“Denial of Benefits” Clause in *Pac Rim v. El Salvador* and *Liman v. Kazakhstan*

*Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Respondent’s Jurisdictional Objections, 1 June 2012 (V.V. Veeder, Guido Santiago Tawil, Brigitte Stern) and Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award, 22 June 2010 (Karl-Heinz Böckstiegel, Kaj Hobér, James Crawford)*

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**Keywords**


The decisions of the ICSID tribunals in *Pac Rim v. Republic of El Salvador* and *Liman Oil v. Republic of Kazakhstan* raise interesting issues relevant in the context of international investment law, one of which is analyzed here below. Although both cases were submitted to ICSID, *Pac Rim v. El Salvador* was based on the provisions of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA), while *Liman Oil v. Kazakhstan* was brought

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under the provisions of the Energy Charter Treaty (ECT). The issue discussed in this comment and extensively debated by the tribunals concerns the right of the host State to deny an investor the benefits of the applicable investment treaty. One of the hot topics related to the denial-of-benefits right appeared to be the timeliness of the invocation of this right by the host State. Although they reached divergent conclusions, both tribunals emphasized that the commencement of the arbitration proceedings is not in itself an impediment for the exercise of the denial-of-benefits right.

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In Pac Rim v. El Salvador, the Claimant, Pac Rim Cayman LLC (PRC) was a legal person organized under the laws of Nevada, USA, owned by Pacific Rim Mining Corporation, a legal person organized under the laws of Canada. The Claimant also advanced claims on behalf of two subsidiary companies: (i) Pacific Rim El Salvador (PRES), the owner of certain rights in the mining areas El Dorado Norte, El Dorado Sur and Santa Rita in El Salvador; and (ii) Dorado Exploraciones (DOREX), the owner of certain rights in the mining areas of Huacuco, Pueblos and Guaco, also in El Salvador. The Claimant, a national of a Contracting State to the ICSID Convention and to CAFTA, alleged that the Respondent breached its treaty obligations under CAFTA on the basis of (a) the Respondent’s arbitrary and discriminatory conduct, lack of transparency, unfair and inequitable treatment in failing to act upon applications for mining exploitation concessions and environmental permits following the Claimant’s discovery of valuable deposits of gold and silver exploration licenses granted by the Respondent; (b) the Respondent’s failure to protect the Claimant’s investments in accordance with the provisions of its own law, and (c) the Respondent’s unlawful expropriation of the investments made by the Claimant and its subsidiaries in El Salvador. According to the Claimant, in 2002 El Salvador induced and encouraged the Claimant and its subsidiaries to spend tens of millions of US$ to undertake mineral exploration activities in El Salvador, based on the licenses duly granted by the Government of El Salvador and with the approval of

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3 The facts of the case are largely set out in an earlier decision of the Tribunal in Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010.
4 Ibid., para. 8.