PAC RIM CAYMAN V. REPUBLIC OF EL SALVADOR:

CONFRONTING FREE TRADE'S CHILLING EFFECT ON ENVIRONMENTAL PROGRESS IN LATIN AMERICA

Because of the disparity of environmental regulation between the United States and its southern neighbors, multinational corporations have long viewed the resource-rich countries of Central America as attractive locations for factories and extractive industry.[1] However, as liberal democracy has gradually penetrated the region in the post-Cold War period, Central American states like Costa Rica have become more environmentally friendly and more democratically responsible to voters.[2] This change has also come with the advent of a huge free trade zone spanning much of the Western Hemisphere.[3]

1. *See* Nathaniel Hemmerick Hunt, Note, *One Step Forward, Two Steps Back: The Central American Free Trade Agreement and the Environment*, 35 GA. J. INT'L & COMP. L., 549–51 (2007) (describing the causes and effects of environmental degradation in Central America in the pre-free trade era).

2. SARAH ANDERSON, MANUEL PEREZ-ROCHA & REBECCA DREYFUS, MINING FOR PROFITS IN INTERNATIONAL TRIBUNALS: HOW TRANSNATIONAL CORPORATIONS USE TRADE AND INVESTMENT TREATIES AS POWERFUL TOOLS IN DISPUTES OVER OIL, MINING, AND GAS 5–6 (2010), *available at* http://www.ips-dc.org/files/1779/Mining%20for%20Profits%20-%20English%20final.pdf.

3. *See* John R. Bolton, *Address to the Federalist Society*, 30 HOUS. J. INT'L L. 639, 641 (2008) ("[I]n Latin America, we came through a decade in the 1990s . . . of enormous promise and opening to the possibility of greater hemispheric integration where you saw a lot of longstanding historical attitudes in both Latin America, the Caribbean, and the United States disappearing."). More ambitious proposals to include the entire hemisphere in a "Free Trade Area of the Americas" have been unsuccessful. Gabriela Lobet, Dir. Gen., Costa Rica Inv. Promotion Agency, Remarks at the Harvard Latino Law Review Panel: The 2009 Summit of The Americas and What It Means for Latin America (Apr. 24, 2010), *in 2009 Harvard Latino Law Review Law and Policy Conference Building Bridges: Connecting the US and Latin America*, 13 HARV. LATINO L. REV. 127 129–31 (2010); *see also* Luis E. Cuervo, *The Uncertain Fate of Venezuela's Black Pearl: The Petrostate and Its Ambiguous Oil and Gas Legislation*, 32 HOUS. J. INT'L L. 637, 682

This zone consists of two primary agreements: the North American Free Trade Agreement (NAFTA) among the United States, Mexico, and Canada[4] and the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) among the United States, the Dominican Republic, and several Central American states.[5] The long-term effects of these free trade agreements (FTAs) remain to be seen, but their immediate benefits, particularly as they relate to the environment, are already hotly debated.

In a 2005 opinion piece, then-Senator Barack Obama wrote that he opposed the CAFTA-DR because it did "little to address enforcement of basic environmental standards in the Central American countries and the Dominican Republic."[6] The senator's concern about environmental degradation in the free trade zone was a direct response to the effects of NAFTA in Mexico.[7] In the 2000 NAFTA arbitration, *Metalclad Corp. v. United Mexican States*, the California-based waste disposal company, Metalclad, obtained a $16.7 million award against the state of Mexico after the arbitration panel found that the Mexican state of San Luis Potosí had indirectly expropriated Metalclad's investment in a pre-existing landfill when the state designated the area surrounding the land as an ecological preserve.[8] The *Metalclad* award set a precedent whereby an arbitral tribunal could hold a

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(2010) (noting a competing regional integration model propagated by Venezuela).

4. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), [hereinafter NAFTA], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta.

5. Dominican Republic-Central American Free Trade Agreement, U.S.-Dom. Rep.-Cent. Am., May 28, 2004, 19 U.S.C. § 4011 (2005), [hereinafter CAFTA-DR], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

6. Barack Obama, Op-Ed, *Why I Oppose CAFTA*, CHI. TRIB., June 30, 2005, at 27.

7. *See* Jordan C. Kahn, *Striking NAFTA Gold: Glamis Advances Investor-State Arbitration*, 33 FORDHAM INT'L L.J. 101, 113 (2009) (noting that the 2001 *Metalclad* arbitration "sparked a perception that NAFTA chapter 11 casts a chilling effect on regulators and serves as a weapon by some multinational corporations against environmental protection") (internal quotation marks omitted).

8. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award ¶ 131 (Aug. 30, 2000), 16 ICSID Rev.—FILJ 168 (2001); *see also* Marcia J. Staff & Christine W. Lewis, *Arbitration under NAFTA Chapter 11: Past Present, and Future*, 25 HOUS. J. INT'L L. 301, 320–22 (2003) (describing the *Metalclad* decision).

NAFTA party government liable in an investor suit for indirect expropriation following the enactment of a legitimate domestic environmental policy.[9]

During the expedited CAFTA-DR negotiations,[10] environmentalists and legal scholars heatedly discussed whether the Central American agreement could or should improve upon NAFTA's weak environmental protections, particularly the Chapter 11 investor-state dispute resolution mechanism that had allowed Metalclad's judgment against Mexico.[11] A report by the Economic Policy Institute noted the dangers of adopting another NAFTA-style FTA: "NAFTA tilted the economic playing field in favor of investors and against workers and the environment, causing a hemispheric 'race to the bottom' in wages and environmental quality."[12] But in his final review of the CAFTA-DR document, the U.S. Trade Representative wrote that it would result in major

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9. *See* Lisa Bennett, Note, *Are Tradeable Carbon Emissions Credits Investments? Characterization and Ramifications under International Investment Law*, 85 N.Y.U. L. REV. 1581, 1601 (2010).

10. CAFTA-DR was negotiated and signed by President George W. Bush under the fast-track trade promotion authority (TPA) granted to him by Congress under the Trade Act of 2002. Lee Hudson Teslik, *Fast-Track Trade Promotion Authority and Its Impact on U.S. Trade Policy*, COUNCIL ON FOREIGN RELATIONS, June 25, 2007, http://www.cfr.org/publication/13663/fasttrack_trade_promotion_authority_and_its_impact_on_us_trade_policy.html. TPA is a tool which grants the president the power to negotiate trade agreements independent of congressional oversight, and which streamlines the complicated process of international trade legislation. *Id.*; *see also* William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More Accessible to American Workers*, 30 HOUS. J. INT'L L. 1, 22 (2007).

11. Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor–State Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L.J. 103, 103–04 (2007); *see* Won-Mog Choi, *The Present and Future of the Investor–State Dispute Settlement Paradigm*, 10 J. INT'L ECON. L. 725, 734 (2007) ("[M]any of the U.S. FTAs concluded after NAFTA also came to include the investor–state dispute settlement system based on the new paradigm of direct claims by individuals . . . [i]n investment disputes."); *see also* NAFTA, *supra* note 3, at art. 1116.

12. David Ratner & Robert E. Scott, *NAFTA's Cautionary Tale: Recent History Suggests CAFTA Could Lead to Further U.S. Job Displacement*, ECON. POLICY INST., July 20, 2005, http://www.epi.org/publications/entry/ib214/; *see also* John H. Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391, 402 (2010) (noting that the *Metalclad* decision, if taken literally, would mean that almost any regulation that significantly restricts the use of property would be an expropriation").

environmental benefits in the region: "[A]s wealth grows and poverty decreases, more resources become available for environmental protection, . . . particularly as [developing countries] develop constituencies in favor of environmental protection."[13] He also asserted that, along with investment and international trade, CAFTA-DR would provide the technology necessary to foster environmentally friendly policies in the region.[14] Despite continuing concerns over the FTA's environmental impact in the underdeveloped states of Central America, CAFTA-DR was signed by Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States in 2004,[15] and became law in the United States in 2005 after a narrow Senate majority vote.[16]

The resulting treaty is largely a word-for-word duplicate of NAFTA, including its investor suit provision.[17] Although CAFTA-DR pays lip service to the goals of "implement[ing] this Agreement in a manner consistent with environmental protection," "protect[ing] and preserv[ing] the environment," and "preserv[ing] [the Parties'] flexibility to safeguard the public welfare,"[18] the treaty as a whole poses many of the same environmental and regulatory dangers that NAFTA was shown to threaten in the *Metalclad* suit.[19] CAFTA-DR's investor suit provision, found in Chapter 10, is copied nearly directly from the language in NAFTA's Chapter 11.[20] CAFTA-DR's article 10.3

13. Hunt, *supra* note 1, at 547–48.

14. *Id.* at 548.

15. CAFTA-DR, *supra* note 4.

16. Hunt, *supra* note 1, at 546.

17. *Compare* CAFTA-DR, *supra* note 4, at arts. 10.3, 10.4, 10.7, *with* NAFTA, *supra* note 3, at arts. 1102, 1103, 1110.

18. CAFTA-DR, *supra* note 4, at pmbl.

19. *See The Dangerous Expansion of Corporate Rights over Citizen Rights Through CAFTA*, GLOBAL EXCHANGE, 2005, http://www.globalexchange.org/campaigns/cafta/Investment.html (asserting that CAFTA and similar FTAs have led to "governments ha[ving] given up [their] sovereign right to pass laws protecting citizens' health, the environment, and labor rights"). More bluntly put, "[e]nvironmentalists lose." Chris Wold, *Taking Stock: Trade's Environmental Scorecard after Twenty Years of "Trade and Environment"*, 45 WAKE FOREST L. REV. 319, 333 (2010).

20. *Compare* CAFTA-DR, *supra* note 4, at art. 10.16, *with* NAFTA, *supra* note 3, at art. 1116.

states that each party shall provide investors of another party "treatment no less favorable than that it accords, in like circumstances, to its own investors."[21] Article 10.7 also prohibits state parties from expropriating, either directly or indirectly, a covered investment, except when it does so for a public purpose, in a non-discriminatory manner, and pays prompt compensation equivalent to the fair market value of the expropriated investment.[22]

In the event that a state party or an investor of a state party breaches one of these provisions, traditional protocol under international law would require the investor to settle the dispute either through the host country's domestic judicial system or through a government-to-government process.[23] However, CAFTA-DR, like NAFTA before it and many other U.S. FTAs since,[24] contains a revolutionary provision allowing for direct dispute resolution between the investor and the host country in an international tribunal.[25] Article 10.16 provides an injured investor or state party the right to bring a claim directly against the offending party in an international arbitral tribunal.[26]

The *Metalclad* decision sent ripples through the legal and foreign investment worlds in 2001.[27] During the CAFTA-DR negotiations, Central American governments were careful to

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21. CAFTA-DR, *supra* note 4, at art. 10.3.

22. *Id.* at art. 10.7.

23. ANDERSON, PEREZ-ROCHA & DREYFUS, *supra* note 2, at 3.

24. *See, e.g.*, Ewell E. Murphy, *Charting the Transnational Dimension of Law: U.S. Free Trade Agreements as Benchmarks of Globalization*, 27 HOUS. J. INT'L L. 47, 65 (2004) (noting that U.S. FTAs with Chile and Singapore mirrored NAFTA's language for breaches of environmental provisions).

25. CAFTA-DR, *supra* note 4, at art. 10.16. *See also* David Livshiz, Note, *Public Participation in Disputes under Regional Trade Agreements: How Much is Too Much—The Case for a Limited Right of Intervention*, 61 N.Y.U. ANN. SURV. AM. L. 529, 590 (2005) (noting the inclusion of investor-state dispute settlement mechanisms in dozens of FTAs to which the United States has become a signatory and the likelihood that this trend will continue in the future).

26. CAFTA-DR, *supra* note 4, at art. 10.16.

27. Justin R. Marlles, Comment, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. TRANSNAT'L L. & POL'Y 275, 280 (2007) ("Metalclad remains the strongest pro-investor interpretation of Article 1110 that any NAFTA tribunal has yet issued.").

protect themselves against similarly large investor suit judgments.[28] To that end, they insisted on including various provisos to the Chapter 10 investor-state dispute resolution provision to assist a future tribunal in interpreting the meanings of "indirect expropriation" and other vague terms that had contributed to the rather surprising result in *Metalclad*.[29] For example, CAFTA-DR's chapter 10 Annex 10-C provides that "indirect expropriation" is to be interpreted according to the U.S. Supreme Court's analysis of Fifth Amendment takings in *Penn. Central Transportation Co. v. City of New York*.[30] Similarly, Article 10.11 admonishes that the investor-suit provision must not be interpreted to "prevent a Party from adopting, maintaining, or enforcing any measure . . . that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[31]

Despite these precautionary measures, activists and legal scholars worried that the CAFTA-DR investor-suit provision would result in a "regulatory chill," wherein state parties to an FTA would refrain from enacting protective environmental and public health legislation for fear of a potentially crippling damages award for indirect expropriation.[32] During his 2008 campaign, President Obama spoke out passionately against the effects of investor suit provisions in U.S. FTAs, promising to "ensure that this right is strictly limited and will fully exempt

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28. *See* Rachel D. Edsall, Note, *Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U. L. REV. 931, 932 (2006) ("In order to avoid the same pitfalls of NAFTA's expropriation provision, the parties to DR-CAFTA updated the language of the analogous section, providing an annex that explicitly elucidates the test for determining indirect expropriation.").

29. *See* Hunt, *supra* note 1, at 563–71.

30. CAFTA-DR, *supra* note 4, at Annex 10-C; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See generally* Anthony B. Sanders, *Of All Things Made in America, Why Are We Exporting the* Penn Central *Test?*, 30 NW. J. INT'L L. & BUS. 339 (2010).

31. CAFTA-DR, *supra* note 4, at art. 10.11.

32. ANDERSON, PEREZ-ROCHA & DREYFUS, *supra* note 2, at 4 ("corporations can sue over environmental, health, and other public interest laws developed through a democratic process. While the tribunals cannot force a government to repeal such laws, the threat of massive damages awards can put a 'chilling effect' on responsible policy-making.").

any law or regulations written to protect public safety or promote the public interest."[33] Nevertheless, investor-state dispute resolution mechanisms persist in many of the most important U.S. FTAs—including NAFTA and CAFTA-DR.[34] Thus the potential for regulatory chill remains a major threat.[35]

The prospect of another *Metalclad*-sized judgment against a CAFTA-DR state is even more alarming because many Central American countries struggle to meet the increased social welfare demands of voters while still managing to stay afloat economically.[36] Still, CAFTA-DR investors appear to be following directly in the footsteps of *Metalclad*.[37] In 2009, Canadian conglomerate Pacific Rim Mining Corporation (Pacific Rim) began international arbitration proceedings against the Republic of El Salvador, seeking $100 million in damages.[38] Pacific Rim alleges "arbitrary and discriminatory conduct, lack of transparency, and unfair and inequitable treatment" amounting to a breach of CAFTA-DR Chapter 10.[39] If successful,

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33. Michael Busch, *El Salvador's Gold Fight*, FOREIGN POLICY IN FOCUS, July 16, 2009, http://www.fpif.org/articles/el_salvadors_gold_fight. To date, President Obama has not taken any steps toward eliminating investor–state suit provisions from existing FTAs or potential FTAs under negotiation. *Id.*

34. Craig Forcese, *Does the Sky Fall? NAFTA Chapter 11 Dispute Settlement and Democratic Accountability*, 14 MICH. ST. J. INT'L L. 315, 316 (2006).

35. *Id.* at 342–43 ("How [NAFTA's dispute resolution framework] will be used in the future remains uncertain, probably enhancing whatever litigation chill governments feel at present.").

36. Guatemala is an example: Since the end of its bloody civil war in 1996, "this fledgling democracy has struggled to initiate the types of social welfare programs that are necessary for its sustainable development. According to the U.S. State Department, approximately 80% of the population of Guatemala lives in poverty, and two-thirds of that number lives in 'extreme' poverty." Archana Sridhar, *Tax Reform and Promoting a Culture of Philanthropy: Guatemala's "Third Sector" in an Era of Peace*, 31 FORDHAM INT'L L.J. 186, 186 (2007).

37. *See, e.g.*, David A. Gantz, *Settlement of Disputes under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 359 (2007) (noting that, despite the relative rarity with which expropriations have been found under NAFTA and CAFTA-DR, "the broad expropriation language of both agreements, by itself, would suggest that the critics are not paranoid.").

38. Busch, *supra* note 33.

39. Claimant's Notice of Arbitration at 9, Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (registered June 15, 2009), *available at* http://www.pacrim-mining.com/i/pdf/2009-04-30_CAFTAF.pdf.

Pacific Rim would contribute to *Metalclad*'s troubling precedent in the region, wherein the law sides with the interests of multinational corporations over the health, safety, and welfare of local populations.[40]

Pacific Rim's dispute arises out of the El Salvador government's failure to authorize extraction permits related to the corporation's El Dorado gold mine.[41] El Dorado is located approximately 65 kilometers east of the capital city of San Salvador along the Río Lempa, the country's longest river and one of its largest supplies of drinking water.[42] The mine is 100% owned by Pacific Rim and is described by the company as its "flagship advanced-stage exploration property."[43]

Pacific Rim began operations in El Salvador in 2002, at the invitation of the Ministries of Economy and the Environment.[44] The company was originally granted permission to explore El Salvador for mining opportunities, and in 2004, it requested an exploitation concession for the El Dorado mine so it could begin mining for profit.[45] In accordance with Salvadoran and CAFTA-DR law, Pacific Rim also submitted an Environmental Impact Assessment (EIA), evaluating the environmental and public health consequences of gold mining in the vicinity of El Dorado.[46]

While government approval of the EIA was pending, Salvadoran environmentalists, community leaders, and public interest organizations began raising the alarm about the

40. *See* Hunt, *supra* note 1, at 563 (noting that NAFTA and CAFTA-DR "provide foreign investors broad rights that do not exist under U.S. or other countries' laws," and that, as a result. "multinational investors have been able to demand compensation for the implementation of legitimate environmental protections").

41. Claimant's Notice of Arbitration at 26–27.

42. *El Dorado, El Salvador*, PAC. RIM MINING CORP., http://www.pacrim-mining.com/s/ES_Eldorado.asp (last visited Apr. 1, 2011); Krista Scheffey, *Pacific Rim v. El Salvador and the Perils of Free Trade in the Americas*, COUNCIL ON HEMISPHERIC AFFAIRS, July 30, 2010, http://www.coha.org/pacific-rim-v-el-salvador-and-the-perils-of-free-trade-in-the-americas/.

43. *El Dorado, El Salvador*, *supra* note 42.

44. Busch, *supra* note 27.

45. Claimant's Notice of Arbitration at 23.

46. *Id.* at 23–24.

potentially adverse effects of gold mining.[47] Citizens living in the areas surrounding El Dorado pointed to the high threat of water and soil contamination resulting from the use of cyanide in gold extraction.[48] Residents worried that dangerous chemical residue could make its way back into the groundwater, or worse, into the Río Lempa, which extends nearly halfway across the country and runs through Guatemala and Honduras, as well.[49]

Salvadoran citizens repeated tales of mercury, arsenic, and cyanide spoiling groundwater sources in areas close to similar mines in Guatemala and Honduras, and already many were familiar with the growing rumors of water contamination and subsequent health problems associated with the San Martín mine in Honduras, which operated between 2000 and 2007.[50] Water contamination could have especially disastrous effects in El Salvador, where a majority of the population relies on agricultural and fishing pursuits for survival.[51] Further, environmentalists throughout the region feared—and still fear—that the pollution generated at El Dorado could eventually evaporate into the atmosphere and affect water supplies throughout Central America.[52]

Besides contamination, another water concern quickly arose: As early as El Dorado's initial exploration, residents in nearby communities noticed that their wells were going dry.[53] Access to clean water is a matter of grave concern in El Salvador, where more than a quarter of the population lacks consistent access to safe drinking water.[54] Pacific Rim's El Dorado mining strategy outlined in the EIA called for the use of 10.4 liters of water per

47. Busch, *supra* note 27.

48. *Id.*

49. *Id.*

50. Scheffey, *supra* note 42.

51. *Id.*

52. Zach Dyer, *El Salvador Faces CAFTA Suit over Mine Project*, N. AM. CONG. ON LATIN AM., Feb. 6, 2009, https://nacla.org/node/5499.

53. Scheffey, *supra* note 42.

54. Dyer, *supra* note 42; *see also* Mirna Cardona, Note, *El Salvador: Repression in the Name of Anti-Terrorism*, 42 Cornell Int'l L.J. 129, 145–46 (2009) (describing massive protests and a police crackdown occurring in response to the perception that water distribution in El Salvador would be privatized).

second—more than 3.2 million liters of water per year.[55] Put in context, "the amount of water the El Dorado mine would use per day to extract gold is what a single Salvadoran family living near the mine would use for household needs in twenty years."[56]

Despite these well founded and well expressed fears, Pacific Rim's EIA failed to address many of the major concerns of Salvadoran citizens.[57] The corporation claims that its detoxification procedures would leave local drinking water cleaner than it was previously, boasting that "[y]ou could basically stick a cup in the water and drink it."[58] But the EIA contains no discussion of remediation measures to address the possibility of a cyanide spill into the Río Lempa, a deficiency made even more shocking considering that the mine is located near an active fault line.[59] The EIA does not even evaluate the likelihood of future seismic activity in the area.[60] And, though Pacific Rim touts the mine's creation of more than 2000 jobs and the government's 3% tax on the mine's gross sales,[61] the EIA admits that the mine's operating life will likely be only 6.2 years.[62] In reality, the number of jobs created and filled by Salvadorans will likely be relatively low because of the greater need for technical expertise rather than unskilled labor in modern mining.[63] Those jobs will dissipate in 6.2 years, but any

55. Scheffey, *supra* note 42.

56. *Id.*

57. ROBERT E. MORAN, TECHNICAL REVIEW OF THE EL DORADO MINE PROJECT ENVIRONMENTAL IMPACT ASSESSMENT (EIA), EL SALVADOR (2005), http://www.miningwatch.ca/sites/miningwatch.ca/files/Technical_Review_El_Dorado_EIA.pdf ("This EIA would not be acceptable to regulatory agencies in most developed countries.").

58. Busch, *supra* note 27.

59. MORAN, *supra* note 47, at 13; *see* Corti, et al., *Active Strike-Slip Faulting in El Salvador, Central America*, 33 GEOLOGY 989, 989 (2005) ("El Salvador, Central America, is a highly seismically active country, where at least 11 major earthquakes have caused more than 3000 casualties in the past 100 [years].").

60. MORAN, *supra* note 47, at 13.

61. Mary Anastasia O'Grady, Op-Ed, *Will El Salvador Veer Left?*, WALL ST. J., Dec. 22, 2008, at A17; *see El Dorado, El Salvador*, *supra* note 42.

62. MORAN, *supra* note 47, at 2.

63. OXFAM AM., METALS, MINING AND SUSTAINABLE DEVELOPMENT IN CENTRAL AMERICA: AN ASSESSMENT OF BENEFITS AND COSTS 2, 21 (2009), http://www.oxfamamerica.org/files/metals-mining-and-sustainable-development-in-central-america.pdf.

negative environmental impact could endure much longer.[64]

Apparently in response to popular concern over both the flawed EIA and the mining project as a whole, the Salvadoran government has taken no action on Pacific Rim's extraction permit request since the final EIA was submitted in 2006.[65] In the intervening years, the El Salvador National Assembly has repeatedly considered a bill that would ban all precious metal mining in the state, giving Pacific Rim and other foreign extraction companies six months to discontinue operations before being ordered out of the country.[66] The bill has yet to become law despite the support of 62% of the Salvadoran public.[67] Nevertheless, it was a highly politicized focal point of El Salvador's 2009 presidential campaign, and the unsolved murders of three prominent anti-mining activists kept public attention on the dispute.[68] Even as "the mining issue had become dangerously political and increasingly violent," the government's apparent policy of inaction has remained firm through the presidential election and subsequent change of administration.[69]

In an effort to force El Salvador into a decision, Pacific Rim reincorporated its Cayman Islands subsidiary Pac Rim Cayman, LLC (Pac Rim) in Nevada, and transferred ownership of El Dorado from Vancouver-based Pacific Rim to the U.S.-based Pac Rim.[70] This highly strategic move allowed Pacific Rim to file

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64. Id. at 22 ("[Even] [i]n countries with well-developed environmental standards, the environmental damage associated with mining turns out to be much higher than was projected . . . Strict enforcement of environmental standards and vigilant monitoring of mining projects can reduce [environmental] damage, but the risk of serious, even permanent, environmental damage will remain.").

65. *El Dorado, El Salvador*, *supra* note 42; *see* Denis Collins, *The Failure of a Socially Responsive Gold Mining MNC in El Salvador: Ramifications of NGO Mistrust*, 88 J. BUS. ETHICS 245, 259–62 (describing delays and political tensions surrounding Pacific Rim's permit request).

66. Busch, *supra* note 27.

67. *See Landmark Hearing Begins at World Bank Arbitration Center*, COMM. IN SOLIDARITY WITH THE PEOPLE OF EL SALVADOR, June 1, 2010, http://www.cispes.org/index.php?option=com_content&task=view&id=715 [hereinafter *Landmark Hearing*].

68. Scheffey, *supra* note 42.

69. *Id.*; *see* Dyer, *supra* note 42.

70. ANDERSON, PEREZ-ROCHA & DREYFUS, *supra* note 2, at 7.

arbitration proceedings against El Salvador pursuant to CAFTA-DR's Chapter 10 investor-state dispute resolution mechanism.[71] Pacific Rim, through Pac Rim, is now seeking more than $100 million in damages from the El Salvador government, including the $77 million it claims to have invested in the El Dorado project since 2002.[72] Along with a similar lawsuit by the U.S.-based mining conglomerate, Commerce Group, El Salvador is facing two judgments worth a total of $200 million—the equivalent of nearly 1% of the tiny nation's gross domestic product.[73]

Pacific Rim bases its claim on CAFTA-DR's Chapter 10 prohibition on discriminatory treatment—essentially alleging that the El Salvador government is allowing domestic companies to pollute while denying the same privilege to Pacific Rim.[74] The corporation also alleges that El Salvador has indirectly expropriated Pacific Rim's investment in El Dorado by withholding approval of the extraction permit.[75] If the claims succeed, El Salvador must pay Pacific Rim the fair market value of the mine[76]—a number that is likely to be highly speculative given the short life and unstable environmental conditions of the mine.[77]

In June 2010, a hearing on El Salvador's preliminary objections was held before the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank

71. Collins, *supra* note 65, at 260.

72. Claimant's Notice of Arbitration at 53, Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (registered June 15, 2009), *available at* http://www.pacrim-mining.com/i/pdf/2009-04-30_CAFTAF.pdf.

73. ANDERSON, PEREZ-ROCHA & DREYFUS, *supra* note 2, at 7.

74. Claimant's Notice of Arbitration at 37.

75. *Id.* Admittedly, the El Salvador government has breached its own laws regarding the timeline for EIA approval. According to Pacific Rim's initial filings with the ICSID, El Salvador's environmental regulations require the government to either grant or deny the exploitation permit within sixty business days of receiving the EIA. Claimant's Notice of Arbitration at 17. Even in extraordinary and complex cases, the permit approval period can only be extended for an additional sixty days. Id. at n.31. It is as yet unclear how the government's complete inaction on the exploitation permit will affect its case before the arbitral tribunal.

76. CAFTA-DR, *supra* note 4, at art. 10.7.

77. *See, e.g.*, United States v. Silver Queen Mining Co., 285 F.2d 506, 510 (10th Cir. 1960) (noting that mining claims are, by their very nature, speculative).

Group in Washington, D.C.[78] The government sought to have the case dismissed, arguing that it had the sovereign right to reject—or, more accurately, fail to take action on—exploitation permit applications because no corporation, foreign or otherwise, has an automatic right to receive extraction permission.[79] Additionally, El Salvador argued that Pacific Rim had failed to fully comply with the environmental laws of El Salvador in its application for the permit, and therefore was not entitled either to damages or to a declaratory judgment.[80] In August 2010, the ICSID arbitral panel ruled in favor of Pacific Rim, rejecting El Salvador's preliminary objections and allowing the suit to move forward, though it could be another two years before the case is resolved.[81]

The *Pac Rim* dispute is an interesting instance of a growing phenomenon in free trade. Of the 128 cases pending before the ICSID, Latin American governments are the targets of 55% of all claims and 66% of the claims related to extractive industries.[82] Many of these, like *Pac Rim*, involve claims of indirect expropriation and discrimination caused by the adoption of environmental and public safety regulations.[83] International tribunals cannot force a government to repeal

78. *Landmark Hearing*, *supra* note 57.

79. Respondent's Preliminary Objections at 13, Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (registered June 15, 2009), *available at* http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&download=286:el-salvadors-preliminary-objections&Itemid=63.

80. *Id.* Somewhat surprisingly, El Salvador did not contest the tribunal's jurisdiction over Pac Rim, given the company's rather dubious reincorporation maneuver; it merely reserved the right to do so at a later time. *See id* at 2 ("If Claimant chooses to continue with this arbitration beyond these preliminary objections, the Republic of El Salvador reserves the right to object to the jurisdiction of the [ICSID] and the competence of this Tribunal regarding any remaining claims.").

81. Press Release, Pac. Rim Mining Corp., ICSID Tribunal Rejects Government of El Salvador's Preliminary Objection (Aug. 3, 2010), *available at* http://finance.yahoo.com/news/Pacific-Rim-Mining-Corp-ICSID-iw-2058911868.html?x=0&.v=1.

82. ANDERSON, PEREZ-ROCHA & DREYFUS, *supra* note 2, at 1.

83. *See* Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L L.J. 359, 381 (2008) (describing recent trends in indirect expropriation as a "renewed wave of nationalization" that "has thus far been led by Latin American countries").

such laws, but the potential for massive arbitral awards often produces a chilling effect on responsible policy-making.[84]

The investor suit provisions of Latin America's FTAs provide foreign investors with an unprecedented level of power at the same time that Latin American governments are beginning to flex their democratic muscles. Precedent shows that, regardless of the drafters' intent, CAFTA-DR's Chapter 10 and NAFTA's Chapter 11 effectively threaten the sovereign ability of non-U.S. states to protect the health, safety, and welfare of their populations. *Pac Rim* and other investor-state lawsuits like it raise troubling questions for the future of free trade and environmental responsibility in the Americas: How much of an incursion on sovereign authority is acceptable when economic development and foreign trade are on the line? Should future FTAs provide the investor-state dispute resolution loophole that allowed the strategic maneuvering mastered by Pacific Rim/Pac Rim? And at what point do FTAs stop paying lip service to environmental aspirations and actually start achieving them?

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84. *Id.* at 4.

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