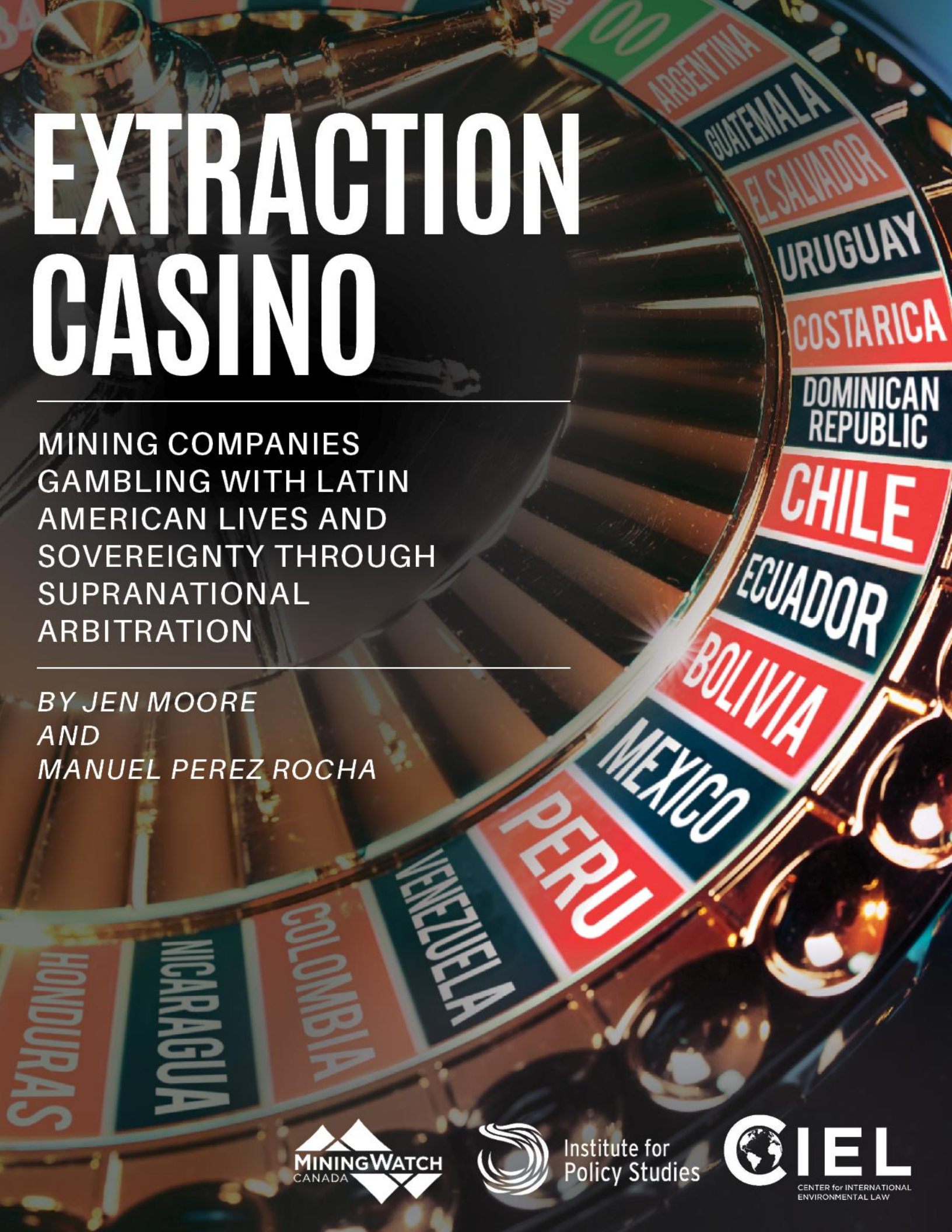


EXTRACTION CASINO

MINING COMPANIES GAMBLING WITH LATIN AMERICAN LIVES AND SOVEREIGNTY THROUGH SUPRANATIONAL ARBITRATION

BY JEN MOORE
AND
MANUEL PEREZ ROCHA

MiningWatch Canada
Institute for Policy Studies
CIEL
CENTER for INTERNATIONAL ENVIRONMENTAL LAW

TABLE OF CONTENTS

SUMMARY **3**

1. INTRODUCTION **5**

2. THE IMPACTS OF LARGE-SCALE MINING IN LATIN AMERICA **8**
Key Elements of Investor Protections in Trade and Investment Treaties..... 11

3. MINING INVESTOR CASES AGAINST LATIN AMERICAN GOVERNMENTS **14**
Analysis of Cases 16
Country-by-Country Overview 19

4. PROPOSALS FOR ACTION **35**
Lessons for Movement Building from Pacific Rim Mining/OceanaGold v. El Salvador.. 39

APPENDIX **41**
ISDS-Cases brought by Mining Companies vs Latin American Countries..... 41

This report is dedicated to all those who have been murdered, criminalized, or threatened or who are otherwise risking their lives to bravely defend their water, land, and territory for future generations from the devastating impacts of mining.

Thanks to Sarah Anderson, Rick Arnold, Nicolás Boeglin, Robin Broad, John Cavanagh, Pedro Cabezas, Kirsten Francescone, Carla García-Zendejas, Kelsey Alford-Jones, Jamie Kneen, Lavinia Stenford, Carlos Lozano Acosta, Thomas McDonagh, Aldo Orellana López and Luis Parada for their input and assistance with reviewing this report, and Sarah Gertler for the design and layout. Thank you to Olimpia Boido for the Spanish translation of this report.

We acknowledge the support of the Center for International Environmental Law (CIEL) for their contribution to research for this report.

This report was last updated April 2019.

SUMMARY

During the last couple of decades—and particularly during the last ten years—mining companies have filed dozens of claims against Latin American countries before international arbitration panels, demanding compensation for court decisions, public policies and other government measures that they claim reduce the value of their investments. In a majority of these cases, the communities most affected by the mining projects have been actively organizing to defend their territories and natural resources. For local residents, these projects are a threat to their land, health, environment, self-determination and ways of life. These suits represent a further assault. For the global mining companies, international arbitration is merely another opportunity to strike it rich through reckless, casino-style gambling, given how the recourse they have to bring expensive lawsuits to international tribunals takes place within a system in which the deck is heavily stacked in their favor.

This paper analyses 38 cases filed by global mining corporations against Latin American governments using the investor-state dispute settlement (ISDS) system. Reflective of the disproportionate participation of Canadian financing in the global mining sector, the majority of these cases were brought or threatened by Canadian-domiciled firms, although U.S., U.K., South African, Swiss, French, Dutch, Chilean, Australian and East Indian companies have also taken part. While companies do not always win, the low risk that corporations face to gamble on a case valued in the millions, or even billions of dollars, along with the increasing availability of third-party funding and rules biased in their favour, provide strong incentives for ever more outrageous suits.

The purpose of this brief is to document the magnitude of the problem in the context of mining conflicts in Latin America and the troubling implications that these suits pose for the already difficult struggles of Indigenous Peoples and mining-affected communities to exercise their self-determination and to defend lands, water and ways of life from the destructive impacts of industrial mining. In particular, these suits further undermine the already marginal protections mining-affected communities have access to through their courts, regulatory systems and governments to guarantee their rights, enforce laws and regulations, and otherwise act in their interest.

This paper begins with an introduction to the problem of mining companies bringing ISDS suits by providing some data for extractive industries as a whole, but with a focus on mining cases. This is followed by an overview of the impacts of industrial mining in Latin America, as well as a description of the investor protection rules most frequently cited in mining arbitration suits. From there, we provide a more detailed account and analysis of nearly forty mining suits brought against Latin American governments to date, over two thirds of which have been brought in cases where communities have been defending land and territory. More than one third of the suits reviewed have been brought by mining companies against states that have nationalized mining projects or sought to boost taxes. These suits indicate how ISDS is also serving to constrain the resource management options of states, as described in greater detail elsewhere.[1]

Finally, the paper concludes with an overview of alternatives being proposed to the current trade and investment framework. We include a reflection on the recent experiences in a transnational campaign against a mining suit against El Salvador, that helped pave the way for a historic ban on metals mining in the country. This and other recent developments should encourage affected communities, civil society organizations, and government officials

[1] For example: Hadrian Mertins-Kirkwood, Canadian Centre for Policy Alternatives, "A Losing Proposition: The Failure of Canadian ISDS Policy at Home and Abroad," August 2015.

to step up the global movement against international investment agreements, related laws, and contracts that threaten to dispossess mining-affected communities and peoples of not only their territories, land and water, but also their sovereignty and self-determination.

Table 1A. Number of Mining, Oil and Gas Cases Per Year (Source: ICSID)

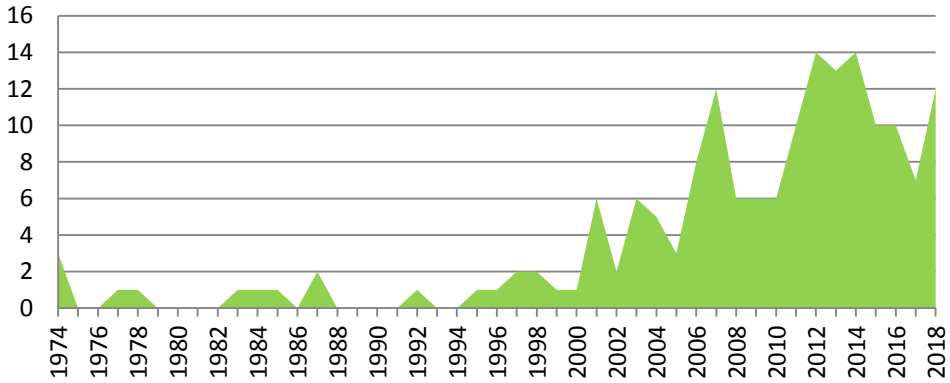
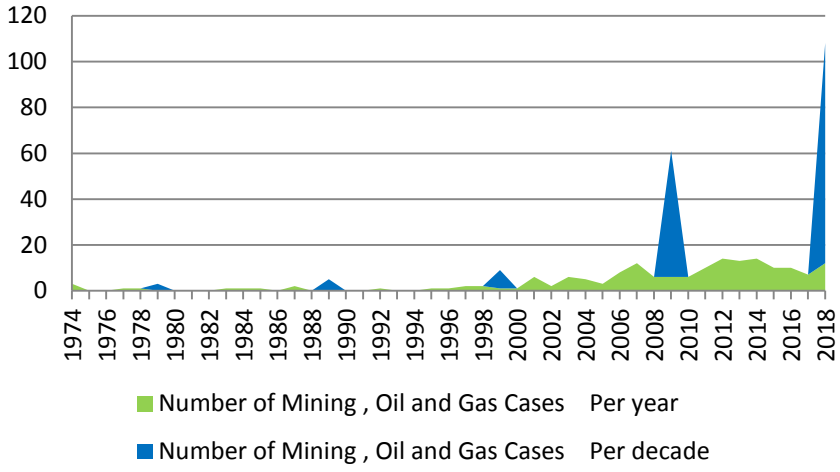


Table 1B. Number of Mining, Oil and Gas Cases Per Year and Per Decade (Source: ICSID)



1

INTRODUCTION

Latin American countries are increasingly the targets of multimillion dollar claims by corporations to undermine the efforts of mining-affected communities, courts, governments and even international human rights bodies to protect people and the environment from the harms of industrial mineral extraction. At the same time that corporations have been granted recourse to an unparalleled international legal system which enables them to bring abusive and costly suits, they largely operate with impunity regardless of the many harms taking place in connection with their operations throughout the hemisphere.

The inclusion of investor-state dispute settlement (ISDS) clauses in Free Trade Agreements (FTAs), Bilateral Investment Treaties (BITs) and other investment pacts, laws or contracts[2] enables investors to bypass domestic courts and bring claims to a supranational arbitration system. This system gives foreign investors recourse to make claims against sovereign states for millions—and even billions—of dollars before private arbitration "tribunals", the World Bank´s International Centre for Settlement of Investment Disputes (ICSID) being the most commonly used, and the United Nations Commission on International Trade Law (UNCITRAL) being another.

These suits are brought before highly-paid, three-person panels of corporate lawyers who usually meet in secret with no witnesses. Such "tribunals" should not be mistaken for a court of law. Rather, they have been called a "caricature of a legal system" with little regard for precedent nor any commitment to truth or justice.[3] George Kahale III, the chairperson of a Washington-based law firm who defends governments in such suits, describes them as the "Wild Wild West of International Law," in which "there are really no hard and fast laws" and where "misrepresentations of fact and gross mis-citations of authorities are rampant and, when discovered, usually go unpunished."[4] It is therefore highly troubling that in suits brought by mining companies these panels are often deliberating on matters of utmost importance to the interests of mining-affected communities, Indigenous Peoples and entire countries, effectively usurping the role of domestic courts and administrative agencies.[5] In contrast, citizens and communities have no comparable legal counterweight at the international level to launch proceedings when mining company activities violate human and environmental rights, or interfere with public policies intended to serve the common good.

As a result, the prevailing international investment framework, put in place through thousands of multilateral and bilateral investor protection agreements around the world, impedes the ability of governments to regulate in the public interest or to effectively implement the decisions of domestic court systems, administrative agencies or even international human rights bodies (as we will see with the case of Goldcorp v. Guatemala). The rules found in investment agreements are not consistent with the self-determination of Indigenous peoples, human rights and environmental protection. Rather, they contain clauses that effectively restrain the capacity of recipient governments to act in support of sustainable livelihoods, to protect the environment and public health, to defend their countries from financial crises, or to guarantee human rights and the rights and self-determination of

[2] Hadrian Mertins-Kirkwood, Canadian Centre for Policy Alternatives, 2015.
[3] George Kahale III (forthcoming). ISDS: The Wild, Wild West of International Law and Arbitration. *Brooklyn Journal of International Law*, 44(1).
[4] George Kahale III (forthcoming).
[5] Johnson, L., Sachs, L., Güven, B., & Coleman, J. (2018). Costs and Benefits of Investment Treaties: Practical Considerations for States. *Columbia Center on Sustainable Investment*.

Indigenous Peoples. As such, investment protection rules threaten to dispossess mining-affected communities and Indigenous Peoples of not only land and water, but of the potential for state agencies to respect their self-determination and govern in their best interest and that of future generations.

Extractive corporations, particularly in the oil, gas and mining industries, take enormous advantage of these provisions. In fact, the extractives industry sector has made the greatest use of the ISDS system. (SEE GRAPH 2, next page.) Today, over 140 *known* extractive industry cases globally have been registered at ICSID and other tribunals.[6] The majority of cases brought by Canadian investors, a principal source of financing in the global mining industry and the source of the majority of cases discussed in this paper, arise from the mining and energy sectors.[7] Notably, half of the companies that have brought or threatened suits discussed in this paper have no operating mine anywhere and yet are still able to bring costly, abusive claims.

Further, these claims have increasingly been for staggering amounts. Following one of the largest awards in history, Ecuador was ordered to pay US$1.8 billion plus interest to the U.S. corporation Occidental Petroleum (Oxy) for cancelling an operating contract in 2006[8] under tremendous pressure from Indigenous Peoples and social movements in this Andean country and after the company illegally sold a portion of its project to another firm.[9] The largest amount awarded in a single mining case so far has been US$1.2 billion plus interest to Canadian mining company Crystallex against Venezuela for having cancelled a mine operation contract.[10] Meanwhile, in 2017, Uruguay was served with notice of arbitration from individuals connected to UK-based Zamin Ferrous for US$3.54 billion[11] over a new mining law and changes in the location of a port in connection with the controversial Valentines iron ore project.[12] In 2019, the US firm Odyssey Marine Exploration filed its notice of intent to sue Mexico similarly for US$3.54 billion for having failed to obtain permits needed to advance an offshore phosphate mine project off the coast of Baja California Sur.[13] At the same time, Colombia faces around US$18 billion in threatened or actual claims from six mining companies gambling on international arbitration to pursue future lost profits over measures to protect water and Indigenous territory.[14]

---

[6] We only report on "known" ISDS cases, since parties to such suits are not always obliged to disclose the existence of such proceedings.

[7] Hadrian Mertins-Kirkwood, Canadian Centre for Policy Alternatives (2015).

[8] http://investmentpolicyhub.unctad.org/ISDS/Details/238

[9] Wallach, L. & Beachy, B. (2012). Memorandum: Occidental Oil v. Ecuador. *Public Citizen* Retrieved from https://www.citizen.org/sites/default/files/oxy-v-ecuador-memo.pdf

[10] Luke Eric Peterson, IAReporter, "Billion dollar award against Venezuela is reward for investor that had battled its creditors for time to pursue ICSID claim – and also a huge win for hedge fund that backed the case," April 5, 2016; https://www.iareporter.com/articles/billion-dollar-award-against-venezuela-is-reward-for-investor-that-had-battled-its-creditors-for-time-to-pursue-icsid-claim-and-also-a-huge-win-for-new-york-hedge-fund-that-backed-the-case/

[11] Valentina Ruis Leotaud, mining.com, "Indian miner sues Uruguay for $3.5 billion," August 8, 2018; http://www.mining.com/indian-miner-sues-uruguay-3-5-billion/

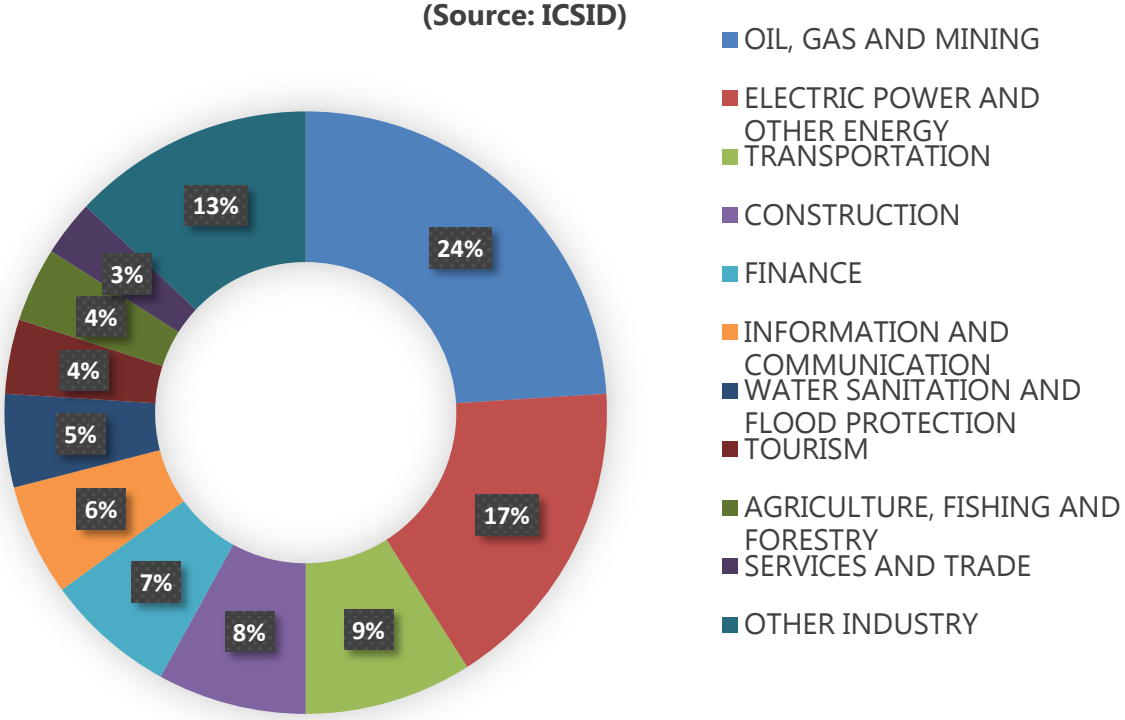
[12] See: Latin American Observatory of Mining Conflicts (OCMAL from its initials in Spanish), "Conflicto Minero; Aratirí. NO a la minería de hierro a cielo abierto," Accessed September 26, 2018; https://mapa.conflictosmineros.net/ocmal_db-v2/conflicto/view/228

[13] Odyssey Marine Exploration, Notice of Intent, dated January 4, 2019; https://www.italaw.com/sites/default/files/case-documents/italaw10442.pdf

[14] Calculated from http://investmentpolicyhub.unctad.org/ISDS/CountryCases/45?partyRole=2

Graph 2. Sectoral Distribution of ISDS cases at ICSID

(Source: ICSID)



Viewing the Los Filos mine, Guerrero, Mexico
Credit: Cristian Leyva

2

THE IMPACTS OF LARGE-SCALE MINING IN LATIN AMERICA

Since the 1980s, in Latin America and around the world, the World Bank Group with the support of a number of governments in the global north, has driven efforts to institute reforms in the mining codes of country after country to facilitate private foreign investment.[15] Such reforms ended restrictions on foreign ownership and repatriation of profits, lowered rates of taxation and royalties, ended local sourcing and hiring obligations, eroded labor protections, and streamlined administrative processes to make permitting easier.[16] They also encouraged privatization of state-owned companies and properties. Concurrently, powerful protections for foreign investors were ushered into law, particularly through the negotiation of bilateral and multilateral free trade and investor protection agreements between countries in the region with the U.S., Canada, European countries and others. These have the effect of locking in place the neoliberal legal reforms that privilege heightened dependence in the region on privatized, large-scale mineral extraction for export.[17]

As prices for mineral commodities boomed through the early 2000s, driven in part by China and India's expanding economies, mineral exploration and extraction grew exponentially in the region. Other factors influencing mining expansion included industrial and military spending, the proliferation of consumer electronic products, and the shift away from fossil fuel extraction, leading to increased demand for renewable energy products such as rechargeable batteries and wind and solar energy technologies. As of 2017, Latin America accounted for 30% of world investment in non-ferrous mineral exploration, with Chile, Peru, Mexico, Brazil and Argentina on the receiving end of 26% of gold exploration alone, accounting for 44% of total investment in the region.[18] With regard to mineral extraction, Mexico is followed by Peru as world leader in silver extraction,[19] while Chile is out ahead of Peru in leading world copper extraction,[20] and Peru, Mexico and Brazil figure as principal sources of new gold.[21]

Since Canadian companies are behind the majority of the cases studied in this report, it is worthwhile contextualizing Canadian mining investment. Canada has emerged as a key

[15] Canadian Network on Corporate Accountability, "Dirty Business, Dirty Practices: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad," May 2007; Also, Roger Moody, Rocks and Hard Places: The Globalization of Mining, Zed Books, 2007.
[16] David Szablowski, Transnational Law and Local Struggles: Mining, Communities and the World Bank, Hart Publishing, 2007.
[17] Hadrian Mertins-Kirkwood, Canadian Centre for Policy Alternatives, "A Losing Proposition: The Failure of Canadian ISDS Policy at Home and Abroad," August 2015.
[18] S&P Global Market Intelligence, World Exploration Trends, March 2018, https://pages.marketintelligence.spglobal.com/rs/565-BDO-100/images/World-Exploration-Trends-Report-2018.pdf
[19] U.S. Geological Service, Silver, 2018; https://minerals.usgs.gov/minerals/pubs/commodity/silver/mcs-2018-silve.pdf
[20] U.S. Geological Service, Copper, 2018; https://minerals.usgs.gov/minerals/pubs/commodity/copper/mcs-2018-coppe.pdf
[21] U.S. Geological Service, Gold, 2018; https://minerals.usgs.gov/minerals/pubs/commodity/gold/mcs-2018-gold.pdf

source of equity financing for the globalized mining industry, with an estimated 60% of the world's mining companies listing in Canada. Canadian stock exchanges estimate that they raised 34% of equity financing for mining activities worldwide in 2015.[22] Regionally, Latin America is the principal destination for Canadian foreign investment, with 55% of Canadian mining assets outside Canada and the United States located in Latin America, according to the most recent estimates.[23] Some have called Canada a "judicial paradise"[24] for the globalized mining industry, thanks to lax listing and incorporation standards, low corporate taxes, a comprehensive framework of tax treaties with other countries, and near negligible control over company activities abroad, as well as generous trade commissioner and diplomatic support to promote mining industry interests. The vast majority of the companies listing in Canada are prospecting and exploration firms, known as "junior" mining companies, many of which will never operate a mine. Rather, junior companies tend to pave the way for larger mining companies to move in once a project becomes sufficiently advanced and make their millions from the selling the project, often laying the seeds of conflict or giving rise to serious conflict in the process, as over half of the companies profiled in the case studies in this report demonstrate. Canada is also domicile for a number of the world's biggest mining companies, largely involved in gold, silver, and uranium extraction.

Whatever the source of capital for a mine, as known mineral deposits have been exhausted, companies are exploring in many areas never before mined, encroaching on fragile ecosystems, vital sources of water, the lands and territories of Indigenous and subsistence communities, and even urban areas. Further, as the concentration of minerals in remaining deposits of metals trends ever lower, the size and long-term risks of industrial mines have multiplied.[25] Extracting just a single ounce of gold entails an estimated 79 tons of mine waste that is left on the land, a significant source of potential contamination for decades and even centuries to come.[26]

In a recent survey of operating gold mines in the U.S., Earthworks and Great Basin Resource Watch found evidence that all 27 mines surveyed had spills and other seepage failures at least once. They also found evidence of contamination for all mines near surface water or groundwater sources.[27]

Industrial mines also make use of tremendous quantities of energy and water, which can enter into competition with other users.[28] Further, increasing automation of mining operations also means they employ fewer and fewer people. While the socioeconomic and environmental impacts intensify, those resisting mines or trying to address their impacts or to renegotiate their terms have been facing increasing threats of criminalization, militarization

[22] TMX Group, Mining Pitchbook, April 2016
[23] Natural Resources Canada, "Canadian Mining Assets: Information Bulletin, December 2014," published February 2015; https://www.nrcan.gc.ca/mining-materials/publications/17072
[24] Alain Deneault, Pushing the Debate: *Noir Canada*'s critical perspective, December 28, 2008; http://www.dominionpaper.ca/articles/2305
[25] MiningWatch Canada, "New Study Indicates Increasing Mine Disasters Worldwide — Why is the industry incapable of learning from its biggest mishaps?" August 7, 2015; https://miningwatch.ca/blog/2015/8/7/new-study-indicates-increasing-mine-disasters-worldwide-why-industry-incapable
[26] Earthworks and Oxfam America, Dirty Metals: Mining, Communities and the Environment, 2004.
[27] Earthworks and Great Basic Resource Watch, "US Gold Mines: Spills & Failures Report," July 2017; https://earthworks.org/publications/us_gold_mines_spills_failures/
[28] Earthworks and Oxfam America, 2004.

and targeted violence in many parts of the region. In one survey of Canadian mining conflicts between 2000-2015, over 40 killings and over 700 cases of criminalization (legal complaints, arrests, detentions or charges) were identified in connection with 28 Canadian mining operations in 13 countries.[29]

In this high stakes life and death scenario, Indigenous Peoples and mining-affected communities have little recourse when individuals are attacked or killed, communities are forcibly displaced, agricultural lands destroyed, sources of water contaminated, diverted or dried up, ways of life radically transformed or denied, and spills or other accidents occur. Meanwhile, Canadian, U.S. and other mining companies are turning to supranational panels of corporate lawyers to sue governments for hundreds of millions of dollars, putting in jeopardy important efforts to protect people and the environment, while undermining the sovereignty and self-determination of peoples seeking to defend themselves.

Banner reads "KCA's suit against Guatemala is the result of the inefficiency of public officials who obey individual interests; the Guatemalan people shouldn't bear this responsibility"; Credit: Jen Moore/IPS

[29] The Justice and Corporate Accountability Project (JCAP), The 'Canada Brand': Violence and Canadian Mining Companies in Latin America, October 24, 2016; https://justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/

KEY ELEMENTS OF INVESTOR PROTECTIONS IN TRADE AND INVESTMENT TREATIES

Investor-State Dispute Settlement (ISDS)

Private foreign investors can bypass domestic courts and sue governments directly before supranational arbitration panels of corporate lawyers that largely meet in secret with no witnesses. The most commonly used arbitration tribunal is the World Bank's International Centre for Settlement of Investment Disputes (ICSID). The United Nations Commission on International Trade Law (UNCITRAL) is another. These tribunals rule on claims of violations of investors protections enshrined in a wide array of legal agreements, including thousands of trade and investment treaties. While these protections vary somewhat in different agreements, the following are some of the most common:

Restrictions on "Indirect" Expropriation

Whereas expropriation used to be understood as physical taking of property, current rules also protect investors from "indirect" expropriation. This is interpreted to mean regulations and other government actions that reduce the value of an investment. Hence, corporations can sue governments over the enforcement of environmental, health, and other public interest laws or measures arising from democratic or judicial processes. While investment tribunals cannot force a government to repeal laws and regulations, time-consuming, costly litigation and the threat of massive awards for damages can put a "chilling effect"[30] on responsible policy-making.

Vague "Fair and Equitable Treatment" Standards

Under a typical trade or investment agreement, governments are obligated to provide foreign investors a "Minimum Standard of Treatment", including "Fair and Equitable Treatment". These terms are highly vague and subjective, and arbitrators have interpreted them in wildly different ways without regard for the diverse histories, cultures and value systems in different countries. Foreign investors allege violations of these investment rules more than any others. Similarly, there are clauses frequently found in international investment agreements that protect investors from "arbitrary/unreasonable and discriminatory measures" on the part of states. Nonetheless, long before the international protection treaties came along, protections for foreigners against arbitrary state action was already considered part of international law.[31]

[30] Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science," October 28, 2010 in Evolution in Investment Treaty Law and Arbitration, Chester Brown, Kate Miles, eds., Cambridge University Press, 2011; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065706

[31] Ursula Kriebaum "Arbitrary/Unreasonable or Discriminatory Measures" in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds), International Investment Law, Baden Baden: Nomos (2013, Forthcoming) University Vienna, November 11, 2012. https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2061075

National Treatment and Most-Favored Nation Treatment

Investment agreements also often require that governments treat foreign investors and their investments at least as favorably as domestic investors and those from any third country. While this is touted as a basic principle of fairness, it strips the power of governments to pursue national economic strategies that have been used successfully in the past. Moreover, a regulatory action that applies to all corporations, but that may have a disproportionate impact—real or perceived—on a foreign investor could be targeted under this rule. Some governments have negotiated exceptions to this rule for certain sensitive sectors, such as national oil reserves (Mexico, for example, prior to its recent energy reforms).

Ban on Capital Controls

Most agreements prohibit governments from applying restrictions on the flows of capital, to prevent or mitigate financial crises. In December 2012, even the International Monetary Fund adopted an official policy endorsing the regulation of cross-border finance in some circumstances. While such measures are not directly related to resource extraction, this rule means countries mired in financial crises face additional pressure to exploit resources recklessly. It also helps extractive industries to move their capitals in and out of a country without restrictions.

Limits on Performance Requirements

Most agreements oblige governments to surrender their authority to require foreign investors to use a minimum percentage of local inputs in production, or to transfer technology, or other conditions on investment that have been used in the past as tools for economic development. This is particularly problematic for governments attempting to avoid certain aspects of the "resource curse".[32] Without the ability to ensure that extractive industries create good local jobs by requiring them to give a share of their business to domestic suppliers and train personnel to use advanced technologies, the potential benefits for the broader economy are limited.

Full Protection and Security Standard (FPS)

The FPS standard encompasses both physical and legal damages to investments supposedly caused by the state or third parties (i.e. civil society). Until recently, FPS maintained a low profile in investment treaties, but investors are now using it more. According to the International Institute for Sustainable Development (IISD), "the stakes for developing states found liable for breach of treaty obligations are particularly high. The seemingly innocuous and obvious treaty promise to accord Full Protection and Security to investments can impose

[32] In mainstream economics, the "resource curse" is usually understood as the macroeconomic pitfalls of dependence on non-renewable resource extraction, including the ways that such dependency tends to undermine economic development on a national scale. Factors responsible for the resource curse include the vulnerability of a national economy to the boom and bust cycles of mineral prices on the global market, over-evaluation of local currency when mineral prices are high (also known as the "Dutch Disease"), a tendency to foster corruption and misspending during boom periods, and diminished attention to more sustainable economic sectors. There is also a local side to such dependency, what Stuart Kirsch calls "the microeconomics of the resource curse," or the incomplete accounting for the social and environmental costs of mining projects at the local level, which frequently result in a net loss for affected communities. (Kirsch, *Mining Capitalism*, 2014). Others have focused on the political economy of the resource curse – that is the fact that the elite (not the marginalized and dispossessed) stand to benefit from the exploitation of minerals rather than from long-term sustainable pathways.

an onerous level of liability on states with scarce resources. Investment treaties formulate the standard of Full Protection and Security in a broad manner, and tribunals have taken this at face value, thus interpreting the obligation as imposing a duty upon states to prevent harm to the investment from the acts of government and non-government actors."[33] For example, this could conceivably include using state armed forces or other means to ensure investors' protection from community protests against their projects.

Umbrella Clause

Another controversial clause in investor protection agreements is the so-called "Umbrella clause". This enforces a requirement on each State party to the agreement to observe all investment obligations entered into with investors from the other Contracting State. In practice, an Umbrella clause can raise a contract claim to the level of a treaty claim. Usually, violating a contract does not invoke treaty protection under international law. However, adding an Umbrella clause to an investor protection agreement does so in several ways. For example, it removes the need for investors to rely on dispute resolution clauses in an investment contract (which may, for example, give exclusive jurisdiction to local courts), and allow them to bring a claim to a supranational arbitration body instead.[34]

Protest at the World Bank in favor of El Salvador, September 15th, 2014
Photo credit: Amanda Kistler, CIEL

[33] Mahnaz Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?". Best Practices Series. November 2011. International Institute for Sustainable Development. https://www.iisd.org/pdf/2011/full_protection.pdf

[34] "The Umbrella Clause." Thomson Practical Law. https://content.next.westlaw.com/Document/I43e21e821c9a11e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1

3

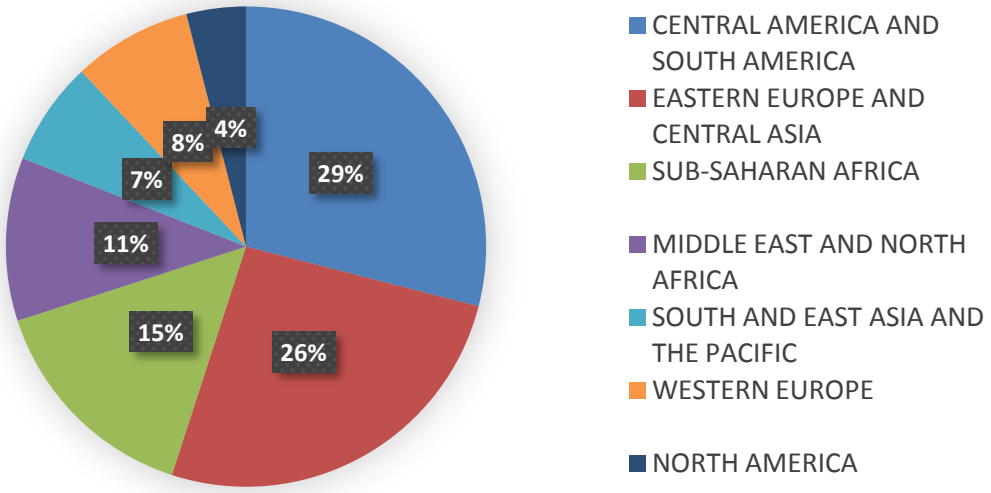
MINING INVESTOR CASES AGAINST LATIN AMERICAN GOVERNMENTS

The proliferation of investor state arbitration by mining companies against governments in Latin America has coincided with growing conflict and community resistance against the rampant expansion of industrial metal mining in the region. Neoliberal reforms to mining codes in country after country, along with the rise of prices for commodities such as gold and silver through much of the 2000s, facilitated exponential levels of investment in the sector and soon gave rise to a proliferation of conflict with Indigenous Peoples and affected communities.

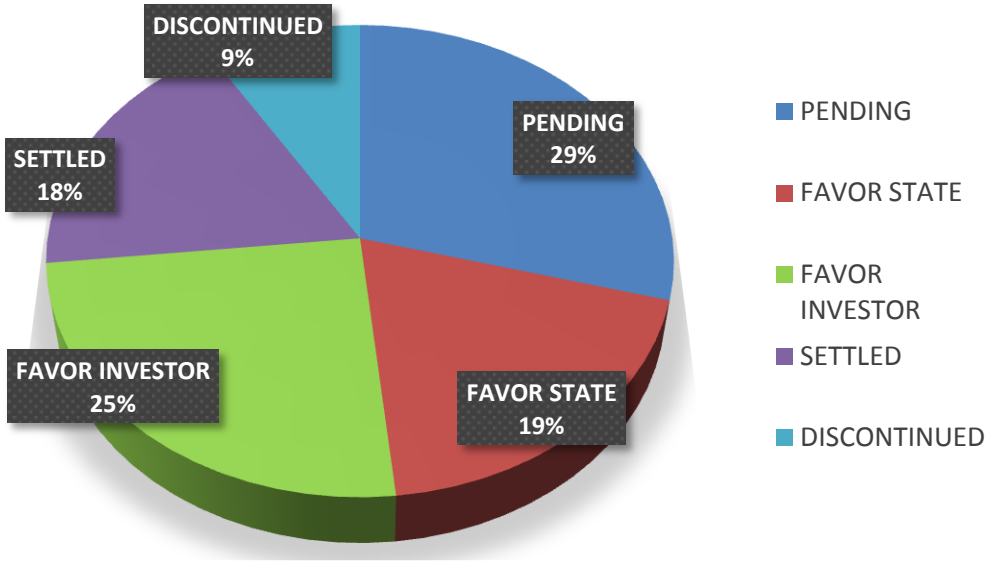
Opposition grew, especially in areas where there has been little industrial mining previously, as communities started learning from their own experience and that of others about the long-term social and environmental harms that accompany industrial mining, often threatening existing ways of life and livelihoods. In other cases, locally-led movements emerged to fight for redress for the environmental and health impacts of mining. Where community and citizen-led efforts to protect fragile ecosystems, water sources, land, Indigenous territories, and the overall health of their communities pressured governments, courts and even international human rights bodies to respond to their demands, governments have been punished with the costly reality of mining investors taking them to supranational arbitration. A considerable number of cases have also arisen from government measures to nationalize mining projects or increase their tax intake from specific mines.

As can be seen in Graph 3, Central America and South America are the most sued regions in the world. Graph 4 illustrates the countries that have been or are being sued the most.

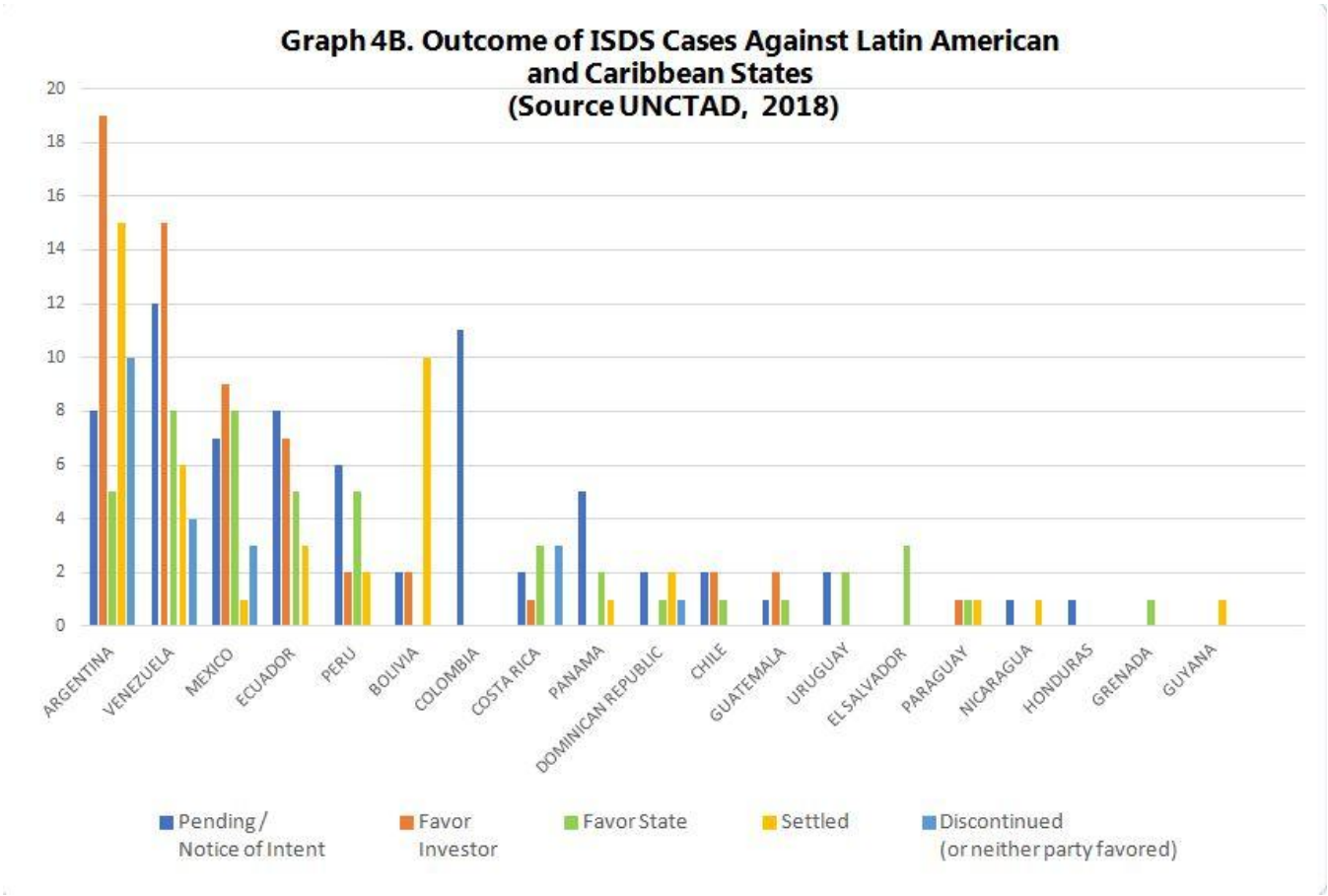
Graph 3. Geographic Distribution of Cases
(Source: ICSID, 2018)



Graph 4A. Outcome of ISDS Cases Against Latin American and Caribbean States. (Source: UNCTAD, 2018)



Graph 4B. Outcome of ISDS Cases Against Latin American and Caribbean States (Source UNCTAD, 2018)



ANALYSIS OF CASES

Although all Latin American countries that have been sued by mining companies under the ISDS system share the commonality of having to defend themselves in the same unjust manner under rules engineered in favor of corporations, the underlying issues, government measures, and alleged breaches of investor protection rules vary.

Of the thirty-eight suits identified in our study, in over two thirds of the cases, some degree of community resistance has been involved, whether or not this was a direct determinant of the government measure in dispute.

Over half of the mining companies that have brought cases are Canadian-domiciled. Furthermore, a majority of these cases have been brought by exploration companies that have no operating mine, or no other mining project at all, and are making a last-ditch effort to extract millions or even billions of dollars from governments in the region through international arbitration whether they have followed local environmental and mining regulations or not, and almost always lacking community consent to operate. In several cases, (Infinito Gold v. Costa Rica, Eco Oro Minerals v. Colombia, and TriMetals Mining - formerly South American Silver- v. Bolivia), exploration companies are being backed by third-party funders[35] who will profit from the case if the arbitration panel finds in favor of the company.

Issues and government measures in dispute

Companies may bring suits involving a range of issues while alleging that different types of government measures have affected or potentially affected their mining projects and future profits. We break these down into three issue areas within which we describe a variety of government measures being disputed:

1. Indigenous rights and lack of community consent

In thirteen cases, or roughly one-third, mining companies are disputing a variety of government measures that principally hinge on the issue of Indigenous rights and community consent. Of these thirteen cases, nine were brought by junior mining companies or companies without an operating mine during the duration of the arbitration.

- In the case of Goldcorp v. Guatemala, the Guatemalan government cited potential arbitration as part of considerations preventing it from implementing an order from the Inter American Human Rights Commission to suspend the Marlin mine operations over violations of Indigenous rights and issues related to protection of water supplies and community health. This is the only case that we found in which an international human rights body is involved.
- In Guatemala, Kappes, Cassidy & Associates (KCA) has initiated a claim and Tahoe Resources has threatened to file a claim involving court decisions that led to the suspension of mining operations over lack of respect for Indigenous consultation and consent.
- Another four cases related to Indigenous rights or community consent were brought over regulatory decisions to revoke permits for lack of consultation and consent. Examples of this include Dominion Minerals v. Panama, Bear Creek Mining v. Peru, Copper Mesa Mining v. Ecuador, and Cosigo Resources v. Colombia.
- In the case of TriMetals Mining (formerly South American Silver) v. Bolivia, the company's project was nationalized in the wake of community conflict.

[35] These are investor groups that help to fund an arbitration case that, although they do not have a direct involvement in the claim or process, have an economic interest in the company achieving a financial award.

- In the case of Gran Colombia Gold v. Colombia, the company is suing over the need for further community consultation and perceived lack of action on the part of authorities to protect company interests in the face of conflict with informal miners.
- Meanwhile, INV Metals has threatened to sue Ecuador over a referendum approved by the national electoral authority regarding its mining activities in water sources upstream of a rural county affected by its proposed gold and silver project.

2. Enforcement of environmental and health protections

Twenty cases, or over half, relate to government measures concerning the implementation or modification of environmental and mining regulations. Of these twenty suits, fifteen were brought by junior mining companies or companies without an operating mine during the duration of the arbitration.

- In four cases identified, mining companies are suing the government over court decisions related to environmental and mining regulations that impeded their projects. These include Infinito Gold v. Costa Rica, Eco Oro Minerals v. Colombia, Galway Gold v. Colombia and Red Eagle Exploration v. Colombia.
- Eight cases relate to regulatory enforcement by state authorities. In El Salvador, suits brought by Commerce Group and Pacific Rim Mining (later acquired by OceanaGold) were over regulatory enforcement of environmental and mining laws by the central government. Blackfire Exploration v. Mexico is a case where the company threatened arbitration after authorities enforced environmental regulation at the local and state, rather than the federal level. More recently, Legacy Vulcan is suing Mexico over measures related to a municipal land use plan that prevents it from quarrying in an ecologically sensitive area. Corona Materials LLC sued the Dominican Republic when it turned down its application for an environmental permit and Renco Group sued Peru for canceling its permit for the La Oroya smelter over environmental remediation measures. Zamin Ferrous investors v. Uruguay relates to regulatory enforcement in a context of local and national resistance to an open-pit iron ore project. Odyssey Marine Exploration v. Mexico similarly is over enforcement of environmental regulations in a context of resistance to its seabed phosphate project.
- Given how issues can be interrelated in mining conflicts, several cases involve a combination of environmental issues and lack of respect for Indigenous rights and community consent. For example, Goldcorp v. Guatemala, TriMetals Mining (formerly South American Silver) v. Bolivia, Dominion Minerals v. Panama, Bear Creek Mining v. Peru, Copper Mesa Mining v. Ecuador and Zamora Gold v. Ecuador. Environmental enforcement also entered into disputes brought by Crystallex and Gold Reserve against Venezuela over nationalization of their projects.

3. Resource management

Fifteen cases, or over one-third of those investigated, hinge on government measures related to resource management, including nationalization of a project or taxation. Of these twelve suits, five were brought by junior mining companies or companies without an operating mine during the duration of the arbitration.

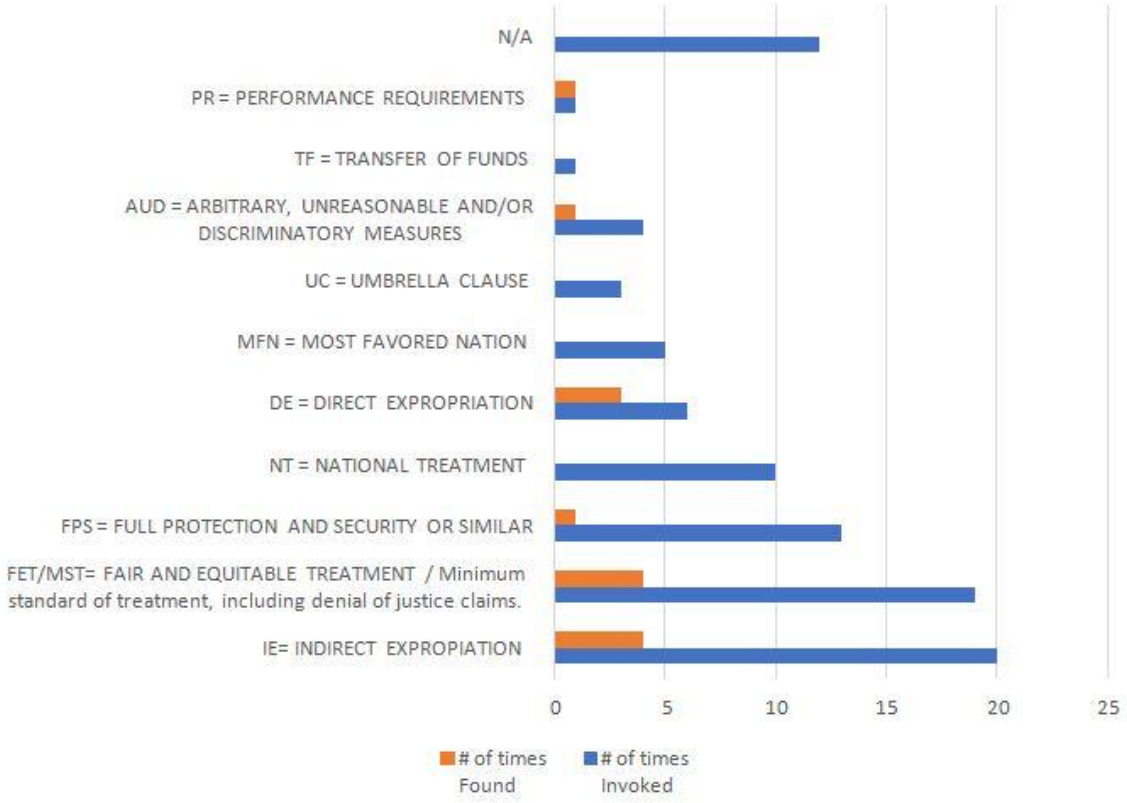
- Compagnie Minière Internationale Or S.A. v. Peru sued alleging that U.S. and Peruvian investors were favored over French investment in the Yanacocha gold project.
- Primero Mining v. Mexico, Glencore v. Colombia, Quiborax v. Bolivia and Rusoro Mining v. Venezuela sued over taxation and associated economic measures.
- With regard to nationalization of projects, TriMetals Mining (formerly South American Silver) v. Bolivia, Glencore v. Bolivia and six other cases brought against Venezuela by mining companies Vanessa Ventures (now Infinito Gold), Gold Reserve, Nova Scotia Power, Crystallex, Anglo American and Highbury International pertain to such measures. Nova Scotia Power and Highbury International have each brought suits twice against Venezuela.

Alleged Breaches of Investor Protection Rules

Cases also diverge with regard to the investor protection rules allegedly breached (see Table 6). Given that full data is not available for over a dozen cases, we arrive at some preliminary observations about the investor protection rules that mining companies are most frequently invoking:

- The right to protection against Indirect Expropriation has been the most invoked clause by mining companies, involving at least 21 cases. Unlike Direct Expropriation, which has been invoked only six times, Indirect Expropriation does not relate to the physical taking of property or other investments. Instead, corporations can use this clause to sue over regulations and other government actions that they claim reduce the value of their investment. Arbitration panels have found that states have "breached" Indirect Expropriation four times and Direct Expropriation three times.
- Fair and Equitable Treatment/Minimum Standard of Treatment clauses, which are highly controversial given their vague language and arbitrary interpretation by tribunals, have been invoked by mining companies at least 20 times.
- The third most used clause by mining companies is Full Protection and Security, used at least 13 times, which perversely enables companies to sue states for not doing everything in their power (like repressing their own populations) to protect foreign investments at any cost. The case of Copper Mesa v. Ecuador is the only one so far in which a panel has found a state to be in breach of an FPS clause, though the ruling was mitigated, in the panel's view, by the company's bad behaviour.

Table 6. Rules Allegedly Breached by Latin American Countries in ISDS Cases. ***Source UNCTAD***



COUNTRY-BY-COUNTRY OVERVIEW

A brief description follows of the arbitration suits brought by mining companies against Latin American governments (organized in alphabetical order by country).

Bolivia

Bolivia has been hit by several ISDS claims from mining companies and has already been ordered to pay US$48.6 million to Chilean mining and quarrying company **Quiborax**[36] concerning the cancellation of ulexite mining concessions in 2004 for irregularities found during an audit of the company's operations.[37] Quiborax brought its arbitration in 2006 under the Chile Bolivia Bilateral Investment Treaty in a process that took over ten years.[38]

In November 2018, Bolivia was ordered to pay a further US$27.7 million to **TriMetals Mining Inc. (formerly South American Silver Limited)**.[39] Canadian mining company TriMetals Mining brought a suit against Bolivia for US$385.7 million in 2013 using its Bermudan subsidiary. The company filed its suit under the UK-Bolivia Bilateral Investment Treaty for expropriation of the Mallku Khota silver, indium and gallium project in 2012. The expropriation took place after a months-long, escalating conflict with local communities culminated in the shooting death of José Mamani Mamani, an Indigenous community member, during a confrontation with police on July 5, 2012.[40] The Bolivian state had been largely supportive of the company up until the killing, after which it resorted to nationalization of the project to quell the protests. It decreed the nationalization of the mine on August 1, 2012.[41] The company had failed to obtain the consent to operate from all 46 Indigenous communities in the area of its project and its actions aggravated divisions in the local area between those who had become convinced of potential benefits from the mine and others who found they would have too much to lose from its exploitation.[42] This case was only possible due to an anonymous third party funding agreement.[43]

Bolivia is facing yet another pending ISDS suit involving a mining company for over half a billion dollars.

---

[36] Martin Dietrich Brauch, International Institute for Sustainable Development, "Quiborax awarded US$50 million against Bolivia, one-third of initial claim, Feb 29, 2016; https://www.iisd.org/itn/2016/02/29/quiborax-awarded-us50-million-against-bolivia-one-third-of-initial-claim-quiborax-sa-and-non-metallic-minerals-sa-v-plurinational-state-of-bolivia-icsid-case-no-arb-06-2/

[37] Bolivia: Decreto Supremo No. 27589, June 23, 2004; https://www.lexivox.org/norms/BO-DS-27589.xhtml

[38] Damian Charlotin, IAReporter, "$50 Mil Bolivia Award is Upheld Even Though Arbitrators Used Valuation Method Different from those of the Parties; New Decision Casts Doubt on Power to Annul Provisinal Measures or Arbitrator Disqualification Rulings," May 20, 2018; https://www.iareporter.com/articles/analysis-award-against-bolivia-is-upheld-even-though-arbitrators-used-valuation-method-different-from-those-of-the-parties-new-decision-casts-doubt-on-power-to-annul-provisional-measures-or-arbitrat/

[39] Damien Charlotin, IAReporter, "South American Silver Wins on Expropriation in Long-Running Bilateral Investment Treaty Case – But Collects Only Sunk Costs from Bolivia," November 23, 2018; https://www.iareporter.com/articles/south-american-silver-wins-on-merits-in-long-running-bilateral-investment-treaty-case-but-collects-only-sunk-costs-from-bolivia/

[40] Noalamina.org, "Evo ofrece revertir concesión de minera canadiense South American Silver," Jul 9, 2012; https://noalamina.org/latinoamerica/bolivia/item/9292-evo-ofrece-revertir-concesion-de-minera-canadiense-south-american-silver

[41] mining.com, "South American Silver announces receipt of formal decree and provides update on plan of action," August 2, 2012; http://www.mining.com/web/south-american-silver-announces-receipt-of-formal-decree-and-provides-update-on-plan-of-action/

[42] Andean Information Network, "Mallku Khota Mining Mess: Analysis," July 20, 2012; http://ain-bolivia.org/2012/07/mallku-khota-mining-mess-analysis/

[43] South American Silver Corporation, "South American Silver Announces Arbitration Costs Funding Arrangement," May 24, 2013.

In 2016, Swiss commodities firm **Glencore** initiated arbitration for USD$675 million,[44] also under the UK-Bolivia Bilateral Investment Treaty, over the nationalization of a smelter and a tin and antimony plant in 2007 and 2010 respectively,[45] and of the Colquiri tin and zinc mine in 2012 in the context of a conflict between cooperative miners and unionized workers at the mine. The conflict was provoked when the company renegotiated production contracts with the cooperative sector that overtook the salaried miners' work areas.[46] An estimated 15 to 28 people were injured.[47,48]

Colombia

Since 2016, Colombia has faced an onslaught of mining-related suits and threats of suits over court decisions upholding constitutional protections for vital water supplies, measures to protect Indigenous territory in areas suffering the ongoing impacts of armed conflict, and a dispute over royalty payments. One of these suits alone is valued at the outrageous amount of US$16.5 billion, with the rest totaling upwards of US$1.5 billion.

Three ISDS suits from Canadian mining companies against Colombia pertain to court decisions upholding constitutional and legislative protections for sensitive ecosystems vital for regulating water supplies in areas where there is also significant opposition to large-scale mining activities from local downstream water users. In February 2016, the Constitutional Court issued a ruling that impacted hundreds of mining licenses that overlap with páramo ecosystems—a high-altitude wetland predominantly found in the Andes that is crucial for regulating the water supplies of tens of millions of people in the country.

One such license was that of Canadian mining company **Eco Oro Minerals (formerly Greystar Resources)** whose advanced exploration stage Angostura gold project is located in the highlands of Santurbán. The company had previously failed to obtain an environmental license for the open-pit design of the project in 2010, given broad opposition from downstream communities led by the Committee in Defense of Water and the Páramo of Santurbán (the Committee) in the metropolitan area of Bucaramanga. The company had hoped to submit a redesigned underground plan for the project, but this was halted by the Constitutional Court decision and what Eco Oro claims were unreasonable delays on the part of the government to clarify limits of the protected páramo ecosystem.[49]

Notably, the World Bank Group's private lending arm, the International Finance Corporation (IFC), had made an equity investment in Eco Oro Minerals in 2009, followed by subsequent investments. A complaint filed by the Committee with support from international allies

[44] El Deber, "Glencore enjuicia a Bolivia por Vinto y Colquiri," December 8, 2017; https://www.eldeber.com.bo/economia/Glencore-enjuicia-a-Bolivia-por-Vinto-y-Colquiri-20171208-0021.html

[45] Perú21, "Bolivia nacionalizará mina de Glencore," June 11, 2012; https://peru21.pe/mundo/bolivia-nacionalizara-mina-glencore-32232

[46] Sindicato de Trabajadores de Colquiri, "Pronunciamiento ante el conflicto en Colquiri", July 8, 2012; https://cedib.org/post_type_documentos/pronunciamiento-del-smtmh-ante-conflicto-en-colquiri-08-08-12/

[47] DW, "Bolivia expropia mina Colquiri a filial de empresa suiza Glencore," June 20, 2012; https://www.dw.com/es/bolivia-expropia-mina-colquiri-a-filial-de-empresa-suiza-glencore/a-16040034

[48] Reuters, "Violence flares in Bolivian Glencore mine dispute," June 15, 2012; http://www.minesandcommunities.org/article.php?a=11755

[49] Luke Eric Peterson and Zoe Williams, IAReporter, "Treaty-based disputes center on friction between Colombian mining and national parks – and highlight differing transparency rules in Canadian and U.S. FTAs," Mar 9, 2016; http://www.iareporter.com/articles/analysis-two-new-treaty-based-disputes-center-on-friction-between-colombian-mining-and-national-parks-and-highlight-differing-transparency-rules-in-canadian-and-u-s-ftas/

demonstrated that the IFC had failed to comply with its own environmental and social standards.[50] After a public campaign calling for the IFC to divest from the project, it did so quietly in December of 2016, just after Eco Oro had announced that it would file its suit against Colombia (at another arm of the World Bank: ICSID) under the Canada-Colombia Free Trade Agreement, seeking over US$764 million in compensation.[51] Although the IFC—a multilateral finance institution of which Colombia is a member State—is not party to the suit, its financing helped Eco Oro justify its venture, counter to efforts in Colombia to enforce environmental protections and stop destructive mining. It should be noted that Eco Oro has only been able to move forward with this arbitration after receiving third party financing for the lawsuit from a U.S. hedge fund, Trexs Investments, LLC.[52] Since this time, two more Canadian mining companies with mining concessions near the Angostura Project, **Red Eagle Exploration**[53] and **Galway Gold**[54] have also initiated arbitration proceedings against Colombia under the Canada-Colombia FTA.

Mining companies have also initiated or threatened suits over efforts to protect areas important to Indigenous and farming communities.

In February 2016, **Cosigo Resources** (Canada), **Cosigo Resources Sucursal Colombia** (Colombia) and **Tobie Mining and Energy Inc**. (U.S.A.) initiated a suit under the U.S.-Colombia FTA over the creation of the Yaigojé Apaporis National Park in Vaupés, in the area of the company's gold mining exploration concession. Despite having done very little exploration work before serious conflict arose with local Indigenous communities, the company is seeking the remarkable amount of US$16.5 billion in compensation or for the park to stop being a burden to its project.[55]

In 2017, Canadian company **Gran Colombia Gold** announced it would file a US$700 million suit against Colombia under the Canada-Colombia FTA over a halt to its operations in a part of Marmato, Caldas, pending consultation with local residents. The company has faced long-standing opposition to its project, given the potential impacts on existing small-scale miners' livelihoods, as well as impacts on Indigenous and Afro-Colombian people. It also claimed lack of state support for removing informal miners from another of its projects in Antioquia.[56] In July 2018, Gran Colombia Gold followed through on its threat and filed notice of arbitration.[57]

---

[50] Comité por la Defensa del Agua y el Páramo de Santurbán, CIEL, SOMO, AIDA and MiningWatch Canada, "Ombudsman Finds IFC Failed to Comply with Own Investment Standards on Eco Oro Minerals in Colombia," September 1, 2016; https://miningwatch.ca/news/2016/9/1/ombudsman-finds-ifc-failed-comply-own-investment-standards-eco-oro-minerals-colombia

[51] Center for International Environmental Law (CIEL), World Bank divests from Eco Oro Minerals and its mining project in the Colombian páramos, December 21, 2016; https://www.ciel.org/news/9504/

[52] When You Thought Trade Deals Could Not Get Any Worse -- Enter Wall Street. https://www.sierraclub.org/compass/2016/12/when-you-thought-trade-deals-could-not-get-any-worse-enter-wall-street

[53] Zoe Williams, IAReporter, "Colombia's Scale-back of mining in sensitive conservation zone spurs a second mining company to threaten arbitration," March 28, 2018; https://www.iareporter.com/articles/colombias-scale-back-of-mining-in-sensitive-conservation-zone-spurs-a-second-mining-company-to-threaten-arbitration-if-it-is-not-compensated/

[54] CIAR Global, "Nueva demanda contra Colombia: la minera canadiense Galway Gold presenta arbitraje," Apr 20, 2018; http://ciarglobal.com/nueva-demanda-contra-colombia-la-minera-canadiense-galway-gold-presenta-arbitraje/

[55] Luke Eric Peterson and Zoe Williams, IAReporter, Mar 9, 2016.

[56] Financial Post, "Canada's Gran Colombia Gold files $700 million lawsuit against Colombia over Marmato project," April 10, 2017; http://business.financialpost.com/news/mining/canadas-gran-colombia-gold-files-700-million-lawsuit-against-colombia-over-marmato-project

[57] IAReporter, "Mining investor, Gran Colombia Gold, makes good on earlier threats of arbitration against Colombia," July 3, 2018; https://www.iareporter.com/articles/mining-investor-makes-good-on-earlier-threats-of-arbitration-against-colombia/

Finally, in the case of **Glencore**, the company is disputing "royalty and financial calculations applicable to the Calenturitas coal project" according to which the Colombian Comptroller's office asserts that the Swiss mining firm owes an additional US$18 million in royalty payments. The company has brought its suits under the terms of the Switzerland-Colombia bilateral investment treaty, for a non-available amount.[58]

Costa Rica

In October 2013, Canadian mining company **Infinito Gold** announced it would sue the government of Costa Rica under the terms of the Canada Costa Rica Foreign Investment Promotion and Protection Agreement (FIPA)[59] for an initial amount of US$1 billion. However, the request presented to ICSID in February 2014 claimed US$94 million, which was upped to US$321 million in 2016.[60,61] The company's suit followed a series of unfavorable domestic judicial rulings in 2010 and a Supreme Court decision in 2011 that led the government to revoke the company's mining concessions for the Las Crucitas gold project on the northern border of Costa Rica with Nicaragua, near the San Juan River. The company is contesting what it calls "legal insecurity" created by the court decisions.[62] Notably, Infinito Gold's proposed mine gave rise to widespread opposition in this country where a ban on new open-pit gold mining and mining activities using cyanide and mercury was approved by the executive, legislative and judicial branches of the government in November 2010. After running out of money to continue the case, Infinito Gold secured third-party financing from Vannin Capital PCC[63] in 2016 to continue pursuing this suit.[64] In December 2017, ICSID accepted jurisdiction over the case, which is proceeding to the merits phase.[65] In September 2018, Canada obtained the status of "non-disputing party" to file its observations.[66]

Among other things, this case provides another example of third-party financing, a growing trend in ISDS arbitration.[67] It also illustrates ICSID's pro-corporate bias since the case was not thrown out when Infinito Gold was unable to meet ICSID's payment schedules.

Dominican Republic

In 2014, U.S. mining company **Corona Materials LLC** sued the Dominican Republic for US$100 million under the Central America–Dominican Republic Free Trade Agreement

[58] IAReporter, "Colombia faces two more investment disputes, leading to a total of at least four that have come to light," March 17, 2016; https://www.iareporter.com/articles/colombia-faces-two-more-investment-disputes-leading-to-a-total-of-at-least-four-that-have-come-to-light/

[59] MiningWatch Canada et al, "Canadian Mining Company Infinito Gold Seeks to Extort $1 Billion from Costa Rica," October 10, 2013; http://miningwatch.ca/news/2013/10/10/canadian-mining-company-infinito-gold-seeks-extort-1-billion-costa-rica

[60] Tico Times, "Canadian mining company reorganizes to seek damages from Costa Rica," January 21, 2016; http://www.ticotimes.net/2016/01/21/canadian-mining-company-reorganizes-seek-damages-costa-rica

[61] Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5). Arnold and Porter; https://www.arnoldporter.com/en/services/experience/republic-of-costa-rica/infinito-gold-ltd-v-republic-of-costa-rica-icsid__

[62] Infinito Gold Ltd correspondence with the Costa Rican Ministerio de Comercio Exterior, April 4, 2013; https://www.italaw.com/sites/default/files/case-documents/italaw3016.pdf

[63] About Vannin Capital, see: https://www.vannin.com/about-us/

[64] ICSID, Decision on Jurisdiction, ICSID Case No. ARB/14/15, December 4, 2017; http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3384/DS10811_En.pdf -

[65] ICSID, Infinito Gold Ltd. v. Republic of Costa Rica, Case No. ARB/14/5, Decision on Jurisdiction, December 4, 2017; https://www.italaw.com/sites/default/files/case-documents/italaw9384.pdf

[66] See CRHoy, "Gobierno de Canadá se sumó a proceso por demanda internacional de Infinito Gold", September 22, 2018; https://www.crhoy.com/nacionales/gobierno-de-canada-se-sumo-a-proceso-por-demanda-internacional-de-infinito-gold/

[67] Columbia Center on Sustainable Investment," Third Party Funding in Investor-State Dispute Settlement," 2017;http://ccsi.columbia.edu/work/projects/third-party-funding-in-investor-state-dispute-settlement/

(CAFTA-DR) over ownership of an exploitation concession to mine aggregate materials for construction. Corona Materials' claims arose from the government's refusal to grant an environmental permit needed to start the mine, despite allegedly having received assurances and previous formal approvals from senior government officials, as the company claimed. In August 2010, the Ministry of the Environment denied Corona the license stating that the project was "not environmentally viable."[68] In 2016, an ICSID tribunal refused jurisdiction over the case arguing that the company had not presented its claim within the three-year time period allowed under CAFTA-DR.[69] The panel also decided that each part had to pay its legal and arbitration costs, leaving the Dominican state with a bill for US$1.68 million.[70]

Ecuador

Ecuador is one of the countries in the world most heavily hit by ISDS arbitration from extractive industries, particularly in the oil and gas sector, but also thanks to mining companies.

Canadian firm **Copper Mesa Mining (formerly Ascendant Copper)** acquired exploration concessions in the Intag valley in northwestern Ecuador in 2004. Local community opposition to Copper Mesa's Junín copper project was vehement, effectively prohibiting the company from ever getting a drill in the ground.[71] Company attempts to work on its mineral concessions, included using private security forces who used threats and force against community protesters, leading to an ultimately unsuccessful civil claim in Canadian courts.[72] In 2008, the government of Ecuador nullified Copper Mesa's claim to the Junín concession for failure to produce a valid environmental impact study and for lack of prior consultation with communities.[73] In response, in 2011, Copper Mesa brought a suit originally for US$69.7M against Ecuador under the Canada-Ecuador Bilateral Investment Treaty (BIT), alleging expropriation of two of its mining concessions.[74]

UNCITRAL acknowledged that the corporation reacted to local opposition by "recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plan to take the law into its own hands."[75] Nevertheless, in March 2016, the UNCITRAL tribunal awarded US$19.4 million plus compound interest to Copper Mesa, only somewhat reducing the final amount of

[68] Martin Dietrich Brauch "Philip Morris v. Uruguay: all claims dismissed; Uruguay to receive US$7 million reimbursement", Investment Treaty News, August 2016. https://www.iisd.org/itn/2016/08/10/awards-and-decisions-24/

[69] María Florencia Sarmiento, "Claimant fails to comply with three-year limitation period under CAFTA-DR," August 10, 2016; https://www.iisd.org/itn/2016/08/10/corona-materials-llc-v-dominican-republic-icsid-case-no-arb-af-14-3/

[70] Arnold and Porter LLP. Objeciones Preliminares Expeditas de Conformidad con el Artículo 10.20.5 del DR-CAFTA CASO CIADI NO. ARB(AF)/14/3 https://www.italaw.com/sites/default/files/case-documents/italaw7962.pdf

[71] Briarpatch Magazine, Jennifer Moore, "Taking Stock of Canada's Mining Industry," May 5, 2010; https://briarpatchmagazine.com/articles/view/taking-stock-of-canadas-mining-industry

[72] For more information: https://www.business-humanrights.org/en/copper-mesa-mining-lawsuit-re-ecuador

[73] Latin American Herald Tribune, "Ecuador Pulls Mining Concession from Canada's Ascendant Copper," November 21, 2008; http://www.laht.com/article.asp?ArticleId=321082&CategoryId=14089; Mines and Communities, "Ecuador: It's all over for Copper Mesa Mining Corporation in Intag — Copper Mesa pierde concesión clave en Intag," November 24, 2008; http://www.minesandcommunities.org/article.php?a=8937

[74] International Institute for Sustainable Development, "Ecuador ordered by PCA tribunal to pay $24 million to Canadian mining company," December 12, 2016; https://www.iisd.org/itn/2016/12/12/ecuador-ordered-by-pca-tribunal-to-pay-24-million-to-canadian-mining-company-copper-mesa-mining-corporation-v-republic-of-ecuador-pca-2012-2/

[75] Ben Beachy, Huffington Post, "Why Mining Corporations Love Trade Deals," Jun 22, 2016; https://www.commondreams.org/views/2016/06/22/why-mining-corporations-love-trade-deals

US$26.5 million demanded by the company.[76] The tribunal decided that Ecuador had not ensured due process when it terminated the company's concessions and that it "should have attempted something to assist [the company]," such as to help the company complete community consultations or meet requirements for the environmental impact assessment.[77]

Two other suits—and the possible threat of others—may have also contributed to limiting the application of a constitutional decree, known as the 'Mining Mandate', that was issued around the same time that Copper Mesa lost its concessions. The Mining Mandate ordered all mining concessions extinguished without compensation for lack of prior consultation with communities, including overlap with water sources and protected natural areas, among other criteria. Nonetheless, it was not applied to some of the most advanced Canadian owned projects at the time.[78] At least two companies brought suits against Ecuador, including **Zamora Gold** in July 2010 under Canada's Foreign Investment Protection Agreement with Ecuador (FIPA-EC) and **RSM Production Corporation**, which filed suit under the US-Ecuador BIT in October 2009.[79] The status of both cases is pending.

In early 2019, Canadian company INV Metals started threatening Ecuador with arbitration when the national electoral tribunal approved a long-awaited referendum over mining in a rural county downstream of its proposed gold and silver project.[80] The community voted overwhelmingly against any mining near its water supplies.[81]

El Salvador

El Salvador has faced two international arbitration suits from mining companies over implementation of the country's mining and environmental laws. Local groups organized strong nationwide resistance, led by the Salvadoran National Roundtable against Metallic Mining (known as La Mesa)[82] and illustrated by a public opinion poll that indicated that 79.5% of Salvadorans deemed metallic mining as inappropriate for their country.[83] Their movement has been a leading force in the global fight both against ISDS and destructive mining. Mining-affected communities, local and national organizations who are part of La Mesa, as well as university researchers and the Catholic Church, in coordination with allies around the world, have successfully fought back against arbitration suits and any mining activities in the country. These ISDS cases delayed the passing of a mining ban for seven years, at high cost to affected communities and the country. In both cases however, the World Bank tribunal ruled against the company, and on March 31st, 2017, Salvadorans achieved a law prohibiting metallic mining..[84]

---

[76] International Institute for Sustainable Development, December 12, 2016.
[77] Award, Copper Mesa Mining Corporation and the Republic of Ecuador, March 15, 2016, part 6, page 26; https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf
[78] MiningWatch Canada and ICLMG, "In the National Interest? Criminalization of Land and Environment Defenders in the Americas," August 2015; http://miningwatch.ca/publications/2015/9/21/national-interest-criminalization-land-and-environment-defenders-americas
[79] Procuraduría General del Estado, Dirección Nacional de Asuntos Internacionales y Arbitraje, "Hoja Maestra de Casos: Arbitrajes en Curso," February 17, 2012.
[80] MiningWatch Canada, "Ecuadorian Network Denounces Possible Threat of Investment Arbitration Made by Canadian Company," February 19, 2019; https://miningwatch.ca/news/2019/2/19/ecuadorian-network-denounces-possible-threat-investment-arbitration-made-canadian
[81] MiningWatch Canada, "Overwhelming 'No' Vote in Southern Ecuador Referendum Targets INV Metals Project," April 3, 2019; https://miningwatch.ca/blog/2019/4/3/overwhelming-no-vote-southern-ecuador-referendum-targets-inv-metals-project
[82] See more: http://noalamineria.org.sv/
[83] Opiniones y percepciones hacia la minería metálica en El Salvador. Instituto Universitario de Opinión Pública. Boletín de prensa Año XXIX, No. 2 http://www.uca.edu.sv/iudop/wp-content/uploads/MINE_ESP.pdf
[84] See http://noalamineria.org.sv/documentos/2017/oct/ley-prohibicion-mineria-metalica-salvador

U.S. corporation **Commerce Group** was the first mining company to lose a case against El Salvador. Commerce Group operated the San Sebastian gold mine in northern El Salvador off and on for decades since the late 1960s. It filed a notice of intent against El Salvador for US$100 million under the terms of CAFTA-DR over the government having revoked environmental permits for its mine and processing plant in 2006. The government did so after the Salvadoran research group CEICOM found evidence of acid mine drainage[85] from the mine. This sparked a state environmental audit, which the company failed. As part of the ISDS claim, the company also demanded that its permits be renewed so it could restart mining activities. The ICSID panel ruled against Commerce Group in the jurisdiction stage of deliberations.

Commerce Group then sought to have ICSID annul this decision. Unlike judicial appeals processes, the ICSID annulment process is extremely narrow, focusing only on whether the tribunal committed a procedural error, not a substantive error. However, ICSID ordered the annulment case closed in August 2013 when Commerce Group failed to provide its share of the funding needed to pay the fees for the ICSID tribunal to continue the litigation.[86] Thus, the jurisdiction ruling against Commerce Group was upheld. Nonetheless, it is important to note that throughout the years of the case ICSID had provided numerous extensions on due dates for Commerce Group to find funding. Although Commerce Group lost at ICSID, El Salvador was not awarded any compensation for legal costs and tribunal fees. Rather, the case cost El Salvador $1.4 million.[87] Moreover, the affected area in San Sebastian has still not been cleaned up and the toxic water and soil remain a hazard for local citizens.[88]

The second and most well-known case against El Salvador was filed in 2009 by Canadian mining company **Pacific Rim Mining** for US$314 million (later reduced to US$250 million) because El Salvador had not granted a permit to operate the company's El Dorado project. Pacific Rim filed the claim simultaneously under CAFTA-DR and El Salvador's national investment law, written with the help of the World Bank Group,[89] which gave foreign companies recourse to bring cases against El Salvador directly to ICSID rather than go through domestic courts first. The Salvadoran government later reformed the law to prevent

[85] When rock rich in sulfide minerals is crushed and ground as part of the mining process, the freed sulphides are exposed to oxygen and water, which react to form sulphuric acid. As this acid leaches through ground rock, it leaches out toxic heavy metals found in the rock, such as arsenic, cadmium, copper, mercury and lead. This cycle can persist for decades, even centuries, leading to contamination of water sources downstream.

[86] ICSID, Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador, Case No. ARB/09/07, Order of the Committee Discontinuing the Proceeding and Decision on Costs, August 28, 2013.

[87] Order of the Committee Discontinuing the Proceeding and Decisions on Costs. ICSID Case No. ARB/09/17 (Annulment Proceeding) https://www.italaw.com/sites/default/files/case-documents/italaw1571.pdf

[88] Informe de la Calidad del Agua de los Ríos de El Salvador. Ministerio de Medio Ambiente y Recursos Naturales, 2017. http://www.marn.gob.sv/descargas/Documentos/2018/Informe%20de%20la%20calidad%20de%20agua%202018.pdf

[89] In Robin Broad and John Cavanagh "Gold for Export? … or Water & Food for Life? The Case of Gold Mining in El Salvador". International Conference Food Sovereignty: A Critical Dialogue. Yale University, September 14-15, 2013. Working Paper #1.

"Research suggests that El Salvador's investment law was revised in 1999 in connection with World Bank structural adjustment lending. Two studies are particularly useful in linking that domestic law with the World Bank's structural adjustment requirements: Maria Eugenia Ochoa, Oscar Dada Hutt and Mario Montecinos, "El Impacto De Los Programas de Ajuste Estructural Y Estabilización Economica en El Salvador" ["The Impact Of Structural Adjustment Programs and Economic Stabilization in El Salvador"], Structural Adjustment Participatory Review International Network (SAPRIN), December 2000 (see especially chapter 1, pp.12-14).

further suits by this means.[90] Prior to the arbitration, Pacific Rim Mining moved Pac Rim Cayman's registration from the Cayman Islands to the state of Nevada, in the United States, with the seeming purpose of making this claim using CAFTA-DR, having no substantive activities or other connection to the U.S. This is an example of "venue shopping". El Salvador made a forceful objection on these grounds and in 2012, as part of the "jurisdictional" phase, the ICSID tribunal dismissed the claims under CAFTA-DR for lack of jurisdiction on other grounds, but allowed the claims to proceed under the El Salvador investment law to the "merits" phase of the arbitration. Canadian-Australian firm **Oceana Gold** bought Pacific Rim in late 2013, after Pacific Rim nearly went bankrupt, and persisted with the arbitration process. Thanks to international solidarity, the case received much publicity in the international media, making it one of the best known ICSID cases.[91] In October 2016, the three-person ICSID panel ruled unanimously against the company, finding that Pacific Rim had not met the terms of El Salvador's mining law for a mineral extraction permit. Furthermore, the Tribunal ordered the company to reimburse El Salvador US$8 million of US$12.9 million in legal costs and ICSID fees. This long-term struggle came with a high price for El Salvador: during the time that the suit continued four community activists were murdered—one of them a pregnant woman—others were threatened, and the Salvadoran state had to devote significant time, effort and millions of dollars over the years to fight the suit.[92]

Nonetheless, the ICSID decision allowed La Mesa, the Catholic Church, universities like the Central American University "José Simeón Cañas" (UCA), and other organizations across the country to push for the long-awaited Law for the Prohibition of Metallic Mining in El Salvador[93], which was passed unanimously by the Salvadoran legislature in March 2017, barely five months after the final decision in the arbitration. Despite the ban being passed, as of the day of writing Oceana Gold still has an exploration subsidiary in the country, a philanthropic foundation, and is believed to be waiting for political conditions to shift and the ban to be lifted. Given the looming threat, Salvadorans have reinforced their commitment to sustain the historic mining ban[94] (see more on the El Salvador experience in the next section).

Guatemala

Guatemala is now facing its first arbitration suit brought by a mining company, having previously faced the threat of such a suit. Guatemala's experience illustrates the "chilling effect" that ISDS can even have on the effectiveness of orders from international human rights bodies. It also demonstrates how ISDS poses a threat to processes of community resistance over the health and environmental impacts of mining and puts pressure on domestic courts that have been creating important jurisprudence regarding the lack of respect for Indigenous rights.

[90] Leonel Flores, ARPAS, "Reform to article 15 of the Investment Law: Assertive legislative action," July 22, 2013; http://www.stopesmining.org/j25/index.php?option=com_content&view=article&id=243:reform-article-15-investment-law&catid=89&Itemid=468

[91] For example: Manuel Pérez Rocha, "When Corporations Sue Governments", New York Times, December 3rd, 2014. https://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html

[92] International Allies Against Mining in El Salvador, "There are No Winners in Pacific Rim Mining Company vs El Salvador: Investor-State Arbitration Subverts Democracy," October 14, 2016; http://www.ciel.org/news/no-winners-pac-rim-mining-company-vs-el-salvador/

[93] Ley de Prohibición de la Minería Metálica. Asamblea Legislativa de El Salvador. https://www.asamblea.gob.sv/decretos/details/3004

[94] "Salvadorans Reinforce Commitment to Sustain Historic Mining Ban on its First Anniversary". May, 2018. http://stopesmining.org/news/82-media-releases-news/529-salvadorans-reinforce-commitment-to-sustain-historic-mining-ban-on-its-first-anniversary

In 2010, the Inter-American Commission on Human Rights ordered precautionary measures for eighteen Mayan Indigenous communities, requesting that the Guatemalan government suspend Canada-based **Goldcorp**'s controversial Marlin Mine and address issues of water contamination, illness and other measures necessary to guarantee the life and wellbeing of the communities while an assessment was carried out of the complaint from affected communities,[95] who asserted that they never gave their consent for the controversial mine.[96] The Guatemalan government agreed to suspend operations pending the outcomes of an administrative process, but never followed through. In internal documents obtained through a Freedom of Information request, the Guatemalan government cited potential arbitration as a reason to avoid suspending the mine, writing that suspending the project could provoke the mine's owners "to invoke clauses of the free trade agreement and resort to international arbitration to claim damages from the state."[97]

More recently, Guatemala has received one notification of arbitration and a second threat of arbitration over court decisions concerning Indigenous rights protections and associated community resistance to mining.

On May 16, 2018, the U.S. company **Kappes, Cassiday & Associates (KCA)** filed a notice of intent to sue Guatemala for at least US$300 million.[98] The company argues that it was unfairly treated given a 2016 Constitutional Court decision that upheld the suspension of the El Tambor project for lack of prior consultation with affected communities, as well as for the suspension of its export license and lack of state protection of company interests given ongoing community protests that it claims have prevented exploration work on its Santa Margarita project.[99] Since 2010, community members have peacefully demonstrated opposition to mining as they are concerned about potential impacts on water and health, for which they have faced violence, repression and criminalization.[100] KCA first threatened arbitration in 2016.[101]

Canadian mining company **Tahoe Resources** has also threatened upward of US$1.7 billion in arbitration over the court-ordered suspension of its Escobal silver mine since July 2017 as a result of discrimination and lack of prior consultation with affected Xinka Indigenous people. In three amicus briefs submitted to Guatemala's Constitutional Court, the International Law Institute (ILI), the American Guatemalan Chamber of Commerce and the Canadian Guatemalan Chamber of Commerce all indicated that the company could bring a suit against Guatemala under CAFTA-DR on the basis of the suspension. ILI's amicus stated that

---

[95] Comisión Interamericana de Derechos Humanos, Medida Cautelar MC-260-07 para Comunidades del pueblo maya (Sipakepense y Mam) de los municipios de Sipacapa y San Miguel Ixtahacán en el Departamento de San Marcos, Guatemala, May 20, 2010.

[96] MiningWatch Canada and Center for International Environmental Law, "Guatemala Suspends Marlin mine — Human rights and environmental organizations applaud the decision, urge President Colom's government to protect communities against retaliation," June 24, 2010; https://miningwatch.ca/news/2010/6/24/guatemala-suspends-marlin-mine-human-rights-and-environmental-organizations-applaud

[97] Brief prepared by Lic. Hugo Enrique Martínez Juárez, Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (COPREDEH), "Análisis Medida Cautelar 260-07 solicitada por la Comisión Interamericana de Derechos Humanos a favor de 18 comunidades de los municipios de Sipacapa y San Miguel Ixtahuacán, en el Departamento de San Marcos: Asunto—Adopción de Medida Cautelar," page 16, obtained by the Centre for International Environmental Law (CIEL) via a freedom of information request; https://drive.google.com/file/d/0B5obOY6qbEasQVlsdVdLNm02XzA/view

[98] Prensa Libre, "Estado de Guatemala se expone a nuevo arbitraje internacional," May 18, 2018.

[99] IAReporter, "Full Details Emerge of Miner's Allegations of Treaty Breach; Dispute Follows Domestic Court Rulings on Investor Duty to Consult Local Communities," May 20, 2018.

[100] Guatemala Human Rights Commission (GHRC), "The Peaceful Environmental Justice Movement at 'La Puya': Violence, Repression and Resistance at the El Tambor Gold Mine in Guatemala," November 2014; http://www.ghrc-usa.org/wp-content/uploads/2014/11/Puya-report-final.pdf

[101] Prensa Libre, "Minera amenaza a Guatemala de poner demanda en Estados Unidos," June 9, 2018.

"governments can be made responsible for the decisions of their courts" and cited investor rules such as Fair and Equitable Treatment and the Full Protection and Security Standard.[102] Company representatives have also made similar threats to the press, indicating that they have been analyzing their options to recur to international arbitration, recognizing that "the legal consequences would affect the entire Guatemalan population."[103] Despite the company's threats, in September 2018, the Constitutional Court ordered the Minister of Mines and Energy to consult with the Xinka People and for the mine to remain suspended during the process.[104] In February 2019, Pan American Silver acquired Tahoe Resources and all of its mining projects, including Escobal.[105]

Mexico

Four mining companies have brought threats of suits against Mexico over regulatory measures related to local socio-environmental conflict in three cases and another concerning tax regulation. One of these companies, Legacy Vulcan LLC, has already filed its demand.

In early 2010, Canadian company **Blackfire Exploration** threatened to bring a suit against Mexico under the North American Free Trade Agreement (NAFTA) for $800 million after environmental authorities in the State of Chiapas shuttered the Payback barite mine in December 2009. This occurred within days of the murder of community leader Mariano Abarca.[106] All the suspects in the murder had links to the company, but no justice has been served. Years later, an access to information request in Canada revealed that the Canadian embassy in Mexico provided advice to Blackfire Exploration about how to launch such a suit, despite Canadian officials' detailed knowledge about protests over Blackfire's barite mine, as well as criminalization, threats and violence against community members who were vocal about the mine's impacts.[107] The company never followed up on its threat and was dissolved in 2017.

A few weeks ahead of a North American leaders' summit in June 2016, Canadian company **Primero Mining (since purchased by First Majestic Silver)** served the government of Mexico with a notice of intent to launch supranational arbitration for alleged breaches of NAFTA rules after Mexico's tax authority took legal action to try to collect more tax from the company based on its silver sales.[108] Primero Mining was taxed on silver sales at a price well below market price, based on an agreement with Mexican authorities for the period 2010 to

[102] Expediente 4785-2017, Corte de Constitucionalidad, Guatemala, September 3, 2018.

[103] Prensa Libre, "Una demanda internacional la pagarían todos los guatemaltecos," Aug 9, 2018; https://www.prensalibre.com/economia/mina-san-rafael-suspension-400-dias-corte-de-constitucionalidad-aun-sin-resolvera

[104] Earthworks et al, "Guatemala's highest court orders Tahoe's Escobal mine to remain suspended," Sept 4, 2018; https://earthworks.org/media-releases/guatemalas-highest-court-orders-tahoes-escobal-mine-to-remain-suspended/

[105] Pan American Silver, "Pan American Silver Completes Acquisition of Tahoe Resources," Feb 22, 2019; https://www.panamericansilver.com/investors/news-releases/detail/76/2019-02-22-pan-american-silver-completes-acquisition-of-tahoe-resources

[106] Common Frontiers, United Steelworkers, MiningWatch Canada et al, "Blackfire adding threats to injury in Mexico: Canadian mining firm looks to pocket $800 million via NAFTA Ch.11," February 22, 2010; https://miningwatch.ca/news/2010/2/22/blackfire-adding-threats-injury-mexico-canadian-mining-firm-looks-pocket-800-million

[107] Common Frontiers, United Steelworkers and MiningWatch Canada, "Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy," May 5, 2013; https://miningwatch.ca/publications/2013/5/6/corruption-murder-and-canadian-mining-mexico-case-blackfire-exploration-and

[108] Financial Post, "Primero Mining launches NAFTA challenge against Mexico, puts tax concerns at centre," June 3, 2016; http://business.financialpost.com/commodities/mining/primero-mining-launches-nafta-challenge-against-mexico-puts-tax-concerns-at-centre; CBC News, "Mexican tax demand prompts NAFTA challenge by mining firm ahead of 3 Amigos summit," Jun 5, 2016

2014. The low market price refers to Primero Mining's contract with Silver Wheaton, to which it sells a portion of silver from the San Dimas mine in Durango through an off-shore subsidiary. Silver Wheaton then sells the silver at a higher price. The company reported that its NAFTA threat for an undefined amount led to a process of dialogue with Mexican authorities for which reason it had suspended arbitration proceedings as of March 2018.[109] This is a typical case of the "chilling effect".

In September 2018, shortly before the renegotiated text of NAFTA (now the United States-Mexico-Canada Agreement or USMCA) was made public, U.S. company **Legacy Vulcan LLC** and its Mexican **subsidiary Calizas Industriales del Carmen (Calica)**, filed a notice of intent to sue Mexico under NAFTA over an environmental dispute concerning limestone quarrying in the state of Quintana Roo.[110] The company is in conflict with the municipality of Solidaridad whose ecological land use planning has prevented the company from mining on two properties.[111] The company is expected to sue for around US$500 million and followed through on its threat, registering its suit on January 3, 2019.[112]

Following this, in early 2019, Odyssey Mineral Exploration filed a notice of intent against Mexico for not having approved environmental permits for its seabed phosphate project off the coast of Baja California Sur, claiming a whopping US$3.54 billion dollars.[113]

Panama

Panama is facing one ISDS case related to a mining project. In 2016, U.S.-based **Dominion Minerals Corp**. brought a suit against Panama to ICSID for at least US$268.3 million under the Panama-USA Bilateral Investment Treaty (BIT), six years after the government refused to renew its exploration license for the Cerro Chorcha copper project in 2010.[114] The permit renewal was denied when the area was declared off limits to mining activities as a result of the struggle of the Ngöbe-Buglé Indigenous People to protect their lands. In 2008, the Ngöbe people declared: "We strongly reject the Chorcha Mining Project and the actions of Dominion Minerals Corp. and those of the (Panamanian) State that violate our rights as Indigenous Peoples and our heritage."[115] With legal support from local NGOs, the mining project was deemed illegal for lack of public consultation and for being approved without a proper Environmental Impact Assessment.[116] In response, the Ministry of Commerce and

[109] Primero Mining Corp, Annual Information Form for the year-ended December 31, 2017, March 28, 2018.

[110] Damien Charlotin, IAReporter, "Citing Uncertainty over Future of NAFTA Chapter 11, a Pari of Investors File Papers Notifying Mexico of a Dispute that Touches on Licensing and Environmental Issues," October 5, 2018; https://www.iareporter.com/articles/citing-uncertainty-over-future-of-nafta-chapter-11-a-pair-of-investors-act-to-file-papers-notifying-a-dispute-that-touches-on-licensing-and-environmental-issues/

[111] Novedades Quintana Roo, "Calica daña ambientalmente a Solidaridad," October 11, 2018; https://sipse.com/novedades/laura-beristain-calica-dano-ambiental-adelita-corchalito-sipse-novedades-quintana-roo-313039.html

[112] Lisa Bohmer, IAReporter, "US Investor in Mexican Limestone Quarry Makes Good on Earlier Threats to Initiate NAFTA Arbitration," January 4, 2019; https://www.iareporter.com/articles/us-investor-in-mexican-limestone-quarry-makes-good-on-earlier-threats-to-initiate-nafta-arbitration/

[113] Odyssey Mineral Exploration, Notice of Intent, dated January 4, 2019; https://www.italaw.com/sites/default/files/case-documents/italaw10442.pdf

[114] "Solidarios contra la Mina Cerro Chorcha," June 3, 2008; https://www.ocmal.org/4802/; See also Central America Data, "Panama: Dominion Minerals demanda compensación," March 31, 2016; https://www.centralamericadata.com/es/article/home/Panam_Dominion_Minerals_demanda_compensacin and italic, Dominion Minerals Corp. v. Republica of Panama, Case No. ARB/16/13, https://www.italaw.com/cases/3972

[115] "No Mine on Cerro Chorcha, say Ngöbe communities." Mines and Communities. June, 2009. http://www.minesandcommunities.org/article.php?a=9327, http://ejatlas.org/conflict/ngobe-bugle-against-mining-panama

[116] "Reclamo Millonario por Mina". La Prensa, July 19th, 2017. https://impresa.prensa.com/panorama/Reclamo-millonario-mina_0_4805519558.html

Industries issued a resolution rejecting the permit renewal and declared Cerro Chorcha a "mineral reserve" of 24,000 hectares within which all mineral exploration and extraction work is prohibited. The suit is currently pending.

Peru

Peru was the first Latin American country to be sued by a mining company in 1998 when it was accused of leaving a French investor out of a major mining deal. Since then, two further suits have been brought against Peru from mining companies that have public health, water protection and Indigenous Peoples' self-determination at their center.

In 1998, **Compagnie Minière Internationale Or S.A.** sued Peru for US$560 million under the Peru-France Bilateral Investment Treaty with regard to a battle over investment in the massive Yanacocha gold project. The Fujimori government—reportedly under pressure from the U.S. Embassy in Lima—had favored U.S. investor **Newmont Mining** and the Peruvian company **Buenaventura** for involvement in the project instead of the French firm.[117] The case was settled in 2001 when Buenaventura and Newmont Mining agreed to pay the French firm US$80 million.[118]

One of the most notorious cases that a mining company has brought to ICSID is **The Renco Group**'s suit against Peru brought in 2011.[119] Renco, a subsidiary of U.S. company **Doe Run** sued for US$800 million when the government cancelled its operating permit for a smelter in La Oroya after the company failed to submit a new environmental remediation plan and financial guarantees on time after having received an extension.[120] La Oroya is one of the most contaminated sites on the planet, according to World Health Organization's standards.[121] Renco purchased the lead smelter in the small mountain town of La Oroya in 1997, at which time it agreed to improve the facility to make it less harmful for the environment. Instead, the company allowed toxic contamination from the smelting process to pollute La Oroya's air, water, and soil. This contributed to health problems, like lead poisoning, that particularly affect local children.[122] The tireless efforts of the Movement for the Health of La Oroya,[123] Peruvian NGOs and church organizations[124] with international allies brought attention to the situation. The case was finally decided in favor of Peru in 2016, although Peru had to pay its own legal costs worth US$8.39 million. The prospect of a new claim from Renco looms on the horizon.[125]

---

[117]The Wall Street Journal, "Peru's Montesinos Pressured Court in Yanacocha Mine Case," January 26, 2001; https://www.wsj.com/articles/SB98045179246288695

[118]Ibid.

[119]Network for Justice in Global Investment (NJGI), "A brief introduction of the Doe Run/Renco vs Peru case," April 16, 2012; http://justinvestment.org/2012/04/fact-sheet-la-oroya-peru/

[120]OCMAL, "Perú cancela licencia a minera estadounidense Doe Run," July 28, 2010; https://www.ocmal.org/peru-cancela-licencia-a-minera-estadounidense-doe-run/

[121]La Oroya, Peru from the list of Top 10: Most Polluted Places, 2007; http://www.worstpolluted.org/projects_reports/display/41

[122]Anna Miller, "More Than a Decade's Wait for Justice in La Oroya, Peru," December 14, 2016; https://earthjustice.org/blog/2016-december/over-a-decade-s-wait-for-justice-in-la-oroya-peru

[123]Testimony of Mrs. Rosa Noemi Amaro Toykin, President of the Movement for the Health in La Oroya (MOSAO), to House Committee on Foreign Affairs, Subcommittee on Africa, Global Health and Human Rights, July 19, 2012; http://archives-republicans-foreignaffairs.house.gov/112/HHRG-112-FA16-WState-AmaroR-20120719.pdf

[124] Presbyterian Mission, "Justice for La Oroya: Renco Group loses arbitration suit against Peru," July 18, 2016; https://www.presbyterianmission.org/together-justice/2016/07/18/justice-la-oroya-renco-loses-arbitration-suit-peru/

[125]DAC Beachcroft, "The Republic of Peru is denied recovery of legal costs despite win in Renco Group arbitration," January 24, 2017; https://www.lexology.com/library/detail.aspx?g=630df79e-52c2-4bcf-8824-dd4168f4b019

In a third mining-related case, Canadian company **Bear Creek Mining** sued Peru under the Canada-Peru Free Trade Agreement for having revoked a crucial permit for its Santa Ana project in 2011, when Aymara Indigenous communities rose up against any mining on their territory in Puno near the border with Bolivia out of concern for the potential impacts of mining activities on water supplies.[126] As a result of the 2011 protests, eighteen Aymara social leaders faced formal legal charges for their alleged role in the regional strike that blocked the mining project.[127] All those charged were eventually acquitted over the years except for one, Walter Aduviri. On October 5th, 2018, following widespread national and international campaigning in support of Aduviri and much to the public's surprise, the Peruvian Supreme Court overturned Walter Aduviri's conviction, which had carried a sentence of 7 years in prison and a fine of approximately US$600,000, ordering the legal process to start over again.[128]After three and a half years of proceedings, the ICSID tribunal found in favor of the company, although it did not accept the company's argument that it should be owed the estimated US$522.2 million in profits that it purportedly could have made should it have built the mine, given that it was made clear to the tribunal that the company did not have the necessary support of the communities to actually advance the project.[129] Nonetheless, the tribunal ordered Peru to pay the company the reduced award of US$18 million plus interest and legal costs.[130] Communities have stated opposition to the state paying any amount of money to the Canadian company.[131] In what appears to be an exchange of concessions for payment from the Peruvian government, however, Puno press reported that the government paid Bear Creek after it renounced the mining concessions related to the Santa Ana project in November 2018.[132]

Uruguay

One of the latest Latin American countries to join the list of countries sued by mining companies is Uruguay, which is facing a suit for the staggering amount of US$3.54 billion.[133] The suit is being brought by three individual investors, Rikita Mehta, Prenay Agarwal and Vinita Agarwal, who are linked to the UK-Swiss firm **Zamin Ferrous** whose Uruguayan subsidiary, **Minera Aratiri**, sought to exploit the Valentines iron ore project and build an

[126] Henry Lazenby, Mining Weekly, "Bear Creek wins C$30.4m award in international arbitration against Peru," December 2, 2017; http://www.miningweekly.com/article/bear-creek-wins-c304m-award-in-international-arbitration-against-peru-2017-12-02/rep_id:3650

[127] "The judicial process of the Aymarazo socio environmental conflict."Watch video: https://www.youtube.com/watch?v=SLKPdt99OqY

[128] https://ips-dc.org/supreme-court-accepts-appeal-of-peruvian-human-rights-defender-and-overturns-sentence/; Also peru21.com, "Corte Suprema informó que no declaró inocente Walter Aduviri del caso 'Aymarazo'", October 9, 2018; https://peru21.pe/peru/corte-suprema-aclaro-declaro-inocente-walter-aduviri-caso-aymarazo-nndc-433427

[129] Jarrod Hepburn, IAReporter, "Tribunal Rejects DCF Approach in Bear Creek Case; Dissenter Sees ILO Convention on Indigenous and Tribal Peoples as Imposing Obligations in Context of Miner's ICSID Claim," December 4, 2017. See also: Jarrod Hepburn, IAReporter, "Requirement, Considers Interpretive Annex on Indirect Expropriation, and Views Treaty's General Exceptions Clause as Ruling Out Other Exceptions," December 4, 2017.

[130] ICSID, Bear Creek Mining Corporation v. Republic of Peru, Case No. ARB/14/21, Award, November 30, 2017; http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

[131] http://movimientom4.org/2018/09/piden-anular-sentencia-contra-aduviri-y-rechazan-pago-millonario-a-minera/

[132] Servindi, "Puno: Bear Creek renuncia a las concesiones mineras del proyecto Santa Ana," January 11, 2019; https://www.servindi.org/actualidad-noticias/11/01/2019/bear-creek-renuncia-las-concesiones-mineras-del-proyecto-santa-ana; Correo Puno, "Gobierno pago 32 millones de dólares a Bear Creek por Santa Ana," January 1, 2019; https://diariocorreo.pe/edicion/puno/gobierno-pago-32-millones-de-dolares-bear-creek-por-caso-santa-ana-862129/

[133] "Minera india Aratirí inició demanda contra Uruguay por u$s 3.536 millones". Marco Trade News, 10 de Agosto, 2018. http://www.marcotradenews.com/noticias/minera-india-aratiri-inicio-demanda-contra-uruguay-por-u-s-3-536-millones-63768

associated mineral duct.[134,135] According to the UNCTAD investment policy hub, the claims "[arise] out of allegedly arbitrary and non-transparent conduct of the Government in relation to the claimants' investments in the Valentines iron ore project, including repeated regulatory changes with respect to the port terminal (which had to be built as part of the project), ultimately leading to the project's shutdown."[136] The case is proceeding under UNCITRAL rules and under the UK-Uruguay Bilateral Investment Treaty. Nonetheless, according to the group Uruguay Free of Mega-Mining, the company never obtained the required environmental permit nor presented the necessary financial guarantees as per Uruguayan law to finalize a contract to build the project.[137,138] The project faced strong opposition from local farmers and environmentalists who wanted the open-pit iron ore project scrapped, and open-pit mining banned,[139] saying that the mine would be devastating for the environment.[140]

Venezuela

Venezuela is the country that has been hit most frequently by mining company lawsuits. Supranational tribunals have awarded US$2.9 billion to just three mining companies (see Table 5A), although the Venezuelan state is disputing the award granted to Rusoro Mining, discussed further below. Taking into consideration other extractive industries (mainly oil companies), Venezuela has been penalized with US$5.6 billion.[141] The disputes brought against Venezuela principally concern matters related to resource management issues, although environmental and Indigenous rights issues have also figured in the cases of Crystallex and Gold Reserve.

The first mining case against Venezuela was brought in 2004 by **Vanessa Ventures (now Infinito Gold)**, which filed for arbitration invoking the Canada-Venezuela Bilateral Investment Treaty (BIT) over its acquisition of concessions for the Las Cristinas mine in 2001 that the government considered illegal.[142] The government then enabled a state-owned company to take over the concessions, and shortly later, in 2002, granted the concessions to Canadian company Crystallex. Vanessa Ventures tried to fight the case in domestic court and then took the case to international arbitration, alleging expropriation and lack of Fair and Equitable Treatment for US$1.045 billion. The panel found in favour of the state of Venezuela.[143] (Crystallex later sued Venezuela as well; see below.)

---

[134] El Observador, "Gobierno se siente resguardado y no teme por le juicio de Aratirí," July 21, 2017; https://www.elobservador.com.uy/nota/gobierno-se-siente-resguardado-y-no-teme-por-el-juicio-de-aratiri-2017721500

[135] Marco Trade News, "Minera india Aratirí demanda contra Uruguay por U$S3.536 millones," Aug 10, 2018; http://www.marcotradenews.com/noticias/minera-india-aratiri-inicio-demanda-contra-uruguay-por-u-s-3-536-millones-63768

[136] Investment Policy Hub: 2017, Agarwal and Mehta v. Uruguay, http://investmentpolicyhub.unctad.org/ISDS/Details/824

[137] Observatorio Minero de Uruguay, "Nuevo acto de piratería de Aratirí," Aug 11, 2018; http://www.observatorio-minero-del-uruguay.com/2018/08/nuevo-acto-de-pirateria-de-aratiri/

[138] According to Uruguay Free of Mega-Mining, the company should not be able to proceed with the arbitration based on Article 19 of Law 15.242 which states that "Mining activities, by whatever method, and all disputes, complaints and petitions in this regard are subject, without exception, to the legislation and jurisdiction of the Oriental Republic of Uruguay."

[139] See the webpage of Uruguay Libre de Megaminería: http://www.uruguaylibre.org/

[140] United Press International, "Uruguay farmers set against open-pit iron ore mine," Jan 20, 2014; http://www.minesandcommunities.org/article.php?a=12542

[141] ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30). http://investmentpolicyhub.unctad.org/ISDS/Details/245

[142] Hadrian Mertins-Kirkwood, Canadian Centre for Policy Alternatives, 2015.

[143] Ibid.

Nova Scotia Power initiated arbitration in 2008 under the Canada-Venezuela BIT over the government's cancellation in 2007 of a long-term coal supply contract with a state-owned enterprise.[144] It is not known how much Nova Scotia Power claimed. The panel dismissed the claim and ordered Nova Scotia Power to pay the state's costs, as a result of having been brought under UNCITRAL instead of ICSID rules.[145] Nova Scotia Power resubmitted its claim under ICSID rules in 2010 for US$180 million, which was also dismissed on jurisdictional grounds given that the panel did not agree that the contract constituted an "investment" according to the treaty.[146]

In 2009, U.S. company **Gold Reserve Corp.** initiated arbitration under the Canada-Venezuela BIT, through its subsidiary in the Yukon, over its attempts to advance the Las Brisas mine project for which it had repeatedly failed to obtain environmental permits.[147] The state took control of the project in 2009, alleging that it "was causing serious environmental deterioration to rivers and biodiversity in the region."[148] The tribunal admitted the claim, despite it being filed through a company subsidiary in Canada, as a result of having received Canadian diplomatic support. The panel ruled in favour of the company, finding that Venezuela had not ensured Fair and Equitable Treatment, ordering the state to pay Gold Reserve US$713 plus US$27.3 million in interest and legal costs.[149]

In 2011, Canadian mining company **Crystallex** sued Venezuela under the Canada-Venezuela BIT for having revoked its permit to the Las Cristinas mining project, which it acquired in 2002 shortly after Vanessa Ventures lost the concessions to the project.[150] Venezuela terminated its contract with Crystallex over environmental concerns and potential impacts on Indigenous peoples in the Imtaca Forest Reserve.[151] Affected Indigenous Peoples in the Imtaca Forest Reserve had been protesting the project.[152] In April 2016, ICSID ordered Venezuela to pay the company US$1.2 billion in lost profits plus interest and legal costs.[153] As it grapples with a severe economic crisis, the Venezuelan government has continued to promote transnational investment in this and a much broader area known as the "Mining Arc" that covers 12% of national territory, despite the ecological sensitivity of mining in this area and the risks to Indigenous Peoples. This includes investments by Gold Reserve, which after suing Venezuela in 2009, has reportedly entered into a joint venture with the state-owned **Venezuela Mining Corporation (CVM)** in the hope of some day operating the Las Brisas-Cristinas deposit. Some have raised the possibility that this deal is a further outcome of Gold Reserve's ICSID suit.[154]

Rusoro Mining filed its claim against Venezuela under the Canada-Venezuela BIT in 2012, alleging that national reforms concerning gold marketing rules effectively nationalized its

[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Martin Dietrich Brauch, "Venezuela ordered to pay US$1.202 billion plus interest to Canadian mining company Crystallex for FET breach and expropriation," Aug 10, 2016; https://www.iisd.org/itn/2016/08/10/crystallex-international-corporation-v-bolivarian-republic-of-venezuela-icsid-case-no-arb-af-11-2/
[152] Pratap Chatterjee, CorpWatch, "World Bank Orders Venezuela to Pay Crystallex $1.4 Billion for Gold Mine," April 6, 2016; https://corpwatch.org/article/world-bank-orders-venezuela-pay-crystallex-14-billion-gold-mine
[153] Martin Dietrich Brauch, Aug 10, 2016.
[154] Bram Ebus, Mongabay, Maduro seeks sell off of Venezuela's natural resources to escape debt – analysis," Jan 25, 2018; https://news.mongabay.com/2018/01/maduro-seeks-sell-off-of-venezuela-natural-resources-to-escape-debt-analysis/

operations.[155] The tribunal found in favour of the company in the amount of US$968 million.[156] However, in response to Venezuela's request for annulment, most of this award was set aside given that it was based on a calculation of damages resulting from measures taken by the Venezuelan state more than three years before Rusoro submitted its claim against Venezuela. As a result, the claim failed to meet the three-year limitation period defined in the Canada-Venezuela BIT.[157] The company has stated that it will appeal this decision and claims that Venezuela still owes it US$100 million based on an agreement reached with the state in October 2018.[158]

U.K.-South African **Anglo American**, filed a suit against Venezuela in 2014 under the U.K.-Venezuela BIT for US$400 million over the cancellation of concessions related to a nickel mining project regarding failure to abide by contract obligations.[159,160] In January 2019, the arbitration panel found against the company, ordering each party to bear its own legal costs and expenses, which totalled USD$9.4 million for the Venezuelan state.[161]

Venezuela faces yet another pending mining case.

Dutch companies **Highbury International** and **Compañía Minera de Bajo Caroní,** in conjunction with **Ramstein Trading Inc.** of Panama, filed against Venezuela in 2014 under the Netherlands-Venezuela BIT for US$209.7 million over the expropriation of gold and diamond mining concessions.[162,163] Highbury International and Ramstein Trading Inc. made a first unsuccessful attempt to sue Venezuela for US$633 million in 2011 over expropriation of mining properties, which was dismissed at the jurisdiction stage.[164]

If these companies win, the total amount that has been awarded against Venezuela for mining cases alone could rise as high as US$3.1 billion, or roughly 1% of Venezuela's GDP.

---

[155] Hadrian Mertins-Kirkwood, Canadian Centre for Policy Alternatives, 2015.

[156] Investment Policy Hub, 2012: Rusoro Mining v. Venezuela: http://investmentpolicyhub.unctad.org/ISDS/Details/483

[157] Damien Charlotin, IAReporter, "Analysis: Paris Court of Appeal Deemed that Treaty's Time-Bar Provisions Should Have Affected Tribunal's Quantum analysis in Billion Dollar Ruling," January 31, 2019; https://www.iareporter.com/articles/analysis-paris-court-of-appeal-deemed-that-treatys-time-bar-provisions-should-have-affected-tribunals-quantum-analysis-in-billion-dollar-ruling/

[158] Rusoro Mining, "Paris Court of Appeals Decision on Award," January 30, 2019; http://www.rusoro.com/s/News_Releases.asp?ReportID=844383

[159] IAReporter, "Anglo-American invokes treaty protections in new arbitration with Venezuela," April 14, 2014; https://www.iareporter.com/articles/anglo-american-invokes-treaty-protections-in-new-arbitration-with-venezuela/

[160] Investment Policy Hub, 2014: Anglo American v. Venezuela: http://investmentpolicyhub.unctad.org/ISDS/Details/605

[161] ICSID (Additional Facility), Award, in the proceedings between Anglo American PLC and the Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, January 18, 2019. Also see: FoleyHoag, "Foley Hoag Wins Arbitration for Venezuela Obtaining Dismissal of $400M Claim," January 29, 2019; https://foleyhoag.com/news-and-events/news/2019/january/foley-hoag-wins-arbitration-for-venezuela-obtaining-dismissal-of-400m-claim and Luke Eric Peterson, "Anglo American Falls Short in Investment Treaty Claim Against Venezuela, As Majority of Tribunal Rejects All Claims," January 24, 2019; https://www.iareporter.com/articles/anglo-american-falls-short-in-investment-treaty-claim-against-venezuela-as-majority-of-tribunal-rejects-all-claims/

[162] Clovis Trevino and Luke Eric Peterson, "Venezuela Update: An arbitrator is challenges and a new case is initiated," Jan 20, 2015; https://www.iareporter.com/articles/venezuela-update-an-arbitrator-is-challenged-and-a-new-case-is-initiated/

[163] Investment Policy Hub, 2014: Highbury v. Venezuela: http://investmentpolicyhub.unctad.org/ISDS/Details/596

[164] Luke Eric Peterson, "Arbitrators decline jurisdiction over claims by Highbury and Ramstein under Dutch treaty and Venezuelan statute for expropriation of mining assets," Sept 30, 2013; https://www.iareporter.com/articles/arbitrators-decline-jurisdiction-over-claims-by-highbury-and-ramstein-under-dutch-treaty-and-venezuelan-statute-for-expropriation-of-mining-assets/

4

PROPOSALS FOR ACTION

The ISDS cases brought against Latin American states by mining companies and presented in this report reflect the stark asymmetry in current rules that govern transnational investment, which permit corporations to sue governments for hundreds of millions, and even billions, of dollars for potential lost profits. The ISDS system entrenched in more than 3,000 bilateral investment treaties and free trade agreements gives foreign investors powerful tools that mining companies are using to undermine the implementation of decisions from courts and human rights bodies, regulatory enforcement and other government measures in the interest of Indigenous Peoples, mining-affected communities and environmental protection. Meanwhile, the serious harms that extractive industries cause largely languish unaddressed.

The head of Washington-based law firm Curtis, Mallet-Prevost, Colt & Mosle LLP, one of two firms that only represent states in arbitration suits, has called this a "dangerous" system. It is "dangerous," George Kahale III states, "not to the players in this game, but to those who created the system and are always on the receiving end of claims: the states. Why do I say dangerous? Because we have something posing as a developed legal system in which billion-dollar claims created out of thin air have become commonplace and, believe it or not, actually have a chance of success." He concludes that it would be better to start from scratch than try to reform it.

The Columbia Center for Sustainable Investment has also published a recent report on the costs and benefits of this framework from the perspective of the state. The authors find that the purported benefits of International Investment Agreements (IIAs) to attract foreign investment are highly dubious at best and even deleterious to the extent that they promote a race to the bottom in protections for labor, the environment and human rights.[165] The costs, however, are so well-demonstrated and substantial that they conclude "it is hard for states to justify the continuation of their investment agreements or the conclusion of any new similar agreement."[166]

Additionally, in a May 2018 decision, the European Court of Justice ruled in its *Achmea* judgement that investor arbitration in agreements between EU member states is essentially incompatible with European law as a result of "sidelining and undermining the powers of the courts of the Member States." The Center for International Environmental Law observes, "Although the case's ruling only applies explicitly to bilateral investment agreements between EU member countries, the implications of the case may well extend much further to investment agreements between the EU or EU Member States and non-EU countries."[167]

Further, the United Nations Conference on Trade and Development (UNCTAD) has stated that "Reform of investment dispute settlement cannot be viewed in isolation; it needs to be synchronized with reform of the substantive investment protection rules embodied in IIAs. Without a comprehensive package that addresses both the substantive content of IIAs and ISDS, any reform attempt risks achieving only piecemeal change and potentially creating new forms of fragmentation and uncertainty."[168]

---

[165] Johnson, L., Sachs, L., Güven, B., & Coleman, J., Columbia Center on Sustainable Investment, 2018.
[166] Johnson, L., Sachs, L., Güven, B., & Coleman, J., Columbia Center on Sustainable Investment, 2018.
[167] Center for International Environmental Law, "Implications of Achmea: How the Achmea Judgement Impacts Investment Agreements with Non-EU Countries," April 2018; https://www.ciel.org/reports/implications-of-achmea/
[168] IIA Issue Note 4. "Improving Investment Dispute Settlement. UNCTAD Policy Tools". November 2017. http://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf

Among these ever-broader demands for fundamental reform, civil society organizations and policymakers around the world have been working to extricate their governments from ISDS and foreign investment protection obligations, and exploring alternative approaches that would prioritize people, workers and the environment over corporate profits.

As a result of the global backlash to this system, alternatives to the investment regime have multiplied. One example is a document developed by dozens of organizations and experts that proposes an alternative model for international investment to address corporate impunity and set out new investment rules that favour the public interest.[169] This document draws from several proposals designed over the course of the last decades.

In broad terms these include:

1. Proposals to prioritize the protection of human rights, and in particular Indigenous Peoples and environmental protection over investor rights, making them mandatory. Respect for Indigenous Peoples, human rights and environmental protection rights should be obligatory in international law and take precedence over other legislation, with binding mechanisms to ensure corporate accountability. This has been the motivation behind organizations engaged in negotiations for an International Binding Treaty on Transnational Corporations and Human Rights,[170] as well as national level efforts to pursue legal mechanisms for corporate accountability.

2. Proposals for Alternative Dispute Settlement Solutions. Current clauses dealing with Investor-State Dispute Settlement should be annulled, particularly those that allow investors to challenge and sue host states using supranational arbitration over governmental regulatory actions or related measures that they perceive to be harmful to their interests. Investment disputes should be brought first to national courts, in accordance with the host country's legislation. According to these proposals, only after exhausting national procedures would the investor accede to a permanent and duly constituted international tribunal to review whether there was any violation of due process or that the appropriate national legislation was properly applied. International dispute settlement mechanisms would also be two-way. In addition to investors, states, communities and citizens would be able to initiate a legal challenge, and tribunals would enable access and equitable participation for affected communities, with the process conducted publicly. At a minimum, in the short term, given the demonstrated social and environmental harms from extractive industries and the threat to governments' obligations to respect Indigenous and human rights and to protect water supplies and fragile ecosystems, extractive industries should be prohibited (as the tobacco industry already is) from using ISDS.

3. Proposals to abolish the privileges of foreign investors and guarantee states the space to design and implement public policy, including special and differentiated treatment to support national priorities and greater equality. The concept of "Indirect Expropriation" would be eliminated from international legislation, given how such provisions undermine the state's right to regulate. The definition of expropriation would be limited to a government act that for reasons of public interest takes over or nationalizes a tangible good from an investor in exchange for economic compensation. These proposals also seek to restore policy space for governments to pursue and prioritize local and national economic priorities; social, cultural and environmental protections; as well as the preservation, promotion and restoration of public services. More recently, proposals have also sought to

[169] Working Group on Investment in the Americas, "A Call for the Building of an Alternative Legal Framework to the International Investment Treaties," May 2014; https://ips-dc.org/call-building-alternative-legal-framework-international-investment-treaties-favoring-public-interest-away-transnational-corporate-impunity/

[170] See Proposals of the Global Campaign for the Binding Treaty on transnational corporations and Human Rights https://www.stopcorporateimpunity.org/binding-treaty-un-process/

take climate change into consideration, proposing to eliminate ISDS and ensure policy space for measures to reduce greenhouse gas emissions and address climate change.[171]

In this context of growing discontent with the current regime, fewer agreements are being reached and some reforms are being implemented. According to UNCTAD, only 18 international investment agreements (IIAs) were concluded in 2017, the lowest number since 1983. For the first time, the number of treaty terminations overtook the number of new IIAs, and numerous countries have been making reforms to the system. Since 2012, more than 150 countries have devised new measures for IIAs that provide specific protection or carve-outs for policies and decisions concerning the environment.[172]

Further evidence of rising discontent with the investor protection framework, and ICSID in particular,[173] include the withdrawal of at least three countries from the ICSID convention; Bolivia, Ecuador and Venezuela.[174] These same countries, in addition to India, Indonesia, South Africa and Tanzania, have terminated several BITs, most notably with European countries.[175] Several countries are also developing alternative BIT models, including Brazil[176], India[177], Indonesia[178] and Tanzania.[179] Regionally, the South African Development Council (SADC) has developed an alternative Model Bilateral Investment Treaty Template with which to advise members states, for example on opting for state-to-state arbitration before recurring to international tribunals.[180] Additionally, El Salvador reformed its investment law in order to avoid being taken directly to ICSID after being sued by Commerce Group and Pacific Rim Mining.

Recently, the governments of Canada, the United States, and Mexico agreed to a renegotiated North American Free Trade Agreement (renamed the USMCA) that, in addition to being a serious setback on many issues (such as intellectual property rights, biotechnology, etc.), only reigns in investor powers between Canada and the U.S. The published text, while not final, removes ISDS after a three-year phase out between Canada and the U.S. Notably, Canada was the most-sued country under NAFTA, particularly over

[171] Discussion Paper: A New Climate-Friendly Approach to Trade". Sierra Club. https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org.creative-archive/files/pdfs/1433%20New%20Trade%20Report%2005_low.pdf

[172] IIA Issues Note: Recent Developments in the International Investment Regime. May, 2018. http://investmentpolicyhub.unctad.org/Publications/Details/1186

[173] Dr. Robin Broad, "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," University of Pennsylvania Journal of International Law, 2015; https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1898&context=jil

[174] Magdalena Bas, "Algunas reflexiones en torno al retiro de Bolivia, Ecuador y Venezuela del CIADI." Densidades no. 17, mayo 2015. https://www.researchgate.net/publication/285233878_Algunas_reflexiones_en_torno_al_retiro_de_Bolivia_Ecuador_y_Venezuela_del_CIADI_2015

[175] Research from UNCTAD's Investment Policy Hub. See http://investmentpolicyhub.unctad.org/IIA

[176] José Henrique Vieira Martins, "Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments." Investment Treaty News, June 2017. https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/

[177] Amiti Sen, Surabhi, "India's Bilateral Investment Pacts Under Cloud". The Hindu Business Line. April 9th, 2017. https://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece

[178] Rachmi Hertanti and Rika Febriani, "Update on Indonesia BITs review". IGJ News Update / February, 18th 2015. http://isds.bilaterals.org/?update-on-indonesia-bits-review

[179] Luke Eric Peterson and Zoe Williams, "As Tanzania seeks to overhaul mining regime, the government reportedly moves to terminate a bilateral investment treaty that was up for renewal." October 8th, 2018. Investment Arbitration Reporter. https://www.iareporter.com/articles/as-tanzania-seeks-to-overhaul-mining-regime-the-government-reportedly-moves-to-terminate-a-bilateral-investment-treaty-that-was-up-for-renewal/

[180] SADC Model Bilateral Investment Treaty Template with Commentary. Southern African Development Community. July 2012. https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf

environmental and health protection measures.[181] Nonetheless, ISDS persists in the USMCA between the U.S. and Mexico, although requiring that local remedies be exhausted first, excepting government contracts in some key sectors like energy.[182] Furthermore, although ISDS between Canada and Mexico is not part of the USMCA, it is part of the Trans Pacific Partnership agreement (CPTPP), which both countries have ratified and which entered into force on December 30, 2018,[183] through which mining companies and other firms will be able to continue bringing cases.

Furthermore, despite such shifts, thousands of agreements remain in place and are still being negotiated with countries in Latin America. As this report demonstrates, until they are undone these pose significant risk to Indigenous peoples and mining-affected communities who are defending their lives and lands from extractive industry projects, eroding the already limited legal tools they have with which to demand that decision-makers respect their self-determination, as well as the decisions of human rights bodies and domestic courts, including to enforce laws and regulations, and take measures to protect territories, water supplies and ways of life and halt the aggressive expansion of mining and other extractive industries.

In this context, many mining-affected communities and Indigenous Peoples in Latin America are exercising their collective rights and learning important lessons from experience that they cannot wait for investment to take place on mining concessions before getting informed about the impacts of mining. Rather, communities and organizations that accompany them are studying where mining concessions have been granted and are getting organized at an early stage, even before there is much presence of a company or an investor. Doing so provides communities with a greater opportunity to assert their self-determination to declare their territories free of mining and avoid the same degree of social division, criminalization, violence, impunity for harms, as well as investor arbitration suits that frequently arise when mining companies start to carry out prospecting and exploration, whether or not companies ever plan to build a mine.

In conclusion, in light of the threat that mining and other extractive industry companies pose to people and the environment, and in the interest of recuperating national sovereignty over policy making to protect the wellbeing of Indigenous Peoples and affected communities, current International Investment Treaties urgently need to be audited and, only after meaningful public participation, either be cancelled or rewritten on terms that put people's rights and the environment first. Furthermore, where abusive arbitration suits are brought by mining companies to try to undermine the struggles of Indigenous Peoples and mining-affected communities to prevent this industry from destroying their territory, their water supplies and their ways of life, there is an opportunity to continue building international solidarity with their struggles while continuing to demonstrate the abusiveness of international investor protection agreements.

[181] Council of Canadians, "Why Canada is one of the most sued countries in the world," October 23, 2015; https://canadians.org/blog/why-canada-one-most-sued-countries-world

[182] Chapter 14 of the Agreement between the United States of America, the United Mexican States and Canada (USCMA). https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/14%20Investment.pdf

[183] Janyce McGregor, CBC, "Why Canada raced to get in on the CPTPP trade deal," December 30, 2018; https://www.cbc.ca/news/politics/cptpp-in-effect-sunday-1.4955582

Lessons for Movement Building from Pacific Rim Mining/OceanaGold v. El Salvador

The suit brought by Pacific Rim Cayman against El Salvador in 2009 for not having granted it a permit to put a gold mine into operation—and for which it had never met regulatory requirements—gave rise to a local, national and international campaign that provides valuable lessons for building solidarity with struggles in defence of land and water, while bringing critical attention on the ISDS system that poses great danger to these same life and death battles. The local, national and international organizing that took place over the duration of the arbitration, and a solid legal defence, contributed to ensure that the Salvadoran state did not lose this case,[184] while helping to clear the way for Salvadorans to finally push their legislature to pass a ban on all metallic mining country-wide in March 2017.[185]

That this suit proceeded past the preliminary stages at all demonstrates the inherent corruption within this self-perpetuating system of richly-paid corporate lawyers,[186] third party financiers and companies happy to roll the dice on multi-million-dollar suits, betting on potential profits for investments not even made. As described earlier, Pacific Rim Mining restructured its company, moving a subsidiary from the Cayman Islands to Nevada in order to bring the suit under the terms of the CAFTA-DR. The arbitration panel, however, was unwilling to dismiss the case despite such a glaring abuse, allowing the case to drag on for seven years under El Salvador's investment law. Although the company did not win in this case, the process still cost the state millions of dollars, during which time four community activists from the resistance were murdered while many others faced threats. Additionally, efforts to achieve a nationwide ban on metal mining were put on hold while the suit continued so as to avoid jeopardizing the arbitration by giving any appearance of prejudice against mining on the part of the government of El Salvador.

Despite communities not being party to the suit, the solidarity built over the course of the arbitration brought global attention to Salvadoran demands to protect water and health from the deleterious impacts of gold mining. The movement created a counter-narrative to the company's misrepresentations and helped expose the threat that ISDS poses to the self-determination of affected peoples and the sovereignty of whole nations. Building on the local and national organizing that had begun years earlier to prevent the mine from operating, the international campaign connected the local struggle to protect Salvador's water from mining, to the harms of the unjust investor protection framework that perversely allows corporations who have wreaked havoc where they operate to sue governments for expected profits that they have never earned.

The campaign garnered extensive international media coverage and protests in the U.S., Canada and Australia, as well as solidarity from as far away as the Philippines (given OceanaGold's operations in this country) helped shine a spotlight and put direct pressure on the World Bank-based panel of corporate lawyers deciding over the interpretation of El Salvador's investment law. Reflecting on the campaign, one Salvadoran organizer stated that the coverage obliged local actors in El Salvador, including politicians, to take a position on the issue of mining.[187] During this period, the government also amended the nation's

[184] International Allies Against Mining in El Salvador, "There Are No Winners: After Seven Years and Millions of Dollars, Pac Rim Mining Loses Suit Against El Salvador," October 14, 2016; http://www.stopesmining.org/news/78-pacific-rim-news/462-press-release-coalition-of-groups-states-there-are-no-winners

[185] Esty Dinur, The Progressive, "How El Salvador Won on Mining," April 1, 2018; https://progressive.org/magazine/how-el-salvador-won-on-mining/

[186] Cecilia Olivet, Pia Eberhardt, "Profiting from injustice How law firms, arbitrators and financiers are fueling an investment arbitration boom" November 2012. https://www.tni.org/en/briefing/profiting-injustice

[187] Thomas McDonagh and Aldo Orellana López, Democracy Center, "El Salvador – When the Seeds of Resistance Bloom," May 2017; https://democracyctr.org/resource/el-salvador-when-the-seeds-of-resistance-bloom/

investment law so that it would no longer provide foreign investors with recourse to international tribunals.

Other aspects of this process that are more difficult to replicate include the willingness on the part of the law firm representing the Salvadoran state to collaborate with local and international civil society organizations.[188] Furthermore, prior to the start of the suit, local organizers were fortunate to achieve support from high-ranked government officials, the head of the Catholic church, cattle ranchers and traditional oligarchy sympathetic to concerns about the impacts of industrial gold mining.[189,190] Nor were there any other operating mining companies in El Salvador during this time. These conditions contributed to the success Salvadorans had in achieving broad-based opposition across the country to mining, as demonstrated in the results of successive public opinion polls carried out by the University of Central America (UCA) in San Salvador, which indicated that 79.5% of Salvadorans were against any gold mining as of 2015.[191]

In summary, it was vitally important that this campaign was grounded in close communication with Salvadoran communities and organizations part of the National Roundtable against Metal Mining (La Mesa) in order to keep efforts focused on their long-term objective to prohibit any mining. Concurrently, while international organizations lifted up the Salvadoran refrain that "water is more valuable than gold," the focus on the defence of water in a country facing a grave water crisis,[192] rather than short-term economic gains, resonated in many spheres. Further, creating a 'poster child' out of an abusive foreign mining investor trying to bully a small Central American country effectively illustrated the injustices of the biased trade and investment system in a context of corporate impunity. As allies in solidarity with local groups, being clear about how these different issues fit together and what each organization could bring to the campaign made it possible to deal with differences over short-term tactics, while keeping a focus on the long-term goals of Salvadoran partners.

Recognizing the intersection between local concerns and global injustices was also crucial to globalising the campaign, enabling a diverse range of organizations to get involved from diverse points of entry. As a result, community-based organizations in the northern Salvadoran department of Cabañas, a range of organizations and institutions in the capital San Salvador, and numerous organizations around the world were able to fight together bt making the connections between water, health and the defence of territory, as well as the struggle to protect the natural commons against the imposition of corporate interests through investor state arbitration before panel of corporate lawyers at the World Bank.

While this case does not provide a cookie cutter recipe to follow, this campaign demonstrates that "when we have a clear, shared understanding of the ways in which local and international struggles relate to and complement each other, we can leverage the diversity of our relationships, privileges, power and resources to great effect."[193]

[188] Thomas McDonagh and Aldo Orellana López, Democracy Center, May 2017.

[189] Esty Dinur, The Progressive, "How El Salvador Won on Mining," April 1, 2018; https://progressive.org/magazine/how-el-salvador-won-on-mining/

[190] Robin Broad and John Cavanagh, Ethics & International Affairs, "Historic Wins for Democracy and Rights in El Salvador, June 2017; https://www.ethicsandinternationalaffairs.org/2017/historic-wins-democracy-rights-el-salvador/

[191] Universidad Centroamericana 'José Simeón Cañas', "Encuesta sobre conocimientos y perceptions hacia el medio ambiente y la minería metálica en El Salvador," June 2015.

[192] Meera Karunananthan, The Guardian, "The human right to water: Salvadoran NGOs and a global campaign," March 25, 2015; https://www.theguardian.com/global-development-professionals-network/2015/mar/25/human-right-water-salvadoran-ngos-global-campaign

[193] Thomas McDonagh and Aldo Orellana López, Democracy Center, May 2017.

APPENDIX

Table 5.A CONCLUDED ISDS CASES BROUGHT BY MINING COMPANIES TO LATIN AMERICAN COUNTRIES (Source UNCTAD)					
RESPONDENT COUNTRY	**CLAIMANT MINING COMPANY**	**HOST COUNTRY**	**ORIGINAL AMOUNT CLAIMED (Millions USD - rounded)**	**PARTY "FAVORED"**	**AMOUNT AWARDED TO COMPANY (Millions USD - rounded)**
BOLIVIA	QUIBORAX	CHILE	66	INVESTOR	48.6
BOLIVIA	TRIMETALS MINING (FORMERLY SOUTH AMERICAN SILVER)	CANADA	385	INVESTOR	27.7
DOMINICAN REPUBLIC	CORONA MATERIALS	USA	100	STATE**	
ECUADOR	COPPER MESA MINING	CANADA	69.7	INVESTOR	19.4
EL SALVADOR	PACIFIC RIM MINING (TAKEN OVER BY OCEANAGOLD (AUS/CAN))	CANADA /AUSTRALIA	314	STATE**	
EL SALVADOR	COMMERCE GROUP	USA	100	STATE**	
PERU	BEAR CREEK MINING	CANADA	522	INVESTOR	18
PERU	COMPAGNIE MINIERE INTERNATIONALE OR S.A.	FRANCE	560	SETTLED	
PERU	DOE RUN/RENCO GROUP	PERU	800	STATE**	
VENEZUELA	RUSORO MINING	CANADA	2,318	INVESTOR	968
VENEZUELA	CRYSTALLEX	CANADA	3,160	INVESTOR	1,202
VENEZUELA	GOLD RESERVE	CANADA	1,735	INVESTOR	713
VENEZUELA	HIGHBURY INTERNATIONAL (I)	NL, PANAMA	633	STATE **	
VENEZUELA	NOVA SCOTIA POWER (I)	CANADA	180	STATE **	
VENEZUELA	NOVA SCOTIA POWER (II)	CANADA	180	STATE **	
VENEZUELA	VANESSA VENTURES	CANADA	1,045	STATE **	
VENEZUELA	ANGLO AMERICAN	UK	400	STATE **	
TOTAL	**17 CASES**	**10 CANADIAN**	**12,568**	**7 in favor of Investor**	**2,997**

**Even when an arbitration panel finds against a company, states still do not win. Rather, states still end up paying hundreds of thousands or millions of dollars in legal costs and arbitration fees, in addition to any chilling effect or other implications that such suits have with regard to policy making and local struggles.

Table 5.B PENDING ISDS CASES BROUGHT BY MINING COMPANIES TO LATIN AMERICAN COUNTRIES (Source UNCTAD)			
RESPONDENT COUNTRY	**CLAIMANT MINING COMPANY**	**HOST COUNTRY**	**CLAIMED (Millions USD - rounded)**
BOLIVIA	GLENCORE	UK	675
COLOMBIA	COSIGO RESOURCES AND OTHERS	CANADA	16,511
COLOMBIA	ECO ORO MINERALS	CANADA	764
COLOMBIA	GRAN COLOMBIA GOLD	CANADA	700
COLOMBIA	RED EAGLE EXPLORATION	CANADA	40
COLOMBIA	GALWAY GOLD	CANADA	N/A
COLOMBIA	GLENCORE	SWITZERLAND	N/A
COSTA RICA	INFINITO GOLD	CANADA	321
ECUADOR	ZAMORA GOLD	CANADA	N/A
ECUADOR	RSM	USA	N/A
GUATEMALA	KAPPES, CASSIDY & ASSOCIATES (KCA)	USA	300
MEXICO	LEGACY VULCAN LLC	USA	500
MEXICO	ODYSSEY MINERAL EXPLORATION	USA	3,540
PANAMA	DOMINION MINERALS	USA	268
URUGUAY	ZAMIN FERROUS (ASSOCIATED INDIVIDUALS)	UK	3,536
VENEZUELA	HIGHBURY (II)	NL, PANAMA	209
TOTAL	**16 CASES**	**7 CANADIAN**	**27,364**

TABLE 5.C THREATENED ISDS CASES			
RESPONDENT COUNTRY	**CLAIMANT MINING COMPANY**	**HOST COUNTRY**	**CLAIMED (Millions USD - rounded)**
GUATEMALA	**GOLDCORP**	**CANADA**	
GUATEMALA	**TAHOE RESOURCES**	**CANADA**	**1,700**
ECUADOR	**INV METALS**	**CANADA**	
MEXICO	**BLACKFIRE EXPLORATION**	**CANADA**	**800**
MEXICO	**PRIMERO MINING (NOW SOLD TO FIRST MAJESTIC)**	**CANADA**	

Center for International Environmental Law (CIEL) (www.ciel.org) uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of earth's inhabitants to live in balance with each other.

MiningWatch Canada (miningwatch.ca) is a pan-Canadian initiative supported by environmental, social justice, Indigenous and labour organisations from across the country. It addresses the urgent need for a coordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat, and community interests posed by irresponsible mineral policies and practices in Canada and around the world.

The **Institute for Policy Studies** (www.IPS-dc.org) is a multi-issue research center that works on peace, justice, and the environment. Its vision is that everyone has the right to thrive on a planet where all communities are equitable, democratic, peaceful, and sustainable. Among its work over the last decade, IPS has published several reports documenting the social, environmental and economic impacts of mining corporations in the Global South.