International Investment Law and Environmental Justice Movements:

The Price of Justice in Latin America

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An undergraduate thesis submitted to the School of Environmental Studies in partial fulfillment of the requirements for the degree of Bachelor of Science (Honours)

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April 2020

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Abstract

Investor state dispute settlement (ISDS) exists in over 3,000 trade and investment treaties. It allows foreign investors to challenge any government action, in private arbitration, that limits the profitability of their investment be that environment, health, or public interest laws. ISDS has been criticized by scholars for restricting host states’ sovereignty and their ability to regulate in the public interest. While the current literature has yielded important insights, most studies are dominated by a state-centrist perspective and neglect to acknowledge that a large number of disputes, particularly in the Global South, emerge as a result of conflicts between foreign investors and local communities. Building on existing literature, this study examines the Canadian mining industry in Latin America to understand the impact of ISDS claims on the environment from an environmental justice perspective. It argues that the asymmetric corporate structure of the ISDS system has extended into community-investor relations, creating a power imbalance that sets the stage for conflict. It is hypothesized that ISDS protections exacerbate local tensions privileging the rights of investors over those of communities. Host governments are more likely to fulfill obligations of investment treaties due to their ISDS enforcement mechanism, regardless of other obligations under international human rights treaties, such as the ILO Convention 169 on Indigenous Rights. This study draws connections between various injustices, highlighting the corporate preference of ISDS and the asymmetry in legal protections that preclude corporate accountability or justice for affected communities.
I would like to begin by thanking my supervisor Kyla Tienhaara for her support and encouragement throughout the year, without her insight and knowledge my project would not have been possible. I would also like the thank my two examiners Allison Goebel and Diana Cordoba for taking the time to engage with my research. I was also fortunate enough to interview experts in the field and I thank them for their input and willingness to participate.

A special thank you to my colleague at SFU who was invaluable and a great help with my data consolidation and analysis. Finally, I would like to thank all the professors, T.A.’s, and peers at Queen’s that I have met with to discuss my project. Their wisdom and patience has enriched my findings and contributed to the success of this project.
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LIST OF ABBREVIATIONS

BIT- bilateral investment treaty
CAFTA-DR- Central America- Dominican Republic – United States Free Trade Agreement
CEPAL- United Nations Economic Commission for Latin America and the Caribbean
CIEL- Centre for International Environmental Law
CODEGAM- Consejo de Desarrollo de García Moreno
DHUMA- Derechos Humanos y Medio Ambiente’s
EIA- environmental impact assessment
EIS- environmental impact statement
EJM- environmental justice movement
ESIA- environmental and social impact assessment
FDI- foreign direct investment
FET- fair and equitable treatment standard
FIAS- Foreign Investment Advisory Service
FPS- full protection and security standard
FTA- free trade agreement
GNI- gross national income
GN- global north
GS- global south
ICSID- International Centre for the Settlement of Investment Disputes
IIA- international investment agreement
IMF- International Monetary Fund
ISDS- investor state dispute settlement
LBI- legally binding instrument
MNCs- multinational corporations
NGO- non-governmental organization
OCMAL- Observatory of Mining Conflicts in Latin America
OECD- Organisation for Economic Co-operation and Development
OEIGWG- Open-Ended Intergovernmental Working Group
RBI- Responsible Business Initiative
SAS- South American Silver
SASC- South American Silver Corp.
TPF- third party funder
TSX- Toronto Stock Exchange
UN- United Nations
UK- United Kingdom
UNCITRAL- United Nation Commission on International Trade Law
UNCTAD- United Nations Conference on Trade and Development
US- United States
1.0 INTRODUCTION

Starting in the 1990s, there has been an emergence of an expansive international investment governing network, of over 3,000 overlapping bilateral investment treaties (BITs), free trade agreements (FTAs), and economic cooperation agreements.¹ This expansive network has given foreign investors access to new legal powers, increasing the frequency and number of investor-state disputes resolved in international investment arbitration. Investor-state dispute settlement (ISDS), allows foreign investors to sue host governments in private, closed-door tribunals, over measures that affect the profitability of their investments.² To contextualize the debate, this thesis will focus on Canadian mining companies, which represent 60% of the worlds listed mining companies and are responsible for 70% of Canadian ISDS cases launched outside of North America.³ They will be explored in the context of Latin America, a locus of environmental justice conflict and the principal destination for Canadian mining investment.⁴

Studies on ISDS and the environment have produced a diverse body of research, highlighting concerns over the impacts on environmental policy and ability to self-govern. The current literature discusses both the outcome of individual ISDS cases and what is termed the “regulatory chill hypothesis”.⁵ This hypothesis suggests that governments will fail to regulate in the public interest, in an effective and timely manner, due to concerns about ISDS.⁶ Mining

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² Hadrian Mertins-kirkwood and Ben Smith, Digging for Dividends Settlement by Canadian Investors Abroad, 2019, https://www.policyalternatives.ca/digging-for-dividends.
³ Mertins-kirkwood and Smith.
⁶ Tienhaara.
companies leveraging these agreements can file claims before an arbitration panel, demanding compensation for “government actions surrounding court decisions, public policies and government measures that are real or perceived threats to investment”. There are several scholars who consider that arbitration outcomes undermine the regulatory mechanisms and governing capacities of host countries. Environmental regulation has become “riskier, more expensive and less democratic” particularly in the context of developing nations.

Building on existing literature, this study seeks to understand the impact of ISDS claims on the environment from an environmental justice perspective. Environmental justice is both a social movement and research subject. It is a form of community led science where citizens monitor the places where they live and work, reporting from a local viewpoint on socio-environmental conflicts. This generates diverse forms of knowledge, allowing patterns of injustices to be mapped and analyzed in terms of power relations and distribution of risk. Adopting the environmental justice framework is argued to provide insight into ISDS-environment relations from a local perspective, filling an important gap in the literature.

The “environmentalization” of social conflicts is invading new spatial and symbolic spaces. Environmental justice movements (EJMs) are rising in importance, expanding beyond an ecological realm, emerging as mechanisms that contest political, social and scientific structures. The ability of investors to access ISDS after confronted by EJMs highlights the varying forms of injustice that manifest at local, national and international scales, reinforcing the structural systems that in essence EJMs contest. The obligations of investment treaties and the tribunal

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rulings that enforce them, determine to what extent states’ can regulate and maintain policies to protect their citizens and intervene during social mobilizations.

To understand the relationship between ISDS and EJM, one must look at both the awards from arbitration and the details of EJMs. Has investment arbitration left room for human rights? Do arbitrators advance legal concepts to balance investor and host state rights? Do they interpret other forms of law that guarantee local communities protection? Are tribunals the right forum to resolve these disputes? The analysis of four case studies in this thesis, examines these questions in detail, advancing the understanding of investment protection and its implications on environmental justice in Latin America. ISDS does not operate within a vacuum, and the decisions made in tribunals have substantial impacts on affected communities. This thesis explores the tendency of EJMs to trigger an ISDS claim and whether or not tribunals take into account the environmental injustices that led up to arbitration when formulating awards. The findings demonstrate the corporate imbalance of the ISDS system, the constraints it places on government intervention during EJMs, and the barriers posed by ISDS to corporate accountability and justice for mining affected communities.

2.0 METHODOLOGY

This study investigates the relationship between ISDS and EJM through an empirical case-based analysis. A case study is an empirical inquiry that can be used to explain, describe or explore events in the everyday contexts in which they occur. These help to understand and explain the causal links and pathways between different phenomena in their natural setting. The

case study approach aims to capture information on more explanatory ‘how’, ‘what’ and ‘why’ questions. For these reasons, a case study approach was best suited to understanding the ISDS-EJM correlation and to answer questions of:

- How investors/states respond to demands for environmental justice?
- What kinds of local Environmental justice concerns spark ISDS disputes?
- How do arbitration panels take local demands for environmental justice into account for their decisions?
- Why are these ISDS-EJM often related?

Specifically, a collective interpretative case study approach was employed. The collective case study involves studying multiples cases sequentially in order to generate a broader appreciation of a particular issue. The interpretative epistemological approach involves understanding the meanings, contexts and processes, with a focus on theory building. The combination of these two approaches is advantageous for this study.

In a collective case study, the number of cases needs to be carefully selected, around four to five cases, in order to consolidate a theory. The importance of access is also stressed, as the cases have to be “hospitable to inquiry”. The cases must also have uniform characteristics for a comparative analysis to take place. Taking those factors into consideration, four case studies were selected. They were selected within the geographical boundary of Latin America and within the time frame of 2000 to 2019. The selective criteria were as follows:

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12 Crowe et al.
14 Doolin.
15 Yin, Case Study Research: Design and Methods (Applied Social Research Methods).
16 Yin.
(i) The mining company is of Canadian origin

(ii) The ISDS claim pertains to an issue with a corresponding EJM

(iii) The EJM is substantial: high intensity\(^{17}\) EJM ranking on EJAtlas

(iv) The EJM was in its preventative stage: before mining site created

(v) The ISDS claim/arbitral rewards are concluded and made public\(^{18}\)

The selective criteria filtered out suitable cases and created conditions appropriate for a comparative analysis. The cases selected include: *Bear Creek v. Peru*, *Copper Mesa v. Ecuador*, *South American Silver (SAS) v. Bolivia*, *Pac Rim v. El Salvador*. The data collected for each case came from multiple sources, using a range of qualitative and quantitative techniques. The use of multiple sources of data, data triangulation, has been advocated as a way to increase the validity of a study.\(^{19}\) Qualitative data was collected through literature review, examination of legal documents and analysis of ‘grey materials’ (websites, NGOs, reports, databases, newspaper articles, international organizations). Additionally, specific databases such as the EJAtlas and UNCTAD Investment Hub Database were used to gather information on specific parameters of the EJM and ISDS cases. Finally, three interviews were conducted with experts in the field of law, employees of NGOs, and professors in relevant academic fields to supplement other sources of data. They were done by skype and in accordance to the General Research Ethics Board guidelines at Queen’s, allowing participants to remain anonymous.

Data on the EJM was sourced from the EJAtlas, a large-scale research database that increases the global understanding of resource extraction and waste disposal conflicts. The data

\(^{17}\) High intensity ranking by the EJAtlas database, includes widespread, mass mobilization, violence, arrests, etc.

\(^{18}\) Cases can go on for several years and there is a lack of mandatory transparency. Thus, for some cases there is very limited information. See, Pia Eberhardt et al., “Profiting from Injustice” (Brussels, 2012), https://www.tni.org/files/download/profitingfrominjustice.pdf.

\(^{19}\) Crowe et al., “The Case Study Approach.”
on ISDS proceedings was collected from Investment Policy Hub, an online database maintained by UNCTAD, that finds details on all publicly known treaty based ISDS cases. Specific variables, depicted in Table 1, were recorded for every extractive related ISDS and EJM case in the four countries. The parameters of ‘extractive related’ were set to include only mining, oil and gas related cases. Energy infrastructure or power related claims were not included in the data set. The uniformity of data collected, set conditions for comparisons to be drawn between the four different cases.

Table 1: Parameters for data collection of EJM & ISDS

<table>
<thead>
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<th>Variable</th>
<th>Unit</th>
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<tr>
<td><strong>Outcome of ISDS Claim</strong></td>
<td>(1)- Investor; (2)- State; (3)- Pending/Dismissed/Settled</td>
</tr>
<tr>
<td><strong>Type of ISDS Claim</strong></td>
<td>Description found in Table 2.0</td>
</tr>
<tr>
<td><strong>Amount Claimed</strong></td>
<td>Million $USD</td>
</tr>
<tr>
<td><strong>Amount paid out</strong></td>
<td>Million $USD</td>
</tr>
<tr>
<td><strong>Presence of an EJM</strong></td>
<td>(1)- Yes; (2)- No</td>
</tr>
<tr>
<td><strong>Intensity of EJM</strong></td>
<td>(1)-low; (2)-medium; (3)-high</td>
</tr>
<tr>
<td><strong>Stage</strong></td>
<td>(1)-Preventative- before mining site created; (2)-Reaction- during construction; (3)-Post- after site is created</td>
</tr>
<tr>
<td><strong>Success of EJM (EJAtlas Classification)</strong></td>
<td>(1)- Yes; (2)- No</td>
</tr>
</tbody>
</table>

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20 Not all arbitral awards are publicly disclosed. ICSID requires consent of both parties to a dispute before a ruling will be published; UNCITRAL rules the award may only be published with consent of investor and state. See Tienhaara 2009, 129.

21 Crowe et al., “The Case Study Approach.”
Following the structure of a collective case study, the data relating to the individual components of the cases was analyzed first, then comparisons across each of the cases were made. Data was organized and coded based on the environmental justice framework. Using a theoretical framework integrates different sources of data and allows common themes to emerge.\textsuperscript{22} The framework was developed to codify issues based on three pillars of justice: recognition, participatory/procedural, and distributional. The three pillars were then extrapolated to draw conclusions and explain connections between the cases.

In this investigation, the ISDS-EJM relationship acts as a risk multiplier, exacerbating existing complexities, including but limited to the legacy of colonialism, war, corruption in government and the mosaic of injustice they perpetuate. Consequently, this study only focuses on a content, descriptive based analysis and will not attempt to establish a cause-and-effect relationship between the ISDS-EJM variables.

This paper will begin with a literature review to establish a theoretical framework for analysis, followed by the analysis of four case studies, a discussion on commonalities among the cases and finally recommendations based on the shortcomings of ISDS identified.

3.0 LITERATURE REVIEW

This section discusses the academic literature that frames the analysis of ISDS-EJM variables. Three key strands of literature are used to guide the investigation: environmental justice, developmental theories and ISDS scholarship. Concepts from environmental justice and socio-metabolic development theories, compound to create a lens of analysis which centers on community relations and drivers of conflict. The ISDS literature review provides a foundational

\textsuperscript{22} Crowe et al.
knowledge of ISDS proceedings and highlights important terminology. Finally, this review concludes with background information on Latin America and the Canadian mining industry.

3.1 Environmental Justice

Environmental justice is a broad, integrated, expansive and inclusive term embodying a variety of understandings. For this study, the loose operational definition that will be used is “the right to a safe, healthy, productive environment, in which ‘environment’ is viewed in its totality including ecological, physical, social, aesthetic and economic components.” The use of the term Global South (GS) encapsulates all countries that are developmentally disadvantaged and mainly suppliers of raw materials. The term colonial capitalism is employed, to link the domination and extended authority of colonial practices to the capitalist system forced on communities by large foreign corporations. Environmental justice movements and socio-environmental/ecological conflicts will be used interchangeably throughout the analysis.

3.1.1 Environmental Justice Framework

The environmental justice framework employed here contains three pillars of justice. Each pillar highlights underlying causes of conflict between industry, government and communities. The first pillar is the distribution of environmental ‘goods’ (benefits) and ‘bads’ (costs). Distributional issues include elements of environmental inequality, where the costs of

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24 Schlosberg.
risk and benefits of policy are not shared equally across demographic and geographic spectrums. Distributional injustices are often reflective of socioeconomic and cultural status. The second, examines the procedural and participatory components of justice. Legal and political systems are explored to assess decision-making, access and accountability. A lack of consultation, transparency, and involvement in decision-making processes is a breach of participatory justice. This pillar highlights the importance of institutionalized public participation.

The third dimension looks at recognition. This is a structural analysis, examining rights embedded in policies and governing practices. The recognition dimension probes power dynamics and the intersectionality of class, race, and gender to determine who the elites are. Groups or categories of people whom are granted authority or privileged and those that struggle with minimal rights or protections are identified here.

These three dimensions compound to created or obstruct capabilities. These capabilities determine social mobility or the ability of a person to transform opportunities into something tangible. Justice is not achieved on a uniform front; justice may prevail in some dimensions and may be lacking in others. For instance, if a project is shut down due to lack of consultation,

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28 Temper, Del Bene, and Martinez-Alier.
31 Gloria Chicaiza et al., “Mining Conflicts around the World-September 2012 Begüm Özkaynak and Beatriz Rodríguez-Labajos (Coord.) with Contributions by Mining Conflicts around the World Common Grounds from an Environmental Justice Perspective,” no. 7 (2012), www.ejolt.org.
recognitional justice is served. However, if no policy changes are enacted to ensure meaningful participation and consultation, participatory justice is still lacking. This framework conceptualizes environmental justice as a spectrum. There are different shades or levels of justice/injustice in each of the three pillars. This broad conceptualization along with key theories from a global socio-metabolic perspective will guide the analysis of the case studies.

3.2 Developmental Theories

According to scholars, the underlying driver of socio-ecological conflicts stems from the increasing metabolic profile of the global economy. The search for resources, is pushing extractive frontiers into new, undeveloped regions, setting the conditions for conflicts to emerge. Using a material flow analysis along with theories from political ecology this study will elucidate metabolic patterns and help visualize links between materials/energy and varying social actors at distant locations.

The theory of social metabolism links economic processes to the consumption, depletion and appropriation of natural resources. Social metabolism can be defined as the “physical throughput of the economic system, in terms of energy and materials associated with economic activities either as direct or indirect inputs”. It is a material flow analysis examining the exchanges of energy and materials with the environment and how uneven flows of materials generate conflict. The globally changing patterns of consumption have increased the world’s

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32 Martinez-Alier, “Mining Conflicts, Environmental Justice, and Valuation.”
34 Fischer-Kowalski and Hüttler.
35 Chicaiza et al., “Mining Conflicts around the World-September 2012 Begüm Özkanayak and Beatriz Rodríguez-Labajos (Coord.) with Contributions by Mining Conflicts around the World Common Grounds from an Environmental Justice Perspective.”
social metabolism putting pressure on peripheral regions and causing the expansion of commodity frontiers.\textsuperscript{36}

A commodity frontier refers to territories of which capitalism depends on as the providers of resources for commodification.\textsuperscript{37} The current capitalist system is dependent on less developed peripheral countries as suppliers of goods and services. The intensification of social metabolism is pushing commodity frontiers into new, previously unexplored territories.\textsuperscript{38} These new frontiers are often occupied by indigenous groups or marginalized communities, setting the conditions for conflict. Opening up of extractive frontiers heightens the social metabolism at the expense of local livelihoods, rural identities, landscapes and natural resources.\textsuperscript{39} The extractive frontiers that capitalism is reliant on are becoming smaller, more costly and problematic.\textsuperscript{40} The crisis of capitalism, has geopolitical significance, transforming socio-ecological conflicts.\textsuperscript{41}

The political ecology concept of a “Global Commodity Chain” can be used to probe global economic processes and the dichotomy of resource use in one part of the world and extractive activities in another. A global commodity chain refers to a “series of interlinked exchanges through which a commodity and its constituents pass from extraction or harvesting through production to end use”.\textsuperscript{42} Exploring economic processes and inter-dependencies,

\textsuperscript{36} Bridge, “Mapping the Bonanza: Geographies of Mining Investment in an Era of Neoliberal Reform.”
\textsuperscript{39} Temper, Del Bene, and Martinez-Alier, “Mapping the Frontiers and Front Lines of Global Environmental Justice: The EJAtlas.”
\textsuperscript{40} Garcia, “Environmental Democratisation in Post-War Colombia.”
illuminates the embedded nature of power relations within the commodity chain answering questions of who the winners and losers of production are. The recent wave of globalization has lengthened commodity chains, distancing producers from consumers. This disconnect has severe consequences, modifying governance spaces available for justice. Globalizing the perspective on commodity chains, highlights larger processes of participation and varying institutional powers of different social actors along the chain.

To further consolidate and merge the commodity chain conceptualization from a socio-metabolic perspective the ecologically unequal exchange theory is explored. This theory asserts that developed countries externalize their consumption based environmental costs to developing countries, shifting the environmental degradation of the global commons on to countries of the GS. These GS, peripheral areas, consequently, suffer disproportionately from negative environmental impacts, without compensation for extraneities. This trade imbalance results in a commercial deficit where developing countries are unable to pay for imports. This is analogous with the situation in Latin America where the export of raw materials exceeds imports by a factor of at least three, in most countries. Congruent with the concept of “environmental load displacement” the dislocation between those benefiting and those harmed by the global political economic system is apparent in Latin America. These asymmetries fuel the conflict in extractive frontiers.

43 Temper, Del Bene, and Martinez-Alier, “Mapping the Frontiers and Front Lines of Global Environmental Justice: The EJAtlas.”
45 Hornborg.
46 Garcia, “Environmental Democratisation in Post-War Colombia.”
The combination of the environmental justice and socio-metabolic frames consolidates a more general theory on extractivism-related conflicts. It elucidates patterns among global environmental justice movements, which share a commonality demanding equity in the distribution of risk, recognition of the diversity of participants in affected communities and participation in policymaking. It allows for a deeper systematic evidence-based inquiry into the politics, power relations and socio-metabolic relations at a regional, national and global scale.

3.3 Investor-State Dispute Settlement

International investment agreements (IIAs) have given foreign investors access to new legal powers, enabling investors to bypass domestic courts, bringing claims to supranational arbitration systems. Investor-state arbitration generally relies on rules of procedure provided by the World Bank’s International Centre for Settlement Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL). The tribunals consist of three corporate lawyers, who meet in closed door private settings, where information is often not transparent to the public. The state and investor each get to appoint one arbitrator and a third (the President of the tribunal) is agreed upon mutually.

49 Özkaynak et al.
50 Moore and Perez-Rocha, “Extraction Casino: Mining.”
52 If they can’t agree then ICSID or another institution will be asked to make the third appointment (and that appointment is the president of the tribunal who has the most power). See, ICSID, “Selection and Appointment of Tribunal Members - ICSID Convention Arbitration,” ABA-ICSID-LCIA Symposium, 2013, https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx.
There are many competing theories on the impact of ISDS on host states’ governance. Many scholars contend that the ability of investors to access ISDS undermines government regulation, domestic court decisions, administrative agencies and human rights bodies. On the other hand, a substantial amount of legal literature argues contrary to these claims suggesting there are no problems with current IIAs. From this perspective, ISDS strengthens the rule of law and benefits host states’ economies increasing foreign direct investment (FDI). While arguments from both perspectives are well-founded, discussion around the termination and reform of treaties and ISDS, suggests host states feel their regulatory capacities are being unduly constrained.

IIAs differ based on the bargaining power of countries involved and when the treaty was negotiated. While there are some important variations in the content of IIAs, the key substantive provisions of investment protection are generally the same. There are six main provisions that are relevant to environmental regulation, each described and analyzed in Table 2 below.

The provisions of IIAs grant numerous rights to investors but not obligations. The one-sidedness of ISDS, and sole ability of investors to initiate ISDS claims, creates an asymmetry in

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53 Bonnitcha, “Assessing the Impacts of Investment Treaties: Overview of the Evidence IISD REPORT.”
57 Tienhaara, Expropriation, 63.
58 A state that is being sued may respond by claiming that the investor also breached its obligation, through a counterclaim. As long as the claim is connected to the main dispute. See, Jean Kalicki, “Counterclaims by States in Investment Arbitration,” Investment Treaty News, 2013, https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/.
power relations between host states and investors. Citizens have no legal counterweight at an international level to launch proceedings when mining companies interfere with public policies and violate environment or human rights. The ability of investors to bypass domestic courts, further exacerbates this inequality, diminishing the role of those courts and their sovereign right to govern over natural resources. Mining affected communities are reliant on regulatory systems and governments to guarantee their rights and enforce laws that act in the public interest. ISDS limits the government’s ability to do so, limiting the protections communities have access to in their courts.

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59 Moore and Perez-Rocha, “Extraction Casino: Mining.”
60 Moore and Perez-Rocha.
Table 2: Key provisions of investment treaties and environmental justice dimensions
Based on information from ⁵⁵ and ⁵⁶

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
<th>Environmental Justice Violations</th>
</tr>
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</table>
| 1. “Indirect” & Direct Expropriation | “Indirect”: Falls short of physical taking of property, results from the ‘effective loss of management, use or control, or depreciation of the value of assets of a foreign investor”⁵⁵.  
- Provides protection from regulations and government action that reduces the value of an investment⁶⁶.  
- Corporations can sue over the enforcement of environmental, health or other public interest laws⁶⁶.  
“Direct: The physical taking of property, resulting in economic loss⁶⁶. | Participatory: Right of public to participate in political processes that determine public interest laws.  
Recognition: Rights of communities to public interest laws & government protection. Right to nature, livelihoods, sacred places. |
| 2. Fair and Equitable Treatment Standards (FET) | Vague and subjective standard that has been broadly interpreted.  
It protects investors from any measure or action by the state that is interpreted by the tribunal to be “arbitrary”, “unreasonable” or “discriminatory” and establishes a ‘minimum standard of treatment’ for the investor⁵⁵. | Recognition: Interpreted in widely different ways without regard for diverse histories, cultures and value systems in different countries.  
Participatory: legal political systems and arbitrators, do not factor in cultural identities when interpreting the law. Narrowly applies to investor rights only. |
| 3. National Treatment and Most Favored Nation Treatment | Requires that countries do not discriminate against foreign investors in favor of domestic ones⁵⁵.  
Ex: A regulatory action that applies to ALL corporations but may have disproportionate affects, be that perceived or real, on foreign investors may be challenged here⁶⁶. | Recognition: Strips away the government’s ability to pursue national economic strategies that have proven effective in the past. Violates right to choose development strategy.  
Participatory: Limits the decision-making capacity of governments and rights of domestic industries to market advantages. |
<table>
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<th>4. <strong>Limits on Performance Requirements</strong></th>
<th>Governments surrender their authority to require investors to use a certain amount of local inputs in production - including labor and resources. There are no requirements to transfer technology.</th>
<th><strong>Participatory:</strong> Inability of government to avoid aspects of the resource curse; cannot pursue economic development tools for job creation or knowledge-sharing. <strong>Recognition:</strong> Does not recognize the right of governments to supply local employment – rights of citizens to benefit from their resources. <strong>Distributional:</strong> Only foreign workers benefit from extractivism; unequal distribution of benefits.</th>
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<td><strong>5. Full Protection and Security Standards (FPS)</strong></td>
<td>Requires the host country to employ ‘due diligence’ in actively protecting foreign investors from harm caused by state or civil society. It is the host state’s responsibility to actively provide physical protection to the investor from its own citizens.</td>
<td><strong>Recognition:</strong> Does not recognize the rights of citizens to protest. Encourages governments to criminalize activists, exacerbating the repression of human rights defenders. <strong>Participatory:</strong> Creates a system where government is pitted against its citizens. Legally requires government to overlook its duty to protect, respect and fulfill rights of its citizens.</td>
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<td><strong>6. Umbrella Clause</strong></td>
<td>Removes the need for investors to rely on dispute resolution clauses in investment contracts – which often give jurisdiction to local courts. Instead allows them to bring a claim directly to a supranational arbitration body. Essentially this allows investors to bypass domestic courts and bring a claim directly to a supranational arbitration panel. It limits the ability of domestic courts to resolve conflicts. This means that local citizens do not have access to legal recourse, as the responsibility for resolution lies within international institutions, they do not have access to.</td>
<td><strong>Recognition:</strong> Denies host countries the right to settle disputes under domestic law. Prioritizes investment law over domestic governance, leading to unequal power relations. <strong>Participatory:</strong> Denies affected citizens from participating in legal proceedings. In-accessibility of supranational arbitration.</td>
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61 Moore and Perez-Rocha.
62 Countries with an abundance of natural resources, tend to have less economic growth, less democracy, and worse development outcomes than countries with fewer natural resources. See, Bebbington et al., “Contention and Ambiguity: Mining and the Possibilities of Development.”
63 Tienhaara 2009,63-85
3.4 Latin American & Canadian Context

The extractive sector has launched 16% of all known ISDS cases, ranking second, after renewable energy, for the highest use of ISDS worldwide. Among these cases, 14% were filed under Canadian based treaties. The Canadian mining industry has played a pivotal role in the Latin American extractive empire, fueling conflict since the early 2000s. During this time, mining companies began registering in Canada and trading on the Toronto and Vancouver stock exchanges. Today, an estimated 60% of the world’s mining companies are listed in Canada. The high frequency of Canadian based mining companies is largely attributed to Canada’s legal system, often referred to as a ‘judicial paradise’. The laws governing the mining industry have lax listing and incorporation standards, low corporate taxes, a comprehensive framework for tax treaties (tax evasion), and negligible control over company activities abroad.

The Latin America mining boom is best understood by examining historical influences that have shaped the contemporary status of nations. In the 1990s, the neoliberalization of Latin American mining began. It was a coordinated effort between the World Bank, IMF, United Nations Economic Commission for Latin America and the Caribbean (CEPAL), National Ministries and advisories from industries and agencies of foreign governments. Countries indebted to international lending institutions, most Latin American countries, were strong armed

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65 Canadian companies are likely responsible for more than 14% of cases. Canadian companies choose to file for arbitration under the most favourable treaties, which may not always be of Canadian origin. See, Mertins-kirkwood and Smith, Digging for Dividends Settlement by Canadian Investors Abroad.
66 UNCTAD, “Investment Policy Hub.”
68 Moore and Perez-Rocha, “Extraction Casino: Mining.”
69 Mertins-kirkwood and Smith, Digging for Dividends Settlement by Canadian Investors Abroad.
70 Moore and Perez-Rocha, “Extraction Casino: Mining.”
71 Studnicki-Gizbert, “Canadian Mining in Latin America (1990 to Present): A Provisional History.”
into an extractive based economic development strategy.72 This neoliberal agenda, pressured countries to revisit mining laws and legal codes to attract more FDI in the mining sector.73 The neoliberal reforms included lower taxation and royalties, ended local sourcing/hiring obligations, eroded labor protections, reduced environmental regulation, and privatized state owned companies.74 This led to the negotiation of bilateral and multilateral free trade and investment treaties to lock in neoliberal reforms and free market ideologies, heightening the dependence of Latin American nations on large scale mineral extraction for export.75

In the early 2000s, after these new neoliberal free market policies were set in place, the mineral commodity boom began. Driven by China and India’s expanding economies, consumer electronic products, renewable energy products and industrial mineral spending, extraction increased exponentially.76 By 2017, Latin America contained 30% of the world’s investment in non-ferrous mineral exploration.77 This influx of mining corporations changed the manner in which corporations intervene in the social lives of communities.78 Consequently, the Observatory of Mining Conflicts in Latin America (OCMAL) reports more than 150 active mining conflicts, most of which began in the 2000s after these neoliberal reforms.79 The following section will explore these mining conflicts through four case studies, closely analyzing the relationship between EJMs and ISDS.

73 Bridge, “Mapping the Bonanza: Geographies of Mining Investment in an Era of Neoliberal Reform.”
74 Moore and Perez-Rocha, “Extraction Casino: Mining.”
76 Moore and Perez-Rocha, “Extraction Casino: Mining.”
77 Moore and Perez-Rocha.
78 Studnicki-Gizbert, “Canadian Mining in Latin America (1990 to Present): A Provisional History.”
4.0 CASE STUDIES

4.1 Bear Creek v. Peru

Fig.1. Regional overview of extractive-based ISDS cases in Peru (2000-present)

4.1.1 Environmental Justice Movement

The Santa Ana mining project is located in Puno, Southern Peru, near the Bolivian border. A preliminary assessment of the 5,400ha area indicates the mine will produce 47.4 million tons of silver over its 11-year lifespan. Although the Peruvian constitution states that only foreign nationals can gain access to natural resources within 50 km of border regions, Bear Creek was able to obtain the concession in 2007 through Supreme Decree 083. They did so

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through one of their Peruvian national employees and only later applied for mining rights in their own name.

In 2008, exploration work began with a comprehensive environmental and social impact assessment (ESIA). The ESIA was approved in 2011 on the condition that the investor implement public participation mechanisms for its evaluation.83 The ESIA presented to the communities was highly technical and only communicated in English.84 This inaccessibility, galvanized action from social organizations and they began to inform the public on the potential consequences of the project and the inadequacy of the ESIA. The ESIA did not contain proficient measures to mitigate pollution and indicated high levels of water consumption in agriculturally sensitive areas.85 Having seen the contamination of land and water sources from mining projects in other provinces, anti-mining citizens petitioned the government to cancel the concession, on the grounds of free prior informed consent.86 Their claims centered around issues of recognition as the mine would negatively affect their land and therefore cultural identity.87

The citizen plea went ignored and in May of 2011 citizens mobilized against the government, in a conflict known as “El Aymarazo”.88 The citizen led movement lasted over two months, with marches to Lima and Puno and various stoppages and blockades to prevent trucks

83 Bernasconi-Osterwalder and Brauch.
84 EJAtlas, “Mina Santa Ana Belonging to Bear Creek Company, and the Death of María Choque, Puno, Peru: EJAtlas.”
85 EJAtlas.
87 Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”
from making it to Puno. At the peak of the conflict, police tried to remove peasants from the Yoroco bridge. In their efforts to disperse the crowd, they threw tear gas, triggering a violent confrontation between policemen and protestors. Despite the onslaught of police, protestors held their ground and remained in place. Five people died during the conflict, one of them an elderly Maria Choque.

In June 2011, after two long months of protests, the newly elected government was eager to resolve the conflict and passed Supreme decree 032-2011 terminating Bear Creek’s mining concession. Following the Aymarazo the public prosecutor opened up investigations against 100 community activists and leaders of the mobilizations. The activists were accused of obstruction of public services, disturbing the peace and aggravated extortion. “Aggravated Extortion” is increasingly being used in cases of public protest in Peru, equating social organizations with that of criminal organizations. The prosecutor’s theory is based under the assumption that “the Aymarazo social protest was a criminal organization to extort the state”. Over the years, most of those were acquitted except for one, Walter Aduviri, current Governor of

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89 EJAtlas, “Mina Santa Ana Belonging to Bear Creek Company, and the Death of Maria Choque, Puno, Peru: EJAtlas.”
90 Terra Justa, PERÚ: Criminalización de La Protesta/Criminalisation of Protest - El Caso de Walter Aduviri/Aymarazo.
91 EJAtlas, “Mina Santa Ana Belonging to Bear Creek Company, and the Death of Maria Choque, Puno, Peru: EJAtlas.”
92 Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”
93 Open Democracy, “Criminalisation Brought to New Extremes in Case of Aymara Indigenous Communities in Peru.”
95 Open Democracy, “Criminalisation Brought to New Extremes in Case of Aymara Indigenous Communities in Peru.”
96 Open Democracy.
Puno and one of the main spokespeople of the Aymarazo. He was sentenced to 7 years in prison and a fine of $600,000. The criminalization of activists erodes the foundations of democracy, damaging political systems that guarantee citizens the rights to protest.

A local NGO-Human Rights and Environment (DHUMA), The Democracy Center, and other Peruvian and international organizations have been part of the campaign against the criminalization of social protestors and fought for the release of Aduviri. On October 5, 2018 the Peruvian Supreme Court accepted Aduviri’s appeal and overturned the sentence against him. In a news release following the Supreme Court decision, a representative from DHUMA, warned that Aduviri’s case was not an isolated one, stating “where there is resistance, the state systematically represses, imprisons and even creates conditions for the assassination of defenders.”

Procedural injustices are inherent to the current legal systems which criminalize activists and support industry over citizens’ rights.

Over the almost decade long legal battle for Aduviri’s freedom, another legal case was unfolding at an international level. In 2014, Bear Creek filed a claim against Peru under the Canada-Peru FTA.

4.1.2 ISDS Case

97 Institute for Policy Studies, “Supreme Court Accepts Appeal of Peruvian Human Rights Defender and Overturns Sentence.”
98 Appendix A discusses details of the case and two key precedents at stake.
99 Institute for Policy Studies, “Supreme Court Accepts Appeal of Peruvian Human Rights Defender and Overturns Sentence.”
100 DHUMA- Human Rights and Environment- is a civil society organization that works to defend indigenous rights in Southern Peru. See, https://www.derechoshumanospuno.org/
101 Institute for Policy Studies, “Supreme Court Accepts Appeal of Peruvian Human Rights Defender and Overturns Sentence.”
102 Institute for Policy Studies.
103 Institute for Policy Studies.
In August of 2014, Bear Creek filed for arbitration claiming that Decree 032, which resulted in the termination of their concession, breached the requirements under the Canada-Peru FTA. They claimed the following treaty violations: expropriation, fair and equitable treatment (FET), full protection and security (FPS), and protection against discriminatory measures. Three amicus curiae\textsuperscript{104} applications were filed by various social organizations and groups involved in the dispute, only two were accepted.\textsuperscript{105} Peru lost the case and was ordered to compensate Bear Creek for sunk costs, totaling US$18.2 million plus legal fees.\textsuperscript{106} The various legal proceedings of this case bring to the fore questions of tribunals’ ability to provide space for human rights, the importance of public consultation, corporate liability and legal requirements for a social license to operate.

The first legal issue under analysis is the legality requirement of an investment. Peru’s main argument was that the tribunal lacked jurisdiction given that Bear Creek’s investment was made in bad faith and unlawfully obtained.\textsuperscript{107} The tribunal looked at the language of the FTA to assess whether it contained preconditions for jurisdiction based on the legality of an investment. The tribunal found that “there is no jurisdictional requirement that the Claimant’s investment [be] legally constituted under the laws of Peru.”\textsuperscript{108}

This interpretation strips the government’s ability to apply domestic law to foreign investors. It sets the standard that corporations can violate domestic law and still be protected

\textsuperscript{104} Amicus Curiae applications are the only form of participation for external parties, it is at the tribunals discretion to accept or reject the applications. Even when they do accept a third-party submission, they may still choose to overlook its arguments. Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”


\textsuperscript{106} Páez-Salgado.

\textsuperscript{107} Bear Creek Mining Corporation v. Republic of Perú, ICSID Case No. ARB/14/21, Award, 30 November 2017: para. 326.

\textsuperscript{108} Ibid: para. 319.
under the international investment regime. This is a dangerous precedent that denies procedural rights and recognition of state sovereignty. Countries cannot consent to the protections these agreements grant to investors, when they have no control or say over who they apply to. As long as these investment treaties exist, foreign investors have free reign to enter into a country without their consent, acquire land concessions, and exploit them economically. This is in essence, a colonial act, that ignores domestic law and dispossesses communities of their land. Foreign investors are shielded from any risk or repercussions from bad business practices and are granted legal recourse should countries try to reclaim their land that was illegally acquired. This decision makes a mockery of domestic law, allowing those who could be considered criminals in host states to access ISDS and use it as an insurance policy against corporate malpractice.

Peru’s other main defence centered on the Doctrine of Police Powers. The contours of the Police Powers Doctrine\textsuperscript{109} are uncertain and there lacks a uniform set of standards for interpretation.\textsuperscript{110} Some tribunals have interpreted this doctrine to include health and environmental regulation, while others have a much narrower approach.\textsuperscript{111} In this case, the interpretation fell under the later. The tribunal ruled that the police powers doctrine should be

\textsuperscript{109} This doctrine proposes that 'a state is not liable for economic injury which is a consequence of bona fide "regulation" within the accepted police powers of states. See, Sam Luttrell, “Green Multilateralism : 'Mega FTAs and the Changing Interface between Environmental Regulation and Investment Protection,” in Research Handbook on Environment and Investment Law, ed. Kate Miles (Northampton: Edward Elgar Publishing, 2019), 264–92..

\textsuperscript{110} Luttrell.

\textsuperscript{111} Páez-Salgado, “Four Key Takeaways of the Decision in Bear Creek Mining Corp v Republic of Peru.”
treated as a general exception\textsuperscript{112} to the FTA.\textsuperscript{113} Under this legal scope, Peru had failed to prove “why it was necessary for the protection of human life not to offer compensation to Claimant for the derogation of Supreme Decree 083.”\textsuperscript{114} For this reason, the tribunal found Decree 083 to be an unlawful expropriation and in breach of the FTA.\textsuperscript{115}

This sets the standard that even with a general exception clause fulfilled, for the sake of protecting human life, compensation is still required. The interpretation of the Police Powers Doctrine confirms the lack of clarity regarding criteria to distinguish an expropriation from a legitimate exercise of government regulation. It reveals the corporate imbalance inherent to the system that requires monetary payment for the protection of human life. Ambiguities like these in FTAs highlight the need for greater interpretive guidance and balance between regulatory sovereignty and investor protection.

The other key legal issue was the consideration of the relevant standards for determining whether an investor had obtained a ‘social license to operate’. This was only considered in the merits and quantification of possible damages. A social license to operate exists when a project has broad social acceptance and ongoing approval within the local community and all affected stakeholders.\textsuperscript{116} It is considered a form of ‘soft law’ and fails to impose any legal obligation.\textsuperscript{117}

\textsuperscript{112} Nothing should prevent a party from enforcing measures necessary:
\begin{itemize}
  \item[a)] to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;
  \item[b)] to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
  \item[c)] for the conservation of living or non-living exhaustible natural resources.
\end{itemize}

\textsuperscript{113} Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”

\textsuperscript{114} \textit{Bear Creek} Award: para. 477.

\textsuperscript{115} Ibid: para. 478.


\textsuperscript{117} Marcoux and Newcombe.
The Tribunal examined what is required of an investor when consulting with indigenous communities, referring to the international law framework. The majority of the Tribunal emphasized the obligation of the State to monitor investor efforts and ensure consultation with affected communities. Peru’s arbitrator Mr. Sands disagreed, suggesting a social license to operate is the responsibility of the investor and failure to acquire one should be taken into consideration by the Tribunal.

Mr. Sands in his partial dissent\textsuperscript{118} addressed the quantification of awards and a social license to operate. Bear Creek’s corporate malpractice and inability to obtain a social license to operate resulted in ‘contributory fault’ that he argued should reduce the amount awarded to Bear Creek. His argument centered around the ILO Convention no.169 and the requirement of corporations to consult with indigenous communities. He argued that the ILO convention is a “rule of international law applicable to the territory of Peru” and that the Tribunal “is entitled to take the convention into account in determining whether the Claimant carried out its obligation.”\textsuperscript{119} Bear Creek’s unfamiliarity with Article 15 of the convention which outlines the rights of indigenous peoples shows that they were “not as fully prepared for making an investment in the lands of communities of indigenous peoples.”\textsuperscript{120}

Mr. Sands made reference to the expert witness Professor Antonio Alfonso Peña Jumpa, who testified that “Bear Creek only worked with four of the communities in the area linked to the mining” while 13 communities were excluded.\textsuperscript{121} It was these excluded communities that

\textsuperscript{119} Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of P. Sands, 30 November 2017: para 11.
\textsuperscript{120} Ibid: para. 12.
\textsuperscript{121} Ibid: para. 26.
“began to protest against the Santa Ana Project.”\textsuperscript{122} The investor’s outreach programme was inadequate, failing to involve all the potentially affected communities. Communities were concerned because they felt themselves to be excluded from the benefits and only subject to the environmental costs.\textsuperscript{123} This lack of participatory justice and exclusion from decision making processes fueled the conflict, leading to social unrest and the eventual termination of the concession.

This conclusion was confirmed by the amicus curiae submitted by DHUMA.\textsuperscript{124} The written submission contended that Bear Creek failed to engage in proper community relations, contributing to the losses it suffered.\textsuperscript{125} They also noted that members of communities felt unable to participate in the public meetings and consultation processes. Bear Creek responded to the amicus criticizing DHUMA for being “biased and unsubstantiated” and a “radical anti-mining” organization.\textsuperscript{126} Sands disagreed with Bear Creek’s stance stating “DHUMA assisted the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties”.\textsuperscript{127} He went on to highlight that “As an international investor the Claimant has legitimate interests and rights under international law; local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights.”\textsuperscript{128}

This is an important recognition of the rights of indigenous persons to participation in arbitration proceedings. Allowing those directly affected to testify during arbitration broadens the overall perceptions of the case, taking all facts into consideration and legitimizing decisions.

\textsuperscript{122} Ibid: para. 27.  
\textsuperscript{123} Ibid: para. 35.  
\textsuperscript{124} DHUMA- Human Rights and Environment- is a civil society organization that works to defend indigenous rights in Southern Peru. See, \url{https://www.derechoshumanospuno.org/}  
\textsuperscript{125} Bear Creek Partial Dissent: para. 36.  
\textsuperscript{126} Ibid: para. 36.  
\textsuperscript{127} Ibid: para. 36.  
\textsuperscript{128} Ibid: para. 36.
This also brings attention to the injustice of investment law interpretations that do not equate the international laws that protect investors to those that protect indigenous rights.

Sand’s concluded his dissent, arguing that the “Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain [a social license to operate].”129 Bear Creek should have been more well versed in the protections and standards of the ILO convention. Decisions were made by foreign investors in faraway countries without proper recognition of the livelihoods and diverse cultures on the extractive frontier. This inadequacy limited the participatory rights to communal consultation and lent to poor community relations. This disconnect, prevented a social license to operate from being obtained and provoked the social unrest that eventually resulted in the termination of the concession.

The other co-arbitrators responded stating, “(The ILO Convention) imposes direct obligations only on states, not on private companies” and “the indigenous communities, irrespective of whether they were in favor or against the project, are not the respondent in this arbitration.”130 This response to Mr. Sands dissent brings to the fore criticism of the investment framework and its suitability in resolving these disputes. It once again highlights the lack of participatory rights for those directly impacted. The conflict in this case was between the indigenous communities and the government backed corporation. Resolving the dispute in international arbitration, where the government is the respondent, seems misguided as the actors involved were not government representatives rather communities acting on their own accord.

130 Bear Creek Award: para. 666.
4.2 Copper Mesa v. Ecuador

Fig. 2. Regional overview of extractive-based ISDS cases in Ecuador (2000-present)

4.2.1 Environmental Justice Movement

The Junín Intag valley\textsuperscript{131} of North Eastern Ecuador contains forests within two of the worlds 34 biological hotspots and an estimated 6.8 million tons of copper.\textsuperscript{132} Exploration first began in the 1990s by Japanese mining corporation Bishimetal and the World Bank’s PRODEMINCA.\textsuperscript{133} A review by the World Bank Inspection Panel found that the World Bank failed to abide by its own standards and guidelines for environmental and social conduct with

\textsuperscript{131} The Intag area’s principal communities are Cotacachi, Apuela, Peñaherrera and García Moreno. The smaller communities include Chontal Alto, Chontal Bajo, La Armenia, Chalguayacu Alto, Chalguayacu Bajo, Junín, Cuellaje, La Magnolia, Alto Mira, Barcelona, El Rosario, La Esperanza, La Libertad and Cerro Pelado. For ease of reference, these smaller communities are collectively described as the “Junín area” See, \textit{Copper Mesa Mining Corporation v. Republic of Ecuador}, PCA Case No. 2012-2, Award, 15 March 2016: para 4.11.


\textsuperscript{133} PRODEMINCA (Ecuador Mining Development and Environmental Control Technical Assistance Project) is a mineralogical mapping exercise funded by the World Bank, UK and Sweden. PRODEMINCA’s primary objectives were to promote industrial mining and modify legislation to make Ecuador pro industry. See, \textit{Copper Mesa Award}: para. 4.43
this project, including consultation with local communities. It played a role in the environmental injustices communities were subject to, contributing to the escalation of the conflict that lead to arbitration. This reveals the role the World Bank plays in empowering extractive projects in GS regions through both explorative projects and in its support for ISDS.

A preliminary environmental impact statement (EIS) of the concession revealed mining activities would have catastrophic effects on the surrounding ecosystems and communities. In response, DECOIN, a grassroots anti-mining organization formed. Their work lead to the declaration of Cotacachi County as an “ecological county” where mining was prohibited.

Bishimetros eventually withdrew from the project, knowing that the community would never agree nor consent to development.

Regardless of the “ecological county” status and communal resistance to mining, in 2004 the rights for the Junín Concession were auctioned off to Ascendant Exploration (later named Copper Mesa). Copper Mesa did not attempt to obtain a social license to operate nor engage with community consultations, a basic legal requirement. Instead they began an aggressive pro-mining campaign that divided the community and escalated the conflict to a point of violence.

This campaign ignored the community’s indigenous rights and concerns for agricultural livelihoods. Copper Mesa’s imposition of an extractive based development model on rural communities, obstructs recognitional justice and the rights to alternative modes of development.

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134 Copper Mesa Award: para. 4.43.
135 The mine would lead to mass deforestation, drying local climate causing desertification, contamination of water sources by lead, arsenic, cadmium and the relocation of 100 families. See, Zorilla, “A Brief History of Resistance to Mining in Intag, Ecuador.”.
136 Zorilla.
Communities were fiercely opposed to extractive development and stood united against the multinational corporation (MNC).

In response, CODEGAM, a pro-mining organization was formed and fully funded by Copper Mesa.\footnote{Copper Mesa Award: para. 4.83-4.93.} This political organization employed people from Intag and was in charge of Copper Mesa’s community development projects.\footnote{Codelco out of Intag, “Struggle of Local Communities against an Open Pit Copper Mine in the Region of Intag, Ecuador.” News, 2017, http://codelcoecuador.com/resistance/} They would violently protest against the mayor of Cotacachi for supporting anti-mining organizations and call on their followers to speak out against him.\footnote{EJAtlas, “Intag Mining in Junin, Ecuador,” 2020, https://ejatlas.org/print/intag-mining-junin-ecuador 1/8%0A1/15/2020.} CODEGAM even tried to use its political agency to denounce the mayor and create a new municipality.\footnote{Zorilla, “A Brief History of Resistance to Mining in Intag, Ecuador.”} The creation of CODEGAM, undermined Ecuador’s sovereignty, threatening its democracy and ability to self-govern.

In 2005, Copper Mesa became publicly traded on the Toronto Stock Exchange (TSX)\footnote{Corporate Europe Observatory, “ARBITRATORS REWARD MINING CORPORATIONS’ HUMAN RIGHTS ABUSES: COPPER MESA vs ECUADOR.”} Carlos Zorilla, the director of DECOIN, travelled to Ottawa to petition the TSX against listing. He argued that Copper Mesa had violated the OECD guidelines for multinational enterprises, citing 14 concerns over human rights and the environment.\footnote{Jennifer Moore, “Canadian Mining Firm Financed Violence in Ecuador: Lawsuit,” The Tyee, 2009, https://thetyee.ca/News/2009/03/03/CanMining/} The TSX ignored the complaints allowing the company to accrue over US$25 million in capital funds.\footnote{Moore.} Some of these profits were later used to finance armed attacks in 2006.\footnote{Zorilla, “A Brief History of Resistance to Mining in Intag, Ecuador.”} The lengthening of the commodity chain strains the capacities of communities to access government institutions for justice. In this case,
Carlos Zorilla was on the losing end of the chain, with limited agency and ability to prevent the listing of Copper Mesa. By 2006, all local governments and organizations were publicly opposed to the project. Even CODEGAM broke ties with Copper Mesa, issuing a public apology, joining the anti-mining movement, and asking for a full investigation into Copper Mesa.147 Regardless of the mounting opposition, Copper Mesa tried to leverage the court system to intimidate the opposition. They filed criminal lawsuits against community members and the leader of DECOIN, Carlos Zorilla, was arrested on trumped up charges.148 The criminalization of activists is a fear tactic that is frequently used to intimidate the opposition. This shows the power dynamics and influence corporations have on local political systems.

In December of 2006, the conflict reached its peak erupting in violence when several armed paramilitary guards tried to gain entry into the concessions.149 The guards pepper sprayed and fired guns indiscriminately into the crowd wounding community members, the attack was well documented and videotaped.150 Copper Mesa denied hiring the guards even though they were traced back to Falericorp, a company frequently contracted by Copper Mesa.151

In 2008, after years of conflict and the election of a new government, Copper Mesa’s concession was cancelled. The new government, under Rafael Correa, amended the constitution to include indigenous concepts and the rights of nature ‘Buen Vivir’.152 The mining mandate of

147 Zorilla.
149 Moore and Perez-Rocha, “Extraction Casino: Mining.”
151 Zorilla, “A Brief History of Resistance to Mining in Intag, Ecuador.”
152 Codelco out of Intag, “Struggle of Local Communities against an Open Pit Copper Mine in the Region of Intag, Ecuador.”
2008 had strict requirements for public participation. The company’s failure to get the ESIA approved by the Ministry of Energy and Mines and to consult with affected communities was grounds for termination.

In an attempt to hold Copper Mesa accountable for the 2006 attacks, community members from Ecuador sued the TSX and the directors of Copper Mesa, in Ontario courts but lost. This asymmetry of access to justice mechanisms, reinforces colonial power dynamics where corporations cannot be held responsible for their actions. The ability of Copper Mesa to file for arbitration after its malpractice, verifies the injustice inherent to the investment regime, where protection is only upheld for investors at the expense of communities.

4.2.2 ISDS Case

In 2011, following the Canadian court case, Copper Mesa filed for arbitration under the Canada-Ecuador BIT claiming US$69.7 million in damages. In brief, Copper Mesa alleged that Ecuador violated its obligations under the BIT including obligations to pay compensation for indirect & direct expropriation, FET, FPS, and to provide national treatment. The Mining Mandate of 2008 that resulted in the termination of Copper Mesa’s contract was argued to be in violation of the treaty. Ecuador rejected these claims contending that the revocation of the Junín

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154 Codelco out of Intag, “Struggle of Local Communities against an Open Pit Copper Mine in the Region of Intag, Ecuador.”
155 See Appendix B for details.
156 The published award is redacted.
157 Copper Mesa Award: para. 6.1.
concessions was part of a “legitimate reform of the Respondent’s mining regime” and was an exercise of legitimate regulatory authority, falling under the General Exception\textsuperscript{158} Clause.\textsuperscript{159}

Ecuador’s argument followed that they were simply “responding to a compelling public policy consideration (the need to consult affected local populations).”\textsuperscript{160} The tribunal ruled that the termination resolutions were made in “an arbitrary manner and without due process.”\textsuperscript{161} The Mining Mandate, which required no compensation for the termination of concessions, did not supersede the Treaty, which imposes “higher standards as a matter of international law.”\textsuperscript{162} In layman’s terms, this means the international investment legal regime takes precedence over domestic law, stripping away Ecuador’s right to self-governance. The tribunal ruled that “the permanent taking of the claimant’s Junín concessions was an expropriation” under the BIT and subject to compensation.\textsuperscript{163}

This brings into discussion the effectiveness of the General Exception Clause. This clause was established to protect a state’s ability to self-govern and regulate in the public interest. If the termination of a mining concession, as a means to protect human health and prevent violence, does not constitute a legitimate exercise of state power, what does? The laws that are in place to prevent the abuse of legal systems are grossly inadequate, highlighting a major gap in procedural processes that are unfairly aligned with corporate interests.

\textsuperscript{158} Nothing should prevent a party from enforcing measures necessary:
\begin{itemize}
    \item [a)] to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;
    \item [b)] to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
    \item [c)] for the conservation of living or non-living exhaustible natural resources.
\end{itemize}


\textsuperscript{159} Ibid: para. 6.2.
\textsuperscript{160} Ibid: para. 6.11.
\textsuperscript{161} Ibid: para. 6.66.
\textsuperscript{162} Ibid: para. 6.69.
\textsuperscript{163} Ibid: para. 6.67.
The tribunal went on to examine the violation of FPS and FET standards.\textsuperscript{164} The discussion focused on Ecuador’s legal duty to “impose its will on anti-miners” as to ensure that Copper Mesa could gain “access to the Junín concessions to carry out the required consultation” necessary for its EIS.\textsuperscript{165} The tribunal highlighted the fact that the region was known to be plagued by conflict, “real, long-standing and well-known even before [Copper Mesa]’s Junín concessions.”\textsuperscript{166} Copper Mesa was aware before entering the area of the potential risks, yet, the tribunals ultimate decision was “the government of Quito could hardly have declared war on its people, but in the tribunal view it could not do nothing.”\textsuperscript{167} They found Ecuador in breach of the FPS and FET clause.

This decision marks a dangerous trend in ISDS cases. Governments are, under this interpretation, required to impose their will and actively suppress their own citizens for the benefit of corporations. This denies citizens of the right to protest and right to protections from their own political systems. This case illustrates how the investment regime may lead to increased repression and criminalization of anti-mining activists. It creates a high stake decision between facing a costly lawsuit by fulfilling obligations to protect, respect and fulfill rights of citizens versus protecting investor interests.\textsuperscript{168}

The procedural injustices are far reaching when a legal obligation is placed on governments to secure “consultation” of local communities. Consultation is voluntary in nature; it cannot be forced on a community. Communities have the right to say no, it is not the

\textsuperscript{164} FET and FPS standards impose legally distinct obligations under the treat; but in this case it was not necessary to distinguish between them.
\textsuperscript{165} Ibid: para. 6.83.
\textsuperscript{166} Ibid: para. 6.83.
\textsuperscript{167} Ibid: para. 6.83.
government’s responsibility to force them to comply. Copper Mesa was fully aware from the time of acquisition, that the region was strongly opposed to mining and would not grant a social license to operate. They chose to take on that risk, thus it should be their sole responsibility to deal with the consequences, not the governments.

Ecuador’s main defense was the doctrine of ‘unclean hands’ which falls under international law. This international law serves as a defense to the defendant, if they can prove the plaintiff acted unethically then the complaint will be dismissed. They had an impressive amount of expert testimony, referencing the legal obligations of foreign investors. The tribunal ruled that “unclean hands” was a matter of admissibility rather than jurisdiction. This meant that because Ecuador had not made any complaints “regarding any alleged violation of human rights by the Claimant prior to this arbitration”, the testimonies were inadmissible. Regardless of the myriad of evidence Ecuador had on human rights violations, they were not taken into consideration for the final ruling.

This participatory injustice prevents local concerns and voices of those affected by Copper Mesa’s actions from being heard. This forestalls corporate accountability from being fulfilled as human rights abuses are deemed irrelevant to processes that lead up to the termination of a contract. Tribunals make decisions that have far reaching effects on communities and entire nations without taking into consideration all the facts, evidence and socio-political circumstances that were involved with the alleged ‘breach’ of treaties. This casts a

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170 Copper Mesa Award: para. 5.37.
doubt on whether ISDS is the right forum to resolve these disputes if they only take into consideration a limited scope of information.

The tribunal only whilst deciding merits, took into consideration the negligent behavior of Copper Mesa. Copper Mesa claimed merits based on a market-based approach.\(^1\)\(^7\)\(^1\) The tribunal denied this proposition using a sunk cost only model with damages reduced due to ‘contributory fault’.\(^1\)\(^7\)\(^2\) The tribunal acknowledged Copper Mesa’s mal practices stating no corporation should “resort to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands.”\(^1\)\(^7\)\(^3\) For that reason, Copper Mesa was found to have contributed to 30% of its losses by negligent acts and was awarded US$24 million.\(^1\)\(^7\)\(^4\)

Contributory fault as a means to redress human right abuses brings to the fore a slew of injustices. It essentially puts a price on corporate negligence, setting a precedent that if you have money you can violate human rights. This case exposes the power dynamics inherent to the international investment regime. The elite corporations who have money thrive in the current political system that allows a price tag to be put on human life. A 30% reduction in merits, will not bring back those who lost their lives in the struggle for sovereignty and control over their traditional lands. Reducing payouts will not encourage a change in corporate accountability rather it perpetuates a system of inequality where investors profit off of communal struggle.

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\(^{1}\)\(^7\)\(^1\) The market approach is a method of determining the value of an asset based on the selling price of similar assets. See, Jason Fernando and Gordon Scott, “Market Approach,” Invstopedia, 2020, https://www.invstopedia.com/terms/m/market-approach.asp.

\(^{1}\)\(^7\)\(^2\) Article 39 of the ILC Articles on State Responsibility provides: “In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.” See, Copper Mesa Award: para 6.91.

\(^{1}\)\(^7\)\(^3\) Copper Mesa Award: para. 6.99.

4.3 South American Silver Corp (SASC) v. Bolivia

Fig.3. Regional overview of extractive-based ISDS cases in Bolivia (2000-present)

4.3.1 Environmental Justice Movement

The Malku Khota mine is located in Northern Potosí, one of the poorest regions of Bolivia. A preliminary assessment of the area indicates that it is host to one of the world’s largest silver deposits. The 46 surrounding indigenous communities, who hold territorial rights over the land, are reliant on the watershed for agricultural livelihoods. Contamination or overexploitation would lead to a collapse of local economies and traditional ways of life.

In 2006, SASC acquired the rights to Malku Khota. The company, in collaboration with NGOs and sociologists, spent years trying to “help them [communities] understand the

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benefits that the project would bring.” They would negotiate on a community to community basis to create divisions within and between communities. The company would identify leaders who would lobby on their behalf, to manipulate the pre-existing indigenous leadership. They preyed on vulnerabilities including poverty, inaccessible healthcare, and dwindling agriculture, dangling infrastructure investments as an incentive for support. The notion of helping communities understand, is a problematic approach and one that is emblematic of modern colonial capitalism. SASC should have worked alongside communities to reach a mutually agreed upon course of action, instead of trying to force an agreement. From these efforts, SASC was able to secure support from 43 of 46 communities.

During this 6-year period of exploration and community campaigning not a single ESIA was carried out. Field work by Celia Garces examined the water requirements for the three open pit mines and the potential contamination. Her study revealed that in the event that operations are executed there will likely be no lakes left and the Malku Khotka community would have to be displaced for tailing ponds. This participatory injustice denies communities of their rights to consultation, involvement and access to information. They were only presented with a one-sided, misleading narrative that neglected to include environmental consequences.

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180 Díaz-Cuellar and Francescone.
182 Garces, “Bolivia’s Mine Nationalization of South American Silver Corporation.”
183 Garces.
184 Garces.
In 2012, after years of frustration and failure to gain support from the three remaining communities conflict erupted. On May 5, police officers entered the homes of 25 sleeping indigenous families.\textsuperscript{185} The families were gassed, assaulted and leaders were apprehended.\textsuperscript{186} In retaliation the communities kidnapped two police officers and held them hostage.\textsuperscript{187}

In response to the attack, 19 ayllus\textsuperscript{188} united to strengthen community resistance and produce a declaration demanding the withdrawal of SASC. Before they could present their declaration in the municipality of Acasio, where government officials were meeting, violence erupted in front of the City Hall, leaving three wounded.\textsuperscript{189} Following this incident, the leader of the movement Cancio Rojas was arrested for attempted murder of the kidnapped police officers. He was charged, despite the fact that he was not even in Malku Kho\textsuperscript{190}ta on May 5, the day of the kidnapping. This political fabrication highlights the power dynamics and ability of SASC to influence domestic legal and political systems. The lack of recognition of the right to protest, perpetuates a colonial system that allows foreign entities to rule over and imprison host states’ citizens.\textsuperscript{191} The governments primary politic was to protect the company rather than its citizens.

On May 28, the government of Potosí and the minister of mining met to sign an agreement that would guarantee SASC’s explorative activities in the area.\textsuperscript{192} This sparked a mass social mobilization and march to La Paz in protest. Communities demanded recognition for

\textsuperscript{186} Garces, “A Briefing on South American Silver’s Actions in Bolivia.”
\textsuperscript{187} Garces, “Bolivia’s Mine Nationalization of South American Silver Corporation.”
\textsuperscript{188} An ayllu is a territorial-political organization, a group of ayllus is called a Marka, and the Marka of Sacaca, in this case, is led by Cancio Rojas. See, Garces, “Bolivia’s Mine Nationalization of South American Silver Corporation.”
\textsuperscript{189} Garces, “A Briefing on South American Silver’s Actions in Bolivia.”
\textsuperscript{190} Garces.
\textsuperscript{191} Garces.
\textsuperscript{192} Garces.
protected indigenous territories, participatory rights to consultation, and cancellation of the
‘imperialist’ project.\textsuperscript{193} During the march, two SASC engineers, who were accused of trespassing
on indigenous territory were kidnapped.\textsuperscript{194} The Governor of Potosí responded, demanding that
the military be deployed to protect and ensure the safety of SASC’s investments. The use of
military forces to protect a foreign company from a host state’s citizens is a denial of the right to
protection and security from the government. It contradicts the inherent function of the military
to protect and serve their people.

On July 7, 400 police officers were dispatched to retrieve the hostages.\textsuperscript{195} Despite initial
claims made by the police about the nature of the death of a community member, it was
determined that the individual died as a result of a gunshot wound to the head.\textsuperscript{196} Only after the
death of the activist, did SASC temporarily suspend its mining activities in the area.\textsuperscript{197}

Bolivian President Evo Morales, responded to the tragic death by meeting with leaders
from the Ayllus, urging the public ministry to carry out an in-depth investigation into the death,
and nationalizing the mine via Supreme Decree 1308.\textsuperscript{198} This push for sovereignty resulted in
backlash from the international community, corporate writers labelled Bolivia as an “outlaw
nation” and the World Bank ranked Bolivia the second worst country for investment, 161 out of

\textsuperscript{193} Garces, “Bolivia’s Mine Nationalization of South American Silver Corporation.”
\textsuperscript{194} Díaz-Cuellar and Francescone, “Canadian Mining Interests in Bolivia, 1985–2015: Trajectories of Failures,
Successes, and Violence.”
\textsuperscript{195} Díaz-Cuellar and Francescone.
\textsuperscript{196} Díaz-Cuellar and Francescone.
\textsuperscript{197} Garces, “Bolivia’s Mine Nationalization of South American Silver Corporation.”
\textsuperscript{198} Kellogg, “Behind Bolivia’s Nationalization of Canadian Mine.”
183 by the World Bank’s ease of doing business index. Shortly after the nationalization, SASC filed for arbitration claiming breach of the UK-Bolivia BIT.  

4.3.2 ISDS Case

SASC filed for arbitration under its Bermudan subsidiary SAS, in order to access the Bolivia-UK BIT. They claimed Bolivia unlawfully expropriated their property and violated the FPS and FET clause, demanding damages of US$385.7 million. The tribunal found the nationalization of the mine to be a direct expropriation and in breach of the obligation to provide compensation for expropriation. SAS was compensated US$18.7 million.

Bolivia had two main objections: the tribunal lacked jurisdiction since SAS was not the direct owner of shares and that the claims were inadmissible because SAS did not have clean hands thus did not fulfill the legality requirement.

The tribunal dismissed the first objection, stating that the corporate structure of SAS was not uncommon and that a BIT does not require the tribunal to consider the “origin of such resources and technologies to be relevant for jurisdiction.” Regardless of the fact that all capital and resources came from the Canadian parent company SASC, SAS which was a shell company in Bermuda had jurisdiction. The globalization of the commodity chain has allowed

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201 Moore and Perez-Rocha, “Extraction Casino: Mining.”  
204 Menon.  
205 South American Silver Award: para. 333.
corporations to thrive, providing them access to a broad range of jurisdictional and legal protections. This makes corporate responsibility difficult to attain, as government institutions and capacities for justice vary across transnational borders. This participatory injustice prevents accountability, limiting the legal systems that are in place to prevent an abuse of power.

The second objection was of SAS’s ‘unclean hands’. This is not referred to in the text of the BIT, rather is a standard of international law. Bolivia argued that SAS had aggravated the conflict leading to serious acts of violence and that SAS had significant downfalls in managing community relations. Bolivia alleged that SAS “undermined the human, special and collective rights of a community that requires special protection under international law.” The tribunal rejected Bolivia’s argument stating they had failed to show that the alleged violations make the investment illegal. They went on to state, even if the conduct may have motivated the reversion, “this does not mean that the investment ceased to be covered by the terms of the treaty.”

This strips host governments of their power to self-govern and protect their people from corporate misconduct. Even if the company had committed acts that fueled the social unrest and violence, they are still protected by these agreements. Corporate accountability is thus unobtainable, when negligent activity will always be subject to protection under the international investment framework. This further diminishes recognitional justice when the protection of

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206 This doctrine is an international standard that proposes that a state is not liable for economic injury which is a consequence of a bona fide regulation. See, Luttrell, “Green Multilateralism: ’Mega FTAs and the Changing Interface between Environmental Regulation and Investment Protection.”

207 Menon, “Tribunal Finds Expropriation of Investment by Bolivia Due to Non-Payment of Compensation but Awards Only Sunk Costs to British Investor.”

208 South American Silver Award: para. 369.

personal dignity of all individuals and their collective indigenous identities are overlooked in legal proceedings.

The ILO convention 169 on Indigenous and Tribal People also came under discussion. Bolivia asserted that in cases of conflict, when there are multiple applicable laws “obligations concerning the fundamental rights of the indigenous communities prevail over obligations concerning foreign investment protection.”210 The tribunal was not convinced that the rules were part of customary international law nor binding between the UK and Bolivia.211 Echoing the decisions made in Bear Creek, the tribunal ruled against the inclusion of the ILO convention 169 stating “[Bolivia] fails to explain how these rules conflict with the Treaty or why they should prevail over its provisions.”212

This denial of legal recognition of indigenous identities is entrenched within the investment regime. Indigenous people are often the actors directly affected by investor actions, yet they are denied legal agency and recognition at an international scale. This decision perpetuates global systematic inequalities, where corporations are prioritized over basic fundamental human rights. The legal hierarchy created precludes participatory rights, and the ability of those affected to take part in decision making processes.

SAS’s argument for the alleged breach of the FPS clause was based on “measures Bolivia could have taken as an alternative to expropriation…including the militarization of the area surrounding Malku Khota.”213 The tribunal rejected this argument, stating it “does not see how a

210 South American Silver Award: para. 196.
212 South American Silver Award: para. 217.
solution of that sort is useful to placate a social conflict.”\textsuperscript{214} Although the tribunal ruled against this claim, the ability of SAS to demand military protection for its investment marks a dangerous trend and threat to state sovereignty. The FPS clause can require a host government to deploy military or police force and take action against its own people. This aspect of the ISDS system highlights the gross inequality and oppression of domestic governance. A country should never be under legal obligation to suppress its own people for the benefit of a foreign corporation. This case acts as a warning, illustrating the dangers the investment frame poses on recognitional justice and sovereignty over political systems.

Another important aspect in this case was the use of a third-party funder (TPF), called ‘the Fund’. This fund specializes in funding international arbitration proceedings and providing assistance with the enforcement of arbitration awards.\textsuperscript{215} In return, the fund takes a percentage of the arbitral award, in SAS’ case it was one third of the total amount.\textsuperscript{216}

TPFs have benefited MNCs, allowing them to pursue damages through ISDS without taking on all the risk. This creates an asymmetry in access, where corporate interests can drag out legal proceedings at the expense of governments who bear the brunt of the costs. ISDS once rooted in protecting investors from discrimination, is now being seen as a high stakes gamble where there is the potential to win big. This gamble shapes the outcomes of countries, limiting their capacities to provide funding for public necessities, fueling a system of indebtedness where loans are taken out to compensate for these payouts.\textsuperscript{217} TPF is often shrouded in secrecy and

\begin{thebibliography}{99}
\bibitem{214} Ibid: para 572.
\bibitem{216} TriMetals Mining Inc.
\bibitem{217} Eberhardt et al., “Profiting from Injustice.”
\end{thebibliography}
financiers are not always publicized, limiting accountability and procedural access to justice.\textsuperscript{218} There is also a political dimension to TPF, if ISDS is seen as a tool to shape public policy. The combination of transparency issues and the politicization of ISDS reaffirms concerns that the system extends corporate power at the expense of state sovereignty and public interest regulation.\textsuperscript{219}

\textbf{4.4 Pac Rim v. El Salvador}

\begin{figure}[!h]
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\includegraphics[width=\textwidth]{fig4.png}
\caption{Regional overview of extractive-based ISDS cases in El Salvador (2000-present)}
\end{figure}

\textit{4.4.1 Environmental Justice Movement}

The El Dorado mining concession is located in the Cabañas area of El Salvador and holds reserves of close to 1.4 million ounces of gold.\textsuperscript{220} In 2002, Pacific Rim acquired the rights to the concession and began exploration. Pacific Rim, is a Canadian-Australian multinational mining

\begin{flushright}
\textsuperscript{218} Eberhardt et al.
\textsuperscript{219} Mertins-kirkwood and Smith, \textit{Digging for Dividends Settlement by Canadian Investors Abroad}.
\end{flushright}
corporation, headquartered in Vancouver. The company began explorative activities in the Cabañas without support from the community, resulting in conflict and communal resistance.\textsuperscript{221}

In 2004, the company submitted an application to convert its exploration license to an exploitation concession.\textsuperscript{222} The application failed to include both an environmental permit and consent of landowners.\textsuperscript{223} The company’s ESIA, which was rejected, was grossly inadequate claiming there were no negative effects foreseen in terms of people or environment from mining activities.\textsuperscript{224} The lack of transparency and involvement by communities in the ESIA process is reflective of broader organizational structures and the lengthening of the global commodity chain. Investors are making decisions that affect communities without any consultation or consideration for the culture, heritage and livelihoods of individuals within commodity frontiers. This strips the participatory agency away from locals when they are not consulted nor involved in processes that directly affect their lives.

From 2004 to 2008, Pacific Rim conducted an intensive pro-mining lobbying campaign to secure the mining concessions. This campaign had detrimental social impacts, creating “corrosive communities” with a loss of social cohesion, fear and violence, and increased rates of crime.\textsuperscript{225} Politically, mining played a significant role in destabilizing the region. Pacific Rim attempted to buy a social license to operate through funding for community projects which was

\textsuperscript{221} EJOLT.
\textsuperscript{223} Brauch.
\textsuperscript{224} EJOLT, “Pacific Rim: El Dorado Mine in El Salvador Fact Sheet.”
\textsuperscript{225} Richard Steiner, “El Salvador-Gold, Guns, and Choice: The El Dorado Gold Mine, Violence in Cabañas, CAFTA Claims, and the National Effort to Ban Mining,” 2010, https://miningwatch.ca/sites/default/files/gold_guns_and_choice-el_salvador_report_0.pdf?__cf_chl_jschl_tk__=e0770c46cd0d4191370f1fa7a45a69e69e0cacf3-1580688628-0-ASlAbNSBGaUEoHA9BEyWiAbAlFY2A8cn2_Y2-tCY0GUh-c70aCF5g7IeU6ZFHHzky1o3svVv2Gtfp8YBM2tXBL-bQd2u.
paid directly to local mayors.\textsuperscript{226} This is a violation of the OECD guidelines for multinational enterprises which states that “enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage.”\textsuperscript{227} Pac Rim’s actions increased rates of corruption in local government officials and police. This was of particular consequence in 2009 when seven anti-mining activists were murdered.\textsuperscript{228} Among the dead included Marcelo Rivera, the public face of the anti-mining movement, and a woman who was 8 months pregnant.\textsuperscript{229}

The investigation into the murders was deemed largely inept, as police themselves would often issue threats and were thought to be connected to the series of murders.\textsuperscript{230} The irregularities in the investigation were discussed by the Ombudsman, “it appears that the Attorney General’s Office has abstained from investigating all possible motives and theories that could lead to the truth behind the crimes.”\textsuperscript{231} This is a violation of the participatory pillar of justice, denying accountability of those responsible for the murders. The company’s interference, through bribery, with domestic legal procedures, hindered recognitional rights to protection, exacerbating social tensions within the community.

\textsuperscript{226} Steiner.
\textsuperscript{228} Robin Broad and John Cavanagh, “Like Water for Gold in El Salvador,” MiningWatch Canada, 2011, https://miningwatch.ca/blog/2011/7/15/water-gold-el-salvador?__cf_chl_jschl_tk__=__8c6ac26565f35ab93094f8e11b3685a8f06767b0-1580688624-0-ATG_uKt-G6MFn3nr1eNvY8IsNSZRjY4Pct6C5uUpQwKtHDKicD2kVymCwNEYzwByKTMVWNiLn-yG5e9v7Rn_mio1mWlQrdH15qPzkboQilDwkvq3iM1bo.
\textsuperscript{229} Broad and Cavanagh.
\textsuperscript{230} Steiner, “El Salvador-Gold, Guns, and Choice: The El Dorado Gold Mine, Violence in Cabañas, CAFTA Claims, and the National Effort to Ban Mining.”
\textsuperscript{231} Steiner.
This tension increased civil society opposition to extractivism, creating a political movement to ban metal mining.\textsuperscript{232} As the anti-mining position grew more politically acceptable, in March 2008 President Antonio Saca released a statement denouncing the mining industry: “We are not going to authorize any mining exploration project…Nor are we going to allow systematic disappearances and threats against members of the environmental movement.”\textsuperscript{233} Out of widespread public concerns over water contamination, the government refused to grant the mining concession. As a result, on April 30, 2009 Pac Rim filed for arbitration under the Central America-Dominican Republic FTA (CAFTA-DR) and the Investment Law of El Salvador.

For this case, the EJM did not end with the cancellation of the concession. It continued over the duration of arbitration, with mobilizations occurring at local, national and international scales. The globalization of the campaign recognized the intersection between local concerns and global injustices. Claims of recognition for the right to water and right to protect natural commons from the imposition of corporate interests, resonated with a diversity of organizations.\textsuperscript{234} The campaign was framed around the idea of “water more valuable than gold.”\textsuperscript{235} International media coverage of protests taking place in Australia and Canada increased pressure on the Tribunal.\textsuperscript{236}

The media coverage was able to bring attention to the participatory injustice inherent to the ISDS system, exposing the threat it poses to self-determination and sovereignty of nations. In a press briefing Marcos Orellana of the Centre for International Environmental Law (CIEL)

\textsuperscript{232} Which was only passed in March 2017 following the ISDS case. See, Moore and Perez-Rocha, “Extraction Casino: Mining.”
\textsuperscript{233} Brauch, “Pac Rim v. El Salvador: All Claims Dismissed; OceanaGold to Pay US$8 Million in Costs.”
\textsuperscript{234} Moore and Perez-Rocha, “Extraction Casino: Mining.”
\textsuperscript{235} EJOLT, “Pacific Rim: El Dorado Mine in El Salvador Fact Sheet.”
\textsuperscript{236} Moore and Perez-Rocha, “Extraction Casino: Mining.”
voiced claims of participatory injustice stating, “By allowing transnational companies to blackmail governments to try to force them to adopt policies that favor corporations, investor-state arbitration undermines democracy in El Salvador and around the world.”

Civil society organizations were frustrated by their inability to participate and have their voices heard in arbitral proceedings. This participatory injustice is further explored in the following section.

4.42 ISDS Case

In April 2009, Pac Rim filed for arbitration under CAFTA-DR and El Salvador’s Investment Law. Pac Rim’s main argument was that the denial of the El Dorado concession was a de facto ban on metallic mining and that it breached El Salvador’s obligations under investment law. Pac Rim claimed monetary damages of US $314 million, which is twice the amount of international aid El Salvador receives in any given year.

Prior to arbitration Pac Rim moved its registration from the Cayman Islands to Nevada, USA in order to gain access to the CAFTA-DR treaty. This is known as “venue shopping” and is a common practice of MNCs. They attempt to gain access to the most favorable legal and political protections, lengthening the commodity chain and spreading activities over various geographical locations. The benefits of the CAFTA-DR treaty protections were denied on the basis of two conditions. The first, Pac Rim was found to have “no substantial business activities

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238 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID CASE NO. ARB/09/12, Award, 14 October 2016: para. 3.16.


240 Mertins-kirkwood and Smith, Digging for Dividends Settlement by Canadian Investors Abroad.
in the territory,” and it was a “passive actor.” Pacific Rim had simply registered a mailing address and had no active business presence in the USA. The second, Pac Rim was found to be owned by Pacific Rim Mining Corporation, which is a Canadian entity. This procedural injustice makes it difficult for countries to monitor which companies are protected under what treaties. It also highlights the lack of clarity surrounding qualifications of ‘substantial’ business activities and requirements to access treaty protections.

Instead the claim proceeded under El Salvador’s National Investment Law. This law was written with the help of the World Bank group and allows foreign companies to bypass domestic courts and bring cases directly to arbitration. El Salvador incorporated arbitration into their domestic laws in response to technical assistance from the World Bank’s Foreign Investment Advisory Service (FIAS). This is known as ‘asymmetric diffusion’, which occurs when “policy is framed as international best practice but only recommended to a subset of states.” There are no developed states that consent to arbitration as part of their domestic law, yet the World Bank selectively portrays ISDS to developing countries as the “best practice.” The FIAS is donor funded through earmarked aid. The interest in investment law reform did not come from the government rather from the FIAS which is inherently biased, promoting agendas of its donors. This is a violation of procedural justice, limiting the ability of domestic law to regulate foreign

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241 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID CASE NO. ARB/09/12, Decision on Jurisdiction, 14 October 2016: para. 4.68.
242 Broad and Cavanagh, “Like Water for Gold in El Salvador.”
243 Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”
244 Moore and Perez-Rocha, “Extraction Casino: Mining.”
246 Berge and St John.
247 Donors can earmark which countries they want the money to be used for and for which specific types of technical assistance, including investment law reform. See, Berge and St John.
248 Berge and St John.
MNCs. It also reveals the important role that the World Bank has played in developing and increasing the use of the ISDS.

Under the El Salvadorian Investment Law, Pac Rim brought its claim to the tribunal. The central question was whether Pac Rim was entitled to the El Dorado Concession.249 Article 37(2)(b) of the mining law requires the applicant to submit “authorized permissions, in legal form, from the landowner.”250 They only acquired documentation for the area directly affected, whereas the law is interpreted to require documentation for the entire surface area of the concession. For this reason, the tribunal concluded that the “application for an exploitation concession, in regard to El Dorado, did not comply with documentary requirements.”251 The tribunal rejected all of Pac Rim’s claims against El Salvador, awarding US$8 million to El Salvador to cover part of its US$12 million arbitration costs.252

The assessment of El Salvador’s legal requirements was done through the application of the country’s national laws and constitution. If CAFTA had been applicable, one might question if the interpretation and application of international standards may have resulted in an alternative outcome. The application of FET standards are often weighted towards the investor, if this had been applied, the tribunal may have arrived at another conclusion.253 This divergence in legal standards highlights the procedural differences and inequalities between national and international bodies of resolution. The lack of uniformity and general consensus on the

249 Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”
250 Bernasconi-Osterwalder and Brauch.
251 Pac Rim Award: para.8.44.
252 Brauch, “Pac Rim v. El Salvador: All Claims Dismissed; OceanaGold to Pay US$8 Million in Costs.”
253 Bernasconi-Osterwalder and Brauch, “International Investment Law and Sustainable Development: Key Cases from the 2010s.”
interpretation of investment agreements, leads to discrepancies in tribunal rulings and causes difficulties for host countries trying to access legal recourse.

There are also discrepancies around amicus curiae applications. Applications were submitted by CIEL, six local communities and other civil society organizations to support El Salvador’s claim. The tribunal admitted the application of CIEL, who based their argument on the country’s obligations to human rights and the environment. CIEL concluded that, regulation and administrative processes, like EIAs, are “indispensable tools for the state to safeguard the rights threatened by extractive industries.”254 Unfortunately, the tribunal declined to consider CIEL’s arguments. The disputing parties did not consent to disclose important evidence of the arbitration case to CIEL; therefore, it would be “inappropriate” for it to include CIEL’s brief in such circumstance.255

The denial of the amicus curiae shows the limited access to tribunals and ability of communities to participate in decisions that affect them. The amicus brief sought to bring local community perspectives into the arbitration process but was denied because Pac Rim did not consent to transparency. This lack of transparency prevented the procedural involvement of stakeholders, denying them the right to information and right to effective participation. This case demonstrates the difficulties civil society groups and local communities face in having their voices heard and claims for justice considered in international arbitration.

254 *Pac Rim* Award: para.3.29.
5.0 DISCUSSION

5.1 Comparisons of the Cases

Looking at the distribution and recognition injustices of affected communities, two main themes emerge: the imposition of commodity frontiers on indigenous communities and the environmental load displacement on highly impoverished regions. First, mining corporations entered into indigenous communities and were not properly equipped or aware of their rights, specifically those enshrined in the ILO Convention 169. This lack of cultural awareness prevented a social license to operate from being obtained in any of the cases. The ESIA processes often excluded indigenous participation and were inaccessible to communities affected, either through a language or technical knowledge barrier. The second distributional issue was the high poverty rates and lack of infrastructure within each community. Corporations exploited this vulnerability, offering money for community projects and the promise of economic prosperity. In El Salvador’s case payments were directed towards mayors and government officials and in the case of Ecuador to a political lobbying organization, CODEGAM.

This leads into the procedural injustices and frequent interference in domestic politics by corporations. In Ecuador through CODEGAM, El Salvador the aggressive pro-mining campaign, Bolivia the hiring of NGOs to obtain consent, and Peru the ESIA campaign. This is a common strategy of mining companies; they enter into projects without the policies in place that guarantee their mine will be operational. Instead they invest in aggressive lobbying campaigns to either gain consent or amend laws to lower standards or legal requirements. They can do this without fear of repercussions, as ISDS can always be accessed to challenge government regulation.

The lack of recognition of collective indigenous identities, interference with procedural political systems, and unequal distribution of costs on marginalized communities all compound
to fuel the social unrest in each of these cases. It creates an unequal exchange, where the costs are externalized on impoverished regions and the benefits are reaped by foreign investors in faraway countries. This asymmetry in environmental justice and social unrest eventually triggers an ISDS claim.

Environmental justice is in many aspects overlooked and almost entirely ignored throughout arbitration proceedings. Distributional injustices manifest in the one-sidedness of investment treaties and their narrow focus on the exclusive rights of investors. One would think just as host states have obligations to protect investors, investors have obligations to abide by domestic laws and international standards for business conduct. However, this is not the case and host governments have no effective legal counterweight to pursue claims of corporate negligence or misconduct. They can launch counterclaims in arbitration, but these are largely unsuccessful. The only other legal recourse is through domestic courts of the investors’ home government. This is also rarely successful as corporate structures are designed to evade legal accountability, as seen in the case of Ecuador.

Each of the ISDS cases highlight aspects of the legal system that are intrinsically created to protect foreign investors at the expense of other forms of international law. For instance, the omission of the ILO Convention 169 in the case of Bolivia and Peru, the interpretation of ‘unclean hands’ in Ecuador’s and Bolivia's case, and the ‘police powers’ interpretation in Peru’s case.

This lack of recognition for other forms of law reveals the inner power dynamics of the ISDS system which privilege the rights of investors. In the case of Bolivia and Peru, the ILO

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257 Moore and Perez-Rocha, “Extraction Casino: Mining.”
258 Kalicki, “Counterclaims by States in Investment Arbitration.”
Convention which governs the rights of indigenous people, of whom were directly impacted, was viewed by the tribunal as non-binding and excluded from the cases. The ‘Unclean Hands’ Doctrine was brought up in both the Bolivian and Ecuadorian cases. This international law serves as a defense to the defendant, if they can prove the plaintiff acted unethically then the complaint will be dismissed. In both cases, there were numerous accounts and considerable evidence of misconduct. However, the tribunals ruled against its application, for Ecuador it was viewed as inapplicable as no official complaints were filed before arbitration and for Bolivia the tribunal ruled that compensation is still required even if misconduct motivated the reversion.

Human rights violations and corporate misconduct seldom made a difference to the outcome of the cases and when they did it was usually through a reduction in merits due to contributory fault. The tribunals’ acknowledged negligent behavior through a limited scope, instilling a false sense of justice through reduced payouts. As seen in the case of Ecuador, a 30% reduction in the award does not equate the damages done by corporate negligence that lead to the deaths of community members. This ruling unveils the corporate preference of the system, which denied communities’ access to justice and instead supported corporate negligence as long as corporations were willing to pay the price.

Another law that was cited in the case of Peru was the Doctrine of Police Powers. This doctrine is supposed to guarantee state’s the right to regulate, as a means to protect human life, without economic repercussion. Yet, the Tribunal ruled that compensation is still necessary even if the regulation was for the sake of protecting human life. These interpretations set the standard that human rights violations or illegal behavior do not bar protection from ISDS.

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259 Thomas Reuters, “Unclean Hands Doctrine.”

260 This doctrine is an international standard that proposes that a state is not liable for economic injury which is a consequence of a bona fide regulation. See, Luttrell, “Green Multilateralism: ’Mega FTAs and the Changing Interface between Environmental Regulation and Investment Protection.”
Even domestic law was overlooked in these disputes as seen in Peru’s case and the illegality of the concession acquisition. Bear Creek’s illegal behavior in acquiring the concession was justified under the interpretation of the treaty, as there are no explicit requirements for investments to be made in compliance with domestic law. Each of these laws serve to protect the rights of various actors and uphold justice in the international arena. The subjectivity around their application shows the selectivity of tribunals, and the corporately biased interpretations that solely entitle investors to protection.

This subjectivity and corporate asymmetry extends into the participatory injustices of the cases, specifically with the amicus curiae\(^{261}\) applications. Amicus curiae applications are currently the only vehicles for third parties to raise concerns and access arbitration\(^{262}\). This has been subject to criticism, “Amicus Curiae is frankly not working, it is all left to the discretion of the Tribunal. It is a one off to provide factual or legal information not a right to intervene nor a vehicle of claiming rights” said an expert working in the financial sector\(^{263}\).

As a result of these legal problems disputes are often skewed, and decisions are based on other considerations. This brings into question arbitration impartiality, if an arbitrator’s main source of income and career path depends on corporations suing states there is motivation to side with investors to further their career. Beyond arbitration impartiality, should a corporation decide to withhold certain details of the case any amicus curiae testimony is rendered irrelevant. Arguments cannot be considered because important evidence was not disclosed, and it would be

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\(^{261}\) In exceptional circumstances, "friend of court", summoned to inform and advise the judge as to matter of fact or law that might otherwise escape consideration - minimize the risk of error in judgement. See, Lise Johnson and Jesse Coleman, “Briefing Note: International Investment Law and the Extractive Industries Sector,” Columbia Center on Sustainable Investment, 2019, https://prod-edxapp.edx-cdn.org/assets/courseware/v1/a3323a037ef768d1996eefb83e6e880e/asset-v1:SDGAcademyX+NR001+3T2019+type@asset+block/Investment-Law-and-Extractives_Briefing-Note_1.pdf.

\(^{262}\) Mertins-kirkwood and Smith, Digging for Dividends Settlement by Canadian Investors Abroad.

\(^{263}\) Expert working in the financial sector. (2020, March 5th). Skype interview.
“inappropriate” to do so, as seen in the case of El Salvador. This is an issue of transparency, not only do corporations not have to disclose all the facts of the case, but by doing so they bar any form of local perspective through amicus curiae.

The current investment regime is failing host states as investment treaties are narrowly fixated on the rights of investors. This limited focus, does not leave room for environmental injustices in tribunal proceedings. The treaties that govern investors are corporately biased and detrimental to host states and local communities within them. Local resistance to mining corporations is increasing all over Latin America. These movements are acting as vehicles for social change, contesting the colonial capitalism unwillingly imposed on them. EJM and ISDS are not wholly distinct entities, they influence each other in important ways. This next section will focus on the obligations of governments and the impact ISDS has on their capacities to resolve internal conflicts.

5.2 Investor State Dispute Settlement & Environmental Justice Movement Relationship

The dynamic relationship between ISDS and EJM is best conceptualized through three main themes of inquiry: host governments’ obligations, precedent setting from tribunals and the emergence of ISDS as an insurance policy against bad business practices.

The first theme, the role of host governments brings to the surface questions about the suitability of ISDS as a forum to resolve these conflicts. Often times scholars who criticize the investment regime see the government as a benevolent regulator whose regulatory powers are unduly infringed by ISDS. Upon closer examination, this study reveals that this is not necessarily the case. Bolivia, Peru, El Salvador, and Ecuador all had governments who supported

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and backed mining corporations. This support varied in scale, most local governments opposed the projects except for Bolivia’s Mayor of Potosí, and all central governments were proponents of the projects.

The central government supported and backed corporations until the conflicts escalated to a tipping point, most commonly the death of an activist. This highlights the divergent interests between host states who authorize investments and who are subject to obligations of investment treaties, and local populations who are affected by foreign investors. Many ISDS disputes, all four in this study, are a result of community resistance against government backed corporations. This is problematic as ISDS is situated around the state and investor as if they are the only key actors. There is limited standing afforded to communities and “host governments are very often on the same side as investors while the other side, communities, are not visible in this particular [ISDS] policy landscape.”

The investment regime imposes certain obligations on host governments. The most severe of these is the FPS clause, which was breached in the Ecuadorian case and rejected in the Bolivian case. This clause requires a host government to interfere and provide physical protection to investors against their own citizens. It forces governments to choose between protecting investors or fulfilling their obligations to their citizens and a costly lawsuit. Figure 5 below, shows the economic weight ISDS lawsuits carry for GS countries compared to Canada, a global north (GN) country. The awards against GS countries are a significant portion of overall gross national income (GNI). This destabilizes countries economically, straining annual budgets and public expenditure, further incentivizing governments to back investors. Looking at Canada, a major proponent of ISDS, the lawsuits have minimal impact on GNI. This shows the unequal

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266 Expert working in the financial sector. (2020, March 5th). Skype interview.
exchange between GN and GS countries; costs are externalized on GS countries which are more severely affected by ISDS awards.

Canada has recently gotten rid of ISDS withdrawing from the North American Free Trade Agreement, because of the negative implications it had on its governance of foreign industries. However, Canada is still a proponent of IIAs in GS regions. This raises another important point surrounding the unequal exchange in access to BITs/FTAs. Latin American countries have minimal investments in Canada, thus do not have the same opportunities to benefit from the protections of trade agreements. Generally speaking, GS countries have less foreign investments and less frequently file ISDS claims, making GN investors the main proponents of ISDS. This explains the nature of investment flows, and the ISDS system that primarily protects investments from high income, GN, countries.


268 Sinclair.


271 Samples.
In response to this unequal exchange, governments are more likely to uphold obligations under investment treaties regardless of commitments to laws such as the ILO Convention 169 that require the protection of indigenous communities. These two forms of international laws contradict one another. However, there is no established order of law, it is up to the arbitral tribunal to interpret how they interact. Tribunals are more familiar with investment law and it is more binding due to its arbitration mechanism, therefore it usually takes precedence. This has severe repercussions for EJMs, it creates a hierarchy in which governments are more likely to serve the interests of investors, rather than upholding their duty to protect indigenous rights. It is difficult to prove the causal impact of ISDS on EJMs, however the case studies and the precedents they set illustrate how it may exacerbate the repression and criminalization of defenders.
In all four case studies, leaders of the EJMs were criminalized, jailed and sued in courts. This once again highlights the divergent interests of states and communities. One may speculate that governments felt obliged to criminalize activists as a necessary fulfillment of the FPS clause. Corruption and bribery may also be at fault, as in the case of El Salvador, Ecuador and Bolivia. Arbitration rulings set certain standards for business conduct. As seen in these case studies, corporate negligence is not a bar to investment protection. This has dangerous repercussions for EJMs, it intensifies global power dynamics that strengthen corporate impunity allowing the behavior of corporations to go unchecked. Other companies may view the tribunals’ decisions to continue with arbitration regardless of malpractice, as a guiding standard. As long as you can afford to be negligent, there are no consequences for bad practices.

ISDS has also evolved as a form of insurance policy against poor planning and inability to obtain approval from government ministries or local communities. The ability of investors to access ISDS has essentially rendered the EIA and ESIA process irrelevant. If corporations do not get there EIA/ESIA approved, regardless of legitimate reasoning, they can sue under investment treaties to challenge government decisions. The same can be said about local consent, if a social license to operate cannot be secured then ISDS can be triggered. Even if a company, as in the case with Copper Mesa, is fully aware before purchasing the concession, of community resistance and the unlikelihood of obtaining a social license to operate, they are still eligible to sue. Corporations take a gamble and recklessly enter into new commodity frontiers without hesitation as they are backed by a legal system that guarantees their protection. This legal system is further strengthened by the imposition of the World Bank and other international institutions.
5.3 Imposition of the World Bank

The World Bank's notion of “development” is promoted through market-based legal reforms that have benefited transnational corporations at the detriment of local communities. Lending programs since the 1990s have contributed to an influx of corporate mining companies and opening up of commodity frontiers in Latin America. The 1990s neoliberal era facilitated the global expansion and economic liberalization of Latin American policy. These policy reforms amended mining codes, eliminated taxation and royalties along with any requirement for profits to stay within the country. They also required countries to sign on to trade agreements that included ISDS provisions. This was achieved through structural adjustment lending and tied aid. Many scholars have researched conditional lending, arguing that it constitutes a direct interference with a country’s sovereign right to develop and implement economic policies. Aid is also argued to be more effective when countries exercise genuine control over their development policies and strategies.

While the World Bank has been criticized for its structural adjustment lending, less attention has been directed towards its role in strengthening the ISDS system. This area of research warrants greater debate, as the promotion of ISDS may be contrary to the Bank’s objective of promoting development. ISDS has been endorsed by the World Bank as a necessary

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272 Studnicki-Gizbert, “Canadian Mining in Latin America (1990 to Present): A Provisional History.”
274 Studnicki-Gizbert, “Canadian Mining in Latin America (1990 to Present): A Provisional History.”
275 Moore and Perez-Rocha, “Extraction Casino: Mining.”
276 Offering aid on the condition that it be used to procure goods or services from the provider of the aid. See, Daniel Cabello, Filka Sekulova, and Schmidt Douwe, “World Bank Conditionalities: Poor Deal for Poor Countries” (Amsterdam, 2008), https://aseed.net/pdfs/ASECOND_Report_on_Worldbank_Conditionalities.pdf.
277 Cabello, Sekulova, and Douwe.
legal framework to attract FDI. From the Bank’s perspective, it would lead to development and positive spillover effects such as job creation, increased infrastructure and technology transfer.\textsuperscript{279} It is worth noting, that there is no solid evidence to support the claim that ISDS increases FDI, and some studies have shown it may actually attract harmful forms of FDI that stunt development.\textsuperscript{280}

Today, the World Bank claims that conditional lending is in the past, however its IDA-Performance Based Allocation system can be considered a form of back door conditionality.\textsuperscript{281} If a country deviates from the standards preferred and defined by the World Bank, they are allocated less aid.\textsuperscript{282} In this respect, although indirectly, aid is still tied to policy agendas of the World Bank. Countries become trapped in a cycle of indebtedness, where the policies they are coerced into adopting, limit their control over economic regulation thus development, forcing them to borrow money once again. This is only exacerbated by the international investment regime, which forces governments to choose between a costly lawsuit or regulating in the public’s interest. Looking at the political power of debt, this is not much of a choice. The impact of costly lawsuits, consequent borrowing from international lending institutions and the policy implications of accumulated debt, is an area that should be explored in further research.

The World Bank has consistently prioritized private interests over the needs and sovereignty of developing countries as seen in the case studies. In Ecuador, PRODEMINCA carried out the preliminary assessment, violating World Bank social and environmental standards.\textsuperscript{283} In El Salvador, the World Bank’s FIAS lead to the ‘asymmetric diffusion’ of ISDS

\begin{thebibliography}{9}
\bibitem{279} Bonnitcha, “Assessing the Impacts of Investment Treaties: Overview of the Evidence IISD REPORT.”
\bibitem{280} Bonnitcha.
\bibitem{281} Cabello, Sekulova, and Douwe, “World Bank Conditionalities: Poor Deal for Poor Countries.”
\bibitem{282} Cabello, Sekulova, and Douwe.
\bibitem{283} Copper Mesa Award: para. 4.43.
\end{thebibliography}
into domestic policy. In Bolivia, the World Bank labelled it as an ‘outlaw nation’, for defending the rights of its indigenous people, ranking it the second worst country for investment. In Peru ICSID, a branch of the World Bank, administered the legal standards and guidelines for arbitration which excluded the ILO Convention 169. The World Bank’s role throughout both the EJM conflicts and ISDS proceedings bring to the surface controversy over its apparent position as a global advocate for development, highlighting the need for future research.

6.0 RECOMMENDATIONS

6.1 International Treaty on Business & Human Rights

In 2014, the UN Human Rights Council established the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights to draft a treaty on business and human rights. The first “zero draft” of 2018 focused on “access to justice and remedy for those who allege harm by a business enterprise.” The draft focused on political and procedural considerations, paying little attention to the role of States and accountability in that context. As seen in the case studies, states are not benevolent actors and often facilitate and support business operations that may result in human rights abuses. The most recent revisions in 2019, include provisions on due diligence, legal liability of business enterprises, streamlined language related to access to justice, and special protections for human rights defenders.

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286 Lopez.

Specifically, it targeted the relationship of the treaty to other international trade and investment treaties. Two main provisions are included: first, future trade and investment treaties shall not contain measures that conflict with the implementation of the convention; second, existing trade agreements shall be interpreted in a way that is least restrictive on the provisions of the convention.\textsuperscript{288} The revisions also include a legally binding instrument (LBI) to regulate international human rights law and the activities of transnational business enterprises.\textsuperscript{289} LBI requires states to adopt measures to prevent human rights abuses and ensure due diligence.\textsuperscript{290} It also attempts to provide guidance to future interpreters, such as ISDS tribunals, to ensure that LBI extends into the interpretation of other treaties when considering issues relating to business and human rights.\textsuperscript{291} If implemented it offers a more inclusive and supportive application of international laws, ensuring corporate accountability and upholding the protection of human rights.

As seen throughout the case studies, tribunals are left with too much interpretative power leading to varied outcomes and a lack of uniformity in the interpretation of international laws. The current system establishes a hierarchy of laws, privileging investor rights at the expense of other applicable legal protections, particularly in the human rights domain. Arbitrators are not impartial; they are hired to represent a certain point of view and enter into arbitration with preconceived agendas. For these reasons, arbitral discretion should be limited and guided by LBI to ensure consistency in rulings and equitable interpretations of all forms on international law.

\textsuperscript{288} Lopez.
\textsuperscript{289} Zhang, “Business and Human Rights Treaty Negotiation Sees a Light at the End of the Tunnel.”
\textsuperscript{290} Zhang.
\textsuperscript{291} Zhang.
LBI offers an entry point to address the corporate bias of ISDS, forging space for environmental justice.

From a legal perspective LBI’s implementation might prove difficult. However, the current UNCITRAL revisions may provide the necessary platform to legitimize these concepts. In 2006, UNCITRAL began revising its arbitration rules, which are the second most commonly used in investor-state arbitration. The UNCITRAL revisions are aimed at promoting a comprehensive and inclusive investment-related dispute settlement mechanism. Reforms center on issues of transparency, impartiality of arbitrators, accountability mechanisms, and consistency in tribunal rulings. The revisions mainly focus on reforming procedural aspects of UNCITRAL, lacking specific considerations for human rights. Combining the UN process for negotiating a binding Treaty on Business and Human Rights with the UNCITRAL revisions, can close this gap, broadening out a more systematic approach to investment issues. These two UN processes are highly interrelated and together have the potential to address the shortcomings of ISDS and uphold protections for local communities.

6.2 Responsible Business Conduct

One avenue for corporate accountability lies within the federal policy sphere of Canada. A federal law of mandatory human rights due diligence could impose legal obligations on Canadian mining corporations (60% of the world’s listed mining companies) to report on human rights impacts. This can be based off of European models such as the responsible

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292 Bernasconi-Osterwalder, “UNCITRAL and Reform of Investment Dispute Settlement.”
294 Expert working in the financial sector. (2020, March 5th). Skype interview.
295 Ibid.
296 Moore and Perez-Rocha, “Extraction Casino: Mining.”
Business Initiative (RBI) of Switzerland. In 2015, a coalition of Swiss civil society organizations launched a public initiative to encourage corporate accountability.\textsuperscript{297} The RBI aims at amending the constitution to oblige corporations to respect human rights and the environment during business operations within Switzerland and abroad.\textsuperscript{298} Companies will have to conduct a mandatory human right due diligence assessment, and any damages caused by their activities are subject to legal penalty.\textsuperscript{299} MNCs would also be liable to human rights violations caused by any of their subsidiaries overseas.\textsuperscript{300} Since its creation there have been many counter proposals and amendments by government and civil society actors. One of these amendments includes the introduction of an arbitration process to settle disputes arising from claims brought against a company by community members abroad.\textsuperscript{301} The initiative has been rejected so many times by the government that it may enter into a popular vote (referendum) in 2020, with a high chance of being approved.\textsuperscript{302}

This type of initiative highlights both the strength of EJMs and the importance of corporate accountability on the home front. The coalition of civil society organizations in Switzerland has been the force behind RBI, consistently pushing and demanding the government address corporate impunity. This movement demonstrates the tenacity of social mobilizations.


\textsuperscript{299} Swiss Coalition for Corporate Justice.

\textsuperscript{300} Swiss Coalition for Corporate Justice.

\textsuperscript{301} Swiss Coalition for Corporate Justice.

and their ability to reconfigure policies and address long standing power imbalances. EJMs in Latin America can learn from this the importance of jumping scales. Engaging with networks of social actors along different nodes of the commodity chain, increases access to regulatory institutions for justice.

Corporate accountability on the home front is essential. Canada claims to be a “strong voice for the protection of human rights and advancement of democratic values abroad.” As a world leader they should uphold and defend the values they promote. GS countries that are victims of human rights abuses, often lack the institutional capacities to hold companies liable. The burden of accountability is thus left for Canada. Implementing a federal law of mandatory human rights due diligence is a realistic avenue that would make Canada a leader in human rights protection and set the standard for other countries to follow suit.

7.0 CONCLUSION

Environmental conflicts are growing in importance, acting as vehicles for revolutionary social change. The asymmetry of benefits from commodity extraction frontiers has received increasing attention from scholars, activists and community-based movements. Marginalized groups are accessing alternative forms of power, mobilizing resources, and creating networks for social transformations as a means to contest these inequalities. ISDS is at the forefront of these inequities, shifting the balance of power, producing an inequitable system in favor of corporate interests.

This study improves the understanding of struggles for social and environmental equity and democratization of decision-making in areas where ISDS takes place. Different countries were

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chosen to give a broad overview of the scope of issues across the region to generalize that these conflicts occur over a variety of environmental justice concerns. However, this is a first look into these issues and warrants future research into several cases within one country and across of larger regional area. The obligations investment law places on governments and the consequent reaction to EJMs requires ongoing monitoring and more in-depth research.

The four case studies each demonstrate the asymmetric corporate structure inherent to the investment regime. Tribunal interpretations set certain precedents, encouraging a system of corporate impunity where accountability and justice are out of reach. The current investment system is failing host states as investment treaties are narrowly fixated on the rights of investors. This limited focus does not leave room for environmental justice in tribunal proceedings. Beyond arbitral procedures, investment law obstructs communities’ access to protections forcing states to prioritize investor rights. The broad spectrum of corporate preference apparent within each case study. shows the extent that contemporary capitalism and the expansion of commodity frontiers has shifted the boundaries of social struggle, so far as to put a price on justice itself.
8.0 SUMMARY

1. ISDS allows foreign investors to challenge any government action, in private arbitration, that limits the profitability of their investment (environment, health, public interest laws).

2. ISDS disputes often emerge as a result of conflicts between foreign investors and local communities and have important implications on the governance of extractive industries.

3. The lack of recognition of collective indigenous identities, interference with procedural political systems, and unequal distribution of costs on marginalized communities all compound to fuel the social unrest that eventually triggers an ISDS claim.

4. Tribunals are given too much interpretive power which has prioritized investment law over other forms of international laws, that protect environment and human rights.

5. ISDS has evolved as a form of insurance policy against poor planning and inability to obtain approval from government ministries or local communities, rendering EIA processes irrelevant.

6. The current investment regime is failing host states as investment treaties are narrowly fixated on the rights of investors. This limited focus, does not leave room for environmental justice in tribunal proceedings.
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TriMetals Mining Inc. “TriMetals Mining Inc.’s Subsidiary, South American Silver, Awarded Approximately US$28 Million (Including Interest) in Arbitration Proceedings against the


APPENDICES

Appendix A

Walter Aduviri’s legal precedents: *Bear Creek v. Ecuador*

Aduviri’s case involves two key legal precedents:

1. The first is that of ‘indirect perpetration’ which allows for the conviction of community spokespersons and leaders based on them “just being leaders of the community without having proven their direct involved in the alleged crimes committed” 304.

2. The second precedent is related to Aduviri’s indigenous rights, as constituted and recognized from the ILO Convention 169 in the Peruvian legal system. While anthropological expert opinion confirmed the Aymarazo were members of indigenous communities, the judges ruled that because Aduviri had obtained a university education, he should “be able to adapt his behavior according to the law”305. Human rights lawyer, Rodrico Lauracio, warns of the jurisprudence this will set for other court rulings affecting not only Aduviri’s rights but those of all indigenous peoples306.

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305 López and McDonagh.
306 Institute for Policy Studies, “Supreme Court Accepts Appeal of Peruvian Human Rights Defender and Overturns Sentence.”
Appendix B

_Piedra v. Copper Mesa:_ Ontario court case summary

In an attempt to hold Copper Mesa accountable for the 2006 attacks community members from Ecuador sued the TSX and the directors of Copper Mesa, in Ontario courts, for “damages in excess of $1500 million (TSX) and $30 million (Directors) for alleged human rights violations and abuses”\textsuperscript{307}. Copper Mesa could not be sued directly due to jurisdictional issues surrounding its complex corporate structure. The plaintiff’s claims were dismissed on the grounds of vicarious liability\textsuperscript{308}. The ruling meant that employers cannot be held legally responsible for the actions of employees, hence the claims are sought against the improper parties\textsuperscript{309}. The TSX and directors had no legal duty to consider possible harms to the plaintiffs when conducting their business\textsuperscript{310}. The respondents were then entitled to their costs of the appeals from the Ecuadorian plaintiffs totaling around $20,000\textsuperscript{311}.

\textsuperscript{307}Piedra v. Copper Mesa Mining (2011), 280 O.A.C. 1 (CA)

\textsuperscript{308}Ibid.

\textsuperscript{309}Levine, “Ecuador Ordered by PCA Tribunal to Pay $24 Million to Canadian Mining Company.”

\textsuperscript{310}Jamie Kneen, “Courting Justice: Victims of Mining Abuses Sue in Canada,” MiningWatch Canada, June 6, 2011, https://miningwatch.ca/fr/node/6739?__cf_chl_jschl_tk__=32b0dd81d1a9e28bda235818de5a557363cb844c-1583028115-0-AXJeo4B77pde73saG9DynUGUfo41X7JT_6xTAixlWtRJVyrU0WLYmvT75SON4SWfCWMRvfE-etOcmLW0-PXiIPlBk-2kTuuPWyW3OXdHhGRO63UMVdeVYcosfocn3lyLmopQD4aYOPFa_ES.

\textsuperscript{311}Piedra v. Copper Mesa Mining (2011), 280 O.A.C. 1 (CA)
Appendix C

Raw data collected on EJMs & ISDS claims for each country.
Data on ISDS from UNCTAD Investment Hub Database and data on EJMs from EJAtlas

<table>
<thead>
<tr>
<th>Date</th>
<th>Country/Region</th>
<th>Home State of Investor</th>
<th>Case Name</th>
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