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MINING IN GUATEMALA: HUMAN RIGHTS AND INVESTMENT TREATY ARBITRATION

by *Valentina Capotosto**

In 2019, the Republic of Guatemala submitted preliminary objections to an arbitration initiated by a U.S. investor specializing in mining, Kappes, Cassidy & Associates (“Kappes”), arising out of a mining operation—the *Progreso VII* Project—operated by the Guatemalan mining company Exmingua.¹ In its Notice of Arbitration, Kappes initiated a lawsuit for over \$300 million in damages claiming Guatemala violated the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) which gives investors covered by the treaty access to arbitration for breach of substantive rights.² The Notice of Arbitration comes after years of conflict over the *Progreso VII* Project, also known as the *El Tambor* mines. The heart of this case rests on access to investment treaty arbitration despite legitimate human rights concerns to protect surrounding communities impacted by natural resource exploitation.

La Puya, a community-led resistance group, was involved in the ongoing conflict by maintaining a makeshift blockade outside of the mine’s entrance since its

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¹ *Kappes v. Rep. of Guat.*, ICSID Case No. ARB/18/43, Respondent’s Preliminary Objections Under Article 10.20.5 of CAFTA DR (Aug. 16, 2019) [hereinafter Respondent’s Preliminary Objections], https://www.italaw.com/sites/default/files/case-documents/italaw10807_0.pdf.

² Dominican Republic-Central American Free Trade Agreement, Aug. 5, 2004, 119 Stat. 462 [hereinafter DR-CAFTA].

construction in 2012 to protest the mining operation’s negative environmental impacts on the surrounding communities.³ The potential for toxic waste contamination and other human health implications from the mining operation raise basic human rights concerns for the surrounding indigenous communities.⁴ In May 2018, the Guatemalan Supreme Court suspended Exmingua’s exploitation license for failure to consult with the local community under the International Labor Organization’s Indigenous and Tribal People’s Convention (ILO No. 169).⁵

Investment treaty arbitration gives investors a unique pathway to challenge sovereign action when states regulate social or environmental issues that foreign investors claim violate states’ obligations under a treaty. Despite the adverse ruling from the Guatemalan Supreme Court, the DR-CAFTA allows Kappes to circumvent national courts and submit a dispute to a third-party tribunal for breach of the investment treaty.⁶ The Guatemalan Supreme Court order suspending Exmingua’s license arose from a constitutional claim against Guatemala’s Ministry of Energy and Mines (“MEM”) by the NGO *Centro de Acción Legal, Ambiental y Social de Guatemala* (“CALAS”).⁷ The Supreme Court ruled in favor of CALAS, finding that MEM failed to conduct consultations with the local community pursuant to ILO No. 169 before granting Exmingua’s exploitation license.⁸

Article 15 of ILO No. 169 specifically calls for states to establish procedures for consultation with indigenous communities potentially affected by exploitation

³ Guatemala Human Rights Commission, *‘La Puya’ Environmental Movement* (Nov. 2014), <https://www.ghrc-usa.org/our-work/current-cases/lapuya/>.

⁴ Benjamin Reeves, *Guatemala’s Anti-Mining La Puya Protesters Are Under Siege*, VICE NEWS (Apr. 12, 2014), https://www.vice.com/en_us/article/vbnpy4/guatemalas-anti-mining-la-puya-protesters-are-under-siege.

⁵ Notice of Intent Pursuant to the Free Trade Agreement Between the Dominican Republic, Central America and the United States (May 16, 2018) [hereinafter Notice of Intent], https://www.italaw.com/sites/default/files/case_documents/italaw9713.pdf; Convention (No. 169) concerning indigenous and tribal peoples in independent countries, adopted June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO No. 169].

⁶ DR-CAFTA, *supra* note 2.

⁷ Notice of Intent, *supra* note 5.

⁸ *Id.*

of natural resources.⁹ Guatemala ratified the legally binding convention in 1996, which the Minister of Labor described at the time as a “historic milestone in Guatemala’s consolidation of democracy and fullest respect for internationally recognized human rights.”¹⁰ However, in 2018, Kappes said the Supreme Court’s enforcement of ILO No. 169 is meritless, arguing that no state law or regulation requiring consultation existed at the time Guatemala granted Exmingua’s exploitation license.¹¹

While Exmingua may have played a role in violating the ILO convention, Guatemala may still be liable for violating Kappes’ rights as an investor under the DR-CAFTA.¹² Exmingua, along with MEM, failed to consult with the local community pursuant to ILO No. 169, but Kappes could still be entitled to relief for breach of the DR-CAFTA. In particular, Kappes claims that Guatemala breached the National Treatment, Most-Favored Nation Treatment, Minimum Standard of Treatment, and Expropriation and Compensation provisions that protect investor’s rights under Chapter 10 of the DR-CAFTA. This specific case falls in line with what has been coined as “community conflict cases” due to the unique controversy stemming from clashes with local communities and human rights concerns attached to natural resources.¹³

Despite Guatemala’s attempt to mitigate MEM’s failure to conform to ILO No. 169, an arbitral panel may still hold a state liable under the DR-CAFTA. One point of criticism for investment treaty arbitration arises when investment treaty cases have human rights implications. In a joint statement released after Kappes’ Notice of Arbitration, a group of international organizations described investor-state arbitration as a means to “privilege corporate interests at the expense

⁹ ILO No. 169, *supra* note 5.

¹⁰ Press Release, Int’l Lab. Org., Guatemala Ratifies Convention Guaranteeing Indigenous Rights, ILO/96/20 (June 13, 1996), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008061/lang--en/index.htm.

¹¹ Notice of Intent, *supra* note 5.

¹² Notice of Intent, *supra* note 5; DR-CAFTA, *supra* note 2 at ch. 10.

¹³ George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking “Reasonable Expectations” and Expecting More from Investors*, 96 AM. U. L. REV. 105 (Oct. 2019).

of local communities and the environment.”¹⁴ While environmental advocates strongly criticize investment treaty arbitration, investment treaties still provide an important function for attracting foreign investment — a significant part of economic growth.¹⁵ In an attempt to address these criticisms, newer treaties such as the Canada-European Union Economic and Trade Agreement (CETA) attempt to address the right of the state to regulate health, safety, and the environment.¹⁶ Yet, a majority of investment treaties currently in force remain silent on whether a state’s legitimate public welfare interests can exclude an investor’s claim.¹⁷

Even if the Guatemalan Supreme Court suspended Exmingua’s mining operations pursuant to binding international human rights standards, Guatemala could still face liability for the hundreds of millions in damages claimed by Kappes for breach of the DR-CAFTA.¹⁸ Investment treaties such as the DR-CAFTA give investors important access to binding treaty rights but also provide avenues for limiting a state’s ability to regulate social and environmental issues without the threat of costly arbitration. While new agreements, such as the Comprehensive Economic and Trade Agreement between Canada and the European Union, attempt to address this trade-off, the almost 3,000 investment agreements currently in force

¹⁴ International Organizations Publish Statement in Solidarity with La Puya, NETWORK IN SOLIDARITY WITH THE PEOPLE OF GUAT. (Feb. 1, 2019), <https://nisgua.org/statement-solidarity-la-puya/>.

¹⁵ Arif H. Ali et al., *Mining Arbitration in Latin American: Social and Environmental Issues in Investment Arbitration Cases*, THE GUIDE TO MINING ARBITRATIONS (Jason Fry & Louis-Alexis Bret, eds. 2019), <https://globalarbitrationreview.com/chapter/1194161/mining-arbitration-in-latin-america-social-and-environmental-issues-in-investment-arbitration-cases#>.

¹⁶ Canada-European Union Comprehensive Economic and Trade Agreement, Can.-Eur. Union, Oct. 30, 2016 [hereinafter CETA], <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (provisionally entered into force Sept. 21, 2017).

¹⁷ Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INT’L INST. FOR SUSTAINABLE DEV.: INV. TREATY NEWS (May 21, 2015), <https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/>.

¹⁸ Notice of Intent, *supra* note 5.

do not.¹⁹ The future of investment treaty arbitration will likely rely on finding a balance between protecting human rights and recognizing the benefits of investment treaties for foreign investment and economic growth — especially in the natural resources sector.

HOW A FISHERMAN'S MURDER REVEALED MOROCCO'S POLICE BRUTALITY AND ETHNIC DISCRIMINATION

*by Nora Elmubarak**

Mouhcine Fikr, a fisherman, was crushed to death three years ago in the Rif region of northern Morocco when he was attempting to retrieve swordfish that police officers had confiscated and placed in a trash compactor.¹ His death in 2016 sparked the “Hirak,” a socioeconomic protest movement in the Rif region. Fikr’s death was a turning point for those in the Rif region; they were no longer complacent with the amount of policing in their community and the severe economic disparities that led to people like Mouhcine Fikr risking their lives. Police arrested over 450 activists in May 2017,² but the violence between the police and protestors is ongoing.³ By arresting protestors and depriving prisoners of their rights, the Moroccan government is in direct violation of Article 19 and Article 20 of the Universal Declaration of Human Rights (UDHR), as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners, which establish guidelines for the

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¹ *What’s Behind Morocco’s Street Protests?* AL JAZEERA (May 19, 2017, 5:11 PM), <https://www.aljazeera.com/programmes/insidestory/2017/05/morocco-street-protests-170519194032194.html>.

² *World Report: Morocco/Western Sahara*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/morocco/western-sahara> (last visited Oct. 8, 2020).

³ *Protests in Morocco Demanding Improvement of Social and Human Rights Conditions*, MIDDLE EAST MONITOR (Feb. 24, 2020 3:19 AM), <https://www.middleeastmonitor.com/20200224-protests-in-morocco-demanding-improvement-of-social-and-human-rights-conditions/>.

¹⁹ CETA, *supra* note 16; *International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV.: INV. POL’Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Sept. 22, 2020).