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12 The rise of the corporate investment rights regime and 'extractive exceptionalism'

Evidence from El Salvador

Sarah Anderson, Manuel Pérez-Rocha, and Michael L. Dougherty

Introduction

In the context of the current extractive boom in Latin America and beyond, transnational mining corporations are increasingly making use of a growing set of investment rights granted to companies operating in foreign countries. Where they perceive violations of these rights, mining companies pursue arbitration against host-state governments in international tribunals. This chapter describes the origins and evolution of this sweeping set of rights, what we call here the corporate investment rights regime. We further focus on this use of binding arbitration to settle disputes that arise around these rights. Mining companies, we argue here, are particularly well-positioned to take advantage of the new investor rights, thus making the enforcement of these rights a key feature of the new landscape of extraction in the twenty-first century. Finally, we draw from the case of Pacific Rim Mining Corporation's arbitration against the government of El Salvador in the International Center for the Settlement of Investment Disputes as an example of how these unprecedented corporate powers can undermine national environmental and other public interest regulations.

In 2006, Canadian junior gold explorer, Pacific Rim, sought a production license for a mine site in San Isidrio Cabañas, El Salvador, which they had been exploring since 2002. The site held substantial proven reserves and Pacific Rim was touting its 'flagship' El Dorado property to investors with great success. Just a few years earlier, in 2001, the Salvadoran Legislative Assembly had lowered the royalty rate on mineral production from 3 to 2 per cent in an effort to compete with Guatemala's and Honduras' extremely low royalty rates (Dougherty 2011). In 2006, Pacific Rim sought a production license from the Ministry of Economy. Then president, conservative, investment-oriented Antonio Saca had previously all-but-assured Pacific Rim of the approval, but in light of looming elections and powerful anti-mining organising from a broad-based swathe of civil society organisations, the license was denied, in late 2008/early 2009 on the basis of an inadequate environmental impact assessment. Pacific Rim responded, in April of 2009, by bringing arbitration against the Salvadoran government before the International Center for the Settlement of Investment Disputes. They demanded

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a 300 million dollar settlement for, what they argued, constituted indirect expropriation of their investment under investor rights enshrined in the Central American Free Trade Agreement and Salvadoran legislation. This case, the causes and the consequences, all of which will be discussed in more detail below, is emblematic of the intersection of the new extraction with the corporate investment rights regime – junior companies engaged in high-stakes competition for financing and licensing exhibit eagerness to pursue structurally violent means of seeking and securing rent opportunities (Dougherty 2013).

We begin this chapter by describing the historical origins of the corporate investment rights regime in Latin America. In the second section we explore rationale for why mining companies operating in Latin America may be particularly inclined to capitalise on investor rights. That is, we make the case that enforcing the corporate investment regime is a key feature of the new extraction. In the third section we highlight some of the key features of the corporate investment rights regime and discuss the concerns these raise within civil society. In the fourth section we return to the case of Pacific Rim's 'lawsuit' against the government of El Salvador, describing the causes and consequences of this exemplar of the patterns described in this chapter. In the fifth section, we detail responses to the corporate investment regime by civil society and briefly posit some alternative formulations.

Origins of the corporate investment rights regime

Latin America has a long history of hosting foreign direct investment from companies in North America, but the ways in which the host states have conceptualised their rights *vis-à-vis* foreign investors have changed over time. Beginning in the nineteenth century, disputes over foreign investments were resolved either through the host country's domestic judicial system or through government-to-government processes. The strong emphasis on national sovereignty among Latin American states in the 1800s meant that governments generally sought to address disputes through national systems of jurisprudence. Much of this emphasis on national sovereignty in Latin America stemmed from the Calvo Doctrine which was enacted in 1868 and prevented foreign investors from claiming more rights and privileges than those granted to national citizens and which barred foreign governments from breaking a sovereign state's laws to protect its citizen's private claim (Bernal 2009). It further subjected foreign investors to domestic law.

Beginning in the 1980s and gaining momentum in the 1990s, most countries in Latin America shifted away from the Calvo Doctrine. The era of structural adjustment followed by the advent of neoliberal policies in 1990s was responsible, to a large extent, for bringing about this shift. At this time, the World Bank and International Monetary Fund began to impose particular policy structures on states as conditions to receive loans. These criteria included relaxing restrictions on foreign direct investment, liberalising capital markets, and focusing on resource extraction for export. The rise of the Washington Consensus in the 1990s forced Latin American countries to redouble the commitments made under structural

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adjustment to unrestricted trade, FDI, privatisation, and production for export. Central to this set of policies were dispute settlement mechanisms that would allow investors from other countries to bypass domestic courts and seek recourse in international tribunals. These, it was claimed, would strengthen governance and transparency and create a favorable enabling environment for foreign direct investment. Without these supranational powers, policymakers warned, foreign investors would be reluctant to invest in the emerging markets of Latin America (Bello, Cunningham, and Rau 1999).

Accompanying the spread of neoliberalism was the rise of the bilateral investment treaty (BIT) and subsequently regional trade agreements such as the North American Free Trade Agreement (NAFTA). By 1990 there were 300 such treaties in force, and by 2010, nearly 2,000 (see Salacuse 1990). Most countries in the world are signatories to BITs and thus obliged to provide sweeping foreign investor rights.

Despite their growth, there is little evidence that participation in BITs or free trade agreements (FTAs) enhances productive FDI inflows to recipient countries. In fact, the large, industrialising economies that have been the largest recipients of foreign investment in recent years (e.g., China, India, and Brazil) have yet to sign such deals with the United States or the European Union. While participation in investment treaties may not enhance economic development for host countries, it does enhance opportunities for foreign investors. As this regime has taken hold over the past three decades, the number of investor-state disputes has increased apace (Salacuse 2007).

Perhaps unsurprisingly, these investment rights disputes occur disproportionately between host states and mining, oil and gas companies, and they occur most commonly in Latin America. Additionally, extractive firms seek redress for such disagreements through international arbitration at a greater rate than companies in other sectors. Therefore, the eagerness of extractive firms to turn to international arbitration constitutes a key feature of the new landscape of extraction in Latin America. As of January 2013, out of a total of 168 pending cases at the International Center for the Settlement of Investment Disputes (ICSID), 60 were related to oil, mining, or gas. By contrast, in 2000, there were only three pending ICSID cases related to oil, mining, or gas, and there were only seven such cases filed during the entire decades of the 1980s and 1990s (Anderson and Pérez-Rocha, 2013). The trend of using investor-state arbitration as an instrument in resource rights disputes is most evident in Latin America. Latin American countries comprise only about 14 per cent of the total 158 ICSID member governments, and yet, in 2013 they were the targets of 79 (47 per cent) of the 168 pending ICSID cases and 31 (51 per cent) of the 61 extractive industries cases (Anderson and Pérez-Rocha, 2013)

The new extraction and the corporate investment rights regime

Why do extractive firms disproportionately exercise their rights under the corporate investment rights regime? The answer lies in a confluence of the competitive urgency of mining companies, the sunk costs and spatial fixity of mineral

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development, and the peculiar friction that often characterises the relationship between multinational mining companies and host states.

'The new extraction' is a term widely employed to loosely refer to the dramatic expansion of extractive activity across the developing world, particularly in Latin America, beginning in the first years of the 2000s along with certain features of this extractive upsurge. One of these qualities of the new extraction, which helps distinguish contemporary mining from that of previous historical periods, is its willingness to relentlessly make use of investor rights and specifically investor-state dispute arbitration.

Mining in the twenty-first century is competitive, particularly among the smaller 'junior' companies that conduct most of the exploration. The competitiveness is driven not just by the perception of increasing scarcity but also by the importance of difficult-to-obtain venture financing in exploration (Dougherty 2013). These two factors drive smaller mining companies to extreme rent-seeking behavior such as violence against community members and bribery of state officials (Dougherty 2015).

The sunk costs unique to extractive projects further exacerbate these tendencies in the industry to push against accepted standards. Companies first must invest many millions of dollars in surveying and prospecting in order to identify sites with potential. They must then spend additional millions in exploration before establishing the proven reserves necessary to finance and implement a working mine. All of this work is undertaken with no guarantee that the company will recover any of its investment through production and sales-based revenue. When companies do strike gold, then, the stakes are extremely high for their ability to bring the deposit online in a cost-effective way. Additionally, companies must then invest further millions in the fixed infrastructure of production, most of which cannot be efficiently dismantled and transferred elsewhere and some of which (e.g. road construction) cannot be transferred, even at a loss. This means that once a mine is fixed in place, the company will undertake extreme measures to keep it open.

This leads to a particularly intimate, yet often tense, relationship with the host country government. The state often has more bargaining power regarding extractive development than with other industries (Bebbington and Bury 2013). In most countries of Latin America, the government owns the subsoil and mining is seen as an activity that is in the national economic interest and central to national identity (Himley 2014, Perreault 2013). This empowers the state with a greater degree of influence over extractive capital than other sources of foreign direct investment.

Extractive investment, negotiating its position at the confluence of all of these factors, is driven to push against accepted standards and innovate creative approaches to pursuing its agenda. It should come as no surprise, therefore, that mining companies take advantage of the corporate investment rights regime and, most notably, investor-state dispute arbitration in disproportionate numbers and with a particularly relentless (and some might say tone-deaf) enthusiasm.

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Tracing the contours of the corporate investment rights regime

A regime is a collection of rules, institutions, and expectations that govern a set of behaviors. As rights regimes emerge and acquire momentum and legitimacy in global discourse they become normative, prescribing norms and accruing influence. The corporate investment rights regime – stemming from an expanding web of international instruments including international arbitration tribunals, bilateral investment treaties (BITs), and free trade agreements (FTAs) – has gained considerable momentum since the early 1980s and has become the dominant governance institution for foreign direct investment across the globe.

The thousands of bilateral investment treaties and the investment chapters of dozens of free trade agreements around the world impose long lists of obligations on governments to provide certain rights and privileges to foreign investors. While foreign direct investment of all types values these protections, no sector has invoked and made use of these protections to the extent that the extractive sector has. This section examines the landscape of the regime, with particular emphasis on investor-state dispute resolution (ISDS). Here we highlight some of the most controversial elements of the corporate investment regime and tie these to the current extractive boom in Latin America.

We begin this section by describing investor-state dispute settlement as a phenomenon and practice. We then lay out five governance mechanisms central to the corporate investment rights regime, which are enforced by ISDS. These are: (1) restrictions on indirect expropriation, (2) obligations to provide foreign investors a minimum standard of treatment,(3) national treatment and most favored nation treatment, (4) restrictions on capital controls, and (5) limits on performance requirements. We then close this section by describing three chief concerns for host states and host-state civil society that accompany the rise of the corporate investment rights regime. These include (1) arbitration often going beyond narrow commercial matters, (2) arbitration lacking public accountability and transparency, and (3) the potential for arbitrator bias.

Investor-state dispute settlement (ISDS) allows private foreign investors to bypass domestic courts to 'sue' governments directly in international tribunals. The best known and most commonly employed tribunal is the International Center for the Settlement of Investment Disputes (ICSID), a member of the World Bank Group headquartered in Washington, DC. Fifty years ago, at the 1964 World Bank annual meeting in Tokyo, 21 developing-country governments, including all of the 19 from Latin America attending, opposed the convention to set up this institution (Broad 2014). Despite this opposition, the convention was readily ratified and entered into force in 1966. However, it wasn't until the proliferation of bilateral investment treaties over the past 30 years, that the center became a widely used instrument (Reed, Paulsson, and Blackaby 2010). Other international tribunals and rules used to resolve investor disputes include the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC). Each of these tribunals consists of three arbitrators, drawn from rosters that largely consist of lawyers with expertise

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in commercial arbitration (Van Harten 2008). These arbitrators are not required to follow judicial precedents, and there is no appeals process (ICSID 2006).

While the tribunals cannot force a government to repeal national laws and regulations, the threat of massive monetary awards for damages can have a 'chilling effect' on responsible policy-making. As Tienhaara (2011:606) writes, 'fundamentally, the notion of regulatory chill suggests that investment arbitration – as an institution – may influence the course of policy development'. This chilling effect is widely observed in the context of mining conflicts in Latin America. For example, in 2010, the Inter-American Commission on Human Rights (IACHR) advised the Guatemalan government to suspend operations at Goldcorp's Marlin Mine because of evidence of human rights abuses. The Guatemalan state initially agreed to suspend operations, but ultimately did not do so. Mining continued uninterrupted. Internal documents obtained through a Freedom of Information Act request indicated that the fear of investment arbitration led the state to avoid suspending the mine. The documents state that closing the project could provoke the mine's owners 'to invoke the clauses of the free trade agreement to have access to international arbitration and subsequent claim of damages to the state' (Pérez-Rocha and Paley 2014). The Salvadoran case, which had begun the year before, was undoubtedly present in their minds as Guatemalan officials weighed the pros and cons of following the IACHR's recommendations.

Investor-state dispute settlement – both the binding arbitration and the chilling effect – is designed to enforce a series of rules central to the corporate investment rights regime. Perhaps the most prominent of these is the set of restrictions placed on indirect expropriation.

Expropriation has historically referred to the direct acquisition of private property by a public or private entity, acting with state approval, in the public interest. In the United States, the power of eminent domain is substantively equivalent to the concept of expropriation. However, the global corporate rights regime has innovated the concept of 'indirect' expropriation. This concept is vaguely defined in international investment agreements, giving rise to a broad interpretation in which any regulation or government action that reduces the value of a foreign investment can qualify. Corporations can, therefore, seek arbitration over environmental, health, labor, or other public interest laws that may arguably diminish the profits of the investor.

It is no coincidence that environmental and resource conflicts lend themselves more readily to dispute settlement around the concept of indirect expropriation. In addition to the Salvadoran case, which will be discussed in detail in the following section, one of the first investor-state cases filed under the North American Free Trade Agreement occurred when the U.S.-based Metalclad Corporation 'sued' the government of Mexico after a municipal government refused to grant a permit for the company to operate a hazardous waste treatment facility in an environmentally sensitive area. In 2000, an ICSID tribunal concluded that the Mexican government's actions constituted indirect expropriation and awarded Metalclad $16.7 million (Aisbett, Karp, and McAusland 2010).

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More recently, in 2012, the extractive firm Lone Pine Resources filed a lawsuit against the Canadian state over the provincial government of Quebec's moratorium on the practice of hydraulic fracturing (fracking) for shale gas. Fracking involves injecting a highly pressurised fluid mixture of water, sand, and various chemicals into the ground to fracture rock and release natural gas. This practice has been contentious because of concerns over potential harmful effects on the environment and on drinking water. Lone Pine, which had invested in permits to mine for oil and gas in Quebec, alleges that Quebec's temporary moratorium on fracking constituted a breach of the North American Free Trade Agreement's provisions on indirect expropriation (De Gramont 2009). Lone Pine is seeking $250 million in compensation in this pending UNCITRAL case (Pérez-Rocha and Paley 2014).

Under the corporate investment rights regime, typical trade or investment agreements obligate host governments to provide foreign investors with a so-called minimum standard of treatment. This phrase is intentionally vague, which allows arbitrators to apply their own, idiosyncratic interpretations to a variety of government actions across countries with diverse histories, cultures, and value-systems. As Porterfield (2013) points out, tribunals have interpreted these provisions broadly to include a right to a 'stable and predictable' business and regulatory environment. This allows foreign investors to seek compensation for changes in tax and regulatory standards. As a result, these provisions have become 'both the most frequently invoked and the most controversial substantive standard of protection in investor-state arbitration' (Porterfield 2013).

A flexible interpretation of the minimum standard of treatment rule was a key factor in the case of Occidental Petroleum v. Ecuador, which resulted in the largest ICSID award in history. In October 2012, Ecuador was ordered to pay $1.7 billion plus interest to the US-based oil giant.

Occidental had been active in the country for decades and environmental and indigenous organisations had accused the company of numerous human rights abuses and widespread environmental devastation. Indigenous groups had long demanded the cancellation of the Occidental contract (Porterfield 2013, COHA 2006, Morsolin 2005). In 2006, the government did just that, on the basis of Occidental violating the terms of their contract by improperly transferring a share of Ecuadoran production to a Canadian company. Occidental immediately retaliated by filing the ICSID claim.

When the ICSID tribunal ruled in favor of Occidental six years later, the ruling raised eyebrows not just for the size of the award but also the substance of the decision. Despite admitting that Occidental could have reasonably expected to lose their contract after selling off part of their concession without government approval, the tribunal argued that Ecuador still breached their obligation to provide fair and equitable treatment because they could have treated Occidental in a less severe manner (Investment Treaty News 2013). Again we see the most egregious examples of capitalising on the corporate investment rights regime play out in the context of conflicts around extractive industries in Latin America.

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Another principle central to the corporative investment rights regime, enforced by ISDS, is the idea that states must 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 development strategies used in the past by nearly every successful economy, namely to favor domestic enterprise. Moreover, a regulatory action that applies equally to all corporations but has a disproportionate impact on a foreign investor, could justify arbitration under this rule. Some governments have negotiated exceptions for certain sensitive sectors, such as national oil reserves, so that the investor protections in trade and investment treaties do not apply to those sectors. But without these types of carve-outs, governments run the risk of provoking investor lawsuits if they pursue policies to build up domestic production capacity or incubate local innovation by offering incentives that favour local companies.

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The United States is particularly insistent in including this rule in free trade agreements, seeking to curb the 'exclusive rights' that it considers state-owned enterprises have in particular emerging economies. Of course, many of the national and public-private hybrid companies in Latin America which remain after the wave of privatisations of the 1980s and 1990s are extractive companies. Mining, oil, and gas are risky enterprises that often require a great deal of support from the state. Further, across most of Latin America, the subsoil is owned by the state. These things lend the extractive industries to some level of state ownership. With this in mind, investor protections that target state-owned companies further weaken domestic extractive sectors.

In addition to indirect expropriation and equal protection, the corporate investment rights regime imposes restrictions on capital controls. Typical investment treaties and trade agreements promote capital account liberalisation by obligating governments to 'permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory' (Gallagher, Anderson, and Viterbo 2013). This limits the authority of governments to use various policy tools for controlling volatile capital flows across their borders, even though such controls have helped some countries prevent and mitigate financial crises. In the wake of the 2008 financial crisis, for example, nations such as Brazil, Indonesia, Taiwan, and Thailand all used some form of capital flow management policies to stem the massive inflows of speculative investment entering their economies and wreaking havoc on their exchange rates and asset markets. (Gallagher, Anderson, and Viterbo 2013).

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Research by the Federal Reserve Bank of the United States and economists at Columbia University has found that nations that used such policy tools to control foreign capital flows were able to reduce pressure on the exchange rate, and grow faster than nations that did not use them. (Ahmed and Zlate 2014). In December 2012, the International Monetary Fund adopted an official policy endorsing the regulation of cross-border finance in some circumstances (International Monetary Fund 2012). And yet, thousands of investment and trade treaties still restrict the use of these policy tools, effectively handicapping national economies' ability to develop, in the service of foreign investors.

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All types of foreign direct investors – not just extractive firms – can and do seek to eliminate host countries' ability to restrict capital flows. But this practice does bear disproportionately on extractive investments, as do those discussed above. Countries mired in financial crisis face particularly acute pressures to exploit resource stocks quickly and recklessly because the windfall income that can come from extraction for export is a short-term, palliative remedy for such crises. Controlling capital flows represents a longer-term, more sustainable solution to resolve certain financial crises; however, where capital controls are restricted, this further incentivises developing economies to court foreign investment in extraction, often from junior companies with little regard for standards.

Finally, investor rights typically require limits on host states' performance requirements. In practice this often means that host states surrender their authority to require that foreign investors use a certain percentage of domestic inputs in production, hire a certain percentage of host country nationals and/or transfer technological knowledge to the host country. These performance requirements have long been tools of economic development for states hosting foreign direct investment, but the new corporate investment rights regime generally prohibits these. These restrictions, like the others described above, have particular bearing on extractive economies. First, mineral production is increasingly less intensive regarding the unskilled labor that is traditionally drawn from the domestic workforce. New extraction and milling techniques require ever fewer workers. Therefore, without performance requirements, new mining employs relatively few locals. Relatedly, labor intensiveness, technology and learning spillovers, and fortifying up and downstream industrial linkages are the best ways for mineral economies to avoid Dutch disease. Thus, the threats to economic development represented by these limitations are particularly acute for mineral economies.

In sum, the corporate investment rights regime, through this expanding network of treaties and agreements, imposes a series of restrictions on host country states that limit their ability to use many traditional economic development policy tools. These restrictions are enforced through investor-state dispute settlement tribunals housed at the World Bank, the United Nations, and the International Chamber of Commerce.

In addition to the restrictions on traditional policy instruments for economic development, this regime is problematic because it represents the privatisation of justice. Corporations have often preferred to resolve disputes via private arbitration rather than the public judicial system because ISDS is primarily controlled by the disputing parties themselves. Under the public judicial system model, a judge must follow applicable law and the binding decisions of appellate courts, whereas with ISDS the disputing parties themselves have much more control over the process. (National Arbitration Forum 2005). In contrast to national judicial systems, ISDS processes offer little accountability to the public, less consistency and decision-making coherence, and no appeals process. As Franck (2005:1538) writes, it 'places the enforcement of public international law rights in the hands of private individuals and corporations'.

Specifically, the expansion of this privatised justice system for multinational corporations raises three interrelated sets of concerns. First, the cases brought

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before these tribunals often go beyond narrow private commercial matters to involve broad public welfare issues. Second, this model lacks public accountability. Third, there is cause for concern around arbitrator bias in favor of investors.

The cases brought before these tribunals – because they sometimes target states' efforts at protecting domestic industry, promoting economic development, and shepherding the biophysical environment – go beyond private commercial concerns and can threaten public welfare in host countries. This is particularly the case with extractive companies where resource issues like water quality and energy provision are on the line. Because many of these cases involve the balancing of private and public welfare issues and often engage important topics of public policy such as regulation to protect the environment and public health, taxpayer, fiscal and budgetary issues, and access to basic public services, they would be better decided in public, national judicial systems.

Private international arbitration may not offer the same level of public accountability, transparency and citizen participation as public jurisprudence. ISDS is designed to shield the proceedings from the public eye. As Brunet (2006) writes, 'The desire for secrecy can be a prime determinant in selecting arbitration. Often one or more parties to an arbitration agreement has an interest in avoiding a public trial with unwanted adverse publicity' (Brunet 2006). There are very few cases where citizen groups have been allowed to submit an amicus brief or even attend a hearing, much less gain access to court documents or provide testimony in the proceedings. Ultimately, ISDS is a one-way system in which only investors can seek arbitration, host states are always on the defensive, and the proceedings are obscured from the affected citizens and the larger public.

Related to these concerns around accountability and the privatisation of justice, is that of arbitrator bias and conflict of interest. In the public judicial system model, no individual may be a practicing lawyer and a member of the judiciary at the same time. However, with respect to ISDS, there is little distinction between the roles of attorney and 'judge'. Lawyers also serve as arbitrators when they serve on arbitration panels or tribunals. This reflects a conflict of interest where arbitrators are incentivised to rule in ways that aid their clients or prospective clients. Thus, in this system, it is well understood that parties to arbitrations choose their arbitrators because of their known leanings (Mann et al. 2004). As Eberhardt and Olivet (2012) argue,

> Law firms, arbitrators and litigation funders ... have profited handsomely from lawsuits against governments (and are) far from a passive beneficiary of international investment law. They are rather highly active players, many with strong personal and commercial ties to multinational companies and prominent roles in academia who vigorously defend the international investment regime (Eberhardt et al., 2012).

Further, one study finds that arbitrators favor the positions of the foreign investors over governments, particularly when the foreign investor is from a major capital-exporting country (Van Harten 2012).

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In sum, the corporate investment rights regime – which, over the last three decades, has become the standard set of norms around relationships between host states and foreign direct investment – is set up to interrupt states' use of traditional economic development policy tools; debilitate states' sovereignty to protect its industry, workforce, and biophysical environment; and privilege corporations in closed-door, private arbitration. No sector has capitalised on these opportunities over the past decade like the extractive sector, and no region has been more affected than Latin America. In the following section we turn to the story of *Pacific Rim Mining Corporation v. El Salvador*, the emblematic case of the suite of issues laid out above.

The story of Pacific Rim in El Salvador

Many of the most controversial elements of the corporate investment rights regime described above are central to the story of Pacific Rim in El Salvador and the arbitration between them, which is ongoing in the World Bank's International Center for the Settlement of Investment Disputes (ICSID). The Salvadoran government sought to respond to the overwhelming demands of its citizenry to prohibit open-pit metal mining in the diminutive and water-constrained Central American nation. The Salvadoran state undertook this effort using proper bureaucratic procedures. Pacific Rim responded by demanding 300 million US dollars in damages and seeking resolution in the ICSID.

In 2002, Pacific Rim Mining Corporation, a Canadian junior company with offices in Vancouver, British Columbia, Canada and Reno, Nevada, United States acquired Dayton Mining Corporation and with it, the exploration license for the El Dorado project in San Isidro Cabañas, El Salvador. El Dorado was Pacific Rim's flagship property with proven reserves of one and a half million troy ounces of gold. Between 2002 and 2008 Pacific Rim spent approximately 77 million US dollars in exploration in El Salvador. When Pacific Rim began exploration, the Salvadoran state was fully supportive and gold mining was not on the activists' radar (Collins 2009, Hopke 2012).

By 2008, mining had become controversial across the Central American isthmus; Salvadoran civil society had begun to organise in earnest against the industry; and the right-wing, neoliberal executive administration was struggling to negotiate a countervailing political climate. The outcome was that the Ministry of Environment and Natural Resources, with the tacit consent of then President, Antonio Saca, refused to approve the environmental impact study (EIS) for this project. This position has been maintained by the subsequent executive administrations –Mauricio Funes (2009–14) and current President Salvador Sanchez Ceren. The approval of the EIS is required for the production license to be issued, thus the action prevented Pacific Rim from turning their exploration project into a producing mine and earning revenue from their substantial investment. This resulted in Pacific Rim seeking a 300 million dollar award from the Salvadoran state before the ICSID under the Central American Free Trade Agreement's prohibition on indirect expropriation (Hopke 2012).

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Public concerns over the environmental and public health impacts of mining were the principal forces that stymied Pacific Rim's work in El Salvador. In particular, concerns around water scarcity and contamination drove the opposition. The Lempa River, which bisects nearly the entire country and which provides a majority of drinking water in El Salvador, even in the capital city, is adjacent to the El Dorado property. This provoked understandable fears about contamination of the country's principal water supply in a nation that is already acutely water-stressed (IPS Correspondents 2015). Additionally, there were real concerns about the veracity and quality of the environmental impact assessment conducted by Pacific Rim including a 'virtual absence of baseline data on the quality and quantity of water,' especially regarding groundwater; and a 'lack of transparency in the public consultation process' (Moran, 2005). The concerns were further fueled by the environmental legacy of gold mining in Morazán in the 1950s, which left the area's hydrologic systems highly acidic. Residents of the area experience high rates of kidney and nervous system diseases (Ventura Cortes and Díaz de Quintanilla 2011). A 2013 study by the Ministry of Environment and Natural Resources of El Salvador found that the water in the nearby San Sebastian River contained nine times more cyanide and a thousand times more iron than what is recommended for human consumption (Ministry of Environment and Natural Resources, 2012).

Pacific Rim has steadfastly argued against the concerns around environmental contamination. The company maintains that they would carry out 'green mining,' that they would employ state-of-the-art safeguards, and would recycle and treat water to the highest standards. They have also repeatedly reminded the public that the epithermal mineralisation that characterises the El Dorado reserves are low acid, thus dramatically diminishing acid mine drainage. Pacific Rim dismisses these concerns, but many have argued that the environmental impact assessment the company conducted was inadequate to understand and be able to mitigate the potential impacts of the project (Moore et al., 2014). In fact, during initial exploration activities, the company's drilling interrupted the flow of underground aquifers, which prevented the groundwater from emerging in traditional sites of springs, denying water to residents. Pacific Rim apologised and took responsibility for the problems, but these problems planted further fears in the community around reduced access to potable water, an increase of contaminated water, impacts on livestock, and adverse health impacts (CIEL 2011).

These environmental and social concerns gave rise to the National Roundtable against Metallic Mining (*Mesa Nacional Frente a la Mineria Metalica*), a coalition of NGOs and civil society organisations, with strong linkages to international allies that united a wide swath of civil society in opposition to mineral development in El Salvador. 'The Mesa' became a surprisingly powerful political force (Broad and Cavanagh 2011). Since its inception, the Mesa has served as the principal political voice for civil society on this issue, organising and advocating tirelessly for legislation to categorically prohibit open-pit metal mining in El Salvador. Although several bills have been introduced in the Legislative Assembly to this effect, such absolutist legislation has yet to pass. Yet the *ad hoc*

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moratorium on metal mining has remained in place for the past decade across conservative and progressive governments. This is a stark accomplishment and one which is due in no small part to the efforts of the Mesa.

In late 2008 the Salvadoran government informed Pacific Rim that their proposed project could not go forward. The state based its decision on three considerations: (1) Pacific Rim had not submitted a feasibility study, (2) Pacific Rim did not have the approval of the landowners in the area to purchase the property on which the mine would be built, and (3) the Ministry of the Environment and Natural Resources had not approved the environmental impact assessment and denied the permit on the grounds that the project was not environmentally feasible (Steiner 2010, CIEL 2011, Steiner 2010).

In response to the Salvadoran state's denial of the production license for the El Dorado property, Pacific Rim executives brought arbitration against El Salvador to the ICSID in April 2009 (De Garment 2009). In the company's notice of arbitration, Pacific Rim argued that El Salvador violated four of the investor protections provided in the Dominican Republic – Central America Free Trade Agreement (DR-CAFTA), including national treatment, most-favored-nation treatment, minimum standard of treatment, and expropriation (which also covers indirect expropriation) (De Garment 2009). The company also argued that the Salvadoran state had breached similar protections in a national foreign investment law enacted in 1999, as part of a World Bank-designed structural adjustment package that offered loans in return for free market-oriented policy reforms (Broad and Cavanaugh 2013, Ochoa et al. 2000).

Many legal experts were surprised to see Pacific Rim's claims regarding breaches of 'national treatment' and 'most-favored nation' treatment. As noted above, 'national treatment' requires governments to treat foreign investors from a treaty partner country no less favorably than domestic investors. 'Most favored nation' (MFN) treatment requires governments to give foreign investors from signatory nations no less favorable treatment than the best treatment given to investors of another signatory nation or even non-signatory nations, even if that treatment is better than that given to domestic investors. As consumer advocate organisation Public Citizen has pointed out, 'no firm from any country has been granted a mining exploitation permit for gold or silver by the Salvadoran government in the period under examination' (CAFTA Investor Rights Undermining Democracy and the Environment). There are no comparable firms against which Pacific Rim can compare its treatment; thus, it's a curious argument to suggest that the state of El Salvador violated national treatment or MFN clauses of DR-CAFTA.

Pacific Rim's decision to invoke DR-CAFTA as the basis for its legal claims further raised eyebrows among legal experts and activists given that Pacific Rim was incorporated and headquartered in Canada, a country which is not a signatory to DR-CAFTA. Observers, therefore, wondered how Pacific Rim could rightly claim DR-CAFTA protections. Pacific Rim had a subsidiary company, Pacific Rim Cayman, LLC, which was incorporated in Nevada, United States. It was through this subsidiary, rather than the parent company, that they claimed access to investor protections guaranteed under DR-CAFTA. However, there

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were some questions about the legitimacy of this effort given the 'denial of benefit' provision in DR-CAFTA, which requires subsidiaries to have 'substantial business activities' in the host country in order to enjoy the benefits of that country's agreement. This provision is designed to prevent exactly the kind of 'treaty shopping' Pacific Rim appeared to be undertaking (Behlman 2014).

The Salvadoran state, on January 4, 2010, presented preliminary objections to the Pacific Rim suit to the ICSID, citing provisions in DR-CAFTA intended to prevent frivolous investor-state cases. El Salvador argued that Pacific Rim had failed to provide sufficient evidence to support its claims. Although Pacific Rim had permits for exploration, the government maintained, this did not give the automatic rights to a production concession (Kay 2010).

On August 2, 2010, the ICSID tribunal rejected these objections, stating the case would proceed. In response, El Salvador launched a new set of objections, arguing that Pacific Rim, a Canadian corporation, should not be allowed to file suit under DR-CAFTA, since Canada is not a party to the agreement. The Salvadoran government argued that Pacific Rim incorporated its US subsidiary, Pacific Rim Cayman, in anticipation of filing a claim under DR-CAFTA and that the case constituted an abuse of investor rights.

In June 2012, the ICSID tribunal dismissed Pacific Rim's claims as predicated on DR-CAFTA. The tribunal determined that Pacific Rim was Canadian and did not have sufficient business activities in the United States to have standing under the treaty (Achtenberg 2012). However, the tribunal allowed the arbitration to continue under El Salvador's 1999 Foreign Investment Law, which allowed companies to use ICSID to resolve investment disputes (Gallus 2013). Since then, El Salvador has amended Article 15 of its Foreign Investment Law so that companies which are not DR-CAFTA signatories can no longer bring claims directly to ICSID (Moore et al. 2014). However, this amendment could not be made retroactive to have the Pacific Rim case dismissed at ICSID. With the case moving forward, Pacific Rim announced that it would seek $315 million in compensation, up from an initial $77 million. Later the figure was set at $301 million (*Pac Rim Cayman LLC v. The Republic of El Salvador*).

In November 2013, the Australian-Canadian firm OceanaGold acquired Pacific Rim for $12.5 million, saving Pacific Rim from insolvency (OceanaGold and Pacific Rim Mining 2013). OceanaGold's bet, in acquiring Pacific Rim, is that they will prevail in the merits phase of the ICSID case, which began in September 2014. Behind closed doors at the ICSID offices inside the Washington, DC headquarters of the World Bank, three arbitrators began hearing the case that will reverberate throughout Salvadoran society and shape the course of resource rights struggles worldwide for years to come. More than 300 groups signed a support letter to the President of the World Bank, Dr. Jim Yong Kim, urging the bank to 'review the role of the International Center for the Settlement of Investment Disputes (ICSID) and to determine if it supports the bank's mission of ending poverty and promoting responsible and sustainable economic development and 'to undertake this review through an open process with public hearings'.

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The letter further suggested that mining host communities be empowered to present evidence as part of the arbitration process (Yong Kim, n.d.).

The case is being closely watched because it reflects broader patterns in the structure of the mining industry that have implications for social and environmental standards. As discussed above, mining companies are becoming increasingly competitive, particularly around the junior exploration stage of the process, as the Malthusian discourses around climate change and resource scarcity produce larger exploration budgets, more source-state protectionism in the mining industry, and a proliferation of aggressive, fly-by-night junior companies (see Dougherty, this volume). Pacific Rim is an exemplar of the aggressive, fly-by-night junior firm relentlessly using the corporate investment rights regime to force the hand of a sovereign nation that is adhering to its national laws, bureaucratic procedures and traditional policy tools to safeguard the public interest. And the ICSID is not just complicit, but as the chief enforcer of the corporate investment rights regime globally, is actively engaged in producing an ever more aggressive mining industry and increasingly contentious relationships between host states and foreign investors in extraction.

Pacific Rim v. El Salvador is expected to conclude in 2016. Whatever the decision – whether El Salvador does or doesn't have to pay the $301 million to the company, El Salvador has lost. The government has spent the last six years pouring resources (human, financial, and otherwise) into their defense which thus far has cost almost $13 million in legal fees, an amount comparable to the annual budget of the Ministry of the Environment and Natural Resources (Pérez-Rocha 2014). If El Salvador were to have to pay the $301 million, this would be just under two per cent of its gross domestic product. Such a payout could sharply reduce resources available for spending on for health care, education, and other public services.

The growing backlash to the corporate investment rights regime

Karl Polanyi (1944) characterises capitalism as the ongoing composite of two competing forces – one that seeks to reproduce and enable free market capitalism (including through regulation and central planning) and the other, a counter-effort by civil society to prevent market fundamentalism from eroding the quality of social life. This is what Polanyi (1944) refers to as the 'double movement.' The entrenchment of the corporate investment rights regime through the proliferation of investment treaties, trade agreements, and dispute settlement mechanisms has been met with a countervailing set of efforts from governments, international organisations and social movements across the world in recent years. Until very recently, investor-state dispute settlement existed largely in obscurity. *Pacific Rim v. El Salvador* and other, similar cases have helped raise awareness of the costs of growing investor rights. These efforts exemplify Polanyi's double movement and allow for alternative imaginaries to the corporate investment rights regime.

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The pushback against ISDS comes, to a large extent, from investment host country governments concerned about the potential for ISDS to undermine national economic development. Many states have begun reevaluating their investment treaties, trade agreements, and affiliations with the ICSID.

In South America, resistance began to grow during the 11 years of negotiations over a Free Trade Area of the Americas. The idea was to create a free trade zone for all countries in the Americas except Cuba. The talks fell apart in 2005, in part because of objections to U.S. government demands for investor-state dispute settlement. Since then, three countries in South America (Venezuela, Bolivia, and Ecuador) have withdrawn as signatories to the ICSID convention and are renouncing their BITs. Ecuador has begun a process of auditing its BITs and the demands presented to ICSID, an approach that could serve as a model for other countries (Andes 2013).

The Transatlantic Trade and Investment Partnership – a free trade agreement currently being negotiated between the United States and the European Union – faces an uncertain future precisely because of the ISDS provisions. In Germany and several other European nations, trade unions, civil society, and many parliamentarians have opposed an expansion of investor rights. In the words of Alex Lawson (2015), 'Political blowback against investor-state dispute settlement … is not a new phenomenon. But EU-based aversion to ISDS has expanded beyond traditional trade skeptics like labor unions and consumer advocacy groups to high-ranking government officials with a substantial role in shaping policy' (Lawson 2015). Similarly, in other instances high-ranking politicians have conceded that ISDS is the 'toxic' element in negotiations around free trade agreements (Donnan 2014).

In addition to South America and the European Union, South Africa and Indonesia are revisiting their BITs, and the future of the Trans-Pacific Partnership (TPP) is in question because of concerns around ISDS. (Yahalom 2010, Investment Treaty News 2012). The TPP is an investment treaty involving at least 14 countries including most of the states in the Americas that border the Pacific Ocean and much of the Asia-Pacific region (Hill 2014, Financial Times 2014).

Beyond government activism, social movements have also taken up the struggle against encroaching corporate investment rights. Part of this countermovement recognises the need for international legal mechanisms. This has led to imaginaries in which alternatives to the current regime have been proposed. Recently a group of experts from various civil society organisations elaborated a document that synthesises several proposals for legal frameworks that serve as alternatives to the corporate investment rights regime (Pérez-Rocha 2014). These proposals operate along several interrelated lines.

The first of these includes proposals that privilege human and environmental rights over corporate rights and that establish obligations for transnational corporations regarding human and environmental rights. The second of these suggests abolishing the privileges of foreign investors and guaranteeing states the space to implement public policy including special and differentiated

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treatment for domestic industry. The third recommends alternative dispute settlement solutions that annul current investor-state dispute settlement clauses and prevent companies from 'suing' governments for undesirable regulation, as in the case of El Salvador. A fourth recommendation is that investor-state disputes be settled before national tribunals in accordance with domestic law. A fifth proposal suggests that the pursuit of arbitration be bi-directional such that states, communities, and citizens can pursue arbitration against investors. Further, any arbitration should allow impacted communities to access the proceedings and participation in the process.

Concluding remarks

In sum, the corporate investment rights regime has, over the past few decades, supplanted the Calvo Doctrine as the dominant governance mechanism of relations between host states and foreign direct investors in Latin America. The crown jewel of this suite of rights is access to investor state dispute arbitration in international tribunals like the ICSID. This shift, a product of the neoliberal turn in Latin America, represents serious implications for economic development across the region.

While the rights and resources investors accrue under this regime are ostensibly available to all foreign investors, mining companies disproportionately capitalise on these resources, particularly investor state dispute arbitration. This is the case because mining companies are especially driven to seek creative rent opportunities because of the riskiness of mineral production in general, and, relatedly, the dependency of exploration firms on capricious venture financing at the exploration phase. Additionally, the tense and intimate relationships between mining companies and host states, exacerbated by the sunk costs of mineral production, drive mining firms' starkly aggressive behavior.

The case of *Pacific Rim v. El Salvador* embodies these trends, demonstrating how companies are driven to undertake these extreme defensive measures and demonstrating the costs and consequences of such for host states and their citizens.

In the past several years, opposition to the corporate investment rights regime has grown. This opposition stems in part from the attention garnered by the Pacific Rim case and other, similar cases in popular media and among social movements, but it also comes increasingly from states themselves, dubious of the economic development tradeoffs and limited sovereignty that accompanies investor rights. The pushback from states encompasses some of the richest and most influential governments in the world. This resistance constitutes a Polanyian double movement and represents the real possibility of reigning in the reach of the corporate investment rights regime in the near future.

As commodity prices prove less stable in the post-recession years than they were for most of the first decade of the twenty-first century, and as resistance to mining continues to grow in intensity across much of Latin America, we might

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expect more efforts by mining firms to capitalise on investor rights in the coming years. It is important, therefore, to remain vigilant regarding these issues. Further research should examine cases beyond that of *Pacific Rim v. El Salvador*, should attempt to break into the black box of the internal processes of ISDS tribunals, and should continuing imagining policy alternatives that privilege national economic development.

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