

## **CAFTA Investor Rights Undermining Democracy and the Environment: Pacific Rim Mining Case**

Pacific Rim Mining Corp., a Canadian-based multinational firm, sought to establish a massive gold mine using water-intensive cyanide ore processing in the basin of El Salvador's largest river, Rio Lempa. This proposed project as well as applications filed by various companies for 28 other gold and silver mines, generated a major national debate about the health and environmental implications of mining in El Salvador, a densely populated country the size of Massachusetts with limited water resources.<sup>1</sup> Leaders of El Salvador's major political parties, the Catholic Church and a large civil society network expressed concerns. In the face of growing opposition, Pacific Rim never completed a feasibility study necessary to obtain an exploitation permit for its mine, called "El Dorado," and in July 2008 ceased exploratory drilling.<sup>2</sup> In December 2008, the firm filed a claim under the Central America Free Trade Agreement (CAFTA), demanding hundreds of millions in compensation from one of the hemisphere's poorest countries. Meanwhile, in El Salvador, the mining debate continues. Intimidation and threats against civic groups have escalated. In the past year, three prominent anti-mining activists were murdered.<sup>3</sup> As the Obama administration begins talks on its first prospective trade pact, the Trans-Pacific Partnership, the Pacific Rim CAFTA case again spotlights the concerns that have led many in Congress and U.S. civil society to demand changes to the past model of trade pact investor rights and an end to their private enforcement. Tribunals have ordered over \$200 million in payments to investors under similar terms in the North American Free Trade Agreement (NAFTA).<sup>4</sup>

### **CAFTA Crashes into El Salvador's National Debate on Mining Policy**

There has been no large-scale gold or silver mining in El Salvador since the start of the civil war in the early 1980s.<sup>5</sup> However, as the price of gold began to climb in the early 2000s, so did the number of applications for gold mining permits. By 2008, the price of gold was soaring over \$1,000 per ounce and firms had filed exploration permits for 29 gold mines in El Salvador.<sup>6</sup>

Pacific Rim's proposed El Dorado gold mine is located six miles west of Sensuntepeque, the capital of the Cabañas region of El Salvador, near the town of San Isidro.<sup>7</sup> The company has indicated that its El Dorado site contains approximately 1.4 million gold equivalent ounces.<sup>8</sup> Pacific Rim's plan is for an underground mine and the use of a process employing large amounts of water and cyanide to extract gold from the ore it excavated.<sup>9</sup>

A 1996 Salvadoran law establishes a two-step process for companies wishing to establish a mine. Pacific Rim completed the first step and acquired an exploration permit and began exploratory drilling for gold in 2002.<sup>10</sup> However, in order to begin operating a proposed mine, the Salvadoran law requires that companies must also acquire an exploitation permit. To do so requires submission of an Environmental Impact Assessment (EIA) and a financial and technical feasibility study, which must then be approved by the Salvadoran government before an exploitation permit is issued.

In 2005 Pacific Rim submitted its EIA to the government.<sup>11</sup> Local community group *Asociación de Desarrollo Economico Social Santa Marta* (ADES), obtained from Oxfam America and the Anglican Church funding to be able to hire an independent geologist with decades of experience conducting hydrological studies. Dr. Robert Moran's report written for ADES criticized Pacific Rim's EIA for its lack of detail and data regarding water issues – both with respect to the amount of water required for the project and the prospect for cyanide contamination.<sup>12</sup>

According to Pacific Rim Mining Corp., the El Dorado mine would use approximately 10.4 liters of water per second, adding up to about 327,970,000 liters per year.<sup>13</sup> Some scientists put that estimate higher. According to environmental chemist Florian Erzinger at the Federal Institute of Technology in Switzerland, who conducted a study of mining in El Salvador, the El Dorado mine would require between 75 and 110 liters of water per second in order to operate. An average Salvadoran uses roughly half of that amount of water in a day.<sup>14</sup> Ninety-six percent of the surface water in El Salvador is contaminated, and widespread deforestation has left only three percent of original forest intact.<sup>15</sup> Roughly half of El Salvador's rural households live on less than \$2 a day.<sup>16</sup> Many of these represent subsistence farmers who rely on local rivers and well water for their survival. Major population centers, including the capital San Salvador, rely on the Rio Lempa for drinking water. Fishing and agriculture communities in the Bajo Lempa area of southern El Salvador also rely heavily on the river.<sup>17</sup>

Another major concern with the project was the prospect that leaks or spills of cyanide or other toxic chemicals used in ore processing could contaminate the Rio Lempa which is El Salvador's largest river and also runs through Guatemala and Honduras. According to one frequently cited study on mining in the Cabañas region, the El Dorado project would use 2 tons of cyanide a day<sup>18</sup> which amounts to hundreds of tons of cyanide a year. The region is subject to earthquakes and torrential rains, which heightened concerns about the proposed mine's safety. (A 4.7 magnitude earthquake occurred directly below the proposed El Dorado site in 2001.)<sup>19</sup>

As Pacific Rim proceeded through the first steps of the Salvadoran permitting process, alarm spread through local communities. This local opposition rippled into a broader national coalition called the *La Mesa Nacional Frente a la Minería Metálica en El Salvador* (The National Roundtable Against Metals Mining in El Salvador), which formed in early 2005 and included a range of organizations including local environmental and development committees and national non-governmental organizations.<sup>20</sup>

As information about prospective environmental and health issues spread and additional mining permits for other sites were filed, community and national civil society groups began to urge the Salvadoran government to review the country's overall mining policy. They called on officials to prioritize public health and the environment and to study the appropriateness of intensive gold and silver mining in the small, densely-populated country. They argued that this was especially crucial, given the country's limited clean water resources.

The national coalition began speaking out against the proposed mines, raising national and international attention, and pushing for national mining law reform, including a ban on intensive gold and silver mining.<sup>21</sup> By May, 2007, the Catholic Church of El Salvador had joined with this coalition and issued a formal pronouncement against gold and silver mining in El Salvador signed by seven

bishops and one archbishop citing potential damage to water, flora and fauna and overall public health.<sup>22</sup> In late 2007, 62.5 percent of Salvadorans interviewed by the Central American University José Simeón Cañas agreed with international development experts and environmentalists that precious metals mining is not appropriate in El Salvador.<sup>23</sup>

In 2008, the conservative ARENA party government of then-President Elias Antonio Saca began focusing on the appropriateness of such mining in El Salvador. In March 2008, Saca announced that he would not grant mining permits until the Legislature undertook an in-depth environmental study of the proposed mining projects and reformed the mining law.<sup>24</sup>

As Salvadoran civil society utilized democratic channels to raise their concerns, – and the government responded with commitments to review the country’s mining policy generally and how the proposed new mining projects would affect prospective host communities specifically – Pacific Rim shifted its effort to CAFTA. In December 2007, Pacific Rim had reincorporated one of its subsidiaries based in the Cayman Islands as a Nevada corporation – Pac Rim Cayman LLC.<sup>25</sup> In April 2008, the new U.S. subsidiary sent a letter to the Salvadoran government first threatening a CAFTA claim.<sup>26</sup> Pacific Rim never completed the feasibility study necessary to obtain an exploitation permit for its mine and in July 2008 ceased exploratory drilling.<sup>27</sup> Then, in December 2008, the company filed a “notice of intent”, the first step in instigating a formal CAFTA investment suit.<sup>28</sup> The filing claimed that the Salvadoran government’s failure to issue the company the exploitation permit it needed in order to operate the mine violated its CAFTA foreign investor rights.

When Saca’s conservative ARENA party lost reelection to the FMLN in March 2009, new President Mauricio Funes tasked the Ministry of Economy with executing a study similar to the one Saca had proposed.<sup>29</sup> On January 21, 2010, the Ministry of Economy issued a detailed plan for a six-month Strategic Environmental Evaluation of the Metal Mining Sector in El Salvador and began assembling a blue ribbon commission. This seven-person committee will include three scientists, an attorney specializing in environmental law, an economist and two generalists with related experience.<sup>30</sup> The objective of the study is “to assess the geological, ecological, territorial, legal, social economic and environmental conditions in the areas where mining would take place.”<sup>31</sup>

While the anti-mining civil society leaders had faced intimidation and threats as the mining debate intensified, violence escalated after the CAFTA case was launched. Marcelo Rivera, founder of an environmental and development committee near the proposed El Dorado mine, the Association of Friends of San Isidro Cabañas, was kidnapped and murdered in June 2009. Six months later, around Christmas, two other anti-mining activists were killed. Ramiro Rivera Gomez was shot while walking to milk his cow. Dora “Alicia” Recinos Sorto was shot while returning from washing laundry at a nearby lake with her young son. She was eight months pregnant. All were active members of local environmental groups opposed to mining.<sup>32</sup> As of May 2010, no one had been convicted of the murders. Local community members have called for a full investigation into the intellectual authors of the murders as well the physical perpetrators.<sup>33</sup>

### **Pacific Rim’s Use of CAFTA to Demand Hundreds of Millions in Compensation**

Pacific Rim’s case is the first challenge of an environmental policy under CAFTA. It employs controversial terms that allow foreign investors to privately enforce the treaty by directly suing

signatory governments. This occurs outside of domestic court systems, in foreign arbitral tribunals, where foreign investors can demand compensation over what they deem violations of their new CAFTA rights. The first hearing on the case is set for May 31 at the Washington, D.C. World Bank headquarters before the International Centre for Settlement of International Disputes (ICSID).

Under CAFTA's Chapter 10, foreign investors from one signatory country are allowed to directly sue another signatory country's government. How is it that a Canadian-based firm is able to use the controversial "investor-state" private enforcement system when Canada is not a party to CAFTA? As noted above, in December 2007, a subsidiary of Pacific Rim Mining Corp. based in the Cayman Islands reincorporated in Nevada under the name Pac Rim Cayman LLC (Pac Rim). It is this new U.S. subsidiary – Pac Rim - that is the named party in the CAFTA suit.

In sum, Pac Rim argues that Salvadoran mining law guarantees a right for it to *operate* a gold mine in the country once the "existence of mineable deposits has been demonstrated," and the firm fulfills all of the administrative requirements for obtaining an exploitation permit.<sup>34</sup> The company claims that the Salvadoran government capriciously halted progress on approving the proposed mine for political reasons.<sup>35</sup> The Salvadoran government argues that it has a right to set the terms for mining in its country and that the company failed to meet these legal obligations in order to be eligible for an exploitation permit. "[T]here is no automatic right to a concession, as Claimant has alleged in its Notice of Arbitration...in short, instead of complying with the Mining Law, Claimant tried to pass a new law that would lessen the requirements and remove the Bureau of Mines and landowners from the process for obtaining an exploitation concession."<sup>36</sup>

The Salvadoran government's preliminary objections filed in the case in March 2010 argue that Pac Rim was misinterpreting Salvadoran mining law and that the firm failed to fulfill critical legal requirements, including proof of ownership and submission of the final feasibility study, which are both required under the mining law. With respect to whether Pac Rim owns the land on which it plans to mine, the government's filing notes: "The parties [El Salvador and Pac Rim] agree on 1) the area of land for which Claimant submitted proof of ownership or authorization from the owners; 2) the size of the area for which the concession was requested; and 3) **that the latter was at least six times larger than the former** (emphasis added)."<sup>37</sup>

According to the government filing, Pac Rim has argued that since the mine will be underground, it should not have to meet land ownership requirements for portions of the mine.<sup>38</sup> The government filing states that Pac Rim could only provide proof of ownership or authorization for 1.6 square kilometers of the total 12.75 square kilometer proposed mine.<sup>39</sup>

With respect to whether Pac Rim submitted the required feasibility study necessary for the Salvadoran government to grant an exploitation permit, government filings state that the company submitted only a 2005 pre-feasibility study.<sup>40</sup> Pac Rim argues that this pre-feasibility study should be considered equivalent to a feasibility study.<sup>41</sup> Interestingly, in February 2009, *Reuters* and *Mining Weekly* both reported that Pacific Rim had put the completion of its feasibility study for the El Dorado mine on hold because of unknown operating inputs and prices for capital.<sup>42</sup>

In its April 30, 2009 notice of arbitration, Pac Rim argues that El Salvador violated four separate articles of CAFTA, including Article 10.3 National Treatment; Article 10.4 Most-Favored-Nation

Treatment; Article 10.5 Minimum Standard of Treatment; and Article 10.7 Expropriation and Compensation.<sup>43</sup> These alleged violations are not explained in detail in Pac Rim’s initial submission. But from past jurisprudence, we know that companies have used similar articles under NAFTA.

CAFTA Article 10.5 guarantees foreign investors and their investments a “minimum standard of treatment.” The provision states:

- “1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
  - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
  - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.”

This CAFTA provision is to be interpreted using CAFTA Annex 10-B, which states:

“The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”

Even expert readers find this clause circular, vague and worryingly elastic. The annex was added to CAFTA after various NAFTA tribunals stretched the minimum standard of treatment rule absurdly.<sup>44</sup> In the *Pope & Talbot v. Canada* NAFTA case, a tribunal found that a bureaucrat’s unpleasant interactions with the U.S. timber firms constituted a breach of the minimum standard, even when the tribunal dismissed other alleged investor rights violations.<sup>45</sup> Yet, the CAFTA annex is hardly clarifying. What is the “general and consistent practice of States that they follow from a sense of legal obligation”? Unfortunately, enormous discretion remains for arbitral tribunals to determine what is “fair.” Further, there is no clear definition of what is meant by “security.” In past NAFTA cases, firms have argued that changes to policy, even those made through normal democratic processes in response to changed circumstances or elections, deny foreign investors security. The argument is that the foreign investor has relied on the host country’s past policy to initiate their investment.<sup>46</sup> Of course, no such guarantees against democratic change – or rights to be compensated if it occurs – are provided to domestic firms in U.S. law. Nor should such a regime of forcing public payment for private firms’ unprofitable gambles be required in trade agreements.

CAFTA Article 10.3 includes a “national treatment” provision that requires governments to treat foreign investors from a signatory country no less favorably than domestic investors with respect to all phases and aspects of an investment. In CAFTA, this right begins “pre-establishment.” In other words, investors have rights even before they invest.<sup>47</sup> This pre-establishment right contrasts with, for instance, the national treatment provisions of European Bilateral Investment Treaties, which require non-discrimination with respect to regulatory treatment after an investment is established.<sup>48</sup> It will be interesting to learn from future filings by Pac Rim how it argues that this provision has been violated,

given El Salvador has apparently not provided mining exploitation permits for gold and silver mining to domestically-owned firms and indeed appears to have not issued any such permits at all during the time period in question.<sup>49</sup>

CAFTA Article 10.4 provides for “most favored nation” (MFN) treatment, which requires governments to give foreign investors from signatory nations no less favorable treatment than the best treatment given to investors of another signatory nation or even non-signatory nations, even if that treatment is better than that given to domestic investors. Similar rules can and have been interpreted to mean that any investment right that the host nation grants to firms of any foreign country under any treaty must be granted to firms from all nations to whom the host country has MFN obligations.<sup>50</sup> Again, it will be interesting to see Pac Rim’s arguments under this provision, as it appears that no firm from any country has been granted a mining exploitation permit for gold or silver by the Salvadoran government in the period under examination.

CAFTA Article 10.7 guarantees foreign investors compensation from a signatory government (i.e., from the taxpayers) for expropriation or nationalization of a covered investment either directly “or indirectly through measures equivalent to expropriation or nationalization.” This provision provides foreign investors rights to demand compensation even if their property has not actually been nationalized or seized, but has lost value because of even non-discriminatory government regulatory actions. Similar language in NAFTA has been the basis for successful investor demands to be compensated for “regulatory takings” – government regulatory policies that have the effect of undermining a foreign investor’s expected future profits or the value of an investment. For instance, in the Metalclad NAFTA ruling, the Mexican government was ordered to pay a U.S. firm \$15.6 million in compensation after the firm challenged a Mexican municipality’s refusal to grant construction and operating permits for a toxic waste facility the U.S. firm had acquired after the operation had been closed down for contamination problems when owned by a Mexican firm. The government required the new owners to clean up the existing contamination before reopening the facility. (The lack of all necessary operating permits and the contamination problem had been made clear to the U.S. firm before it acquired the site.) The NAFTA tribunal determined the government regulatory requirements constituted a regulatory taking and ordered compensation.

An Annex was added to CAFTA that was intended to forestall such cases. Among other terms, it states: “Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” When CAFTA was being debated, this provision was criticized for leaving open any discretion for a tribunal to find a non-discriminatory public interest policy required compensation.<sup>51</sup> The Pacific Rim case will be the first test of this annex. However, worryingly, CAFTA Article 10.28 expanded, not narrowed, the NAFTA definition of compensable investments, adding “the assumption of risk,” “expectation of gain or profit,” and licenses, authorizations and permits. This flew in the face of congressional instructions to narrow the CAFTA scope of compensable takings to the U.S. law standard. U.S. courts generally have not been receptive to indirect takings claims. And, in U.S. law, demands for such compensation are limited to real property. Further, a series of U.S. Supreme Court rulings have held that almost 100 percent of the value of all of the property must be destroyed permanently by the government action for compensation to be ordered.<sup>52</sup>

## **The Stakes Are High in the Pacific Rim CAFTA Case**

At stake in the Pacific Rim CAFTA case is whether the operations of the fragile democracy that emerged from 12 years of civil war in El Salvador and the policies by its elected leaders to ensure mining does not further damage the country's ravaged environment will prevail – or whether CAFTA will allow the demands of a multinational mining firm to reign supreme over the rule of law in El Salvador.

Narrowly, the case will revolve around whether Pacific Rim met the obligations of Salvadoran law. And, if the firm prevails in arguing it did so, then the CAFTA tribunal will determine whether the government has violated CAFTA-granted investor rights by not yet issuing the firm an exploitation permit.

However, this specific legal battle raises much broader concerns about the foreign investor rights provided in NAFTA, CAFTA and other past U.S. free trade agreements. Namely, even assuming that foreign firms meet all laws in effect in another country when setting up operations, a trade agreement should not guarantee that foreign firms are sheltered from or compensated for having to meet new laws that apply to foreign and domestic firms equally that are enacted through normal democratic practices. Imagine, for instance, if foreign-owned power plants operating in the United States in the 1980s would have had to be paid taxpayer compensation for or be excluded from meeting Clean Air Act rules passed by Congress that applied to all power plants operating here.

Although Salvadoran civil society has been effective in getting the government to think more seriously about the potential environmental and social impacts of mining in El Salvador, the government has made no final decision about future gold and silver mining policy. CAFTA's extreme investor rights now loom over these policy decisions, with the government forced to calculate potential CAFTA liabilities against publicly demanded improvements in environmental and human rights policy. The threat of CAFTA chilling important environmental or public health reforms is not hypothetical. In July 2009, Milwaukee-based mining firm Commerce Group filed a CAFTA notice of arbitration for \$100 million over another Salvadoran mine permitting issue.<sup>53</sup> Will the companies behind the additional 27 mining applications filed in El Salvador follow suit, perhaps repeating Pacific Rim's move of using a U.S. subsidiary to facilitate such claims?

And, this problem extends beyond El Salvador. Increasingly, multinational companies are invoking trade-agreement investor rights in situations where natural resources and public health are at stake. According to one recent report, of the current 128 trade agreement investment cases pending before ICSID, where the Pacific Rim case will be heard, 32 cases relate to oil, gas or mining projects, including four that are related to gold mines.<sup>54</sup>

During the 2005 U.S. congressional debate on CAFTA, CAFTA supporters argued vehemently<sup>55</sup> that the pact's investment posed no threat to countries' public interest policies, in part because of changes made relative to similar rules in NAFTA that had led to the United States, Canada and Mexico repeatedly being sued by corporations over important environmental and public safety regulations. CAFTA ultimately passed by a narrow vote of 217-215 in the U.S. House of Representatives on July 27, 2005, with only 15 Democrats voting yes. Many Democratic members of Congress based their opposition to CAFTA on its replication of the NAFTA investor rights and their private enforcement.<sup>56</sup>

Now, this first environmental challenge under CAFTA is fueling this debate. At the same time, the Obama administration is faced with the challenge of delivering on the specific commitments President Obama made during his campaign to fix these very trade pact foreign investor provisions,<sup>57</sup> as it starts its first trade pact negotiations in the TPP.

## ENDNOTES

<sup>1</sup> Florian Erzinger, et. al, “El Lado Oscuro del Oro,” *Unidad Ecologica Salvadoreña* (UNES) and Development and Peace report, December 2008, at chapter 1.

<sup>2</sup> Pacific Rim Mining Corp, “El Dorado, El Salvador.” Accessed May 25, 2010. Available at: [http://www.pacrim-mining.com/s/ES\\_Eldorado.asp](http://www.pacrim-mining.com/s/ES_Eldorado.asp).

<sup>3</sup> Matt Kennard, “How Sustainable is ‘Socially Responsible’ Mining?” *The Nation*, Feb. 17, 2010.

<sup>4</sup> This total includes the award issued to Ethyl Corp., S.D. Myers Inc., Pope and Talbot Inc., Metalclad Corp., CEMSA, Archer Daniels Midland Co., Cargill Inc., and Corn Products International. Corn Products International has filed a request for correction and interpretation of the \$58.386 million award issued by the tribunal in August 2009. This request is still in process. ICSID, “Case Details: Corn Products International, Inc. v. United Mexican States,” ICSID. Accessed Dec. 10, 2009. Available at: <http://icsid.worldbank.org/ICSID/FrontServlet>.

<sup>5</sup> Interview with Prof. Tom Power, author of 2009 Oxfam report, “Metals, Mining and Sustainable Development in Central America,” May 25, 2010; *Ministerio de Economía de El Salvador Dirección de Cooperación Internacional*, “Concurso Publico Internacional,” at 28. On file with Public Citizen.

<sup>6</sup> Debbie Fabb, “Gold fever,” *BBC News*, June 12, 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7450751.stm>; Florian Erzinger, et. al, “El Lado Oscuro del Oro,” *Unidad Ecologica Salvadoreña* (UNES) and Development and Peace report, December 2008.

<sup>7</sup> Pacific Rim Mining Corp. website, “El Dorado Quick Facts.” Accessed May 5, 2010. Available at: <http://www.pacrim-mining.com/s/Eldorado.asp#qf>

<sup>8</sup> United States Securities and Exchange Commission, “Pacific Rim Mining Corp. Annual report,” January 2008 Updated Resource Estimate section. Accessed May 25, 2010. Available at: [http://google.brand.edgar-online.com/EFX\\_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=6716778-851-342988&SessionID=y2RIHeJgWDEgSz7](http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=6716778-851-342988&SessionID=y2RIHeJgWDEgSz7)

<sup>9</sup> Pacific Rim Mining Corp. website, “Environmental and Social Responsibility,” Accessed May 25, 2010. Available at: <http://www.pacrim-mining.com/s/ESResponsibility.asp>.

<sup>10</sup> Pac Rim Cayman LLC, “Notice of Arbitration, Pac Rim Cayman LLC v. Republic of El Salvador,” Submitted under the rules of arbitration of the International Centre for Settlement of Investment Disputes, the Central America- United States- Dominican Republic Free Trade Agreement and the Foreign Investment Law of El Salvador, April 30, 2009 at 9-10; 22. Accessed May 3, 2010. Available at: [http://www.pacrim-mining.com/i/pdf/2009-04-30\\_CAFTAF.pdf](http://www.pacrim-mining.com/i/pdf/2009-04-30_CAFTAF.pdf); Pacific Rim Mining Corp. website under mineralization section of the description of El Dorado page. Available at: <http://www.pacrim-mining.com/s/Eldorado.asp>.

<sup>11</sup> Pac Rim Cayman LLC, “Notice of Arbitration, Pac Rim Cayman LLC v. Republic of El Salvador,” Submitted under the rules of arbitration of the International Centre for Settlement of Investment Disputes, the Central America- United States- Dominican Republic Free Trade Agreement and the Foreign Investment Law of El Salvador, April 30, 2009, at 25. Accessed May 3, 2010. Available at: [http://www.pacrim-mining.com/i/pdf/2009-04-30\\_CAFTAF.pdf](http://www.pacrim-mining.com/i/pdf/2009-04-30_CAFTAF.pdf)

<sup>12</sup> Moran, 2005 at v, 4, 10,12

<sup>13</sup> Robert Moran, PhD, “Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA). Oct. 2005 at 2. Accessed May 9, 2010. Available at: <http://www.miningwatch.ca/en/technical-review-el-dorado-mine-project-environmental-impact-assessment-eia-el-salvador#attachments>.

<sup>14</sup> Raul Gutierrez, “Gold Mining is a Huge Rip Off,” *Institute for Policy Studies*, Dec. 8, 2008. Available at: <http://www.minesandcommunities.org/article.php?a=8973>.

<sup>15</sup> Oxfam International, “President Saca Speaks out Against Mining in El Salvador,” press release, March 24, 2009. Available at: <http://www.oxfamamerica.org/articles/president-saca-speaks-out-against-mining-in-el-salvador>

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<sup>17</sup> *Unidad Ecologica Salvadoreña* (UES) “La Minería Aurífera en El Salvador: Política nacional e impactos ambientales, socioeconómicos y en la salud colectiva,” UES report, Accessed May 9, 2010, at 4, 41. Available at: [www.unes.org.sv](http://www.unes.org.sv).

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- <sup>20</sup> Institute for Policy Studies, “The Struggle Against Free Trade Continues,” Oct. 27, 2009. Available at: [www.ipsdc.org/articles/the\\_struggle\\_against\\_free\\_trade\\_continues](http://www.ipsdc.org/articles/the_struggle_against_free_trade_continues)
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- <sup>22</sup> Letter from Archbishop Lacalle and Bishops Cabrera, Astorga, Alfaro, Morales, Avelar, Aquino, Alas, Morao, “Cuidemos La Casa de Todos: Pronunciamento de la Conferencia Episcopal de El Salvador sobre la explotación de minas de oro y plata,” May 3, 2007.
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- <sup>24</sup> “Presidente de El Salvador pide cautela ante proyectos de explotación minera,” *Invertia*, March 11, 2008. Accessed May 10, 2010. Available at: [http://economia.terra.cl/noticias/noticia.aspx?idNoticia=200803112248\\_AFP\\_224800-TX-SXH27&idtel](http://economia.terra.cl/noticias/noticia.aspx?idNoticia=200803112248_AFP_224800-TX-SXH27&idtel) Pac Rim arbitration, p. 30 – March 11, 2008
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- <sup>29</sup> *Ministerio de Economía de El Salvador Dirección de Cooperación Internacional*, “Concurso Publico Internacional,” at 28. On file with Public Citizen
- <sup>30</sup> *Ibid*, 33, 38
- <sup>31</sup> *Ministerio de Economía de El Salvador Dirección de Cooperación Internacional*, “Concurso Publico Internacional,” at 28. On file with Public Citizen.
- <sup>32</sup> Matt Kennard, “How Sustainable is ‘Socially Responsible’ Mining?” *The Nation*, Feb. 17, 2010.
- <sup>33</sup> “Suspenden audiencia preliminar por inasistencia de imputados,” April 4, 2010. *Diario Co Latino*. Accessed May 13, 2010. Available at: <http://www.diariocolatino.com/es/20100430/nacionales/79483/>.
- <sup>34</sup> Pac Rim Cayman LLC, “Notice of Arbitration Under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes, the Central America – United States – Dominican Republic Free Trade Agreement and the Foreign Investment Law of El Salvador,” Pac Rim Cayman LLC v. Republic of El Salvador, April 30, 2009, at 13.
- <sup>35</sup> Pac Rim Cayman LLC, “Notice of Arbitration, Pac Rim Cayman LLC v. Republic of El Salvador,” Submitted under the rules of arbitration of the International Centre for Settlement of Investment Disputes, the Central America – United States – Dominican Republic Free Trade Agreement and the Foreign Investment Law of El Salvador, April 30, 2009 at 3-4,13-15. Accessed May 3, 2010. Available at: [http://www.pacrim-mining.com/i/pdf/2009-04-30\\_CAFTAF.pdf](http://www.pacrim-mining.com/i/pdf/2009-04-30_CAFTAF.pdf)
- <sup>36</sup> Republic of El Salvador, “The Republic of El Salvador’s Reply (Preliminary Objections),” Pac Rim Cayman LLC v. The Republic of El Salvador, ICSID Case No. ARB/09/12, February 2010 at 37 Accessed May 8, 2010. Available at: <http://ita.law.uvic.ca/documents/PreliminaryObjections.pdf>.
- <sup>37</sup> *Ibid*, 27.
- <sup>38</sup> Republic of El Salvador, “The Republic of El Salvador’s Reply (Preliminary Objections),” Pac Rim Cayman LLC v. The Republic of El Salvador, ICSID Case No. ARB/09/12, February 2010 at 30 Accessed May 8, 2010. Available at: <http://ita.law.uvic.ca/documents/PreliminaryObjections.pdf>.
- <sup>39</sup> *Ibid*, 28.
- <sup>40</sup> *Ibid*, 48.
- <sup>41</sup> *Ibid*
- <sup>42</sup> “Pacific Rim freezes study on El Salvador gold mine until markets stabilise,” *Mining Weekly*, Feb. 12, 2009; “Update 1- Pacific Rim puts off El Dorado feasibility study,” *Reuters*, Feb. 12, 2009.

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<sup>43</sup> Pac Rim Cayman LLC, “Notice of Arbitration Under the Rules of Arbitration of the International Centre for Settlement of Investment Disputes, the Central America – United States – Dominican Republic Free Trade Agreement and the Foreign Investment Law of El Salvador,” Pac Rim Cayman LLC v. Republic of El Salvador, April 30, 2009.

<sup>44</sup> For a general background on how the annex was added to address criticisms arising from the experience under NAFTA, and how ultimately these critics were not satisfied, see: “States, Cities Flag Problems with DR-CAFTA Investment Provisions,” *Inside U.S. Trade*, May 22, 2005.

<sup>45</sup> Mary Bottari and Lori Wallach, “NAFTA’s Threat to Sovereignty and Democracy,” Public Citizen report, February 2005, at 7. Available at: <http://www.citizen.org/Chapter%2011%20Report%20Final.pdf>

<sup>46</sup> See description of Metalclad, Tecmed and other cases in Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law,” *New York University Public Law and Legal Theory Working Papers*, 2009, at 10

<sup>47</sup> See discussion of “pre-establishment” rights in Geoffrey Antell, Marinn Carlson, Jennifer Haworth McCandless, *The Arbitration Review of the Americas 2010, Overviews*, Sidley Austin LLP. Available at: [http://www.globalarbitrationreview.com/reviews/21/sections/78/chapters/815/icsid/#ftn\\_4](http://www.globalarbitrationreview.com/reviews/21/sections/78/chapters/815/icsid/#ftn_4)

<sup>48</sup> Julie Raynal, “Bilateral Investment Treaties and a possible basic Multilateral framework on Investment: Two independent stories or a mutually reinforcing process?” OECD Conference Paper, May 28, 2001, at 3. Available at: <http://www.oecd.org/dataoecd/44/40/1894786.pdf>

<sup>49</sup> According to a December 2008 study funded by the Canadian international development arm of the Catholic Church (<http://www.dev.org/>), none of the 29 exploration licensees had been granted exploitation permits. A Salvadoran Ministry of Economy document from January 2010 discussed the current state of mining exploration permits, and did not indicate that any of these 29 licensees had been granted exploitation permits. Indeed, a thorough review of press, corporate and scholarly reports did not produce evidence of any gold and silver mining exploitation on a significant scale. The only exception in our literature review was a passing claim made by the Commerce Group, which suggested that “the government does not enforce its stated policies against native El Salvadorans engaged in gold and silver production.” However, no evidence was provided for this claim. Future research will need to make a comprehensive inventory of the status of all potential mining exploration and exploitation licensees.

<sup>50</sup> See discussion of *Maffezini vs. Kingdom of Spain* case in Efraim Chalamish, “The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?” *Brooklyn Journal of International Law*, 34:2, 2009, at 324-327. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1543322](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543322)

<sup>51</sup> “States, Cities Flag Problems with DR-CAFTA Investment Provisions,” *Inside U.S. Trade*, May 22, 2005.

<sup>52</sup> “States, Cities Flag Problems with DR-CAFTA Investment Provisions,” *Inside U.S. Trade*, May 22, 2005.

<sup>53</sup> Commerce Group notice of arbitration page 5.

<sup>54</sup> Sarah Anderson, Manuel Perez-Rocha, and Rebecca Dreyfus, “Mining for Profits in International Tribunals,” Institute for Policy Studies, April 29, 2010 at 1.

<sup>55</sup> See e.g. USTR June 2005 fact sheet (<http://waysandmeans.house.gov/media/pdf/trade/cafta/sovereignty.pdf>) and also the Ways & Means Committee report on the CAFTA implementing legislation, which provides a summary of the debate (<http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr182&dbname=109&>

<sup>56</sup> Dear Colleague letter from Reps. Jane Harman (D-Calif.), Mike Honda (D-Calif.), Hilda Solis (D-Calif.), Henry Waxman (D-Calif.), July 20, 2005. “We wanted to draw your attention to the ... threat that the investor rights rules in the Central America-Dominican Republic Free Trade Agreement (CAFTA) pose to important state and local laws and regulations that protect the environment and public health. Like Chapter 11 of NAFTA, the investor rights provisions of CAFTA give foreign corporations the power to demand payment from the U.S. when public interest protections affect a company’s commercial interests. Our state has witnessed the impact of these rules: foreign companies have brought NAFTA suits totaling more than \$1 billion challenging a California law phasing out the toxic gasoline additive MTBE and one regulating mining operations to protect the environment and Native American sacred sites... U.S. trade negotiators failed to heed the lessons of NAFTA in their negotiation of the investor rights rules in CAFTA. We hope you will join us in opposing CAFTA.”

<sup>57</sup> For a compilation of these commitments, see <http://www.citizen.org/Page.aspx?pid=905>