Two weeks ago, a little-known Canadian gold mining company that has developed or operated exactly zero mines over 17 years announced to its investors that it had initiated international arbitration proceedings against the government of Romania for failing to permit what would be the largest open-pit gold and silver mine in Europe.

Claiming this right under Romania's bilateral investment treaties (BITs) with Canada and the U.K. (the company consists of ten separate entities in half a dozen countries), Gabriel Resources opined that the Romanian government had unlawfully deprived them of their right to develop the project and extract the full value of their investment.

Using some 40 tons per day, Gabriel subsidiary Roşia Montana Gold Corporation's project would have created a massive pool of cyanide over priceless archaeological gold mining sites dating back to the Roman Empire and possibly earlier. It would have destroyed the village of Roşia Montana and two adjacent villages, as well as four mountains in this remote corner of the Carpathians.

Almost two years ago, the project triggered historic street protests of tens of thousands of people around Romanian cities. Public opposition and eventually government action rejected the project, which had been secured with secretive government contracts, massive contributions to domestic media markets, and a special mining law that was subsequently ruled unconstitutional. Amidst the clear public outcry against Roşia Montana–which came to stand for the intersection of corporate interests and government corruption, with a characteristic lack of transparency–Gabriel Resources threatened to file an arbitration claim against the state of Romania for lost profits up to $4 billion US dollars.

In many ways, the Roşia Montana protests catalyzed a larger, if more diverse, movement of civic participation and social change within Romania. The subsequent years have seen broad-sweeping political changes and an unprecedented increase in civic participation.

For a company who hangs its shingle on exploitation rights acquired in the late 1990s, when corruption ran particularly rampant at the interface of government and foreign corporations in Eastern Europe, it is no surprise that these changes in Romanian governance and political will are unwelcome. Gabriel Resources has employed hundreds of employees over the course of nearly two decades and it would appear that the country is moving on from the corporation and the project. Gabriel Resources, whose sole reason for existing is to do this project, has nothing to move on to.

And yet, it is not without warrant that Gabriel Resources has expressed confidence, gold mine or not, in the future. Indeed, it has already sold a stake in any arbitration award, according to recent filings with Canadian securities authorities. The payoff could be spectacular, not just an award of the half billion dollars Gabriel says it has already spent over the past 17 years, but all the profits a majority of three arbitrators thinks the company would have made if they had mined every ounce of the Roşia Montana gold and silver deposits.

In October 2012, just over a year before Gabriel's $4 billion dollar threat, Occidental Petroleum received an award of $1.8 billion plus another $589 million in interest and costs against the State of Ecuador for lost profits. Occidental did not rely on Ecuadorian state courts to get that judgment. Indeed, a year before, Ecuador had found Chevron responsible for environmental damage to the tune of $18 billion dollars (a judgment the California-based oil company has dismissed out of hand). Instead, the company relied upon a bilateral investment treaty between Ecuador and the United States and the rules and procedures of a little known World Bank Group organization, the International Centre for Settlement Investment Disputes (ICSID).

As Public Citizen reported at the time, the tribunal relied on an Occidental witness to explain Ecuadorian domestic law to find that, while Occidental had breached its confidential contract with the Ecuadorian government, the penalty was simply too harsh for the U.S.-based corporation. As the dissenting vote on the three-person arbitration panel opined, the majority opinion in Occidental v. Ecuador was "so egregious in legal terms and so full of contradictions, that I could not but express my dissent."

Operating out of Washington, D.C., the ICSID was originally created by the World Bank (now the de facto regulator) in 1966 to settle contractual disputes in transnational business. It has since become the leading forum for transnational corporations to sue countries (over 90% of which have been low- or medium-income countries). Between 1966 and 1995, five cases had gone to arbitration. By 2012, that number had ballooned to over 390.

Notoriously expensive (litigation costs are in the millions) and business-friendly, the ICSID has become a magnet for criticism around the globe. Its de facto judges are drawn from an elite community of high-paid lawyers at a handful of firms. These arbitrators come from high-powered commercial practices, with comparatively little public law and policy professional experience. Their opinions are non-appealable and they are bound by no precedent. Given a choice of law between international trade law and international human rights law, these arbitrators routinely exercise their discretion in favor of the former. They often interpret contract and trade law (and domestic law!) in ways more favorable to the foreign corporation. These are not neutral, objective choices, but rather are subjective public policy determinations having major impacts on sustainable development in trade and domestic governance arenas around the world.

Indeed, Investor-State Dispute Settlement and forums such as the ICSID are central to much of the global critiques leveled against the Transatlantic Trade & Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). Investor-State Dispute Settlement (ISDS) clauses haven risen in tandem with the free trade agreements and BITs that they are embedded in. Today there are over 2,500 BITs. Along with free trade agreements, they are sold as necessary conditions for attracting foreign investment. But many countries are beginning to balk at the excesses of the international trade agreements. Brazil, one of the top investment importers on the planet, has always rejected the entire enterprise of BITs. Other countries have followed suit or, as Ecuador, rejected the legitimacy of ICSID ad hoc tribunal awards.

Corporations routinely challenge countries over labor rights, environmental regulations, and human rights claims. More often than not, companies from wealthy capital-exporting countries file claims against lower-income countries, challenging domestic laws and government actions, but this is not always the case. In Vattenfall v. Germany, the Swedish company sued Germany and a tribunal found against Germany, whose Nuclear phase-out was deemed to have been unfairly discriminatory. Phillip Morris has sued both Uruguay and Australia for cigarette labels meant to discourage smoking. One tribunal recently ordered Venezuela to pay $1.6 billion to Exxon, while another Canadian gold mining company is currently pursuing claims against El Salvador, where serious environmental damage coupled by public dissatisfaction led the country to a moratorium on mining in the country. Increasingly, states are taking strong stances against ICSD and BITs. Brazil, one of the largest capital importers in the world has never taken part. Countries like India have avoided the ICSID as well. In Europe, where states are currently debating the terms of the TTIP, the outcry against Investor-State disputes under the ICSID is no longer limited to protesters and civil society, with national leaders speaking out. The European Commission itself has balked at the idea of EU court jurisdiction being supplanted by ISCD jurisdiction from free trade agreements.

A central tension in all of these cases is between the sovereignty of a state and its peoples, their right to self-determination, on the one hand, and the private rights of contracting parties. Inclusive of this is a state’s sovereignty over its own natural resources, as clearly stated in the United Nations Declaration on the Permanent Sovereignty of States over Natural Resources. Part of this right is, surely, to define as a people and a state what is in the public interest and what satisfies domestic law.

In the case of Romania, a company that, despite expending over a hundred million dollars over 17 years, has not been able to secure all permitting and has been essentially rejected by the Romanian people on substantive grounds seeks to impose its own definition of their best interests and seeks to extract wealth likely in excess of the country's annual healthcare budget.

If we are to credit states and peoples with the right to self-determination, then we must allow that they must be the ones to define what their own interests are and what conditions should be placed on a foreign corporation whose first duty is to maximize the wealth of its distant shareholders. The free trade regime of the past several decades is clearly at a tipping point and countries like Romania must weigh their sovereignty against their appetites for foreign investors, some of whom clearly have little sympathy for domestic measures advancing environmental protection, sustainable development, and public health, let alone the will of the people.

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