
11 claimants did not file, did not comply with the
12 waiver requirements of Article 10.18.2.

13 The waiver requirement is a

14 condition of consent. Consent is a condition of
15 jurisdiction. Because they did not meet those
16 requirements, there is no jurisdiction, and this
17 entire arbitration must be dismissed.

18 Thank you very much.

19 MR. Van den BERG: Thank you,
20 Mr. Smith. Does the -- would the claimants want
21 to have a --

22 MR. MACHULAK: A short time.

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1 MR. Van den BERG: -- short time
2 out? How much do you need?

3 MR. NEWCOMBE: 15 minutes, please.

4 MR. Van den BERG: 15 minutes,
5 okay. Recess 15 minutes.

6 (There was a discussion off the
7 record.)

8 MR. Van den BERG: Mr. Machulak,
9 please proceed with the rebuttal.

10 CLAIMANTS' REBUTTAL

11 BY MR. MACHULAK:

12 MR. MACHULAK: Thank you.

13 Good afternoon, again.

14 There is only -- again, I will be
15 giving, hopefully, a short presentation,
16 followed by Professor Newcombe. There's only
17 really four points that I want to make, which
18 are perhaps more factual in nature than the
19 legal interpretation.

20 The first is that, in response to
21 what El Salvador has argued, it says -- well, my
22 first point is that claimants' interpretation of

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1 the treaty is not at all at odds with the
2 interpretation of the United States. I disagree
3 with the premise in the argument that they just
4 made.

5 I don't know what is proper and
6 improper in these proceedings. But in the
7 interest of transparency, less than a month ago,
8 received a call from our State Department
9 indicating that opposing counsel was down there
10 asking them to put an opinion on the thing, and
11 would I like equal time.

12 So we both had equal time -- I went

13 to the later time. We both had equal time to
14 relate our views to the State Department. The
15 United States has chosen not to make a
16 submission in these proceedings at the end of
17 the day.

18 As to the other two states that we
19 have in connection with these proceedings, it
20 doesn't escape notice, looking at the Dewey &
21 LeBoeuf web site, that their law firm is
22 representing those two countries.

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1 So to sit here and listen, in all
2 fairness to my clients, that everybody else in
3 the world is against us in our interpretation of
4 the treaty is just plain not true.

5 The other -- when I watched --
6 listened to the presentation again this
7 afternoon, I mean, this is derived from language
8 from snippets of opinions that do not relate to
9 the particular facts before you or the
10 particular issue before you. And that is
11 whether or not we had to discontinue local

12 proceedings before we could even think about
13 filing a CAFTA proceeding.

14 The comment was made -- and also, a
15 lot of commenting was made suggesting that we
16 did something once we gave our waivers to
17 somehow upset it. We did nothing. The real
18 complaint is that we did nothing that -- we did
19 not file something with the court down there. I
20 agree. That's factually true. Did we do
21 something to promote proceedings down there?
22 No, we did not. Did we -- what was our mindset

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1 at the time? Our mindset at the time, again, is
2 we received correspondence from El Salvador
3 saying that "No matter what you do now, you have
4 no jurisdiction, and we're going to fight you on
5 that point."

6 And everything that they've said
7 here today suggests that, if we would have done
8 like they say, dismissed, and then tried to
9 dismiss the local proceedings and then refile a
10 CAFTA, we'd be into a big statute of limitations
11 fight. I mean, it's, more than ever before,

12 clear to me today that perhaps that was the
13 object at the time.

14 I don't -- I would agree with
15 Mr. Smith that El Salvador was never required to
16 teach us, our law firm, international law on the
17 subject, and the correspondence that we received
18 was telling us what their interpretation of the
19 law is.

20 But I believe today, even more so
21 than I've ever believed it before, that our
22 interpretation of the law is correct, that we

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1 followed the plain language of the treaty. We
2 did what was required for us. We gave them a
3 waiver that they could have presented anywhere
4 in the world they wanted.

5 They say this is unfair to a
6 state -- that, how is a state supposed to know.
7 We told them in the notice of arbitration where
8 the pending litigation was. And then within a
9 month after filing, they're in touch with the
10 clerk of the Supreme Court, but never once

11 raised the issue of the fact that they have the
12 waiver.

13 In fact, I'm glad we did not follow
14 El Salvador's advice, because I think we would
15 be in a very poor, poor position here today.

16 Lastly, the last point is this:
17 El Salvador complains that this preliminary
18 objection proceeding is very expensive to them.
19 Well, it's expensive to us, too. I mean, we're
20 not a huge company. We -- Mr. Newcombe --
21 Professor Newcombe didn't get to that point in
22 the presentation. I mean, we would like to

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1 recover the costs that we have expended in
2 addressing a motion which we don't think that we
3 were -- that we think we acted perfectly proper
4 on in terms of presenting them with a -- the
5 exact waiver as required by the treaty, and then
6 having them tell us that's not enough, something
7 beyond the language of the treaty is required,
8 having to fight that, and hopefully prevail on
9 that issue.

10 Thank you very much.

11 CLAIMANTS' REBUTTAL

12 BY MR. NEWCOMBE:

13 MR. NEWCOMBE: The all important
14 watch.

15 MR. Van den Berg: Don't worry
16 about the watch for the time being because the
17 tribunal has three questions for you, unless you
18 would like to first start the rebuttal.

19 MR. NEWCOMBE: I believe I better
20 obtain my copy of CAFTA before the questions
21 start.

22 MR. Van den BERG: And I would

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1 invite you, also, to take a copy of, I think,
2 your response.

3 MR. NEWCOMBE: Yes, Mr. President.

4 MR. Van den BERG: Okay. Could you
5 please go to paragraphs 80 and 81 of your
6 response.

7 MR. NEWCOMBE: Yes.

8 MR. Van den BERG: In paragraph 80,
9 you start to say:

10 "The only measures at issue in the
11 Domestic Proceedings," both capitalized, "were
12 the revocation of the environmental permits."

13 And you go on, and then you say:

14 "The claimants' notice of
15 arbitration defines a series of other measures
16 that includes CAFTA and foreign investment law.

17 MR. NEWCOMBE: My apologies,
18 Mr. President. Are we in the response or the
19 rejoinder?

20 MR. Van den BERG: The response.

21 MR. NEWCOMBE: At paragraph?

22 MR. Van den BERG: 80.

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1 MR. NEWCOMBE: 80. Thank you. My
2 apologies.

3 The question again?

4 MR. Van den BERG: What you see
5 here is in the first two sentences, it's stated
6 in the claimants' response:

7 "The only measures at issue in the
8 Domestic Proceedings," both capitalized, "were
9 the revocation of the environmental permits.

10 The claimants' notice of arbitration provides a
11 series of other measures that includes CAFTA and
12 foreign investment law."

13 And it goes on:

14 "First, the respondent's decision
15 is between you, the claimant's exploration
16 licenses are undoubtedly measures."

17 And then if you go to 81 -- that's
18 the second one -- it says:

19 "Second, the notice of arbitration
20 claims that the respondent has imposed a
21 defective ban on gold and silver mining, which
22 is arbitrary, discriminatory, and

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1 expropriatory."

2 The question is: Where do we find
3 those two points, those two measures complained
4 about in the notice of arbitration, in the sense
5 they are presented as a claim in this case?

6 So let's take them in turn.

7 First, you have the respondent's
8 decision not to review the claim's exploration

9 license.

10 MR. NEWCOMBE: Paragraph 24 of the
11 notice of arbitration says that:

12 "On January 29th, 2009, Commerce
13 and SanSeb's" --

14 MR. Van den BERG: January 20, it
15 says, my copy.

16 MR. NEWCOMBE: "January 20th, 2009,
17 Commerce and SanSeb's legal counsel filed a
18 challenge in the courts to the government's
19 refusal to honor Commerce and SanSeb's request
20 to extend its exploration permits pursuant to
21 the terms of the 2002 permits."

22 So those are the measures with

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1 respect to --

2 MR. Van den BERG: Not the
3 proceedings that had already been resolved, or
4 am I confused here?

5 MR. NEWCOMBE: As clarified later,
6 clarified by the respondent in its -- I believe
7 their preliminary objection, that there were
8 not -- there were never any legal proceedings

9 with respect to the exploration permits. There
10 was an administrative review process, an
11 internal administrative review process, but not
12 the legal proceedings before the El Salvadorean
13 Supreme Court in the same way that there was
14 with respect to the revocation of the
15 environmental permits. So the reference to
16 these legal proceedings have not been resolved
17 is a -- is not factually correct.

18 MR. Van den BERG: Yes.

19 MR. NEWCOMBE: In a sense, the
20 administrative review process is a legal
21 process. But with respect to the question of
22 application of the waivers, internal review

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1 process or the -- our submission is that
2 internal review processes are not caught by
3 the -- the -- you know, the waiver requirement.

4 MR. Van den BERG: Could you help
5 me?

6 Whether or not proceedings have
7 taken place about the exploration permits, are

8 the measures complained about in notice of
9 arbitration, where is it that you complain about
10 them in the notice?

11 MR. NEWCOMBE: In paragraph 23, it
12 says:

13 "On October 10, 2006, Commerce
14 applied to MARN for an environmental permit for
15 its exploration in connection with the new San
16 Sebastian exploration license and the
17 Nueva Esparta license. MARN did not respond to
18 the request; and on March 8th, 2007,
19 Commerce/Sanseb applied to the El Salvadorean
20 Ministry of Economy for an extension of these
21 exploration licenses, as was its right."

22 "On October 28th, 2008, the

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1 Ministry of Economy denied Commerce and SanSeb's
2 application, citing Commerce's and SanSeb's
3 failures to secure an environmental permit."

4 And that was an environmental
5 permit with respect to the exploration licenses.

6 MR. Van den BERG: Look at
7 paragraph 80 of your response. You say that the

8 notice -- you say that:

9 "The claimants' notice of
10 arbitration identifies a series of other
11 measures that breach CAFTA.

12 MR. NEWCOMBE: Yes.

13 MR. Van den BERG: And then you say
14 the first one is not to renew claimants'
15 exploration licenses.

16 MR. NEWCOMBE: Yes.

17 MR. Van den BERG: What I am
18 looking for is a place where you could find it
19 in the -- this is a measure referred to as a
20 breach of CAFTA.

21 MR. NEWCOMBE: In paragraph 26, the
22 claimants refer to the government's ban on

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1 development of gold and silver mine supplies and
2 practice vis-a-vis to foreign companies.

3 And in A:

4 "The Government of El Salvador
5 asserts that the current ban on mining and --
6 silver mining and exploration connected with

7 this mining stems from the government's desire
8 to protect the environment, the government
9 permits, and other -- and other activities."

10 So there's --

11 MR. Van den BERG: Slower, please.

12 MR. NEWCOMBE: In paragraph --

13 MR. Van den BERG: Can you please
14 repeat? Because what you are saying is that
15 paragraph 26 contains an identification of a
16 measure that breaches CAFTA. And as the first
17 one identified in paragraph 80 is not to renew
18 the claimants' exploration licenses.

19 MR. NEWCOMBE: Yes.

20 MR. Van den BERG: And 26 talks
21 about, at least the opening, the policy as
22 applied, that this would discriminate against

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1 foreign investment. Could you please help me
2 with how I could connect the two?

3 MR. NEWCOMBE: Article -- paragraph
4 26A says that:

5 "While the Government of
6 El Salvador asserts that the current ban on gold

7 and silver mines and exploration."

8 So there's A, a reference to the
9 fact of the current ban on gold and silver
10 mining.

11 We then turn to B, the government's
12 ban on the development of gold and silver mines.
13 And that ban on the development of gold and
14 silver mines, we say is -- is a de facto
15 moratorium or practice. And this would include
16 the decisions, regulatory decisions, not to
17 approve exploration licenses, not to approve
18 permits, environmental permits.

19 And then in paragraph 30, there is
20 a reference "by its conduct," conduct referring
21 to the government's ban on the development of
22 gold and silver mines, which includes the

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1 exploration licenses.

2 I accept that there's -- the notes
3 of arbitration is -- does not set that -- set
4 the issue clearly with respect to exploration
5 licenses, but our submission is that it is -- it

6 is pleaded that the -- that there was -- a one
7 of the measures complained about is the denial
8 of the -- the denial of the exploration license.

9 In paragraph 23, we're saying that
10 this is -- in paragraph 26, we're saying that
11 this is a policy or a practice that
12 discriminates against foreign investment, and
13 further, in B, elaborated is a ban on
14 development, development both of exploration
15 concessions and exploration licenses. The
16 policy that's being referred to is the sort of
17 the -- the -- sort of the de facto moratorium.

18 Paragraph 27 refers to this policy.
19 And I would read that as this measure or this
20 conduct as applied is arbitrary and irrational
21 and has denied Commerce of its property rights.

22 And then paragraph 30 pleads the

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1 reference to "by its conduct" in reference to
2 all of the previously enumerated paragraphs. By
3 its conduct, El Salvador has breached these
4 obligations, natural treatment, MFN, minimum
5 standard of treatment, and expropriation.

6 MR. Van den BERG: Then I have a --
7 the chairman has a further question.

8 Now, the Supreme Court has rendered
9 a decision on the environmental permits. Does
10 that decision have any effect, either legally or
11 factually, in the presentation?

12 MR. NEWCOMBE: Clearly, it has an
13 effect factually. It is an act of the Supreme
14 Court, one of the -- there are issues of minimum
15 standard of treatment in the claim. But the
16 Supreme Court judgment was -- made a
17 determination that the revocation of the
18 environmental permits was in accordance with the
19 law of administrative procedure in El Salvador,
20 and so we have a determination, a final
21 determination, of the -- of the highest court in
22 El Salvador that there was compliance. And

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1 so -- so there's sort of a final determination
2 of a court on that issue, and that may have some
3 type of -- you know, of res judicata with
4 respect to, you know, factual determinations of

5 El Salvadorean law.

6 But the main claim in the
7 arbitration is that there is a de facto
8 moratorium on gold mining, despite that the fact
9 that the claimants have a concession which runs
10 until 2034. In practice, as a measure, the
11 government is not issuing any regulatory
12 approvals. And the acts since 2006, including
13 the revocation of Commerce's permits and the
14 exploration license, is -- is -- is background
15 to that -- to that main claim, in addition to
16 the other additional claims that are submitted.

17 MR. Van den BERG: Now, let's
18 hypothetically -- for law professors, there's
19 always an amount of exercise.

20 Now, hypothetically, reverse the
21 situation, and let's assume now that the Supreme
22 Court would have granted the relief sought by

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1 the claimants.

2 MR. NEWCOMBE: Yes.

3 MR. Van den BERG: How would that
4 have had an effect, if any, on the present

5 proceedings?

6 MR. NEWCOMBE: The claimants'
7 submission is that the effect of the waiver is
8 definitive, and that with respect to there's a
9 waiver of rights to continue and initiate
10 proceedings with respect to the environmental
11 measures.

12 The claimants' submission is that,
13 if there had been a final determination in favor
14 of Commerce, that there was a breach of
15 El Salvadorean law, and that Commerce was
16 awarded \$100 million, that the waivers would --
17 would be operative and legally definitive to
18 extinguish and abandon any right that the
19 claimants had to the benefit of that judgment or
20 to initiate proceedings, initiate -- because we
21 also waived the right to initiate proceedings
22 with respect to any enforcement because, of

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1 course, there is a court judgment that says
2 El Salvador must pay \$100.

3 But if El Salvador doesn't comply

4 with that, there still have to be enforcement
5 procedures. And our view is that the waiver,
6 given its definitive effect and wide effect with
7 respect to the measures at issue, would -- would
8 include anything. So that goes back to the
9 position that the waivers provide a complete
10 release to the state with respect to any -- any
11 legal rights or -- legal rights that the
12 claimants might have with respect to those --
13 those future proceedings.

14 So once the waiver is submitted,
15 those proceedings from the point of view of the
16 claimant are essentially -- I am not -- I am not
17 sure what the -- quite what the exact word is,
18 but the idea is that the claimants would never
19 be able to obtain any benefit from a favorable
20 judgment given the waiver having definitive
21 effect.

22 MR. Van den BERG: But would it,

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1 then, not work also in the same way with -- with
2 regard to the previous question of the tribunal?
3 What you are saying now, as I understand, is the

4 waiver operates as an obstacle to give any
5 effect to the Supreme Court judgment in cases
6 that would have been in favor of the claimants.
7 Is my understanding correct?

8 MR. NEWCOMBE: Yes.

9 MR. Van den BERG: Would it also
10 have been an obstacle in respect of the
11 situation that actually occurred, that they did
12 not reject the claimants' relief, it also has no
13 effect whatsoever?

14 MR. NEWCOMBE: It has no effect
15 from the -- for the purposes of El Salvadorean
16 law. But the claim, the CAFTA claim --

17 MR. Van den BERG: In other words,
18 let me say:

19 Assume now you would have won in
20 El Salvador. You would -- the claimants. Could
21 you still pursue the claim in the present case?

22 MR. NEWCOMBE: Yes, because the

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1 claimant has complied with the jurisdictional
2 requirements in the -- in the waiver. The win

3 in El Salvador is a determination with respect
4 to whether the revocation of the environmental
5 permits were valid under El Salvadorean
6 administrative law. They don't make any sort of
7 determination with respect to CAFTA breaches.
8 And the -- the claimants would be able to -- in
9 our submission, be able to continue to make a --
10 submissions with respect to the breach of CAFTA
11 obligations based upon the revocation of the
12 environmental permits.

13 MR. Van den BERG: I see.

14 So everyone has -- so the question
15 is in the hypo that the claimants would win in
16 El Salvador. And your submission is that you
17 could not collect, you being the claimants, on
18 the judgment in El Salvador because of the
19 waiver; is that correct?

20 MR. NEWCOMBE: Yes, that's correct.

21 MR. Van den BERG: But how does it
22 work? Because the Supreme Court has issued a

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1 decision, and then you completed the
2 hypothetical by saying, "We got our hundred

3 million in damages," because you also, at the
4 same time, were claiming damages in the
5 proceeding; right?

6 MR. NEWCOMBE: Yes.

7 MR. Van den BERG: Assume now --
8 and, now, how does it operate? So you --
9 basically, you could collect the judgment. And
10 how does it operate under El Salvadorean law?
11 Could then the response be, you waived your
12 right to continue in the court the proceedings?

13 MR. NEWCOMBE: Yes.

14 MR. Van den BERG: And now I go on.
15 You can now say, "The proceedings are over. I
16 have now a judgment against you."

17 How does it operate under
18 El Salvadorean law? You can simply -- couldn't
19 then the respondents say, "Here, we have a
20 waiver of you, whereas there's already a
21 judgment offered by the Supreme Court"?

22 MR. NEWCOMBE: Mr. President, I am

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1 not a licensed attorney in El Salvador. We do

2 not have El Salvadorean law on that question of
3 what the -- what the effect would be.

4 Our submission, given our view that
5 the waiver is a complete extinguishment of all
6 legal rights, any legal rights with respect to
7 those proceedings or benefits from those
8 proceedings, that there is just absolutely no
9 opportunity for the claimants to obtain a
10 benefit.

11 And our submission would be that --
12 that the -- that the attorney general would be
13 able to submit a -- the waiver to the courts to
14 show that there had been a -- this complete
15 abandonment of rights, as was done in the
16 Vanessa Ventures case.

17 MR. Van den BERG: I assume it has
18 not done so. The attorney general has waived
19 from his side the right to invoke the waiver.
20 Is that your position? Because it gets now
21 complicated. All of this would not have
22 happened if one way or the other before the

1 judgment had been issued somebody had told the

2 court, "I think we should stop," because the --
3 there is now -- the proceedings have been -- the
4 legal case goes to an international arbitration
5 and we have to get a waiver.

6 MR. NEWCOMBE: We go back to our
7 fundamental submission that CAFTA does not
8 prevent or prohibit concurrent proceedings. The
9 mere fact that the -- the mere fact -- if the
10 El Salvadorean Supreme Court had issued its
11 judgment on June 30th, and then claimants had
12 commenced arbitration on July 2nd, there would
13 be no issue. So the mere fact that there is a
14 definitive judgment of the El Salvadorean
15 Supreme Court with respect to the revocation of
16 the environmental permits is not a problem for
17 the purposes of the CAFTA arbitration.

18 MR. Van den BERG: Let's not sort
19 of complicate the hypo, because we're not
20 talking about proceedings that have ended before
21 the 2nd of July 2009. We're talking about
22 something still that's going on on the 2nd of

1 July 2009. And there we -- we wonder how -- how
2 this works if you do not do anything -- do not
3 take any step in those proceedings because of
4 the commencement of the operation. What then
5 may happen is that you are running on two
6 parallel tracks, if somebody does not say later
7 on to stop here.

8 MR. NEWCOMBE: Yes. And our
9 submission is that respondents state, in some
10 situations, may want, after having engaged in
11 three years of litigation, to have a resolution
12 of an issue such as -- as this determined, and
13 that there's nothing in CAFTA that prevents
14 that.

15 What if this was, for example, test
16 litigation, and this is one claimant, and there
17 were 100 other claimants in the similar
18 situation in El Salvador? The state might have
19 an interest in having a definitive resolution on
20 this -- on this issue that would then -- you
21 know, would be useful for -- for the state.

22 So it goes back to the submission

1 that -- the fact that there was a final decision
2 of the Supreme Court on a specific matter of
3 El Salvadorean administrative law is a fact, but
4 that it doesn't, one, affect the jurisdiction of
5 this tribunal. And this tribunal can proceed to
6 make determinations of whether El Salvador's
7 conduct breaches CAFTA obligations and the
8 foreign investment law.

9 MR. Van den BERG: Thank you.

10 After you have finished your
11 rebuttal, we would like to ask the -- also, the
12 respondent to comment on this question, if they
13 wish to, unless you think that the respondent
14 could already now comment on this question.
15 Then we can dispose of it now, if that's
16 procedurally proper really. But now we are
17 really deviating from the written part of your
18 rebuttal.

19 MR. NEWCOMBE: I'm in your hands,
20 Mr. President. If Mr. Smith would like to
21 address the question now, I'm -- that is fine
22 with me.

1 MR. Van den BERG: Mr. Smith, if
2 you would like -- I think we could finish this
3 question if at all you are in a position to do
4 so.

5 MR. SMITH: Okay. I think I can
6 respond. I can.

7 (There was a discussion off the
8 record.)

9 MR. SMITH: I think the
10 hypothetical has become somewhat complicated,
11 but I guess the question is -- or part of the
12 question is, at least, is what would be the
13 effect on this proceeding, and particularly with
14 regard to the waivers, if the Supreme Court of
15 El Salvador had decided in favor of the
16 claimants, issuing them an award for
17 \$100 million.

18 The claimants take the position
19 that they would have -- because of the waivers,
20 they would have no right to collect on that
21 award, and that they have renounced all rights.

22 The first point to make is, I very

1 seriously doubt that, had the decision gone
2 their way, that they ever would have taken the
3 position that their waiver presented them from
4 collecting \$100 million. That is a position
5 that they can take now because it is coherent
6 with -- in some sense, with their position on
7 the waiver.

8 But if the case had gone the other
9 way, I would find it very surprising if they
10 would interpret it, their waiver, to that
11 extent.

12 What would the effect have been on
13 these proceedings? The measures at issue before
14 the Supreme Court of El Salvador were the
15 revocation of the environmental permits. Those
16 are the measures that give rise essentially to
17 100 percent of the claims of the claimants.

18 At the time that their
19 environmental permits were revoked, they lost
20 their right to their concession. Every right
21 that they had in El Salvador was ended. Nothing
22 that would have happened after 2006, when they

1 lost those permits, could have caused them any
2 further injury. They have no claims for
3 measures taken by the Government of El Salvador
4 other than that.

5 Let me finish.

6 So if the Supreme Court of
7 El Salvador has decided that those measures were
8 invalid, and issued an order for compensation,
9 there would be no further issue in this
10 arbitration.

11 MR. Van den BERG: Take it one step
12 further.

13 The hypo was, as you stated, that
14 the claimants would have won, prevailed in the
15 court case. And then on the question was:
16 Under Salvadorean law, could you invoke the
17 waiver? Now, there are two aspects of this.

18 First of all, a procedure aspect,
19 because you have already a judgment against you.
20 And is there still a possibility, then, to
21 invoke the waiver?

22 And the second one is: Even if

1 there's a possibility to invoke the waiver,
2 since you have previously taken the position
3 that the waiver is invalid, can you then still
4 say, "After I have now second thoughts about
5 this, the waiver is relevant"?

6 MR. SMITH: The decision of the
7 Supreme Court of El Salvador would be binding on
8 the Government of El Salvador. The existence of
9 the waiver would not be something that the
10 government could, as a legal matter, use to
11 oppose the enforcement of a binding judgment of
12 the Supreme Court of El Salvador. The
13 government would be obligated to pay the award
14 because it is an award of the highest court of
15 the government.

16 MR. Van den BERG: Thank you.
17 That's -- okay. Dr. NaÛn has some questions.

18 MR. NA'N: I'm sorry. Is that a
19 statement of counsel, or is there any
20 authorities behind that? Because this seems to
21 be an important issue. And the same -- my
22 question is also to the claimants. Whatever you

1 have said regarding defense of the waiver, is
2 that your position or is that supported by some
3 authorities, precedent? And the question goes
4 to both parties, because I have seen assertions
5 in one sense and the contrary assertion on the
6 other. And I want to know legally speaking
7 where we stand on the subject. I want to know
8 your positions.

9 MR. Van den BERG: Let's first
10 start with Mr. -- the respondents on this. Then
11 we finish this one, because we actually are in
12 rebuttal time.

13 MR. SMITH: Okay. Simply, we -- we
14 have conferred with a representative of the
15 Attorney General's Office of El Salvador, and
16 that was the opinion he related to us. It is
17 not based on a review of court cases or
18 decisions. If the tribunal would like further
19 documentation on this issue, we certainly would
20 be willing to provide it.

21 MR. Van den BERG: Please, also,
22 finish this point. And then you can start your

1 real rebuttal.

2 MR. NEWCOMBE: Our submissions with
3 respect to the waiver in El Salvador are
4 submissions that are not based on -- we don't --
5 we do not have legal opinions of local counsel
6 in -- in the materials.

7 One point, however, is that, if
8 we're thinking of the waiver, it's sort of --
9 one of the questions here are, what is the law
10 that applies with respect to the requirements
11 for the waiver. And my submission is that
12 the -- the effectiveness and requirements for
13 the waiver, must they not be determined by
14 international law?

15 Why is it that El Salvador law is
16 controlling, particularly, where the waiver
17 requirement applies in different captive
18 parties? And so why are we so focused on
19 El Salvadorean law?

20 Our submission is that CAFTA as an
21 international treaty requires a certain form of
22 legal document to be provided. That's -- and it

1 was provided in accordance with CAFTA. So
2 really, in some sense -- and I know there has
3 not been submissions on this -- the question
4 seems to me more about whether the waiver is
5 effective under -- as a matter -- you know, as a
6 matter of treaty interpretation under
7 international law.

8 MR. Van den BERG: The question is
9 not so much about the waiver in and of itself.
10 The question is, how you can procedurally invoke
11 it once the Supreme Court has issued a judgment?

12 MR. NEWCOMBE: Yes.

13 MR. Van den BERG: And is there a
14 procedure in place, then, to invoke the waiver?
15 And then especially because, as I said, the
16 added aspect to this is that it may not be that
17 the party, that in this case, El Salvador, in
18 the hypo, cannot invoke the waiver because they
19 have previously taken the position that the
20 waiver is invalid.

21 MR. NEWCOMBE: Yes, I understand.

1 suggest is:

2 In many court procedures in many
3 countries, there is an opportunity to apply for
4 revision of a Supreme Court judgment, so to the
5 extent of a court decision based upon
6 information that was not before the court at the
7 time -- so if the court did make a decision, a
8 final decision, in favor of the claimants,
9 again, would it not be available to the -- to
10 the attorney general to make a submission for
11 revision of that decision based upon new
12 information that was not before the court?

13 And I would submit that in most --
14 in most domestic court procedures, that
15 procedure is available and would be -- would be
16 effective. And you would have a similar
17 situation that we had in Vanessa Ventures where
18 the constitutional chamber of the Venezuelan
19 Supreme Court dismissed the action based upon
20 the waiver.

21 I know --

22

MR. Van den BERG: Thank you for

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1 all of these -- these answers. You can now
2 proceed with the rebuttal.

3 MR. NEWCOMBE: Thank you.

4 Mr. President, members of the
5 tribunal, in light of the time, I will try to
6 use the utmost economy in making my submissions
7 brief.

8 My next submission from this
9 morning is the point that San Sebastian was not
10 a party to the domestic proceedings. The record
11 in the domestic proceedings is clear that only
12 Commerce was a party to the proceedings. The
13 court's judgments highlight that the
14 environmental permits were issued to Commerce.
15 The MARN resolutions in question revoked
16 Commerce's permit. The notifications refer to
17 Commerce as the party. The judgment only refers
18 to -- only to Commerce.

19 My submission is, if San Sebastian
20 had sort of moved to discontinue the domestic

21 proceedings, the courts would have been clear,
22 San Sebastian was not a party to the

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1 proceedings.

2 Now --

3 MR. Van den BERG: You're now with
4 slide 57 of the --

5 MR. NEWCOMBE: Yes, slide 57.

6 The fact that the claimants'
7 lawyers identified himself as the attorney for
8 both companies which operates as a joint
9 venture, we submit, is not relevant to the
10 question of whether -- of whether San Sebastian
11 was a party itself to the domestic proceedings.

12 Further, the claims by
13 San Sebastian in this arbitration are as San
14 Sebastian as a -- a separate entity which has an
15 investment in the joint venture. Investment in
16 CAFTA is defined to include an equity
17 participation in an enterprise. And an
18 enterprise is defined in CAFTA to include a
19 joint venture.

20 SanSeb's investment was its -- it

21 was its participation, its ownership directly
22 and indirectly in the -- in the joint venture.

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1 And, also, San Sebastian had separate
2 investments in El Salvador, including the lease
3 on the actual -- on the mine.

4 The point is that in this
5 proceeding, the claim is not being made by the
6 investor on behalf of the -- of an enterprise in
7 El Salvador. This is not a claim where Commerce
8 is claiming on behalf of the Commerce/SanSeb
9 joint venture under Article 10.16(1)(b) of -- of
10 CAFTA. There's the provisions about claiming as
11 an investor in your own right and claiming on
12 behalf of the enterprise.

13 So the question is not -- the issue
14 is not about whether Commerce was acting on
15 behalf of the joint venture in the domestic
16 proceedings for the purposes of CAFTA. For the
17 purposes of CAFTA, San Sebastian is an
18 independent investor with an investment which
19 includes an equity participation in the -- in

20 the joint venture it's claiming for -- for
21 damages for the effect of El Salvador's measures
22 on the -- on its -- its investment. And its

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1 investment is the equity participation in the
2 joint venture plus its separate investments
3 which it contributes to the joint venture.

4 So in response, our submission is
5 that SanSeb is -- the waivers did not apply to
6 SanSeb. And the court record makes that --
7 makes that clear.

8 Finally, with respect to the
9 tribunal's jurisdiction with respect to the
10 foreign investment law issue, I would just
11 highlight that the claimants' notice of
12 arbitration requests arbitration both under
13 CAFTA and Article 15 of the foreign investment
14 law.

15 There is an issue with respect to
16 the particulars claimed by the -- by the
17 claimant with respect to the breaches of the
18 foreign investment law. Respondents this
19 morning have raised an issue about whether there

20 was consent. We submit that there is consent.
21 I would just -- I would just note that the issue
22 of whether there is jurisdiction with respect to

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1 the foreign investment law was not -- was not an
2 issue that was pleaded in the preliminary
3 objection.

4 My understanding with respect --
5 the preliminary objection was -- it was
6 primarily focused on the issue of whether there
7 was consent under CAFTA. Of course, we do
8 submit that there is the separate consent to
9 arbitration under -- under the foreign
10 investment law.

11 With respect to the issue of
12 ancillary claims, claimants submit that if --
13 that, if the pleading just with respect to
14 naming the foreign investment law is
15 insufficient, that we claim to make an ancillary
16 claim with respect to certain breaches, and that
17 we rely on various authorities on the ancillary
18 claims, including in Enron, I'll just note --

19 and this is in Professor Schreuer's commentary,
20 which has not been submitted as a legal
21 authority, although with permission I would
22 submit it -- that in Enron the tribunal decided

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1 to accept the new request for arbitration as an
2 ancillary claim.

3 So to the extent that there are
4 deficiencies with the notice of arbitration, our
5 submission is that, based upon ICSID -- ICSID
6 rules, based upon the convention, that we can
7 submit an ancillary claim to address any of
8 those deficiencies.

9 Further, with respect to the --
10 with respect to the foreign investment law, the
11 waivers do not prevent the claimants from
12 bringing claims in this arbitration based on the
13 foreign investment law. The CAFTA waiver is a
14 waiver of the right to bring another separate
15 proceeding under another dispute settlement
16 procedure.

17 These are -- these are not -- there
18 are not two proceedings in this case. In this

19 case, we have one proceeding based on two
20 consents to arbitration in which the CAFTA is
21 making claims both under CAFTA and the foreign
22 investment law. And we submit that the Pac Rim

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1 decision on this is persuasive. The whole
2 purpose of the waiver requirement is so that
3 there's not concurrent proceedings. The whole
4 purpose is to ensure that claims are brought
5 in -- in one forum.

6 MR. THOMAS: I'm going to just ask
7 a question about that.

8 MR. NEWCOMBE: Yes, Mr. Thomas.

9 MR. THOMAS: The question I have
10 relates to the structure of Article 10.18.2, the
11 last limb, where we get into the waiving of
12 other procedures. And I think I take your
13 submission to be that, under the foreign
14 investment law, the consent to ICSID arbitration
15 there would allow the claimant to bring before
16 this tribunal claims in respect of the
17 revocation of the environmental permits.

18 MR. NEWCOMBE: Yes.
19 MR. THOMAS: Is that correct?
20 MR. NEWCOMBE: Yes, it is.
21 MR. THOMAS: Okay. If that's
22 correct, I just draw you to -- your attention to

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1 the use of the wording "any proceeding with
2 respect to any measure alleged to constitute a
3 breach." And the question I have for you is:

4 How do you differentiate -- when
5 we're talking about the environmental permit's
6 revocation, how do you differentiate between a
7 cause of action based on local law, municipal
8 law, a cause of action based on the foreign
9 investment statute, and a cause of action based
10 on the treaty?

11 Where do you find the right to have
12 a different cause of action in respect of the
13 same measure? This is what I'm having trouble
14 with in your argument. Just to be absolutely
15 clear, isn't it really -- isn't the focus here
16 on the measure? If the measure has been
17 challenged in the claim for damages in whatever

18 forum captured by that language --

19 MR. NEWCOMBE: Yes.

20 MR. THOMAS: -- isn't that what the
21 tribunal should be focusing on, on the measure,
22 as opposed to the cause of action which gives

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1 rise to the claim?

2 MR. NEWCOMBE: Thank you for the
3 clarification.

4 Our submission is that, if the
5 claimants commenced a separate arbitration
6 proceeding under the foreign investment law,
7 that the waiver would apply, because the
8 reference is to any proceeding with respect to
9 any measure.

10 And we are -- and in that -- in the
11 context of any proceeding, the focus is on
12 proceedings other than the CAFTA arbitration,
13 and that there is only one proceeding, there is
14 only one ICSID proceeding, and that the waiver
15 does not -- would not apply when the foreign
16 investment law is brought into the same

17 proceeding.

18 And it goes back to the -- the
19 whole purpose of Article 10.18 is primarily with
20 respect to ensure that there is not concurrent
21 proceedings with respect to the same measure and
22 all the difficulties that that arises.

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1 In this case, there would be one
2 tribunal making the determination, so therefore
3 there is -- one, there is not concurrent
4 proceedings. There is no problem with respect
5 to concerns about inconsistent decisions or
6 double recovery. And in our view, the Pac Rim
7 decision supports that -- that interpretation.

8 MR. THOMAS: Sorry. This is the
9 last question on this point, because I know that
10 you have to go on.

11 But the provisions of the CAFTA
12 which provide for the submission of a claim to
13 arbitration list what can be alleged to be at
14 issue in the arbitration in Articles 10.16, and
15 they only refer to either an obligation under
16 section A or an investment authorization or an

17 investment agreement. They don't refer to any
18 other legal regime that can be the subject of a
19 CAFTA claim.

20 MR. NEWCOMBE: No, but the -- this
21 proceeding involves both the consent to
22 arbitration under CAFTA and the consent to

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1 arbitration under the foreign investment law.
2 The reference to -- if I may say that -- this.
3 With respect to Article 10.18.2, the provision
4 says in the very last:

5 "Any right to initiate or continue
6 before any administrative tribunal or court
7 under the law of any party or other dispute
8 settlement procedure, any proceeding with
9 respect to any measure."

10 Now, it's not any claim with
11 respect to any measure. Right? If it was any
12 claim with respect to any measure, then the idea
13 would be that you can only bring -- you can only
14 bring CAFTA claims. But the focus is on any --
15 any proceeding. So you waive the right, and the

16 waiver of the right only extends to other
17 proceedings.

18 But within the CAFTA -- I'm sorry,
19 within this arbitration, which is only one
20 proceeding, any type of claim based upon
21 consents in other instruments can be -- can be
22 brought.

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1 MR. THOMAS: Thank you.

2 MR. NEWCOMBE: Finally, just with
3 respect to the foreign investment law, I would
4 just -- the respondent argues that the waiver
5 is -- the claimants' waiver is effective with
6 respect to the foreign investment law claims,
7 although which we of course reject. But, of
8 course, at the same time, they're also saying
9 that it's the -- it was not effective vis-à-vis
10 the domestic proceedings.

11 In our view, the waiver -- the
12 waiver is effective with respect to the domestic
13 proceedings, but does not prohibit to have one
14 proceeding involving two consents.

15 I would now turn to just a number

16 of the -- of questions and issues in response.

17 With respect to the tribunal's
18 question with respect to the dissenting opinion
19 of Mr. Hyatt, in the response, we didn't --
20 didn't -- do not suggest -- or we do not suggest
21 or claim that Mr. Hyatt's dissenting opinion is
22 authoritative as a statement of the meaning of

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1 the decision of Waste Management.

2 We refer to the decision of
3 Mr. Hyatt to highlight the -- sort of the
4 treaty -- a point about treaty interpretation
5 which he makes about, if NAFTA had contemplated
6 the determination of domestic litigation as a
7 jurisdictional requirement, we would have
8 expected the treaty drafters to have that
9 express requirement. So it's more to just
10 highlight and draw upon our argument about
11 treaty interpretation.

12 The second, we refer to Mr. Hyatt's
13 dissenting opinion for the principle that there
14 is the distinction between jurisdiction and

15 admissibility, and that post-waiver conduct is
16 an issue of admissibility.

17 Our submission is not that
18 Mr. Hyatt's dissenting opinion was the correct
19 determination of the case, as I submitted this
20 morning. Our submission is that the majority of
21 the Waste Management tribunal was correct to
22 find that there was no jurisdiction, because in

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1 that case there was a defective waiver
2 because -- at the time of submission because
3 it -- the claim -- the investor in that case
4 carved out something from the waiver, and it was
5 not -- not effective.

6 Clearly, I would -- I would agree
7 that dissenting opinions in the international
8 arbitration are -- I mean, they're clearly not
9 binding. Depending on the -- on the strength of
10 the reason, they may be persuasive in certain
11 circumstances, like -- like any other legal
12 authority.

13 With respect to the issue of
14 whether there is an agreement between the CAFTA

15 parties with respect to the interpretation of
16 CAFTA, I would highlight that the various
17 statements of the CAFTA parties which have been
18 referred to by the respondents on the
19 requirement for conduct focused more on the
20 question of the requirement for conduct
21 consistent with the waiver.

22 So most of the submissions, for

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1 example -- for example, the US's submissions in
2 Tembeck [phonetic], argue that the claimants'
3 conduct subsequent to the waiver can negate the
4 waiver because of post-waiver conduct.

5 In this case, the interpretive
6 issue is with respect to whether there is a
7 requirement to discontinue prior to
8 submitting -- prior to submitting a notice of
9 arbitration. And there is -- there's -- the
10 various statements of the CAFTA parties are
11 primarily addressing the post-waiver conduct
12 issue. They're not addressing the specific
13 treaty interpretation issue.

14 So there is not -- there clearly is
15 an agreement on that issue, and -- and there
16 is -- because -- and -- because primarily the
17 CAFTA states are referencing post-waiver
18 conduct.

19 Finally, CAFTA provides an express
20 procedure for binding interpretation of
21 provisions, and that has not been used in this
22 case.

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1 On the question of, could
2 El Salvador have discontinued the domestic
3 proceedings, the respondents have submitted this
4 morning, the respondents were powerless to have
5 the domestic proceedings dismissed.

6 First, we would note that
7 El Salvador never requested the claimants to
8 take the active step to discontinue the
9 proceedings. The respondent never notified the
10 court of the -- of the waiver. Respondent
11 suggests that only claimants could request
12 termination.

13 However, the attorney general's

14 opinion only addresses -- the submission that
15 came in on Friday only addresses whether the
16 claimant can discontinue the claim. And we
17 agree that the claimant -- there is the
18 possibility the claimant discontinuing the
19 claim.

20 The attorney general's opinion and
21 those -- and the materials do not address the
22 question of whether it is impossible for the

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1 attorney general to have the proceedings
2 dismissed with the waivers in hand.

3 We would note that Article 40 of
4 the Law of the Administrative Litigation refers
5 to discontinuance by the claimant or
6 discontinuance of the claimant. And it's not
7 clear why the waiver could not be considered
8 itself a discontinuance by the -- by the
9 claimant.

10 In the claimants' submission, the
11 material before the tribunal does not -- does
12 not prove that the -- that -- there is just

13 simply not evidence of the -- before this
14 tribunal that the -- that El Salvador was
15 powerless. What the materials establish is that
16 the claimants could have discontinued. But
17 there is the -- the point is not established
18 that the respondent could not have submitted the
19 waiver to the court, again, as was done in the
20 Vanessa case.

21 Mr. Smith made the point that the
22 waiver includes the requirement to act in

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1 conformity. The difficulty with this submission
2 is that it then means that jurisdiction is not
3 determined at a particular date, because, if the
4 waiver includes the requirement to act in
5 conformity with the waiver, well, then we have
6 sort of a situation not where jurisdiction is
7 determined on the date of the submission of the
8 notice of arbitration, but a situation where
9 jurisdiction sort of floats in the air.

10 And it then depends upon the
11 subsequent conduct of the -- of the claimant.
12 And we submit that this is not the regime that

13 is established by CAFTA. Jurisdiction is
14 determined as of -- as of the date, and there is
15 no sort of post -- post-waiver conduct is
16 irrelevant to the jurisdiction of the tribunal.

17 Mr. Smith suggests that our
18 submission is that the claimant has the
19 obligation to do nothing and may initiate
20 proceedings everywhere. That is not our
21 submission.

22 Our claimants' submission is not

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1 that they can -- they can engage in an abuse of
2 process. We have been very clear that the
3 tribunal has a supervisory mechanism to ensure
4 that claimants did not act in good faith. The
5 claimants accept that -- that the claimant has
6 an obligation to arbitrate in good faith, that
7 the tribunal can -- can control the use of
8 waivers, but the submission is that there simply
9 is no bad faith in this -- this circumstance.
10 The -- there was never a request to discontinue.
11 And the -- the attorney general's position was

12 in -- in his letter to the -- to ICSID that
13 whatever the claimants did, it didn't matter.
14 It was pointless because jurisdiction was -- was
15 lost.

16 In conclusion, the claimants submit
17 that CAFTA Article 18.2 should not be
18 interpreted to read in a restrictive
19 jurisdictional condition. The claimants fully
20 satisfied the jurisdictional requirement. The
21 claimants submit that the preliminary objection
22 must be rejected in its entirety with cost to

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1 the claimants. And the claimants respectfully
2 request that the tribunal grant the relief
3 requested in the claimants' response at
4 paragraph 101.

5 I will now conclude, unless there
6 are any further questions.

7 MR. Van den BERG: There are no
8 further questions. Thank you.

9 MR. NEWCOMBE: Those are my
10 remarks.

11 MR. Van den BERG: This concludes

12 the rebuttal by the claimants.

13 You said there was liberty to reply
14 before the lunch break. I see Mr. Smith looking
15 with some consternation.

16 MR. SMITH: I would like the
17 opportunity to reply briefly. I assure you I
18 will be brief, but I would like maybe just one
19 or two minutes to gather my thoughts.

20 MR. Van den BERG: Two-minutes
21 recess.

22 (Recess.)

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1 MR. Van den BERG: Mr. Smith, are
2 you ready?

3 RESPONDENT'S SURREBUTTAL BY

4 MR. SMITH:

5 MR. SMITH: Thank you. I know it's
6 late. I will be brief.

7 I just first want to quickly
8 correct a couple of factual misstatements that
9 were made.

10 El Salvador did not request that

11 the United States issue any specific sort of
12 non-disputing party submission in this case.
13 It's true, obviously, that El Salvador consulted
14 with the other party and invited them to make a
15 decision, but it certainly wasn't a request to
16 make a particular type of decision. And
17 El Salvador was perfectly ready to have them put
18 in a submission that was contrary to
19 El Salvador.

20 It is equally true that their
21 decision not to make a submission in no way
22 infers that their position has changed. And

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1 there was not some sort of a competition between
2 the parties to see if they could get the US to
3 submit. And then since they didn't, somehow the
4 US now supports the position of the claimants.
5 But, again, I can't speak for the US.

6 The other -- the other point of
7 fact is that the law firm of Dewey & LeBoeuf
8 does not represent Nicaragua and does not
9 represent Costa Rica. In fact, our law firm has
10 been adverse to Costa Rica in a recent ICSID

11 case in Galube [phonetic] versus Costa Rica. So
12 I wanted to clarify those facts.

13 Another issue that was raised that
14 I think needs brief clarification is whether
15 somehow El Salvador had forced claimants into
16 some sort of a situation where they were going
17 to be faced with a statute of limitations, and
18 somehow El Salvador is to blame for the fact
19 that they couldn't act in conformity with their
20 waivers. There's a couple of things.

21 First, claimant was at liberty at
22 any time to act in conformity with their

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1 waivers. But even if we look to the point where
2 El Salvador brought the issue to their
3 attention, they were still at least a little
4 over two months away from the running of the
5 statute of limitations, because El Salvador has
6 been very clear that the three-year period in
7 CAFTA runs not from the date of a particular
8 act, but from the date on which the possible
9 claimant becomes aware of the act and aware of

10 those damages. That date was September 13th,
11 2006, when the -- when the revocation of the
12 environmental permits was notified to the
13 claimants; and therefore, the date of the
14 running of the statute of limitations would have
15 been September 13th, 2009.

16 They had plenty of time from the
17 time they filed their case until that date to
18 withdraw this proceeding with -- seek
19 termination of the proceedings in El Salvador
20 and then refile a new case, but they chose not
21 to do that. It was not El Salvador's obligation
22 to tell them that they should have done that or

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1 invite them to do that.

2 As regards the joint venture, the
3 issue of the relationship between Commerce, San
4 Sebastian Gold Mines, and the Commerce/SanSeb
5 joint venture, they've now taken the position
6 that San Sebastian Gold Mines is an independent
7 investor and is making their claims based on
8 their investments that is based on their
9 percentage participation in the joint venture.

10 That's not the way that they pleaded this case.
11 They pleaded this case as if they had
12 independent rights independent of the joint
13 venture.

14 But, more importantly, under their
15 new representation of the facts where Commerce
16 Group is a holder of all of the interests, the
17 recipient of the environmental permits, the
18 holder of the concession, and the recipient of
19 the revocation of the environmental permits, not
20 only does San Sebastian Gold Mines have no
21 interest and no claim in El Salvador, the joint
22 venture doesn't either. It would only be

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1 Commerce. So again, they're still in the same
2 position of having to choose between either they
3 have no claims because they were not involved or
4 they were a part of the proceedings and they
5 violated their waivers. They can't have it both
6 ways, but they keep trying to have it both ways.

7 I also just want to point out,
8 there has been a considerable discussion of

9 whether or not the waiver applies to the
10 investment law proceedings regarding the
11 investment law before this tribunal. We've
12 heard the position of the parties.

13 From El Salvador's point of view,
14 that issue is not yet ripe for decision. It has
15 not been placed before the tribunal.

16 El Salvador again reserves its right to raise
17 that issue if the time came, but would hope that
18 the tribunal would reserve a decision on that
19 until it has been fully briefed, as it is a
20 rather significant and complicated legal issue.

21 And, finally, with regard to the
22 issue of whether or not El Salvador could have

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1 taken the waiver to the Supreme Court of
2 El Salvador and sought the termination of the
3 case, they have said that the attorney general's
4 opinion submitted in response to the tribunals
5 in question did not address that issue. Of
6 course, it didn't address that issue. It was in
7 response to an entirely different question.

8 However, the case that was

9 submitted along with that -- with the
10 respondent's submission, one of the two Supreme
11 Court cases clearly states that the only way for
12 a termination under Article 40 by a party is for
13 the claimant itself or a representative of the
14 claimant to request in writing to the tribunal
15 for discontinuance.

16 So I -- while claimants may not
17 have their own separate knowledge of this issue
18 under Salvadorean law, I don't think they've put
19 forward anything to challenge that position.

20 And just finally, to read it:

21 "In this regard, this chamber
22 clarifies that the ground for discontinuance

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1 provides for in Article 40 letter B of the Law
2 of the Administrative Litigation, jurisdiction
3 is an integral part of the right of a petition
4 that every citizen has when appearing before the
5 judicial body. Such expression is of concrete
6 character, just as a claim filed in writing and
7 admitted by this tribunal indicates at the

8 beginning of the process, the discontinuance is
9 the concrete expression by the claimant in
10 writing before this tribunal that it does not
11 intend to continue with the proceeding."

12 One final point. Claimants'
13 counsel has said that it is not their position
14 that the waiver requires them to do nothing.
15 But that is exactly what claimants' counsel has
16 claimed in this case, that because they took no
17 affirmative actions, they have not violated
18 their waiver. But of course everyone knows that
19 violations can be undertaken by act or omission,
20 and claimants had no right just to do nothing
21 when they had a proceeding for the court of
22 El Salvador that was in violation of the waiver

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1 which they could have and should have and had
2 the obligation to discontinue.

3 Thank you.

4 MR. Van den BERG: Mr. Machulak,
5 you have, also, the possibility for a short
6 surrebuttal.

7 CLAIMANTS' SURREBUTTAL

8 BY MR. MACHULAK:

9 MR. MACHULAK: I didn't want to --
10 I did not want to leave on a note that somehow
11 suggested that I gave misinformation to this
12 tribunal.

13 In the very last paragraph -- and
14 you can see the web site yourself -- there's a
15 press release from Dewey & LeBoeuf that they're
16 representing the governments of Costa Rica,
17 El Salvador, and Nicaragua in a lawsuit. I
18 don't know how to display the whole article on
19 the web site, but that's the top part of it.
20 And my information from this press release is,
21 their representation started within the last
22 couple of months. So I leave it to you to

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1 decide what is the accurate information. That's
2 all I have to say on it.

3 MR. Van den BERG: Then we come to
4 the point in the agenda on the table of final
5 matters.

6 First of all, what is outstanding

7 is a very brief submission by the respondents
8 within seven days on the question of with or
9 without prejudice. The tribunal wonders whether
10 the claimants would also like to avail
11 themselves of this opportunity to file also, in
12 a very brief submission, on exactly the same
13 question so that we get the same information.

14 All right. So both parties will
15 file within seven days of today. This is by
16 next Tuesday, not the Tuesday tomorrow, but
17 tomorrow, seven days -- or eight days, if my
18 count is correct. Take the seven days a little
19 bit generously.

20 The question is whether the
21 discontinuance of administrative proceedings
22 before the Supreme Court of El Salvador is with

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1 or without prejudice to reinstatement, to use
2 the full term.

3 Then the time for rendering the
4 awards -- this is also an expedited proceeding.
5 If I understand correctly, the time started to
6 run on 16 August 2010, if that's correct. I

7 look to the parties whether my start date is
8 correct.

9 MR. SMITH: El Salvador agrees it's
10 correct.

11 MR. Van den BERG: And can, then,
12 both parties help me on the 50 days? Who knows
13 the answer?

14 MR. SMITH: I believe that because
15 there was a hearing, that in fact the tribunal
16 has 180 days.

17 MR. Van den BERG: No. We start
18 with the before position. A good lawyer, you're
19 immediately asking for an extension.

20 Let's see. Where does 150 days
21 bring us? Somewhere in January, isn't it?
22 Anybody knows the exact date? You can do it on

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1 Excel.

2 VOICE: January 13th, 2011.

3 MR. Van den BERG: Now, the
4 tribunal will endeavor to render its decision
5 before January 13th, 2011. It might be that we

6 have to apply for extension for 30 days. That,
7 we will try to avoid.

8 We are blessed by the cooperation
9 of the parties at the first session that the --
10 we do not have to submit simultaneously the
11 Spanish translation. In other cases, that is --
12 really, that delays enormously the process. But
13 here you will get immediately the English text,
14 and then we will, as quickly as we can, provide
15 you with the Spanish text.

16 This leads me to the next question.
17 Are there any issues or questions left of a
18 procedural administrative nature that the
19 parties would like to raise at this point in
20 time?

21 Mr. Machulak?

22 MR. MACHULAK: I don't think so.

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1 No, Mr. President.

2 MR. Van den BERG: Thank you.

3 Mr. Smith?

4 MR. SMITH: Excuse me?

5 MR. Van den BERG: Do you have any

6 questions or issue which you would like to raise
7 on a procedural or administrative nature?

8 MR. SMITH: No, not at this time.

9 MR. Van den BERG: Now, then the
10 tribunal would like to ask both parties whether
11 the fundamental principles of due process have
12 been observed by this tribunal until now in the
13 sense that has there been any serious departure
14 from the fundamental rule of procedure taken
15 place within the meaning of Article 52,
16 paragraph 100-E, of the Washington Convention?

17 MR. MACHULAK: Absolutely not.

18 MR. SMITH: No, nothing from the
19 perspective of El Salvador.

20 MR. Van den BERG: Thank you. Then
21 the tribunal would like to thank, first of all,
22 the court reporter for the perseverance. And we

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1 would like thank very much, also, the
2 interpreters for keeping up. Muchas gracias.
3 And the ICSID secretariat, who as of today had a
4 minicrisis in terms of finding out because the

5 site was crashed. We much appreciate that they
6 got us back on the air.

7 We particularly would like to
8 extend thanks to the secretary of the tribunal,
9 Marco Montanes-Rumayor. And above all, the
10 tribunal would like to commend counsel on both
11 sides for the high degree of professionalism,
12 but also the courtesy they have presented in the
13 case here today, and also in their written
14 pleadings.

15 And we do not fail, also, to thank
16 the back benches, because we know that the
17 paralegals and the junior lawyers have worked a
18 lot in this case as well. So we also extend our
19 thanks to them.

20 On that, I close the hearing.

21 Thank you.

22 (Deposition adjourned, 5:50.)

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I N D E X

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4 Arguments

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BY MR. SMITH 21, 190, 274

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BY MR. MACHULAK 100, 220, 281

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BY MR. NEWCOMBE 121, 225

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CERTIFICATE

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I, TAB PREWETT, A Registered

3

Professional Reporter, Notary Public, Certified

4 LiveNote Reporter, and Certified Shorthand
5 Reporter, do hereby certify that the foregoing
6 is a true and accurate transcript of the
7 testimony as taken stenographically by and
8 before me at the time, place and on the date
9 hereinbefore set forth. I DO FURTHER CERTIFY
10 that I am neither a relative nor employee nor
11 attorney nor counsel of any of the parties to
12 this action, and that I am neither a relative
13 nor employee of such attorney or counsel, and
14 that I am not financially interested in the
15 action.

16 _____
17 Notary Public
18 My Commission expires February 9, 2014
19 Dated: November 15, 2010
20
21
22