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Thinking twice about a gold rush: *Pacific Rim v El Salvador*

by
Gus Van Harten[*]

Whether it concerns oil drilling or gold mining, sometimes a government, facing new circumstances, must change its mind.

This reality creates a tension in law between encouraging stability and allowing adaptation to new information and new situations. The "gold rush" CAFTA lawsuits[1] against El Salvador reveal this tension.

Pacific Rim, a Canadian-based mining firm, has brought one of two gold mining lawsuits against El Salvador under CAFTA.[2] Since the early 2000s, Pacific Rim has spent money looking for gold in El Salvador. It did so under exploration (but notably not exploitation) licences that were issued in 1996 and that Pacific Rim acquired in 2002. A few years later, after Pacific Rim decided where it wanted to dig, the government had adopted a more cautious position on gold mining.

So, Pacific Rim has invoked its privilege – uniquely available to foreign investors under international law, via investment treaties – to sue El Salvador. It argues that the government should have allowed it to mine for gold; the government responds that Pacific Rim failed to satisfy steps in the approvals process, including an acceptable environmental assessment. Pacific Rim seeks at least $77 million for its costs and hoped-for profits.

El Salvador is a small, poor country with precariously few water resources. It lost 20% of its surface water in the past 20 years, and 95% of the rest is reportedly

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[1] CAFTA is short for the United States-Dominican Republic-Central America Free Trade Agreement, signed in 2004.

[2] The second lawsuit is by U.S.-based Commerce Group Corporation. I focus on the Pacific Rim case here because there is more information publicly available about it.

contaminated.[3] Industrial gold mining is a recent prospect for the country, and there are serious concerns about the risks it poses to people's health and livelihoods, especially their access to clean water.

How should the tension here between stability and change be resolved?

On the one hand, it seems unfair that a company that put money into exploration should be frustrated when applying for permission to exploit what it has found. On the other hand, all mining companies must be aware that a government might change its approach over time to health and environmental risks of mining. If taxpayers had to compensate everyone who lost out in bets on the social or environmental feasibility of a project, this would disadvantage those who are more prudent, patient, or environmentally conscious.

The question of how the arbitrators in *Pacific Rim v El Salvador* might resolve this tension is challenging to answer. Although not the fault of the arbitrators, it raises some important concerns.

First, under CAFTA and other investment treaties, the constraints put on governments are both exceptionally potent and highly malleable. This makes it very important, and yet very difficult, to assess the legal standards that will apply in particular cases. In numerous awards to date, tribunals have interpreted provisions on expropriation, national treatment and fair and equitable treatment in starkly divergent ways. In turn, they have fueled high-stakes uncertainty in the evaluation of policy space and litigation risk.

Second, investment treaties rely on the remedy of damages in cases often stemming from difficult judgment calls by governments in complex areas of policy. This can put arbitrators in a bind. Do they order a state to pay damages after finding that it violated an unclear rule? Or do they dismiss the claim, leaving the investor reeling after a long, expensive arbitration? Compared to other forms of public law judging, the system gives few options to respond to government conduct that is characterized, well after the fact, as unlawful.

Third, the use of arbitrators instead of judges to decide basic tensions in public policy makes it essential that the process be credible and independent. However, investment treaty arbitration lacks key safeguards of independence that apply to courts, including security of tenure, an objective method of assigning judges to specific cases, and checks on income-earning activities outside of the judicial role.

This invites unsavoury questions. What are the business interests of the arbitrators chosen to decide a case? With whom might they have a common outlook at the International Chamber of Commerce, ICSID and others that wield key powers over arbitrator appointments? By allowing the arbitration industry to make final decisions in matters of public law, investment treaties remove longstanding safeguards that protect judges from economic and financial entanglement and that ensure public confidence in the courts.

How should governments respond? One option is to re-introduce a mediating role for domestic courts, including perhaps the courts of neutral states not involved in a specific dispute. Another is to look for ways to re-introduce safeguards of judicial independence, such as by designating a roster of eminent jurists, drawn from outside the commercial arbitration industry, from which arbitrators would be chosen.

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[3] R. Steiner, "El Salvador: gold, guns, and choice," Report for the International Union for the Conservation of Nature and the Commission on Environmental, Economic, and Social Policy (February 2010).

On the rules, governments could clarify that investment treaties are designed to offer an exceptional remedy in cases of serious abuse or targeted discrimination against a foreign investor, but not a wide-ranging opportunity to challenge general laws and policies. Nearly all government measures harm some people while helping others, not because this is the aim of the regulation but because all general decisions, by definition, have ripple effects across the economy and society. Requiring public compensation for those foreign investors who are "harmed" by a general measure skews markets, as well as regulation, by inappropriately privileging one group of private interests over all others.

There are various ways to address the lack of independence, fairness and coherence in investment treaty arbitration. But the root questions are familiar. How should the tension in law between stability and change be resolved, and by whom?

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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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