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Benjamin Witte-Lebhar

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El Salvador Wins High-Stakes Investment Dispute with Multinational Miner

by Benjamin Witte-Lebhar
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A jilted mining company’s years-long quest to secure a multi-million-dollar settlement from El Salvador came to a crashing halt this month when an arbitration panel in Washington, D.C., finally decided that the controversial claim lacked merit.

The International Centre for Settlement of Investment Disputes (ICSID), a business tribunal connected to the World Bank, issued the ruling on Oct. 14, ending a punishing process that could have required the cash-strapped Central American country to shell out US$250 million. As it was, El Salvador spent a reported US$13 million on legal bills over the course of the proceedings, which the Pacific Rim Mining Corporation, a Canadian enterprise, launched in 2009 after Salvadoran authorities refused to issue an extraction permit for a mine the company had spent years—and an estimated US$77 million—exploring and developing (NotiCen, Dec. 10, 2009).

Pacific Rim was later acquired by Australia-based OceanaGold, which continued to argue that El Salvador’s decision not to grant an extraction permit for El Dorado, as the mine is known, was “arbitrary” and thus a violation of the country’s investment laws. It pointed to a tentative moratorium on metals mining, decreed in 2008 by then President Antonio Saca (2004-2009) and still in effect, eight years later, as evidence that the decision was purely political. The defense team countered by saying that El Salvador’s refusal to green-light the El Dorado project predated the mining freeze and was based on technical, rather than political considerations.

The ICSID agreed, ultimately, that El Salvador had legitimate reasons to reject Pacific Rim’s petition for an operating license, one of them being that the company never even secured ownership of much of the property in question. El Salvador acted fairly, therefore, and shouldn’t be held accountable for the company’s squandered investment dollars or would-be profits, the tribunal determined. The three-person panel also ordered OceanaGold to cover US$8 million of El Salvador’s legal expenses.

“This is a victory for the entire people of El Salvador,” Attorney General Douglas Meléndez, who traveled to Washington to receive the ruling, told reporters. “We hope the mining company accepts the result and quickly reimburses the money.” He also called it a “mission accomplished” for the people of Cabañas, the northern department where El Dorado is located.

The ruling attracted a fair amount of international attention as well, earning write-ups in The New York Times and The Guardian and prompting statements from watchdog groups like MiningWatch Canada, which has long pointed to the case as a prime example of how outside corporations can take advantage of international trade and investment rules to pressure and/or punish host countries for decisions they disagree with. “Within the universe of investor arbitration, there are lots of frivolous cases. There is lots of abuse of process. And this is one of the worst,” Jaime Kneen, the group’s communications and outreach coordinator, told the Latin America Data Base in a telephone interview.
Ponderous proceedings

Pacific Rim originally based its investor-dispute claim on rules contained in the US-Dominican Republic-Central American Free Trade Agreement (CAFTA-DR), which allows outside companies that feel their profit potential is threatened by local governments to sue for cash compensation. The rules apply only to companies hailing from one of CAFTA-DR’s seven participating countries, a list that does not include Canada. The Vancouver-based Pacific Rim was careful, therefore, to file its ICSID suit through a fully owned subsidiary, Pac Rim Cayman LLC, which it had registered shortly beforehand in the US state of Nevada.

The Salvadoran defense team challenged Pacific Rim’s supposed US connection as a legal ploy. After three years of deliberations, the ICSID eventually accepted El Salvador’s argument and ruled that Pacific Rim could not, after all, pursue the case based on CAFTA-DR (NotiCen, June 21, 2012). But the tribunal did declare itself eligible to proceed with the matter under El Salvador’s own investment law, setting the stage for what would be another four years of expensive legal wrangling.

Pacific Rim, in the meantime, was acquired by OceanaGold, which is headquartered in Melbourne, Australia, and has operations in New Zealand, the US, and the Philippines. OceanaGold completed the purchase in 2013. In an Oct. 14 press release, the company acknowledged that it was “disappointed” by the ICSID ruling. It also made a point, however, of downplaying the case as something it “inherited” from Pacific Rim. OceanaGold’s stated goal, it went on to say, was always “to reach an amicable resolution of this matter which would benefit all parties.”

For critics like Kneen, the company’s characterization of the case as an unfortunate consequence of the Pacific Rim purchase rings false. “It’s disingenuous at best,” he said. “Because when they bought Pacific Rim, Pacific Rim’s only asset was a court case. The only project Pacific Rim ever had was this one in El Salvador. And at the time that OceanaGold bought Pacific Rim, it was precisely to gamble on the court case.”

Listening to the people

This is the second major ICSID case that El Salvador has had to endure in recent years for refusing to open its subsoil to foreign mining interests. A US firm headquartered in Milwaukee, Wisconsin, filed its own hefty claim in 2009 after Salvadoran authorities refused to renew the company’s operating license for a gold mine in La Unión, near the Honduran border. El Salvador made the decision after tests conducted on the site in 2006 found evidence of serious water pollution.

The company, Commerce Group Corporation, sought US$100 million in damages but ended up empty handed when the ICSID dismissed the suit in 2011 on a technicality (NotiCen, April 14, 2011). The case was not, however, “frivolous,” according to the World Bank tribunal, which ordered the two parties to split all associated court costs. The arbitration process was reported to have cost El Salvador roughly US$800,000.

The government’s opposition to large-scale mining contrasts with the “come-on-down” treatment foreign companies enjoy in many other Latin American countries, including nearby Nicaragua, where gold is now a top export product with sales of nearly US$320 million in 2015 (NotiCen, April 21, 2016). Only beef and coffee earn more.

Economic opportunities of that caliber are not easy for a small developing country to ignore. Polls, nevertheless, show that a broad majority of the Salvadoran population back the de facto ban, which
began to take shape a decade ago amid growing concern about the environmental impact of metals mining, particularly on the country’s scarce and in many cases already polluted fresh water sources, and associated health risks.

Commerce Group and Pacific Rim were presumably hoping, with their ICSID suits, to change the government’s mind. Instead the opposite happened: The legal threats hardened El Salvador’s resolve, which was boosted further still by the high-profile murders of several anti-mining activists. Three opponents of Pacific Rim’s El Dorado project were killed in 2009 (NotiCen, Jan. 28, 2010). A fourth activist, Juan Francisco Durán Ayala, 30, was murdered in 2011.

“El Salvador did very well,” said Kneen. “They stuck to their own laws. They stuck to their own standards and their own democratic process. The fact that the government of El Salvador is actually listening to the people of El Salvador is quite a victory.”

Salvadoran authorities should be careful, however, not to rest on their laurels, say Kneen and other critics of large-scale mining. Having dodged OceanaGold’s US$250-million bullet, they say, El Salvador ought now to reinforce its opposition to mining with serious reform on the legislative side. Many activists and their allies, including prominent church leaders, urge the government to introduce an outright ban on metals mining to replace the de facto moratorium, which risks being reversed when and if the country’s political climate shifts (NotiCen, July 25, 2013).

“I don’t see why the lawmakers don’t do it, given that they’ve been chosen by the people to look after our rights,” the archbishop of San Salvador, José Luis Escobar Alas, said during a late July Mass in the Salvadoran capital. “This is a wild country where there aren’t any laws to really stop [mining], and it needs to stop.”

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