# Kluwer Arbitration Blog

## The "99%" take on investment tribunals

Annalise Nelson (Associate Editor) · Thursday, December 15th, 2011



As World Bank protests go, today's was a pretty mild one. This afternoon, a group of labor and environmental activists huddled outside World Bank headquarters in DC to protest the on-going *Pacific Rim v. El Salvador* CAFTA arbitration, complete with a giant balloon of a sinister corporate-looking orange cat, an ensemble of guitarists, and panels declaring "the solidarity of the 99%" with El Salvador.

The 99% theme may be new–it's a clear reference to the populist Occupy movements, as the posters testify. But the message of the protestors hasn't much changed from earlier protests. The protestors, headed by the Institute for Policy Studies and supported by a number of American labor organizations including the AFL-CIO, have issued an open letter to the President of the World Bank, the ICSID Secretary General, and the three members of the Pac Rim tribunal. The letter accuses Pac Rim of "using ICSID and the investor-state rules in a free trade agreement to subvert a democratic nationwide debate over mining and sustainability in El Salvador," and singles out the move of Pac Rim's subsidiary from the Cayman Islands to Nevada as "an abuse of process designed to qualify for jurisdiction under DR-CAFTA."

Pacific Rim LLC, a subsidiary of the Vancouver-based Pacific Rim Mining Corporation, brought the CAFTA dispute against El Salvador in late 2008. The company claims that the state had violated the National Treatment, Most-Favored-Nation Treatment, Minimum Standard of Treatment and Expropriation and Compensation provisions of the CAFTA, and seeks $77 million in damages. Pac Rim had received exploratory permits by El Salvador to develop the El Dorado gold mine years earlier. But El Salvador never issued the final permit necessary for the company to begin extraction activities, citing potential environmental and health concerns of the project.

At dispute in the jurisdictional stage of the case is whether the company engaged in impermissible treaty-shopping. El Salvador has alleged that Pac Rim manipulated the corporate form of its Cayman Island subsidiary, changing its nationality so that it could assert jurisdiction as a national of the United States, a CAFTA member state.

Under the terms of the CAFTA, the Pac Rim arbitration must be conducted publicly. So far, in its jurisdictional stage, the legal pleadings and oral hearings have been open to the public, two non-disputing parties (the United States and Costa Rica) have presented written submissions on the interpretation of the Agreement, and the Tribunal has accepted an amicus brief from a coalition of community organizations, research institutions, and environmental, human rights and faith-based

non-profits. This has, by and large, been a model case for increasing the transparency of proceedings. As Luke Peterson has pointed out in a previous post, the Pac Rim arbitration has progressed smoothly despite its high degree of politicization. That seemed to be no exception today.

A decision on jurisdiction in the case is expected fairly soon. The event today also coincides with the ongoing public hearings in another CAFTA case, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), which are slated to conclude tomorrow.

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