

**CORPORATE BIAS IN THE WORLD BANK GROUP'S  
INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES:**

**A CASE STUDY OF A GLOBAL MINING CORPORATION  
SUING EL SALVADOR**

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This article is based on fieldwork in El Salvador as well as in Washington, D.C. (For more details see note 13). The author is profoundly grateful to the many people in El Salvador and the United States who took the time and effort to meet with her and answer her queries. The views presented in this article are, of course, the author's own.

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## 1. INTRODUCTION AND OVERVIEW

If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS.<sup>1</sup>

This paper focuses on the main venue for investor-state dispute settlement: the World Bank Group’s International Centre for Settlement of Investment Disputes (ICSID). The paper’s analysis establishes significant ICSID bias in favor of corporations and commercial interests.

At its core, the paper is a case study of what transpired after the government of El Salvador did not approve a mining concession for a Canadian mining company and subsequently implemented an environmentally-inspired moratorium on metals mining. The case study was chosen in part because it is unusual for a poorer-country government to prioritize the environmental costs of mining over potentially significant foreign-exchange earnings from gold deposits. The paper presents the Salvadoran case study by moving from the local level to the national level in El Salvador, and then proceeds to the global level to follow the investor-state suit filed by Pac Rim Cayman against the Salvadoran government at the World Bank Group’s International Centre for Settlement of Investment Disputes.

The paper bookends the Salvadoran case-study with a broader look at ICSID. The author begins with a brief history of ICSID, from its controversial birth fifty years ago to its controversial present

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<sup>1</sup> *Investor-state Dispute Settlement: The Arbitration Game*, ECONOMIST, Oct. 11, 2014, at 78, available at <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.

moment. Following the Salvadoran case, the author returns to reflections on ICSID and investor-state dispute settlement (ISDS) in current and proposed trade and investment agreements.

The paper's analysis of the El Salvador case, framed within the broader umbrella of ICSID itself, reveals that ICSID is biased and flawed in two main ways: (1) ICSID is biased in favor of corporate and commercial interests over both government and non-corporate non-governmental actors; and (2) ICSID excludes consideration of vital, non-commercial interests such as the environment and the broader public good. As the author will argue, these two biases reinforce one another and make ICSID an institution ill-suited to deal with the key challenges of our current historical moment and of the future.

It is important to note the author writes as an interdisciplinary scholar of development studies, building on academic expertise in economics, ecology, and political economy (among other fields) alongside decades of practice in rural communities, from the Philippines to El Salvador, as well as hands-on policy experience (notably as an international economist in the US Treasury Department).

## 2. A BRIEF HISTORY OF ICSID

Let us begin with a brief but important history of ICSID, which will help frame the debates surrounding this institution, as well as threads that will be further explored in the Salvadoran case study.

ICSID was created some 50 years ago, opening its doors in 1966, to deal with government expropriation of property of foreign investors.<sup>2</sup>

The author's historical research reveals, however, that ICSID has been controversial since before it opened its doors. Indeed, at the 1964 World Bank annual meeting in Tokyo, 21 developing-country governments voted "no" on the convention to set up this new part of the World Bank Group where foreign corporations could sue governments and bypass domestic courts.<sup>3</sup> The 21 included *all* of the 19 Latin American countries attending as well as the Philippines

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<sup>2</sup> ICSID, *ICSID Convention, Regulations and Rules*, at 5, ICSID/15 (Apr. 2006).

<sup>3</sup> ANTONIO R. PARRA, *THE HISTORY OF ICSID* 66-67 (2012).

and Iraq.<sup>4</sup> The historic vote was dubbed “*El No de Tokyo*,” or the Tokyo No.<sup>5</sup> It is worth noting that, in the history of World Bank initiatives, the vote stands as significant in terms of the large number of participating countries against the initiative as well as the united stance of *all* Latin American representatives.

It is also significant in terms of the reasons the 21 voted no. In the words of then-representative of Chile, Félix Ruiz, speaking on behalf of the Latin American countries voting no:

The legal and constitutional systems of all the Latin American countries that are members of the Bank offer the foreign investor at the present time the same rights and protection as their own nationals; they prohibit confiscation and discrimination and require that any expropriation on justifiable grounds of public interest shall be accompanied by fair compensation fixed, in the final resort, by the law courts.

The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority.<sup>6</sup>

To emphasize Ruiz’s key points, “the 21” deemed the new investor-state dispute settlement system both unnecessary and unfair. It is worth keeping this in mind as we proceed to the case

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<sup>4</sup> *Id.* There were 21 votes against ratifying the ICSID convention, including the 19 Latin American World Bank member countries. The countries voting no were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iraq, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Uruguay, and Venezuela. *Id.*

<sup>5</sup> Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration*, 2 BEIJING L. REV. 134, 136 (2011); Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT’L & COMP. L. 47, 54 (2009).

<sup>6</sup> PARRA, *supra* note 3 at 66.

study of El Salvador's mining suit. To what extent has the 1964 "no" vote been vindicated by history?

Despite the "no" votes, the formally titled Convention on the Settlement of Investment Disputes between States and Nationals of Other States went forward to states for signatures from March 18, 1965 until October 14, 1966 when ICSID became a reality.<sup>7</sup> For the record, Brazil never joined, and in fact has refused to privilege international investors through international investor-state dispute settlement (ISDS) mechanisms.<sup>8</sup>

In its early years, ICSID was small, indeed largely irrelevant. Its first case was not filed until 1972, with just over two dozen cases filed in total through 1988. In fact, there were a number of years where no cases were filed.<sup>9</sup> However, by the mid-1990s, ICSID moved center-stage, thanks to the ISDS clauses inserted in neoliberal bilateral and multilateral trade and investment agreements that were proliferated starting in the 1980s and that exploded in the 1990s.<sup>10</sup> In 2012 alone (forty years after ICSID's first case was filed),

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<sup>7</sup> ICSID, *supra* note 2 at 5.

<sup>8</sup> To expand upon this point for clarity (and fact-checking): Brazil has refused to ratify the ICSID Convention or any bilateral investment treaties (BITs) with an ISDS mechanism. Note that, while Brazil has signed onto some such BITs, they have not been ratified by Brazil's Congress, which sees them to be against the country's Constitution. Brazil does have arbitration agreements in contracts with foreign investors. See Ricardo Berretto Ferreira Da Silva et al., *Arbitration & ADR – Brazil: Bilateral Investment Treaties and International Arbitration*, INT'L LAW OFFICE (May 15, 2003), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=6ce64813-8cf6-4f97-b8a8-2ad950fa25ad> (providing access to the BITs and international arbitrations at issue).

For more on this, see Elizabeth Whitsitt & Damon Vis-Dunbar, *Investment Arbitration in Brazil: Yes or No?*, INVESTMENT TREATY NEWS (Nov. 30, 2008), <http://www.iisd.org/itn/2008/11/30/investment-arbitration-in-brazil-yes-or-no/> (illustrating Brazil's refusal to formally ratify the ICSID Convention or BITs with an ISDS mechanism); ICSID, ICSID Database of Bilateral Investment Treaties, available at [https://icsid.worldbank.org/apps/ICSIDWEB/resources/\\_layouts/mobile/mblists.aspx](https://icsid.worldbank.org/apps/ICSIDWEB/resources/_layouts/mobile/mblists.aspx) (displaying ICSID caseload statistics and annual reports).

<sup>9</sup> PARRA, *supra* note 3 at 199-260; Nicolas Boeglin, *ICSID and Latin America: Criticism, Withdrawal and the Search for Alternatives*, BRETTON WOODS PROJECT (Dec. 3, 2013), <http://www.brettonwoodsproject.org/wp-content/uploads/2013/12/At-Issue-ICSID.pdf>.

<sup>10</sup> United Nations Conference on Trade and Development [UNCTAD], *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward*, UNCTAD/ITE/IIT/2007/3, U.N. Sales No. E.08.II.D.1 (2008), available at [http://unctad.org/en/Docs/iteiit20073\\_en.pdf](http://unctad.org/en/Docs/iteiit20073_en.pdf); Jonathan C. Hamilton, *A Decade of Latin American Investment Arbitration*, LATIN AMERICAN INVESTMENT TREATY ARB.: THE CONFLICTS & CONTROVERSIES 69-82 (Thomas E. Carbonneau & Mary H Mourra, eds. 2008).

48 new cases were added to ICSID's docket. All of the 48 cases were filed against governments of developing countries.<sup>11</sup> And, of these 48 cases, more than one-third (17 or 35.45%) related to extractive industries.<sup>12</sup>

### 3. EL SALVADOR & GOLD MINING: FROM LOCAL, TO NATIONAL, TO GLOBAL

With that framing and history of ICSID and the debate surrounding it, let us now turn to the basic contours of the case of *Pac Rim Cayman LLC v Republic of El Salvador*. It is a case that the author knows well as a result of four research trips to El Salvador and related research in Washington, DC where ICSID is housed at the World Bank.<sup>13</sup> After presenting the case, the paper will turn to broader reflections on bias in investor state dispute settlement at ICSID.

The best way to present the case is to follow its chronology on three levels – from local to national to global.

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<sup>11</sup> Sarah Anderson & Manuel Perez-Rocha, *Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership*, INST. FOR POLICY STUDIES 6 (Apr. 2013), available at <http://www.ips-dc.org/wp-content/uploads/2013/05/Mining-for-Profits-2013-ENGLISH.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Unless otherwise noted, the information presented is based on my fieldwork in El Salvador. I conducted field research in El Salvador in April and May 2011, July and August 2012, May 2013, and July 2014. Research ranged from more formal interviews (especially the case with interviews conducted with government officials in various ministries in San Salvador) to informal, multiple-day participant observation outside of San Salvador, especially in the province of Cabañas. Research related to ICSID was done in Washington, D.C., where the author is based.

For other useful written sources on this case, see Richard Steiner, *El Salvador: Gold, Guns, and Choice*, INT'L UNION FOR THE CONSERVATION OF NATURE (IUCN) COMM'N ON ENV'L, ECON., & SOCIAL POL'Y (Feb. 2010), available at <http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf> (discussing the backdrop of *Pac Rim LLC v. Republic of El Salvador*); Robert E. Moran, *Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA)*, *El Salvador*, (Oct. 2005), [http://www.votb.org/elsalvador/Reports/Technical\\_Review\\_El\\_Dorado\\_EIA.pdf](http://www.votb.org/elsalvador/Reports/Technical_Review_El_Dorado_EIA.pdf) (detailing technical reports on the mine and its environmental impact).

### 3.1 At the local level:

El Salvador's northern province of Cabañas is one of its poorest provinces, with a population comprised largely of farmers, growing corn and beans. It is also home to a rich gold vein that runs across its Central American neighbors Guatemala, Honduras and Nicaragua. When global gold prices began to soar in the early 2000s, the Canadian mining company Pacific Rim came to Cabañas in 2002, the result of its merger with a company that had under three years left of an eight-year exploration license.<sup>14</sup> In El Salvador, as in many countries, the process for getting a license to explore for gold or other minerals is separate from the process for getting approval for the actual "exploitation" or the mining concession itself. With its license to explore, Pacific Rim continued exploration operations in Cabañas.

Interviews suggest that many local inhabitants, originally intrigued by the prospect of mining jobs, soon became concerned as Pac Rim's exploration operations proceeded.<sup>15</sup> Some experienced changes in water levels. Others learned more about the mining process (the proximity of ongoing gold mining projects in neighboring Honduras facilitated the education). They learned of the toxic cyanide used by mining companies to separate the gold from the rock and, in Cabañas as in much of the world, the arsenic

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<sup>14</sup> Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, El Salvador's Rejoinder on the Merits 6 (July 11, 2014), available at <http://www.italaw.com/sites/default/files/case-documents/italaw3321.pdf> [hereinafter Pac Rim].

<sup>15</sup> This paragraph is based on the author's in-country interviews, which included Cabañas-based interviews during each of her field trips. For relevant writing by the author that covers this terrain, see Robin Broad & John Cavanagh, *El Salvador: Toward a Mining Ban*, in *ENDING THE FOSSIL FUEL ERA 167-193* (T. Princen et al. eds., MIT Press, 2015); Robin Broad & John Cavanagh, *Poorer Countries and the Environment: Friends or Foes?* 72 *WORLD DEV.* 419-31 (2015); Robin Broad & John Cavanagh, *Like Water for Gold in El Salvador*, *THE NATION*, Aug. 1/8, 2011, available at <http://www.thenation.com/article/162009/water-gold-el-salvador> (noting that this was written after the author's first research trip to El Salvador).

For another source with details on the local level, see Richard Steiner, *El Salvador: Gold, Guns, and Choice*, *INT'L UNION FOR THE CONSERVATION OF NATURE; COMM'N ON ENVTL., ECON., AND SOC. POLICY*, 13, 40-44 (2010), <http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf>.

The ICSID submissions by both Pacific Rim and the government of El Salvador, and especially the July 2014 Rejoinder on Merits by the government, include detailed chronologies on what happened and did not happen.



embedded in the rock that would be released along with the gold. Moreover, they learned of the acid mine drainage that would occur as the mining operations exposed the sulfide-bearing rocks to the elements. For these reasons, they became increasingly concerned about the environmental impact of mining on both land and water they depended on for small-scale agriculture and life in general. Overall, their concerns focused on the impact on El Salvador's main Rio Lempa watershed, which supplies over half of El Salvador's drinking water.<sup>16</sup>

As concern and knowledge grew among individuals, a number of small Cabañas-based non-governmental organizations began various activities and organizing, with the intent to keep gold mining out of Cabañas.<sup>17</sup>

For the purposes of this article, the details of the local level will be limited to the above; the author (and others) has written extensively about these elsewhere.<sup>18</sup> However, before moving to the national level, it is important to note that conflict erupted between those who were against mining and those, including most local mayors and some local Pac Rim employees, who were in favor of

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<sup>16</sup> See Robert Goodland, *Responsible Mining: The Key to Profitable Resource Development*, 4 SUSTAINABILITY 2099 (2012) (describing the adverse environmental impact of gold mining in El Salvador and in general, including the release of arsenic and the problem of acid mine drainage). See also Dina L. Lopez, *Professor and Department Chair, College of Arts & Sciences, OHIO UNIV.*, <http://www.ohio.edu/geology/lopez/> (last visited Mar. 28, 2015) (explaining that her research includes focusing on acid mine drainage and contamination in water). On arsenic and gold mining in particular, see generally Jochen Bundschuh et al., *One Century of Arsenic Exposure in Latin America: A Review of History and Occurrence from 14 Countries*, 429 SCI. OF THE TOTAL ENV'T 2 (2012); WILLIAM HOLDEN & R. DANIEL JACOBSON, *MINING AND NATURAL HAZARD VULNERABILITY IN THE PHILIPPINES: DIGGING TO DEVELOPMENT OR DIGGING TO DISASTER* (2012).

For more on how to assess the environmental, social and economic costs and benefits of mining regimes, see Robin Broad, *Responsible Mining: Moving from a Buzzword to Real Responsibility*, 1 THE EXTRACTIVE INDUSTRIES AND SOC'Y 4, 5 (2014) (explaining the need for valid definitions of responsible mining); Andrés McKinley, *Mitos y Realidades de La Minería de Oro en Centroamérica*, CARITAS EL SALVADOR (Nov. 2013), available at <http://www.movimientom4.org/wp-content/docs/mitos-y-realidades-de-la-mineria-de-oro-en-centroamerica.pdf> (assessing the environmental, social, and economic costs and benefits of mining regimes).

<sup>17</sup> See generally note 15. For more on domestic and international opposition to mining in El Salvador, as well as a list of other publications, see STOPESMINING, <http://www.stopesmining.org/j25/> (last visited Mar. 29, 2015).

<sup>18</sup> See *supra* note 15.

the project. Social conflict escalated, culminating in the brutal assassination of three anti-mining activists in 2009.<sup>19</sup>

### 3.2 *At a national level:*

As civil society became more organized against mining in Cabañas, so too did it reach out to other groups across the country. In 2005, a Salvador-wide coalition – La Mesa Nacional Frente a la Minería Metálica (National Roundtable on Mining) – was created that, after some deliberation, decided a key part of its work would be to push the national government to ban metallic mining. Such a sentiment had widespread support in El Salvador. Indeed, by 2007, an academic poll indicated that more than 60% of the Salvadoran public was against gold mining.<sup>20</sup> Notable vocal opponents included the Catholic Church, but it was joined by environmentalists, human rights advocates, academics, other religious denominations, indigenous populations and so on, and also larger-scale agribusiness dependent on water.<sup>21</sup>

So too, starting around 2005, were individuals in, and segments of, the national-level government increasingly concerned about the

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<sup>19</sup> *Id.*

The details on these 2009 deaths and other subsequent assassinations were repeated to the author on numerous occasions. For more details on the local level, including the assassinations, *see generally* *Like Water for Gold in El Salvador*, *supra* note 15; RICHARD STEINER, INT'L UNION FOR THE CONSERVATION OF NATURE AND COMM'N ON ENVTL., ECON., AND SOC. POLICY, EL SALVADOR: GOLD, GUNS, AND CHOICE 13, 40-44 (2010), available at <http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf>.

For more on domestic and international opposition to mining in El Salvador, as well as a list of other publications, see also *STOPESMINING*, *supra* note 17.

<sup>20</sup> The poll asks: "Do you think El Salvador is an appropriate country for metallic mining?" 62.4 percent say "no." *Consulta De Opinión Pública De Octubre De 2007*, INSTITUTO UNIVERSITARIO DE OPINIÓN PÚBLICA, UNIVERSIDAD CENTROAMERICANA 54 (Nov. 2007), <http://www.uca.edu.sv/publica/iudop/Web/2008/finalmineria040208.pdf>.

<sup>21</sup> For related questions on the roles of civil society, the private sector and the government, as well as to the overall political economy of El Salvador, *see generally* *The Poor and the Environment: Friends or Foes?*, *supra* note 15 at 420-23.

On hypotheses related to the role of various social sectors in El Salvador, see Rachel Nadelman, *Sitting on a Gold Mine: El Salvador's Departure from Extractive-led Growth* (2013) (unpublished Ph.D. dissertation, School of International Service, American University) (on file with author). Given Nadelman's 2014 fieldwork in El Salvador, her Ph.D. dissertation is likely to contribute significantly to this literature.

environmental and social impacts of mining and the government's own inability to regulate the mining firms. Interestingly enough, research shows that this concern surfaced around 2005 and gelled in 2006 – when the conservative administration of President Antonio Saca was in power. Then, an unusual and (in this author's mind) far-sighted alliance grew between the Ministry of Economy and the Ministry of the Environment over the need to conduct a "strategic environmental review," not just an economic review, before any metallic mining activities could proceed or any applications related to metallic mining would be processed. A *de facto* moratorium was thus born. However, the actual task of conducting such a strategic environmental review was left to the progressive Farabundo Martí National Liberation Front ("FMLN") government elected in 2009.<sup>22</sup>

On assuming office on June 1, 2009, President Mauricio Funes continued the *de facto* moratorium on metals mining. Funes, focusing especially on the fragility of Lempa River watershed, announced that there would be no mining exploitation licenses or concessions granted during his administration. This stance has carried over into a third administration – that of the FMLN's Salvador Sánchez Ceren, who assumed office in July 2014. As Sánchez Ceren's Minister of Economy stressed in an interview with the author, "Our country should be called Lempa . . . because the river is everything."<sup>23</sup>

It is important to separate this national-level policy on gold mining from the specific case of Pacific Rim. As noted above, Pacific Rim had an exploration license *but – and this is key – it never received an actual exploitation concession, that is the right to mine*. In order to receive an exploitation concession, it needed to meet certain conditions; the factual record shows that it never met three of these conditions. (We will return to this in next subsection on the global level.) Pacific Rim, however, argues that, in granting it an exploration license, the government of El Salvador was essentially giving it a green light on the exploitation license.

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<sup>22</sup> This is perhaps why much writing on this case incorrectly credits the Funes administration with the initiative on this.

<sup>23</sup> Interview with Tharsis Salomón López, Minister of Economy, in San Salvador (July 18, 2014).

### 3.3 *At the global level and ICSID:*

Rather than pursue the case in El Salvador's domestic court system, Pac Rim filed an international arbitration case against the Republic of El Salvador on April 30, 2009.<sup>24</sup> This then brings us to Washington, D.C. and the World Bank Group's ICSID.

An important detail here is that Pac Rim Cayman, not its Canada-based parent company Pacific Rim, officially brought this case before ICSID. In a nutshell, Pac Rim's claim built on the logic explained in the prior section: We received an exploration license, so you have to give us exploitation concession – that is, an actual mining concession. We were assured of the government's support for our project repeatedly by a top Salvadoran government official and the government's overall change of mining policy is thus unfair and illegal and we should be compensated appropriately by ordering El Salvador to pay us the market value of the gold that is still under the ground.<sup>25</sup> Again, this is the essence of Pac Rim's claim.

Then, following ICSID protocol, a case-specific ICSID tribunal was set up, composed of three arbitrators (typically lawyers), each one of them paid \$3,000 for every day of work.<sup>26</sup> What transpired procedurally as the first step was the jurisdictional stage hearing.<sup>27</sup>

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<sup>24</sup> See generally Pac Rim, *Notice of Arbitration*, *supra* note 14. To note some key dates: The Notice of Intent was filed in December 2008 and the Notice of Arbitration in April 2009, before the Funes administration took office. June 15, 2009 (just two weeks after the start of the Funes presidency) was when ICSID registered the Request for Arbitration. *Id.* ¶ 3. Note that the ICSID site was changed sometime in late 2014 or early 2015; this was formerly <<https://icsid.worldbank.org/ICSID/FrontServlet>>.

<sup>25</sup> See *infra* Part 3.2 (explaining that Pac Rim received an exploration license, but did not meet the conditions necessary for an exploitation concession).

<sup>26</sup> According to the ICSID site, arbitrators are entitled to "a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings (corresponding to US \$375 per hour)." *Claims for Fees and Expenses*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/Claims-for-Fees-and-Expenses.aspx> (last visited Apr. 3, 2015).

For more on selection and appointment of tribunal members, see *Selection and Appointment of Tribunal Members – ICSID Convention Arbitration*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx> (last visited Mar. 24, 2015).

<sup>27</sup> *Case Details*, International Centre For Settlement Of Investment Disputes, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/09/12&tab=DOC> (last visited Apr. 3, 2015).

In an example of what critics call “treaty shopping,”<sup>28</sup> Pac Rim submitted its case under two potential jurisdictions: under the Central American Free Trade Agreement (CAFTA) and also under El Salvador’s domestic investment law.<sup>29</sup> In the jurisdictional decision, the tribunal rejected CAFTA’s jurisdiction (rightly so, since Canada was not a signatory to CAFTA and the Canadian company’s decision to change the nationality of its shell subsidiary from the Cayman Islands to the United States did not mean the newly-established US company could enjoy the benefits of CAFTA).<sup>30</sup> However, the tribunal accepted jurisdiction under the domestic investment law.<sup>31</sup> This already suggested pro-corporate bias: the details of the submission should have led the tribunal to throw out the case since Pac Rim claimed that it did not know about the potential problems with getting the concession until March 2008, but that claim was disproved by indisputable evidence including emails from Pac Rim top officials dating as early as 2005.<sup>32</sup> (More on this below.)

With jurisdiction accepted, the case moved into its merits – or substantive – stage. It is worth noting that, at ICSID, the merits stage is overseen by the same three-person tribunal as the jurisdictional

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<sup>28</sup> See Inna Uchkunova, *Drawing a Line: Corporate Restructuring and Treaty Shopping in ICSID Arbitration*, KLUWER ARBITRATION BLOG (Mar. 6, 2013), <http://kluwerarbitrationblog.com/blog/2013/03/06/drawing-a-line-corporate-restructuring-and-treaty-shopping-in-icsid-arbitration/> (defining treaty-shopping “as the process of routing an investment so as to gain access to a BIT where one did not previously exist or for gaining access to a more favorable BIT protection.”).

<sup>29</sup> Pac Rim, *Hearing of Objections to Jurisdiction*, *supra* note 14, Hearing on Jurisdiction, 6:18-7:12 (May 2, 2011).

<sup>30</sup> Pac Rim, *Decision on Jurisdiction*, *supra* note 14, ¶ 7.1 (June 1, 2012). This involved the change of nationality of Pac Rim Cayman LLC from the Cayman Islands to the United States, without Pac Rim Cayman having any substantial business activities in the United States.

(More details later in article, *infra*. pp. 114-15).

<sup>31</sup> *Id.*

<sup>32</sup> *Infra* p. 113; Pac Rim, *supra* note 14, ¶¶ 68-69 (July 11, 2014), available at [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=26:otros-documentos&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63). As the ICSID documents make clear, Pac Rim knew this was a possibility shortly after submitting its application for a concession, by early 2005. *Id.* The Rejoinder refers to evidence on the record that Pac Rim was repeatedly notified of problems with its application from 2005-2007. *Id.* ¶¶ 32-65. This was well “before then-President Saca confirmed in 2008 that mining had to be studied before exploitation could be allowed.” *Id.* ¶ 65. In May 2007, the Ministry of Environment (MARN) and the Ministry of Economy told mining corporations that there would be no more mining until a “strategic environmental evaluation” was completed. *Id.* ¶ 64.

stage. In other words, in allowing the case to proceed on jurisdictional grounds, the three arbitrators continue their well-paid jobs. The merits hearing was held in September 2014, with a ruling likely sometime in 2015 (unknown as of this writing).<sup>33</sup>

The merits stage focused on technical issues and narrow grounds: whether Pac Rim had met the conditions for a mining concession. With meticulous detail (including use of internal Pac Rim emails), the government's lawyers focused on proving that Pac Rim knew it had not successfully completed the key three requirements for being granted an exploitation concession: (1) Pac Rim did not get government approval for its Environmental Impact Study (EIS) because the EIS that Pac Rim submitted was not deemed satisfactory, in particular for its failure to cover the full area where Pac Rim hoped to mine; (2) Pac Rim did not submit the required feasibility study; and (3) Pac Rim was not even close to meeting the requirement that it hold titles to (or permission to mine in) all the land for which it requested a concession.<sup>34</sup> The lack of land titles also demonstrates that, contrary to Pac Rim's claims, the majority of the local population was not – and is not – supportive of Pac Rim's plans to mine in Cabañas. Pac Rim's attempts to get the land titles were not successful: Pac Rim had less than 13% of the required land holdings, lacking more than 87% of land estimated to be owned by over 1,000 people.<sup>35</sup>

On Pac Rim's side, lawyers focused on Pac Rim Cayman LLC's President and CEO Thomas Shrake's statements that he was "not aware" of the reality of such legal complications.<sup>36</sup> To the contrary, however, documents make it clear that Pac Rim well knew that it was not able to fulfill these requirements for an exploitation

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<sup>33</sup> *Case Details*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/09/12&tab=DOC> (last visited Apr. 3, 2015).

<sup>34</sup> Robin Broad, *Summary of El Salvador's Rejoinder on the Merits (11 July 2014) in Pac Rim Cayman LLC v. The Republic of El Salvador*, THE BLUE PLANET PROJECT (Sept. 4, 2014), <http://www.blueplanetproject.net/index.php/summary-of-el-salvadors-rejoinder-on-the-merits-11-july-2014-in-pac-rim-cayman-llc-v-the-republic-of-el-salvador/>. See also Pac Rim, *supra* note 14, ¶¶ 254-57.

See also Jen Moore et al., *DEBUNKING EIGHT FALSEHOODS BY PACIFIC RIM MINING/OCEANAGOLD IN EL SALVADOR: Oceana Gold in El Salvador* (Mar. 2014), available at <http://www.ips-dc.org/wp-content/uploads/2014/03/Eight-Falsehoods-Final-March-17-2014-WEB.pdf> (explaining that Pacific Rim did not meet the regulatory requirements to obtain a mining permit).

<sup>35</sup> Pac Rim, *supra* note 14, ¶ 98.

<sup>36</sup> *Id.* ¶ 69.

concession. Indeed, as early as 2005 Pac Rim was working with President Saca's vice-president and others to eliminate the requirement that it hold all relevant land titles.<sup>37</sup> Their plan to get around this requirement was to attempt to convince the Salvadoran Congress to amend or replace the mining law to remove this requirement.<sup>38</sup> The above points also refute Pac Rim's argument that a key reason it did not receive an exploitation concession rests in the fact that it did not play along with the corruption of the Saca administration (2004-2009).<sup>39</sup> "This is nonsense," to quote a sentence used in the Rejoinder for another point.<sup>40</sup>

The fascinating details of this case are available publicly, thanks mainly to documents posted by the Salvadoran government.<sup>41</sup> The merits stage was held in secret (with no outside observers allowed, not even potentially affected individuals who signed amicus briefs). Ironically, if this case had proceeded under CAFTA jurisdiction, the proceedings would have had to have been made public. But, in the jurisdiction allowed, both sides had to agree to open the hearings, and both sides did not. The author knows from interviews that the Salvadoran government was willing to have the merits stage open; therefore, it seems reasonable to surmise that Pac Rim opposed such transparency.

The case exposes additional "biases" inherent in ICSID's structures and procedures. Among them: Pac Rim Cayman LLC has been able to finance its ICSID trial because its financially-floundering parent company, Pacific Rim, was purchased by

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<sup>37</sup> *Id.* ¶¶ 69-70.

<sup>38</sup> *Id.* ¶¶ 71-72, 230.

<sup>39</sup> *High Stakes Poker (2012 Documentary encore)*, 1:55-2:16, 24:20-25:14 (Nov. 16, 2012), available at <http://www.cbc.ca/player/Radio/The+Sunday+Edition/Full+Episodes/ID/2324862711/>.

<sup>40</sup> Pac Rim, *supra* note 14, ¶ 68 (referring to Pac Rim's denial that it lobbied the government). Beyond not complying with the requirements needed to get a concession and trying to change the law (both, as explained earlier in this article, see *supra* Part 3.2; notes 37-8 and accompanying text), Pac Rim clearly had its own plans to circumvent the democratic processes of El Salvador. Some of this appears to have involved hiring key people as employees or consultants, from Manuel Hinds to relatives of the vice-president, as well as providing funds to local individuals and groups in Cabañas. See *id.* ¶¶ 69-70, 285-86, and 445. In this regard, it is unfortunate that the ICSID tribunal did not require that Pacific Rim submit a list of those persons to whom it paid more than a certain amount, as would be required in a corruption or fraud case.

<sup>41</sup> *Descarga de Documentos*, MINISTERIO DE ECONOMÍA, GOBIERNO DE EL SALVADOR, [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=26:otros-documentos&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63) (last visited Mar. 27, 2015).

Canadian/Australian mining company OceanaGold in November 2013, just as Pacific Rim was running out of money. As a result, Pacific Rim became a wholly owned subsidiary of OceanaGold,<sup>42</sup> with enhanced financial ability to pursue the case at the tribunal. But the claimant in this case remains Pac Rim Cayman.

This means that, should El Salvador win, its win is only against Pac Rim Cayman – an entity that, as one knowledgeable insider explained, has no actual address, no actual physical presence, no bank account, and no actual money, “not a mailbox or a phone or a desk.” OceanaGold will not have a legal duty to pay any ICSID financial rulings against Pac Rim Cayman. This is an example of what is called “third party funding” – a seemingly unfair situation whereby, in this case, Pac Rim can get unlimited financial assistance to pursue its case at ICSID, but, if El Salvador wins, it has access only to Pac Rim Cayman’s finances.<sup>43</sup>

The financial costs of lengthy ICSID cases are also substantial. According to insiders, each side has already spent over \$12 million. Even if El Salvador wins, the arbitrators may not require Pac Rim to cover El Salvador’s legal costs. If El Salvador loses, Pac Rim has asked for \$301 million in compensation. Thus far, the government has been insistent that it will pay rather than allow mining. But an El Salvador loss at ICSID could open the flood-gates to ICSID suits by other mining companies and, if the cost is high enough, actual mining. It could also have the effect of dissuading other governments from putting environmentally-inspired restrictions on mining.

In addition, the case is likely to drag on beyond the merits stage into an annulment stage. Unlike courts and most judicial systems, ICSID tribunals are *not* based on legal precedent, so there is no

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<sup>42</sup> Press Release, OceanaGold and Pacific Rim Mining, OceanaGold Agrees to Acquire Pacific Rim Mining (Oct. 8, 2013) (published on OceanaGold website), available at <http://oceanagold.com/assets/documents/filings/2013-Press-Releases/081013OceanaPacRimPressReleaseFINAL2.pdf>. The buyout seems reflective of the relationship between “junior” exploratory ventures and more “senior” mining companies. On this relationship between “junior” and “senior” mining companies with a focus on Canadian firms, see Michael Dougherty, *The Global Gold Mining Industry: Materiality, Rent-Seeking, Junior Firms and Canadian Corporate Citizenship*, 17 *COMPETITION AND CHANGE* 339 (2013).

<sup>43</sup> *Commerce Group Corp. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, International Centre for Settlement of Investment Disputes, para. 23, n. 22 (Aug. 10, 2012), available at [http://www.minec.gob.sv/index.php?option=com\\_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&Itemid=63](http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=30:commerce-group-vrs-republica-de-el-salvador&Itemid=63).



appeal on those judicial grounds. Either side can request an annulment of the award based only on “procedural errors in the decisional process.”<sup>44</sup> Furthermore, the ad-hoc annulment tribunal has the power to decide “not to annul notwithstanding that an error has been identified. . .”<sup>45</sup>

To conclude this section: Overall, the author’s detailed research provides more than ample evidence and documentation that the case of *Pac Rim Cayman LLC v the Republic of El Salvador* has no merit. If the three ICSID tribunal members decide otherwise, it will further prove the point of those who argue that ICSID is an institution biased towards corporations and unable to weigh the evidence using both the facts at hand and legal precedents. That this case has been allowed to proceed is itself evidence of pro-corporate bias.

Moreover, should El Salvador win, it will be based on legal prowess and Pac Rim’s mistakes, not on the fate of the Lempa River or the views of the majority of people in Cabañas. Indeed, the key environment issues raised at local and national levels are not material in ICSID procedures. Although El Salvador’s lawyers have raised them,<sup>46</sup> the impacts of gold mining on the Lempa River and the centrality of the Lempa watershed to the future of El Salvador as a country are not relevant to the proceedings.

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<sup>44</sup> ICSID Background Paper on Annulment for the Administrative Council of ICSID, para. 72 (Aug. 10, 2012), <http://documents.worldbank.org/curated/en/2012/08/16755063/background-paper-annulment-administrative-council-icsid>.

The logic behind the annulment process is explained by ARON BROCHES, *Observations on the Finality of ICSID Awards*, in *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 295 (Martinus Nijhoff Publishers 1995). Broches was World Bank Vice President and general counsel and the key individual involved in ICSID’s creation, where he served as Secretary-General from 1967-1980.

<sup>45</sup> ICSID Background Paper on Annulment for the Administrative Council of ICSID, para. 63 (Aug. 10, 2012), <http://documents.worldbank.org/curated/en/2012/08/16755063/background-paper-annulment-administrative-council-icsid>.

<sup>46</sup> *Pac Rim*, *supra* note 14, ¶¶ 57-65, 203-206, 249-255, 252-288; *Id.*, *El Salvador’s Counter-Memorial on Merits*, ¶¶ 249-55 (July 11, 2014).

## 4. FROM CASE STUDY TO ICSID

Let us now build from this case study of Pac Rim Cayman LLC v Republic of El Salvador to expand on general points about this key investor-state tribunal that is presented by its proponents as a level-playing field. As the number of cases brought before ICSID has ballooned,<sup>47</sup> so too have the criticisms. As stated in this article's introduction, the arguments are that ICSID rulings are: (1) increasingly biased in favor of investors over the state, and (2) too narrow in their focus on commercial rights over broader non-commercial issues.<sup>48</sup>

The first, ICSID's bias towards corporations, echoes the concerns raised by the "Tokyo No" 21 countries fifty years ago.<sup>49</sup> Indeed, a first conclusion is that the Tokyo No countries were prescient in their concerns. If anything, as ICSID's workload has expanded and as corporations' global reach has expanded, ICSID appears to have become increasingly biased towards private corporate investors.

This author is hardly the only one raising these criticisms. There is increasing public airing of insider discomfort and discussion of ICSID's corporate bias. In 2014, prominent trade lawyer George Kahale III publicly declared that ICSID tribunals, before which he has argued cases, are increasingly biased in favor of the foreign investors.<sup>50</sup> Such insider critics have pointed out, since ICSID does not build its cases on legal precedents nor allow for appeals based on judicial reviews, there are no ways to correct such rulings.<sup>51</sup> As Kahale phrased it, "The system is broken." Kahale has also denounced the agreements that have empowered hundreds of

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<sup>47</sup> ICSID Secretariat, *The ICSID Caseload – Statistics (Issue 2014-2)*, at 7 (2014), available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202014-2%20%28English%29.pdf>. A list of completed and pending cases can be found at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>, accessed January 7, 2015. (This was formerly: <<https://icsid.worldbank.org/ICSID/Index.jsp>>).

<sup>48</sup> See *supra* Part 1.

<sup>49</sup> See *supra* notes 3-4 and accompanying text.

<sup>50</sup> See generally George Kahale, Keynote Speech at Eight Annual Juris Investment Treaty Arbitration Conference, Washington, D.C. at 4 (Mar. 28, 2014), available at <http://www.aph.gov.au/DocumentStore.ashx?id=dff029f2-594e-48b5-8318-f02adf7b632c> (citing to transcript).

<sup>51</sup> E.g., Nassib Ziadé, *Is ICSID Heading in the Wrong Direction*, BILATERALS.ORG (Mar. 3, 2015), <http://www.bilaterals.org/?is-icsid-heading-in-the-wrong>.

corporations to pursue these ICSID cases as “weapons of legal destruction.”<sup>52</sup>

Such criticism has been matched by member-country discomfort and action. Bolivia, Ecuador, and Venezuela – all part of the original Tokyo No – have left ICSID.<sup>53</sup> South Africa is establishing a new investment law that allows foreign corporations to bring such claims *only* to domestic courts.<sup>54</sup> India is conducting a review of its treaties in the face of several corporate lawsuits,<sup>55</sup> and Indonesia has announced its intent not to renew its bilateral investment treaties.<sup>56</sup> Australia declined to include these corporate rights in the 2005 Australia-U.S. Free Trade Agreement.<sup>57</sup> Brazil has stayed out of investor-state dispute mechanisms.<sup>58</sup>

A related set of biases moves beyond the concerns of the Tokyo No fifty years ago. Here the argument is that ICSID’s purview is too narrow. Why, for example, should the investor – as a non-state

<sup>52</sup> *Supra* note 50.

<sup>53</sup> Sergey Ripinsky, *Venezuela’s Withdrawal From ICSID: What it Does and Does Not Achieve*, INVESTMENT TREATY NEWS (Apr. 13, 2012), <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>; Nicolas Boeglin, *ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives*, BILATERALS.ORG (June 25, 2013), <http://www.bilaterals.org/?icsid-and-latin-america-criticisms>.

<sup>54</sup> Jackwell Feris, *Challenging the Status Quo – South Africa’s Termination of its Bilateral Trade Agreements*, Publications, DLA PIPER (Dec. 10, 2014), <https://www.dlapiper.com/en/us/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/>.

<sup>55</sup> *Supra* note 1; Kavaljit Singh, *India and Bilateral Investment Treaties – Are They Worth It?*, FINANCIAL TIMES (Jan. 21, 2015), <http://blogs.ft.com/beyond-brics/2015/01/21/guest-post-india-and-bilateral-investment-treaties-are-they-worth-it/>.

<sup>56</sup> Ben Bland and Shawn Donnan, *Indonesia to Terminate More Than 60 Bilateral Investment Treaties*, FINANCIAL TIMES (Mar. 26, 2014), <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3WTC8rx2C>; Abdulkadir Jailani, Ministry of Foreign Affairs, Indonesia’s Experience: IIA Review (Feb. 25-27, 2015), [http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/Indonesia\\_side-event-Wednesday\\_model-agreements.pdf](http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/Indonesia_side-event-Wednesday_model-agreements.pdf); Matthew J. Skinner & Zara Shafruddin, *Turning Tides*, Publications, JONES DAY (Oct. 2014), [http://www.jonesday.com/Turning-Tides-What-Indonesias-Reconsideration-of-Bilateral-Investment-Treaties-Means-for-Foreign-Investors-10-10-2014/?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.jonesday.com/Turning-Tides-What-Indonesias-Reconsideration-of-Bilateral-Investment-Treaties-Means-for-Foreign-Investors-10-10-2014/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original).

<sup>57</sup> Ann Capling and Kim Richard, *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*, 19(2) GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION AND INSTITUTIONS 151, 165 (2006).

<sup>58</sup> Elizabeth Whitsitt & Damon Vis-Dunbar, *Investment Arbitration in Brazil: Yes or No*, INVESTMENT TREATY NEWS (Nov. 30, 2008), <http://www.iisd.org/itn/2008/11/30/investment-arbitration-in-brazil-yes-or-no/>.

actor—have the right to sue the government, while other presumably key non-state actors such as the affected communities are not even allowed to listen to ICSID's often secret hearings, never mind participate equally? Yes, there have been some small steps to expand the potential voices heard by ICSID arbitrators: communities can submit amicus briefs<sup>59</sup> — but only if they find a lawyer<sup>60</sup> willing to write one on their behalf and if the tribunal accepts the submission. This is hardly true participation. And there is not even any assurance that such briefs will be read or taken into account by the ICSID arbitrators who preside over any given case.

At the time of ICSID's founding, there were few universal human rights instruments, save the ILO conventions and the 1948 UN Declaration of Human Rights.<sup>61</sup> While there were a couple of environmental treaties concluded prior to the advent of the ICSID Convention, the international community focused its environmental law-making efforts on the environmental field only *after* the 1972 Stockholm Conference on the Human Environment.<sup>62</sup> In addition, the key international instruments on the rights of indigenous peoples, namely ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, date from 1989 and 2007, respectively.<sup>63</sup> But much has changed since the mid-1960s, including widespread understanding of the centrality of environmental issues. The

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<sup>59</sup> On ICSID's 2006 rule changes to allow amicus briefs, see Gary Born, et al., *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules, Publications & News*, WILMERHALE (Apr. 2006), <http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=90393> (discussing ICSID's 2006 rule changes, including Arbitration Rule 37 allowing amicus briefs).

<sup>60</sup> In the El Salvador case, for example, the Center for International Environmental Law provided the legal expertise needed to write such a brief. See Benjamin Miller, Jennifer Liu, Ramin Wright, and Jenny Yoo, *The Guide for Potential Amici in International Investment Arbitrations*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, 15-16 (Jan. 2014), [http://ciel.org/Publications/Guide\\_PotentialAmici\\_Jan2014.pdf](http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf).

<sup>61</sup> *The Core International Human Rights Instruments and Their Monitoring Bodies*, United Nations Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Apr. 11, 2015).

<sup>62</sup> DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 146 (4th ed. 2010).

<sup>63</sup> *Convention No. 169*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm> (last visited May 9, 2015); *Declaration on the Rights of Indigenous Peoples*, United Nations Permanent Forum on Indigenous Issues, <http://undesadspd.org/indigenouspeoples/declarationontherightsofindigenouspeoples.aspx> (last visited May 1, 2015).

Salvadoran government should be allowed, indeed encouraged, to protect a key watershed from the adverse environmental impacts of gold mining. Our instruments of global governance should be structured to reward a government for so doing, rather than punished by being sued at ICSID. It should be the duty of governments – from local to national to global levels – to privilege their responsibility to protect people and their ecosystems.

In its current structure, ISDS clauses and rulings by ICSID do the exact opposite – providing a negative incentive on a national level for environmental and social regulations, for fear of being sued for “indirect taking” via regulation. This is what has been termed “regulatory chill.”<sup>64</sup>

## 5. THE URGENCY FOR CHANGE

To say that the outcome of the Pac Rim Cayman suit at ICSID has profound ramifications for the future of El Salvador is an understatement. So too does it provide lessons about better ways forward vis-à-vis investor-state regimes.

There is urgency to this topic given far-reaching trade agreements on the horizon—the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)<sup>65</sup>—that the Obama administration is negotiating with nations in the Pacific and in Europe. If either or both are approved with investor-state dispute settlement (ISDS) provisions exemplified by the latest TPP version (as of this writing), ICSID’s caseload will mushroom further. And we can expect even more action in terms of investors’ propensity to sue governments not just for direct taking via expropriation (the original purpose of ICSID), but also for indirect

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<sup>64</sup> See, e.g., Kyla Tienhaara, *What You Don’t Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries*, GLOBAL ENVIRONMENTAL POLITICS, Nov. 2006, at 73, 85 (“The notion that regulators fear raising environmental standards beyond the status quo because they believe it may deter new investment or cause industrial flight has been termed regulatory chill.”).

<sup>65</sup> See Robin Broad and John Cavanagh, *A Strategic Fight against Corporate Rule*, THE NATION, Feb. 3, 2014, available at <http://www.thenation.com/article/177930/global-fight-against-corporate-rule> (discussing the emerging movement to “reverse the momentum” or national corporations which have written and rewritten “hundreds of rules skewing tax, trade, investment, and other policies in their favor” to the detriment of communities and governments). To follow the controversy and protests, see *Globalization & Trade*, PUBLIC CITIZEN, <http://www.citizen.org/trade/> (last visited Mar. 27, 2015).

taking via environmental, social, and other regulations that might impinge on a foreign investor's future ability to make profits by irresponsible exploitation of a country's resources.

Recently leaked documents suggest that several governments are attempting to at least scale back investors' rights (and, thus, the power of ICSID) in these draft trade deals. This includes countries in the European Union—notably France and Germany—voicing concerns about the investor-state provisions they contain.<sup>66</sup>

It is also important to refute some misunderstandings about the need for such investor rights' protections and for ICSID. Proponents would have one believe that the global economy would be seriously damaged without such investor rights (as in the current ISDS clauses) and their key venue ICSID, and that foreign investment would dry up should a country not sign ISDS clauses and be an ICSID member.<sup>67</sup> To counter this hypothesis, one can simply point

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<sup>66</sup> On these member country actions, see Matthew J. Skinner and Zara Shafruddin, *Turning Tides: What Indonesia's Reconsideration of Bilateral Investment Treaties Means for Foreign Investors*, JONES DAY PUBLICATIONS, JONES DAY (Oct. 2014), <http://www.jonesday.com/Turning-Tides-What-Indonesias-Reconsideration-of-Bilateral-Investment-Treaties-Means-for-Foreign-Investors-10-10-2014/?RSS=true#> (explaining that Indonesia is not renewing its bilateral treaty with the Netherlands); Dario Sarmadi, *Commission Mulls TTIP Minus Investor Arbitration*, EURACTIV (Oct. 24, 2014), <http://www.euractiv.com/sections/trade-society/commission-mulls-ttip-minus-investor-arbitration-309460> (stating that the European Commission is debating whether to include investor arbitration in the TTIP); *The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014, at 78), available at <http://www.economist.com/node/21623756/print> (expounding that some countries are withdrawing from treaties with ISDS clauses because of problems in the arbitration process); and Cécile Barbière & Anne-Claude Martin, *French government will not sign TTIP agreement in 2015*, EURACTIV (Nov. 17, 2014), <http://www.euractiv.com/sections/trade-society/french-government-will-not-sign-ttip-agreement-2015-310037> (illustrating that some European Union countries oppose ISDS clauses).

On states and citizens in the US "getting proactive" on TPP, see Karen Hansen-Kuhn, *States get proactive on trade agreements: The Maine model*, INSTITUTE FOR AGRICULTURE AND TRADE POLICY (July 16, 2014), <http://www.iatp.org/blog/201407/states-get-proactive-on-trade-agreements-the-maine-model>. See also the campaigns and publications of the Council of Canadians, and its chairperson Maude Barlow, *California Drought*, MEDIA LE CONSEIL DES CANADIENS, <http://www.canadians.org/media> (last visited Mar. 27, 2015) (exemplifying Barlow's objections to trade agreements), as well as that of Public Citizen's Global Trade Watch, and its director Lori Wallach, *Lori Wallach, Director, Public Citizen's Global Trade Watch*, PUBLIC CITIZEN, [http://www.citizen.org/trade/article\\_redirect.cfm?ID=17010](http://www.citizen.org/trade/article_redirect.cfm?ID=17010) (last visited Mar. 27, 2015) (providing articles about trade agreements involving the United States).

<sup>67</sup> Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Stratification" of Investment Dispute Settlement*, 55 HARV. INT'L L. J. 45, 50 (2014); Editorial Board, *Don't Buy the*

to Brazil, a leading host to foreign investment but, again, a country that has never accepted investor-state dispute settlement in any venue. To make a more general point: Foreign investors, if they believe they are making a risky investment, can simply rely on foreign risk insurance. And, like domestic investors, they have recourse to the relevant domestic courts in a given country. Indeed, here is another example of the bias created by ISDS's reliance on global venues such as ICSID: domestic firms have to go through domestic courts; so should foreign firms.<sup>68</sup>

Those who follow the World Trade Organization and its dispute resolution mechanism might note the irony: A fundamental rule of today's neoliberal push towards "ultra-globalization," as embedded in the WTO,<sup>69</sup> is that a country's rules must treat foreign and domestic investors the same. The irony is, of course, that ICSID's existence seems to suggest that such ultra-globalization proponents do not find it problematic to have foreign investors privileged over domestic investors.

Fifty years ago, those 21 governments who were part of Tokyo No were prescient in their concerns about ICSID and ISDS. This article, with its central case study of *Pac Rim Cayman LLC v Republic of El Salvador* demonstrates how an investor-state tribunal that represents itself as an objective institution to resolve disputes between the two sides has increased its biases toward the private

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Trade Deal Alarmism, *The Washington Post*, March 11 2015, [http://www.washingtonpost.com/opinions/dont-buy-the-trade-deal-alarmism/2015/03/11/41575fee-c1d5-11e4-9271-610273846239\\_story.html](http://www.washingtonpost.com/opinions/dont-buy-the-trade-deal-alarmism/2015/03/11/41575fee-c1d5-11e4-9271-610273846239_story.html); and Time Worstall, *Explaining TTIP and ISDS to George Monbiot One More Time*, *Forbes*, Jan. 14, 2015, <http://www.forbes.com/sites/timworstall/2015/01/14/explaining-ttip-and-isds-to-george-monbiot-one-more-time/>.

<sup>68</sup> For more on the questionable relationship between investor-rights regimes and FDI levels, see *RETHINKING FOREIGN INVESTMENT FOR SUSTAINABLE DEVELOPMENT LESSONS FROM LATIN AMERICA* (Kevin Gallagher & Daniel Chudnovsky, eds., Anthem Press 2010); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 *VA. J. INT'L L.* 397, 405-409 (2010) (discussing the relationship between BITs, increased FDI flow, and property rights). *Contra* BITs 'Not Decisive' in Attracting Investment, Says South Africa, *Third World Network Info Services on WTO and Trade Issues*, *THIRD WORLD NETWORK* (Oct. 8, 2012), <http://www.twn.my/title2/wto.info/2012/twninfo121001.htm> (explaining the South African government's position that there is "no clear relationship" between BITs and increased inflows of FDI).

<sup>69</sup> World Trade Organization, *Settling Disputes*, *UNDERSTANDING THE WTO*, 55, (2015), available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf).

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corporation/investor side and commercial over non-commercial interests.