



Institute for
Policy Studies



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

Executive Summary

The report [“Extraction Casino: Mining Companies Gambling with Latin American Lives and Sovereignty through Supranational Arbitration”](#) examines how mining companies have been filing dozens of multi-million dollar claims against Latin American countries before supranational arbitration panels, demanding compensation for court decisions, public policies and other government measures that they claim reduce the value of their investments. In most of these cases, communities have been actively organizing to resist mining activities and defend their land, health, environment, self-determination and ways of life. For them, these suits represent a further assault against their self-determination and the already limited protections they have. Meanwhile, for transnational mining companies, supranational arbitration is yet another opportunity to strike it rich through reckless, casino-style gambling, given the recourse they have to bring suits within a system in which the deck is heavily stacked in their favor.

This report examines 38 cases that have been brought by mining companies against governments in Latin America. Notably, over half of the mining companies involved have no operating mine anywhere and yet are still able to bring costly, abusive claims.

For example, Colombia currently faces over US\$18 billion dollars in threatened or pending suits, especially related to protecting Indigenous territory and fragile páramo ecosystems, which provide water to over a million people. Mexico and Uruguay face over US\$3 billion each in suits for measures that have put ecologically sensitive areas off-limits to industrial mining. And Guatemala and Ecuador have been threatened with tens or hundreds of millions of dollars in suits related to gold and silver projects that communities have spent many years fighting, facing criminalization and threats to defend their water, health, and livelihoods.

Access for transnational corporations to the supranational arbitration system is enabled through the inclusion of investor-state dispute settlement (ISDS) clauses in Free Trade Agreements (FTAs), Bilateral Investment Treaties (BITs) and other international investment pacts, laws or contracts. This system allows foreign investors to bypass domestic courts and make claims against sovereign states for millions — and even billions — of dollars before private arbitration “tribunals”. The World Bank’s International Centre for Settlement of Investment Disputes (ICSID) is the most commonly used, along with the United Nations Commission on International Trade Law (UNCITRAL). Such “tribunals” made up of highly-paid, three-person panels of

corporate lawyers should not be mistaken for a court of law. Rather, they have been called a “caricature of a legal system” with little regard for precedent, truth or justice

The extractive sector takes greatest advantage of ISDS with oil, gas and mining companies having brought 24% of known claims. The geographic distribution of cases is concentrated in Latin America, where Central and South American governments face 29% of known claims.

While companies from a range of countries make use of ISDS, the majority of those discussed in this paper were brought by Canadian-domiciled firms. This is reflective of the disproportionate role of Canadian financing in the global mining sector and that some 55% of Canadian mining assets abroad are concentrated in Latin America.

Highlights from the Analysis of Cases Studied:

The report probes the justifications used by mining companies to pursue supranational arbitration against Latin American governments and comes to the following conclusions:

- Thirteen or approximately one-third of cases surveyed dispute government measures related to **Indigenous Rights and community consent**. Nine of these were brought by companies without any operating mine at the time of arbitration.
- Twenty or over half of cases examined dispute government measures concerning the enforcement of **environmental and health protections**. Fifteen of these were brought by companies without any operating mine at the time of arbitration.
- Fifteen or over one-third of cases dispute government measures related to **resource management** (including nationalization or taxation). Five of these were brought by companies without any operating mine at the time of arbitration.

The report also analyzes the Investor Protection Rules that mining companies most frequently invoke as alleged violations in such cases:

- **Indirect Expropriation** was invoked in twenty-one or over half of the cases studied. This is especially egregious since it relates to so-called expropriation of anticipated future lost profits, rather than the physical taking of property or investments.
- **Fair and Equitable Treatment/Minimum Standard of Treatment** was allegedly violated in twenty or over half of the cases studied. This concept is highly vague and subjective, and arbitrators have interpreted it in wildly different ways without regard for diverse histories, cultures and value systems.
- **Full Protection and Security** was allegedly violated in thirteen or about one third of the cases examined. This concept imposes a duty on governments to do everything in their power to protect foreign investments from harm whether from state or non-state actors, and despite harm to people or the environment from such investments.

The report also includes a country-by-country description of the trends and specificities of ISDS cases, including the local context of community resistance or conflict, as well as government measures taken or related decisions from courts and human rights bodies.

A Call to Action Locally and Internationally:

This report forcefully demonstrates that ISDS poses a threat to diverse peoples and the environment, as well as to state sovereignty.

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

At the policy level, in light of the threat that mining and other extractive industry companies pose to people and the environment, and in the interest of recuperating national sovereignty over policy making to protect the wellbeing of Indigenous Peoples and affected communities, current International Investment Treaties urgently need to be audited and, only after meaningful public participation, either be cancelled or rewritten on terms that put people's rights and the environment first. Clauses enabling the use of ISDS should be eliminated. Privileges for foreign investors, such as the concept of "Indirect Expropriation" should as well. This is necessary to restore policy space for governments to pursue and prioritize local and national economic priorities; social, cultural and environmental protections; as well as the preservation, promotion and restoration of public services.

Where abusive arbitration suits are being brought by mining companies to try to undermine the struggles of Indigenous Peoples and mining-affected communities to prevent this industry from destroying their territory, their water supplies and their ways of life, there is an opportunity to continue building international solidarity with their struggles while continuing to demonstrate the abusiveness of international investor protection agreements.

In this vein, the report concludes with lessons learned from a campaign against the ISDS suit that Pacific Rim Mining brought against El Salvador. Pacific Rim Cayman in 2009 for not having granted it a permit to put a gold mine into operation—and for which it had never met regulatory requirements. The local, national and international campaign provides valuable lessons for

building solidarity with struggles in defence of land and water, while bringing critical attention on the ISDS system that poses great danger to these same life and death battles. The local, national and international organizing that took place over the duration of the arbitration, and a solid legal defence, contributed to ensure that the Salvadoran state did not lose this case, while helping to clear the way for Salvadorans to finally push their legislature to pass a ban on all metallic mining country-wide in March 2017.