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Mining and Self Determination

by the National Roundtable Against Metallic Mining Communications Team

In the next few days, the Salvadoran State will have to present itself before the International Center for Settlement of Investment Disputes (ICSID) to face a lawsuit presented by the Canadian company Pacific Rim. The demand is for \$77 million in damages for denying exploitation permits to the El Dorado mine in San Isidro (Cabanas).

The news is not part of the media's agenda, nor has the new government taken a position, but the case is serious and deserves a profound debate about the implications of a possible ruling in favor of Pacific Rim, whose example is already being followed by other companies affected by El Salvador's rejection of mining. What will the country do with an avalanche of lawsuits for \$100 million, \$300 million, etc.?

Pacific Rim finds its legal recourse in the dark provisions of the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA), primarily in the contents of the chapters on Investments (Art. 10) and Dispute Resolution (Art. 20). These—in practice—prohibit the States from defending their national interests.

Pacific Rim is favored with an ambiguous concept of investment, the malevolent principle of indirect expropriation, and the activation of arbitration mechanisms put forth in CAFTA—among them the ICSID. The ICSID is a corporate tribunal, assigned to the World Bank, which almost always condemns governments (other than the US government) and favors transnational corporations.

According to CAFTA, indirect expropriation is all government actions or omissions that affect potential earnings of corporations. In this sense, the denial of licenses to Pacific Rim constitutes an act of “indirect expropriation” by the Salvadoran State which could be required compensate the Canadian mining company and be obligated to authorize the permit.

With excellent foresight, the opposition to CAFTA warned us of the serious threat to national sovereignty and the violation of the self-determination of the people of El Salvador. Or perhaps El Salvador doesn't have the right to reject mining projects that will contaminate the environment (water, air, and soil) and put in great danger the future of human existence?

Pacific Rim's lawsuit is reason for national alarm. The Legislative Assembly should immediately approve a law that prohibits metallic mining and the Executive—allied with civil society—should prepare itself to defend the interests of the country, appealing to the principle of national sovereignty, the people's right to self-determination, and the defense of life.

The Salvadoran State could find legal recourse in some of the clauses of CAFTA, especially those that refer to the environment (Art. 17). But that would be insignificant if the ICSID throws the dice towards the corporations. What is necessary is to propose the repeal of CAFTA or—at the very least—a reform to the clauses that are the most dangerous to national interests.