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CAFTA Ruling Continues Corporate Attack on Environmental Protection

Part of Attack on Mining Law Will Proceed at International Tribunal; El Salvador May Pay Millions in Tribunal, Legal Fees Even for Dismissed Claims

WASHINGTON, D.C. – A tribunal constituted under the Central America Free Trade Agreement (CAFTA) ruled that Pacific Rim Mining Corp. could proceed with half of its attack on an El Salvadoran mining law strongly supported in that country by the left and right political parties and the Catholic Church. Given the extraordinary facts of this case, the only reasonable outcome should have been total dismissal and that today’s outcome is even possible spotlights why the extreme investor rights and their private enforcement in foreign tribunals included in past U.S. “trade” pacts must be ended, Public Citizen and Sierra Club said today.

Legal observers expected the tribunal, constituted under the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), to deny all jurisdiction. Not only is Pacific Rim a Canadian firm, but it failed to complete the permitting process to operate a mine. The tribunal also held that the Canadian firm could not pursue claims under a trade pact between the United States and six Central American countries, but refused to waive millions in tribunal costs and legal fees accrued by El Salvador defending against that aspect of the attack. It permitted Pacific Rim’s claims at ICSID under an investment law with provisions similar to CAFTA to continue.

“The fact that corporate attacks on a sovereign country’s domestic environmental policy before a foreign tribunal would even be possible – much less cost a country millions when a key element of the attack is dismissed – highlights what is wrong with our ‘trade’ agreement model,” said Lori Wallach, director of Public Citizen’s Global Trade Watch. “These investor rules are an outrageous example of how ‘trade’ pacts have been stuffed with special-interest terms that empower corporate attacks on basic democratic public interest policymaking at home and abroad.”

“The CAFTA attack on mining policy has reignited the debate about trade pacts’ threats to the environment and public health, and spotlights why the Obama administration must exclude these extreme investor rights for future trade deals,” said Margrete Strand Ranges, director of Sierra Club’s Labor and Trade Program. “Even when a country successfully defends against

elements of an attack on its environmental laws, it can face major legal costs. The very existence of this undemocratic mechanism threatens critical environmental and health improvements.”

Unfortunately, the long tragedy of the Pacific Rim case is not over. The tribunal found that, thanks to a neoliberal law put in place by El Salvador in 1999, many claims similar to those under CAFTA can continue to be adjudicated in *foreign* courts, namely at ICSID. That poor countries have been pushed to offshore their very judicial systems – through trade pacts’ investor-state enforcement systems and through investment laws like El Salvador’s – show that the world needs a fundamental rethink of the way we regulate foreign investment, said Public Citizen and Sierra Club.

The tribunal’s conclusion that this Canadian firm could not pursue CAFTA claims is welcome. But that El Salvador could be charged millions for costs related to that aspect of the case is outrageous, given Pacific Rim had no U.S. business activity and established a U.S. corporation only months before launching its CAFTA case. Public Citizen and Sierra Club urge the tribunal to waive these costs, already totaling millions.

Pacific Rim began exploring for gold in El Salvador in 2002 and applied for an “exploitation permit” in December 2004. Its application lacked three of the five required elements, and no permit was issued. A year later, CAFTA went into effect. In December 2007, Pacific Rim reincorporated a Cayman Islands corporate shell (which had formally owned the Salvadoran operations) in Nevada. Shortly thereafter, the company launched the first environmental challenge under CAFTA, using the extremely controversial “investor-state” enforcement procedure. This process allows investors to directly sue signatory governments in foreign tribunals, where they can demand cash compensation for government policies they claim undermine their new CAFTA investor rights. Pacific Rim’s attack on El Salvador demanded more than \$200 million in compensation, alleging (among other claims) that the failure to automatically issue an exploitation permit was a violation of CAFTA.

“These trade pact investor attacks ring an alarm across the political spectrum – from conservatives concerned about sovereignty threats posed by the U.S. government being under the jurisdiction of foreign tribunals, to progressives concerned about corporate attacks on domestic environmental or health policies,” said Wallach. “Do we want to leave a two-track justice system to our children: one for multinational corporations and another for average citizens?”

The Pacific Rim CAFTA case also spotlights how a U.S. “trade” agreement can be exploited by a multinational mining firm to attack El Salvador’s fragile democracy, which emerged from 12 years of civil war, and to undermine the laws enacted by its elected leaders to regulate mining and safeguard the environment. Although Salvadoran civil society has been effective in getting the government to review the potential environmental and social impacts of mining, the government has made no decisions about future mining policy. CAFTA’s extreme investor rights now loom over these policy decisions, with the government forced to calculate potential CAFTA liabilities against publicly demanded improvements in environmental policy. Another CAFTA attack on the mining law by U.S. firm Commerce Group was dismissed last year because that firm had not terminated its domestic legal challenge of the law, but the firm has since filed to annul the dismissal.

Increasingly, multinational companies are using trade-agreement investor rights in situations where natural resources and public health are at stake. Of the 137 investment cases pending before ICSID, 59 cases relate to oil, mining or gas projects. The Pacific Rim case also raises much broader concerns about the foreign investor rights provided in U.S. trade agreements. Even assuming that foreign firms meet all laws in effect in another country when setting up operations, a trade agreement should not guarantee that foreign firms are sheltered from or compensated for having to meet new laws that apply to foreign and domestic firms equally that are enacted through normal democratic practices, Public Citizen maintains.

“We have seen an alarming increase of cases related to oil, mining and gas projects with hundreds of millions of dollars already paid to corporations through these secret trade tribunals,” said Strand Rangnes. “Not only are the environmental and health implications for local communities severe, but this is also the exact wrong way to go as we look to curb global warming and climate change.”

BACKGROUND

The CAFTA “investor-state” system replicates the controversial mechanism that has been included in almost every U.S. trade deal since the North American Free Trade Agreement (NAFTA). By granting multinational corporations expansive new rights to sue governments in foreign tribunals over government actions that they say could undermine their profits, the system provides a powerful tool for corporate attacks on an array of domestic policies. To date under NAFTA-style deals, corporations have extracted more than \$350 million in challenges of toxics bans, zoning rules, timber policies and more. There are nearly \$12 billion in outstanding claims in the 16 major investor-state cases currently being prosecuted under NAFTA-style deals. None relate to traditional trade concerns, but rather to environmental, public health and transportation policy.

There has been no large-scale gold or silver mining in El Salvador since the start of the civil war in the early 1980s. However, as the price of gold began to climb in the early 2000s, firms began to file exploration permits. Pacific Rim Mining Corp., a Canadian-based multinational firm, sought to establish a gold mine in the region of Cabañas, in the basin of the Rio Lempa, El Salvador's largest river. The proposed El Dorado mining operation would have included an underground mine and a water-intensive cyanide ore processing facility.

A 1996 Salvadoran law establishes a two-step process for companies wishing to establish a mine. Pacific Rim completed the first step and acquired an exploration permit and began exploratory drilling for gold in 2002. Salvadoran law requires mining explorers seeking to advance to exploitation to submit an application containing 1) a description of the area for which the concession is requested; 2) a showing that the licensee owns or is authorized to use the real estate where the mine project is located; 3) an environmental permit, accompanied by an environmental impact assessment; 4) a feasibility study; and 5) a development plan. Pacific Rim submitted an application for an exploitation concession on December 22, 2004, even though it had been presumptively denied an environmental permit a few weeks earlier, and it had never completed a final feasibility study, according to El Salvador. Moreover, by Pacific Rim’s own admission, it did not own or have authorization to use the entire exploration site. In other words,

Pacific Rim's application lacked the majority of the elements needed for a successful exploitation concession.

By March 2005, its application was presumptively denied - all a full year before CAFTA was even in effect. Moreover, in February 2009, Reuters and Mining Weekly both reported that Pacific Rim had put the completion of its feasibility study for the El Dorado mine on hold because of unknown operating inputs and prices for capital. The firm has struggled to finance its operations.

Pacific Rim's proposed El Dorado project (along with the applications filed by various companies for 28 other gold and silver mines) generated a major national debate about the health and environmental implications of mining in El Salvador, a densely populated country the size of Massachusetts with limited water resources. Leaders of El Salvador's major conservative and left political parties, the Catholic Church and a large civil society network expressed concerns about cyanide contamination and the enormous amount of water the cyanide processing method requires.

The aspect of the case that was dismissed related to the question of how a Canadian-based firm could use the controversial "investor-state" enforcement system when Canada is not a party to CAFTA. In December 2007, the company reincorporated a Cayman subsidiary in Nevada. In April 2008, the new U.S. subsidiary notified the Salvadoran government it would file a CAFTA claim and did so in December 2008. The claim demanded hundreds of millions in compensation from one of the hemisphere's poorest countries. Pacific Rim's CEO admitted to the tribunal that its reincorporation was driven at least in part by a desire to gain standing under CAFTA.

Pacific Rim argued that the failure to automatically grant an exploitation permit was a CAFTA violation, and was part of an alleged nationwide "ban" on mining that was covert prior to 2008, and overt after 2008. In fact, in 2008, the conservative government then in power agreed to a national review of mining policy, an initiative continued under the progressive government elected in 2009. But, to date, despite broad demands to ban mining in El Salvador, neither the conservative ARENA government nor the FMLN government that followed it have agreed to do so. El Salvador's mining laws remain the same and the Salvadorian government's main counter argument in the CAFTA case focused on the firm's failure to comply with the law by filing the required feasibility study so that a determination on its exploitation permit request could be conducted.

In today's jurisdictional ruling, the tribunal determined that Pacific Rim had no substantial business activities in the United States and thus the tribunal determined that it lacked jurisdiction to hear that element of the case. But the tribunal did not rule against Pacific Rim on the merits. Indeed, but for the jurisdictional issue, a Cayman-cum-U.S. company could have been on its way to force Salvadorans to pay compensation for the company's own failure to comply with the exploitation permitting process. (Indeed, in August 2010, the ICSID tribunal had made a preliminary ruling that an award could be made in Pacific Rim's favor as a matter of international law.)

Meanwhile, in El Salvador, the mining debate continues. Intimidation and threats against civic groups have escalated, and four prominent anti-mining activists were murdered.

The same foreign investor provisions and investor-state private enforcement system are in the trade deals with Korea, Colombia and Panama that President Barack Obama pushed through Congress in late 2011. In contrast to CAFTA, the Korea deal involves a country with 270 corporate affiliates in the United States, any of which are now empowered to attack U.S. public interest laws before foreign tribunals, and demand taxpayer compensation for loss of expected future profits.

The Obama administration is pushing to include the same provisions in the nine-country Trans-Pacific Partnership (TPP) “free trade” agreement it is now negotiating. Australia has expressed opposition to this, and even Obama committed during the 2008 campaign to close off investors’ ability to attack public interest laws.

Read more about the Pacific Rim CAFTA case at <http://bit.ly/nzKvVH>.

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