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Mining for facts: *PacRim Cayman LLC v. El Salvador*

by

Alexandre de Gramont*

In his recent article, “Thinking twice about a gold rush: *Pacific Rim v. El Salvador*” (*Columbia FDI Perspectives*, No. 23, May 24, 2010), Professor Gus Van Harten uses the *PacRim v. El Salvador* arbitration, pending at the International Centre for Settlement of Investment Disputes (ICSID), as the basis for asserting a number of criticisms against the overall system of arbitration under investment treaties.

The problem is that Van Harten has embraced a version of the facts that is very similar to that promulgated by the Government of El Salvador (GOES), without even acknowledging the allegations made by PacRim. The one-sided presentation of the facts contributes, in part, to a critique of the system that is off-target.

I must disclose that I serve as counsel for the claimant in the *PacRim* case. Given that Van Harten has effectively presented only El Salvador’s side of the case, I will briefly present the claimant’s side here. The juxtaposition of PacRim’s version of the facts against El Salvador’s helps demonstrate why the issues posed by these cases are often more complex than presented in Van Harten’s “gold rush” article – and why a neutral, independent system to resolve these disputes is so important.

Van Harten’s premise is that GOES had to act against PacRim because of environmental concerns that GOES did not previously recognize when it invited PacRim to invest in the country, and when GOES enacted the mining and environmental laws under which PacRim carried out its activities in El Salvador. According to Van Harten, the issue is simply whether and how an investor should be given redress when a government has acted reasonably to safeguard its environment.

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But according to PacRim, GOES did not act reasonably, rationally or fairly. PacRim's project would have set new standards for environmentally clean gold mining in the Americas.

PacRim – led by a group of geologists who are dedicated to green mining and sustainable development – searched throughout Latin America before choosing this location in El Salvador. PacRim chose the site in large part because its geology allows for extremely clean, underground mining, with very limited surface disturbance and virtually no possibility of ground water contamination.

The project would easily meet the regulatory requirements of any developed country where gold is mined (including, for example, Sweden, Canada, and the United States), while also bringing enormous economic benefits to an especially impoverished region of an already poor country.

But El Salvador's regulators never ruled on PacRim's application. Nor have any of the laws and regulations under which PacRim invested in El Salvador been changed.

Rather, in the midst of a difficult election campaign, then-President Saca – attempting to outflank his opposition on the left – announced that his Administration would not grant any more mining permits. The only “changed circumstances” here involve a highly-charged political situation, where wildly inaccurate information and accusations against PacRim have made any rational, informed or balanced discussion of the issue impossible.

The real question posed by these circumstance is: in what forum are both sides most likely to receive a fair, neutral and objective hearing on their respective cases?

Van Harten is critical of the system's use of independent arbitrators. He suggests that it would be better for government appointed judges to hear these cases, or that it would be preferable to select arbitrators from “a roster of eminent jurists, drawn from outside the commercial arbitration industry.” But governments like El Salvador's agreed to have these cases heard by independent arbitrators, who are not selected by states or governmental organizations, to remove any appearance of governmental influence or pro-government bias.

Van Harten's suggestion that the “business interests” of the independent arbitrators who hear these cases are unknown – possibly raising conflicts of interest – is inaccurate. Each side typically picks an arbitrator, and the chair is usually appointed upon agreement of the parties. The arbitrators and their backgrounds are well known to the parties. Indeed, the parties and lawyers who use the system have effectively created a *de facto* list of arbitrators with significant experience in these cases. It includes former judges and government officials, law professors and private lawyers. In the *PacRim* case, the three arbitrators (an Argentine lawyer, a French law professor and an English barrister) not only have diverse backgrounds; they have collectively served as arbitrators in over twenty investor-state cases.

While Van Harten is correct that there have been some inconsistent and contrary rulings issued by tribunals in these cases, the same is true for virtually any court and any legal system. For the most part, the arbitrators are acutely aware of their obligation to create a consistent, transparent and predictable body of investment laws.

Van Harten is also correct that there is room for improvement. But much has been accomplished and improved in a system that was hardly used ten years ago. The drafters of CAFTA (which, along with El Salvador's Investment Law, provides the basis for PacRim's claims) and other so-called “new generation” treaties have attempted to address various critiques of earlier treaties. Among other things, CAFTA provides for great transparency, in which all of the pleadings and briefs, as well as the hearing, are public. In *PacRim*, the hearings have been broadcast live via the Internet (and can still be watched on ICSID's

website). It is difficult to envision a better way to resolve the factual (and legal) dispute between PacRim and El Salvador – and perhaps to improve the system through a candid, open and balanced debate concerning both its strengths and weaknesses.

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The Vale Columbia Center on Sustainable International Investment (VCC), led by Dr. Karl P. Sauvant, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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