



**Corporate Bias in the World Bank
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Settlement of Investment Disputes:
A Case Study of a Global Mining
Corporation Suing El Salvador**

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Introduction and Overview

If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS.
--*Economist* (October 11, 2014)¹

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

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

The paper bookends the Salvadoran case-study with a broader look at ICSID. The author begins with a brief history of ICSID, from its controversial birth fifty years ago to its controversial present moment. Following the Salvadoran case, the author returns to reflections on ICSID and investor-state dispute settlement (ISDS) in current and proposed trade and investment agreements.

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

It is important to note the author writes as an interdisciplinary scholar of development studies, building on academic expertise in economics, ecology, and political economy (among other fields)

alongside decades of practice in rural communities, from the Philippines to El Salvador, as well as hands-on policy experience (notably as an international economist in the US Treasury Department).

A Brief History of ICSID

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

ICSID was created some 50 years ago, opening its doors in 1966, to deal with government appropriation of property of foreign investors.²

The author's historical research reveals, however, that ICSID has been controversial since before it opened its doors. Indeed, at the 1964 World Bank annual meeting in Tokyo, 21 developing-country governments voted "no" on the convention to set up this new part of the World Bank Group where foreign corporations could sue governments and bypass domestic courts. The 21 included *all* of the 19 Latin American countries attending as well as the Philippines and Iraq.³ The historic vote was dubbed *El No de Tokyo*, or the Tokyo No.⁴ It is worth noting that, in the history of World Bank initiatives, the vote stands as significant in terms of the large number of participating countries against the initiative as well as the united stance of *all* Latin American representatives.

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

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

The new system that has been suggested would give the foreign investor, by virtue of the fact that he is a foreigner, the right to sue a sovereign state outside its national territory, dispensing with the courts of law. This provision is contrary to the accepted legal principles of our countries and, de facto, would confer a privilege on the foreign investor, placing the nationals of the country concerned in a position of inferiority.⁵

To emphasize Ruiz's key points, the 21 deemed the new investor-state dispute settlement system both unnecessary and unfair. It is worth keeping this in mind as we proceed to the case study of El Salvador's mining suit. To what extent has the 1964 "no" vote has been vindicated by history?

Despite the "no" votes, the formally titled Convention on the Settlement of Investment Disputes between States and Nationals of Other States went forward to states for signatures, from March 18,

1965 until October 14, 1966 when ICSID became a reality. For the record, Brazil never joined, and in fact has refused to privilege international investors through international investor-state dispute settlement (ISDS) mechanisms.⁶

In its early years, ICSID was small, indeed largely irrelevant. Its first case was not filed until 1972, with just over two dozen cases filed in total through 1988. In fact, there were a number of years where no cases were filed.⁷ However, by the mid-1990s, ICSID moved center-stage, thanks to the ISDS clauses inserted in neoliberal bilateral and multilateral trade and investment agreements that were proliferated starting in the 1980s and that exploded in the 1990s. In 2012 alone (forty years after ICSID's first case was filed), 48 new cases were added to ICSID's docket. All of the 48 cases were filed against governments of developing countries. And, of these 48 cases, more than one-third (17 or 35.45%) related to extractive industries.⁸

El Salvador & Gold Mining: From Local, to National, to Global

With that framing and history of ICSID and the debate surrounding it, let us now turn to the basic contours of case of *Pac Rim Cayman LLC v Republic of El Salvador*. It is a case that the author knows well as a result of four research trips to El Salvador and related research in Washington, DC where ICSID is housed at the World Bank.⁹ After presenting the case, the paper will turn to broader reflections on bias in investor state dispute settlement at ICSID.

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

At the local level:

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

Interviews (and subsequent events) suggest that many local inhabitants, originally intrigued by the prospect of mining jobs, soon became concerned as Pac Rim's exploration operations proceeded. Some experienced changes in water levels. Others learned more about the mining process (the

proximity of ongoing gold mining projects in neighboring Honduras facilitated the education). They learned of the toxic cyanide used by mining companies to separate the gold from the rock and, in Cabañas as in much of the world, the arsenic embedded in the rock that would be released along with the gold. Moreover, they learned of the “acid mine drainage” that would occur as the mining operations exposed the sulfide-bearing rocks to the elements. For these reasons, they became increasingly concerned about the environmental impact of mining on both land and water they depended on for small-scale agriculture and life in general. Overall, their concerns focused on the impact on El Salvador’s main Rio Lempa watershed which supplies over half of El Salvador’s drinking water.¹⁰

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

For the purposes of this article, the details of the local level will be limited to the above; the author (and others) have written extensively about these elsewhere. However, before moving to the national level, it is important to note that conflict erupted between those who were against mining and those, including most local mayors and some local Pac Rim employees, who were in favor of the project. Social conflict escalated, culminating in the brutal assassination of three anti-mining activists in 2009.¹¹

At a national level:

As civil society became more organized against mining in Cabañas, so too did it reach out to other groups across the country. In 2005, a Salvador-wide coalition – La Mesa Nacional Frente a la Minería Metálica (National Roundtable on Mining) -- was created that, after some deliberation, decided a key part of its work would be to push the national government to ban metallic mining. Such a sentiment had widespread support in El Salvador. Indeed, by 2007, an academic poll indicated that more than 60% of the Salvadoran public was against gold mining.¹² Notable vocal opponents included the Catholic Church, but it was joined by environmentalists, human rights advocates, academics, other religious denominations, indigenous populations and so on, and also larger-scale agribusiness dependent on water.¹³

So too, starting around 2005, were individuals in and segments of the national-level government increasingly concerned about the environmental and social impacts of mining and the government’s own inability to regulate the mining firms. Interestingly enough, research shows that this concern surfaced around 2005 and gelled in 2006 – when the conservative administration of President Antonio Saca was in power. Then, an unusual and (in this author’s mind) far-sighted alliance grew between the Ministry of Economy and the Ministry of the Environment over the need to conduct a “strategic environmental review,” not just an economic review, before any metallic mining activities

could proceed or any applications related to metallic mining would be processed. A *de facto* moratorium was thus born. However, the actual task of conducting such a strategic environmental review was left to the progressive FMLN government elected in 2009.¹⁴

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

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

At the global level and ICSID:

Rather than pursue the case in El Salvador’s domestic court system, Pac Rim filed a case against the Republic of El Salvador on April 30, 2009 – ICSID case no #ARB/09/12.¹⁶ This then brings us to Washington, DC and the World Bank Group’s ICSID.

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

Then, following ICSID protocol, a case-specific ICSID tribunal was set up, to be overseen by a tribunal of three arbitrators (typically lawyers or free-trade economists), each one of them paid over \$3000 for each day of work.¹⁷ What transpired procedurally as the first step was the jurisdictional stage hearing. In an example of what critics call “treaty shopping,” Pac Rim submitted its case under two potential jurisdictions: under the Central American Free Trade Agreement (CAFTA) and also

under El Salvador's domestic investment law. In the jurisdictional decision, the tribunal rejected CAFTA's jurisdiction (rightly so, since Canada was not a signatory to CAFTA and the Canadian company's decision to change the nationality of its shell subsidiary from the Cayman Islands to the United States did not mean the newly-established US company could enjoy the benefits of CAFTA).¹⁸ However, the tribunal accepted the jurisdiction of the domestic investment law. This already suggested pro-corporate bias: The details of the submission should have led the tribunal to throw out the case since Pac Rim claimed that it did not know about the potential problems with getting the concession until March 2008, but that claim was disproved by indisputable evidence including emails from Pac Rim top officials dating as early as 2005.¹⁹ (More on this below.)

With jurisdiction accepted, the case moved into its merit – or substantive -- stage. It is worth noting that, at ICSID, the merit stage is overseen by the same three tribunalists as the jurisdictional stage. In other words, in allowing the case to proceed on jurisdictional grounds, the three tribunalists continue their well-paid jobs. The merit hearing was held in September 2014, with a ruling likely sometime in 2015 (unknown as of this writing).

The merit stage focused on technical issues and narrow grounds: whether Pac Rim had met the conditions for a mining concession. With meticulous detail (including use of internal Pac Rim emails), the government's lawyers focused on proving that Pac Rim knew it had not successfully completed the key three requirements for being granted an exploitation concession:²⁰ (1) Pac Rim did not get government approval for its Environmental Impact Study (EIS). The EIS that Pac Rim submitted was not deemed satisfactory, in particular for its failure to cover the full area where Pac Rim hoped to mine; (2) Pac Rim did not submit the required feasibility study; and (3) Pac Rim was not even close to meeting the requirement that it hold titles to (or permission to mine in) all the land for which it requested a concession. The lack of land titles also demonstrates that, contrary to Pac Rim's claims, the majority of the local population was not – and is not – supportive of Pac Rim's plans to mine in Cabañas. Pac Rim's attempts to get the land titles were not successful: Pac Rim had less than 13% of the required land holdings, lacking more than 87% of land estimated to be owned by over 1,000 people.²¹

On Pac Rim's side, lawyers focused on Pac Rim Cayman LLC's president and CEO Thomas Shrake's statements that he was "not aware" of the reality of such legal complications (p.31). To the contrary, however, documents makes it clear that Pac Rim well knew that it was not able to fulfill these requirements for an exploitation concession. Indeed, as early as 2005 (pp.30-31), Pac Rim was working with President Saca's vice-president and others to eliminate the requirement that it hold all relevant land titles. Their plan to get around this requirement was to attempt to convince the Salvadoran Congress to amend or replace the mining law to remove this requirement. The above points also refute Pac Rim's argument that a key reason it did not receive an exploitation concession rests in the fact that it did not play along with the corruption of the Saca administration (2004-2009). "This is nonsense," to quote a sentence used in the Rejoinder for another point (p.30).²²

The fascinating details of this case are available publicly, thanks mainly to documents posted by the Salvadoran government.²³ The merit stage was held in secret (with no outside observers allowed, not even potentially affected individuals who signed amicus briefs). Ironically, if this case had proceeded under CAFTA jurisdiction, the proceedings would have had to have been made public. But, in the jurisdiction allowed, both sides had to agree to open the hearings, and both sides did not. The author knows from interviews that the Salvadoran government was willing to have the merit stage open; therefore, it seems reasonable to surmise that Pac Rim opposed such transparency.

The case exposes additional “biases” inherent in ICSID’s structures and procedures. Among them: Pac Rim Cayman LLC has been able to finance its ICSID trial because its financially-floundering parent company, Pacific Rim, was purchased by Canadian/Australian mining company OceanaGold in November 2013, just as Pacific Rim was running out of money. As a result, Pacific Rim became a wholly owned subsidiary of OceanaGold, with enhanced financial ability to pursue the case at the tribunal.²⁴ But the claimant in this case remains Pac Rim Cayman.

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

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

In addition, the case is likely to drag on beyond the merit stage into an annulment stage. Unlike courts and most judicial systems, ICSID tribunals are **not** based on legal precedent, so there is no appeal on those judicial grounds. Either side can request an annulment of the award based only on “procedural errors in the decisional process.”²⁵ Furthermore, the ad-hoc annulment tribunal has the power to decide “not to annul notwithstanding that an error has been identified...”²⁶

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

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

From Case Study to ICSID

Let us now build from this case study of *Pac Rim Cayman LLC v Republic of El Salvador* to expand on general points about this key investor-state tribunal that is presented by its proponents as a level-playing field. As the number of cases brought before ICSID has ballooned,²⁷ so too have the criticisms. As stated in this article’s introduction, the arguments are that ICSID rulings are: (1) increasingly biased in favor of investors over the state, and (2) too narrow in their focus on commercial rights over broader non-commercial issues.

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

This author is hardly the only one raising these criticisms. There is increasing public airing of insider discomfort and discussion of ICSID’s corporate bias. In 2014, prominent trade lawyer George Kahale III publicly declared that ICSID tribunals, before which he has argued cases, are increasingly biased in favor of the foreign investors. Such insider critics have pointed out, since ICSID does not build its cases on legal precedents nor allow for appeals based on judicial reviews, there are no ways to correct such rulings. As Kahale phrased it, “The system is broken.” Kahale has also denounced the agreements that have empowered hundreds of corporations to pursue these ICSID cases as “weapons of legal destruction.”²⁸

Such criticism has been matched by member-country discomfort and action. Bolivia, Ecuador, and Venezuela—all part of the original Tokyo No—have left ICSID. South Africa is establishing a new

investment law that allows foreign corporations to bring such claims *only* to domestic courts. India is conducting a review of its treaties in the face of several corporate lawsuits, and Indonesia has announced its intent not to renew its bilateral investment treaties. Australia declined to include these corporate rights in the 2005 Australia-U.S. Free Trade Agreement. Brazil has stayed out of investor-state dispute mechanisms.

A related set of biases moves beyond the concerns of the Tokyo No fifty years ago. Here the argument is that ICSID's purview is too narrow. Why, for example, should the investor—as a non-state actor—have the right to sue the government, while other presumably key non-state actors such as the affected communities are not even allowed to listen to ICSID's often secret hearings, never mind participate equally? Yes, there have been some small steps to expand the potential voices heard by ICSID tribunalists: communities can submit amicus briefs²⁹— but only if they find a lawyer³⁰ willing to write one on their behalf. This is hardly true participation. And there is not even any assurance that such briefs will be read by the ICSID tribunalists who preside over any given case.

At the time of ICSID's founding, there were few universal human rights instruments, save the ILO conventions and the 1948 UN Declaration of Human Rights. Nor were there related instruments focused on the protection of indigenous peoples rights, protection of environment, and related rights. But much has changed since the mid-1960s, including widespread understanding of the centrality of environmental issues. The Salvadoran government should be allowed, indeed encouraged, to protect a key watershed from the adverse environmental impacts of gold mining. Our instruments of global governance should be structured to reward a government for so doing, rather than to be punished by being sued at ICSID. It should be the duty of governments – from local to national to global levels – to privilege their responsibility to protect people and their ecosystems.

In its current structure, ISDS clauses and rulings by ICSID do the exact opposite – providing a negative incentive on a national level for environmental and social regulations, for fear of being sued for “indirect taking” via regulation. This is what has been termed “regulatory chill.”³¹

The Urgency for Change

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

There is urgency to this topic given far-reaching trade agreements on the horizon -- [the Trans-Pacific Partnership \(TPP\)](#) and [the Transatlantic Trade and Investment Partnership \(TTIP\)](#)³² -- that the Obama administration is negotiating with nations in the Pacific and in Europe. If these are

approved in their current form, ICSID's case-load will mushroom further, thanks to the investor-state dispute settlement clauses currently in both drafts. And we can expect even more action in terms of investors' propensity to sue governments not just for "direct taking" via expropriation (the original purpose of ICSID), but also for "indirect taking" via environmental, social, and other regulations that might impinge on a foreign investor's future ability to make profits by irresponsible exploitation of a country's resources.

Recently leaked documents suggest that several governments are attempting to at least scale back investors' rights (and, thus, the power of ICSID) in these draft trade deals. This includes countries in the European Union—notably France and Germany—voicing concerns about the investor-state provisions they contain.³³

It is also important to refute some misunderstandings about the need for such investor rights' protections and for ICSID. Proponents would have one believe that the global economy would be seriously damaged without such investor rights (as in the current ISDS clauses) and their key venue ICSID, and that foreign investment would dry up should a country not sign ISDS clauses and be an ICSID member. To counter this hypothesis, one can simply point to the Brazil, a leading host to foreign investment but, again, a country that has never accepted investor-state dispute settlement in any venue. To make a more general point: Foreign investors, if they believe they are making a risky investment, can simply rely on foreign risk insurance. And, like domestic investors, they have recourse to the relevant domestic courts in a given country. Indeed, here is another example of the bias created by ISDS's reliance on global venues such as ICSID: domestic firms have to go through domestic courts; so should foreign firms.³⁴

Those who follow the World Trade Organization and its dispute resolution mechanism might note the irony: A fundamental rule of today's neoliberal push towards "ultra-globalization," as embedded in the [WTO](#),³⁵ is that a country's rules must treat foreign and domestic investors the same. The irony is, of course, that ICSID's existence seems to suggest that such ultra-globalization proponents do not find it problematic to have foreign investors *privileged* over domestic investors.

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

¹ “Investor-state Dispute Settlement: The Arbitration Game -- Governments are Souring on Treaties to Protect Foreign Investors,” Economist, October 11, 2014.

² See International Centre for Settlement of Investment Disputes, “ICSID Convention, Regulations and Rules,” ICSID/15, Washington, DC, April 2006, pp.1-128.

³ There were 21 votes against ratifying the ICSID convention, including the 19 Latin American World Bank member countries. The countries voting no were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iraq, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Uruguay, and Venezuela. Source: Antonio R. Parra, The History of ICSID (Oxford: Oxford University Press, 2012), pp. 66-67. <DOI: 10.1093/acprof:oso/9780199660568.001.0001>

⁴ See: Andreas F. Lowenfeld “The ICSID Convention: Origins and Transformation” Georgia Journal of International and Comparative Law, (2009) 38, pp.47-62; and Fiezzoni, Silvia “The Challenge of UNASUR Member Countries to Replace ICSID Arbitration,” Beijing Law Review, (2011) 2, pp. 134-144.

⁵ Excerpt from statement of Felix Ruiz, Governor for Chile, September 9, 1964, in Tokyo, quoted in: Parra, Antonio R. The History of ICSID, Oxford: Oxford University Press, 2012, p.67. <DOI: 10.1093/acprof:oso/9780199660568.001.0001>. See page 66-68 for more on the history.

⁶ To expand upon this point for clarity (and fact-checking): Brazil has refused to ratify the ICSID Convention or any bilateral investment treaties (BITs) with an ISDS mechanism. Note that, while Brazil has signed onto some such BITs, they have not been ratified by Brazil’s Congress, which sees them to against the country’s Constitution. Brazil does have arbitration agreements in contracts with foreign investors. For more on this, see, for example, Elizabeth Whitsitt and Damon Vis-Dunbar, “Investment Arbitration in Brazil: Yes or No?” Investment Treaty News (published by International Institute for Sustainable Development), November 30, 2008, <<http://www.iisd.org/itn/2008/11/30/investment-arbitration-in-brazil-yes-or-no/>>; and Ricardo Barretto et al, “Bilateral Investment Treaties and International Arbitration,” International Law Office, May 15, 2003, at: <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=6ce64813-8cf6-4f97-b8a8-2ad950fa25ad>>. For more on Brazil’s debate over the BITs, see ICSID, “ICSID Database of Bilateral Investment Treaties,” accessed January 23, 2013, at: <<https://icsid.worldbank.org/ICSID/FrontServlet>>.

⁷ For details, see Parra, chapters 7-10, pp.119-260. (The year 1972 and the 25 cases between 1972-1988 are on p.157.) For a briefer source (and fact-checking): Nicolas Boeglin, “ICSID and Latin America: Criticism, Withdrawal and the Search for Alternatives,” Bretton Woods Project Bulletin, December 2013, p.3.

⁸ This information is from Sarah Anderson and Manuel Perez-Rocha, Mining for Profits in International Tribunals, Washington, D.C., Institute for Policy Studies, April 2013 updated version, pp.1, 6. <<http://www.ips-dc.org/wp-content/uploads/2013/05/Mining-for-Profits-2013-ENGLISH.pdf>>

⁹ Unless otherwise noted, the information presented is based on field work in El Salvador. I conducted field research in El Salvador in April and May 2011, July and August 2012, May 2013, and July 2014. Research ranged from more formal interviews (especially the case with interviews conducted with government officials in various ministries in San Salvador) to informal, multiple-day participant observation outside of San Salvador, especially in the province of Cabañas. Research related to ICSID was done in Washington, D.C., where the author is based. Other useful written sources on this case include: Richard Steiner, “El Salvador: Gold, Guns, and Choice,” International Union for the Conservation of Nature (IUCN) Commission on Environmental, Economic, and Social Policy, February 2010), <<http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf>>; and Robert Moran, “Technical Review of the El Dorado Mine Project Environmental Impact Assessment, El Salvador” (October 2005), <http://www.votb.org/elsalvador/Reports/Technical_Review_El_Dorado_EIA.pdf>

¹⁰ On the adverse environmental impact of gold mining in El Salvador and in general, including the release of arsenic and the problem of acid mine drainage, see Robert Goodland, “Responsible Mining: The Key to Profitable Resource Development,” Sustainability 4, no. 9 (2012): 2099– 2126, <http://www.mdpi.com/2071-1050/4/9/2099>. See also the work of Ohio University geologist Dina L. Lopez (<http://www.ohio.edu/geology/lopez/>). On arsenic and gold mining in particular, see Jochen Bundschuh et al., “One Century of Arsenic Exposure in Latin America: A Review of History and Occurrence from Fourteen Countries,” Science of the Total Environment 429 (2012): 2–35; and William Holden and R. Daniel Jacobson, Mining and Natural Hazard Vulnerability in the Philippines: Digging to Development or Digging to Disaster (New York: Anthem Press, 2012). For more on how to assess the environmental, social and economic costs and benefits of mining regimes, see Robin Broad, “Responsible Mining: Moving from a Buzzword to Real Responsibility,” The Extractive Industries and Society Journal, March 2014, doi: 10.1016/j.exis.2014.01.001; and Andrés McKinley, Mitos y Realidades de La Minería de Oro en Centro-América (Central America: The Myths and Realities of Gold Mining), Caritas, San Salvador, November 2013

¹¹ Other such writings include Robin Broad and John Cavanagh, "Beyond Fossil Fuels & Climate Change: The Case of Gold Mining in El Salvador," in *Ending the Fossil Fuel Era*, edited by T. Princen, P. Martin, and J. Manno, Cambridge, MA: MIT Press, forthcoming 2015, pp. 167-193. For more details on the local level including the assassinations, see Robin Broad & John Cavanagh, "Like Water for Gold in El Salvador," <http://www.thenation.com/article/162009/water-gold-el-salvador>. Note that this was written after the author's first research trip to El Salvador. The details on these 2009 deaths and other subsequent assassinations were repeated to me on numerous occasions. For a written source, see, among others, Richard Steiner, "El Salvador: Gold, Guns, and Choice," International Union for the Conservation of Nature (IUCN) Commission on Environmental, Economic, and Social Policy, February 2010), 13, 40–44, <http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf>. For more on the domestic and international opposition to mining in El Salvador, as well as a list of other publications, see also <http://www.stopesmining.org/j25/>.

¹² Note: 62.4 percent opposed mining. The poll was carried out by the University of Central America (UCA): <http://www.uca.edu.sv/publica/iudop/Web/2008/finalmineria040208.pdf>. The relevant question is question number 43 on p. 54. It asks: "Do you think El Salvador is an appropriate country for metallic mining?" 62.4 percent say "no."

¹³ Related questions on the roles of civil society, the private sector and the government, as well as to the overall political economy of El Salvador, are explored in: Robin Broad and John Cavanagh, "Poorer Countries and the Environment: Friends or Foes?" 2014 draft available from authors. On hypotheses related to the role of various social sectors in El Salvador, see Nadelman, R. (2013). *Sitting on a gold mine: El Salvador's departure from extractive-led growth*. (Dissertation Prospectus). School of International Service, American University, Washington, D.C. Given Nadelman's 2014 fieldwork in El Salvador, her PhD dissertation is likely to contribute significantly to this literature.

¹⁴ This is perhaps why much writing on this case incorrectly credits the Funes administration with the initiative on this.

¹⁵ Interview with Minister of Economy Tharsis Salomón López, San Salvador, Ministry of Economy, July 18, 2014.

¹⁶ To note some key dates: The Notice of Intent was filed in December 2008 and the Notice of Arbitration in April 2009, before the Funes administration took office. June 15, 2009 (just two weeks after the start of the Funes presidency) was when ICSID registered the Request for Arbitration. See <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&clmnt=Pac%20Rim%20Cayman%20LLC>, accessed January 7, 2015. Note that the ICSID site was changed sometime in late 2014 or early 2015; this was formerly <https://icsid.worldbank.org/ICSID/FrontServlet>.

¹⁷ According to the ICSID site: "a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings (corresponding to US\$375 per hour)." <https://icsid.worldbank.org/apps/ICSIDWEB/arbitrators/Pages/Claims-for-Fees-and-Expenses.aspx>. Accessed on January 7, 2015. For more on "selection and appointment of tribunal members," see <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx>.

¹⁸ This involved the change of nationality of Pac Rim Cayman LLC from the Cayman Islands to the United States, without Pac Rim Cayman having any substantial business activities in the United States. (More details later in article.)

¹⁹ As the ICSID documents (and especially *El Salvador's Rejoinder on the Merits (11 July 2014) in Pac Rim Cayman LLC v The Republic of El Salvador*, http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63) make clear, Pac Rim knew this was a possibility shortly after submitting its application for a concession, by early 2005 (pp.31-32). The Rejoinder refers to evidence on the record that Pac Rim was repeatedly notified of problems with its application from 2005-2007. This was well "before then-President Saca confirmed in 2008 that mining had to be studied before exploitation could be allowed." (Quote is from p.29; see also pp.58, 103 105, 119, among many others). In May 2007, the Ministry of Environment (MARN) and the Ministry of Economy told mining corporations that there would be no more mining until a "strategic environmental review" was completed.

²⁰ See Robin Broad, "Summary of El Salvador's Rejoinder on the Merits (11 July 2014 in Pac Rim Cayman LLC v The Republic of El Salvador," August 28, 2014, <http://www.blueplanetproject.net/index.php/summary-of-el-salvadors-rejoinder-on-the-merits-11-july-2014-in-pac-rim-cayman-llc-v-the-republic-of-el-salvador/>, as well as the full Rejoinder: *El Salvador's Rejoinder on the Merits (11 July 2014) in Pac Rim Cayman LLC v The Republic of El Salvador*, http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63. See also Jen Moore, Robin Broad, John Cavanagh et al., "Debunking Eight False Claims by Pacific Rim Mining/OceanaGold in El Salvador," March 2014, http://www.ips-dc.org/debunking_eight_falsehoods_by_pacific_rim_mining/.

²¹ Percentages calculated from numbers on Rejoinder, p.47.

²² Beyond not complying with the requirements needed to get a concession and trying to change the law (both, as explained earlier in this article), Pac Rim clearly had its own plans to circumvent the democratic processes of El Salvador. Some of this appears to have involved hiring key people as employees or consultants, from Manuel Hinds to relatives of the vice-president, as well as providing funds to local individuals and groups in Cabañas. (See pp. 31, 32, 98, 141, 174, & 212.) In this regard, it is unfortunate that the ICSID tribunal did not require that Pacific Rim submit a list of those persons to whom it paid more than a certain amount, as would be required in a corruption or fraud case.

²³ These are at:

<http://www.minec.gov.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63>.

²⁴ OceanaGold and Pacific Rim Mining, “OceanaGold Agrees to Acquire Pacific Rim Mining,” press release, October 8, 2013. The buyout seems reflective of the relationship between “junior” exploratory ventures and more “senior” mining companies. On this global trend, see Michael Dougherty, “The Global Gold Mining Industry: Materiality, Rent-Seeking, Junior Firms and Canadian Corporate Citizenship,” *Competition and Change* 17 (2013): 339–54.

²⁵ Quote is from p.29 of: International Centre for Settlement of Investment Disputes, “Background paper on Annulment for the Administrative Council of ICSID,” Washington DC: ICSID, August 10, 2012. Available from: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DC_EVENTS11> Accessed October 24, 2014. See also pages 15, 23, and 29. The logic behind the annulment process is explained by Aron Broches in “Observations on the Finality of ICSID Awards,” in his *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Boston: Martinus Nijhoff Publishers, 1995), pp.295-356. Broches was World Bank vice president and general counsel and the key individual involved in ICSID’s creation, where he served as Secretary-General from 1967-1980.

²⁶ ICSID, “Background Paper on Annulment...,” p.23

²⁷ A list of completed and pending cases can be found at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>, accessed January 7, 2015. (This was formerly: <<https://icsid.worldbank.org/ICSID/Index.jsp>>).

²⁸ See, for example, George Kahale, “Keynote Speech.” Eight Annual Juris Investment Treaty Arbitration Conference, Washington, D.C., March 28, 2014. Transcript at: <<http://www.curtis.com/siteFiles/Publications/8TH%20Annual%20Juris%20Investment%20Treaty%20Arbitration%20Conf.%20-%20March%2028%202014.pdf>>.

²⁹ On ICSID’s 2006 rule changes to allow amicus briefs, see: Gary Born, Steven P. Finizio, David W Ogden, Rachael D. Kent, John V.H Pierce, David W Bowker, and Richard A. Johnston, “Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules,” Wilmer Hale, 2006, <<http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=90393>>.

³⁰ In the El Salvador case, for example, the Center for International Environmental Law provided the legal expertise needed to write such a brief. See Benjamin Miller, Jennifer Liu, Ramin Wright, and Jenny Yoo, “The Guide for Potential Amici in International Investment Arbitrations.” Center for International Environmental Law, January 29, 2014, <http://www.ciel.org/HR_Envir/Guide_Amici_Investment_29Jan2014.html>.

³¹ See, for example, Kyla Tienhaara, “What You Don’t Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries,” *Global Environmental Politics* (November 2006) 6:4, pp.73-100.

³² For more information, see Robin Broad and John Cavanagh, “A Strategic Fight against Corporate Rule,” *The Nation*, February 3, 2014, <<http://www.thenation.com/article/177930/global-fight-against-corporate-rule>>. To follow the controversy and protests, see: <http://www.citizen.org/trade/>.

³³ On these member country actions, see: “The Arbitration Game,” *The Economist*, October 11, 2014, <<http://www.economist.com/node/21623756/print>>; Matthew J. Skinner and Zara Shafuiddin, “Turning Tides: What Indonesia’s Reconsideration of Bilateral Investment Treaties Means for Foreign Investors,” *Jones Day*, October 2014, <<http://www.mondaq.com/x/346276/international+trade+investment/Turning+Tides+What+Indonesias+Reconsideration+Of+Bilateral+Investment+Treaties+Means+For+Foreign+Investors>>; Dario Sarmadi, “Commission Mulls TTIP Minus Investor Arbitration,” *Euractiv*, October 24, 2014, <<http://www.euractiv.com/sections/trade-society/commission-mulls-ttip-minus-investor-arbitration-309460>>; and Cécile Barbière, and Anne-Claude Martin, “French government will not sign TTIP agreement in 2015,” *Euractiv*, November 17, 2014, <<http://www.euractiv.com/sections/trade-society/french-government-will-not-sign-ttip-agreement-2015-310037>>. On states and citizens in the US “getting proactive” on TPP, see Karen Hansen-Kuhn, “States get Proactive on Trade Agreements: The Maine Model,” *Institute for Agriculture and Trade Policy*, July 16, 2014, <<http://www.iatp.org/blog/201407/states-get-proactive-on-trade-agreements-the-maine-model>>. See also the campaigns and

publications of the Council of Canadians, and its chairperson Maude Barlow, at <http://www.canadians.org/media>, as well as that of Public Citizen's Global Trade Watch, and its director Lori Wallach, at http://www.citizen.org/trade/article_redirect.cfm?ID=17010.

³⁴ For more on the questionable relationship between investor-rights regimes and FDI levels, see Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," *Virginia Journal of International Law* 51:2 (2010): pp.397-442, at < <http://www.vjil.org/assets/pdfs/vol51/issue2/Yackee.pdf>>; Third World Network, "BITs 'Not Decisive' in Attracting Investment, Says South Africa," Third World Network Info Services on WTO and Trade Issues, October 8, 2012, at <<http://www.twn.my/title2/wto.info/2012/twninfo121001.htm>>; and Kevin Gallagher and Daniel Chudnovsky, eds. *Rethinking Foreign Investment for Sustainable Development Lessons from Latin America*, Anthem Press, 2010.

³⁵ See, for example, World Trade Organization, "Chapter 3: Settling Disputes" in *Understanding the WTO*, 2011, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf>.