

# **Pacific Rim and Beyond: Global Mining, Global Resistance and International Law**

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## I. INTRODUCTION

Under the lush hillsides and small farms of El Salvador's Cabanas region run rich, potentially very lucrative veins of silver and gold, according to exploration done over the past decade by a Nevada subsidiary of the Canadian mining company Pacific Rim.<sup>1</sup>

Pacific Rim was drawn to El Salvador because of the possibility of lucrative metallic deposits and also new Salvadoran Mining and Investment laws passed in 1996 and 1999, respectively, meant to court foreign investment.<sup>2</sup> Pacific Rim president and CEO Tom Shrake has worked in Latin America for twenty-three years and considers himself "an environmentalist" and personally devoted to helping the people of economically struggling countries like El Salvador.<sup>3</sup> According to Shrake and filings now in front of the International Centre for the Settlement of Investment Disputes ("ICSID"), the Salvadoran government and local residents initially welcomed Pacific Rim. The good relationship was key to Pacific Rim's 2002 merger with the Dayton Mining Company,<sup>4</sup> which owned<sup>5</sup> mining operations in El Salvador, Chile, and the United States. But several years later, relations soured. In December 2006, the Salvadoran government, then led by conservative president Antonio Saca, stopped communicating with the company as it sought permits to continue its exploration. At first Shrake thought it was a matter of bureaucracy and backlog, but he soon began to suspect more "political"

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1. Kari Lydersen & Jason Wallach, *Is Free Trade a Gold Mine?*, THE PROGRESSIVE MAGAZINE (July 2010) available at <http://progressive.org/lydersen0710.html>; *CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case*, PUBLIC CITIZEN, available at <http://www.citizen.org/documents/CAFTA-investor-rights-undermining-democracy.pdf>; *El Dorado Overview and Resource Estimate*, PACIFIC RIM MINING CORP., available at <http://www.pacrim-mining.com/s/Eldorado.asp> (last visited 15 April 2012).

2. Pac Rim Cayman LLC vs. The Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, p. 34-35, (Aug. 2, 2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C661>.

3. Interview with Tom Shrake, CEO, Pacific Rim Mining Corp., (Feb. 10, 2012, & Jan.-Feb. 2010).

4. Rim Cayman LLC vs. The Republic of El Salvador, *supra* note 2, at 31-32.

5. Pacific Rim's 2002 annual report focuses on the Dayton Mining Company including on p. 4: "The merger of Pacific Rim and Dayton has created a company whose position is stronger than the sum of its parts. Pacific Rim's current market capitalization of approximately \$38 million is more than 3 times that of the combined Dayton (\$5.8 million) and old Pacific Rim (\$4.5 million) market capitalization of \$10.3 million when the merger proposal was announced." (Report on file with author).

motives, as noted in the ICSID filing.<sup>6</sup>

Opposition to mining by foreign companies was growing across Latin America, with increasing international attention to the complaints of poor farmers and indigenous communities,<sup>7</sup> who often live atop the mineral deposits and report social upheaval, intimidation, violence, and environmental harm related to mining while they reap little economic benefit from the extraction. In El Salvador, opposition was led in part by the Catholic Church, including San Salvador Archbishop Fernando Saenz.<sup>8</sup> Residents were extremely concerned about contamination and depletion of their water, which is a particular risk with gold and silver mining since such metals are often locked in sulfide ore which when exposed to oxygen through the mining process releases sulfuric acid that can contaminate groundwater, potentially for decades or even centuries into the future.<sup>9</sup> Though El Salvador is a rainy country, long-standing infrastructure and land use problems and the privatization of water delivery means many Salvadorans don't have access to clean fresh water on a regular basis, as many as sixty percent of rural residents by some estimates.<sup>10</sup>

In March 2008, amidst growing public opposition, President Saca announced the government would not grant any more mining licenses.<sup>11</sup> He later added that he would not grant new exploration or mining permits until two conditions were met: passage of a new more protective mining law and an environmental study of the effects of mining on the country.<sup>12</sup>

Shrake was furious because he suspected El Salvador was unfairly

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6. Pac Rim Cayman LLC vs. The Republic of El Salvador, *supra* note 2.

7. See, e.g., *Mining on Indigenous Lands*, INDIGENOUS ENVIRONMENTAL NETWORK, <http://www.ienearth.org/mining.html> (last visited 15 Apr. 2012); *Who We Are*, TAMATSIMA WA HAA WIRIKUTA DEFENSE FRONT, [http://frenteendefensadewirikuta.org/wirikuta-en-bk/?page\\_id=366](http://frenteendefensadewirikuta.org/wirikuta-en-bk/?page_id=366) (last visited 15 Apr. 2012); PASTORAL COMMISSION PEACE AND ECOLOGY WEBSITE, [www.resistance-mining.org](http://www.resistance-mining.org) (last visited 15 Apr. 2012) (detailing opposition to chemical and metal mining in Guatemala).

8. Pac Rim Cayman LLC vs. The Republic of El Salvador, *supra* note 2, at 45.

9. *Watershed Contamination from Hard Rock Mining*, USGS, [http://www.earthworksaction.org/issues/detail/acid\\_mine\\_drainage](http://www.earthworksaction.org/issues/detail/acid_mine_drainage) (last visited 15 Apr. 2012).

10. CHRONIC NEGLECT: THE WATER CRISIS IN EL SALVADOR (CDC/Witness Oct. 2011).

11. Brendan Fischer, *Death Threats in El Salvador as Mining Company Asserts Corporate "Rights,"* PRWATCH (May 14, 2011) available at <http://www.prwatch.org/news/2011/05/10748/death-threats-el-salvador-mining-company-asserts-corporate-rights>.

12. Pac Rim Cayman LLC vs. The Republic of El Salvador, *supra* note 2, at 42–43.

and illegally depriving Pacific Rim of its right to mine while also sabotaging the country's own well-being. "We invested a lot of money with their support and under the legal system," he said. "To pull the plug on that is fine but at that point in time we'd made an investment and that investment has some value. If they decide not to move forward, they have the obligation under the law to provide our investors the damage we've realized because of that about-face."<sup>13</sup>

In 2009, Pacific Rim took legal action against the country, both under El Salvador's Investment Law and also under provisions in Chapter 10 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA"), between the United States and Costa Rica, Nicaragua, Honduras, the Dominican Republic, Guatemala and El Salvador. Among other things Chapter 10 says foreign investors must be compensated if their property is effectively expropriated or nationalized by a state.<sup>14</sup>

This is an example of an investor-state provision, which are common components of free trade agreements or other international agreements that allow companies operating in foreign countries to bring cases before an arbitration body if they feel they have been discriminated against compared to domestic companies or otherwise have seen their rights violated by the country where they are investing.<sup>15</sup>

Pacific Rim is seeking the \$77 million it says it invested in exploration in El Salvador, plus interest, and a much greater amount of compensation for things including "reasonable lost profits, and indirect losses."<sup>16</sup> The ICSID filing says that "while this sum has not yet been quantified, it is far in excess of the amount of expenditures" already invested.<sup>17</sup>

The Pacific Rim claim was the first case filed under the investor-state provision of CAFTA, signed in 2004 against the opposition of anti-globalization activists, labor unions, and indigenous groups in Latin

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13. Interview with Tom Shrake, CEO Pacific Rim Mining Corp., (Feb. 10, 2012); Email Interview with Todd Tucker, Res. Dir. Public Citizen Global Trade Watch (March 2012) (mentioning that it appears Salvadoran law does grant foreign investors to seek recourse for alleged violations of domestic Salvadoran law in front of the ICSID).

14. *CAFTA-DR (Dominican Republic-Central America FTA)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, at chp. 10, art. 10.7 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>.

15. *STRONG INVESTOR-STATE DISPUTE SETTLEMENT = INCREASED US EXPORTS*, NATIONAL ASSOCIATION OF MANUFACTURERS, (Feb. 4, 2011); see also, *NAFTA Investor-State Arbitrations*, U.S. DEPARTMENT OF STATE, available at <http://www.state.gov/s/l/c3439.htm>.

16. *Pac Rim Cayman LLC vs. The Republic of El Salvador*, *supra* note 2, at 13.

17. *Id.*

America and the United States.<sup>18</sup> CAFTA allows for such cases to be heard by a three-person tribunal convened by the ICSID, which also hears cases under other free trade agreements and treaties.<sup>19</sup> A tribunal in 2010 ruled against preliminary objections<sup>20</sup> raised by El Salvador—allowing Pacific Rim’s case to move forward.<sup>21</sup> As of March 2012, the tribunal was considering whether Pacific Rim has jurisdiction under CAFTA, given the parent company is based in Canada, which is not a party to the free trade agreement.<sup>22</sup> Shrake notes that the Pacific Rim subsidiary is based in Nevada, and he said most of the investment capital that went into El Salvador and the company’s “intellectual property” is American.<sup>23</sup>

Last spring, the ICSID dropped a similar case brought against El Salvador under CAFTA Chapter 10 by a Wisconsin-based company called the Commerce Group Corporation (“Commerce Group”), which similarly sought \$100 million or more from El Salvador for blocking its attempts to mine gold.<sup>24</sup> ICSID turned down the Salvadoran government’s attempt to recoup about \$800,000 in legal costs from the Commerce Group, essentially saying the company’s claim was not frivolous even though it was not sustained, in part because investment occurred before CAFTA was signed, according to analysis by the watchdog non-governmental organization (“NGO”) Public Citizen.<sup>25</sup> The

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18. Regarding widespread opposition to CAFTA, see Kathy Schalch, *CAFTA Encounters Opposition from Labor*, NPR (May 12, 2005); *Q and A: The CAFTA Debate*, NY TIMES (July 18, 2005); *Doing Business in Central America*, CAFTALAW.NET, www.caftalaw.net (last visited 15 Apr. 2012); STOP CAFTA, www.stopcafta.org (last visited 15 Apr. 2012).

19. *ICSID Convention, Regulations and Rules*, INT’L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, (Apr. 2006) available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

20. *Pac Rim Cayman LLC vs. The Republic of El Salvador*, *supra* note 2, at 16 (noting that the government of El Salvador basically argued that Pacific Rim was wrong in claiming that Salvadoran law offered the company an “automatic right” to mine, and also that the company had not fulfilled procedural requirements for mineral exploration to go forward).

21. *Procedural Details: Pac Rim Cayman LLC vs. The Republic of El Salvador*, ICSID, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C661&actionVal=viewCase>.

22. See *id.*; see also, Interview Tom Shrake, *supra* note 13.

23. Interview with Tom Shrake, *supra* note 13.

24. *Commerce Group Corp. and San Sebastian Gold Mines Inc. vs. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, ¶ 140(1)–(2) (Mar. 14, 2011) <http://icsid.worldbank.org/ICSID/FrontServlet>.

25. Press Release, Public Citizen, “Commerce Group CAFTA Ruling Highlights Threat of Foreign Investor Rules Also Included in Korea FTA: Even as Mining Firm’s Frivolous Challenge of Environmental Policy Is Dismissed on Technicality, El Salvador

Commerce Group is seeking to revive the claim through an annulment appeal, heard by a different ICSID tribunal, which could result in the original tribunal's decision being overturned (or annulled) and a new hearing on the claim.<sup>26</sup>

## II. INVESTORS RIGHTS PROVISIONS PROVOKE IRE

Investor-state claims under CAFTA and the North American Free Trade Agreement ("NAFTA") Chapter 11<sup>27</sup> have been lightning rods for opponents of free trade agreements and economic neo-liberalism who argue that the provisions give corporations undue power to challenge state and federal laws in a process that lacks transparency.<sup>28</sup> So far there have been no major victories for mining companies bringing cases under these provisions.<sup>29</sup> Even if they don't result in settlements, both mining proponents and opponents say the free trade agreement investor-state provisions are a powerful way for companies to persuade foreign governments to allow mining, either to avoid such arbitrations or as part of settlements after claims have been filed.<sup>30</sup>

"I'm not of the opinion this arbitration will proceed to the end," said Shrake. "In my opinion we will settle with El Salvador. I think settling

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Must Pay \$800,000" (Mar. 15, 2011); Interview with Todd Tucker, Res. Dir. Public Citizen Global Trade Watch (Feb. 21, 2012).

26. Commerce Group Corp. and San Sebastian Gold Mines Inc. vs. Republic of El Salvador, ICSID Case No. ARB/09/17, Procedural Details, (filed Aug. 21, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet>.

27. *Chapter 11: Investment*, NAFTA, available at <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mpiID=142>.

28. The summary of a report by the watchdog NGO Public Citizen describes NAFTA's Chapter 11 thus: "NAFTA's investment chapter (Chapter 11) contains a variety of new rights and protections for investors and investments in NAFTA countries. If a company believes that a NAFTA government has violated these new investor rights and protections, it can initiate a binding dispute resolution process for monetary damages before a trade tribunal, offering none of the basic due process or openness guarantees afforded in national courts. These so-called "investor-to-state" cases are litigated in the special international arbitration bodies of the World Bank and the United Nations, which are closed to public participation, observation and input." *NAFTA Chapter 11: Corporate Cases*, PUBLIC CITIZEN, available at <http://www.citizen.org/Page.aspx?pid=1218>.

29. Email Interview with Travis McArthur, Trade and Finance Researcher, Global Trade Watch (Mar. 2012) (An analysis by Public Citizen shows that 31 mining cases have been filed before the ICSID, with 19 of them resolved and 12 pending.); Interview with Todd Tucker, *supra* note 13.

30. Phone Interview Tom Shrake, *supra* note 13; Interview with Todd Tucker, *supra* note 13; Interview with Jamie Kneen, spokesman MiningWatch Canada (Feb. 2012).

will be moving the industry and the gold mine forward.”<sup>31</sup>

Tucker said that according to Public Citizen’s analysis, investor-state provisions have existed in some form since at least the 1950s and are enshrined in about 3,000 bilateral trade agreements nationwide.<sup>32</sup> He said claims under these provisions accelerated greatly starting in the 1990s, because “developing nations have been breaking from several decades of neoliberal policies, and now investors are launching investor-state attacks as a form of political insurance against the costs of socioeconomic change.”<sup>33</sup>

“Unfortunately I think this kind of case will become more common,” Tucker said, adding that corporations have increasing motivation for such suits “in the last few years as countries break with the ‘Washington consensus’—the pro-deregulation mentality. Countries are beginning to chart a new path for themselves, and investors are increasingly turning to investment treaties and trade agreements as a way to limit their ability to do so.”<sup>34</sup>

Critics including NGOs focused on global trade, indigenous rights and the environment see the ability of companies to challenge the laws of sovereign nations and seek to force them to pay for not only a lost investment but also for foregone potential profit as an unnecessary and unethical advantage for multinational corporations doing business in developing countries, whose GNPs are often dwarfed by the would-be investors’ corporate coffers.<sup>35</sup> The fact that tribunals hearing investors’ rights cases have binding power under free trade agreements is also seen by these critics as an injustice and an insult to communities fighting foreign mining companies, since international law offers few concrete, binding options for mining opponents, as discussed later in this article.

### III. HUMAN RIGHTS AND ENVIRONMENTAL VIOLATIONS ALLEGED WORLDWIDE

In many developing countries, opponents of multinational mining operations often suffer violence, intimidation, displacement, and assassinations. The most famous case may be in Papua New Guinea, where residents of the island of Bougainville are suing the mining giant

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31. Interview with Tom Shrake, *supra* note 13.

32. Interview with Todd Tucker, *supra* note 13.

33. *Id.*

34. *Id.*

35. See Citizens Trade Campaign, <http://www.citizenstrade.org/ctc/> (last visited Apr. 15, 2012); Mark Weisbrot, *CAFTA not likely to do better than NAFTA*, CHICAGO TRIBUNE (Dec. 19, 2003).

Rio Tinto in U.S. federal court for genocide and war crimes under the Alien Tort Statute.<sup>36</sup> The lawsuit alleges that Rio Tinto essentially ordered the Papuan government to do whatever necessary to quash indigenous opposition to its massive copper mine, and provided the government helicopters and other equipment to use against locals even after reports of war crimes by the military.<sup>37</sup> Violence, displacement, and a devastating economic blockade of the island reportedly killed about 10,000 residents.<sup>38</sup>

In El Salvador, several prominent anti-mining activists have been murdered and others receive death threats on a regular basis, including members of the grassroots radio station Radio Victoria.<sup>39</sup> Locals say the mining controversy has inflamed local political divisions left simmering since the country's brutal civil war in the 1980s.<sup>40</sup> Shrake said that he frequently receives death threats and that the violence in the area of Pacific Rim's explorations is, if anything, perpetrated by mining opponents.<sup>41</sup> He points to family conflicts and other factors potentially driving the violence, and notes that the company has invested in buildings, education and other social welfare projects for the surrounding communities.<sup>42</sup> Shrake also said locals' fears of water contamination are unfounded.<sup>43</sup> He said an independent analysis of the ore in the Cabanas region commissioned by Pacific Rim found that mining would not release significant amounts of sulfuric acid:

The El Dorado ores had no acid potential based on numerous chemical results done by third party labs. There is absolutely no scientific evidence that has ever been conducted that suggests otherwise, only the commonly repeated misinformation provided by rogue NGOs. When asked for the science behind their claims by the consultants, they have never provided a shred of such evidence because they don't have it.<sup>44</sup>

These claims have not convinced local opponents, however,<sup>45</sup> who point to the experience of peasant farmers in the Valle de Siria region of neighboring Honduras. The Honduran peasants blame the Canadian

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36. *Sarei v. Rio Tinto, PLC and Rio Tinto Limited*, 671 F.3d 736 (9th Cir. 2011).

37. *Id.* at 744.

38. *Id.* at 774.

39. *See, e.g.*, Lydersen & Wallach, *supra* note 1.

40. *Id.*

41. Interviews with Tom Shrake, *supra* note 3.

42. *Id.*

43. *Id.*

44. Email Interview with Tom Shrake, CEO Pacific Rim Mining Corp. (March 2012).

45. Lydersen & Wallach, *supra* note 1.



company Goldcorp's mining, and resultant water contamination, for a rash of mysterious health problems and for destroying local agriculture.<sup>46</sup> Salvadoran mining opponents and international doctors have visited Valle de Siria to see the mining impacts and interview affected villagers.<sup>47</sup> Opponents of the Honduran government of President Porfirio "Pepe" Lobo Sosa (elected in Nov. 2009)<sup>48</sup> frequently say that the June 2009 coup, which deposed popular then-President Manuel Zelaya and brought right-wing forces to power, was driven in part by Zelaya's antipathy toward foreign mining companies.<sup>49</sup>

Similarly in Guatemala, the Marlin mine run by Glamis Gold, another Canadian company with a Nevada-based subsidiary, was accused of causing massive environmental contamination and sparking violence and murders.<sup>50</sup> (Canada is home to "over 75 percent of the world's exploration and mining companies" as of 2008.)<sup>51</sup>

After a complaint from the Guatemalan environmental group MadreSelva, the World Bank's Compliance Advisor Ombudsman launched an investigation into Glamis's Marlin mine.<sup>52</sup> The resulting report published in September 2005 found violations of required community involvement procedures and environmental safeguards, among other things.<sup>53</sup> Local Mayan residents vehemently opposed the project, blocking a truck carrying mining equipment on the Pan American Highway for forty days in 2004.<sup>54</sup> The stand-off ultimately

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46. *Id.*

47. *Id.*

48. *Nations divided on recognizing Honduran president-elect*, CNN WORLD (Nov. 30, 2009) available at [http://articles.cnn.com/2009-11-30/world/honduras.elections\\_1\\_president-roberto-micheletti-zelaya-supporters-zelaya-and-micheletti?\\_s=PM:WORLD](http://articles.cnn.com/2009-11-30/world/honduras.elections_1_president-roberto-micheletti-zelaya-supporters-zelaya-and-micheletti?_s=PM:WORLD).

49. Press release from MiningWatch, *Affected Communities from the Americas Demand that Canadian Mining Industry Respect Their Rights*, (May 17, 2011); Interviews with Honduran residents of Comayagua and surrounding small communities in Honduras, affiliated with the Centro Nacional del Trabajadores del Campo (CNTC)(July 2010).

50. Press release from MiningWatch, *Two killed so far protesting Glamis Gold in Guatemala* (Aug. 12, 2005).

51. *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (March 2009) available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx?view=d>.

52. Press release from the Halifax Initiative, *Glamis Gold and the IFC: Gross Mismanagement in Guatemala* (Dec. 2005).

53. *Id.*

54. Press releases from MiningWatch, *supra* note 51.

ended in violence that left at least one dead and more injured.<sup>55</sup> The mine was eventually launched thanks in part to a \$45 million loan guarantee from the World Bank. In 2006, Glamis merged with the company Goldcorp.<sup>56</sup>

In Mexico, critics including U.S.- and European-based solidarity groups allege that the relatively strong labor and environmental laws on the books are regularly flaunted by mining companies with the tacit or explicit support of local and federal government authorities.<sup>57</sup> The town of Cananea, about 25 miles south of the Arizona border, has been bitterly divided with ongoing violent attacks and vandalism related to a years-long strike by the Mexican miner's union at the town's massive open pit copper mine,<sup>58</sup> where a strike a century ago helped spark the Mexican Revolution.<sup>59</sup> Mexican law prohibits companies from hiring replacement workers during a strike, but in 2010 the government declared the strike at the mine, owned by Grupo Mexico, illegal and allowed the company to resume production.<sup>60</sup> Federal police descended on Cananea with weaponry and tear gas to disperse picketing miners.<sup>61</sup>

In another example of government compliance with mining companies in the face of local opposition, Julio Calderon, the mayor of Chicomuselo, a town in Chiapas, Mexico, allegedly accepted bribes from the Canadian mining company Blackfire Exploration Ltd. in exchange for suppressing local opposition to barite mining.<sup>62</sup> The bribery scheme

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55. *Id.*

56. Press releases from MiningWatch, *supra* note 51; Press releases from other groups including The Halifax Initiative; Robert Moran PhD., *New Country, Same Story: Review of the Glamis Gold Marlin Project EIA, Guatemala*, MININGWATCH CANADA (Feb. 2004) available at [http://www.miningwatch.ca/sites/miningwatch.ca/files/Moran\\_Marlin\\_rpt\\_Feb\\_2005.pdf](http://www.miningwatch.ca/sites/miningwatch.ca/files/Moran_Marlin_rpt_Feb_2005.pdf).

57. See MAQUILA SOLIDARITY NETWORK, <http://en.maquilasolidarity.org/actions/urgentaction> (last visited 15 Apr. 2012); see also, *Social and Political Analysis*, MEXICO SOLIDARITY NETWORK, available at <http://mexicosolidarity.org/about/analysis/en>.

58. Press Release United Steelworkers, *Steelworkers Condemn Mexican Government Attack on Cananea Miners* (June 7, 2010); Kari Lydersen and Jessica Pupovac, *Striking on the Shoulders of Giants: Injustice Persists at Copper Mine that Sparked Mexican Revolution*, IN THESE TIMES MAGAZINE (July 27, 2008) available at [http://www.inthesetimes.com/article/3861/striking\\_on\\_the\\_shoulders\\_of\\_giants](http://www.inthesetimes.com/article/3861/striking_on_the_shoulders_of_giants).

59. David Bacon, *Mexican Miners Fight Privatization in Revolutionary Cananea* (Jun. 15 1999) available at <http://dbacon.igc.org/Mexico/24MinersFight.htm>.

60. *New Clashes Erupt at Cananea's Copper Mine*, REUTERS (Sept. 8, 2010) available at <http://www.reuters.com/article/2010/09/09/us-grupomexico-clashes-idUSTRE68808P20100909>.

61. Lydersen & Pupovac, *supra* note 59; Bacon, *supra* note 60.

62. *Blackfire adding threats to injury in Mexico: Canadian mining firm looks to pocket \$800 million via NAFTA Ch. 11*, MININGWATCH CANADA MINES ALERT (Feb. 22,

reportedly collapsed<sup>63</sup> when Calderon demanded that the money be augmented with a sexual encounter with a specific Playboy model, which apparently never happened.<sup>64</sup> The barite mine was closed by government orders in 2009 and that same year three Blackfire employees were reportedly arrested in relation to the death of an anti-mining activist.<sup>65</sup> Despite the scandal, in 2010 Blackfire reportedly threatened to file an investor-state case under NAFTA Chapter 11 seeking \$800 million in compensation for the government's closing the barite mine.<sup>66</sup> The company never followed through on the threat, and in August 2011, the Royal Canadian Mounted Police launched an investigation of the alleged bribery.<sup>67</sup>

Canada's government encourages the more than 1,000 mining companies headquartered there to act responsibly abroad, through a governmental Corporate Responsibility Strategy for extractive industries that includes training and incentives to push Canadian companies to forge good relationships with foreign governments and local populations.<sup>68</sup> But MiningWatch Canada's Jamie Kneen said NGOs are skeptical of how much good that policy does. He and other Canadian activists complain that aside from Canadian corporations' conduct abroad, the current conservative Canadian government supports environmentally destructive extraction projects—like mining of the Albertan tar sands<sup>69</sup>—that harm indigenous people in Canada.<sup>70</sup> “What we'd like to see is either that just stop or be balanced by some set of criteria or some additional emphasis on indigenous rights and labor rights

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2010) available at <http://www.miningwatch.ca/blackfire-adding-threats-injury-mexico-canadian-mining-firm-looks-pocket-800-million-nafta-ch-11>.

63. *Id.*

64. *Id.*

65. *Id.*; see REMA, [www.rema.codigosur.net](http://www.rema.codigosur.net) (last visited 15 Apr. 2012).

66. *Id.*; see also, Interview with Jamie Kneen, *supra* note 31.

67. *Blackfire*, *supra* note 63; REMA, *supra* note 67.

68. *Building the Canadian Advantage*, *supra* note 53.

69. *Indigenous Activists from Canada Protest Tar Sands Development at Durban Climate Change Summit*, DEMOCRACY NOW (Dec. 6, 2011) available at [http://www.democracynow.org/2011/12/6/indigenous\\_activists\\_from\\_canada\\_protest\\_tar](http://www.democracynow.org/2011/12/6/indigenous_activists_from_canada_protest_tar)

70. Peter O'Neil, 'An Aboriginal Uprising is Inevitable if Harper Doesn't Listen,' *Chief Threatens*, NATIONAL POST (Jan. 23, 2012) available at [http://news.nationalpost.com/2012/01/23/canada-could-face-aboriginal-uprising-if-harper-doesnt-listen-chief-threatens/?\\_lsa=e24a3f0a](http://news.nationalpost.com/2012/01/23/canada-could-face-aboriginal-uprising-if-harper-doesnt-listen-chief-threatens/?_lsa=e24a3f0a); Ari Peskoe, *Will Canada Choose Mining over Indigenous Rights?* CHANGE.ORG (Oct. 26, 2010) available at <http://news.change.org/stories/will-canada-choose-mining-over-indigenous-rights>.

and everything else that Canada is supposed to be standing for," Kneen said.<sup>71</sup>

#### IV. INTERNATIONAL INSTRUMENTS AND THE 1872 MINING LAW IN THE UNITED STATES

While advocacy groups complain that the governments of Canada, Mexico, Papua New Guinea, and many other developed and developing countries do not do enough to regulate mining companies or protect their citizens from the effects of mining, the U.S.'s law governing hard rock mining gives companies—including foreign companies—much leeway to mine on public land, as described below.

In fact, the Hardrock Mining Law of 1872 law, which hard rock mining on public land in the United States, could be considered more subservient to mining companies than the laws of many developing countries.<sup>72</sup> The 1872 law was passed to stimulate settlement of the American West and encourage the extraction of natural resources needed to power a growing country<sup>73</sup> by offering any U.S. citizen the right to mine on public land without paying royalties to the federal government. Furthermore, this right to mine explicitly trumps most other claims to, or uses of, public land under the law.<sup>74</sup>

The label of "U.S. citizens" soon came to include small companies, and then larger ones, and ultimately multinational, largely foreign-based corporations, that got around the "U.S. citizen" stipulation by forming U.S. subsidiaries.<sup>75</sup> In one prominent mining controversy in California, the Canadian company Glamis Gold sought to present itself simultaneously as both a foreign company with standing under NAFTA and a U.S. company—through a Nevada subsidiary—necessary to give it mining rights under the 1872 Mining Law.<sup>76</sup>

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71. Interview Jamie Kneen, *supra* note 31.

72. See 30 U.S.C. §§ 22–42.

73. See, e.g., Roger Flynn, *The Right to Say No: Federal Authority Over Hardrock Mining on Public Lands*, 16 J. ENVTL. L. & LTG. 249, 14–15 & 36–37 (2001); Scott Harn, *Legislative and Regulatory Update*, 75 ICMJ PROSPECTING AND MINING JOURNAL 6 (2006), available at [http://www.icmj.com/article.php?id=613&keywords=Legislative\\_and\\_Regulatory\\_Update](http://www.icmj.com/article.php?id=613&keywords=Legislative_and_Regulatory_Update).

74. Flynn, *surpa* note 74.

75. Alison Ochs, *Glamis Gold Ltd. —A Foreign United States Citizen?: NAFTA and Its Potential Effect On Environmental Regulations and the Mining Law of 1872*, 16.2 COLO. J. INT'L ENVTL. L. & POL'Y 495, 497 (Spring 2005).

76. Jordan C. Khan, *A Golden Opportunity for NAFTA*, N.Y.U. ENVTL. L. J. 380, 390 (2008); Ochs, *supra* note 76.

Mining opponents in the United States say the 1872 law allows foreign companies to run roughshod over local residents and environmental protections.<sup>77</sup> Another complaint is that local, state and federal government agencies don't do enough to meaningfully regulate mining by foreign companies on public and private land.<sup>78</sup>

Colorado attorney Roger Flynn has spent his career opposing mines on behalf of local residents, Native American tribes, and environmental groups across the American west.<sup>79</sup> Flynn notes that<sup>80</sup> because the 1872 law severely restricts the U.S. government's "right to say no" to mining on public land, opponents are often relegated to trying to delay the approval process in hopes foreign mining companies will eventually decide that mining is uneconomical.<sup>81</sup> Flynn also stated:

You have these big Canadian companies that set up a shell company with essentially no assets and one employee, then if anything goes wrong, if there's extensive pollution, poof! This shell company disappears, that one employee is fired and we get screwed.<sup>82</sup>

Many of Flynn's cases involve public land that tribes consider sacred, but gaining any legal protections on those grounds is an uphill battle.<sup>83</sup> His Native American clients sometimes reference international law in their briefs, since they are sovereign entities themselves and also since they are looking for any possible tools to plead their cases. But, he said, "then the judge just ignores" the international law claims.<sup>84</sup>

One example of a foreign company facing strong opposition from tribes and local residents in the United States is the London-based multinational company Rio Tinto, which is in the process of opening huge new nickel and copper mines in Michigan's Upper Peninsula<sup>85</sup> and central Arizona,<sup>86</sup> respectively. In Michigan, a Rio Tinto subsidiary

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77. Flynn, *supra* note 74.

78. Editorial, *The Case for Mining Law Reform*, NY TIMES (June 23, 2008), available at <http://www.nytimes.com/2008/06/23/opinion/23mon2.html>; MINING LAW REFORM <http://www.mining-law-reform.info/>; *General Mining Law of 1872*, EARTHWORKS, [http://www.earthworksaction.org/issues/detail/general\\_mining\\_law\\_of\\_1872](http://www.earthworksaction.org/issues/detail/general_mining_law_of_1872) (last visited Apr. 15, 2012).

79. Interview with Roger Flynn (Feb. 23, 2012).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Kennecott Eagle Minerals*, RIO TINTO, [www.kennecotteagleminerals.com](http://www.kennecotteagleminerals.com) (last visited Apr. 15, 2012).

86. RESOLUTION COPPER MINING, [www.resolutioncopper.com](http://www.resolutioncopper.com) (last visited Apr. 15,

(Kennecott Eagle Minerals) has broken ground on its nickel mine<sup>87</sup> after more than a decade of legal battles over possible environmental effects.<sup>88</sup> In order to start its proposed copper mine in Arizona, Rio Tinto subsidiary Resolution Copper needs Congress to pass a “land swap” bill—proposed in Congress several times since 2005 and most recently passed by the House of Representatives in October 2011—that would void President Dwight D. Eisenhower’s executive order (and a continuation by President Richard M. Nixon) withdrawing the area in question from mining.<sup>89</sup> In both Michigan and Arizona, as in many areas around the country, the lands targeted for mining are held sacred by Native American tribes—the Ojibwe Keweenaw Bay Indian Community (“KBIC”) in Michigan<sup>90</sup> and the San Carlos Apache in Arizona.<sup>91</sup> This raises legal, social, and ethical parallels and questions in common with multinational companies mining in developing countries—also often in areas inhabited by indigenous people. Are the indigenous groups’ rights being violated by mining on ground they hold sacred? Are indigenous groups being given meaningful input into the process? Are indigenous groups and other local residents going to profit fairly from the mining operations that disrupt their lives and pollute their environment? And will the mining interfere with other local economic and cultural practices, from subsistence fishing to tourism? Wendsler Nosie Sr., former chairman of the San Carlos Apache, described the disconnect between how his tribe and the foreign mining company Rio Tinto see the same Arizona land:

When we talk about preservation, they talk about ownership. When we talk about feeding the people, they talk about profits. These are the last sacred places left. When these places are gone the world will

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2012).

87. John Pepin, “Blasting Begins,” *The Mining Journal* (Oct. 1, 2011).

88. Kari Lydersen, *MineField*, *EARTH ISLAND JOURNAL* (June 3, 2010) available at <http://www.earthisland.org/journal/index.php/eij/article/minefield/>.

89. Kari Lydersen, *Arizona plan for largest U.S. copper mine spurs economic, environmental debate*, *THE WASHINGTON POST* (Jan. 2, 2011) available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/02/AR2011010203276.html>; Interviews with local citizens in Superior, AZ (Dec. 2011).

90. *Stand for the Land*, [www.standfortheland.com](http://www.standfortheland.com) (last visited 15 Apr. 2012).

91. The National Congress of American Indians resolution, “Opposition to Legislation Proposing a Land Exchange in Southeastern Arizona for the Purpose of Mining Operations” (2011); Wendsler Nosie Sr., *Why Oak Flat is Sacred to the San Carlos Apache Tribe*, *YOUTUBE.COM* (Sept. 2010), available at <http://www.youtube.com/watch?v=sGw9dNT9Orc>.

take another turn. That's why it's so important this land exchange doesn't take place—it's really the final chapter.<sup>92</sup>

At Rio Tinto's Michigan nickel mine, KBIC tribal members risked arrest in 2010 to occupy Eagle Rock, site of the mine portal, which they consider sacred.<sup>93</sup> The members of the tribe were ultimately unsuccessful in gaining any governmental protections and in 2011 the company cleared forest and began blasting below the rock.<sup>94</sup>

In Arizona, leaders of the San Carlos Apache tribe fear that the beautiful and delicate high desert land sacred to them will be destroyed if Congress passes the land swap legislation.<sup>95</sup> That legislation would allow Rio Tinto to begin "block cave" underground copper mining, wherein blasting is done underground to loosen huge amounts of ore, which then falls into a tunnel with a conveyor system below.<sup>96</sup> While the method avoids the surface disruption that occurs with open pit mining, significant subsidence, when the surface collapses like a big sink hole, is a common result.<sup>97</sup>

Sue Montgomery, an attorney representing the San Carlos Apache, said that in the future they might invoke the U.N. Declaration on the Rights of Indigenous Peoples ("UNDRIP") in the future to try to block the Rio Tinto mine.<sup>98</sup>

The UNDRIP<sup>99</sup> and the International Labour Organization ("ILO") Convention 169<sup>100</sup> have been invoked by indigenous people fighting

92. Interview with Wendsler Nosie Sr., Fmr Chairman San Carlos Apache Tribe (Dec. 2011).

93. See, e.g., Kari Lydersen, *Kennecott Loses Road Decision; Worries Intensify Over U.P. Mine*, GREAT LAKES ECHO (MICH.) (21 Feb. 2011); Interviews with KBIC tribal members (May 2010); See also, John Pepin, *Judge denies stay of mining operation*, THE MINING JOURNAL (Sept. 14, 2011); Michelle Bourdieu, *Updated: Protect the Earth 2011, Part 2: Jessica Koski speaks on mining exploration on KBIC reservation* (Sept. 12, 2011) <http://keweenawnow.blogspot.com/2011/09/protect-earth-2011-part-2-jessica-koski.html>.

94. *Kennecott Eagle Minerals*, supra note 86; *Stand for the Land*, supra note 91; *Eagle Rock Occupation Day 15*, STAND FOR THE LAND (May 8, 2010) available at <http://standfortheland.com/2010/05/08/eagle-rock-occupation-day-15>.

95. Interviews with Wendsler Nosie Sr., supra note 93.

96. *Block Caving*, GLOBALINFO MINE, <http://technology.infomine.com/reviews/Blockcaving/welcome.asp?view=full> (last visited 15 Apr. 2012); Interview with Jon Cherry, CEO, Resolution Copper (Dec 2011).

97. *Id.*

98. Interview with Sue Montgomery, Attorney, (Dec. 2011).

99. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (13 Sep. 2007) [hereinafter UNDRIP].

100. International Labour Organization [ILO], *Indigenous and Tribal Peoples Convention, C169*, 27 Jun. 1989, C169, available at <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.

mining on their land in the United States and abroad, both as legal instruments and for symbolic appeal.

The ILO convention requirements include that indigenous groups be consulted and have a role in determining priorities in the case of natural resource extraction on their historic land.<sup>101</sup> The ILO convention has been ratified by most Latin American countries, though not by the United States.<sup>102</sup> An ILO casebook lists numerous examples where Latin American governments and courts have used the convention to inform policies and decisions on mining.<sup>103</sup> However, there is no official international adjudication body responsible for enforcing ILO conventions, and Convention 169 has binding power only in those individual countries that ratify it and also pass legislation implementing it.<sup>104</sup>

The UNDRIP was adopted by the U.N. General Assembly in 2007 and endorsed by the United States in 2010.<sup>105</sup> Among other things, the Declaration officially acknowledges the right of indigenous people to exist, and outlines indigenous rights regarding land, traditions, and natural resources. Especially relevant to mining is Article 32, which calls for “free, prior and informed consent” before allowing developments that would impact indigenous peoples’ traditional lands.<sup>106</sup> The UNDRIP has binding power only in those individual countries that ratify it and implement it in their domestic laws.<sup>107</sup> During the annual State of Indian Nations Address in January 2012, the National Congress of American Indians president, Jefferson Keel, called on the federal government to examine and revise federal laws so that they are in keeping with the Declaration.<sup>108</sup>

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101. *Id.*

102. *Application of Convention No. 169 by Domestic and International Courts in Latin America*, ILO, (Nov. 2009) available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_123946.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf).

103. *Id.*

104. Interview with Robert Coulter, Founder, Indian Law Resource Center (Feb. 25, 2012); Interview Charles Wilkinson, Professor, University of Colorado Law School (Feb. 2012).

105. *President Obama endorses the UN Declaration on the Rights of Indigenous Peoples*, AMNESTY INTERNATIONAL, (Dec. 18, 2010) available at <http://blog.amnestyusa.org/women/president-obama-endorses-the-un-declaration-on-the-rights-of-indigenous-peoples/>.

106. UNDRIP, *supra* note 103.

107. *Id.*; see also *Frequently Asked Questions: Canada's Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, <http://www.aadnc-aandc.gc.ca/eng/1309374807748> (last visited Apr. 15, 2012).

108. *The Native American SOTU: A Call on Obama to Advance Indigenous Rights*,



Robert Coulter, founder and executive director of the Indian Law Resource Center, said the UNDRIP had considerable symbolic power, even before the United States endorsed it.<sup>109</sup> Coulter noted that the UNDRIP has already figured into various cases where tribes are fighting to preserve sacred areas, and he expects to see it become more prominent in mining cases in the future.<sup>110</sup> Despite the lack of a binding international enforcement mechanism, Coulter sees<sup>111</sup> the UNDRIP as a powerful tool. Specifically, Coulter said:

The Declaration is an instrument now that enjoys worldwide consensus. . . . We know there are hideous regimes in certain parts of the world that voted for the Declaration and then violated it. . . . Guatemala voted for the Declaration then turns around and approves mines that result in the dislocation of Indian communities. . . . But it still means the world has come to agreement that these really are the legal rules and values that they are prepared to live with and that they agree should govern their conduct. Murder is illegal; people violate that law all the time but we still know the law criminalizing murder is a good thing. The same is true in international law.<sup>112</sup>

Even though there are not international adjudication bodies dedicated to enforcing the ILO conventions or U.N. declarations like UNDRIP, alleged violations of these and other international treaties and declarations can be part of claims in U.S. courts under the Alien Tort Statute and other laws.<sup>113</sup> For example, in the Papua New Guinea Rio Tinto case, the plaintiffs used the Alien Tort Statute to bring a lawsuit in U.S. federal court alleging violations of international law, including war crimes and genocide.<sup>114</sup> The plaintiffs also alleged Rio Tinto violated other international agreements, including the U.N. Convention on the Law of the Sea.<sup>115</sup>

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NEW AMERICA MEDIA (Jan. 2012), *available at* [www.newamericamedia.org](http://www.newamericamedia.org).

109. Interview with Robert Coulter, *supra* note 105.

110. *Id.*

111. *Id.*

112. *Id.*

113. Amy K. Lehr, *Looking Ahead: Indigenous Peoples and Free, Prior, and Informed Consent*, FOLEY HAUG LLP., (Jan. 17, 2011) *available at* <http://www.csrandthelaw.com/tags/informed-consent>.

114. *Sarei v. Rio Tinto, PLC and Rio Tinto Limited*, 671 F.3d 736 (9th Cir. 2011).

115. Declaration of Professor Lakshman D. Guruswamy, U.S. District Court Central District of California Western Division, in the case of *Alexis Holyweek Sarei, et al., v Rio Tinto PLC*, 650 F.Supp.2d 1004 (C.D. Cal. 2009).

115. (C.D. Cal., 2001) (University of Colorado law professor Dr. Lakshman D. Guruswamy served as an expert witness, testifying that Rio Tinto had violated the Law of the Sea by creating extensive contamination of rivers that killed much marine life.); United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

Though indigenous people face an uphill battle in U.S. courts and international tribunals to protect their sacred areas from mining, there have been some notable victories. In one landmark case, for example, tribal interests won out over the company Glamis Gold (now Goldcorp) in Imperial County, Calif., when the U.S. government supported the Quechan tribe's demands that public land they held sacred be off-limits to mining, specifically to an open pit gold mine proposed by Glamis Gold.<sup>116</sup> In 2001, then-Interior Secretary Bruce Babbitt refused to grant permission for the mine on public land because of its potential impacts on an historical "Trail of Dreams" and other areas sacred to the tribe.<sup>117</sup> Further, the State of California passed mine reclamation requirements that would have made the project economically infeasible.<sup>118</sup> Glamis brought suit under Chapter 11 of NAFTA, seeking \$49 million in lost investments plus interest and other damages.<sup>119</sup> Glamis ultimately lost before a three-member ICSID arbitration panel in June 2009, with commentators considering the tribe's testimony as key to the outcome.<sup>120</sup> "I wouldn't expect to see many more challenges like that because the gold company got nowhere," said Robert Coulter, who also praised the U.S. government's "vigor" in fighting Glamis's claim. "The company must have spent so much money (on the claim) and it got them nothing."<sup>121</sup>

In a 2008 article in New York University's *International Environmental Law Journal* before the decision in the Glamis case, Jordan C. Khan urged the ICSID tribunal hearing the case to help make NAFTA a tool for protecting the environment, by among other things, "stating that investors in heavily regulated industries must expect subsequent lawful restrictions."<sup>122</sup>

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116. Khan, *supra* note 77; Press Release, Indian Law Resource Center, NAFTA Tribunal recognizes sacred place of Quechan Tribe – denies Glamis Gold's claim in full (June 9, 2009), *available at* [http://www.indianlaw.org/Quechan\\_Glamis\\_NAFTA\\_Tribunal](http://www.indianlaw.org/Quechan_Glamis_NAFTA_Tribunal).

117. Khan, *supra* note 77, at 397–398.

118. Khan, *supra* note 77; Press Release Indian Law Resource Center, *supra* note 119.

119. ICSID, "Reply Memorial of Claimant Glamis Gold Ltd.," filing in Glamis Gold Ltd. v. The United States of America (Dec. 15, 2006).

120. ICSID, "Award" filing in Glamis Gold Ltd. v. The United States of America, IIC 380 (2009) (Mentioning tribal issue on pages including 7, 25, 44, 48 and 63); *see also*, Press Release Indian Law Resource Center, *supra* note 119.

121. Press Release Indian Law Resource Center, *supra* note 119; Interview with Robert Coulter, *supra* note 105.

122. Khan, *supra* note 77.

#### IV. GROWING GLOBAL OPPOSITION

Though national laws, national governments and free trade agreements are often stacked against them, communities that oppose mining or want to gain more say in how mining operations are carried out near their land have increasingly developed global networks and used public relations, shareholder activism, lawsuits, and other tools with increasing effectiveness. Indigenous groups, NGOs, labor unions, and human rights organizations are increasingly networked worldwide, spreading information about their struggles and drawing the connections between the records of multinational mining companies—and their subsidiaries—in different countries.

Opponents of multinational mining projects have made it a practice to buy stock in the companies and attend shareholder meetings, where they speak out about alleged injustices perpetrated by the companies.<sup>123</sup> The hope is that such activity will draw the attention of the media, company executives, and other shareholders.<sup>124</sup> Michigan priest Jon Magnuson described his experience at the 2011 Rio Tinto shareholders meeting in London:

The big news for Rio Tinto is the large purchase option being negotiated with China. Reporters appear eager to interview members of our group, looking for inside information. When we mention we're here to address issues of environmental damage and human rights, they turn away. We pass through security screenings and enter a large, attractive meeting room with upbeat music. There are no photos of human rights victims on the wall, no images of children or village leaders from Third World countries . . . . Allegations received by the chair are responded to briefly, then deftly referred to the executive officer or other board members. An air of impatience fills the room. The three hundred stockholders are clearly here to monitor personal investments. There's little interest in other matters.<sup>125</sup>

In keeping with Magnuson's experience, MiningWatch Canada spokesman Jamie Kneen has little faith in shareholder activism's ability to effect real change.<sup>126</sup> "Effective shareholder activism can produce minor adjustments and reports—lots of reports," he said.<sup>127</sup> "It's not

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123. *Shareholder Activism: The New Smoking Gun?* THE MINING JOURNAL (Oct. 2009), available at <http://www.mining-journal.com/reports/shareholder-activism-the-new-smoking-gun>.

124. *Id.*

125. Jon Magnuson, *Witness: A personal account of local efforts to stop the Kennecott Eagle Project mine*, MARQUETTE MONTHLY (Mich.) (Dec. 2011).

126. Interview with Jamie Kneen, *supra* note 31.

127. *Id.*

really produced major change. Even where there has been divestment, it hasn't produced lasting impact on the company's finances."<sup>128</sup>

But public pressure is clearly having an effect on mining companies' stated policies and commitments. Major mining companies, including Rio Tinto and Anglo American, belong to the International Council on Metals & Mining, a "CEO-led industry group" founded in 2001 "to improve sustainable development performance in the mining and metals industries."<sup>129</sup> The Council has partnered with global conservation organizations and human rights leaders to publish detailed reports on how to respectfully deal with indigenous communities and protect biodiversity, among other things.<sup>130</sup>

Pacific Rim CEO Tom Shrake said his company similarly professes to be guided by social conscious and corporate responsibility in the company's dealings in El Salvador. He argues that only foreign investment can save El Salvador, which is currently plagued by high levels of unemployment, poverty, and gang crime.<sup>131</sup> He said foreign investors are now avoiding El Salvador, and he hopes Pacific Rim's claims against the government and an eventual settlement will help change that:

The idea that this is corporate overrunning of El Salvador is nonsense. We don't even have any money—how could we overrun them? The opposition groups are twenty times better funded than we are. This David versus Goliath image is perfect but the only problem is we're David.<sup>132</sup>

Public Citizen's Todd Tucker said he didn't buy Shrake's claim to be outgunned by mining opponents, and noted that while there is no binding precedent under the ICSID, public opinion around Pacific Rim or other cases could sway future decisions by the tribunal, and more broadly governmental and corporate decisions.<sup>133</sup>

"This isn't impartial justice; these are very political actions," Tucker said. "When the spotlight is put on some of these cases, the smart tribunalists say, 'Okay we'll give the government a pass on this one

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128. *Id.*

129. INTERNATIONAL COUNCIL ON MINING & METALS, [www.iccm.org](http://www.iccm.org) (last visited Apr. 15, 2012).

130. *Good Practice Guidance for Mining and Biodiversity*, INT'L COUNCIL ON MINING & METALS, available at <http://www.icmm.com/page/1182/good-practice-guidance-for-mining-and-biodiversity>; *Good Practice Guide: Indigenous Peoples and Mining*, INT'L COUNCIL ON MINING & METALS, available at <http://www.icmm.com/library/indigenouspeoplesguide>.

131. Interview Tom Shrake, *supra* note 13.

132. *Id.*

133. Interview Todd Tucker, *supra* note 13.

because it's just attracting too much scrutiny—if we push it too far governments may be less willing to sign up for these agreements.”<sup>134</sup>

Ultimately, only time will tell how much mining companies adopt more environmentally-friendly practices, involve indigenous people and other local residents in a meaningful way, respect the laws of local and national governments, and comply with the spirit and word of non-binding international agreements like the UNDRIP and ILO Convention 169. In the face of growing international public pressure, mining companies are already making significant efforts to develop best practices, adopt environmentally superior technology and do outreach to local communities and indigenous peoples. The true test will be whether they are ultimately willing to leave valuable ore bodies untapped if that is what community opinions, national laws and environmental concerns dictate; if they are truly willing to consider concerns other than profit in determining where, when, why, and how to mine, and for whom.

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134. *Id.*