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World Bank Allows Canadian Miner To Keep Pursing El Salvador's Gold

by Benjamin Witte-Lebhar

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El Salvador has already paid dearly for its trend-bucking decision to not open up the country to foreign mining interests. The government has had to shell out millions of dollars in legal fees to fend off arbitration suits filed by jilted mining firms. For anti-mining groups operating on the grassroots level, the high-stakes standoff has been even costlier: at least four Salvadoran activists have been murdered in recent years.

Thanks to the World Bank, the impoverished Central American country can expect those costs to keep accruing—at least for another year and a half. On June 1, a panel from the World Bank's International Centre for Settlement of Investment Disputes (ICSID) decided to move forward with a multimillion-dollar arbitration case filed by Canada's Pacific Rim Mining Corporation, which claims El Salvador's de facto freeze on issuing mining permits amounts to "expropriation."

Pacific Rim filed the case in 2009 after failing for several years to secure permission to operate a gold and silver mine in the department of Cabañas, approximately 65 km east of San Salvador ([NotiCen, Dec. 10, 2009](#)). The disputed El Dorado mine is thought to contain some 1.4 million ounces of gold, which currently sells for more than US\$1,600 an ounce. When Pacific Rim first explored the site in 2002, gold was selling for less than US\$310 an ounce.

The company claimed it was unfairly misled by the Salvadoran government, which allowed it to spend some US\$77 million exploring the site only to later withhold final operating permits. Pacific Rim insists El Salvador's decision was "arbitrary" and thus a violation of both Salvadoran law and the US-Dominican Republic-Central American Free Trade Agreement (CAFTA-DR), which El Salvador implemented in 2006. The agreement's Chapter 10 allows foreign companies that feel their profit potential is threatened by local governments to sue their host country for cash compensation.

The Salvadoran government has already spent an estimated US\$4.5 million trying to convince the ICSID otherwise. The expense sheet does not include what El Salvador paid to defend itself against the Commerce Group Corporation of Milwaukee, Wisconsin, another North American mining firm that tried to sue the government via the ICSID. The tribunal dismissed that case last year on a technicality but ordered the two parties to split all associated court costs ([NotiCen, April 14, 2011](#)).

The defense claims that Salvadoran authorities had every right to decide, for environmental and public health reasons, not to allow mining at Las Cabañas. Lawyers for the Salvadoran government also objected to Pacific Rim's CAFTA-DR argument—for the simple reason that the company hails from Canada, which is not a member of the seven-nation trade alliance. Pacific Rim tried to sidestep that stumbling block by filing its ICSID suit via a fully owned subsidiary, Pac Rim Cayman, headquartered in the US state of Nevada.

In its June 1 ruling, the ICSID agreed with El Salvador that CAFTA-DR rules do not apply in this case since Pacific Rim does not have sufficiently "substantial" business activities in the US. But the tribunal did declare itself eligible to proceed with the matter under El Salvador's own investment

law. Observers expect the next phase of the already three-year-old case to take at least another 18 months.

"The Tribunal considers that neither the Claimant nor the Respondent can be regarded as having either wholly succeeded or wholly lost their respective cases," the ruling reads. "Whilst the Claimant's CAFTA Claims can no longer proceed in this arbitration as a result of this Decision, the Claimant's Non-CAFTA Claims may now proceed to the merits of the Parties' dispute."

Both sides claim victory

Both sides are taking a glass-is-half-full response to the ruling. In a press release directed at shareholders, Pacific Rim president and CEO Tom Shrake said that the ICSID's refusal to consider the matter within the context of CAFTA-DR "has no impact on the case."

"What is relevant," he added, "is the fact that we will continue to protect our company's rights with ICSID, at the World Bank. It is our hope the Government of El Salvador will put an end to this dispute and put her people and our industry back to work. Every mining concession in El Salvador has been expropriated, resulting in the loss of jobs, tax revenues, and stability, as well as El Salvador's standing in the foreign investment community."

One of the company's hired attorneys, R. Timothy McCrum, struck an equally optimistic note. "The final phase of the case will now reveal that there is no genuine environmental controversy here but simply a politically motivated effort to expropriate this gold resource discovered by extensive mineral exploration drilling at enormous expense," the Washington, DC-based lawyer said.

Salvadoran authorities say they also have reason to applaud the ruling—in part because the CAFTA-DR argument was thrown out but also because Pacific Rim must now limit its case to matters that occurred after 2008. Most of the company's original arguments, in contrast, relate to events in and around 2004, when Salvadoran authorities first rejected Pacific Rim's permit applications.

"The complaints against El Salvador that have survived [this far into the process] are more worn down than what Pacific Rim presented to the ICSID tribunal in the previous phase," Benjamín Pleités Mazzinij, a Salvadoran government lawyer, told *El Diario de Hoy*.

El Salvador's anti-mining activists and their allies, however, see far less cause for celebration in the ICSID ruling, which at the very least will laden the government with millions of dollars in additional legal fees. The government stands to lose far more—maybe even as much as US\$100 million—if the ICSID ends up siding with the claimant.

"The attorney general should not create false expectations of success in the population," the Mesa Nacional frente a la Minería Metálica (MESA), a Salvadoran anti-mining coalition, wrote in a June 2 press statement. "While it may be true that the results in the cases brought before the ICSID against El Salvador [Commerce Group and Pacific Rim] could have been worse, the results have been the product of technical, procedural errors by the companies, to the extent that the government should be considered lucky."

"Neither the press, nor the population, should consider these results a success for the country and, consequentially, a loss for the company, because under the current rules of the game established by CAFTA and the investment law, sooner or later El Salvador will again be on the defense bench in some international tribunal," MESA added.

Fourth activist murdered

MESA, an umbrella group representing dozens of environmental, religious, human rights, and community organizations in northern El Salvador's Cabañas and Chalatenango departments, is particularly concerned about the effect metal mining would have on the country's waterways, which already suffer from serious pollution.

Pacific Rim's El Dorado, for example, is along the Rio Lempa, El Salvador's longest river and single-biggest source of drinking water. Although the company insists otherwise, opponents worry that at least some of the cyanide, mercury, and other toxins routinely used in gold mining could make it into the water. That would be bad news indeed for a river that, according to the Ministerio de Medio Ambiente y Recursos Naturales (MARN), is too polluted in most places to be used safely even for irrigation purposes ([NotiCen, May 10, 2012](#)).

Polls suggest a majority of Salvadorans share MESA's concerns about metals mining. The country's political leaders have sided against such ventures as well. Before leaving office, then President Antonio Saca (2004-2009) of the conservative Alianza Republicana Nacionalista (ARENA) announced a freeze on mining permits. His moderate successor, President Mauricio Funes, has maintained that position, despite intense legal pressure from Commerce Group and Pacific Rim, which filed their ICSID suits around the time he took office.

The lawsuits have coincided with a series of murders in El Salvador involving anti-mining activists. Marcelo Rivera, a community organizer and outspoken critic of the El Dorado project, disappeared in June 2009. His lifeless body was discovered two weeks later at the bottom of a well. Six months after that—also in Cabañas—two more mining opponents were killed: Dora Sorto Recinos, who was eight months pregnant at the time; and Ramiro Rivera, who was ambushed while driving his pickup truck ([NotiCen, Jan. 28, 2010](#)). A fourth activist, a young volunteer named Juan Francisco Durán Ayala, was murdered last June.

Calls for a legislature-approved mining ban

If anything, the murders appear to have steeled President Funes' resolve in the face-off with foreign mining interests. "I will not put the public health of the population at risk in exchange for some additional income that we might receive," the president explained in a statement released just after Durán Ayala's death.

MESA and its allies, however, wonder just how long Salvadoran authorities can and will stand up to pressure from the likes of Pacific Rim—especially if the government ends up losing the ICSID arbitration case. And as long as El Salvador remains a member of CAFTA-DR, or if it doesn't amend its investment law, other suits could follow, they warn.

There is no guarantee, furthermore, that the current permit freeze—which is simply a matter of political whim—will survive future leadership changes. MESA insists that if the government really wants to protect El Salvador's environment and citizens, it ought to team up with the unicameral Asamblea Legislativa (AL) and ban metals mining outright.

So far, efforts for such a ban have stalled in the AL, where ARENA has a thin numbers advantage over the leftist Frente Farabundo Martí para la Liberación Nacional (FMLN). Just last month, however, the Funes government did present the results of a long-promised Evaluación Ambiental

Estratégica (strategic environmental assessment) for the mining sector. The government study, which took two years to complete, concluded that El Salvador "is not in a position" to green light new mining projects—at least for now.

MESA and its allies are hoping the report will convince the legislature to finally push through a mining ban. If not, critics say the Evaluación Ambiental Estratégica could end up serving as a how-to guide for future governments eager to do just the opposite: reintroduce metals mining.

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