

**INAUGURAL INVESTOR-STATE DISPUTE BROUGHT
UNDER THE DOMINICAN REPUBLIC-CENTRAL AMERICAN
FREE TRADE AGREEMENT**

Canada, El Salvador & United States
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The first ever investor-state dispute has been initiated under the investment provisions of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). Pac Rim Cayman, LLC (“Pac Rim”), a Nevada-based company that is a wholly-owned subsidiary of a large Canadian mining corporation lodged the complaint against the government of El Salvador. Pac Rim contends that El Salvador wrongfully denied it permits for exploration and development of several gold mine sites located in El Salvador. The International Center for Settlement of Investment Disputes (ICSID), an institution of the World Bank Group located in Washington, DC, is handling the case. The dispute raises several critical issues involving economic, environmental and human rights issues that could have long-range implications for the integrity of the DR-CAFTA.

The dispute dates back to 2002 when Pac Rim obtained permits from El Salvador’s Ministries of Economy and Environment to explore potential gold mining sites throughout the country. Shortly after Pac Rim began exploration, concerns arose about the environmental and health consequences of cyanide-based gold mining in the country. Concerns involved not only potential water and soil contamination but social concerns regarding the prospect of a massive increase in mining activity in the country. In 2005 a broad-based coalition of community-based organizations, research institutes, environmental and faith-based groups organized themselves as *La Mesa Nacional Frente a la Minería* (“*La Mesa*”) to lead a national campaign to ban metals mining in El Salvador. *La Mesa* successfully increased awareness throughout the country of mining’s potential environmental degradation, health problems and labor rights abuses. When Pac Rim reapplied for the final exploitation permits in 2006, then-President Antonio Saca refused to comply and ordered a full environmental assessment of the proposed mining.

President Saca’s refusal to grant the permit(s) prompted Pac Rim to initiate dispute settlement proceedings under Chapter 10 of DR-CAFTA. One of the key issues of the dispute that could have wide-ranging implications is the domicile of the Pac Rim subsidiary that was performing the work in El Salvador. When the work began the subsidiary was based in the Cayman Islands with its parent located in Canada. Accordingly, at the time the work was ongoing neither the subsidiary nor the parent had standing to bring a dispute under DR-CAFTA because the Cayman Islands and Canada are not parties to the agreement. In a move that many decry as foreign-shopping writ large, the Pac Rim subsidiary reincorporated in Nevada after the concessions were denied in an apparent effort to gain DR-CAFTA eligibility through the US.

DR-CAFTA’s investor-state dispute settlement provisions require arbitration.

ICSID was selected to arbitrate this unique dispute that involves key threshold jurisdiction issues as well as significant questions regarding a sovereign nation's right to regulate and protect its environment in the context of a free trade agreement's non-discrimination principles. The primary legal provisions at issue are: (i) Article 10.3: "National Treatment"; (ii) Article 10.4: "Most-Favored Nation Treatment"; (iii) Article 10.5: "Minimum Standard of Treatment"; (iv) Article 10.7: "Expropriation and Compensation"; and (v) Article 10.16.1(b)(i)(B): "investment authorizations." Pac Rim also alleges a breach of domestic Salvadoran law but it is not clear whether the arbitral panel has jurisdiction to rule on issues of domestic Salvadoran law.

Outside of the important jurisdictional question, the ultimate substantive issue for the arbitral panel is whether El Salvador violated Chapter 10 by treating Pac Rim differently than it would treat a Salvadoran or other non-US mining company. El Salvador answered the dispute denying all allegations and lodging Preliminary Objections pursuant to Articles 10.20.4 and 10.20.5. El Salvador also sought a complete dismissal of all claims on the ground that Pac Rim does not have an absolute right to a mining concession and that it nevertheless treated Pac Rim just as it would a company from any other national. El Salvador maintains that it would have denied any concession request in light of the environmental and other concerns. The three judge ICSID tribunal recently denied all of El Salvador's preliminary objections and claims.

The tribunal's final decision in this case will have far reaching implications in the free trade and investor-state world. Even though arbitration decisions bind only the parties to the dispute, if the tribunal maintains jurisdiction we could see a proliferation of corporate domiciliary changes in order to take advantage of international obligations that are otherwise unavailable to certain companies. The substantive issue is no less intriguing and important. The tribunal faces the long-lingering question of how far sovereign nations can go to protect the environment but maintain international investor-state obligations. Whether El Salvador is acting as a true steward of its environment or is simply disguising economic discrimination in the garb of environmental protection remains to be seen. This dispute could serve as a guidepost for future actors on both sides of the development v. environment debate.